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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

ENSIGN *v.* COFFELT.

Opinion delivered May 24, 1915.

1. CONTRACTS—PAROL EVIDENCE TO VARY.—Where a contract to furnish and install a certain lighting plant is made in writing, parol evidence of a different agreement made by the seller's agent is inadmissible.
2. CONTRACTS—UNAMBIGUOUS WRITING—DUTY OF COURT.—Where a contract made in writing is unambiguous in its terms, it is error to submit the same to the jury for interpretation.
3. CONTRACTS—SALE OF LIGHTING PLANT—BREACH OF GUARANTY.—Where the contract for the sale of a lighting plant is in writing, if there is a breach of the terms of the written contract of guaranty, such a breach constitutes a failure of consideration and operates as a defense to an action for the purchase price.
4. CONTRACTS—SALE OF LIGHTING PLANT—MINOR DEFECT.—Where there is some defect in a lighting plant which was sold under a written contract of guaranty, which the buyer could have corrected by a trifling outlay, it is his duty to have it remedied, or give the seller an opportunity to do so, and the buyer may recoup the cost to himself of correcting the defect.
5. CONTRACTS—BREACH BY PLAINTIFF.—The one who is the first to break a contract, can not maintain an action to recover upon it.

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

E. P. Watson, for appellant.

1. This was an absolute contract of sale in writing; the title passed to defendant on delivery. Bish. on Cont.,

§ § 322, 329, 333; 7 A. & E. Enc. (2 ed.) 142; 30 *Id.* 168; 35 Cyc. 655. All the instructions of the court on the theory of a conditional sale on trial were erroneous. 6 A. & E. Enc. (2 ed.) 449.

2. The contract was in writing. Oral testimony was inadmissible to vary or contradict it. Where a contract limits the time of trial, or acceptance, the option to object, reject and return must be exercised promptly. 35 Cyc. 238-9, 243; 38 Ark. 351; 95 *Id.* 488; Bish. on Cont., § 322; 30 A. & E. Enc. (2 ed.) 168.

3. The contract was printed. Roberts, the agent, had no authority to add anything to it. 92 Ark. 319; 110 *Id.* 123; 101 *Id.* 68. No authority was shown.

4. The court tried the case on the wrong theory. It should have construed the contract, as written, as a question of law for the court to determine, and not for the jury. Cases *supra.*

McGill & Lindsey and *Rice & Dickson,* for appellee.

1. The facts were concluded by the finding and verdict of the jury and there is no error in the instructions.

2. An agent to make sales is authorized to agree upon terms of sale and sell conditionally or unconditionally where the vendee has no notice of any limitation upon his authority. 103 Ark. 79; 100 *Id.* 360.

3. A principal is not only bound by the acts of his general agent done under his express authority, but he is also bound by all acts of such agent which are within the apparent scope of his authority whether authorized or not. The burden is on the principal to show a limited agency. 103 Ark. 79; 112 *Id.* 63.

4. Phelps is estopped by silence and ratification. 96 Ark. 505; 111 Ark. 598.

McCULLOCH, C. J. This is an action instituted by appellant against appellee to recover the price of a lighting plant which was installed in appellee's country residence in Benton County, Arkansas. The transaction occurred in the year 1908. A. S. Phelps, Jr., doing busi-

ness at Elkhart, Indiana, under the name of New England Manufacturing Company, was engaged in manufacturing, selling and installing gas lighting plants for private use, called the "Phelps' Carbide Feed Gas Generator," and through his agent, one E. P. Roberts, sold an outfit to appellee and installed it in his residence. Appellee signed a written order to Phelps for the outfit, which order contained specifications and stipulated the price of $225.00 to be evidenced by two notes payable in eighteen months. Phelps installed the plant, and when the installation was complete Roberts executed to appellee, in the name of his principal, a written guaranty in the following form:

"We hereby guarantee for one year the Phelps Carbide Feed Acetylene Gas Generator as follows:

"Made in workmanlike manner and of substantial material in accordance with the National Board of Underwriters' requirements.

"Will diffuse light equal to sample exhibited.

"The laboratory test yield per pound of carbide is five cubic feet of gas.

"The lighting capacity depends upon the size and number of burners used.

"Cost of carbide is $3.75 per cwt. or $70.00 a ton, at the Union Carbide Co.'s warehouse in every state.

"If same don't do as this guarantee calls for, we agree to take out plant without cost to Mr. Coffelt.

"Chicago, Illinois, "New England Mfg. Co.
"March 6, 1908. "By E. P. Roberts."

The whole of the above writing was according to a printed form furnished to Roberts by his principal, except the last clause, which was inserted by Roberts in his own handwriting and, according to the evidence in the case, without any specific authority from his principal to do so. Negotiable promissory notes were executed by appellee to Phelps on the same date that the above guaranty in writing was given, and Phelps transferred the notes before maturity to appellant, and the

latter instituted suit thereon; but it was adjudged in that case that the article sold was "a patent machine, implement, substance or instrument," and that as appellee's notes were not executed upon a printed form showing the true consideration in accordance with the terms of the statute, the same were void. *Ensign* v. *Coffelt,* 102 Ark. 568. Phelps thereupon assigned to appellant the original cause of action, which constituted the consideration for the notes, and he instituted the present action thereon. Appellee alleged in his answer that Phelps' agent, in making the sale of the lighting plant to him, agreed that the same should be taken on trial by appellee for a period of eighteen months, and that if it did not diffuse light up to the standard of the sample which was exhibited, or should in any other way fail to give satisfaction, the seller would take out the plant and release appellee from all obligation to pay the price. The answer further alleges that the outfit failed to furnish light in accordance with the guaranty, and that appellee gave notice thereof to Phelps and tendered the plant back to him. The trial of the case before a jury resulted in a verdict in appellee's favor, from which an appeal has been prosecuted.

(1) The court admitted, over appellant's objection, proof of the alleged oral agreement of Roberts that the sale should not be an unconditional one, and that the plant would be put in for appellee to try it out, and that it would be removed if it did not give satisfaction for a period of eighteen months. The testimony was inadmissible for the reason that there was a written contract which could not be varied by oral testimony. The written order constituted an offer to Phelps, the seller, which was accepted by installation of the plant, and that writing, together with the written guaranty given to appellee by the seller, constituted a contract between the parties which must control their rights in this litigation. It is unnecessary to discuss the question of Roberts' authority to make the addition in his own handwriting to the

printed form of guaranty furnished him by his principal, as it adds nothing material to the force of the contract. The printed form as furnished by the seller constituted a guaranty, operative for one year, that the gas generator would diffuse light equal to the sample exhibited; and if there was a breach of that contract, it constituted a failure of consideration which absolved appellee from paying the price specified in the contract.

(2) There are also numerous assignments of error with respect to rulings of the court in giving and refusing instructions, and we are of the opinion that those assignments are well founded. The case was tried upon the wrong theory and in disregard of the fact that the rights of the parties are to be determined by the written contract. The written contract was unambiguous, and it was the duty of the court to construe it. *Mann* v. *Urquhart,* 89 Ark. 239. The contract was one for installation and unconditional sale of the lighting plant, and the court erred in giving the first and second instructions, of its own motion, submitting the question whether or not the contract was conditional. There was error in giving the first instruction requested by appellee on the subject of the implied warranty of suitableness of the article. Inasmuch as the contract itself contained an express warranty on that subject, it was exclusive and there was no question of implied warranty in the case. The second instruction given at appellee's request was also erroneous in submitting the question of a written guaranty covering a period of eighteen months for the reason that there is no evidence of any such writing, the sole evidence on that subject being in the form of oral testimony which was incompetent. The third instruction was erroneous in telling the jury that Phelps was bound by "any terms, conditions, guaranties, or warranties that were made by such agent with the defendant that were reasonably necessary to effect the sale and were in good faith accepted and relied upon by the purchaser." The contract was in writing and it was uncontradicted that

its terms were accepted by both parties. Therefore the question of the authority of the agent to make any additional terms, conditions or warranties was not involved in this case.

(3-4-5) Appellant further insists that he was entitled to an instruction to the effect that, even though the article was not as represented by the seller, appellant was entitled to recover the price "less any actual damages the defendant may have sustained." The instruction was not correct in the form it was asked, for the reason that if there was a breach of the terms of the written contract of guaranty, it was a failure of consideration and there could be no recovery. On the other hand, if there was some defect which appellee could have corrected by a trifling outlay, it was his duty to have it remedied or give the seller an opportunity to do so, and in that case would only be entitled to recoup the cost of correcting such defect. If an instruction to that effect had been asked, it would have been the duty of the court to give it, but it was not correct to tell the jury broadly that if there was a breach of the warranty, appellant, as assignee of the seller, would be entitled to recover the stipulated price less any damages sustained by reason of defects. Appellant was not entitled to recover the price at all if the contract had been broken by his assignor, the seller, for the two features of the contract, namely the agreement for the sale and the guaranty, constituted one inseparable contract, and the rule is elemental that one who is the first to break a contract can not maintain an action to recover upon it.

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

FAULKNER v. CRAWFORD.

Opinion delivered May 24, 1915.

1. APPEAL AND ERROR—VERDICT OF JURY—CONCLUSIVENESS.—The jury are the judges of the credibility of the witnesses and the weight to be given to their testimony; it is their duty to reject that part of the

testimony which they believe to be false and to receive that part which they believe to be true; and where, in the exercise of these rights the jury found for the plaintiff, their verdict will not be disturbed on appeal, although there is a sharp conflict in the testimony.

2. BROKERS—SALE OF REAL ESTATE—COMMISSIONS—STATUTE OF FRAUDS.—B. agreed to exchange his lands and certain personal property in Arkansas, with F. for F.'s farm in New Mexico, and as a part consideration for the exchange F. agreed to pay B. certain sums of money and also the real estate broker's commission due one C. who had brought about the trade. *Held*, under the facts, F. did not agree to pay the debt of another, but did promise to pay his own, and the promise is not within the statute of frauds, and such agreement is enforceable.

3. TRIAL—IMPROPER VERDICT AS TO AMOUNT—ACTION OF TRIAL COURT.—C. sued F. for real estate broker's commissions. The evidence showed F. to be liable in the sum of $1,400. The jury returned a verdict of $700, whereupon the court said, "he is entitled to all of the commission or he is not entitled to any of it," and sent the jury back to reconsider their verdict. Subsequently, the jury returned into open court with a verdict for C. against F. in the sum of $1,400. *Held*, no error was committed by the trial judge, there being no evidence to warrant a verdict for a smaller amount than $1,400, if plaintiff was entitled to anything at all.

4. TRIAL—IMPROPER VERDICT—DUTY OF COURT.—It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence.

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

George M. Chapline and *Vaughan & Akers,* for appellant.

1. The evidence does not support the verdict. Improper evidence was adduced. 95 Ark. 233, 238; 74 *Id.* 300, 256, 259, 260; 102 *Id.* 435, 438.

Beadle was never released, and it is not shown that Faulkner assumed the payment of the commission. 102 Ark. 407, 409, 410.

2. Even if Crawford orally assumed the payment of Beadle's debt, the promise is within the statute of frauds. 102 Ark. 407.

3. It was error to refuse to receive the first verdict. 40 N. Y. Sup. Ct. 271; 22 Enc. Pl. & Pr., p. 970, par. 2;

4 Watts (Pa.) 357. The verdict should have been accepted or set aside and a new trial awarded. Kirby's Dig., § § 6203-4, 6209; 86 Ark. 570, 577, 578; 42 Atl. 228; 29 S. W. 172.

Trimble & Williams, for appellee.

1. The testimony of Crawford and Beadle support the verdict.

2. The statute of frauds does not apply. The commission was part of the purchase price of the land. Faulkner simply agreed to pay a debt of his own for a valuable consideration. 29 Am. & Eng. Enc. Law (2 ed.) 914; 89 Ark. 321, 324; 96 Ark. 46; 103 Ark. 219; 83 Ark. 258; 25 L. R. A. 264; 76 Ark. 292; 102 *Id.* 407, 409.

3. The verdict was properly recommitted to the jury. 38 Cyc. 1893-4; 106 S. W. 1091; 38 S. W. 159, 165; 37 *Id.* 544; 104 *Id.* 606, 615; 86 Ark. 570.

HART, J. Dr. C. L. Crawford sued Francis R. Faulkner and Oscar Beadle to recover a real estate broker's commission. The case was tried before a jury, which returned a verdict for the plaintiff against the defendant, Faulkner, and from the judgment rendered Faulkner has appealed.

The facts are as follows: The defendant, Beadle, in August, 1912, listed his farm and certain personal property on it with plaintiff, Crawford, for sale and agreed to pay him 5 per cent commission therefor. Doctor Crawford had formerly lived in Chaves County, New Mexico, and he wrote back there to defendant, Faulkner, asking him to interview a man named Gibbs and find out what were the chances of exchanging Gibbs' property in New Mexico for Beadle's property in Lonoke County, Arkansas. Faulkner replied that Gibbs had sold his property but that he himself had a farm which he might trade to Beadle for his land. Upon receipt of this letter, Doctor Crawford told Beadle to go to New Mexico and examine Faulkner's land. Beadle went there, and after remaining eight or ten days returned to Arkansas with Faulkner. Faulkner stayed with Doctor Crawford and drove

about the country with him, looking at the lands of Beadle and other parties. After several days' negotiation, Beadle and Faulkner entered into a contract whereby Beadle exchanged his lands in Lonoke County, Arkansas, comprising about five hundred and twenty acres, for Faulkner's land in New Mexico, consisting of eighty acres. As a part of the consideration Faulkner agreed to pay Beadle fifteen thousand dollars in money, or to assume debts of Beadle's for that amount. For the purpose of fixing the commission which would be due Doctor Crawford, Beadle's lands were valued at twenty-eight thousand dollars and Doctor Crawford was to receive 5 per cent commission on that amount as his services for bringing about the exchange of lands between the parties. Both Doctor Crawford and Beadle testified that before the trade was made Faulkner agreed with Beadle that he would pay the commission to Doctor Crawford as a part of the consideration for the exchange of the land and that Doctor Crawford was notified of that fact. They also testified that after the exchange of land had been consummated, Faulkner said that he had agreed with Beadle that he would pay the real estate commission due Doctor Crawford. Faulkner testified in his own behalf, and denied in most emphatic terms that he had agreed with Beadle to pay the commission due Doctor Crawford. After the exchange of lands was made Beadle removed to New Mexico, and in behalf of Faulkner it was shown that Beadle stated to three persons after his arrival there that Doctor Crawford had come to him just before he left Arkansas and asked him to sign a paper stating that Faulkner had agreed to pay Crawford the commission on the trade and that he had declined to sign the paper because the statements contained in it were not true. Beadle denied that he had made this statement to the persons in New Mexico, and Doctor Crawford testified that he did not go to Beadle with such a paper for him to sign either just before he left Arkansas or at any other time.

(1) It is contended by counsel for the defendant that there is not sufficient evidence to warrant a verdict

against him. They point to the fact that Crawford first instituted suit in New Mexico to recover his commission against both Beadle and Faulkner, and that Beadle in his answer to that suit set up a statement of facts wholly at variance with what he testified to in the present action. Crawford took a nonsuit and afterward instituted the present action. It is true that the testimony of Beadle is not in all respects consistent with the matters set up in the suit brought against him in New Mexico, but he explained that his answer to that suit was prepared by his attorney. It is also true that the force of Doctor Crawford's testimony was somewhat weakened upon cross-examination. Be that as it may, however, the testimony of both Crawford and Beadle is to the effect that as a part of the consideration for making the exchange of the lands Faulkner agreed to pay the real estate commission which was due Crawford for his services in bringing about the trade between the parties. The jury were the judges of the credibility of the witnesses and the weight to be given their testimony. It was their duty to reject that part of the testimony which they believed to be false and to receive that part which they believed to be true. In the exercise of that right the jury found for the plaintiff and under the settled rules of practice of this court we are not at liberty to disturb their verdict.

(2) It is next contended by counsel for defendant that the oral agreement of Faulkner with Beadle to pay the real estate commission which was due Crawford was such an agreement to answer for the debt of another as to be within the provision of the statute of frauds. In the case note to 12 American & English Annotated Cases, page 1101, it is said: "It is a well established rule that a promise by a purchaser of real property to pay a debt of the grantor to a third person as a part of the purchase price of the property is not a promise to answer for the debt, default, or miscarriage of another within the meaning of the statute of frauds." Numerous decisions from many of the States are cited in support of the rule. In 29 A. & E. Enc. of Law (2 ed.), page 914, it is said: "A prom-

ise by the purchaser of property and as a part of the consideration for the purchase, to pay a debt of the seller, or a promise to pay a claim of the seller against a third person is a promise to pay the purchaser's debt and not within the statute." See, also, *Scott* v. *Moore,* 89 Ark. 321. "It may indeed be stated as a general rule that wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another." Parsons on Contracts, ninth edition, volume 3, star page 24. Thus it will be seen that this case has nothing to do with the statute of frauds. Beadle agreed to exchange his lands and certain personal property in Lonoke County, Arkansas, with Faulkner for his farm in Chaves County, New Mexico, and as a part of the consideration for the exchange of the land Faulkner was to pay Beadle certain sums of money and also the real estate broker's commission due Crawford. Under these circumstances, it is not the debt of another but his own debt which Faulkner promised to pay, and neither the fact that the payment was to be made to Crawford nor the fact that in paying his own debt he extinguished the debt of Beadle, nor the fact that the liability of Beadle continued the same after as before his undertaking brings it within the statute.

(3) The jury returned a verdict for the plaintiff against the defendant, Faulkner, in the sum of $700. The court, after hearing the verdict read, said to the jury: "He is entitled to all of the commission or he is not entitled to any of it." A member of the jury said: "Judge, we understood we could return a verdict for any amount from one dollar up." The court replied: "No, he is entitled to all of the commission or he is not entitled to any of it; you will retire and consider your verdict further." Subsequently, the jury returned into open court a verdict for the plaintiff against defendant, Faulkner, in the sum of $1,400.

(4) It is insisted by counsel for the defendant that the court erred in its remarks to the jury. It was the duty of the court to set aside the first verdict if it was clearly against the weight of the evidence. Both Doctor Crawford and Beadle testified that in fixing the commission the property of Beadle was valued at twenty-eight thousand dollars and that Crawford was to receive 5 per cent as his commission. The commission then would amount to $1,400. There is no testimony which would justify the jury in returning a verdict for a smaller amount. It is true that when Doctor Crawford first wrote to Faulkner about selling the land of Beadle for him he stated that Beadle had agreed to pay him 5 per cent commission therefor and that he would divide his commission with Faulkner for his assistance in procuring a purchaser for the lands. After this, however, Faulkner decided to exchange his lands for the lands of Beadle, and according to his own version of the matter he was not to receive any part of the commission which was due Crawford from Beadle. He did not claim at the trial that he was to receive any part of the commission due by Beadle to Crawford. He denied in most emphatic terms that he had agreed with Beadle to pay the commission due to Crawford. The jury have settled this disputed question of fact in favor of the plaintiff. There could be no controversy between them as to the amount of the commission which Doctor Crawford was to receive. The undisputed testimony shows that he was to receive fourteen hundred dollars if he was entitled to any amount. Therefore, the court did not err in telling the jury that he was entitled to this amount if he was entitled to any at all.

It follows that the judgment must be affirmed.

DICKEY v. SOUTHWESTERN SURETY INSURANCE COMPANY.

Opinion delivered January 25, 1915.

1. SURETYSHIP—LIABILITY OF SURETY—RIGHT TO PROTECT HIMSELF—CONTRACT WITH PRINCIPAL.—Appellee was surety on the bond of a con-

tractor where it became apparent that the contractor could not complete the work on time, appellee advanced the contractor money to proceed with the work, taking an assignment of the estimates due the contractor, and a mortgage on certain property. *Held*, under the evidence the surety had the right to protect itself in this way and that there was no such fraud in the transaction as would warrant its being set aside.

2. ASSIGNMENT—EQUITABLE ASSIGNMENT—PARTICULAR FUND.—A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity.

3. ASSIGNMENT—EQUITABLE ASSIGNMENT—PARTICULAR FUNDS.—In order to constitute an equitable assignment, there must be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise.

4. CONFLICT OF LAWS—FOREIGN CORPORATIONS—FORFEITURE OF CHARTER.—The courts of this State have no right or authority to dissolve a foreign corporation and wind up its business, the rights of courts of equity in this State are limited to taking charge of the property within the jurisdiction of the court and enforcing the rights of creditors here.

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

L. H. Southmayd and *New & Krauthoff,* for appellant; *Frederic O. Berge,* of counsel.

1. The mortgage was void. It was made with fraudulent intent to cheat, hinder and delay creditors and the surety company was privy to such fraud. Kirby's Dig., § § 3374-5; Bigelow, Fraud. Conv. Rev. Ed. 291; 20 Cyc. 462; 151 Mo. 86; Bump. Fr. Conv. (3 ed.), 200; 101 U. S. 141; 14 Ark. 69-75; 55 *Id.* 579, 582; 23 *Id.* 735, 744; 50 *Id.* 314; 46 *Id.* 122, 127; 50 *Id.* 314-318; 99 *Id.* 45; 57 *Id.* 569; 31 *Id.* 666.

2. The surety company became a party to the contract and obligated itself to furnish all labor, material, etc., and is now precluded from setting up any claim against Dickey.

3. The agreement between the engineering company and the district was an equitable assignment of, or equit-

able lien on, moneys sufficient to pay Dickey, and the money can be followed into the hands of the surety company. 166 Ala. 231; 52 So. 388; 139 Am. St. 30; 114 Ala. 277; 30 Col. 287; 97 Am. St. 138; 132 Ga. 495; 131 Am. St. 210.

4. The amendment should have been allowed. The failure to comply with the laws of Oklahoma forfeited the company's charter. The statute is self-executing and requires no judicial action. A corporation which has forfeited its charter can not sue or be sued. A forfeiture of charter of a foreign corporation under the laws of its own State can be alleged and shown even on collateral attack. 86 N. C. 492; 8 Ind. 392; 16 *Id.* 181; 19 *Id.* 192; 8 B. Mon. (Ky.) 122; 5 Ia. 357; 8 Wend. 480; 89 Wis. 297-312; 19 Johns. (N. Y.) 456, 476; 48 Mo. 543; 52 *Id.* 583; 8 Cow. 391; 133 Mo. 545; 12 Ind. 285-7; 120 Pa. St. 391; 209 *Id.* 305; 164 Col. 382; 136 Pac. 62; 21 Col. 263; 52 Mo. App. 439; 107 N. Y. 159-170; 56 N. J. Eq. 526; 179 Fed. 257; 128 Pac. 1040; 68 Ark. 134-141; 109 U. S. 527; 10 Cyc. 1316; 5 Thomp. on Corp., § § 6721-23.

Read & McDonough and *G. A. Paul,* for appellee.

1. The mortgage was not fraudulent nor void. 91 Ark. 218; 120 S. W. 844; 115 *Id.* 510; 117 *Id.* 956; 119 *Id.* 1169; 111 *Id.* 1169; 118 *Id.* 1159; 120 *Id.* 844. A transfer of property to indemnify a surety is valid in the absence of fraud. 6 Mart. 572; 6 Mass. 339; 46 Mich. 135; 32 S. W. 556; 122 Mass. 102. A pre-existing debt is a good consideration. 10 Ind. 240; 93 Mich. 499; 75 Tex. 139; 15 S. W. 101; 77 Ind. 383; 29 N. C. 471; 20 Ark. 332. Preferences of creditors in good faith are upheld in this State. 22 Ark. 184; 26 *Id.* 20; 14 Fed. 155; 54 N. W. 568; 44 *Id.* 645. To vitiate a conveyance made on a valuable consideration it must be shown that the grantee participated in the fraudulent intent. 31 Ark. 554; 55 Ala. 368; Fed. Cas. 8956; 30 Ark. 417; 50 Ark. 314. The liability to the surety was prior to any liability to Dickey. 96 Ark. 268.

2. The surety company was not liable for labor and material. There was no novation of the debt because there was no release of the original debtor. 56 Ark. 163.

There was no lien against a purchaser for value. 91 Ark. 218; Kirby's Dig., § § 4966-7.

3. There was no equitable assignment of estimates to Dickey. 124 N. Y. S. 301; 130 N. Y. S. 284; 72 Misc. 486; 202 Fed. 791; 4 Cyc. 29; 81 U. S. 69.

4. The existence of a corporation can not be questioned nor attacked collaterally. 96 Ark. 396; 68 *Id.* 134; 95 *Id.* 396; 139 Pac. 248.

McCULLOCH, C. J. This case originated in the chancery court of Crawford County as an action instituted by appellant, W. S. Dickey, against the Oklahoma Engineering Company, a corporation domiciled in the State of Oklahoma, to subject assets of that corporation in this State to the payment of a debt owing by said corporation to appellant, and to cancel a mortgage and other securities executed by said Oklahoma Engineering Company to the Southwestern Surety Insurance Company, another foreign corporation. On July 8, 1912, the Oklahoma Engineering Company entered into a contract with an improvement district in the city of Van Buren, Arkansas, for the construction of sewers in that city, and appellee, at the instance of said Oklahoma Engineering Company, entered into obligation with the improvement district to guarantee performance of the contract on the part of the Engineering Company. The Engineering Company proceeded to perform said contract and purchased from appellant material to be used in the work of constructing the sewers. A balance in the sum of $1,646.69 is still due appellant on the account for the price of said material furnished. On November 27, 1912, the Engineering Company executed to appellee a mortgage on machinery and tools which it owned to secure advances of money which had already been made to it and to be thereafter made, and further to indemnify appellee company from loss on the aforesaid bond. About the same time, the Engineering Company made an assignment in writing to appellee of the amounts due upon estimates from the improvement district. Appellee was joined as defendant in the suit

and the prayer of the complaint was that said mortgage to appellee and the assignment of the amounts due upon estimates from the improvement district be cancelled and set aside as a fraud on the rights of appellant, and that the property be subjected to the payment of appellant's debt. Appellee filed an answer and cross-complaint, in which all the allegations of fraud were denied and a foreclosure of the mortgage was prayed for.

After the proof was taken, and before the submission of the case, appellant offered to file an amended complaint setting up the fact that the Engineering Company had forfeited its charter on June 30, 1912, by failing to pay the corporation tax in the State of its domicile, and asked that the three directors be substituted as defendants and held to account as trustees for the creditors of the corporation pursuant to the statutes of Oklahoma.

The case was heard upon the pleadings and the testimony, and final decree was rendered dismissing appellant's complaint as against the appellee and awarding to appellee a foreclosure of the mortgage and directing payment over of the funds paid into court under the assignment of estimates due from the improvement district.

(1) The evidence supports the finding that when appellee gave the bond to the improvement district to guarantee performance of the contract on the part of the Engineering Company, the latter undertook to indemnify appellee against loss. The contract of the Engineering Company with the improvement district provided for completion of the work on a certain date, and before that date it became apparent that the Engineering Company would not be able to complete performance of its contract. In order to protect itself from loss, appellee agreed to make advances of money to enable the Engineering Company to complete performance of the contract, and the mortgage and the assignments of estimates were executed to secure the amounts so advanced. The testimony is very voluminous and a strenuous effort has been made to show that improper motives prompted these transactions

between the Engineering Company and appellee, but we fail to find anything at all in the evidence which would warrant the conclusion that the transactions were in any wise tainted with fraudulent intention, or that the effect thereof was to cheat, hinder or delay the creditors of the Engineering Company. Appellee was already liable to the improvement district for the performance of the contract, and the agreement to make further advances was prompted alone by that obligation and to protect itself from loss. It certainly had a right to exact security from the Engineering Company, and there is no semblance of fraud in the transaction so far as we are able to discover from the evidence. Certainly, the form of the transaction did not operate as a wrongful interference with the assets of the corporation so as to amount to a hindrance or defeat of its creditors, and there is, as already stated, nothing in the evidence to show that there was any actual fraud intended. We fail to see any principle upon which the transactions could be declared to be fraudulent or that would warrant a court of equity in setting aside the security. The evidence is entirely too voluminous to justify an analysis and discussion in this opinion.

(2-3) It is contended that prior to the assignment, the amount due on one of the estimates was assigned or appropriated to the payment of appellant's debt and that it should not be included within the securities held by appellee. The facts upon which this claim is based are that some time prior to the time the mortgage and the assignment to appellee were executed, appellant, through his representative in Van Buren, insisted upon payment of his account, and the commissioners of the improvement district showed a disposition to hold back payment of an estimate until appellant's account should be paid. The sum of $500 was paid on the estimate to the agent of Engineering Company and there was an agreement that the balance should be held by the improvement district pending a settlement with appellant. There was no agreement, either express or implied, that the money should be appropriated to the payment of appellant's debt. The most

that can be made out of it was that the amount should be held up indefinitely until a settlement be made with appellant. This does not constitute an assignment of the amount in the hands of the improvement district nor an appropriation to the payment of appellant's debt. *Christmas* v. *Russell,* 81 U. S. 69. In the case just cited, the court said: "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise." Now, if the improvement district was being sued, there might be more force in the contention that the agreement to postpone payment until after settlement with appellant barred the right of the Engineering Company or its assignee to recover until after settlement with appellant; but there being no appropriation of this fund to the payment of appellant's debt, the parties to that agreement, namely, the improvement district and the Engineering Company, could have rescinded it at any moment and paid the money over to the Engineering Company or any one to whom it assigned the debt. It is not contended that appellant had any lien which he could assert against the improvement district, or that the money was held back for the purpose of enabling the improvement district to protect itself against any claim made by appellant. Appellant was not a party to that agreement, if it can be properly held in law to constitute a contract, and is therefore not in position to challenge the right of the Engineering Company or appellee, as its assignee, to collect the amount from the improvement district.

(4) The remaining question to be determined relates to the contention of appellant that the Engineering Company forfeited its right to exist as a corporation under the laws of Oklahoma, the place of its domicile, that the forfeiture resulted *ipso facto* from the failure to com-

ply with the statute with respect to the payment of a license fee, and that its property passed into the hands of the directors as trustees for the benefit of creditors It is contended, on the other hand, by appellee, that under the Oklahoma statute the legal existence of the corporation could not be questioned collaterally and could only be drawn into question by a suit brought at the instance of the State of Oklahoma. The Engineering Company being a foreign corporation, the courts of this State have no right or authority to dissolve it and wind up its business, the courts of equity of this State being limited to taking charge of the property within the jurisdiction of the court and enforcing the rights of creditors here. *Culver Lumber & Manufacturing Co.* v. *Culver,* 81 Ark. 102; *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389. The Engineering Company existed *de facto* when all the transactions under review took place, and both parties to the present controversy dealt with it as a valid corporation and as a going concern, so to speak. Therefore, the question of the legal existence of the corporation depends upon the Oklahoma laws as interpreted by the courts of that State.

The statutes of Oklahoma provide that every corporation organized under the laws of the State and every foreign corporation doing business therein shall "procure annually from the Corporation Commission a license authorizing the transaction of such business in this State," that such corporation shall pay a license fee of fifty cents for each one thousand dollars of authorized capital stock, and that "every domestic corporation subject to the provisions of this act, who shall fail to file the annual statement and to pay the annual fees required by the provisions of this act for sixty days after the time provided therefor, shall forfeit its charter." Another section of the statute provides that in case of forfeiture, the directors of any domestic corporation or any foreign corporation doing business in the State "are deemed to be trustees of the corporation and all the stockholders and members of the corporation whose power or right to do busi-

ness is forfeited, and as such trustees shall have full power to settle the affairs of the corporation and to maintain or defend any such corporation, or to take such legal proceedings as may be necessary to finally settle the affairs of said corporation." Another section reads as follows: "The due incorporation of any company claiming in good faith to be a corporation under the laws of this State, and doing business as such, or its rights to exercise corporate powers can not be inquired into collaterally, in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had, and action brought at the suit of the State, in the manner prescribed in civil procedure."

The Supreme Court of Oklahoma, in the case of *Higbee* v. *Aetna Bldg. & L. Assn.*, 109 Pac. 236, after quoting the statutes above, said that the corporation involved in that controversy was doing business under the laws of that State and that "the regularity of its incorporation could not be inquired into in this proceeding." In a later case, *Smith Rolfe Co.* v. *Wallace,* 139 Pac. 248, the Supreme Court of Oklahoma reviewed the statutes relative to foreign and domestic corporations doing business in the State, and announced the rule that those statutes were designed chiefly for raising revenue and that it was not the intention of the Legislature to invalidate contracts made by delinquent corporations. That interpretation is binding on us here and we are of the opinion that the courts of this State would exceed their power and jurisdiction in declaring the charter of an Oklahoma corporation forfeited contrary to the statutes of that State as interpreted by its highest judicial tribunal.

Judgment affirmed.

LESS LAND COMPANY *v.* FENDER.

Opinion delivered February 1, 1915.

1. DRAINAGE DISTRICTS—FORMATION—DUE PROCESS OF LAW.—Act 279 of the Acts of 1909 as amended by Act 221 of the Acts of 1911, providing for formation of drainage districts, and for the assessment

of benefits by commissioners after notice and a hearing, does not deprive the owners of their property without due process of law, nor deny them the equal protection of the law.

2. DRAINAGE DISTRICTS—FORMATION.—Act 279, Acts 1909, as amended by Act 221, Acts 1911, providing for the formation of drainage improvement districts is not in conflict with Act 2, § 23, of the Constitution of 1874, which provides that the Legislature is without power to authorize the assessment of lands for the construction of drains and ditches unless the improvement will be conducive to the public health, convenience or welfare.

3. DRAINAGE DISTRICTS—FORMATION—BOND.—When a drainage district is formed under Act 279, Acts 1909, as amended by Act 221, Acts 1911, a bond for preliminary expenses signed by fifteen of the petitioners who were able to discharge its obligation, is valid without other sureties.

4. DRAINAGE DISTRICTS—FORMATION—QUALIFICATIONS OF COMMISSIONERS.—Act 279, Acts 1909, as amended by Act 221, Acts 1911, provides that the commissioners shall be owners of real property within the county, and the fact of their ownership of lands within the district does not disqualify them to act as commissioners.

5. DRAINAGE DISTRICTS—BOUNDARIES—OBJECTIONS.—It is too late on appeal, to question the boundary lines of a drainage district, no objection having been made thereto at the time of its formation, nor an appeal taken from the order establishing it, within the time provided by the act for appeal.

6. APPEAL AND ERROR—SUFFICIENCY OF TESTIMONY.—When it is contended on appeal that the evidence is insufficient to support the judgment of the circuit court, the question on appeal is not upon the weight of the evidence, but only whether it is sufficient to support the judgment of that court.

Appeal from Randolph Circuit Court; *J. W. Meeks,* Judge; affirmed.

STATEMENT BY THE COURT.

The petition asked for the establishment of the drainage district to include the territory designated, situated in Lawrence and Randolph counties, that an engineer be appointed to make the survey and report to the county court. This petition was signed by D. W. Fender, T. Z. James, D. W. Johnson and fourteen others, and the bond to pay the expenses of the survey of the drainage district petitioned for, in case it was not formed was signed by the said parties and eleven of the other signers of the petition.

August 8 was fixed for the date of the final hearing of the petition and notice duly published. On July 23 the surveyor filed the preliminary report. On August 8 the matter was heard and the court found that the petition asking the establishment of the district was signed by a majority in number, in acreage and value, of owners of real estate in the proposed district and found the establishment of said district would be for the best interest of all the property owners therein and made an order establishing it, by virtue of Act 279 of the Acts of 1909, as amended by Act 221 of the Acts of 1911.

The court also appointed the said D. W. Fender, D. W. Johnson and T. Z. James, three of the petitioners for the district, commissioners thereof.

The assessments were made and filed in the clerk's office of Randolph County and notice of the time to file remonstrance was duly given in both counties, July 20, 1914, being the date fixed for the hearing thereof. On that day the Less Land Company, a corporation, and other owners of lands in the proposed district, filed exceptions, asking that the entire proceedings be declared void, because no bond was filed, as required by law, before the appointment of the surveyor; that the appointment of three of the petitioners of the proposed drainage ditch as assessors was contrary to law; that the assessments were inequitable, unjust and discriminatory and that the lands belonging to the remonstrants were assessed at a higher rate than lands of like value belonging to the assessors, and that lands were erroneously and arbitrarily assessed that were not benefited.

The court upon the final hearing adjudged the assessment of a forty-acre tract of land in Randolph County, belonging to John L. Ford, unreasonable, and lowered and fixed it at $50, approved and confirmed the assessments upon all the other real estate within the district and ordered the tax levied to pay same. The remonstrants excepted to this judgment, filed a motion for a new trial which was overruled, and prayed and were granted an appeal.

It is conceded that the bond for the payment of the expenses of the preliminary survey was a good bond in the sense that the signers thereof were solvent and worth the amount and able to discharge the obligation thereof, but all of them were petitioners for the district. It was likewise conceded that the persons appointed assessors by the court were three of the principal petitioners for the improvement.

It appears from the testimony that the ditch proposed would drain a certain lake Tupelo and benefit the lands assessed for the improvement in the amount assessed against them, the principal contention of appellants being that the lands below Fender's gin were assessed unreasonably high and in fact arbitrarily, that the amount of the assessment levied against these lands for the construction of the ditch or drainage canal below this point was $6,637.50, and that some of the witnesses were of opinion that a ditch could be constructed from this point south that would drain Tupelo Lake effectively for $900. The object and purpose of establishing the district was to drain Tupelo Lake, situated north of the Fender gin.

A good deal of testimony was introduced, and although some of the witnesses testified that a ditch could be constructed below the gin for $900, others thought that a ditch that could be constructed for such an amount would be entirely inadequate and that the amount assessed against the lands benefited through its construction, would be required to build it.

Several witnesses testified that the different tracts of land belonging to the remonstrants, against which assessments were made, would be benefited in the amount of the assessments levied, except the particular forty acres the assessment of which was lowered by the court.

W. E. Beloate, for appellant.

1. All the proceedings are contrary to the law. Acts 1911, Act 221; Acts 1909, Act 279. These acts are unconstitutional. Const. U. S., 14th Amend., and § 23, art. 2.

Const. Ark.; 58 L. R. A. 353, and note; 163 N. Y. 133; 49 L. R. A. 781, note; 93 Ark. 335; 64 *Id.* 555; *Ib.* 108. Must be for public welfare, roads or utilities. 199 U. S. 472; 72 N. Y. 1; 2 Farnham on Waters, 951; 49 L. R. A. 781; 13 Am. 655; 16 L. R. A. (N. S.) 292; 25 A. & E. Enc. (2 ed.) 1199; 58 L. R. A. 367, 371, note; 101 Ark. 29.

2. A cost bond presupposes a surety. A "good bond" means that the surety be financially sound. 4 Words & Phr. 3112.

T. W. Campbell, for appellees.

1. The appeal should be dismissed because the appeal was not perfected within twenty days. Acts 1909, p. 743.

2. Local assessments are not *taxes* and the acts are not unconstitutional. Art. 2, § 23, Const. Ark.; 14 Am. Const. U. S.; 59 Ark. 513; 64 *Id.* 55.

3. Commissioners are not disqualified because they own lands within the district. 120 Ill. 129; 14 Cyc. 1027. Where objections are not made in time they are waived. 25 Cyc. 203.

4. The bond is ample. 132 Ind. 496.

5. The finding of the court is conclusive. 104 Ark. 154; 80 *Id.* 249; 90 *Id.* 512; 92 *Id.* 41; 100 Ark. 166.

6. The omission of a judge to sign an order or record does not invalidate. 9 Ark. 375.

KIRBY, J., (after stating the facts). It is first contended that the acts authorizing the establishment of the drainage district and the assessment of the property therein upon a petition therefor signed by a majority either in number, acreage or value of the owners of land within the proposed district and without such majority, if in the opinion of the court the establishment thereof will be to the advantage of the owners of real property therein are unconstitutional and in conflict with the Fourteenth Amendment to the Constitution of the United States and section 23, article 2 of the Constitution of Arkansas, the Legislature being without power to authorize the assess-

ment of lands for the construction of drains and ditches unless the improvement will be conducive to the public health, convenience or welfare. Under the prior general law for the construction of drains and ditches, sections 1414-1450, Kirby's Digest, no authority is conferred to establish a district for the construction of public drains and ditches unless the improvement be found conducive to the public health, convenience or welfare "or will be of public utility or benefit," while the said acts of the Legislature, under which the district herein was organized provide for their establishment, when the majority in number, acreage or value of the land owners therein petition therefor or upon a petition without such majority if the court finds "that the establishment thereof will be to the advantage of the owners of real property therein."

These acts have twice been considered by this court without passing upon this question. *Burton* v. *Chicago Mill & Lbr. Co.,* 106 Ark. 296; *Grassy Slough Drainage Dist.* v. *National Box Co.,* 111 Ark. 144.

In the latter case the court held the act constitutional relative to the provisions authorizing the establishment of such districts by original proceedings in the circuit court. The Legislature has authority to exercise the power of the State, under the restrictions and limitations of the Constitutions of the State and Nation, and there is no provision of our State Constitution prohibiting its exercise of power to authorize the assessment of benefits against lands for the expense of drainage for the improvement of the lands of a particular district or locality for the common benefit and general advantage of all the owners thereof.

Laws requiring the drainage of wet, marshy and swampy lands within particular localities at the expense of the owners thereof in proportion to the benefits derived therefrom to each particular tract of land assessed have been generally made and upheld. In *Fallbrook Irr. Dist.* v. *Bradley,* 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369, the court said: "The power does not rest simply upon the ground that the reclamation must be necessary for

the public health, that indeed is one ground for interposition by the statutes, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9, 28 L. Ed. 889; *Wurts* v. *Hoagland,* 114 U. S. 606; Cooley on Taxation (2 ed.) 617. If it be essential or material for the prosperity of the community, and if the improvement be one in which all the land owners have to a certain extent a common interest, and the improvement can not be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

(1) The statute provides for the assessment of benefits by commissioners after notice and a hearing, and does not deprive the owners of their property without due process of law nor deny them the equal protection of the law. *Wurts* v. *Hoagland* 114 U. S. 606, 29 L. Ed. 229; *Hagar* v. *Reclamation Dist.*, 108, 111 U. S. 701; *Davidson* v. *New Orleans,* 96 U. S. 97.

(2) Neither are they in conflict with said section 23 of article 2 to our Constitution of Arkansas of 1874. *Carson* v. *St. Francis Levee Dist.,* 59 Ark. 513; *Cribbs* v. *Benedict,* 64 Ark. 555.

The individual is not deprived of his property nor taxed for the benefit of other land owners, but only required to pay the assessment against it of the benefits accruing to his own lands by reason of the construction of the improvement for the common interest or advantage of all land owners of the district.

(3) It is next contended that the district is invalid because no bond was given as required by law to pay the expenses of the preliminary survey, in case the district was not established and because the commissioners were appointed from those petitioning for the district and owning lands therein. The bond was signed by the three petitioners afterward appointed commissioners and assessors and eleven others of the petitioners and was a good bond and solvent, so far as the ability of the signers to discharge and pay the obligation of the bond is concerned. It is true that the term "bond" usually implies that there shall be sureties, who are also financially sound, but the statute here only requires "a good bond" and the fact that it was signed by fifteen of the petitioners, who were amply financially able to discharge its obligation, without others as sureties, did not render it invalid. The obligation of the bond in any event was but to pay the expenses of the preliminary survey of the drainage district, in case it was not established, and, the same having been established, the technical objection to the bond is without weight against the validity thereof. *Sample* v. *Carroll,* 132 Ind. 496.

(4) The statute only provides that the commissioners shall be owners of real property within the county, and the fact of their ownership of lands within the district does not disqualify them to act as commissioners. *Scott* v. *People,* 120 Ill. 129; 14 Cyc. 1027; *State* v. *Fisk,* 107 N. W. 193; *In re Cranberry Creek Drainage Dist.,* 128 Wis. 98, 107 N. W. 25; *McKusick* v. *Stillwater,* 44 Minn. 372, 46 N. W. 769; *Bowker* v. *Wright,* 54 N. J. L. 130, 23 Atl. 116; *State* v. *Rutherford,* 55 N. J. L. 441, 27 Atl. 172, S. C. 56 N. J. L. 340, 29 Atl. 156.

(5) It is too late now to question the boundary lines of the district, no objection thereto having been made at the time of its formation, nor appeal taken from the order establishing it, within the time provided by the act for appeal. Sections 1, 2 and 3, Act 221 of the Acts of 1911; *Church* v. *Gallic,* 76 Ark. 423. The objection not having

been made at the proper time, nor the order appealed from, it must be considered waived. 25 Cyc. 203.

(6) The last contention is that the preponderance of the testimony is against the amount of benefits assessed against certain of the lands by the commissioners and the circuit court having passed upon this matter, the question here upon appeal is not upon the weight of the evidence, but only whether it is sufficient to support the judgment of that court, and we are of the opinion that there is competent testimony of a substantial nature, sufficient to base the findings upon relative to the amount of benefits fixed. *St. Louis & S. F. Ry. Co.* v. *Fort Smith & Van Buren Bridge Dist.*, 168 S. W. 1066, 113 Ark. 493.

Neither is there merit in the objection that the record of the order of court establishing the district was not signed by the circuit judge. *Ex parte Slocomb*, 9 Ark. 375.

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

* * * * * * * * *

Justices HART and SMITH dissent for the reason that, in their opinion, the evidence shows the assessments complained of were made arbitrarily and without reference to the benefits derived from the improvement.

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

Opinion delivered March 15, 1915.

1. RAILROADS—FALSE ARREST—ACT OF EMPLOYEE.—A railroad company will be liable in damages when its servant caused the arrest of a passenger, it being the servant's duty to protect the passenger, when damages are shown to have resulted.
2. RAILROADS—DUTY TO PASSENGERS.—A railroad company is an insurer of the safety of its passengers against intentional ill treatment, from its servants and agents whose duties relate to the comfort and safety of its passengers and require them to come in contact with the passengers.

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

STATEMENT BY THE COURT.

J. B. Tukey, a traveling salesman, bought a ticket from Batesville to New Augusta, Arkansas, on the 31st of July, 1913, and changed cars at Newport. When he attempted to board appellant's train, there was a woman passenger in front of him and he and the other passengers, who were all impatient, were detained while the brakeman waited for the lady to search in her bag for a ticket, which she feared was lost.

Tukey with his personal baggage and sample grips, two in one hand and one in the other, started to board the train, the brakeman asked him where he was going and he replied to New Augusta, and was requested to show his ticket, which Tukey produced after setting his grips down. The brakeman then told him to move on, but Tukey insisted on his reading the ticket and seeing the destination. This caused an argument and contention and the brakeman finally told him if he did not get on in he would have him arrested and Tukey went on into the car and sat down.

The brakeman turned to another employee of the company and told him to get a policeman, who appeared in a few minutes and the brakeman went to the door of the car with the officer and pointed out Tukey to him. The officer then arrested him, and upon his inquiry for the cause of his arrest, was told "it was for drunkenness, that there were nine saloons in Newport and nine million gallons of whiskey, to come on and he could get all he wanted to drink."

He protested that he was not drunk, but the officer took him out on the platform, and after detaining him five or ten minutes decided he was not too drunk to proceed with the journey and released him.

He stated that he was never intoxicated in his life, did not drink at all, and that he had used no profane or boisterous language in talking to the brakeman, but had only insisted, after he was requested to produce his ticket, that the brakeman read the station of his destination therefrom. That he was never arrested in his life before,

was greatly chagrined and humiliated by being arrested under the circumstances and suffered much anguish of mind on account thereof.

Others testified that the drummer, when the lady was searching for her ticket, elbowed his way to the front of the crowd and said, "I hope to God you have lost it and will never find it." This he denied.

They also said he was excited and talking loud to the brakeman and appeared to be drunk.

A judgment for $500 damages for the wrongful arrest of appellee was rendered against the railroad company, from which it appealed.

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

1. The second instruction, given at appellee's request, leaves the jury to find damages without reference to the testimony, and allows them to base their finding upon conjecture or speculation. Specific objection was made on this ground, and the court erred in not curing the defect. 105 Ark. 205.

2. The damages awarded are manifestly excessive. If appellant caused appellee's arrest, his own conduct brought it about.

3. No liability on the part of appellant is shown. There is no evidence tending to show that the brakeman had any authority to cause appellee's arrest. 87 Ark. 524.

S. Brundidge, for appellee.

1. The brakeman who caused the arrest was one of the employees of appellant, in charge of the train, and as such had duties to perform with reference to the comfort and safety of passengers; and when he caused the wrongful arrest of appellee, who was at the time a passenger on the train, appellant became liable, even though the brakeman was acting without the scope of his authority and had departed from the line of his duty. 82 Ark. 292; 97 Ark. 28; 99 Ark. 235; 96 N. E. 58; Hutchison on Carriers, § 1100.

2. There was no error in giving the second instruction for plaintiff. It did not authorize any finding not based on the evidence.

3. The verdict is not excessive.

KIRBY, J., (after stating the facts). It is insisted for reversal that there is no liability against the railroad company for the arrest of appellee, the brakeman being without authority to cause the arrest, and that the testimony shows the arrest was in fact made by the peace officer.

C., R. I. & P. Railway Company v. *Nelson,* 87 Ark. 524, is relied on in support of appellant's contention. There the arrest was caused by the gateman at the depot, who refused to allow the persons to pass through the gate and take the train because the tickets presented by them had already been punched, and the court held (quoting syllabus):

"A railroad company is not liable for the wrongful arrest by a policeman of a passenger, though the arrest was made under the direction of the company's station master, if the latter had no authority to direct the arrest to be made."

In *Mayfield* v. *St. L., I. M. & Sou. Railway Co.,* 97 Ark. 28, the court held that a railway company was liable for any wrongful arrest of a passenger made or procured by its servants in charge of the train, being under obligation to protect the passengers against any negligent or wilful misconduct of its servants, while performing its contract of carriage.

The brakeman was enforcing the rule as was his duty to do requiring the passengers to show their tickets before boarding the train, and the controversy arose between him and the passenger while performing this service. After the incident was closed and the passenger had desisted from further contention and argument and moved on by the direction of the brakeman and taken his seat in the coach, the officer who had been sent for by the brakeman made the arrest. There is no question but that Tukey was a passenger at the time of his arrest, nor of the fact that he was arrested and taken from the train

after having been pointed out to the officer by the brakeman, who had threatened to have him arrested if he did not move on, and sent for an officer for that purpose.

(1) The colloquy between the passenger and the brakeman had already been finished before the arrival of the officer, and since it did not amount to an offense or violation of the law for which he could be arrested and the necessity for the proper protection and handling of the passengers in their embarkation had already passed, the causing of the passenger's arrest was a violation of the railway's duty to him for which it is liable in damages.

(2) The railroad is an insurer of the safety of the passengers against intentional ill treatment from its servants and agents whose duties relate to the comfort and safety of its passengers, and require them to come in contact with the passengers. *Moore* v. *Louisiana & Arkansas Railway Company,* 99 Ark. 235.

Instruction numbered 2, relative to the measure of damages, means only that the jury were authorized to find for the matters set out therein, as shown by the evidence, and did not leave the jury free to find damages against the company without regard to such matters as shown by the testimony.

The passenger who was not given to drinking and who was arrested and taken from the train and detained on the outside of the coach for ten minutes, remonstrated against his arrest and insisted that he be allowed to proceed with his journey, was necessarily humiliated and chagrined and suffered such anguish from the condition produced and the situation developed, as entitled him to substantial compensation, and the award of the jury is not excessive. The passenger's persistent demand of the brakeman to read his ticket after that official had rightfully requested him to produce it, doubtless provoked him to go to the unwarranted extent of having the officer to arrest the passenger, but that did not excuse the company for the violation of its duty to him.

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. DOUGLAS.

Opinion delivered March 15, 1915.

RAILROADS—INJURY TO PASSENGER ON PLATFORM—CONTRIBUTORY NEGLIGENCE.—The engineer of an approaching train has the right to assume that a crowd on the station platform will get out of the way of the engine, and will not be liable when plaintiff was struck because he failed to observe the approaching engine, and could have saved himself from injury by a slight movement of his body away from the train.

Appeal from Calhoun Circuit Court; *Charles W. Smith,* Judge; reversed.

S. H. West, Gaughan & Sifford, for appellant.

Under the facts shown in evidence, the train operatives had the right to presume that appellee would get out of the way, until they saw him, or should have seen him, in the attitude of preparing to write; and, when that occurred, it was entirely too late to prevent the injury. 90 Ark. 403; 107 Ark. 218, 220.

H. S. Powell, for appellee.

There is no denial that, while the train was running a distance of about 900 feet, the appellee was engaged in earnest conversation with another man, during which time he was standing at the same place, and in the same position where he was struck, and that neither he nor the one with whom he was talking looked in the direction of the train or gave the slightest evidence of consciousness of its approach or of realization of their danger. The fireman and engineer stated that they could judge from their positions on the engine whether the pilot beam would strike a person who was dangerously near the track; and the jury had the right to believe from the evidence that they did see the dangerous proximity of appellee to the track and that he was insensible of his danger. 89 Ark. 496; 107 Ark. 431; 111 Ark. 129.

SMITH, J. Appellee, a traveling salesman, and long accustomed to travel, was struck by the pilot beam of a locomotive drawing one of appellant's passenger trains at Camden on October 2, 1913. Appellee was severely in-

jured and no complaint is made as to the excessiveness of the judgment covered. At the time of his injury appellee was at the depot to take passage on this train, which was reported a little late. He was standing in front of the depot, opposite the white waiting room door, and about the west rail of the track. He saw the train coming, and started to get his grips, when he met an old acquaintance with whom he engaged in a business conversation, during which he was given an address, which he started to write down in a memorandum book, but before he wrote the address the pilot beam of the engine struck him in the back and injured him seriously. The injury occurred between 10 and 11 o'clock in the forenoon and the train was running at from five to eight miles per hour. The engineer and fireman both testified they were keeping a lookout, although the engineer was on the opposite side of the engine from appellee and could not see him after getting within sixty feet of him. There is proof that the whistle was blown at the usual place and that the bell was ringing constantly for three-quarters of a mile before the station was reached, and, while this last statement is denied by some of the witnesses, none of them deny knowing that the train was approaching the station. The engineer testified that he did not notice appellee and the gentleman to whom he was talking, and the fireman stated that his attention was not called to them specially until just before the pilot beam struck appellee, which was not in time to have avoided striking him. The station platform is level with the top of the rail, and as the train approached a number of people were scattered along at different places on the platform, the number being variously stated at from ten or twelve to seventy-five or more. Appellee testified that he did not move during the time the train traveled the last few hundred feet before striking him and that he did not realize he was in danger. The testimony on the part of appellant is that no one was on the track or in apparent danger. That there was the usual crowd to be expected at this station, that it was quite the usual thing for persons to stand near the track as trains ap-

proached and stopped at stations, and that appellee and his companions were not observed apart from others in the crowd, all the members of which appeared to be aware of the train's approach and to be moving about in anticipation of its stopping, and that the usual stop was made at the usual stopping place. Appellee testified that he had been nearer the track, and when he saw the train coming, stepped away, and that he thought he was in the clear, and no one else on the platform appeared to observe that he was in danger. The pilot beam which struck appellee in the back extended out from the rail a distance of from twenty-eight to twenty-nine and one-half inches.

No error appears to have been committed at the trial either in the admission of evidence or in the giving of instructions, and the real point in the case is whether, under the facts stated, the cause should have been submitted to the jury or not. The principles of law which govern in cases of this character are well known and have been several times stated in recent decisions of this court. Appellee was of course guilty of contributory negligence and the question for decision is whether appellant was guilty of negligence in failing to discover appellee's presence and danger in time to avoid injuring him. We think this question must be answered in the negative. This is not the case of a person upon the track whose very presence there is a warning to the engineer that he may be injured, and that he will be injured unless he leaves the track. While as to such person the engineer has the right to assume he will leave the track, unless something indicates he may not do so, the engineer must exercise care to observe such person and must be prepared to use the means at his hands to avoid an injury. Here appellee was a member of a crowd, every member of which knew of the train's approach and the picture presented to the operatives of the train was a composite one. These operatives say they were on the lookout and that there was nothing which came to their view to apprise them that any one was in danger. That the prospective passengers and others stood near the track, as is ordinarily done, and they were

unaware of any one's danger. Appellee was barely in danger. It is true he proved to be nearer the track than any other person, but this injury occurred in a very short space of time. We think it would be imposing a degree of care beyond reason, under the circumstances of this case, to charge the railroad company with knowledge of the fact that appellee was oblivious of his proximity to the track, and only oblivion could have imperiled his safety, a slight step, or possibly an inclination of the body. and he would have been out of danger. No degree of care, consistent with the practical operation of trains, would charge appellant, under the evidence here, with knowledge of appellee's abstraction, and we conclude therefore it was guilty of no negligence.

The judgment of the court below is therefore reversed and the cause dismissed.

KIRBY, J., dissents.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. WILSON.

Opinion delivered May 31, 1915.

1. RAILROADS—DEATH OF PERSON ON TRACK—LOOKOUT.—Deceased, who was very deaf, was killed by being struck by a moving train, while deceased was walking on the tracks, being struck from behind. *Held*, under the evidence it was a question for the jury, whether the engineer used every means possible to avoid the accident after discovering deceased's peril.
2. RAILROADS—DEATH OF PERSON ON TRACK—UNCONTRADICTED EVIDENCE.—Where deceased was killed by being struck by a moving train, the testimony of the engineer that he stopped the train as quickly as possible after discovering deceased's peril; *held*, not to be uncontradicted.
3. EVIDENCE—PERSONAL INJURY ACTION—REMARK OF RAILWAY ENGINEER.—Deceased was killed by a moving train, after the accident the engineer said that if he had known it was deceased on the track, he would have stopped the train. Deceased was a former railway engineer and known to be very deaf. *Held*, while evidence of the remark was not admissible as part of the *res gestae*, still, under the facts of the case its admission was not prejudicial, in an action by deceased's widow to recover damages on account of negligence.

4. DAMAGES—WRONGFUL DEATH—AMOUNT.—When deceased was forty-seven years of age, able bodied, except for deafness, a former railway engineer, and a skilled mechanic and bookkeeper, a verdict of seven thousand dollars in favor of his widow is not excessive, when his death was due to the negligence of the servants of defendant railway.

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

Sam H. West and *Gaughan & Sifford,* for appellant.

1. This case is not affected by the "lookout" statute," but falls under the rule governing liability in cases of discovered peril. Deceased was an admitted trespasser and guilty of gross negligence. The only question is, did the engineer exercise ordinary care to avoid the accident after he discovered the peril of deceased. There can be no recovery in the absence of reckless or wilful conduct of the company or its agents. 46 Ark. 513; 47 *Id.* 497; 50 *Id.* 483; 49 *Id.* 257; 93 *Id.* 579; 83 *Id.* 300; 90 *Id.* 278; 97 *Id.* 560; 91 *Id.* 14. The engineer did all that a man of ordinary prudence could, in view of his experience.

2. The testimony of Kirby and his brother was incompetent. This clearly was no part of the *res gestae* and was prejudicial.

3. The verdict is excessive. 57 Ark. 382. Deceased was earning nothing when he was killed and had not been earning anything for two years. He was an expense to his wife. No pecuniary loss is proven.

Manning, Emerson & Morris, for appellee.

1. The lookout statute is applicable to this case. Acts 1911, page 275. A railway company is liable for an injury resulting after the employees discovered the peril of deceased, but also where they should have discovered the peril in time to avoid the injury. Where one is seen upon the track and there is reason to believe that he is * * * *insensible of danger,* or unable to avoid it, the employees of a railway company have no right to presume that the person will get out of the way, but should use due care to avoid an injury. 48 Ark. 513; 102 *Id.* 417-421; 99 *Id.* 422.

2. The testimony of Kirby and his brother was admissible as part of the *res gestae*. At any rate, it was harmless.

3. The verdict is not excessive. 98 Ark. 507; 94 *Id.* 147; 88 *Id.* 352; 96 *Id.* 383; 83 *Id.* 133.

HART, J. Appellant prosecutes this appeal to reverse a judgment against it in favor of appellee for damages for the alleged negligent killing of her husband by one of its passenger trains. The facts proved by appellee are substantially as follows:

Appellee, Mrs. Lillian Wilson, is the widow of W. S. Wilson, who was killed near Texarkana, in Miller County, Arkansas, on February 28, 1914, by one of appellant's passenger trains. Wilson was an old locomotive engineer and had been in the employ of appellant as such until about two years before he was killed. His sense of hearing was almost entirely gone, and for two years he had been engaged in trying to restore it. At the time he was killed he was in the hospital of appellant at Texarkana, Arkansas, for the purpose of treatment, and had walked out on the railroad some distance from Kirby's Crossing, which was about two miles from Texarkana. On his return to the city, he was struck and almost instantly killed by one of defendant's passenger trains near Kirby's Crossing. There was a curve about a half mile north of Kirby's Crossing, and the train which struck deceased whistled as it came around the curve. The track was straight from the curve to the crossing.

The train consisted of an engine and eight passenger coaches. When it reached the whistling post, about a third of a mile from the crossing, the engineer again blew the whistle and some of the witnesses to the accident say that the engineer blew three sharp blasts when he was in about twenty feet of Wilson; that the train which struck Wilson projected him forward sixty or seventy-five feet; that they could not see that the train had checked its speed any at the time it struck Wilson; and that Wilson seemed to be entirely oblivious of the approach of the train and

was walking along the middle of the track with his head bent down.

There were six or seven little negro boys and girls between Wilson and the approaching train, traveling in the same direction. When the engineer blew the whistle at the whistling post these little negro children who were about one hundred yards ahead of the engine, immediately got off the track. The witnesses state that Wilson proceeded leisurely along and did not appear to notice the approach of the train until just immediately before it struck him; that he then attempted to jump off the track but the pilot beam of the engine struck him and knocked him sixty or seventy-five feet ahead of the train and that the train stopped in a distance of a little more than six hundred feet from the point where it struck Wilson.

One of the witnesses for appellee states that a short time before the trial he saw a train consisting of an engine and nine passenger coaches stop at about the place where Wilson was killed in order to avoid striking some cattle, that the train was going at a speed of about thirty-five to forty miles an hour, and that when the emergency brake was applied the train stopped within a distance of its own length. The train which struck Wilson was likewise running at a speed of thirty-five to forty miles an hour.

The engineer of the train which struck Wilson testified that the accident happened at a little past 10 o'clock in the morning and that as the train came around the curve he was running at a rate of forty miles an hour; that he blew the whistle as the train came around the curve and again blew it at the whistling post which was, as he stated, about a quarter of a mile from the crossing; that he saw the little negro children and Wilson walking along the track ahead of the train; that the little negro children were between Wilson and the train and that they got off the track when he blew the whistle at the whistling post; that he did not see anything in the appearance of Wilson to indicate that he was oblivious of the approaching train, and that he supposed he would get off the track

before the train reached him; that he had been an engineer on the road for a great many years, and that his experience before this time led him to believe that Wilson would get off the track; that when the train approached in four or five hundred feet of Wilson he blew three or four short blasts to warn Wilson of the approach of the train; that Wilson failed to get off the track and he then applied the emergency brake; that the train then ran about a thousand feet before it stopped; that it struck Wilson and carried him forward about seventy-five feet; that the condition of the engine was first class, the emergency brake working well, and that he did all he could to stop the train; that he expected the man to get off the track when he sounded the alarm whistle, and when he failed to do so he applied the emergency brake; and that the last he saw of Wilson he was about seventy feet ahead of the engine.

The fireman and the roadmaster, who was also on the engine, corroborated the statements of the engineer, and in addition the fireman testified that the whistle was kept blowing almost all of the time after they passed the whistling post, and that the bell was kept ringing after that time. He said that the blasts were short and quick.

(1) It is insisted by counsel for appellant that the above state of facts does not support the verdict of the jury, but we are of the opinion that the testimony made it a question for the jury as to whether or not appellant's servants engaged in the operation of its train exercised ordinary care, after discovering the perilous situation of the deceased, to avoid injuring him. The evidence shows that Wilson was walking along in front of the approaching train with his head hanging down, and that he appeared to be wholly oblivious of the approach of the train. He had almost wholly lost his sense of hearing, and, of course, the jury were warranted in finding that he did not know that the train was approaching him until just before he was struck, when he attempted to jump off of the track. The engineer and fireman admitted that they saw the deceased walking along the track in front of the engine, but

said that this was a common occurrence and that they thought he would get off the track before the train reached him. They testified that when they were in about four or five hundred feet of him they blew three short, sharp blasts of the whistle to warn him of his danger and that when they then saw that he did not realize his danger the engineer put on the brake in emergency and stopped the train as soon as he could. He said that the train stopped a thousand feet from the point where the brake was applied and that he stopped as quickly as he could.

(2) It can not be said that the testimony of the engineer and fireman was uncontradicted. One of the witnesses for appellee testified that he saw about a week before the trial a train consisting of an engine and nine coaches stop within its own length at the very place where the injury under consideration occurred. The train which struck Wilson was about five hundred feet long. Therefore, this testimony tended to contradict the engineer in his statement that the train could not be stopped in a distance short of one thousand feet.

Another of the witnesses for appellee testified that the engine did not appear to have been checked at all at the time it struck Wilson and that the alarm whistle was not blown until the engine was in about twenty feet of Wilson. This tended to contradict the testimony of the engineer to the effect that he blew the alarm whistle when the train was four or five hundred feet away from Wilson, and then immediately applied the brake in emergency.

It will be remembered that the fireman testified that the engineer blew the whistle for the crossing at the whistling post which was at least a quarter of a mile from the crossing; that the bell was ringing from that time and that the whistle was blown almost continuously until Wilson was struck. This tends strongly to indicate that the engineer was apprised of the fact that Wilson was unconscious of the approaching train. If he saw the little negroes run off the track as soon as he blew the whistle at the whistling post, and if, as stated by the fireman, he almost continuously blew the whistle from that time on,

the jury might have found that he necessarily saw that Wilson was not conscious of the approaching train and should have applied the brakes sooner than he did.

We think there was testimony of a substantial character to support the verdict. See *St. Louis, I. M. & S. Ry. Co.* v. *Scott,* 102 Ark. 417; *Memphis, D. & G. Ry. Co.* v. *Buckley,* 99 Ark. 422; *St. L., I. M. & S. Ry. Co.* v. *Wilkerson,* 46 Ark. 513.

(3) One of the witnesses for appellee stated that when the train was stopped he went to the place where Wilson was lying and heard the engineer say that if he had "known it was Scotty Wilson" he could or would have stopped the train. Counsel for appellant insist that this testimony was not part of the *res gestae,* but was a narrative of a past occurrence and was, therefore, improperly admitted in evidence. We agree with counsel that it was not part of the *res gestae,* but it is perfectly evident that no prejudice resulted to appellant from its admission. The engineer admitted that he saw a man walking on the track when the train came around the curve. This was a half mile from the crossing and from that time on the engineer saw the man walking along the middle of the track.

The deceased was an old engineer and had worked on appellant's road for many years. The engineer and other members of the crew of the train which struck him knew that he was almost wholly deaf, and the remark of the engineer meant no more than to say that if he had known the man walking on the track was Scotty Wilson he would have stopped the train because he knew that Scotty Wilson was so deaf that he couldn't hear its approach. It simply meant that if he had known that a deaf man or a man oblivious of the approach of the train was walking on the track in front of it he would have stopped the train. The remark worked no prejudice whatever to the rights of appellant.

(4) Again, it is insisted by counsel for appellant that the verdict is excessive. The jury returned a verdict for $7,000, but we do not think it can be said to be exces-

sive. At the time he was killed Scotty Wilson, except for his affliction of deafness, was a stout, able-bodied man, forty-seven years of age. His life expectancy was 23.8 years. In his youth he had been apprenticed as a machinist, and was also capable of being a bookkeeper. Though his affliction prevented his continuing at work as a locomotive engineer, it did not prevent his being a stationary engineer or working as a machinist. The proof shows that the wages of a stationary engineer vary from $2 a day to $125 a month. Wilson was well qualified to fill a position of that kind. His wife testified that he was sober and industrious; that he was a man of frugal habits and that he gave her all of his wages except what was actually necessary to buy his own clothes. She also testified that he nearly abandoned hope of regaining his hearing and that he contemplated engaging in work in a short time. Under these circumstances, we do not think a verdict of $7,000 is excessive.

It follows that the judgment will be affirmed.

CONWAY LUMBER COMPANY *v.* HARDIN.

Opinion delivered May 31, 1915.

1. MECHANIC'S LIENS—NOTICE—COMPLIANCE WITH STATUTE—WAIVER.—There must be a substantial compliance with the statutes regarding the filing of mechanic's and material man's liens, unless the owner has, by contract or waiver, or in some manner by his conduct, estopped himself from insisting upon such compliance.
2. MECHANIC'S LIENS—STATUTE—SUBSTANTIAL COMPLIANCE.—A mechanic's lien can be obtained only upon a substantial compliance with the provisions of the act granting the right. Kirby's Digest, Chap. 101.
3. MECHANIC'S LIENS—COMPLIANCE WITH STATUTE.—When resort is had to a court of equity to have a mechanic's lien, as provided by the statute, declared and enforced, such court must see that the statutory requirements have been substantially fulfilled as prerequisites to the relief sought.

Appeal from Faulkner Chancery Court; *Jordan Sellers,* Chancellor; affirmed.

R. W. Robins, for appellant.

1. Where no rights of a third person are involved, it is not necessary for a material man to file his affidavit for a lien punctually within the ninety days allowed by law. 30 Ark. 568; 51 *Id.* 203; 49 *Id.* 475; 21 *Id.* 192; Kirby's Digest, § § 4976, 4981.

2. The appellee is estopped by her agreement to execute a mortgage. 20 A. & E. Enc. L. (2 ed.) 386; 77 Ark. 590.

J. C. Clark, for appellee.

1. The statute must be complied with or there is no lien. Kirby's Dig., § 4941; 30 Ark. 568; 49 *Id.* 475; 51 *Id.* 302; 32 *Id.* 59; 56 *Id.* 547; 91 *Id.* 108; 107 *Id.* 245.

2. The chancellor found that appellee did not agree to execute a mortgage, and did nothing to mislead appellant or hinder it from filing its claim. There is no estoppel.

WOOD, J. This suit was instituted by the appellants against the appellee to have a lien declared and enforced in favor of appellants for certain materials furnished by them which were used by a contractor employed by the appellee in repairing a dwelling house on certain lots belonging to appellee, and on which appellants seek to fix a lien.

The material was furnished on a running account, the first item being entered on the books of appellants June 11, 1912, and the last item, August 8, 1912.

On December 21, 1912, appellants served notice on the appellee that they would file their lien on January 1, 1913. And appellants did on January 1, 1913, file their claim for a lien. On February 6, 1913, appellants instituted this suit.

They allege, as a reason for not filing a lien before the expiration of the time required by the statute, the following:

That finally, ten days before the time for filing the lien expired, the plaintiffs demanded the payment of said account and informed the said defendant that unless said

account was paid, they would file lien therefor as provided by law; that thereupon defendant did promise and agree that if plaintiff would not file a lien she would execute a mortgage to plaintiffs on said property to secure the amount due them on said account; that, relying solely upon the terms of said agreement, they did not file their lien at that time, etc." Appellee denied these allegations.

The above allegation of appellants' complaint, denied by the appellee, raised purely an issue of fact which was whether or not the failure of appellants to file their account with the clerk of the circuit court within ninety days, in compliance with the statute, (Sec. 4981 of Kirby's Digest), was caused by an oral agreement on the part of the appellee with appellants, entered into before the ninety days had expired, to the effect that she would execute a mortgage to the appellants on the property providing appellants did not file their claim for a lien.

The evidence on this issue is substantially as follows: A. A. Halter, a member of appellants' firm, who conducted the alleged negotiations with the appellee, testified that he had several conversations with Mrs. Hardin in regard to the giving of the mortgage, one of which occurred at her home. At least two of these conversations were over the telephone; and the last conversation he had with her, which was at about the noon hour of the last day for giving the notice, he called her over the 'phone from his office to her residence and asked her what she was going to do about the matter. She told him she would accept their proposition. He repeated her answer, and she again told him that she would accept it; that the proposition was for her to give the appellants either a first or second mortgage on the property. He stated that they did not file their lien for this reason.

J. H. Imboden, who was a member of appellants' firm, testified that he heard Mr. Halter talking to Mrs. Hardin over the 'phone and that Mr. Halter used the words: "You will accept our proposition then?" and that Mr. Halter turned around and told him that Mrs. Hardin had accepted their proposition.

On the other hand appellee testified that she did not tell Mr. Halter that she would give him a mortgage. She only told him that she would have to have more time to be advised. She understood from Mr. Halter that the time for giving notice would expire on Thursday, and she called him up over the 'phone on Wednesday before and told him to file his lien and protect himself.

Two witnesses, who were boarders at appellant's, testified that they heard appellee tell someone over the 'phone, whom she called Halter, "to go ahead and file his lien."

It thus appears that there is a sharp conflict in the evidence on the above issue of fact, and we are unable to say that a finding to the effect that the appellee did not promise to execute a mortgage on the property in consideration that the appellants would forego their right to file a lien on the property in controversy is clearly against the preponderance of the evidence.

The testimony of Halter, to the effect that the appellee said to him over the 'phone that she would accept his proposition, is not corroborated by the testimony of Imboden, because Imboden only testified that he heard Halter say that appellee had accepted his proposition. This was but hearsay testimony. The testimony of the appellee, to the effect that she called a person by the name of Halter over the 'phone on Wednesday preceding the day when the time for filing the notice of lien had expired, and told him to go ahead and file his lien, is corroborated by the testimony of Brooks, and also by the testimony of Foreman. These witnesses testified that they heard appellee call Mr. Halter, and that in this conversation she told the one to whom she was talking "to go ahead and file his lien." These witnesses were disinterested, and even if it could be said that the testimony on this issue of fact was evenly balanced between Halter and appellee, the burden of proof being upon the appellants, they would fail, and certainly a finding as above stated is not clearly against the preponderance of the testimony.

(1) The next question is purely one of law, towit: whether or not it is necessary as between the owner of property and a material man for the latter, in order to obtain a lien for materials furnished, to give ten days' notice "and file a just and true account, verified by affidavit, with the clerk of the circuit court of the county in which the building is situated on which a lien is sought to be fixed," as required by Sections 4976 and 4981 of Kirby's Digest. There must, according to our previous decisions, be a substantial compliance with this statute unless the owner has, by contract or by waiver, or in some manner by his conduct, estopped himself from insisting on such compliance. In the cases relied on by the appellants, towit: *Murray* v. *Rapley,* 30 Ark. 568; *Anderson* v. *Seamans,* 49 Ark. 475; *Buckley* v. *Taylor,* 51 Ark. 302, it will be observed that there was neither a waiver on the part of the owner of compliance with the statute on the part of the lien claimant or else the facts disclosed were held to be a substantial compliance with the statute.

(2) Under the express terms of the act the material furnisher, etc., can only acquire a lien "upon complying with the provisions of this act," etc. Kirby's Digest, Mechanics Lien, chapter 101, section 4970.

Section 4976, (Kirby's Digest) recites, "Any person * * * who may wish to avail himself of the benefit of this act shall give ten days' notice," etc. And, again, section 4981 recites, "It shall be the duty of every person who wishes to avail himself of this act to file with the clerk," etc.

The above language indicates clearly that there can be no lien under our mechanics lien law in favor of the persons therein named except upon some substantial compliance with the provisions of the statute. It is true that the furnishing of the material gives the right under the statute to have the lien declared on the building in which the materials are used, but in order to perfect and enforce such lien it is necessary that the party who has the right to such lien shall proceed in the manner also prescribed by the statute to have same enforced.

(3) While a literal compliance is not essential, as shown by the cases upon which appellants rely, a substantial compliance is a prerequisite according to these and all other cases where the subject is considered. *Kizer* v. *Mosely,* 56 Ark. 544. See also, *Midland Valley Rd. Co.* v. *Moran B. & N. Mfg. Co.,* 91 Ark. 108; *Marianna Hotel Co.* v. *Livermore, F. & M. Co.,* 107 Ark. 245. All the above cases show that there must be substantial observance of the statutory requirements in order to perfect the lien.

Where resort is had to a court of equity to have the lien provided by the statute declared and enforced, such court must see that the statutory requirements have been substantially fulfilled as prerequisites to the relief sought.

It follows that the decree of the chancery court is in all things correct, and it is affirmed.

COLE v. COLE.

Opinion delivered May 31, 1915.

PARTNERSHIP — AGREEMENT — COMPENSATION — DISSOLUTION.—A., B. and C., entered into a partnership. B. died and C. became insane, but A. continued to operate the partnership business. *Held,* where A., after the happening of these events elected not to wind up the affairs of the partnership and dissolve it, as he had the right to do under the law, but chose rather to continue its operations, he will not be heard to say that the terms upon which he entered the partnership were not sufficiently favorable to him and that he should have a compensation not originally agreed upon.

Appeal from Craighead Chancery Court; *N. F. Lamb,* Special Chancellor; affirmed.

J. C. Hawthorne and *D. K. Hawthorne,* for appellants.

The ordinary rule is not disputed that one partner can not charge another for services rendered the partnership unless by special agreement; but there are exceptions to this rule which are well recognized, as that where it can be fairly and justly implied from the course of

dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim therefor will be sustained. 24 N. W. 129; 49 N. W. 846; 5 N. W. 243, 251.

It was within the scope of the partnership business for Y. A. Cole, Sr., to contract with appellant to pay him for his services in managing the firm business. 66 So. 694; 145 S. W. 194; 92 Ark. 271.

In the absence of an express agreement to pay appellant a salary, it can be clearly implied from the course of dealing the partners adopted, and from other circumstances of equivalent force, that he is entitled to compensation for his services, and he should be allowed it. *Supra;* 68 N. E. 199; 35 S. W. 921; 11 So. 745; 147 N. W. 148; 23 Ark. 566.

M. P. Huddleston, for appellee.

1. A partner can not charge for services rendered in the business or receive any salary for his services, unless there is a special agreement to that effect, or unless an agreement may be fairly inferred from the course of the business. 23 Ark. 566; 135 Cal. 561, 17 Pac. 1054; 17 L. R. A. (N. S.) 384 and note p. 386.

2. Inequality of services rendered does not entitle a partner to extra compensation. 17 L. R. A. (N. S.) 391, note.

SMITH, J. Appellee G. B. Cole, by his guardian, commenced this suit on November 9, 1910, to dissolve the copartnership known as the Jonesboro Wagon & Manufacturing Co., and to distribute its assets. This copartnership was formed on January 1, 1902, and was then composed of appellee, who owned one-half interest, and of Y. A. Cole, Sr., and Y. A. Cole, Jr., who each owned one-fourth interest. Y. A. Cole, Sr., and Y. A. Cole, Jr., were father an son, and Y. A. Cole, Sr., was the uncle of appellee, G. B. Cole. The business was operated by these partners without any contract or understanding as to compensation for their services except that each partner drew on the partnership bank account for such money as he required for his personal use. G.

B. Cole became insane in May, 1907, but recovered sufficiently by the latter part of June to return to his work, but he soon became insane again and retired permanently from the business. Thereafter Y. A. Cole, Sr. became less and less active in the management of the affairs of the copartnership, and finally ceased to give the business any attention and died June 9, 1910. Y. A. Cole, Jr., continued the business until this suit was filed, and was appointed receiver and wound up the partnership affairs as such. After appellee became insane, and after the responsibility for the management of the partnership affairs had fallen on appellant, he complained to his father that it did not look right for him to stay at the factory and manage it and receive no salary for his labor. Appellant testified that his father said: "I think so, too; go ahead and do the best you can." Speaking of his father, he further testified: "From time to time he would come over and I would talk to him about it, as often as I would get a chance, and there was a time or two that I would get the subject right down to the point in regard to how much salary I ought to have. I reckon he thought I wanted a little more than he thought I ought to have." He further testified that on another occasion he told his father he thought he should have a salary of $150 per month, but his father told him that was too much, and that while no agreement was ever reached about his salary he supposed he would be paid for his services, and continued in charge of the business because of that expectation. There was testimony to the effect that Y. A. Cole, Sr., had stated to the employees about the plant that appellant was to be paid a salary, and that his services were reasonably worth $125 per month. The partners adopted at the beginning a very loose and inaccurate system of bookkeeping, which was continued by appellant, and it became necessary to employ an expert accountant to state the account between the partners, and there is now a wide difference of opinion as to the result of appellant's management of the business. However, the heirs of Y. A. Cole, Sr., were made parties to this

suit, and the court below stated the account between the partners, and the only item questioned on this appeal is appellant's claim for salary for the thirty-eight months during which he had charge of the business. The court found that, pursuant to the agreement that the partners might draw money as they needed it, Y. A. Cole, Sr., had drawn $300; that $1,152.50 had been drawn by and for G. B. Cole, while appellant had drawn $2,364.50, which sum he admits should be credited against the allowance of $4,750 which he claims as salary, and the difference between these two amounts forms the subject-matter of this appeal.

We think the court below allowed appellant all he was entitled to receive, for the reason that the proof is insufficient to show any right on his part to charge for his services. The law of this subject is stated in Modern American Law, Vol. 9, section 76, as follows:

"A partner is entitled to participate in the profits realized in a partnership business in the proportion agreed upon by the partners. Since he, by attending to the firm business, is conducting but his own affairs, he is not entitled to any extra compensation unless a special agreement to that effect has been made, or unless extra trouble has been caused to him by his copartner's neglect of duty. Where the partnership agreement has provided for extra compensation of one or more of its members the agreement controls. This agreement may also anticipate such events as the death or sickness of a member and may provide a compensation to the other members for the extra work which will be caused to them by such event. If no such agreement is made, the sickness of a copartner will be considered as a risk which is incidental to the partnership relation and which is, therefore, assumed by all the partners. 'Even where a liquidating or surviving partner settles up the business, it has been repeatedly held that he is not entitled to compensation for doing so, although in such case he performs all the services.' "

An extensive note will be found to the case of *Williams* v. *Pederson*, 17 L. R. A. (N. S.) 384, citing many authorities on this subject.

Two events happened in the history of this copartnership, either of which would have worked a dissolution of the firm had appellant so desired. The first of these events was the insanity of G. B. Cole, and the second was the death of Y. A. Cole, Sr. Notwithstanding these events appellant did not dissolve the firm, but continued to carry on the business, and the presumption must be indulged, despite his expectations to the contrary, that he did so pursuant to the original articles of agreement.

One witness testified that he heard G. B. Cole say, after he had ceased to perform any services or to discharge any duties in connection with his copartnership, that appellant was drawing a salary for his services. But it was not shown whether G. B. Cole was referring merely to the sums which the partners had been drawing for their personal use or not, nor does it appear that G. B. Cole had recovered his reason. Moreover, this remark was not made in the presence of appellant, and it was not shown to have been communicated to him. It is true appellant testified that his father agreed with him that it would be right for him to have some compensation for his services, but no agreement was ever reached with his father as to what the compensation should be. Besides, any understanding between appellant and his father about salary would have constituted an amendment to the articles of copartnership, which would not have been binding on the insane partner.

If, for reasons satisfactory to himself, appellant elected not to wind up the affairs of the copartnership and dissolve it, as he had the right to do under the law, but chose rather to continue its operations, then he should not be heard to say that the terms upon which he entered the partnership were not sufficiently favorable to him and that he should have a compensation not originally agreed upon. *Pierce* v. *Scott*, 37 Ark. 308; *Haller* v. *Willamowicz*, 23 Ark. 566.

Upon filing the bill for the settlement of the affairs of this copartnership appellent was appointed receiver, and wound up its affairs, and was allowed a thousand dollars as compensation therefor. We think no error was committed in rejecting appellant's claim, and the decree is therefore affirmed.

BANK OF HOXIE *v.* HADLEY MILLING COMPANY.

Opinion delivered May 31, 1915.

1. PRINCIPAL AND AGENT—COLLECTION OF FUNDS—RIGHT OF AGENT TO USE. —An agent with authority to collect money for his principal has no right to use the funds for his individual purposes, and it is not within the apparent scope of his authority to so use the funds.
2. PRINCIPAL AND AGENT—NOTICE OF AUTHORITY TO THIRD PERSONS—PROCEEDS OF COLLECTIONS.—Persons who deal with an agent with knowledge of the agency must take notice of the want of his authority to use the proceeds of his collections for his individual purposes.
3. BILLS AND NOTES—ACCEPTANCE OF DRAFT—GUARANTY—KNOWLEDGE BY PURCHASER—PRINCIPAL AND AGENT—APPROPRIATION OF DRAFT BY AGENT. —The doctrine that the acceptance of a draft amounts to a guaranty of the capacity and authority of the drawer, does not apply to a case where an agent misappropriates the draft of his principal to his own use, with the actual knowledge of the one who receives the draft from him.

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

Baker & Sloan, for appellant.

1. Under the ordinary rules of the Law Merchant, White, by accepting the draft, became liable to the bank. By his acceptance he affirmed to all subsequent holders that Burke had authority to draw. 62 Barb. 101; 3 Burr. 1354; 1 W. Bl. 390; 60 Minn. 189; 51 Am. St. 519. If a bill be drawn by one professing to act as agent of the drawer, the acceptance admits his handwriting and authority as agent to draw. Daniel on Neg. Inst. (3 ed.), § 537; 7 Taunton, 455; 1 McGloin, 161; 10 Bing. 51; Tiedeman on Com. Pap., § 230, p. 386; 3 Rul. Cases Law, § 360, note 4; 8 Ala. 163; 29 N. Y. 554.

2. The bank was an innocent holder, in due course of business, without any notice. 111 Ark. 263, 270; 109 *Id.* 107, 113; 102 *Id.* 45; Ib. 426; 94 *Id.* 387. The burden was on White to show that the bank took the draft in bad faith. 84 Ark. 1, 10; 95 *Id.* 582-6.

3. It requires actual bad faith, or dishonesty, to deprive a purchaser of negotiable paper of the characteristic of good faith. 2 Wall. (U. S.) 110; 101 U. S. 564; 102 *Id.* 444; 20 How. (U. S.) 367; Daniel on Neg. Inst. (3 ed.), § 775; 61 Ark. 81; 79 *Id.* 149; 84 Neb. 808; 122 N. W. 61.

4. No bad faith is proven, nor was the bank put upon notice that Burke was misappropriating funds. 36 App. Div. 112; 55 N. Y. Sup. 545.

Lamb, Caraway & Wheatley, for appellee, White.

1. The Bank of Hoxie was not an innocent purchaser. 104 Ark. 388, 394; 90 *Id.* 97; 94 *Id.* 102; 86 *Id.* 82; 29 *Id.* 500. It had notice of defect of title in Burke, on the face of the draft. Besides it knew Burke was merely an agent.

2. Where the buyer knows that the person he is dealing with is only an agent, he can not aid the agent in defrauding the principal by converting the property of the latter to the agent's use. 79 Ark. 401; 53 *Id.* 135; 42 *Id.* 22; 3 R. C. L., § 289; 34 L. R. A. 723; 35 Fed. 723.

Hawthorne & Hawthorne and *D. K. Hawthorne,* for appellee, Hadley Milling Company.

1. No authority was given Burke to collect in anything except money. One who deals with an agent is put upon notice of the limitations of his authority, and must ascertain what that authority is, and if he fails to do so, he deals with the agent at his peril. 117 Ark. 173; 46 Ark. 210; 105 *Id.* 111.

2. An agent, without express authority, can not accept any kind of commercial paper in satisfaction of a debt due the principal. Mechem on Agency, § 375; 1 Clarke & Skyles on Agency, p. 645; 1 Am. & Eng. Enc. Law, 1027. The bank knew this, and it was its duty at least to inquire. Daniel on Neg. Inst. (3 ed.), § 537.

McCULLOCH, C. J. One of the appellees, Hadley Milling Company, a foreign corporation engaged in the manufacture and sale of flour, instituted this action against appellee White to recover the sum of $710, the price of a car load of flour sold to White by the plaintiff's agent, one J. E. Burke. White was engaged in the mercantile business at Lake City, Arkansas, when he purchased the car load of flour, and about the time of the delivery of the flour to him he accepted a draft drawn on him by Burke in the name of the latter's principal, Hadley Milling Company, but payable to Burke's own order, for the full amount of the price. The draft was drawn on January 30, 1913, and was payable February 15, 1914, and was signed "Hadley Milling Company, per J. E. Burke." White indorsed his acceptance upon the draft. Burke assigned the draft before maturity to the Bank of Hoxie, a banking corporation at Hoxie, Arkansas, as collateral to secure his own debt to that bank for borrowed money. Burke absconded without having accounted to his principal, for that and other amounts collected by him in similar transactions. White admitted his liability for the price of the flour, and, after setting up in his answer the facts concerning the draft, asked that the Bank of Hoxie be made a party to the suit and that he be permitted to pay the sum due into court. White paid the money into court upon order of the court, and the Bank of Hoxie was brought in as a party and filed its interplea asking judgment against White on the draft. The case was submitted to the court sitting as a jury and judgment was rendered in favor of Hadley Milling Company against White, and the clerk was ordered to pay over the fund in court in satisfaction of that judgment, and judgment was rendered in White's favor on the claim of appellant, Bank of Hoxie.

The question presented here is whether or not there is sufficient evidence to support the findings of the court. It is unnecessary to discuss the question whether or not from the facts of the case it was within the apparent scope of Burke's authority to draw a time check in his own

favor for the price of the flour sold to White so that the latter would have been protected in paying a check drawn in that way. The testimony in this case, so far as would concern any controversy between Hadley Milling Company and White, is very similar to that which was brought out in the recent case of *Hadley Milling Company* v. *Kelley,* 117 Ark. 173, 174 S. W. 227, except that the Bank of Hoxie was not a party to the other suit and its rights were not involved in the controversy. The judgment of the court in the present case settled the controversy between Hadley Milling Company and White, and the latter has not appealed, so we are only concerned with the claim of appellant against White to recover on the draft.

(1-2) The undisputed evidence is that Burke's authority was to collect only in money, and that he had no authority to draw a draft in his own favor or to use the collections for his individual purposes. It is also undisputed that the cashier of the bank, when he accepted the draft from Burke, knew that it was for the price of flour sold by Burke for his principal, the Hadley Milling Company. In fact, the draft shows those facts upon its face, and that was sufficient to put the bank upon notice that Burke had no authority to use the draft for his individual purposes. The fact that Burke made the draft payable to his own order does not alter the controlling principle, which is that an agent with authority to collect money for his principal has no right to use the funds for his individual purposes, and it is not within the apparent scope of his authority to so use the funds. Persons who deal with an agent with knowledge of the agency must take notice of the want of his authority to use the proceeds of the collection for his individual purposes. *Smith* v. *James,* 53 Ark. 135; *Briggs* v. *Collins,* 113 Ark. 190, 167 S. W. 1114.

The use of the draft made by Burke constituted an attempt to misappropriate the funds of his principal, and even if White would have had to pay the draft in the hands of an innocent purchaser, he would have had no right to pay to one who had notice of those facts, and

the proof is undisputed that appellant was apprised of facts which made the transaction an attempt on the part of Burke to misappropriate the funds of his principal. Therefore, according to principles of law which are quite well settled, the bank has no rightful claim to the funds represented by the draft, for the simple reason that it participated in the attempt of an agent to misappropriate the funds of his principal.

(3) This conclusion does not disregard the principle so earnestly contended for by appellant's counsel that the acceptance of a draft amounts to a guaranty of the capacity and authority of the drawer, for that principle does not apply to a case where the agent misappropriates the draft to his own use, with the actual knowledge of one who receives the draft from him. The acceptor does not, by his act of acceptance, guarantee the authority of the agent to use the draft for his own individual purposes, and one who takes it from the agent, with knowledge of the misappropriation gains nothing, for the reason that his title to the draft is vitiated by the fraud of the agent.

The judgment is therefore affirmed.

McGOUGH v. STATE.

Opinion delivered May 31, 1915.

1. HOMICIDE—VOLUNTARY MANSLAUGHTER.—When death results from a voluntary act, and the killing was intentional and resulted from means calculated to produce death, the crime is not involuntary manslaughter, but is voluntary manslaughter, or some higher degree of criminal homicide.

2. CRIMINAL LAW—CONVICTION FOR LESSER CRIME.—The fact that a jury returned a verdict finding the accused guilty of a lower degree of the offense charged than that which the evidence justified, does not warrant the setting aside of the verdict by the appellate court, for it is an error of the jury of which the accused can not complain, for the reason it inured to his benefit.

3. HOMICIDE—DEGREE—INSTRUCTION AS TO FORM OF VERDICT—LESSER CRIME.—In a prosecution for homicide the court gave no instruction on the crime of involuntary manslaughter, but in instructing the jury the court instructed them as to the form of verdict in

case they found defendant guilty of involuntary manslaughter. *Held*, under the facts of the case, the defendant was not prejudiced by this action of the court.

4. HOMICIDE—EVIDENCE OF THREATS.—In a prosecution for homicide proof of threats is admissible only to aid in determining who was the aggressor, and to throw light on the state of mind of the accused at the time he fired the fatal shot; threats are to be considered for no other purpose, and it is not improper to tell the jury so.

Appeal from Drew Circuit Court; *Turner Butler*, Judge; affirmed.

Knox & Knox and *Williamson & Williamson*, for appellant.

1. There is absolutely no evidence tending to prove involuntary manslaughter, nor any evidence to sustain such a verdict. 71 Ark. 459; 99 *Id.* 188; 32 *Id.* 552; Kirby's Digest, § 1779; 21 Cyc. 760-2.

2. It was error for the court to instruct the jury on involuntary manslaughter. The error was not invited by appellant. 71 Ark. 86; 80 *Id.* 225; 82 *Id.* 25; 95 *Id.* 104; 74 *Id.* 262; 75 *Id.* 142; 73 *Id.* 262; 173 S. W. 852; 102 Ark. 266; 85 *Id.* 514; 103 *Id.* 505; 88 *Id.* 448; 77 *Id.* 464; 36 *Id.* 293; 156 U. S. 51. The error was prejudicial. 15 Sup. Ct. Rep. 294; 130 S. W. 1107; 131 *Id.* 551; 46 Wis. 516; 43 Tex. Cr. 407.

3. Especially was it prejudicial error without defining the crime of involuntary manslaughter. 71 Ark. 367, 372; Const., art. 7, § 23.

4. The court erred in giving the seventh instruction requested by the State, as to threats, and in the manner in which it permitted Walter Cruce's memory to be refreshed.

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

1. The evidence was sufficient not only to sustain a verdict for involuntary manslaughter, but for a higher degree of homicide, and hence the instruction as to the lower degree was not prejudicial. 100 Ark. 330, 335. By its verdict the jury found defendant guilty of some de-

gree of homicide, and he can not complain because the verdict was too favorable to him. 68 Ark. 310-314; 71 *Id.* 86; 68 *Id.* 225; 82 *Id.* 25-27; 95 *Id.* 100; 96 *Id.* 58; 40 Ark. L. R. 303-307.

2. Instruction No. 7, requested by the State as to threats, has been approved by this court in many cases.

3. There is nothing in the record to show that witness Cruce was taken from the court room and "coached" as to how he should testify, but it is shown that the record from which he refreshed his memory was properly identified.

McCULLOCH, C. J. Appellant was placed on trial in the circuit court of Drew County under the charge of voluntary manslaughter, and the jury returned a verdict finding him guilty of involuntary manslaughter. He is charged with killing his brother-in-law, one Guy Ferguson, and he admits the killing but pleads self-defense. Appellant is a farmer in Drew County and Ferguson was a tenant on appellant's farm. They had not gotten along well together at all times, there being some evidence of altercations occurring between them, and there is also proof of violent threats against appellant on the part of deceased.

Ferguson lived only a few hundred yards from appellant's house, where the killing occurred early one morning shortly after daylight. Ferguson went up to the house to get a wagon and team with which to do some hauling. No one was present except those two parties and appellant's wife, who, of course, did not testify in the case. Ferguson's wife testified about hearing the shot and finding the dead body of her husband when she went up to the house. She states that the body was lying on the ground outside the gate, his head being about ten feet from the gate. Other witnesses testified that when they reached the scene they found the body lying about fifteen or twenty feet from the gate. Other testimony tends to show that the gate was about ten steps from the gallery of the house. Defendant admitted that he shot Ferguson with a Winchester rifle, and undertook

to detail the altercation which led up to the killing. He said that he had another use for the wagon and team that morning and so informed Ferguson when the latter came up there to get them, and that Ferguson used vile epithets toward him and started toward the gate, and had one hand on the gate and was thrusting the other hand into his bosom when he (appellant) fired the shot. Appellant stated that he was standing on the gallery, and when Ferguson started toward the gate he stepped back in the door for the rifle and then walked out on the porch and fired the shot just as deceased put his hand on the gate. The following is the identical statement of the facts made by appellant:

"I went and told him that I would have to use them (the team of mules) and to let them alone. He said that I ought to let him use it and said, 'You son-of-a-bitch, I will go get my gun and kill you.' And I told him to go get it, and he said, 'No.' That he had gun enough here to kill me, and said, 'You son-of-a-bitch, I will kill you.' I went and got my gun and shot and he run to the tree and stood there a little and lay down."

Further on he explained about stepping back into the room or into the door to get the gun when deceased first made the statement that he would get his gun or had a gun. He stated also that when deceased thrust his hand into his bosom as he started to open the gate, he thought that deceased was going to shoot, and that that was the reason why he fired the shot. There was only one shot fired, and that was from the Winchester rifle, and the ball penetrated deceased's neck. He bled very freely, the blood being found scattered about on the dry leaves. A physician was immediately summoned and his testimony was that death was produced almost immediately from the result of the shot. His testimony also tends to show that there was no blood farther away than about three feet from the body. Deceased had no weapon except a common pocket knife which was in his pocket and unopened at the time the body was found. Appellant left the house by another gate as soon as he fired the shot and went over to one of his neighbors. He testified

that he didn't learn until some time afterward that the shot had killed deceased. According to the testimony of appellant himself, deceased was standing outside of the gate a distance of about ten steps, and according to the testimony adduced by the State the jury might have found on account of the situation of the body of deceased, and the distance of the blood stains, that deceased was several steps away from the gate on the outside at the time he received the fatal shot.

The only issue of fact in the case was whether or not appellant was justified in believing that his life was in danger so that the homicide may be excused. It is not contended that the evidence was not sufficient to have sustained a verdict of guilt of the crime of voluntary manslaughter, but it is insisted that there was no evidence to sustain a verdict of guilt of involuntary manslaughter and that the court erred in submitting that degree of homicide to the jury. The court gave correct instructions defining the crime of voluntary manslaughter, and also gave proper instructions on the doctrine of self-defense. No definition of the crime of involuntary manslaughter was given, but after the attorneys had concluded the argument of the case, the court, in giving final instructions to the jury concerning the form of the verdict, stated the form of verdict and extent of the punishment of both degrees of manslaughter, voluntary and involuntary. The record shows that appellant's counsel objected to the instruction of the court as to the form of the verdict as to involuntary manslaughter.

(1) There is no element of involuntary manslaughter in this case, and the verdict was not responsive to the evidence nor to the instructions of the court which undertook to state the law applicable to the case. Involuntary manslaughter is defined by the following statute: "If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter." Kirby's Digest, § 1779. That is substan-

tially the common law definition of involuntary manslaughter. *State* v. *Hardister,* 38 Ark. 605; *Edwards* v. *State,* 110 Ark. 590. According to the undisputed testimony, the death of Ferguson resulted from the voluntary act of appellant in firing the gun at him. That being true, the question of involuntary manslaughter is not involved. Where death results from a voluntary act, and the killing was intentional and resulted from means calculated to produce death, the crime is voluntary manslaughter or some higher degree of criminal homicide. It is not involuntary manslaughter. Wharton on Homicide (3 ed.), § 6.

(2-3) The fact, however, that the jury returned a verdict finding the accused guilty of the lower degree of the offense than that which the evidence justified does not warrant this court in setting aside the verdict, for it is an error of the jury of which the accused can not complain, for the simple reason that it inured to his benefit. If he was guilty at all, it was of the higher offense, and the fact that the jury reduced the offense is a matter about which he can not complain if the evidence was sufficient to sustain the higher offense. There are numerous decisions of this court which hold to that effect. But it is insisted that the rule is different where the trial court gives an instruction on the lower offense and there is no evidence to sustain it; the argument being that the jury may have been misled by the submission of the issue, and after reaching the conclusion that the accused was innocent of the higher offense charged, were induced by the misleading instruction to return a verdict of guilty of the lower offense. Counsel rely upon the following statement found in the opinion of this court in *Ringer* v. *State,* 74 Ark. 262: "On the other hand, if there is no evidence to show that the defendant is guilty of a lower degree of homicide than murder or voluntary manslaughter, the judge should refuse to instruct in reference to involuntary manslaughter; for to submit the question of whether a defendant is guilty of involuntary manslaughter in a case where there is nothing to show that the homicide was unintentional would be very likely to mislead the

jury." Without undertaking to decide whether an instruction erroneously given on a degree of offense not sustained by any evidence could in any case be prejudicial where the verdict was for the lower offense, we think it is quite clear in the present case that it was not prejudicial; and since we conclude that no prejudice resulted, it would not be proper for us to reverse the case on account of technical error in the instruction. It must be remembered now that the court gave no instructions defining the degree of involuntary manslaughter, and the only error was in referring to the form of the verdict in such a case. So, if the jury gave heed to the instructions of the court (which we should indulge the presumption that they did), they found that defendant did not act upon the appearance of danger so as to be justified, and that he was guilty of some degree of criminal homicide. That being true, the only effect of the erroneous instruction of the court concerning the form of the verdict was to induce the jury to return a verdict for the lower offense, and that was not prejudicial to appellant. In other words, he was not prejudiced, but got the benefit of the erroneous suggestion of the court about the form of the verdict. It might be different if there had been an erroneous instruction defining the offense of involuntary manslaughter and submitting the issue to the jury whether there was sufficient evidence to constitute that crime within the definition given; but, as before stated, no such instruction was given in this case, and when we indulge the presumption that the jury followed the instructions of the court we necessarily reach the conclusion that the jury properly found that the defendant was not acting in self-defense or upon the appearance of danger and was guilty of an unlawful homicide, which, under the evidence, could not have constituted any offense of a lower degree than voluntary manslaughter. We are of the opinion, therefore, that appellant was not prejudiced by the instruction of the court nor by the verdict of the jury.

(4) The only other assignment of error relates to the giving of the seventh instruction, which reads as fol-

lows: "You are instructed that the only purpose for which threats are admissible is to throw light on the defendant's act at the time he fired the shots, and to show who was the probable aggressor; and if you believe from the evidence as explained in these instructions that the deceased was not making any attempt to kill the defendant or to do him great bodily harm, as viewed from the standpoint of the defendant acting as a reasonable man, you will not consider threats, even if proved, for any purpose; and in this connection you are instructed that no threats, however violent, however great, are any provocation whatever."

The substance of the instruction is correct, but it is not very aptly phrased. It is a correct statement of law that proof of threats is admissible only to aid in determining who was the aggressor and to throw light on the state of mind of the accused at the time he fired the fatal shot. Threats are not to be considered for any other purpose, and it is not improper to tell the jury so. Doubtless the latter part of the instruction was intended to mean that threats alone, however violent, would not justify an assault or afford provocation for a homicide. No specific objection was made to the particular language of the instruction, and we think that while the instruction is not very aptly phrased it was not prejudicial in this case.

Judgment affirmed.

BOWEN v. LOVEWELL.

DRIVER v. RHODES.

Opinion delivered May 31, 1915.

1. PUBLIC OFFICERS—CONTEST—CLAIM FOR EMOLUMENTS ARISES WHEN—LIMITATIONS.—When the right to a public office is contested, the right to receive the emoluments of the office depends upon an adjudication of the title which is made in the contest suit, and until the title to the office is adjudicated, the right of action to recover emoluments is not mature, and an action to collect such emoluments is not barred by limitations when brought within three years of the final adjudication of the title to the office.

2. PUBLIC OFFICERS—CONTEST—APPEAL FROM COUNTY COURT—LIABILITY OF SURETIES ON SUPERSEDAES BOND.—In a contest before the county court to decide the title to a certain county office, the unsuccessful party appealed from the order of the county court and executed a bond, with sureties, superseding the judgment. *Held*, the bond was unavailing, and there could be no liability on the bond.

3. INJUNCTION BOND—LIABILITY.—A temporary injunction was granted and a bond executed conditioned that the obligor would pay all damages, if it should be finally decided that the injunction was improperly granted; a permanent injunction was then granted restraining appellee from interfering with appellant's office. *Held*, there was no liability upon the bond and sureties thereon, when in other proceedings it was finally determined that appellee was entitled to the office, since the bond was conditioned only upon the adjudication that the injunction was rightfully issued at the time the bond was executed.

4. BONDS—NATURE OF—LIABILITY OF OBLIGOR.—If the form in which a bond is given is not prohibited by statute or the law, is not contrary to public policy, but is founded upon a sufficient consideration, is intended to subserve a lawful purpose, and is entered into by competent parties, it is a valid contract at common law.

5. PUBLIC OFFICERS—CONTEST—COMMISSION—LIABILITY ON BOND.—Appellant contested the claim of appellee to an elective office. The Governor issued a commission to appellant, requiring, however, a bond from the appellant to indemnify the appellee from loss by reason of the granting of the commission. *Held*, when it was finally adjudicated that the appellee was entitled to the office, that the appellee could recover on the bond.

6. EQUITABLE RELIEF—PARTIES NOT IN PARI DELICTO—BOND.—While a transaction contrary to public policy is void, however, one who is not in *pari delicto*, or who is not a participant in the wrong at all, is not, on account of the character of the transaction, barred from asserting rights under it. So, when A. and B. were contestants for a puplic office, and the Governor issued a commission to A., exacting a bond from him to indemnify B. from loss, B. may recover on the bond when it was finally determined that B. was entitled to the office.

7. PUBLIC OFFICERS—CONTEST OVER OFFICE—INDEMNITY BOND—LIABILITY.—A. and B. were contestants for a county office; the Governor issued a commission to A., exacting a bond in favor of B. to indemnify him from loss. Thereafter the commission was revoked, but A. continued to hold the office. It was finally decided that B. was entitled to the office. *Held*, B. could recover on the aforesaid bond for all the fees and emoluments of the office while A. wrongfully held the same.

Appeals from Mississippi Chancery Court; *Charles D. Frierson,* Chancellor; reversed in part and affirmed in part.

A. B. Shafer, for appellants.

1. As to the appeal bond. The court erred in overruling the demurrer to that part of the complaint which sought a recovery against the sureties upon the bond given upon appeal from the judgment of the county court in the election contest to the circuit court. The judgment under section 2862, Kirby's Digest, is self-executing and as such is not subject to stay or supersedeas. 106 Ark. 433; 153 S. W. 619. It was not given in pursuance to any order of court. The bond was executed in the county court. It was an ordinary appeal bond, and the sureties could not be liable for more than the judgment which could be recovered from the principal, and the fees and emoluments of the office can not be recovered in a statutory proceeding to contest an office in the county court or on appeal. 86 Ark. 259; 110 S. W. 1024. Even costs can not be recovered. 128 S. W. 563.

2. As to the Governor's bond. This bond was not authorized by law and was without consideration and absolutely void. It bears no date, and was executed after the judgment of the county court in the contest case was rendered in favor of appellant. Kirby's Digest, § 2862; 67 Ark. 135; 52 *Id.* 174; 67 Am. St. 271; 94 Am. Dec. 370. If the contestee was not entitled to the commission then the contestant was, and the consideration was illegal and void. 23 Ark. 390; 63 *Id.* 318; 115 N. C. 448; 44 Am. St. 463; 68 Ark. 276. Whether the contestee was entitled to the commission or not, the bond was extorted *colore officii* by the Governor and is void. 62 Tex. 515; 48 N. Y. 347.

3. As to the injunction bond. On final hearing the injunction was made perpetual. 69 Ark. 606; 65 S. W. 106; 5 L. R. A. 403. The condition of the preliminary bond was never broken and there was therefore no liability. 208 U. S. 149; 33 App. Cas. (D. C.) 228; 208 U. S. 149, 155.

4. This was an action for money had and received and is barred by the statute of limitations. Kirby's Dig., § 5064; McCrary on Elections (4 ed.), ¶ 367, p. 277; 69 Ark. 606; 65 S. W. 106; 87 Oh. St. 117; 100 N. E. 322. An appeal does not stop the running of the statute. 59 Kan. 496; 53 Pac. 482; 12 Okla. 502; 71 Pac. 1073; 94 Fed. 921; 36 C. C. A. 549; 84 Kan. 393; 114 Pac. 241; 105 N. E. 1045.

Coleman & Lewis, for appellee.

1. The judgment of the county court was self-executing and could not be superseded. The sureties are practically the same on all the bonds, and as there is no doubt of the liability on at least two of the bonds it is useless to waste time as to the liability on the supersedeas bonds.

2. The so-called Governor's bond recites the circumstances under which it was given and was not without consideration nor void. It was not extorted *colore officii.* 18 N. Y. 115; 71 Ala. 479; 16 N. Y. 439; 41 N. Y. 464; 37 Barb. (N. Y.) 179. No compulsion was used by the Governor. 10 Wall. (U. S.) 395, 406; 15 Peters, 290; 79 Ill. 564; 13 Iowa, 322; 26 Fed. Cas. 428; 57 Cal. 157; 86 Cal. 367; 24 Pac. 1072; 133 Mass. 461; 100 Pa. St. 307; 78 N. W. 98.

3. If given voluntarily, the bond was good as a common law obligation. 16 N. Y. 439; 28 *Id.* 318; 41 *Id.* 464; 133 Mass. 461; 100 Pa. St. 307; 18 N. Y. 115; 7 Ariz. 108; 60 Pac. 872; 5 Cyc. 752; 10 Wall. (U. S.) 395; 56 Ark. 108; 75 Minn. 533; 78 N. W. 98; 86 Cal. 367; 62 Tex. 615; 16 N. Y. 439; 28 *Id.* 318; 41 *Id.* 464.

4. Bowen and his sureties are liable upon the injunction bond. It was finally decided that the injunction should not have been granted. 157 Fed. 92; 18 Ill. 309; 1 McCord, Chy. (S. C.) 347; 2 High on Injunctions (4 ed.), § 1673; 24 Ind. 439; 62 Md. 88.

5. The statute of limitations did not run. Kirby's Dig., § 5086; 29 Ark. 201; 54 Fed. 269.

McCULLOCH, C. J. Appellant, Bowen, and appellee, Lovewell, were opposing candidates for the office of

sheriff of Mississippi County at the general election held in September, 1900. Bowen was elected, according to the face of the returns, and Lovewell instituted a contest which continued in the courts until after the expiration of the term of office. The county court decided the contest in favor of Lovewell, but the circuit court on appeal decided in favor of Bowen. This court reversed the judgment and remanded the case for a new trial, and the last judgment was in favor of Lovewell, finally adjudicating his title to the office.

This is an action instituted by Lovewell to recover the emoluments and fees of the office, being instituted, as before stated, after the expiration of the term. The contest was decided in the county court on October 24, 1900, and Bowen immediately appealed and executed a bond in statutory form to supersede the judgment, the bond providing that "the said Sam Bowen will pay all the costs and damages that may be adjudged against him on appeal granted in the cause, or in the event of his failure to prosecute said appeal to final judgment in the circuit court, or if said appeal for any cause be dismissed against him, the said sureties shall pay all costs and damages and perform the judgment of the court appealed from, also that said appeal shall be prosecuted without delay, and that he will satisfy and perform the judgment of the circuit court of Mississippi County, which may be rendered in this cause."

There was a like contest between the opposing candidates for circuit clerk, Driver and Rhodes, and the result was the same in each case. Another suit is pending here on appeal, instituted by Rhodes against Driver, and the facts are the same except as to the amount of the judgment. The decision of this case will therefore control the case of *Driver* v. *Rhodes*.

Bowen and Driver applied to the Governor for commissions for the respective offices of sheriff and clerk, claiming that they were entitled to the commissions by reason of the fact that they had been returned as elected, and that the judgment of the county court in favor of their respective contestants had been superseded. Love-

well and Rhodes appeared before the Governor and resisted the efforts of their adversaries to claim the commissions and asserted the right to the commissions under the judgment of the county court pursuant to the statute which declares that if the court in such a contest "shall be of the opinion that the person proclaimed elected is not duly elected, and the person contesting is elected, an order shall be entered to that effect, and a copy thereof shall forthwith be transmitted to the Governor, who shall commission the person declared duly elected by such order." Kirby's Digest, § 2862.

The Governor decided, over the protests of Lovewell and Rhodes, to issue commissions to their adversaries, Bowen and Driver, but required the latter to execute and file with him a bond in the following form, signed by numerous parties as sureties:

"Whereas, at the general election held in Mississippi County, Arkansas, on the 3d day of September, 1900, the election returns showed that Chas. S. Driver was elected clerk of the circuit court, and Sam Bowen was elected sheriff of said county; and, whereas, J. W. Rhodes contested the election of clerk, and J. A. Lovewell contested the election of sheriff, and on the 24th day of October, 1900, the county court of Mississippi County rendered a judgment declaring the said contestants were duly elected to said offices respectively, and that the contestees were not elected; and, whereas, the contestees have appealed from said judgment to the circuit court of said county, and have filed a bond and superseded said judgment; and, whereas, the contestees are both asking for commission from the Governor; now, therefore, in consideration of the issuing of commissions to them, the said Chas. S. Driver and Sam Bowen, as principal, and ....., as sureties, undertake and agree to pay to the said J. W. Rhodes and J. A. Lovewell the fees and emoluments of the office of circuit clerk and sheriff of Mississippi County, Arkansas, respectively, if it shall be finally determined on said appeal that they were legally elected to said offices respectively."

Bowen and Driver took the oaths of office, respectively, under the commissions issued to them and continued in office throughout the full statutory term and enjoyed the emoluments thereof. On July 18, 1901, which was shortly after this court had reversed the judgments in the contest cases, the Governor issued a proclamation revoking said commissions and issuing new commissions to Lovewell and Rhodes, and the latter immediately took oaths of office and undertook to enter upon the duties of their respective offices; the contest proceedings being then pending in the circuit court on remand of the causes from this court. Bowen and Driver then instituted actions in the chancery court of Mississippi County to enjoin Lovewell and Rhodes from interfering with their incumbency of the offices and the chancellor issued a temporary injunction, as prayed for in the complaints, upon the plaintiffs giving bond with security conditioned that "should it be finally decided that said injunction ought not to have been granted said Sam Bowen, and his sureties herein shall pay to the said J. A. Lovewell the damages he may sustain by reason of the injunction in this action." A similar bond was executed in the suit of Driver against Rhodes. On the hearing of that cause, the chancellor rendered a decree in favor of Bowen and Driver, making the injunctions perpetual, and on appeal to this court those decrees were affirmed. *Rhodes* v. *Driver,* 69 Ark. 606. The ground of the decision of this court was that Bowen and Driver were *de facto* officers and that a court of equity should exercise its extraordinary powers for the purpose of protecting *de facto* officers against interference with their possession. This action was instituted in the chancery court and an accounting was asked and a recovery sought against the sureties on each of the three bonds. There was a reference to a master and a finding upon conflicting evidence as to the amount of fees collected by appellant Bowen, and on final hearing of the cause the chancellor rendered a decree in favor of Lovewell against Bowen for the sum of $8,570.75, with interest from September 15, 1913, being the amount of fees found to have been collected, and also rendered

judgment for the full amount against the sureties on the supersedeas bond and the bond executed to the Governor, and also rendered a judgment for the sum of $3,936.21, (included in the other amount just referred to) against the sureties on the injunction bond. We do not understand that there is any serious conflict here as to the correctness of the amounts of the emoluments which appellee is entitled to recover, if he is entitled to recover anything at all. In fact, the record is not sufficiently abstracted on that point to enable us to discover any error, even if any exists, as to the findings of the master and the chancellor concerning the amount due.

(1) It is contended, in the first place, that appellee's cause of action is barred by the statute of limitation for the reason that it was not brought within the statutory period of three years after its accrual. The action was instituted more than three years after the expiration of the term of office, which was the subject-matter of the controversy, but was brought within three years from the last judgment which finally disposed of the contest and declared Lovewell to be entitled to the office. Contests for the offices of clerk and sheriff are required to be instituted in the county court, but that court has no power to render judgment, except one declaring the contestant either elected or not elected. *Rhodes* v. *Driver, supra; Williams* v. *Buchanan,* 86 Ark. 259; *Buchanan* v. *Parham,* 95 Ark. 81. The remedy of a successful contestant, if the contestee has obtained possession of the office during the pendency of the contest, is to bring a separate action to recover the possession and emoluments of the office. That is the course pursued in the present case, except that the term of the office had expired and the relief sought is confined to a recovery of the emoluments which were received by the contestee. Counsel for appellant insists that a right of action for recovery of the emoluments was mature and ran, at least, from the date of the expiration of the term, even though the contest was still pending, but we are of the opinion that that contention can not be sustained, and the separate action to recover the emoluments can not be prosecuted until the title

to the office is finally adjudicated in the contest proceedings. The right to receive the emoluments of the office depends upon an adjudication of the title which is made in the contest suit, and until the title to the office is adjudicated the right of action to recover emoluments is not mature. That is the effect of the decision of this court in *Baxter* v. *Brooks,* 29 Ark. 173, where it is said: "If the title to the office of Governor had been determined in Brooks' favor by a competent tribunal, he might have sued in the Pulaski Circuit Court for his salary; but the right to this is but an incident, and follows the right to the office of Governor as the shadow follows the substance; and before the Pulaski Circuit Court could, in this case, take jurisdiction of the incident, it must determine the principal question, towit: the right to the office." The chancellor was correct, therefore, in holding that the cause was not barred by the statute of limitations.

(2-3) It is conceded by counsel for appellee that there can be no recovery on the supersedeas bond for the reason that the judgment of the county court was self-executing and could not be superseded by the execution of the bond. We are of the opinion that that position is correct, and that as the bond accomplished no purpose there was no liability thereon. There was no right under the statute to supersede the judgment of the county court, for the provision already quoted declares the effect of the judgment and the duty of the Governor with respect to issuing the commission. Whether or not the circuit court has inherent power to order a stay of the proceedings need not be decided in this case, for no such order was made by the circuit court. It is to be remembered that the judgment of the county court was rendered prior to the issuance of any commission to the contestee, Bowen, and the question of the right and power of the circuit court to grant a supersedeas preserving the *status quo* of the parties did not arise and is not now before us for decision. It was error, therefore, to render a decree holding the sureties on the supersedeas bond liable. Nor do we think that there is any liability on the part of the sureties on the injunction bond, for the simple reason

that the condition of the bond was that the obligor would pay all damages if it should be finally decided that the injunction was improperly granted. The bond, it will be seen, was to pay, not in the event that it was finally adjudicated that Bowen was entitled to the office, but to pa, damages in the event the injunction was found to be wrongful, so a final adjudication that the injunction was rightfully issued ended all liability of the sureties.

(4-5) Now, as to the bond executed by Bowen and Driver and the sureties in response to the exaction of the Governor: That bond is claimed to be enforceable as a common law obligation; and it is. The Governor required Bowen to execute it as a protection to appellee, and as the latter is expressly the beneficiary of the obligation he is entitled to sue on it. It can not be said that he is not a privy to the obligation, for the reason, as before stated, that he is by its express terms the beneficiary. *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27; *Burton* v. *Larkin,* 36 Kan. 250. The undertaking was not without consideration to support it, nor was it extorted *colore officii* by the Governor. Bowen was not entitled to the commission, for according to the terms of the statute the commission should have been issued to appellee. In other words, Bowen got what he was not entitled to, and got it solely by virtue of the voluntary execution of the bond. That being true, it can not be said that the bond was extorted from him by the Governor. *U. S.* v. *Hodson,* 10 Wall. 395.

The following is, we think, the correct rule of liability with respect to such bonds: "If the form in which a bond is given is not prohibited by statute or the law, is not contrary to public policy but is founded upon a sufficient consideration, is intended to subserve a lawful purpose, and is entered into by competent parties, it is a valid contract at common law." 5 Cyc. 752.

(6) The consideration was sufficient, for Bowen obtained the desired commission to the office by reason of the execution of the bond; and the purpose was not unlawful, for it was intended as a protection of the rightful contestant—the one who was entitled to the commission.

The transaction—that is to say, the execution of the bond—was not contrary to public policy so far as the appellee was concerned, for he was not a party to the agreement to issue the commission to appellant in consideration of the execution of the bond. On the contrary, he protested against the issuance of the commission. That part of the transaction was unlawful, but appellee was not a participant in the wrong. Trading in office is contrary to public policy, and if appellee had participated in the agreement the whole transaction would have been void, but such is not the case. There is a well established exception to the rule, that a transaction contrary to public policy is void and no rights can be claimed under it, and the exception is that one who is not in *pari delicto,* much less one who is not a participant in the wrong at all, is not on account of the character of the transaction barred from asserting rights under it. *Hutchinson* v. *Park,* 72 Ark. 509; 1 Page on Contracts, § 242. Appellee's attitude with respect to the transaction whereby Bowen obtained the commission brings him clearly within the exception stated. He is therefore entitled to assert rights under the bond notwithstanding the illegal agreement whereby the commission was issued to Bowen contrary to the terms of the statute.

(7) Again, it is claimed that the sureties on that bond are not liable for the emoluments of the office after the Governor revoked Bowen's commission in July, 1901, and issued a commission to appellee. That contention is unsound for the reason that the bond was an undertaking to pay to appellee all the fees and emoluments of the office if it should be finally determined that appellee was legally elected to said office. It covered all the emoluments of the office enjoyed by Bowen while he was the incumbent. He got into the office *de facto* by virtue of the bond, and the chancery court protected his possession because of the pendency of the contest. *Rhodes* v. *Driver, supra.* The fact that appellee did not during the pendency of the contest seek any legal remedy to oust Bowen from possession of the office did not absolve the obligors from the undertaking of the bond. Appellee had a right

to rely on the protection which the bond afforded, and the obligors can not be heard to say that appellee might, notwithstanding the pendency of the contest, have sought a legal remedy to recover possession of the office awarded to him by the judgment of the county court and to which the Governor commissioned him in July, 1901.

The decree is therefore affirmed as to appellants Bowen and the sureties on the bond required by the Governor; but the decree against appellants, Morrow, H. E. Bowen, Fisher, Hall, Brewer, Johnson, Wade, Cloar, Prewitt and Segars is reversed and the cause is dismissed.

This order applies in the case of *Driver* v. *Rhodes*, the bond being the same.

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

Opinion delivered May 31, 1915.

1. CARRIERS—INDUCING PASSENGER TO ALIGHT FROM TRAIN.—A carrier of passengers must be careful not to invite or mislead its passengers into alighting at an improper place. If its servants, in the charge or management of a train, induce its passengers to reasonably believe that the train has stopped, and that they are invited to alight, and if the passenger in so doing is injured while he is in the exercise of due care and diligence, the company will be liable.
2. CARRIERS—INJURY TO PASSENGER ALIGHTING FROM TRAIN.—In an action for damages caused by an injury to plaintiff, a passenger, received while alighting from a caboose at an improper place, the plaintiff testified that the conductor told him that he had reached his station and to alight. The conductor testified that he did not tell the plaintiff either of these facts. *Held*, it was a question for the jury to determine whether the conductor did make such statements to the plaintiff, inducing him to alight.
3. CARRIERS—PASSENGER ON CABOOSE—INJURY FROM ALIGHTING AT WRONG PLACE.—Whenever a train has stopped, and any statement is made to a passenger on a freight caboose, by the person in charge of the freight train, which amounts to an assurance that that is the place where he is expected to alight, and that the train has stopped for that purpose, then the passenger has a right to assume that the opportunity to debark has been made safe, and

a passenger injured under those circumstances is entitled to recover unless his injuries are attributable to his own negligence.

4. CARRIERS—INJURY TO PASSENGER ALIGHTING AT WRONG PLACE.—Plaintiff, a passenger on the caboose of a freight train, was injured when he debarked from the caboose at a point below the regular station. *Held*, if the plaintiff was induced by the conductor to believe that the caboose had stopped at the proper place for him and his companion to debark, then he is not precluded from recovery merely because he could, by the exercise of ordinary care, have known that he was not at the station, or not at the place where it was intended for him to debark.

5. WITNESSES—DUTY OF JURY TO CONSIDER TESTIMONY—SINGLE CLASS OF WITNESSES.—In an action for damages for personal injuries, against a railroad company, when several witnesses testified on the behalf of the defendant, an instruction was proper which told the jury that the mere fact that a witness is in the employ of the defendant, there being no other circumstances establishing an interest, that they must not arbitrarily disregard his testimony.

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

J. W. & J. W. House, Jr., for appellant.

1. It was error to refuse the modifications to the instructions requested by defendant, as asked by the plaintiff. The modifications asked merely embodied the rule that carriers must be careful not to invite or to mislead passengers into alighting at an improper or dangerous place. If a carrier, or its servants, induce passengers to believe the train has stopped, and they are invited to alight, and the passenger is thereby injured the carrier is liable. 99 Ark. 248. It is error to give instructions about which there is no issue. 69 Ark. 489; 67 *Id.* 147; 77 *Id.* 234; *Ib.* 261, etc.

2. It is the duty of a carrier that it should be exceedingly careful to see that passengers are not injured, and if the train stops before the caboose reaches the station, it is the duty of the person in charge to notify passengers when they are to alight. 84 Ark. 81; 87 *Id.* 581; 88 *Id.* 325; 87 *Id.* 101; 59 *Id.* 122; 95 *Id.* 220.

3. The instructions are inconsistent and erroneous. 79 Ark. 12; 83 *Id.* 202; 94 *Id.* 282; 89 *Id.* 213; 69 *Id.* 134; 65 *Id.* 64; 95 *Id.* 506; 96 *Id.* 311.

4. There is no difference as to liability between a local freight and passenger train. 44 Ark. 322; 88 *Id.* 225, and cases *supra.*

5. An erroneous instruction is not cured by giving a correct one on the same subject. 87 Ark. 364; 88 *Id.* 550; 89 *Id.* 213; 99 *Id.* 377; 100 *Id.* 433; 101 *Id.* 37; 105 *Id.* 223; 107 *Id.* 245.

6. Abstract instructions should not be given. Nor should the court single out a certain class of witnesses, or particular class of testimony, and refer to them in its instructions. 59 Ark. 122; 99 *Id.* 69; 103 *Id.* 21; 105 *Id.* 467; 62 *Id.* 286-312; 99 *Id.* 69-77.

7. The instructions asked by plaintiff and given covered every question arising in this case. 104 Ark. 67; 109 *Id.* 5-10. The fact that defendant plead contributory negligence is an admission of negligence. 99 Ark. 377.

Troy Pace, P. R. Andrews and *W. G. Riddick,* for appellee.

1. Each side has a right to have its theory of a case presented to the jury under proper instructions. 87 Ark. 243; 96 *Id.* 206; 92 *Id.* 394. There was no conflict.

2. It is not error to refuse abstract instructions. The assumption of undisputed facts is not error in an instruction, nor is it error to submit to the jury hypothetical instructions upon facts about which there is no dispute. 67 Ark. 147; 104 *Id.* 196; 89 *Id.* 178; 91 *Id.* 475; 95 *Id.* 506.

3. One who takes passage upon a freight train assumes the inconveniences and risks usually and reasonably incident to travel on such trains. The appellee's instructions correctly stated the law. 76 Ark. 520; 98 *Id.* 494; 93 *Id.* 119; 94 *Id.* 75; 6 Cyc. 614; 76 Ark. 356; 75 *Id.* 211. A carrier is not required to stand guard over its passengers as if they were unable to protect themselves in the ordinary conditions of travel. 76 Ark. 356; 75 *Id.* 211; 6 Cyc. 614.

4. It is true that the announcing of a station followed by a stop of the train, is an implied invitation to

passengers to alight, etc., but the instructions for defendant correctly declared the law on this question. 46 Ark. 322; 88 *Id.* 325. But it is not negligence *per se,* and does not excuse contributory negligence. 67 Ill. 398; 31 L. R. A. (N. S.) 629; 16 Am. St. 63; 75 Ark. 165; 113 Ga. 1021; 57 L. R. A. 890; 97 Am. St. 666; 19 N. Y. Sup. 516; 5 Am. Negl. Cases, 529; 88 Cal. 86; 2 Am. Negl. Cases, 191; 81 Ill. 19; 92 Ala. 237. Here plaintiff was familiar with the operation of trains and stopping places. 2 Am. Negl. Cases, 608, 69; 92 Ala. 237; 97 *Id.* 332; 6 Am. Negl. Cas. 308; 71 Tex. 274; 4 Am. Negl. Cas. 322-326; 96 Ind. 346; 38 N. J. L. 137; 87 Am. Dec. 668.

McCULLOCH, C. J. This is an action instituted by the plaintiff, C. H. Steptoe, against the defendant railway company to recover for personal injuries alleged to have been sustained by plaintiff while alighting from the caboose of a freight train on which he was a passenger. The jury returned a verdict in favor of the defendant and the plaintiff has appealed.

Plaintiff was a traveling salesman, and took passage on defendant's local freight train at Calico Rock, a station on the White River branch, and paid his fare to Guion, another station twenty or thirty miles distant. The train contained twenty-one cars besides the caboose, and arrived at Guion about 8 o'clock in the evening. It was on January 28, 1914, and was therefore after dark when the train reached Guion, the night being a dark one. The train came to a stop with the caboose 668 feet distant from the station, and the caboose, when it came to a stop, was standing on a trestle twenty-two feet high. Plaintiff and another traveling man were the only passengers and they attempted to alight from the caboose at that place, and they contend that they did so upon the invitation of the conductor and his assurance that it was a proper place for them to debark. When plaintiff attempted to alight from the steps of the caboose, he fell to the ground below and received very severe injuries. Plaintiff testified that when the train whistled he asked the conductor, "Are you going into Guion?" And that the conductor replied, "Yes;" that after the train came

to a stop he and his companion picked up their suit cases and passed the conductor, who was sitting at his desk in the caboose writing, and that they asked the conductor, "Is this Guion?" and that the conductor replied, "Yes, this is the place." He testified that the conductor was sitting there and saw him and his companion pass out on the platform for the purpose of getting off the train. Plaintiff's companion testified concerning the incident and narrated the same facts upon the witness stand that plaintiff did. There is a sharp conflict in the testimony and the jury might have found either way upon the testimony. The conductor testified that the only conversation he had with plaintiff or his companion was that when the train whistled for Guion, the caboose then being as much as a mile distant from the station, one of the passengers, either plaintiff or his companion, asked, "What is this?" And that he (conductor) replied, "It will be Guion when we get there." The conductor testified that he immediately went up in the cupola of the caboose and out on the roof and proceeded along the top of the cars for the purpose of reaching the front end so as to be there when the train stopped, and that he was on top of one of the cars, within three or four cars of the engine when the train came to a stop. He denied positively that he was in the caboose at the time the train stopped or had any conversation with plaintiff or his companion except that just related. He is corroborated by several of the trainmen who testified that they saw the conductor on top of the boxcars going toward the engine before the train stopped. The defendant also introduced a written statement purporting to have been made by the plaintiff at his home a few days after the injury occurred, and the narrative of facts in that written statement is in direct conflict with what the plaintiff testified on the witness stand. However, the plaintiff denied that he made that statement, or rather he stated that he had no recollection of signing it, and that if he did so he was not conscious of it. He said that he was sick at home and suffering from his injuries and was not in a condition mentally to give

any statement or to recollect the details of the one that was given.

(1-2-3) Now, it is clear from the above statement of the testimony in the case that the jury would have been warranted in returning a verdict either for the plaintiff or for the defendant, and a verdict in favor of either would not be set aside as being without support from the testimony. The testimony, in other words, brought the plaintiff within the following statement of the law made by this court, which would have entitled him to recover: "A carrier of passengers must be careful not to invite or mislead its passengers into alighting at an improper place. If its servants in charge or management of a train induce its passengers to reasonably believe that the train has stopped, and that they are invited to alight, and if the passenger in so doing is injured while he is in the exercise of due care and diligence, the company will be liable." *Chicago, R. I. & P. Ry. Co.* v. *Claunts,* 99 Ark. 248. The evidence adduced by the plaintiff tends to show a statement and conduct on the part of the conductor which amounted to an invitation to him and the other passengers to alight at that time and an assurance that it was a safe place for them to alight from the train. If the testimony of the conductor was true, his conversation with the plaintiff and statement to the plaintiff did not amount to an invitation to alight or an assurance that it was a safe place at which to do so. Even the plaintiff's own narrative of the facts does not make it conclusive as a matter of law that there was an invitation to him to alight, but it certainly was a question for the jury to determine whether the statement made to him by the conductor amounted to such an assurance. According to his testimony, he asked the conductor, after the train had come to a stop, whether or not that was Guion, and that the conductor replied, "Yes, this is the place." And he said that the conductor was sitting there and saw him and his companion start to leave the caboose. The above quotation from the Claunts case is a mere reiteration in substance of the doctrine announced by this court in many other cases. *Memphis & L. R. Ry. Co.* v. *Stringfellow,* 44

Ark. 322; *Ry. Co.* v. *Johnson,* 59 Ark. 122; *Davis* v. *K. C. S. Ry. Co.,* 75 Ark. 165; *K. C. S. Ry. Co.* v. *Davis,* 83 Ark. 217; *St. Louis, I. M. & S. Ry. Co.* v. *Glossup,* 88 Ark. 225. It was held in those cases that the announcement of the station and the stopping of the train constituted an implied assurance to the passengers that the train had stopped to enable them to debark, "unless the circumstances and indications make it manifest that the proper and usual stopping place has not been reached." *Davis* v. *K. C. So. Ry. Co., supra.* Those were all cases in which the plaintiff had been a passenger on a regular passenger train, and not a freight train carrying passengers, but the principles of law are the same, except that there are certain extra hazards of traveling on a freight train which the passenger assumes and the circumstances may not always warrant the same inference. It is undoubtedly correct, as a matter of law, however, to say that whenever the train comes to a stop, and there is any statement made to the passengers on a freight caboose which amounts to an assurance that that is the place that they are expected to alight, and that the train has stopped for that purpose, then the passengers have a right to assume that the opportunity to debark has been made safe, and a passenger injured under those circumstances is entitled to recover unless his injuries are attributable to his own negligence.

(4) The court gave correct instructions at the plaintiff's request, submitting the issues to the jury. All of the instructions requested by plaintiff, save one, were given. The court also gave nearly all of the instructions requested by the defendant, and the assignments of error relate mainly to those instructions. The plaintiff objected to the instructions and also asked the court to modify the same by adding words which qualified them so as to make them conform to the instructions requested by plaintiff, but the court refused the modification in each instance. We deem it necessary only to set out one of those instructions and the requested modification, as we have reached the conclusion that that is the only instruction which is in conflict with those given at the instance of the plaintiff.

It is instruction No. 6, and reads as follows: "If you find from the evidence in this case that the plaintiff had had occasion to travel over the defendant's line of railroad upon which he was injured for a number of years prior to date of his injury, and was familiar with the stations along said line, including the station of Guion, where he alleges he was injured, and that he knew or by the use of ordinary care could have known, that he was not at the station of defendant at Guion, or the place provided by defendant at such station for discharging passengers, and that he undertook to alight from said train, before he reached said station, and in a dangerous place, and at a place not intended by defendant for discharging passengers, then he would not be entitled to recover, and your verdict should be for the defendant."

The plaintiff, in addition to its exceptions to that instruction, asked the following modification: "Unless you further find from the testimony that the acts, words and conduct of conductor W. M. Case were such as would reasonably cause the plaintiff to believe they had reached a reasonably safe place to alight, and plaintiff did so believe, and undertook to alight, and in doing so, while in the exercise of ordinary care, was injured." We think this instruction was, as before stated, in direct conflict with the correct instructions given at the instance of plaintiff, and it was error to give the instruction without the modification requested by plaintiff or a similar one. The court had already given appropriate instructions embodying the statements contained in the modification asked by the plaintiff, but the omission of this modification left the instructions in conflict with others and might have misled the jury. There is no testimony which would justify a finding that the plaintiff was entirely familiar with the surroundings at Guion. There is some testimony that he traveled regularly along that route, and that he had stopped at Guion six or seven times during the time he was traveling in that territory. It was incorrect to state the law to the jury to be that the plaintiff could not recover if, by the use of ordinary care, he could have known that he was not at the station, or that the place

where the caboose was standing, was not a suitable place to debark, and not the place intended by the defendant for discharging passengers. This entirely ignored the plaintiff's theory of the case, that he was induced by the misleading statement and conduct of the conductor to believe that it was the proper and safe place to debark. If, as plaintiff contended, he was induced by the conductor to believe that the caboose had stopped at the proper place for him and his companion to debark, then he is not precluded from recovery merely because he could, by the exercise of ordinary care, have known that he was not at the station or not at the place where it was intended for him to debark. The language of the instruction contradicts the whole theory upon which the case should have been tried, and it was clearly erroneous. There was a sharp conflict in the testimony, and therefore we can not say that the jury were not misled by this instruction.

(5) The giving of the following instruction, at the defendant's request, is also assigned as error: "13. The jury are instructed that while they are the judges of the weight of the evidence, and the credibility of the witnesses, yet, they must not disregard the testimony of any witness arbitrarily, nor are they to discard or depreciate the testimony of a witness merely because he is in the employ of the railway company." The instruction, as will be seen, singles out a certain class of witnesses, and it was improper to do that in an instruction. We have often held that it was not good practice to single out facts or witnesses, individually or in classes, and to refer to them in instructions—that this court will not reverse a case for refusal to give such an instruction; but, on the other hand, we have held that the giving of such an instruction, though bad practice, does not constitute reversible error. *Hogue* v. *State*, 93 Ark. 316.

Now, this instruction states that the jury should not "discard or depreciate the testimony of a witness merely because he is in the employ of the railway company." It tells the jury, in other words, that the mere fact that a witness is employed by the defendant does not justify the jury in discarding the testimony of such witness or les-

sening its weight. Now, we think that is a correct statement of the law, for the mere fact that the witness is in the employ of the defendant, there being no other circumstances establishing an interest, then it would be entirely arbitrary to disregard his testimony. We have said in cases that where employees of a railway company give a satisfactory account of a transaction under investigation, their testimony can not be disregarded merely because they are employees of the company. *St. Louis, I. M. & S. Ry. Co.* v. *Landers,* 67 Ark. 514. There is no prejudicial error, therefore, in making that statement of law to the jury. If, however, there are other circumstances, such as the fact that the conduct of the witnesses themselves are under investigation, and they are themselves to that extent interested, the jury would have the right to reject their testimony, and it would be improper to tell the jury anything to the contrary, or to give an instruction which might lead a jury to believe to the contrary. In other words, if this instruction had related to the conductor, who was subject to censure for his misconduct, if the testimony of the plaintiff be true, then the instructions might have had prejudicial effect. But there are several other witnesses in this case who were employees of the railway company, and doubtless the instruction was intended to cover their testimony, and as to them it was not an incorrect statement of the law concerning the weight to be given the testimony of witnesses. If learned counsel for plaintiff feared that the jury might treat the instruction as applicable to the conductor, they should have asked a modification or should have asked another instruction telling the jury that in considering the weight of the testimony of such a witness, they should take into consideration his relation to the occurrence which resulted in plaintiff's injury. We are therefore of the opinion that instruction No. 13, though one which should not have been given because it is bad practice to single out a class of witnesses, was not prejudicial, and does not call for a reversal of the case.

For the error, however, in giving instruction No. 6, without the modification requested by plaintiff, the judgment is reversed and the cause remanded for a new trial.

HART, J., concurs in the judgment of reversal on the ground that instruction No. 13, was erroneous.

JIM HARRIS v. STATE.

Opinion delivered May 31, 1915.

1. HOMICIDE—FIRST DEGREE MURDER.—In the absence of premeditation and deliberation, a killing can not be murder in the first degree, and the burden is on the State to establish the specific intent.
2. HOMICIDE—FIRST DEGREE MURDER—PROOF—PREMEDITATION.—To warrant a conviction of first degree murder, the evidence must show that the killing with malice was preceded by a clearly formed design to kill, a clear intent to take life; the design to kill may, however, be the conception of a moment, and reason being upon its throne, it is only necessary that the premeditated intention to kill should have actually existed as a cause determinately fixed on before the act of killing was done, and was not brought about by provocation received at the time of the act, or so recently before as not to afford time for reflection.
3. HOMICIDE—FIRST DEGREE MURDER—INSUFFICIENCY OF THE EVIDENCE—PRESERVING PEACE IN HOME.—It appeared from the evidence that defendant had invited deceased to his house to a dinner and a dance, and that prior thereto there was no ill feeling between the two men; at the dance deceased created some disturbance. *Held*, defendant had the right to preserve the peace and to enforce order in his own home, and that under the evidence, when defendant killed deceased in the furtherance of that purpose, and as the result of a sudden quarrel, that it will be held as a matter of law that defendant was not guilty of first degree murder.
4. HOMICIDE—MURDER—CONVICTION FOR TOO HIGH A DEGREE.—While the facts show that defendant killed deceased with a deadly weapon, and under circumstances from which the law will imply malice, he can not be convicted of first degree murder, where the act was not done after deliberation and premeditation essential to constitute murder in the first degree; and where defendant has been so convicted of first degree murder, the judgment will be reversed and the cause remanded, unless the Attorney General will elect to have defendant sentenced for murder in the second degree.
5. HOMICIDE—CONVICTION—REVERSAL—SENTENCE FOR LESSER CRIME.—When the evidence is not sufficient to sustain a verdict for murder

in the first degree, but is sufficient to sustain a verdict for murder in the second degree, the cause, instead of being reversed, and remanded for a new trial, may, with the consent of the Attorney General, be remanded with directions to sentence for murder in the second degree.

Appeal from Lafayette Circuit Court; *George R. Haynie,* Judge; reversed.

STATEMENT BY THE COURT.

The facts are substantially as follows: The appellant is a negro. On the 10th of February, 1915, there was at his house what the witnesses designate in the record as a festival, to which the negroes in the neighborhood were invited, and where they had a supper and dance. Along about 2 or 3 o'clock in the morning, as the witnesses say, there was a "considerable fuss in the house."

One of the witnesses for the State, describing it, says: "Mr. Johnnie (referring to John Daniels, the deceased), said, 'This is Uncle Johnnie Daniels talking; now come and let's dance.' A woman told him not to call her name. He replied he was not scared of her. Jim Harris (appellant) was standing in the middle of the door, and met the woman. He had his pistol in his hand and commenced to shoot and shot five times. Daniels fell in the floor. He had nothing in his hand."

Another witness stated that Daniels came to the festival late in the night, and there was a big crowd in the house.

Another describes the fuss as follows: "There was a squabble among some girls. John Daniels (the deceased) stepped on a girl's foot, and told her to go ahead. She started toward Harris, who met her half-way. Harris come up to Daniels and commenced to talk. He cussed and shoved and shot him."

Another witness stated that John Daniels, "Spoke there to Mitchell Marlowe, and they were squabbling, and he said there wasn't no use in that. At that time Jimmie (Harris) walked over and says, 'John, what's the matter?' and Johnnie says, 'Nothing; I just told these fellers about there was no use squabbling,' and he (John Dan-

iels) says, 'Mr. Daniels is around here.' Jim Harris says, 'Yes, and Mr. Jimmie is around here,' and that time Jimmie said, 'John, you get out of here,' and Johnnie spoke and said, 'You give this festival and opened the doors for everybody to have a good time,' and Jimmie spoke up and says, 'You get out of here; don't there'll be hell and a whole lot of it,' and John spoke and said, 'Let it be hell and a whole lot of it,' and that time Jimmie commenced shooting. John Daniels, at the time of the shooting, had his right hand out and his left hand in his pocket."

Another witness details the occurrence as follows: "Mr. Mitchell and Sue and Dude was in the corner. Mitchell and Sue was fussing, and Mr. John walked up and spoke to Mitchell about fussing with a little girl, and told him he ought to be ashamed to be fussing with her, and Mitchell talked about knocking her head off, and Mr. John told him he ought to be ashamed to be talking about knocking a little girl's head off, and that time Willie Taylor come over there in the corner, and what she said to Mr. Johnnie, I don't know, and he says, 'Go on, I am not talking to you,' and she went over to cousin Jimmie (Harris) and cousin Jimmie (Harris) come over there and says, 'What is the trouble?' and Mr. John (Daniels) says, 'Nothing,' and cousin Jimmie (Harris) says, 'Go on out, and Mr. John (Daniels) had his side to him and I just put my hand on his shoulder and told him to go on out; and cousin Jimmie (Harris) says, 'Go on out, hurry, go out, there'll be hell and plenty of it,' and Mr. Johnnie (Daniels) says, 'Let it be hell,' and that time he shot him." This witness, on cross-examination, stated that John Daniels asked him for a knife to open some whiskey with.

Another witness stated that "they danced two sets while I was there, and after that they all got up in the corner, and that was when the fuss commenced." This witness stated that he did not hear any cursing at all before the shooting commenced. He also stated that John Daniels told him after he was shot that Harris shot him for nothing.

Another witness stated, "I don't know how it started, but when I knowed anything they was over there in the corner squabbling, and I heard somebody say there was going to be shooting, to get out of here, there was going to be shooting, and I looked over there and they was standing up in the corner squabbling and cussing one another, and Mr. Jimmie shoved him and shot him twice, then stepped back about three steps and shot him three times more. I didn't see John (the deceased) with nothing."

Witnesses for the State testified that they did not see any pistol, and that John Daniels, the deceased, did not have a pistol.

The testimony by the appellant and several witnesses in his behalf tended to show that he gave a supper and dance to the negroes on the night of the fatal rencounter, and that the deceased, John Daniels, just before he was killed, was creating a disturbance in the house, and that the appellant protested, asked him to desist and to get out of the house, whereupon he refused and attempted to shoot appellant, and thereupon appellant fired upon him and killed him.

Several of the witnesses stated that John Daniels was cursing and that Harris told him that if he wanted to fight anybody to go out in the road and fight it out, that he didn't want any fighting done in his house. A witness stated that John Daniels was cursing, and exclaimed that he was "the baddest son-of-a-bitch in the house." This witness also stated that he heard John say he "would kill him, God damn him."

One of appellant's witnesses described what took place as follows: "He (John Daniels) was walking around there in the house cussing among them before they commenced fussing. He was dancing before he commenced fussing. After he quit dancing he commenced walking around the house cussing, with a pistol in his hand. When I saw him he was walking around there in the floor with his pistol in his hand kinder down to his side, and when Mr. Jimmie Harris went to ask him to

stop cussing, and if he wanted to fight to go out doors, John spoke and said he was a God damned man; couldn't nobody make him do nothing, and he throwed his hand toward Mr. Jimmie Harris and Mr. Jimmie knocked his hand back and commenced shooting."

Appellant testified in his own behalf that deceased and a whole crowd of people came to the supper and dance. "About an hour after they started to dancing, two women got to scrapping around there, and I told them to hush, or they would have to get out of the house, and the women hushed and went on dancing; and they come to the bar and commenced drinking, and about fifteen or twenty minutes afterward they all got over in the corner, and John Daniels commenced cursing over there, and I went over there and asked him what the matter was, and he said 'God damn it, they have been raising hell all night,' and he was the baddest man in the house, and he was going to do some fighting, and I says, 'No, John, don't fight; I give this supper for the people to have a good time,' and I told him if he wanted to fight to go outdoors, and when I told him that he run right out of the corner with a pistol in his hand, and it scared me, and I commenced backing away from him and jerked my pistol out so he could see it; thought maybe that would keep him off of me, and he commenced cursing me, and says, 'God damn you, I will kill you before I get out of here; and he commenced coming up on me, and I shoved him back, and he come up on me again and grabbed me, and I shoved him back and commenced shooting. I was scared he was going to shoot me, and I shot him to keep him from shooting me."

The court gave instructions on the law concerning the different degrees of homicide and self-defense. No objection is urged to any instruction except No. 10, given at the instance of the State, which is as follows:

"10. If you believe from the evidence in this case that the defendant, armed with a deadly weapon, sought the deceased with a felonious intent to kill him, or sought or brought on, or voluntarily entered into the difficulty with the deceased with the felonious intent to take his

life, then the defendant can not invoke the law of self-defense, no matter how imminent the peril in which he found himself placed."

The jury returned a verdict finding appellant guilty of murder in the first degree, and from the judgment of the court sentencing him to be electrocuted he prosecutes this appeal.

Allen H. Hamiter, for appellant.

1. The facts and circumstances testified to by the witnesses did not justify the giving of instruction 10. They show that appellant, as host to the persons invited to his house, was acting, not in an unfriendly manner toward the deceased, but in accordance with his rights and his duty toward his guests in trying to preserve the peace. No malice, deliberation or premeditation is shown, and this instruction excluded appellant's plea of self-defense. 73 Ark. 399.

2. The evidence does not sustain a conviction either of murder in the first degree or murder in the second degree, because it is not sufficient to show premeditation, nor deliberation nor malice aforethought. Wharton on Homicide, 167; 118 N. C. 1145; 24 S. E. 722; 11 Ark. 455; 56 Ark. 8; 35 Ark. 585; 20 Ark. 250; 38 Ark. 221; 3 Kan. 450; 6 Neb. 136; 71 Mo. 218; 20 Tex. 522; 1 Tex. 159; 40 Ark. 511; Anderson's Dict. 334; Black's Dict. 348; 2 Bouvier Dict. 363-4.

3. Where the evidence is not sufficient to sustain a conviction for the degree of murder found by the jury, this court has often exercised the right to reverse and remand the case for new trial, or, at the election of the State, with directions to enter judgment for a lesser degree of murder. That principle ought to apply here. 69 Ark. 189; 21 L. R. A. (N. S.) 20, and note; 82 Ark. 97; 56 Ark. 8, 19; 70 Ark. 272; 29 Ark. 248; 76 Ark. 615; 73 Ark. 315; 34 S. W. 262.

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

1. Instruction 10 was free of the argumentative feature condemned by this court in the *Price* case, 114 Ark.

398, and with that feature eliminated it was a proper instruction in this case, under the evidence. We believe the evidence is ample to sustain a finding by the jury that appellant voluntarily sought out the deceased for the purpose of bringing on the difficulty.

2. There was premeditation, deliberation and malice aforethought shown, and the verdict is sustained by the evidence. 79 Ark. 460; 98 Ark. 120; 100 Ark. 330.

WOOD, J., (after stating the facts). Giving the evidence its strongest probative force in favor of the finding of the jury, it is still not sufficient to sustain the verdict for murder in the first degree. The burden of proof was on the State.

(1) There is no testimony tending to show that prior to the shooting the appellant harbored any malice or ill will toward John Daniels. The fact that John Daniels was at the home of the appellant, enjoying the hospitality which he had provided for his guests in the way of a dance and supper, or "festival," as the witnesses designate it, would warrant the inference that, up to the time when the dispute between them arose, the appellant and Daniels were friends. If the contrary was true, the burden was on the State to prove it, and it has not done so.

(2) Now, in the absence of premeditation and deliberation, the killing can not be murder in the first degree. Kirby's Digest, section 1766.

As early as *Bivens* v. *State,* 11 Ark. 455, 460 and 461, this court, through Mr. Justice Scott, speaking of the character of proof necessary to establish murder in the first degree, said:

"It is indispensable that the proof adduced shall be sufficient to satisfy the minds of the jury that the actual death of the party slain was the ultimate result sought by the concurring will, deliberation, malice and premeditation of the party accused. The distinctive feature of this particular class of cases of murder in the first degree being a wilful, deliberate, malicious and premeditated specific intention to take life. The inquiry then in cases of this class of murder in the first degree, must always be, was the killing wilful, deliberate, malicious and deter-

mined on before the act of killing. If it was, then that degree of malice has superinduced the act that is necessary to make it rank in the highest grade of murder.

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

That these are essentials and must be proved in order to convict of the crime of murder in the first degree has since then repeatedly been held by this court, and there has been no change in the doctrine. See cases collated under note "K," page 523, Kirby's Digest. See, also, *Green* v. *State,* 51 Ark. 189; *Cannon* v. *State,* 60 Ark. 564; *King* v. *State,* 68 Ark. 572-75; *Howard* v. *State,* 82 Ark. 97, 101; *Ferguson* v. *State,* 92 Ark. 120-124; *Gilchrist* v. *State,* 100 Ark. 330-37.

(3) Applying the above doctrine to the facts of this record, the uncontroverted evidence shows that the killing of Daniels by the appellant was the result of a provocation, growing out of what the witnesses describe as a "squabbling" in the house of appellant, and in which appellant thought that Daniels was engaged. The witnesses for the State show that appellant approached Daniels, and those of them who purport to relate all that took place, state that appellant asked Daniels "What is the matter?" or "What is the trouble?" and asked him to go out of the house, but Daniels refused to go, and used brag-

gadocio in bandying words with appellant, showing that he did not intend to leave the room or to desist from his conduct, which appellant conceived was causing the disturbance.

A majority of us have concluded that under these circumstances the killing could not have been murder in the first degree, according to the essential ingredients of that crime as defined by our statute and the many decisions of this court.

True, appellant, by providing the dance and supper to which he had invited his guests, had in a measure thus thrown open the doors of his home to the public. Nevertheless, appellant was still the head of his house, the master of his home, and, as such, was the conservator of the peace and quiet of that home. He had the right, and it was his duty, under the circumstances, toward those whom he had invited there, to see that good order was preserved; and he had a right to request and to demand of those who were engaged in the quarrel or disturbance to desist and to go out of his house, and, upon refusal, to use such force as might be necessary to enforce his demands.

As before stated, there was no evidence of any bad blood between appellant and Daniels before the fatal rencounter. There was no evidence of any malice, threats or any previously formed design upon the part of the appellant before that time to do Daniels any harm. In the opinion of the majority, the killing was the result of the sudden quarrel, brought on in an effort by the appellant to preserve the peace of his home on the occasion of the "festival," and to remove Daniels, whose conduct had become objectionable to appellant, from the room.

(4) True, the provocation was not sufficient to justify the extreme measures to which appellant resorted, and it was not sufficient to reduce the killing from murder to manslaughter; but it was sufficient to reduce the homicide from murder in the first degree to that of second degree. Appellant acted hastily and in reckless disregard of human life. While there was no considerable provoca-

tion, and same was not apparently sufficient to arouse the passion of appellant and to make it irresistible, nevertheless there was some provocation. The uncontradicted proof shows that the killing was done with a deadly weapon, and under circumstances from which the law would imply malice, but it was not done after that deliberation and premeditation essential to constitute murder in the first degree. See *Howard* v. *State,* 82 Ark. 97.

As before expressed, the undisputed evidence, as we view it, shows that the killing was not the result of any previously formed design to kill, growing out of any grudge or ill will on the part of appellant toward Daniels; but was the result of the sudden quarrel or "squabble," and there was an entire absence of such deliberation and premeditation as must be proved before one can be convicted of murder in the first degree. As was said in *Harris* v. *State,* 36 Ark. 127-33:

"A doubt as to the degree of murder upon the facts of the case should be resolved upon a humane principle in favor of the accused."

(5) This court has repeatedly held that where the evidence is not sufficient to sustain a verdict for murder in the first degree, but is sufficient to sustain a verdict for murder in the second degree, the cause, instead of being reversed and remanded for a new trial, may, with the consent of the Attorney General, be remanded with directions to sentence for murder in the second degree. *Simpson* v. *State,* 56 Ark. 19-20; *Vance* v. *State,* 70 Ark. 272-86; *Darden* v. *State,* 73 Ark. 315-21; *Id.* 80, Ark. 295-299; *Howard* v. *State, supra; Pittman* v. *State,* 84 Ark. 292; *Warren* v. *State,* 88 Ark. 322-24.

The judgment will therefore be reversed and the cause remanded for a new trial, unless the Attorney General elects to have the appellant sentenced for murder in the second degree, in which event the trial court is directed to sentence appellant for that crime.

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

Opinion delivered May 31, 1915.

1. RESCISSION OF CONTRACT—FRAUDULENT REPRESENTATIONS—RELEASE FROM LIABILITY.—A contract will be rescinded on the grounds of fraudulent representations if the relative position of the parties is such, and their means of information such, that the one must necessarily be presumed to have contracted upon the faith reposed in the statements of the other, and where the injured party relied upon these fraudulent statements, and had a right to rely upon them.
2. RELEASE—PERSONAL INJURIES—VALIDITY.—Plaintiff was injured by a railway collision, he signed a contract releasing the railway company from liability for a certain consideration; later he sought to repudiate the release agreement on the ground that defendant's claim agent falsely told him that the attending physician had said that plaintiff was not seriously injured and would be up in a few days. *Held*, when the physician was in attendance and could have been seen by plaintiff, and where twenty-four hours elapsed between the time the claim agent made these statements and the time plaintiff executed the release, that plaintiff will not be heard to complain that he executed the release under the influence of the statements of the claim agent.

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

STATEMENT BY THE COURT.

Appellant instituted this action against the appellee, alleging that he was a passenger on appellee's train, and that while on such train there was a collision through the negligence of the agents of the appellee by which he was seriously and permanently injured. He specifically described his injuries, and prayed for damages for pain and suffering and for loss of earning power, etc., in the aggregate in the sum of $40,000.

The appellee denied the allegations of the complaint as to negligence and the injuries and damages, and set up by way of affirmative defense the following:

"For and in full release, discharge and satisfaction of all claims, demands or causes of action arising from, or growing out of any and all personal injuries now ap-

parent, as well as those that may hereafter develop as a result of local freight No. 92 backing into or colliding with engine No. 73, at or near Bald Knob, Arkansas, on the 6th day of December, 1912, on which train (local freight No. 92) I was riding as a passenger, being in caboose of said local freight at time of collision or accident occurred. This includes any and all attorney fees, medical expenses or any and all other expenses that I have been out or may be put to as a result of injury or injuries received by reason of this collision $400.

Audited: F. W. Johnson, Auditor Disbursements.

Approved for payment. J. G. Liningood, General Auditor.

Received of the St. Louis, Iron Mountain & Southern Railway Company four hundred and no/100 dollars, in full payment for the above account. In consideration of the payment of the said sum of money, I, W. N. Hardister, of Batesville, in the county of Independence and State of Arkansas, hereby remise, release and forever discharge said company of and from all suits, actions, claims and demands of every class or character that I have now or may have against said company, growing out of any and all injuries in consequence of, or in any wise connected with the above accident.

In testimony whereof, I have hereunto set my hand this 13th day of December, 1912.

W. N. Hardister.

Witness: A. W. Heyer, J. B. Collins."

Appellant conceded in his pleadings and in his evidence that he had executed the purported release set up by the appellees, but alleged that he was induced to sign the same while he was weak and suffering, and while incapacitated on account of his injuries to execute such release, and that he was induced to do so "by false and fraudulent statements made to him by one J. B. Collins, a claim agent representing defendant," to the effect that he (Collins) had talked with Doctor Gray, and "Doctor Gray stated to him that he did not think that plaintiff was hurt to amount to anything, and that plaintiff would be out in a few days."

The appellant, in his testimony, after describing the occurrence and the nature of the injuries which he had received, testified in regard to the release as follows:

"Mr. Collins, claim agent, came next Monday morning and for three or four days encouraged me for a settlement, and finally, December 13, made settlement. Mr. Collins made three visits each day, insisting for a settlement, and that I was not seriously hurt, and I told him that I did not think I was in shape to settle; but finally he came in there one night and told me that he had just come from Doctor Gray's office, that is, my family physician, and he told me that Doctor Gray had just told him that he didn't think I was seriously hurt, and would be out in a short time, and he insisted that we make the settlement under those conditions. I signed a paper purporting to be a release and a draft was given in payment. I relied on Mr. Collins, he seemed to be a very fair man, and I told him at the start that I would like to deal with him just like I would any other business man. So I thought the man was telling the truth, and I believed him. He influenced me in that way by telling me that Doctor Gray had told him that I wasn't seriously injured, and I would be out in a short time." Appellant's testimony further shows that Doctor Gray was treating him for the injuries he had received.

In his testimony on cross-examination, we find the following: "Thursday or Friday evening Collins offered the $400 and acceptance made next evening. Collins told me the night before that Doctor Gray had told him injuries were not serious, and I would soon be up. Relying upon statement of Collins as to his just coming from Gray's office and being told by Doctor Gray that I was not much injured and would soon be up, I decided to accept."

Doctor Gray testified that he treated the appellant for the injuries received in the collision; that he visited him on the 10th, 11th and 12th of December, but did not see him on the 13th. In regard to the alleged conversation with Collins, he testified as follows: "Had no talk with him (Collins) prior to December 13, 1912, in which I

stated to him that Mr. Hardister's condition was not serious, and that he would probably be up in a short time, or words to that effect." Doctor Gray testified further concerning the condition of appellant as to his injuries at the time he visited him just after the collision, as follows: "I found that he was suffering with a painful hip, very painful, and some * * * That is the principal thing he was suffering from. The hip was not fractured. The injury to his hip was all that he complained of, as I remember. There was not any physical evidence of any other injury to him except to his hip." On the 12th, the day on which the doctor paid him the last visit, he stated that appellant "seemed to be resting pretty well."

Among others, the court gave at the instance of the appellee, over appellant's objections, instructions to the effect that if, at the time of making the settlement, both parties believed that appellant had only a hip injury, and that there was no misrepresentation of facts as to the extent of his injuries, he could not recover; that before appellant would be permitted to take advantage of any statement which was the expression of an opinion as to the extent of his injuries, he must show that the opinion was given fraudulently and that he relied upon it, and would not have executed the release but for the expression of such opinion; that in order to vitiate the release on the ground of fraudulent misrepresentations such misrepresentations must be such as were peculiarly within the knowledge of the party making them, and upon which the other party had a right to rely, and did rely; that if the means of information as to the alleged misrepresentations were equally accessible to both parties, and the appellant failed to avail himself of the means of learning the truth, he could not recover.

The jury returned a verdict in favor of the appellee, and from a judgment in its favor this appeal has been duly prosecuted.

The conclusion we have reached upon the consideration of this record makes it unnecessary to state other facts.

Bradshaw, Rhoton & Helm, and *Campbell & Suits,* for appellant.

The instructions given on the question of the release err in ignoring the element of mistake and also in many particulars in not being based upon the evidence.

Appellant's requested instruction No. 5, to the effect that if the representations made to the plaintiff by the claim agent that he had just talked with Doctor Gray, and the latter had told him that the plaintiff was not permanently injured, and would soon be up, was false, and if the plaintiff relied upon such false statement, and if such false statement was the moving and controlling cause inducing the plaintiff to sign the release, then said release was void and not binding upon plaintiff, should have been given. 82 Ark. 20; *Id.* 105; 100 Ark. 144; 102 Ark. 187; 115 Ark. 297; 128 S. W. 855; 97 Ark. 269; 98 Ark. 48; 73 Ark. 42; 76 Ark. 88; 81 Ark. 264; 83 Ark. 575; 87 Ark. 614; 93 Ark. 589; 103 Ark. 341; 107 Ark. 363; 110 Ark. 182.

Troy Pace and *T. D. Crawford,* for appellee.

To affect the validity of a contract, fraud must be shown to have been acted upon by the party complaining of the fraud. 99 Ark. 438; 101 Ark. 95; 47 Ark. 148. There is nothing in plaintiff's testimony which tends to show that he was overreached at all.

Where it is sought to avoid a contract on the ground of fraudulent misrepresentation, the misrepresentation must relate to some matter material to the contract, upon which the other party had a right to rely, and did rely, to his injury. If the means of information are equally accessible to both parties, they will be presumed to have informed themselves, and if they have not done so, they must abide the consequences of their own carelessness. 95 Ark. 136; *Id.* 523, 527.

Misstatement of that which is a mere matter of opinion will not constitute deceit. 95 Ark. 375; 13 Pet. 37; 66 Ala. 206; 48 Ia. 378. Requested instruction 5 was properly refused. The plaintiff knew the facts about his in-

jury better than any one else, and he had no right to rely upon the statements of the claim agent.

WOOD, J., (after stating the facts). (1) Among the tests announced by this court to determine whether contracts should be rescinded on the ground of fraudulent representations are the following:

"*First.* Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statements of the other; and,

"*Second.* Did the injured party rely upon the fraudulent statements of the other, and did he have a right to rely upon them?"

These were among the tests formulated by this court from all previous decisions, as early as *Yeats* v. *Pryor,* 11 Ark. 66, and stated succinctly in *Matlock* v. *Reppy,* 47 Ark. 164, and as there stated, they have been often quoted with approval in many subsequent cases, some of them quite recent. See *English* v. *North,* 112 Ark. 490. Applying these tests to the testimony of the appellant himself, and that of his witness, Doctor Gray, the court, had it been requested so to do by the appellee, should have directed a verdict in its favor.

It follows that the verdict and judgment were correct, even though some of the instructions which the court gave submitting the issue concerning fraudulent misrepresentations may have been erroneous.

(2) Appellant testified that appellee's claim agent Collins influenced him to sign the release by telling him that Doctor Gray had told him (Collins) that he (appellant) was not seriously injured, and would be out in a short time. But his testimony further shows that the proposition to pay him $400 as a consideration for his signing the release was made by the agent of the appellee one evening, and was not accepted by him until the next evening. Collins had told him the night before that Doctor Gray said appellant's injuries were not serious, and that appellant would soon be up. Thus it appears that appellant had a day to determine, after the alleged false representations were made, as to whether or not they

were true. Doctor Gray was his family physician, was treating him for these very injuries, was in easy reach of appellant, and he could have easily ascertained from his doctor whether or not there was any truth in the representations made by Collins. The relative position of appellant and his means of information was such that he can not in law be presumed to have signed the release upon the faith reposed by him in the statements of Collins; and, although he testified that he did rely upon such statements, he had no right, under the circumstances, to rely upon them, and can not escape the binding obligation of his contract of release upon the plea that he did rely upon them.

In *Delaney* v. *Jackson,* 95 Ark. 131-6, we said: "If the means of information as to the matters represented is equally accessible to both parties, they will be presumed to have informed themselves; 'and if they have not done so, they must abide the consequences of their own carelessness.' " See, also, *McDonald* v. *Smith,* 95 Ark. 523-7. The means of information for appellant to determine what his physical condition was as a result of his injuries, and whether or not he would soon recover, was even more accessible to appellant than to the agent of the appellee who was making the alleged false representation. Appellant, with the slightest diligence, could have ascertained, if he did not already know, what the doctor thought about his real condition, and whether or not he had made the statements attributed to him by appellee's agent. The law holds him to the duty of making this inquiry, and will not allow him, under such circumstances, to vitiate a solemn contract into which he entered for a valuable consideration. Such being our conclusion, the other questions pass out. The judgment is correct, and it is affirmed.

MASSACHUSETTS BONDING & INSURANCE COMPANY v. HOME LIFE & ACCIDENT COMPANY.

Opinion delivered May 31, 1915.

1. SURETYSHIP—SURETY BOND—LOSS—LIABILITY.—Where a loss occurs upon a policy of fire insurance, only the surety upon the bond of the fire insurance company at the time of the loss will be liable, and not the surety upon the bond at the time the policy was written.
2. CONFLICT OF LAWS—CONTRACT OF INSURANCE—VALID WHERE MADE.—A contract of fire insurance, when made in another State, will be treated as valid here, if valid in the State where made.
3. INSURANCE—FAILURE TO COMPLY WITH STATUTE—FOREIGN CONTRACT—VALIDITY—PENALTY.—Where a contract of insurance is made in another State and is valid there, it will be treated as valid here, although it does not comply with the terms of Act 327, Acts 1905, but under the act, the insurance company will be liable for a penalty for failure to comply with its terms.
4. INSURANCE—BOND—LIABILITY.—The surety on the bond of a fire insurance company, filed under Kirby's Digest, § 4339, is liable on any valid contract of insurance issued to any person upon property situated in this State, and Act 327, Acts 1905, which provides penalties for a violation of any of its provisions, does not limit or restrict the liability of the surety of the insurance company on its bond.
5. COMPUTATION OF TIME—RULE—SURETYSHIP CONTRACT.—In computing time the first day is to be excluded and the last day is to be included, and the rule is applicable to the bond of an insurance company filed with the auditor, under Kirby's Digest, § 4339, and the rights and liabilities of the surety will be so governed.
6. INSURANCE—LOSS—LIABILITY OF BOND.—Appellant was surety on the bond of a fire insurance company for a period of one year ending March 1, 1913, filed under Kirby's Digest, § 4339. *Held*, the surety was liable where a loss occurred at daybreak on March 1, 1913.
7. RECEIVERSHIP—EFFECT ON CORPORATION.—The appointment of a receiver for a corporation suspends the corporate functions of the company, and its officers and agents thereafter cease to have any authority over its property and effects.
8. INSURANCE COMPANIES — INSOLVENCY — RECEIVERSHIP — PAYMENT OF LOSSES—PENALTY.—A loss covered by a policy of fire insurance occurred on March 1, 1913. The insurance company was placed under a receivership on March 27, 1915; proof of loss was made out and sent to the company on March 29, 1913. *Held*, the insurance company was not thereafter liable under Act 115, Acts 1905, for the penalty therein provided for failure to pay the amount of the loss within the statutory period.

9. SURETYSHIP—RELEASE OF PRINCIPAL—PENALTY.—When the principal is released from liability, the surety is released also.

10. INSURANCE—LOSS—PENALTY—LIABILITY OF SURETY ON BOND—RELEASE.—An insurance company was released from liability for a penalty and attorney's fees, fixed by Act 115, Acts 1905, by reason of its insolvency and the appointment of a receiver, before filing of proof of loss, *held*, the principal being released, the surety on its bond was likewise released from liability under the statute.

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

Bradshaw, Rhoton & Helm, for appellant.

1. The policy issued in Alabama on property in Arkansas, is void as to the surety, being in violation of Kirby's Digest, § § 4363, 4364, and Acts 1905, p. 780. 29 Ark. 386; 47 *Id.* 378; 34 *Id.* 762; 81 *Id.* 599. Where an illegal contract has been made, no court will grant relief, but leaves the parties where it finds them, if they have been cognizant of the illegality. 67 Ark. 480; 81 *Id.* 41; 98 S. W. 711; 95 Ark. 552; 129 S. W. 797. Contracts contrary to the laws of a State will not be enforced. 126 Wisc. 281; 105 N. W. 801; 110 Am. St. 919; 27 L. R. A. 556.

2. If the policy is a valid liability, the Home Life & Accident Company is liable. The loss occurred on March 1, 1913, whereas the bond of appellant expired February 28, 1913. March 1 is the beginning of the insurance year. Year means calendar year (Kirby's Digest, § 7814), or twelve calendar months. 40 Cyc. 2876; 38 *Id.* 310. The year had expired when the loss occurred. The last day should be excluded. Part of a day is not reckoned in law. The renewal of the bond terminated all liability of appellant. 49 S. W. 415; 16 L. R. A. 542. This court has settled the question. 76 Ark. 410; 168 S. W. 1062. See, also, 76 S. E. 1036; 126 S. W. 313.

3. Cotton to the value of $10,000 was not destroyed by the fire. No penalty nor attorneys' fee should have been allowed. 88 Ark. 474.

Rose, Hemingway, Cantrell, Loughborough & Miles, for Hanson, Receiver.

1. The policy was not void. It was valid in Alabama, where issued, and hence valid here. 216 Fed. 642-9;

61 Ark. 1; 66 *Id.* 472; 234 U. S. 542. Where an act is forbidden and a penalty prescribed, the penalty is exclusive. 61 Ark. 1; 77 *Id.* 203.

2. The fire was on March 1, 1913. The appellant's bond was for a year ending that day. The latter day was included, the day of the execution excluded. The first bond covered all liability occurring on March 1, 1913. 101 Ark. 353; 23 Atl. 198; 142 N. W. 437, 35 Pac. 878.

3. The penalty and attorneys' fee should have been allowed. 2 Sto. Eq., § 1326; Pom. Eq. § 458; 108 U. S. 436; 13 So. 39; 56 *Id.* 792; 86 Ark. 489; 223 U. S. 261-2.

McRae & Tompkins, for Home Life & Accident Company.

1. No more than $20,000 can be adjudged against the surety company on its bond. 80 Ark. 49; 75 S. W. 1076; 49 L. R. A. 193. This was settled on the former appeal.

2. The penalty and attorney's fees should not have been allowed. Acts 1905, 308; 86 Ark. 115; 104 *Id.* 423; 88 *Id.* 473; 95 Ark. 390. A receiver had been appointed before the loss. See 22 Cyc. 1316; 28 L. R. A. 231; 111 U. S. 784.

Cockrill & Armistead, for appellees.

1. The term of the bonds includes the last day named and excludes the first. 76 Ark. 410; 117 Ark. 372; 49 L. R. A. 193 and note, 208; 53 Pac. 433; 38 Cyc. 320; 108 S. W. 778.

HART, J. This is the second appeal in this case. For the opinion on the former appeal, see *Massachusetts Bonding & Ins. Co.* v. *Home Life & Accident Co.,* 113 Ark. 576, 168 S. W. 1062. The issues raised by the present appeal are different from those involved in the former appeal, and on that account it will be necessary for a particular statement of the facts pertinent to the issues raised by the present appeal.

The American Union Fire Ins. Co. of Philadelphia, Penn., was engaged in the fire insurance business in the State of Arkansas during the years 1911, 1912 and 1913. The Southwestern Surety & Insurance Company signed

as surety the bond of said fire insurance company to the State of Arkansas for the period of one year ending March 1, 1912. The Massachusetts Bonding & Insurance Company signed as surety the bond of said insurance company to the State of Arkansas "for the period of one year ending March 1, 1913." The bond was conditioned that the American Union Fire Insurance Company should promptly pay all claims arising and accruing to any person or persons by virtue of any policy issued by said company during the term of the bond, upon any property situated in the State of Arkansas when the same should become due. This bond was filed in the auditor's office and approved February 29, 1912. The Home Life & Accident Company executed a similar bond as surety of said fire insurance company for the period of one year, ending March 1, 1914.

C. C. Hanson, as receiver of the Gulf Compress Company, an insolvent domestic corporation, procured a policy of insurance in said fire insurance company for $10,000 on 168 bales of cotton. On March 1, 1913, about daylight, a period of time during the life of the policy, a fire occurred which destroyed the 168 bales of cotton. The policy of fire insurance was executed in the State of Alabama.

The American Union Fire Insurance Company became insolvent, and on March 27, 1913, a receiver was appointed to take charge of its assets. On the 29th day of March, 1913, proof of loss duly made out and signed by the receiver in accordance with the terms of the policy was mailed to the insurance company. On June 19, 1913, C. C. Hanson, as receiver of the Gulf Compress Company, instituted an action in the circuit court against the Massachusetts Bonding & Insurance Company to recover the amount of loss covered by said policy of fire insurance. On July 14, 1913, the present action was instituted in the chancery court by the Massachusetts Bonding & Insurance Company against The Home Life & Accident Company, C. C. Hanson, receiver of the Gulf Compress Company, and other parties having claims against the American Union Fire Insurance Company. The plaintiff prayed

for an order enjoining defendants from prosecuting any suits against it in the law courts of the State of Arkansas, and requiring them to file their claims for adjudication in the chancery court where an ancilliary receiver had been appointed to take charge of and wind up the assets of the said insurance company. An injunction was granted as prayed for.

The Home Life & Accident Company filed an answer in which it denied liability on the bond which it had signed as surety. Subsequently, Hanson, as receiver of the Gulf Compress Company, filed an intervention and asked judgment against the Massachusetts Bonding & Insurance Company for $10,000, the amount of the policy above referred to. Other claims to the amount of $18,000 were filed.

(1) On the former appeal we held that though loss occur upon policies written while the earlier bond was in force, only the surety upon the bond at the time of the loss is liable, the provision for renewal contemplating that there should be only one bond in force at one time. The other claims above mentioned, amounting to $18,000, under our ruling in the former appeal, accrued during the life of the bond of the Home Life & Accident Company, and on that account were claims for which its bond was liable. There was a contest between the Massachusetts Bonding & Insurance Company and the Home Life & Accident Company as to which would be liable upon the $10,000 policy issued to Hanson, as receiver of the Gulf Compress Company. The chancellor held that the Massachusetts Bonding & Insurance Company was liable for that claim and rendered judgment against it for the sum of $10,000 and the accrued interest, but refused to allow statutory penalty and attorney's fee. The case is here on appeal.

Act 327 of the Acts of 1905 is amendatory of sections 4371-2-3-4 of Kirby's Digest. See Acts 1905, p. 780.

Section 2 of the act amends section 4372 of Kirby's Digest, and provides that any person licensed by the auditor to act as agent for any fire insurance company is prohibited from paying, directly or indirectly, any commis-

sion, brokerage or other valuable consideration on account of any policy or policies covering any property in the State of Arkansas to any person, agent, firm or corporation who is a nonresident of the State.

Section 3, which amends section 4373 of Kirby's Digest, provides that when the auditor shall have received notice or information of any violation of any of the provisions of the act, he shall investigate such violation, and further provides for a revocation of the license of the insurance company for a certain period of time for a violation of the provisions of the act.

Section 1 of the act is amendatory of section 4371 of Kirby's Digest, and in effect provides that the companies named in the act are prohibited from authorizing or allowing any agent who is a nonresident of the State to issue or cause to be issued its own policy or policies of insurance or reinsurance on property located in this State. A comparison of these sections of the act of 1905 with the sections of the Digest which they amend, shows that the amendment consists in bringing other companies than fire insurance companies within the terms of the act.

(2) Counsel for appellant Massachusetts Bonding & Insurance Company insist that because the contract of insurance in question was issued in the State of Alabama, it is void. They further contend that under the rule laid down in *Crawford* v. *Ozark Insurance Company,* 97 Ark. 549, we must presume that it was the intention of the surety company to execute the bond in compliance with the requirements of the statute, and because the insurance company failed to comply with the provisions of the act of 1905, above referred to, the surety company is not liable on the bond. It is true that the contract of insurance was an Alabama contract, but, being valid under the laws of that State, it is valid here. *State Mutual Fire Ins. Assn.* v. *Brinkley Stave and Heading Co.,* 61 Ark. 1.

(3) It will be observed that although penalties are imposed by the act of 1905 upon companies and their agents not complying with the provisions of the act, the act does not make void the contract made by the insurance company without such compliance, either as to the

corporations named therein, or the policy holders in said company. In other words, the statute does not assume to forbid the making of contracts of insurance made in another State upon property situated in this State, nor does it assume to invalidate such agreements. The contract of insurance was innocent in itself, and in its consequences. Such contracts are valid and enforceable for the reason that by annexing a penalty, the Legislature manifested its purpose that the penalty should be exclusive of all the consequences of noncompliance.

(4) The bond sued on was executed in compliance with the provisions of section 4339 of Kirby's Digest. The section in effect provides that fire insurance companies shall give a bond to the State with sureties to be approved by the auditor in the sum of $20,000, conditioned for the prompt payment of all claims arising and accruing to any person during the terms of said bond by virtue of any policy issued by any such company upon any property situated in this State. The language of the statute is sufficiently broad and comprehensive to include any valid contract of insurance issued to any person upon property situated in this State. The sections of the act of 1905 above referred to, which provide penalties for a violation of any of its provisions, are upon a collateral subject, and in our opinion do not have the effect to limit or restrict the liability of the surety of the insurance company on its bond. To hold otherwise would be to say that the surety might be released from the performance of its contract according to its terms for the reason that the insurance company had failed to perform a duty that it owed to the State at large, but the nonperformance of which could result in no prejudice to the surety company.

In short, we think the purpose to be accomplished by the act of 1905 and sections 4371-4374 of the Digest, which it amends, is collateral to that sought to be accomplished by the enactment of section 4339 of the Digest, and for that reason we are unwilling to engraft upon the latter section a consequence so inequitable as that contended for by counsel for the surety company.

This brings us to the question as to whether or not the loss accrued during the term of the bond of appellant company or during the term of the bond of the Home Life & Accident Company. Claims amounting to $18,000 have already been adjudged against the Home Life & Accident Company. The claim of Hanson, as receiver of the Gulf Compress Company, is for $10,000. On the former appeal, we held that under our statute, which provides for a renewal of the bond annually, a bond for only $20,000 was in force at any one period of time. If the $10,000 claim under consideration is added to the $18,000 claim already adjudged against the Home Life & Accident Company, the aggregate amount will be $28,000 against that company, and the amount of the bond would be pro rated among all the claimants. It is, therefore, apparent that all persons having claims against the insurance company, as well as the Home Life & Accident Company are interested in casting the liability for the $10,000 claim under consideration against the appellant company, and briefs in support of their contention have been filed in this court by all these parties.

It is the contention of counsel for appellant that the bond of its company became effective on March 1, 1912, and that its liability terminated on February 28, 1913; and that, inasmuch as the fire occurred about daybreak on the first of March, 1913, it is not liable. Evidence was adduced by them tending to show that it was the custom of the auditor to approve the bond on or before the 1st day of March, and to consider it effective on that day.

On the other hand, it is contended by counsel for the claimants and for the Home Life & Accident Company that the bond of the appellant company was in force on March 1, 1913, when the loss occurred. As we have already seen, we must presume that it was the intention of the surety to execute the bond in compliance with the requirements of the statute, and unless it would be doing violence to the language of the bond itself, we must so hold. See *Crawford* v. *Ozark Insurance Company, supra.*

(5) The general rule now is that in computing the time, whether from the date or the day of the date, or

from a certain act or event the day of the date of the event is to be excluded. That is to say, the general rule is that in computing the time, the first day is to be excluded, and the last day is to be included. The reason for the rule that in the computation of time, the first day will be excluded is that the law takes no notice of fractions of a day except in certain cases where the hour itself becomes material; and time is not, therefore, computed from the hour of the day on which the event happens to the corresponding hour of the day of performance, but the computation is from the day when the act was done. Such day is regarded as a point of time, and the computation begins from the expiration of such day, as if counted it would fail to give the party affected the whole of that day, but would give only a fractional part of it. See case note to *Halbert et al.* v. *San Saba Springs Land & Live Stock Ass'n,* 49 L. R. A. 193; see, also, note to 15 L. R. A. (N. S.) 686; 38 Cyc. 317, *et seq.*

We have followed this general rule in the case of taking appeals and in construing the statute of limitations. See *Connerly* v. *Dickinson,* 81 Ark. 258; *Peay* v. *Pulaski County,* 103 Ark. 601.

By section 4337 of Kirby's Digest, every insurance company is required, within sixty days after the 1st of January, to file with the auditor a statement of its business for the preceding year. By section 4338 each company is likewise required to file with the auditor at the same time a statement showing its net receipts for the year ending December 31, preceding, and is required to pay into the State treasury "on or before the 1st day of March a tax of 2 per cent of such net receipts."

(6) Section 4339 provides for the giving of the bond and that it shall be renewed annually. There is nothing in any of these sections of the statute that indicates that the law-makers intended that the period of time constituting the term of the bond should be contrary to the general rule above announced. Therefore, we are of the opinion that the first day should be excluded and the last day included in compliance with the general rule on the subject. This would give the auditor all of the first day of March

in which to perform all the duties required of him by the statute. The companies then that desired to do business in the State could all be ready to proceed on the second day of March.

Then when the bond was required to be renewed, all of the 1st day of March would be given the companies to file their renewal bond, and on this day the old bond would be in force and the liability of the new surety would commence on the succeeding day. The surety to the bond in question seems to have thought this a proper construction of the statute for the term of the bond was "for a period of one year ending March 1, 1913."

The fire in question occurred about daybreak on the 1st day of March, 1913, and we are of the opinion that the appellant company is liable for the loss.

It is next contended by counsel for appellant that the proof does not sustain the finding of the chancellor as to the amount of cotton destroyed by the fire; but we do not agree with them in this contention. A detailed statement of the evidence on this point and a specific review of it would be without any value. The proof of loss sent in on the 29th day of March, 1913, contained a specific and detailed statement of all the cotton lost. Evidence of witnesses was adduced at the trial which tended to show that all of these 168 bales of cotton were destroyed by the fire, and that their value exceeded the sum of $10,000, the amount of the policy. The chancellor rendered judgment against appellant for $10,000. We are of the opinion that his finding is not against the preponderance of the evidence, and will be upheld.

The chancellor refused to allow a penalty or attorney's fee provided by Act 115 of the Acts of 1905. Section 1 of that act provides that in all cases where loss occurs and the fire insurance company liable therefor shall fail to pay the same within the time specified in the policy after demand thereon, shall be liable to the holder of such policy in addition to the amount of such loss for 12 per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss.

(7) The insurance company became insolvent and a receiver was appointed for it on the 27th day of March, 1913. The proof of loss was not made out and sent in to the company until March 29, 1913. The appointment of a receiver suspended the corporate functions of the insurance company and its officers and agents ceased to have any authority over its property and effects. After the receiver was appointed, the corporation's officers and agents had no right to collect any indebtedness due to the corporation, to pay claims against it or dispose of any of its assets. The receiver succeeded to all the rights of the corporation and the authority to control its property and collect its assets could only be exercised by him under the direction of the chancery court. *Buchanan* v. *Hicks,* 98 Ark. 370. So, it will be seen that at the time the demand was made for the amount of the policy, the company could not legally pay same to the assured.

(8-9-10) Under the act in question, the company is liable for the penalty and attorney's fee where it fails to pay a loss within the time specified in the policy after demand is made therefor, but in this case no demand was made within the time specified in the policy for the payment of the loss until after the receiver was appointed. As we have already seen, the officers and agents could exercise no authority over the affairs of the company after the receiver was appointed, and on that account the company was not in fault in not paying the debt within the time specified in the policy. The fact that the law interfered and released the insurance company from the payment of the penalty and lawyer's fees operated in favor of the appellant company. If the principal was not liable for the penalty and attorney's fees, it certainly could not be said that its surety would be liable therefor. We think this reasoning is recognized in the case of *North State Fire Insurance Co.* v. *Dillard,* 88 Ark. 473. As bearing on the question, see also *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389. Therefore, we are of the opinion that the chancellor was right in refusing to allow the penalty and attorney's fee.

It follows that the decree will be affirmed.

McCULLOCH, C. J., dissenting. The first section of the act of May 11, 1905, is an amendment of section 4371 of Kirby's Digest, which is a part of the act of May 23, 1901, the amendment being a provision adding other kinds of insurance companies. Notwithstanding the provision of that statute, the contract of insurance is valid and enforceable so far as the company itself is concerned. The contract was enforceable against the company, not because it was one authorized by the laws of the State of Arkansas, but because it was valid in the State of Alabama where it was entered into, and would, upon the doctrine of comity, be enforced in this State.

The question of the liability of the sureties on the bond, is, however, quite another thing. The contract may be valid and enforceable against the insurance company, and yet not fall within the terms of the surety bond, and such is, I think, clearly the state of this case. The bond was furnished by the insurance company pursuant to the laws of this State, which provided a scheme whereby foreign insurance companies might be permitted to do business here. Our first statute creating an insurance bureau, and outlining the scheme for permitting insurance companies to do business in the State, was passed April 25, 1873, but it contained no provision with respect to the requirement for giving bond. The first statute on that subject was the act of March 6, 1891, the first section of which provided that "all fire, life or accident insurance companies, individuals or corporations now or hereafter doing business in this State, shall, in addition to the duties and requirements now prescribed by law, give a bond to the State of Arkansas with not less than three good and sufficient sureties to be approved by the Secretary of State, in the sum of twenty thousand dollars, conditioned for the prompt payment of all claims arising and accruing to any person by virtue of any policy issued by any such company, individual or corporation." The act has been amended several times, but not in any particular which is important in the present inquiry. The auditor has been substituted for the Secretary of State as the official to receive and approve the bond. Other sections

of that act remain unamended. Kirby's Digest, sections 4340-41-42-43. The statute requires that the bond executed shall be "in addition to the duties and requirements now prescribed by law," which shows that the intention of the law-makers was to insert the requirements concerning the giving of bond as a part of the scheme under which the company is permitted to do business.

In dealing with the matter of giving the bond in the case of *United States Fidelity & Guaranty Co.* v. *Fultz,* 76 Ark. 410, we said: "The bond was executed pursuant to the requirement of the statute, and the obligors are presumed to have known the terms of the statute, and to have bound themselves with reference thereto."

Now, is it to be presumed that the sureties, knowing the law contemplated liability for an unlawful or unauthorized act of the company? I think not. Even compensated sureties ought to be protected by the presumption that they meant to become liable only on transactions which could reasonably be anticipated, and that unauthorized and unlawful acts of the principal are not to be deemed within the contemplation of the parties. Nor would the surety be liable under the doctrine of *ultra vires,* as laid down in the case of *Minneapolis Fire & Marine Mutual Ins. Co.* v. *Norman,* 74 Ark. 190, for the reason already given, that the sureties were not parties to the contract made outside of the State, and are not deemed to have had that in contemplation as a part of their suretyship.

The statute not only prohibits a company doing business in this State from authorizing contracts to be made out of the State, but it requires the auditor to investigate the condition of insurance companies, and when found to have violated that provision to revoke the license of the company. That provision emphasizes the force of the presumption that the sureties did not contract with reference to such unlawful acts, and that the statute was not intended to bind them to the extent of making them liable for contracts executed contrary to the provisions of the statute. The fact that the company itself is liable on the contract because it was valid under the laws of the place

where it was executed, does not affect the liability of the sureties, for they did not contract with reference to the laws of Alabama or any other State save those of the State of Arkansas. It is true that the language of the statute is that it shall be a bond for payment of all claims arising by virtue of any policy "upon any property situated in the State." But that language was inserted to exclude liability on the loss of property in another State, and not for the purpose of enlarging liability so as to extend to any contract made contrary to the statutes of the State. When the statute is considered as a whole in its relation to our scheme of laws on the subject of foreign insurance companies, it is obvious that the lawmakers had in mind legislation with reference to the business of the company done in this State, and not business done elsewhere. The bond was given to enable the insurance company to do business in this State, and there is no reason to suppose that they meant to protect policy holders on contracts entered into elsewhere, for the statutes have no extraterritorial effect, and could not for that reason have been intended to cover anything else except transactions occurring in this State. A contract of suretyship must, says a text writer on the subject, "have a reasonable interpretation according to the intent of the parties, as disclosed by the instrument read in the light of surrounding circumstances and purpose for which it was made." Pingrey on Suretyship, section 67. It was not within the power of the law-makers to regulate a contract made by a foreign insurance company in another State. Therefore, they are not presumed to have intended to impose a liability on the sureties with reference to such a contract.

I am also of the opinion that the majority are wrong in holding that the appellant's bond is the one liable for the loss in this case, if there is any liability at all on the part of the sureties. I think the bond executed by appellant expired with the last day of February, and that the bond executed by the Home Life & Accident Company on March 1, 1913, is the bond upon which liability rests, if any, for losses which occurred after that time. Our stat-

ute has carved out a period of time which may be termed an insurance year, and begins on March 1 and ends on the last day of February. The bond executed by the company is intended to cover that period, and, even when executed after the first day of the period, may have a retroactive effect so as to cover all losses occurring during the period. *United States Fidelity & Guaranty Co.* v. *Fultz, supra.* I attach no importance to the fact that in other decisions we have mentioned March the 1st as the date of the commencement of the bond, for that precise question was not involved in those cases, the liabilities not arising on that day. But I am convinced now, upon consideration of the statute, that the law-makers intended to make the first day of March as the beginning of the insurance year. The companies are given the whole of that day for the execution of the bond, filing the annual statement, and paying the tax required by the statute, but that does not necessarily mean that the period begins the next day. The companies are, in other words, given the whole of the first day of the period within which to make the bond, and, inasmuch as the law does not take account of parts of days, the bond given during that day covers all of that day's transactions. It may be conceded that the ordinary rule of interpretation is that where a given period is mentioned, the last date is included and the first excluded. But that rule is not an inflexible one, and does not apply where the context shows that the contrary was intended. In the very nature of this transaction, it is necessarily contemplated that the bond executed on the 1st day of March would cover the transactions of that day, otherwise a new company coming into the State and executing a bond on the last day mentioned could not do business until the following day without executing another bond. To be more explicit, suppose a new company should file with the Auditor its bond on the 1st day of March, would that bond cover transactions on that day, or would the company be bound to wait until the next day to begin business? Applying that test, it is conclusive that the Legislature meant to start the insurance year on March the 1st, and to give the whole of that day to execute bonds

which would cover transactions of that day. Of course, if the bond took effect on March 1, and ran for one year, it necessarily expired with the last day of the month of February of the next year.

My conclusion, therefore, is that there is no liability on the part of appellant for this loss. This is so on both the grounds which I have attempted to maintain.

SPECIAL SCHOOL DISTRICT NO. 33 *v.* EUBANKS.

Opinion delivered May 31, 1915.

SCHOOL DISTRICTS—TRANSFER OF CHILD FROM SPECIAL SCHOOL DISTRICT TO ADJOINING COMMON SCHOOL DISTRICT—AUTHORITY OF COUNTY COURT.—It is proper, under Kirby's Digest, § 7639, for the county court to transfer the child and property of a resident petitioner, for educational purposes alone, from the special school district in which the petitioner resided, to an adjoining common school district in the same county.

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

Geo. A. Burr and *R. E. L. Johnson,* for appellant.

1. No right of transfer exists, under our statutes, from a special to a common school district. Kirby's Digest, § 7639; *Ib.* § § 7607, 7668-7669; Acts 1909, 947; 102 Ark. 411; 60 *Id.* 124; 65 *Id.* 427; 97 *Id.* 71. The provisions for transfer apply only to common school districts. 120 Iowa, 119; 35 Cyc. p. 850, note and cases *supra.* There is no law authorizing such a transfer. Declaration No. 1, asked by appellant, should have been given. Kirby's Digest, § 7639, does not apply. 97 Ark. 71.

Huddleston, Fuhr & Futrell, for appellee, filed no brief.

KIRBY, J. The sole question involved by this appeal is whether the county court has the power to transfer children from a single or special school district to an adjoining common school district.

The agreed statement of facts shows that appellee petitioned the county court of Greene County, to transfer his child and property for educational purposes alone,

from the Special School District No. 33, in which he resided, established under Act 321 of the Acts of the General Assembly of 1909, to an adjoining common school district in the same county, under the authority of section 7639 of Kirby's Digest, which was done.

The special school district appealed to the circuit court from the order granting the transfer, which likewise directed the transfer, and from its judgment this appeal is prosecuted.

Said section provides: "The county court shall have power, upon the petition of any person residing in any particular school district, to transfer the children or wards of such persons, for educational purposes, to an adjoining district in the same county, or to an adjoining district in an adjoining county; provided, said petitioner shall state under oath that the transfer is for school purposes alone, etc." This provision is a part of the act of December 7, 1875, and there is no other law providing for the transfer of children from one school district to another, and no provision of any kind relating thereto in the laws providing for the creation of single or special school districts and the regulation of public schools therein. It is insisted by appellant, therefore, that it was not contemplated that there should be a transfer of children to or from single or special school districts, but only from common school districts to adjoining common school districts, under the authority of said section 7639, which it is claimed has no application whatever to single or special school districts. Said section gives the county court power to make the transfer of children for educational purposes alone from any particular school district to an adjoining school district. Section 7695 of Kirby's Digest, a part of the act of February 4, 1869, for the establishment of single school districts in cities and towns, and the regulation of public schools therein, provides that the general school laws of the State, present and future, when not inapplicable and not inconsistent with and repugnant to the provisions of said act, shall apply to districts organized thereunder, and rural special school districts are governed by the same laws, as are said single school

districts in cities and towns, with the modifications provided in the act of May 31, 1909, as amended by act of April 7, 1911. Said provisions of law authorizing the transfer of the child or children of a resident of one school district to another and his school tax, as well, for educational purposes, is certainly not inconsistent with nor repugnant to any of the provisions of the law governing the organization of single or special school districts and the regulation of the schools therein. Neither do we see any reason for holding it inapplicable to such single and special school districts. There appears to be as much reason for the transfer of children to and from such districts as from common school districts since the transfers are generally made to subserve the convenience and benefit the children of those asking therefor, and the school tax on the transferrer's property goes along with the child or children transferred.

The State owes the same duty to educate all her children and provide the means therefor, regardless of whether they live in cities and towns or in the country, in single, in special, or in common school districts, and the fact alone, that the means and facilities provided for their education are generally better in single and special, than in common school districts furnishes no sufficient reason for preventing the transfer of children from one of such districts to an adjoining common school district wherein the schools might be more conveniently located and accessible to the children transferred. It is as essential that the educational means be available to the child, as that they be provided and the best schools maintained therefor, since no benefit or advantage can be derived from the best means and facilities that can be supplied, if beyond the reach of the particular child. The authority of the county court to make such transfer "is given solely for the benefit of the children in obtaining better school facilities," as said in *Norton* v. *Lakeside Special School District,* 97 Ark. 74. Notwithstanding it was said there that the provisions of that statute (sections 7639-40, Kirby's Digest) were applicable to the common school districts

of the county, it was also expressly said that it was not necessary to pass upon the question as to whether they were applicable to special school districts, or single school districts established in cities and towns.

The court did not err in refusing to declare the law as requested, that the county court was without power to make the transfer, and the judgment is affirmed.

KANIS v. ROGERS.

Opinion delivered May 31, 1915.

1. INSTRUCTIONS—BURDEN OF PROOF—IMPROPER INSTRUCTION.—In an action for damages for killing a dog, it is not error for the trial court to refuse to give an incorrect instruction on the burden of proof, although no other instruction on the burden of proof was given.
2. NEGLIGENCE—KILLING DOG—DAMAGES—BURDEN OF PROOF.—Where defendant killed plaintiff's dog, and admitted the killing, he will be liable to plaintiff in damages, in such a sum as the dog is shown to be worth, unless he killed it under such circumstances as gave him the right to do so, and the burden of proof is on the defendant to show that right.
3. DAMAGES—NEGLIGENT KILLING OF DOG—MARKET VALUE.—Where defendant killed plaintiff's dog, without justification, plaintiff may recover as damages, the market value of the dog.

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

STATEMENT BY THE COURT.

Appellee brought this suit in justice court for damages for the killing of a hunting dog and recovered judgment, from which appellant appealed to the circuit court, and upon trial there again recovered judgment for $50, from which appellant prosecutes this appeal.

It appears from the testimony that plaintiff passed near defendant's home, about 10 o'clock in the morning, and hitched his horse by the pasture 250 yards from the house. Some goats and sheep ran by him and his dog started to chase them. He went after the dog with a whip and passed two crippled sheep, but before he reached the dog to control him, Kanis ran out with a gun, and notwithstanding he shouted, "Don't shoot my dog," shot

the dog and so wounded and crippled her that he asked him to shoot again and kill her, which he did.

He testified that Kanis cursed and swore and told him he thought he knew better than to hunt there, and that it was the twenty-third dog he had killed this year, and he would kill every damn dog he could that was chasing his sheep, that he ought to be thankful that he did not kill his other dog. Said Kanis made no effort to make the dog stop before shooting, that the dog did not take hold of any sheep, and that he had hunted them all over the country, and they had never made a break to catch any sheep. That he could have stopped the dog if she had been chasing the sheep, and was within 75 feet of her on the public highway. He said, also, that Mr. Kanis knew him, called his name; that the dog was young and only playing at chasing the sheep; that he had been chasing a fox to the west of Mr. Kanis's home for two hours that morning. The dog was well trained, and was worth $100, and had cost $50.

Others testified that they knew the dog and had never seen her chase or try to catch any sheep, and also as to the value, placing it all the way from $25 to $100.

Herman Heiden testified that he had handled a good many hounds, some for pleasure, and some for profit. He bred the Rogers' dog, which was of good stock, Carmichael Red Bone; that it was worth $100—that it was worth $50 to train a dog.

Kanis testified that on the 30th of March, about 9 o'clock, he heard two dogs barking fast and heard his sheep bell and rushed to their assistance. By the time he had reached there, they had killed a goat. That about 10:30 he heard dogs barking again, chasing his sheep, and coming toward him, and "I got my gun and met them at the mouth of the lane, and this dog I killed had hold of the sheep about half-way up on the leg. I hollered at the dog, but it would not turn loose, and I killed it. The other dog did not have hold of any of the bunch, and I did not kill it. After I had killed the dog, I heard Mr. Rogers calling to me, but it was too late. If I had seen him before, I would not have shot. I had killed other dogs for

killing our sheep. I found the sheep afterward lying down bleeding freely, with a large place torn in the leg, and it died next day. I did not hear Rogers holler at the dogs, and if I had, I would not have shot. I did not know him nor his dog, and never saw him before. I have had a great many sheep killed, under similar circumstances, and have killed the dogs when I could. I do not think a sheep-killing dog is worth anything. I testified in the lower court that when I shot the dog, it had hold of the sheep. I shot him in the breast and shot him the second time. I shot him because he had hold of the sheep, and would not turn it loose.

Another witness testified that she saw the dog chasing the sheep, and heard Mr. Rogers calling to them, but they paid no attention to him; that the sheep were without any inclosure.

The justice before whom the case was tried testified that appellant did not testify in his court about the dog killing the sheep.

Several testified that a dog that would kill sheep had no market value, and was less than worthless.

The court instructed the jury, refusing to give appellant's requested instruction numbered 2, as follows:

"The court instructs the jury that the burden is upon the plaintiff in this case, and that he must prove by a fair preponderance of the testimony that the dog in controvery had a market value, and what that market value is, and if he fails to do so, your verdict will be for the defendant."

From the judgment against him appellant brings this appeal.

John D. Shackleford, for appellant.

1. The court erred in giving and refusing instructions. Every one has a right to protect his stock from injury by dogs, and may kill the dog in such protection. 2 Cyc. 415-416; 15 L. R. A. 251-3, and note and forty other authorities. To kill a dog who kills sheep is the only way to stop his career. Under the law defendant had the undisputed right to kill the dog. 2 Cyc. 425.

2. The burden was on appellant to show the market value of the dog. A sheep-killing dog has no value. Opinion evidence is not admissible. Cyc. L. Dic. 593; 88 Mich. 15; 99 Mass. 345; 38 Ark. 174; 2 Cyc. 424, and many cases cited.

Kirtley & Gulley, for appellee.

1. The jury were properly instructed that if it was necessary to kill the dog in order to protect property defendant was justifiable.

2. The market value is determined at the time and place where the sale is to be made or where the value is to be determined. 78 Ark. 402. A dog is personal property. 83 Ark. 264. In determining a dog's value all the circumstances are important. 67 Am. St. Rep. 292, note. The value is for the jury. 1 R. C. L. 1131; 81 Tex. 222. Expert evidence is admissible. 1 R. C. L. 1131; 77 Miss. 353, and others. The evidence shows a wanton killing, and the value was proven.

KIRBY, J., (after stating the facts). (1) It is contended for reversal that the court erred in refusing to give said requested instruction numbered 2. The instruction as requested, was not an accurate statement of the law, since the burden of proof in the case was not upon the plaintiff, except to show the value of the dog, the defendant having admitted the killing. The instruction not being correct, the court did not err in refusing it, although no other instruction was given upon the burden of proof alone.

The court instructed the jury, however, after saying that the plaintiff brings this suit to recover damages for the dog, which the defendant killed, alleging that the dog had a market value, and was killed without cause: "The question for you to decide in this case is the motive that controlled the defendant in the killing of this dog. You are instructed that if he acted in good faith, and believed it was necessary to kill this dog in order to protect his property he would be justified in doing it under the law; but if he killed it without taking into consideration the circumstances, if he acted negligently or wantonly in shooting the dog, then you will find for the plaintiff."

"2. If you find for the plaintiff, the amount of the damages will be such an amount as you may find from the evidence will compensate him for the loss of the dog, if you find that the dog had a market value."

(2) The defendant having admitted that he killed plaintiff's dog, was bound to pay damages therefor in such sum as the dog was shown to be worth unless he killed it under such circumstances as gave him the right to do so, without liability to damages therefor, the burden of proof of which devolved upon him. The court in effect told the jury that if they found he believed it was necessary to kill the dog in order to protect his property, he would be justified in doing so under the law, if he took into consideration the circumstances surrounding the transaction, and did not act negligently or wantonly in shooting the dog, which was as fair a statement of the law as he was entitled to.

(3) The court's instruction as to damages is not happily phrased, but means no more than to tell the jury if they should find for the plaintiff, or in other words, that the defendant was not justified in killing the dog to protect his property, that they should award damages in such an amount as would equal the market value of the dog. Of course, plaintiff was not entitled to compensation for the loss of the dog, except in the amount of its proved market value, as the instruction indicates. The jury could well have found for appellant had they believed his statement, but they found against him upon testimony sufficient to support the verdict, and the judgment is affirmed.

JOHNSON v. STATE.

Opinion delivered May 31, 1915.

1. LARCENY—JOINT OWNERSHIP.—In a prosecution for larceny of five hogs, *held*, the indictment charging a joint ownership in two persons named, was sustained by the proof.

2. TRIAL—ARGUMENT OF COUNSEL—SPECIAL COUNSEL AND PROSECUTING ATTORNEY—DIFFERENCE IN ARGUMENT.—In a prosecution for larceny of certain hogs, special counsel for the State in the opening argu-

ment, argued that the hogs had been stolen about September 1, and in the closing argument the prosecuting attorney argued that the larceny occurred about June 1. *Held*, it was not error for the trial court to refuse to permit defendant's attorney to reply to the argument of the prosecuting attorney on this point.

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

G. B. Oliver, for appellants.

1. The evidence does not show the ownership of the hogs as alleged in the indictment.

2. Edgar Smith testified that his hogs disappeared about the 1st of September, 1914, while the proof on the part of the appellants is positive to the effect that the hogs found in the possession of Sidney Johnson, in Missouri, were taken there by him about the 1st of June, 1914. The testimony absolutely precludes the possibility of the hogs found in his possession being the hogs described in the indictment.

3. The law requires that in prosecutions for crime, the State's attorney shall in his opening argument make a full and fair statement of the grounds upon which he will rely for a conviction. Kirby's Digest, § 2388. The court, therefore, erred in refusing to give time to counsel for appellants in which to reply to the argument of the prosecuting attorney that the hogs were taken about the 1st of June, and not the 1st of September, as the State's witnesses had testified. This was a complete abandonment of the theory upon which the State had relied up to that time, a thing appellant's counsel could not have anticipated, and he ought to have been permitted to reply to it. 1 Tex. App. 494, 28 Am. Rep. 419; 12 Cyc. 570-C; 93 N. E. 609.

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

1. The testimony of the two Smiths is sufficient to sustain the finding of the jury that the hogs were the property of B. C. Smith and Edgar Smith, as alleged in the indictment.

2. The evidence sustains the conviction. Both the prosecuting witnesses testified positively that the hogs in

the possession of the appellants belonged to them, the Smiths, and their descriptive identification of the hogs was such as to leave no room for doubt. 109 Ark. 138; *Id.* 130.

SMITH, J. Appellants were convicted of the crime of grand larceny alleged to have been committed by stealing five hogs, the property of Edgar Smith and Bert Smith.

The proof upon the part of the State was to the effect that a sow and four pigs, the property of the Smiths, were stolen about the 1st of September, 1914, and the hogs in question were found at appellant Sidney Johnson's home in Missouri, just over the State line, and appellants offered evidence of a rather convincing nature that the hogs said to have been stolen, which were found in Sidney Johnson's possession, had been continuously in his possession since the 1st day of June, 1914.

It is first insisted as a ground for the reversal of the judgment that the proof was insufficient to sustain the allegation of ownership. The testimony upon this question was substantially as follows: Bert Smith testified that he had a number of hogs for sale, and, among others, the sow in question and the sow was not in good condition, and he made an arrangement with his son, which he described as follows: "When I wanted to sell these hogs, this sow was not in shape to sell, and they wanted to dock her so much off for the shape she was in, and I told the boy to keep her and raise him and I meat, and I supposed he would have half of that. Just kill them and keep half of them. He had the care of them for his part of it, and I wouldn't allow a dock on them."

Edgar Smith, the son, testified that the father gave him the sow with the understanding that he should have a half-interest in all the meat he raised.

(1) Appellants insist that the effect of this proof is to show that both the father and the son claimed to own the sow, and that such proof does not sustain the allegation of joint ownership. But we think the effect of this evidence is to show both the father and the son had an interest in this sow and in her pigs, and it is immaterial to consider whether there is any conflict in their testimony

as to the extent of their respective interests. According to the evidence of each, both had a property right in the sow, and between them they were the owners, and the indictment alleges a joint ownership.

(2) It is also insisted that the proof is insufficient to sustain the verdict, because of the conflict in the evidence as to the time when the hogs were stolen. And it is further insisted that the court erred in not permitting counsel for appellant to reply to the closing argument made by the prosecuting attorney in which that officer stated that the hogs had been stolen in this State about the 1st of June, when special counsel representing the State insisted in the opening argument that the hogs had been stolen from the Smiths about the 1st of September. It appears that the prosecuting attorney was not in the court room during the argument of the special counsel, and after the statement had been made in the closing argument that the larceny occurred about the 1st of June, appellants' counsel demanded the right to reply to this argument for the reason that this position had not been taken by the special counsel. But the court refused to grant appellants' counsel this privilege, and exceptions were duly saved to that action.

The trial court has a discretion in the decision of such questions, and it does not appears here that there was such an abuse of this discretion as to require the reversal of the judgment of conviction. It is conceded, of course, that the State was entitled to the closing argument, and we can not say that it was error for the respective attorneys representing the State to take different views of this evidence and to present those views in their arguments to the jury. Either date was within three years of the date of the indictment upon which appellants were tried, and proof of the commission of the larceny at any time within three years prior to the date of this indictment was sufficient so far as the allegation of time was concerned. It is the province of the jury to pass upon any inconsistencies or apparent contradictions in the evidence, and counsel must be allowed some latitude in their discussion of such questions. No doubt learned counsel for appel-

lants pressed upon the jury, as he has upon us, the significance of this proof, but he should have anticipated the argument which the prosecuting attorney afterward made.

The evidence upon the part of the State is legally sufficient to sustain the conviction, and it was the province of the jury to pass upon conflicts in the evidence, and the jury's finding as reflected by the verdict is conclusive upon us.

No other grounds for reversal are urged in the briefs, and the judgment of the court below will, therefore, be affirmed.

DUDGEON v. DUDGEON.

Opinion delivered May 31, 1915.

1. WILLS—LOST ISTRUMENTS—PROOF OF CONTENTS.—Under Kirby's Digest, § 8062, chancery courts have jurisdiction to establish lost or destroyed wills, but it is not sufficient simply to establish the fact that there was a will, it is essential that the proof show its provisions.
2. FAMILY SETTLEMENTS—PROOF.—Courts will uphold family settlements, where the proof shows the same to have been made.
3. WILLS—DESTROYED INSTRUMENT—SETTLEMENT.—Where the proof shows that deceased died leaving a will, but that the same was later destroyed, the court will not give effect to an instrument sought to be established as deceased's will, without sufficient proof of the same, and in the face of proof of a family settlement.

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

C. T. Bloodworth, for appellant.

1. The court ought to have sustained appellant's demurrer, interposed after the evidence was in, to the allegations of the answer as to the purported oral agreement to disregard the will. The effect of allowing this defense and the evidence to sustain it, is to convey the real estate of the decedent by an oral agreement. 55 Ark. 74. The further effect of it would be to say that appellant conveyed his share, or a part of his share in the real estate to his tenants in common by parol. A contract be-

tween tenants in common must be manifested by a writing duly signed. 44 Ark. 79.

2. All the testimony of Mrs. Amanda M. Dudgeon relative to the will should have been excluded, for the reason that one who voluntarily destroys a written instrument should not be allowed to offer parol testimony as to its contents. 9 Am. & Eng. Ann. Cases 481.

3. The finding of the chancellor was against the clear weight of the evidence. That the will was executed and properly witnessed is undisputed, and the terms of the will are established by evidence with sufficient clearness to bring this case within the rule laid down in *Nunn* v. *Lynch,* 73 Ark. 20. See, also, 2 So. 110; 72 Ark. 381. Where it is established that a will has been made, the presumption is against partial intestacy. 90 Ark. 155.

4. The plea of laches has no place in this case. Appellant could not be held to anticipate the action of his mother in destroying the will, and, so long as she lived, there was no particular need of probating the will, since all the real estate was given for her use and benefit during her life. There has been no change in the relation of the parties or the property. 33 Ark. 759; 83 Ark. 154; 100 Ark. 399; 101 Ark. 230; 40 Cyc. 1225.

5. The chancery court's jurisdiction extended only to the establishment of whatever will was made by the decedent, after which it should be probated. It had no power to try out the issue raised in defense that the will was void for failing to name three of his children. The validity of the will could only be contested by proceedings in the probate court. Kirby's Digest, § 8063; 40 Cyc. 1251; 31 Ark. 175.

G. B. Oliver, for appellees.

1. The burden of proof to establish the execution *and contents* of the will was upon appellant, and the evidence must be strong, cogent and convincing. Underhill on Wills, § 275, p. 375; 73 Ark. 20; Kirby's Digest, § 8065.

2. The will was void as to the heirs not mentioned in it. Kirby's Digest, § 8020.

3. An agreement by the devisees under a will to disregard the will and distribute the estate as in intestacy

is a valid defense to a suit to establish and probate the will. Page on Wills, § 346; 40 Cyc. 2107-U; 40 S. W. 871.

SMITH, J. This is an action to establish a destroyed will under section 8062 of Kirby's Digest, and was begun December 13, 1912. Plaintiff alleged that Joseph Dudgeon, died testate March 14, 1902, and named as devisees his widow, Amanda Dudgeon, and their children, Bertha Hawks, Pearl Schnables, Ella Jellard, Arthur Dudgeon, and J. A. Dudgeon, who was the plaintiff below, and is appellant here. That the said Joseph Dudgeon, by his will, disposed of all his property, which consisted of a livery stable in Corning, certain lots in that town and some lands near there, and that by the terms of the will the widow was to have the choice of a horse and buggy from the livery stable, and the remainder of the personal property was given to appellant and his sister, Pearl Schnables. That the widow was given the rents and profits of all the real estate during her life, and that subject to this life estate there was devised to appellant in fee simple one-half of all the real estate, and the other half was devised to all the other children. It was further alleged that the will was properly executed, and that upon the death of the testator the will was read in the presence of all the devisees, and was delivered into the custody of the widow, who kept it for some years, and then destroyed it without ever having probated it.

Appellant gave testimony supporting all the allegations of his complaint and offered evidence corroborating his own testimony.

It is undisputed that Mr. Dudgeon made a will, but the evidence does not support appellant's contention as to its provisions.

The evidence appears to establish the following facts: The will was read at a gathering at which all the children and the widow were present, and it was found that the will did not mention the names of Ella Jellard, Bertha Hawks and Arthur Dudgeon, and, indeed, made no disposition of the real estate. All the children were of age at that time. Appellant testified that after the will was read, he left the room and was not present at the conference which

thereafter took place and was not a party to the agreement then made by those who remained. All the others testified, however, that it was then agreed by all the devisees that, inasmuch as the will did not dispose of the real estate and was void as to three of the children, the will should not be probated, and it was further agreed that the personal property willed to appellant and his sister, Mr. Schnables, should be turned over to the widow, and that she should have the rents and profits from the real estate during her life, in consideration for which she should assume and pay all the debts of her husband.

Appellant admits that he agreed for his mother to take the personal property and pay the debts, but denies that any agreement was made by which the will was not to be probated. But we must uphold the finding of the chancellor to the contrary. In determining what the parties agreed we are largely influenced by a consideration of what they have done. Mrs. Dudgeon testified that after keeping the will for a number of years, she was advised by her son Arthur that it was unnecessary to keep it any longer, and she destroyed it. Arthur is now dead, and died before the institution of this suit, but his children who survived him were made parties to the suit.

(1) The right to probate this will would not be defeated merely by the delay in the institution of this suit, although, with full knowledge of all the facts, appellant delayed over ten years in moving for that purpose. Yet this is a circumstance to be considered in determining what action the court should take. While it is admitted there was a will, appellant failed to prove its provisions. Section 8062 of Kirby's Digest gives chancery courts jurisdiction to establish lost or destroyed wills, but it is not sufficient simply to establish the fact that there was a will. It is just as essential that the proof show its provisions. Section 8065 of Kirby's Digest provides that no will shall be allowed to be proved as a lost or destroyed will unless, among other requirements, its provisions be clearly and distinctly proved by at least one witness, a correct copy or draft being equivalent to one witness.

Appellant makes no complaint as to the disposition of the personal property, and the purpose of this lawsuit is to establish his title to an undivided half-interest in the lands, subject to the life estate of his mother. He says the will gave his mother a life estate in the lands; but the other heirs testified that she has this interest by virtue of the family settlement made upon the death of the testator. According to both contentions, the widow has a life estate in these lands, although the parties differ as to the manner in which she acquired it. According to what we regard as the preponderance of the evidence in this case, the testator failed to mention the names of three of his children, and as to these he died intestate. Section 8020 of Kirby's Digest. It is true the names of the other two children are mentioned, the appellant being one of them; but the proof does not show the disposition of the real estate.

(2-3) Moreover, we think the agreement which the proof shows these parties entered into after the death of the testator was in the nature of a family settlement, and it is the fixed policy of courts to uphold such settlements where the proof shows them to have been made. There are cases which hold that an agreement between heirs and legatees that a will should not be probated, and that the property should be distributed as an intestate estate, is not contrary to public policy and that such agreement annuls the will. *Phillips* v. *Phillips,* 8 Watts 197; *Stringfellow* v. *Early,* 40 S. W. 871. This view of the law, however, is criticised in Page on Wills at section 346, in which the author says that the propriety of this view of the law is very doubtful, and that the better practice would be for the will to be probated and for the beneficiaries then to contract between themselves with reference to the property given them by the will, as they would with reference to property acquired in any other manner. But we are not called upon to choose between these conflicting views as to the rule that should be adopted as a matter of public policy for the reasons, to summarize, first, that the proof in this case shows only that there was a will, without showing, with the necessary certainty, what its provisions

were, and, second, because the agreement reached was in the nature of a family settlement.

Finding no error, the decree is affirmed.

SCOTT v. MCCRAW, PERKINS & WEBBER COMPANY.

Opinion delivered May 31, 1915.

1. PLEADING AND PRACTICE—CROSS-COMPLAINT—ANSWER.—Where proof is taken which puts in issue the allegations of a cross-complaint it is not error to permit the filing of an answer to the cross-complaint, after all the proof is in, but before submission of the case.
2. ACTIONS—TRANSFER FROM LAW TO EQUITY—INVITED ERROR.—Appellant cannot complain when a cause is erroneously transferred to equity, when done on his motion.
3. ACTIONS—TRANSFER FROM LAW TO EQUITY—ACCOUNTING.—A cause is properly transferred from law to equity, which involves the determination of the prices which various bales of cotton should have brought, if sold in accordance with the terms of the contract between the parties.
4. CONTRACTS—COMMISSIONS—USURY.—A contract to pay commissions on the sale of cotton, whether the same was shipped by appellant to appellee or not, *held* not to be usurious, but in the nature of liquidated damages.

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; reversed on cross-appeal; affirmed on appeal.

STATEMENT BY THE COURT.

Appellant was a planter and merchant at Eudora, Arkansas, during the years in which the cotton involved in this litigation was shipped. The appellees were commission merchants in Memphis. Appellant bought cotton on the streets of Eudora and shipped it, as well as that raised by his own tenants, to appellees, who had made him advances on it, and after closing the transactions between the parties, a balance was claimed by appellees of $2,519.59, with interest at 6 per cent from February 27, 1912.

Suit was filed by appellees on this account in the Pulaski Circuit Court July 20, 1913. Appellant answered, alleging that his instructions in regard to the sale of his cotton had not been observed, and he claimed, by way

of cross-complaint, an excess over said account, which he claims resulted from appellees' failure to observe his instructions. He asked that the cause be transferred to the chancery court to purge appellees' account of illegal charges of interest, all commission on cotton not shipped, all charges of storage, fire insurance and commissions on cotton that was wrongfully held by appellees, and further that the value of cotton at the time it should have been sold in obedience to appellant's instructions be ascertained by a master appointed by the court for that purpose and a balance struck.

Depositions covering the various issues in the case were taken, and before the final submission of the cause, appellant moved to remand it to the circuit court on the ground that, at the time of filing his answer and cross-complaint in the circuit court, it was expected by all parties that the issues made would develop a state of facts that would call for an accounting by a master, and that the intervention of the chancery court would be necessary, but he alleged in his motion to remand that the evidence taken had developed the fact that no accounting was necessary and no question of equity jurisdiction was involved. The motion was overruled and exceptions duly saved.

Appellant moved the court for a decree on his cross-complaint except as to the value of the cotton, as to which he offered proof; but this motion was overruled, and appellees were permitted to file an answer, denying the allegations of the cross-complaint. Thereafter, the cause was submitted to the chancellor upon a voluminous record and a decree rendered in favor of appellees for the sum of $2,003.39, which was the full amount for which judgment had been prayed less the amount of commissions claimed by appellees on cotton which appellant had contracted to to ship, or, upon failure so to do, to pay commissions on any deficiency at the rate of $1.25 per bale. Both parties have appealed from the decree.

Appellant had dealt with appellees as commission merchants and cotton factors for five years, and during this time borrowed large sums of money and shipped a

large quantity of cotton, and the evidence appears to show without contradiction that the basis of their transactions was that appellees should advance money, which was to be repaid by appellant by the shipment of cotton. On April 9, 1910, appellant entered into an agreement with appellees whereby, in consideration of the sum of $5,000 to be thereafter advanced, appellant agreed to ship, during the cotton season of 1910 and 1911, 400 bales of cotton, to be sold by appellees on commission for appellant's account, with a proviso that, in case there was any failure on appellant's part to ship the cotton contracted for, appellant should pay commissions, at the rate of $1.25 per bale, upon each bale which appellant had failed to ship. Similar agreements had been made for the shipment of the same amount of cotton during the previous years during which the parties did business together, and in some of these years a quantity of cotton in excess of the amount contracted to be shipped had been shipped; but the difference between the parties as to cotton not shipped in accordance with the contract is confined to the cotton year of 1910 and 1911.

Appellant was furnished the money contracted for, and at the beginning of the cotton season, commenced shipping to appellees cotton raised by him on his own plantation and other cotton purchased by him at Eudora. Appellant soon became dissatisfied with the prices obtained for his cotton, and offered proof tending to show that his cotton was not being sold at the highest market price, and that higher prices were being obtained for similar cotton in the markets at Greenville, Mississippi, and New Orleans, and that some of the cotton which appellant had purchased at Eudora was sold in Memphis below its cost.

There is a sharp conflict in the evidence in regard to the price which should have been obtained for this cotton, and this question is involved principally in the sale of cotton which was reported sold at one price and afterward reported as having been rejected because of the cotton being stained and mixed. The proof shows that appellant called on appellees in November, 1910, and directed that

his cotton be held until a price named by him could be obtained for it. Appellant admits having given this direction in regard to holding his cotton, but he says that in December thereafter and again in February, 1911, he called upon appellees and directed that his cotton be placed on the market and sold. The evidence in this respect is also sharply conflicting; that on the part of the appellant being to the effect that his directions were not obeyed, and that considerable loss was sustained on that account. Upon the other hand appellees testified that appellant's directions had been followed, and that the market price of all cotton had been obtained at the time of the respective sales of the cotton, but that the sale of the cotton had been hampered by appellant's directions, as a result of which they had been compelled to hold cotton while the market was high, and had been required to sell it when the price was low; and the proof on the part of appellees was also to the effect that some of their most advantageous sales had been annulled because the cotton, on delivery, did not correspond to the samples under which it had been sold.

Baldy Vinson, S. M. Wassell and *Miles & Wade,* for appellant.

1. The cause should have been transferred to the law court; the intervention of a court of equity was not necessary as developed by the evidence. 105 U. S. 430; 33 Atl. 193; 4 Wash. 534; 108 Ark. 283; 19 L. R. A. (N. S.) 1064, and note; 70 Ark. 157. Consent can not give jurisdiction. 88 Ark. 1.

2. In addition to the highest rate of interest allowed by law, a charge of $1.25 per bale for cotton not shipped, constitutes usury. 39 Cyc. 971; 59 Ark. 366; 93 U. S. 344; 160 Fed. 425.

3. Appellees were liable for damages for failure to obey instructions as to the sale of cotton. 78 Ark. 402, is not applicable. 31 Cyc. 1451-2-3.

Riddick & Dobyns, for appellee.

1. The chancery court had jurisdiction. 22 Ark. 301; 49 *Id.* 575; 51 *Id.* 198; 82 *Id.* 547; 31 *Id.* 345. The motion to transfer was made by appellant, and the cause

was transferred on his motion. 74 Ark. 104; 75 *Id.* 400; 92 *Id.* 46; 89 *Id.* 143, etc.

2. The question of usury can not be considered. Usury must be specifically pleaded. 26 Ark. 358; 17 *Id.* 138; 25 *Id.* 260; 30 *Id.* 145; 22 *Id.* 409.

3. The stipulation to pay commissions on cotton not shipped is not usury. 91 Ark. 438; 74 *Id.* 41; 58 S. W. 314; 93 S. W. 1102; 22 S. C. 367; 40 So. 458; 59 Ark. 366.

4. Appellant's contention that his instructions as to the sale of cotton were disobeyed, is not sustained by the evidence. Besides, he ratified the sale by silence and failure to disapprove the sale. The chancellor's finding is not against the preponderance of the evidence.

SMITH, J., (after stating the facts). (1) We think no error was committed in permitting appellees to file an answer to the cross-complaint after the proof had all been taken and before the case was submitted. The effect of the proof which had been taken was to put in issue the allegations of the cross-complaint, and no prejudice could have resulted to appellant in having the truth of the allegations of his cross-complaint formally denied. *Beekman Lbr. Co.* v. *Kittrell,* 80 Ark. 228.

(2-3) No error was committed by the court in refusing to transfer the cause to the circuit court. The cause was transferred to the chancery court upon appellant's motion, and he is in no position to complain of that action of the court, even though the order was improperly made. It is not contended that under the allegations of the pleadings this transfer was improper. It is only urged that after the proof had been taken it then appeared that there was no ground upon which the cause should have been transferred to the chancery court. But we do not agree with that contention. If appellant is correct in his theory of this case, and is entitled to recover the damages claimed by him, these damages could be ascertained only after much accounting. Under the allegations of appellant's cross-complaint numerous bales of cotton had been sold at different times at less than the prevailing market price, and a determination of the price which the various bales of cotton should have brought would have

involved a consideration of the grades and character of the cotton, and in view of the accounting which would have been necessary to determine those questions, if the proof had made it necessary to pass upon them, we think the case was properly transferred to the chancery court.

The principal question in the case is whether or not appellant's instructions in regard to the sale of his cotton were obeyed. The parties do not disagree about the law upon this subject, and appellees concede that it was their duty to have followed appellant's instructions, but they claim that they did so. The proof shows that some of the cotton was held for months, and that a very considerable loss was sustained as a result of this action; but appellees deny ever having received instructions to sell the cotton below 16 cents, the price per pound fixed by appellant when he first ordered the cotton held, and that this price could not be obtained. We will not undertake to review the evidence upon this question, but announce our conclusion to be that the finding of the chancellor does not appear to have been clearly against the preponderance of the evidence.

(4) The chancellor disallowed, however, the claim for commissions upon the cotton which appellant failed to ship, and appellees have prosecuted a cross-appeal from that finding. The decree of the chancellor in this respect must be reversed. The proof does not show that this contract for the shipment of cotton was designed as a cloak for usury. Upon the contrary, appellant had, in former seasons, shipped the quantity of cotton here contracted for, and it was in the contemplation of the parties that this amount of cotton should be shipped during the season covered by the agreement. Such provisions have been upheld as a stipulation for liquidated damages for breach of the contract to ship the cotton. *Allen-West Commission Co.* v. *Peoples Bank,* 74 Ark. 41; *Blackburn* v. *Hayes,* 59 Ark. 366.

The decree of the chancellor upon the appeal is affirmed, and upon the cross-appeal his decree in favor of appellees will be modified and a decree will be rendered here for the sum of $2,519.59, with interest from Febru-

ary 27, 1912, at 6 per cent, the difference between the decree here rendered and the one pronounced by the court below being the amount due on account of commissions on cotton not shipped.

McCULLOCH, C. J., disqualified and not participating.

VALLEY PLANING MILL v. McDANIEL.

Opinion delivered November 9, 1914.

NEGLIGENCE—INJURY TO CHILD—PROXIMATE CAUSE.—Where defendant, operating a saw mill, permitted a truck loaded with lumber to stand in its doorway, so that it protruded several feet into a public thoroughfare, the truck being so loaded that it would require only a slight exertion to tilt it down, and a child, passing by did attempt to play with the truck, receiving an injury; *held*, the defendant was under a duty to anticipate that children, passing along the public street, might attempt to play with the truck, and be injured, and that defendant's negligence was a question for the jury.

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

Martin, Wootton & Martin, for appellant.

1. We are not unmindful of the rule of law upheld in this State that a child can be guilty of negligence only when he possesses sufficient intelligence to realize the effect of his acts; but this doctrine, under the evidence, can have no application to this case. It applies only under the theory of the "turntable cases," ordinarily spoken of as the "attractive danger doctrine."

Before this doctrine could apply here, two things are necessary to be proved: First, that the loaded truck was an attractive and dangerous instrumentality. Second, that the owner had knowledge that the injured party, or other children, would likely come in touch with it.

Neither of these essentials was present in this case. 70 Ark. 331, 335; 100 Ark. 76; 127 N. C. 328, 52 L. R. A. 359, 360.

2. While the question of negligence in the temporary use of a street is generally one for the jury, yet,

where there is no conflict on the material points of the case, the question of negligence rightfully belongs to the court, and it should not be submitted to the jury. 63 Ark. 427; 72 Ark. 572; 61 Ark. 549.

M. S. Cobb, for appellee.

1. The peremptory instruction was properly refused. The evidence amply sustains the verdict. 80 Ark. 190; 98 Ark. 388; 103 Ark. 147.

2. The rule in the "turntable cases" was not invoked by appellee, and has no application. Appellee was not on appellant's premises, was in no sense a trespasser, but was on the public street.

3. "The owner of property abutting on a highway is under a positive duty to keep it from being a source of danger to the public by reason of any defect in structure, repair, *use* or *management* which reasonable care can guard against." 1 Thompson on Negligence, 1199.

While appellant had the right to use the street in conducting its business, it was also required to use reasonable care to avoid and prevent injuring others. It was bound to use reasonable care in loading its lumber so that it would not topple over and fall upon children playing about it. 1 Thompson on Neg., 1255; 120 Wis. 443, 64 L. R. A. 183; 78 Ark. 251; *Id.* 426; 81 Ark. 178; 92 Ark. 437; 90 Ark. 119.

4. The obstruction out into the street was not necessary; but if there had been a necessity for such obstruction, appellant was under the legal obligation to use reasonable care to the end that no one be injured thereby while passing in the street. 50 App. Div. (N. Y.) 158; 95 App. Div. 234; 24 App. D. C. 81.

HART, J. The appellant prosecutes this appeal to reverse a judgment against it for damages alleged to have been caused by the negligence of its servants. The material facts are as follows:

Appellant was engaged in manufacturing lumber in the city of Hot Springs, and had a dry shed abutting on one of the streets of the city. Its servants loaded a two-wheel truck with lumber ranging in length from eight to

sixteen feet. The truck was so loaded that its two ends were nearly evenly balanced, but the rear end was heavier so that if it was placed on the ground the front end would extend above the ground four or five feet. The truck was left standing in the door of the dry kiln abutting on the street with the front end extending into the street about three feet. Roy McDaniel, a boy of nine years of age, was walking along the street going to a store on an errand for his mother. He saw the loaded truck and reached up and caught hold of the front end of it. This caused the truck to fall over and crush him to the ground whereby his leg was broken and he was otherwise severely injured.

In conducting its business appellant's truck would be carried to the door of the dry kiln and a mule hitched to two wheels would be backed up against the truck and the truck fastened to these wheels with a hook. The lumber would rest on a bolster of the wheels to which the mule was hitched and would be fastened down. When the truck was being hauled away other trucks would be loaded and carried to the door of the dry shed so that they could be attached to the wheels drawn by the mule.

Witnesses for the plaintiff testified that the proper way to load these trucks was to load them more heavily in front and place a prop under the front end. Witnesses for the defendant said the proper way to load them was to place the heavier part of the load on the rear end so that end would rest on the ground and the front end would be above the ground, so that the mule attached to the front wheels might be more easily backed under the truck. Be that as it may, the undisputed evidence was that the loaded truck was placed in the door of the dry shed abutting on the street and that its front end extended out into the street about three feet and was about four feet above the ground and that the load of lumber on the truck was so evenly balanced that it required but a slight exertion to pull the front end down.

The only contention made by counsel for appellant is that there was no actionable negligence on the part of the appellant and that the verdict should have been di-

rected in its favor. The language of Cooley, J., in the case of *Powers* v. *Harlow,* 53 Mich. 507, 51 Am. Rep. 154, is peculiarly applicable to the facts in this case. The learned justice said: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken."

The evidence shows that the street abutting on the dry shed of the appellant where appellee was injured was not a very much traveled street by footmen, but appellant, in the exercise of that care which the law requires of an ordinarily prudent person in the conduct of his business, was bound to anticipate that children as well as adults were likely to be walking along the street and that a child of tender years might be tempted to play with a loaded truck or to indulge in such childish pranks as the one in question. The child was upon the street where it had a right to be, and appellant should not only have anticipated that children were likely to walk upon the street but that they were also likely to turn aside from travel and play and meddle with a loaded truck which extended out into the street. Having left the truck there heavily loaded with lumber with the front end sticking up and the load on the truck so nearly evenly balanced that only a slight exertion was necessary to tilt it down, we think the negligence of the appellant was a question for the jury. The evidence shows that the truck had been standing there in that position for about one-half hour and one of the servants of the appellant stated that when it was first placed there a prop was placed under the front end of it, but that this prop had been taken away before the injury occurred.

For a discussion of the principle of law bearing on the question, see *Busse* v. *Rogers* (Wis.), 64 L. R. A.

183; *Rachmel* v. *Clark,* 205 Pa. 314; Thompson on the Law of Negligence, Vol. 1, § 1048.

No objection has been raised to the instructions of the court. The case was properly submitted to the jury on the question of negligence of the appellant and contributory negligence of the appellee. The judgment will be affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* WILSON.

Opinion delivered November 9, 1914.

1. NEGLIGENCE—RAILROADS—DAMAGE BY FIRE.—In an action for damages caused by a fire escaping from defendant railway company's right-of-way, the evidence *held* to show that a section crew, in the employ of the railway company, were engaged in burning off the railway company's right-of-way a short time before the fire which destroyed the plaintiff's property.
2. NEGLIGENCE—RAILROADS—DAMAGE CAUSED BY FIRE—RIGHT-OF-WAY.—Where a section crew of a railroad company was seen engaged in burning off its right-of-way, a jury will be justified in finding that a fire which a short while thereafter burned over plaintiff's adjacent pasture field, was caused by the negligence of the section crew.
3. DAMAGES—DESTRUCTION OF PERMANANT IMPROVEMENTS—MEASURE OF DAMAGES.—The measure of damages when permanent improvements on a farm are destroyed by negligence, is the difference in value between the farm without the improvements and the farm with the improvements.
4. DAMAGES—DAMAGE BY FIRE—NEGLIGENCE.—A. leased a farm to B. for a term of years. Due to defendant's negligence a pasture was burned over, and the fence around the same destroyed. *Held,* a verdict by the jury was proper which covered the reasonable rental value of the premises for the remainder of the season, and the value of the fence destroyed.

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

STATEMENT BY THE COURT.

H. B. Wilson instituted this action against the Kansas City Southern Railway Company to recover damages for the negligence of the defendant's servants in permit-

ting fire to escape from its right-of-way, whereby his pasture was burned and destroyed. The plaintiff had leased the land on which the pasture was burned; subsequently the owners of the land were also made parties to the action. The facts are as follows:

On the 21st day of October, 1911, H. B. Wilson leased a tract of land in Little River County, Arkansas, for a term of five years. In 1912 about one hundred acres of it was enclosed as a pasture. In the pasture were red top oats, peas, kafir corn, bermuda and other natural grasses. On Saturday evening, the 23d day of November, 1912, the pasture was burned over and the grass and other products on it entirely destroyed. A little more than a thousand fence posts and about a half mile of fence around the field were also destroyed by the fire and about a quarter of a mile of plank and board fence around his barn was also burned. A part of the fence destroyed by the fire was adjoining the right-of-way of the Kansas City Southern Railway Company. On Friday before the fire occurred the plaintiff saw H. Hicks, a section foreman and some section men burning off the right-of-way adjoining the farm. It was their custom to burn off the right-of-way every fall.

Two of the tenants on the farm as they went to town on Saturday afternoon saw the section men burning off the grass on the right-of-way of the railway company. The fire had not then got off of the right-of-way. Later in the afternoon the fire escaped from the right-of-way and burned the fence and pasture of the plaintiff as above stated.

Wilson testified that the rental value of the pasture was $150 and that a reasonable value of the posts destroyed was twelve to fifteen cents each; that it would cost about $35 to replace the fence around the pasture and about $26 to replace the plank and board fence around the barn. Another witness testified that he had bought some posts from the plaintiff Wilson on the farm, that they were good post oak posts and were reasonably worth fifteen cents each. Other facts will be referred

to in the opinion. The jury returned a verdict in favor of the plaintiffs in the sum of $160, and the defendant has appealed.

Read & McDonough, for appellant.

1. The court should have directed a verdict for appellant for want of evidence to show that the fire originated upon the right-of-way of appellant, and that the section men were the employees of appellant.

To sustain their complaint, it was necessary that appellees should prove that the railroad belonged to the Kansas City Southern Railway Company and that the section men referred to were its employees. 70 Ia. 185.

The court should have directed a verdict for appellant also because the proof is wholly insufficient to show that the employees set out the fire. No presumption will be indulged where a fact must be established by the burden of proof. There should be positive proof connecting the fires and showing a causal relation between the agency of the employees and the existence of the fire. 42 Pac. 602; 100 S. W. 504; 71 S. W. 1073; 83 N. W. 137; 79 N. W. 1032; 75 N. W. 1114; 47 N. E. 691; 33 S. E. 917; 29 S. E. 213; 121 Fed. 924; 100 N. W. 207; 79 N. W. 310; 55 S. E. 270; 110 N. W. 561; 86 Pac. 1010; 89 Ark. 274; 97 Ark. 287.

Evidence that the fire was set out by section men would not be sufficient. The statute of 1907 applies to the setting out of fires through the operation of trains or locomotives. 97 Ark. 287. There must be some proof, in order to show that the fire was set out negligently, that it was done through the operation of a train or locomotive. *Id.;* 105 Ark. 374.

2. It was clearly error to permit the plaintiff to testify as to the reasonable expense of replacing the fences. The measure of damages where permanent improvements are destroyed, is the difference in value between the farm with the improvements and the farm without the improvements. It is not the cost of reproducing the fences. 73 Ark. 464; 82 Ark. 387; 93 Ark. 46.

3. The measure of damages in case of the destruction of a pasture is the reasonable value of the land with

the pasture, and its value without it, or the reasonable rental value of the pasture. 67 Ark. 371; 82 Ark. 387; 95 Ark. 297.

A. D. Dulaney and *Steel, Lake & Head,* for appellees.

HART, J., (after stating the facts). It is contended by counsel for the defendant that there is not sufficient evidence to support the verdict. The testimony on the part of the plaintiff shows that some section men were engaged in burning off the right-of-way of the railroad on the Friday before the fire occurred. This the railroad company was legally entitled to do. The liability of the defendant to the plaintiff for the destruction by fire of its pasture and fence depends, first, upon the proof whether it resulted from its act, and, second, whether the fire resulted from the negligence of the defendant or its servants in burning off its right-of-way. What would constitute such negligence or want of care and prudence as would render the railroad company liable for the destruction by fire from its act in burning off its right-of-way depends upon the circumstances as they existed at the time. See *Bizzell* v. *Booker,* 16 Ark. 314.

(1) The testimony of the plaintiff, as abstracted by the defendant, shows that a part of the fence which was burned was on the right-of-way of the Kansas City Southern Railway Company and that some section men were engaged in burning off the right-of-way on Friday before the fire occurred on Saturday afternoon. His testimony also shows that it was a custom of the section foreman and his crew to burn off the right-of-way every fall. It is now contended by counsel for the railway company that the proof does not show that the section men were employees of the defendant company nor that they were engaged in burning off the right-of-way on the Saturday afternoon that the fire occurred. As we have already seen, the testimony shows that a part of the fence burned was next to the right-of-way of the defendant railway company and the plaintiff knew the section foreman who was engaged in burning off the grass on Friday. From these facts the jury might have inferred that the section

crew was in the employ of the defendant railway company.

The evidence of two of the tenants shows that the section crew was also engaged in burning off the right-of-way on Saturday afternoon just before the fire occurred and that when they saw them burning off the right-of-way the fire had not escaped from the right-of-way, and that there was no other fire burning in the neighborhood. From these facts the jury might have inferred that the same section crew was still engaged in burning off the right-of-way of the defendant company on Saturday.

(2) It was the duty of the foreman to prevent the fire from escaping from the right-of-way of the railroad company. There was no other fire in the neighborhood and the jury might have inferred that the section foreman after burning off the right-of-way, went off and negligently left fire burning there. That the wind which was blowing at the time fanned it into flame and that the fire escaped from the right-of-way of the railway company and burned the fence and pasture of plaintiffs.

(3) As to the measure of damages the court instructed the jury as follows: "If you find for the plaintiffs, the measure of your damages for the posts that were stacked on the lands would be the reasonable market value of the posts at the time, as shown by the evidence. The measure of damages for the destruction of the fence, if you believe that the fence was destroyed, would be the reasonable cost of replacing the fence as it was at that time. The measure of damages for the burning of the pasture grass, pea vines, or other stuff used for pasture, if any was burned, would be the reasonable rental or usable value of that pasture for the remainder of that season. If you find for the plaintiffs, then you will take these various elements and add them together, and 6 per cent interest upon the amount you find from that date until the present time. If you find for the defendant, of course your verdict would be, 'We, the jury, find for the defendant'."

It is insisted by counsel for the defendant that the court erred in permitting the plaintiff Wilson to testify as to the reasonable expense of replacing the fence and also in instructing the jury that a part of the measure of damages for the destruction of the fence would be the reasonable cost of replacing the fence as it was at that time. Counsel for the defendant insists that the measure of damages where permanent improvements are destroyed, is the difference in value between the farm without the improvements and the farm with the improvements, and we are of the opinion that counsel is correct in this. But it does not follow that the judgment should be reversed for that reason. The only issue of fact in the case was whether or not the defendants' servants were negligent in allowing fire to escape from its right-of-way to the premises of the plaintiffs and destroy their fence and pasture. The jury returned a verdict for the plaintiffs for $160. The case was tried on the 7th day of June, 1914. The fire occurred on the 23d day of November, 1912. The plaintiff Wilson testified that the reasonable value of the pasture for the remainder of that season was $150. Other evidence shows that the pasture contained peas, kafir corn, bermuda and other grasses. There is no attempt made to contradict the testimony of the plaintiff Wilson as to the reasonable value of the pasture for the remainder of the season, and we think his testimony in this respect might have been accepted by the jury as undisputed. The court told the jury that the plaintiff should be allowed 6 per cent. interest on the damage allowed from the time of the fire until the date of the trial. Six per cent interest on $150 for the period of time from the date of the fire until the date of the trial would amount to about $10. Therefore, it may be said that the undisputed evidence shows that the plaintiff was entitled to the amount of damages allowed him by the jury.

(4) In addition to this, another witness testified that he purchased some fence posts which were lying on the place, and that they were worth fifteen cents each. The plaintiff testified that more than a thousand fence

posts were destroyed by the fire and about a quarter of a mile of plank and board fence. The jury had a right to take into the jury box with them their common sense and experience in the every-day affairs of life, and when they took into consideration the reasonable rental value of the premises for the remainder of the season, and the fact that a half mile of fence around the pasture and a quarter of a mile of board and plank fence around the barn was destroyed by the fire, we think the undisputed evidence shows that the plaintiff was entitled to the amount of damages allowed him.

It is also claimed by counsel for the defendant that the court erred in instructing the jury that they might take into consideration the rental value of the pasture for the remainder of the season. We do not think the court erred in this respect. In the first place, the owners of the land and the tenant, Wilson, were all joined as plaintiffs in the suit, and, in the second place, the plaintiff, Wilson, had a five years' lease on the place, only one year of which had expired at the time the fire occurred. Therefore, the court properly told the jury to take into consideration the reasonable rental value of the pasture for the remainder of the season.

We find no error in the record and the judgment will be affirmed.

SCHOOL DISTRICT NO. 45 *v.* SCHOOL DISTRICT NO. 8.

Opinion delivered June 7, 1915.

SCHOOL DISTRICTS—DISMEMBERMENT—MAJORITY PETITION.—Property can not be taken from one school district and added to another, under Kirby's Digest, § 7544, except upon a petition of a majority of all the electors residing upon the territory of the districts to be divided.

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

E. H. Vance, Jr., for appellant.

The petition did not contain a majority of all the electors of the district, to be "*divided.*" Kirby's Dig.,

§ 7544; Acts, 1891, p. 194. District No. 8 was not divided, and it took a majority of the electors of District No. 8 to give the court jurisdiction. 54 Ark. 134; 105 Ark. 47; 102 Ark. 401.

J. C. Ross, for appellee.

The circuit court followed the statute. Kirby's Dig., § 7544; 54 Ark. 134.

McCULLOCH, C. J. This is a controversy over the change of the boundary line between two adjoining school districts in Hot Spring County transferring about three sections of land from District No. 45 and attaching the same to District No. 8. The proceedings were inaugurated on the petition of electors which constituted a majority of the aggregate number of electors of both districts, but all of the petitioners save one resided in District No. 8. There were only two voters residing upon the disputed territory sought to be transferred from one district to the other, and one of them signed the petition, being the only elector in District No. 45 who signed. The county court refused to grant the prayer of the petition, but on appeal to the circuit court the prayer was granted and judgment was rendered changing the boundaries of the districts so as to transfer the disputed territory to District No. 8.

The decision of the case involved a construction of the statute on this subject, which reads as follows: "The county court shall have the right to form new school districts or change the boundaries thereof upon a petition of a majority of all the electors residing upon the territory of the districts to be divided." Kirby's Digest, § 7544.

On both sides of the controversy, the case of *Hudspeth* v. *Wallis,* 54 Ark. 134, is cited, with the contention that it is decisive of this case, but we do not find that it has any bearing on the question now involved. In that case, the petitioners were attempting to form a new school district out of territory taken from four old districts, and the contention of those opposing the formation of the district was that the statute required a petition of a majority of the electors of each district to be divided,

but the court held that the statute meant that there must be a majority of the aggregate number of electors of all the districts to be divided. The court, in deciding that case, literally followed the language of the statute.

Now, it will be observed from the narrative of the facts that District No. 45 is the only one to be divided. The disputed territory is to be added to District No. 8, but that district is not to be divided. So, if we follow the language of the statute literally, it leads necessarily to the conclusion that a petition of a majority of the electors of District No. 45, which is the one to be divided, is required, and that the number of electors in District No. 8 is not to be taken into account at all in determining the requisite number of petitioners who could authorize the county court to make the change. Counsel for appellee treat the statute as providing that a petition of a majority of each of the districts to be affected is required, but that calls for a substitution of the word "affected" for the word used in the statute—a word having an altogether different meaning. It may be argued also that this construction of the statute gives no voice at all to the electors of the district to which the territory is to be attached, but the answer to that is that they can be heard in the county court, where there is a discretion vested to determine whether, even though the statutory requisites have been complied with, it is for the best interests of the districts for the change to be made. The county court is not bound to grant the petition merely because the prerequisites are complied with, but that court or the circuit court on appeal may exercise a discretion in regard to making the change. *Hale* v. *Brown*, 70 Ark. 471; *Stephens* v. *School District*, 104 Ark. 145; *Carpenter* v. *Leatherman*, 117 Ark. 531, 176 S. W. 113.

The court has no authority, however, to make the change unless the statute has been complied with by a presentation of a petition signed by a majority of the electors of the district or districts to be divided. The petition in this case did not come up to the requirements of the statute, and therefore the circuit court erred in granting the prayer thereof.

The judgment is therefore reversed, and the cause is remanded with directions to the circuit court to enter a judgment denying the prayer of the petition, as was done by the county court of Hot Spring County.

PEARSON v. STATE.

Opinion delivered June 7, 1915.

1. CONTINUANCES—ABSENT WITNESS—DISCRETION.—A continuance for the term was properly refused in a criminal trial, asked on account of the absence of defendant's father, who was alleged to be a material witness for the defense, when no reason was shown why defendant's father was absent, when he had recently been seen in the neighborhood, and where it was not shown that he would be present at the next term of court.
2. EVIDENCE—STATEMENTS OF ACCUSED.—Appellant was accused of murder, and being captured in Oklahoma, was brought back to this State by a special officer. On the journey back appellant made certain statements to the officer, admitting being present when the killing was done, but denying that he had done the act. *Held*, evidence of these statements was admissible, in the absence of any showing that they were not freely and voluntarily made.
3. APPEAL AND ERROR—BURDEN OF SHOWING ERROR—PRESUMPTION.—Where it is sought to reverse a judgment for the admission of incompetent testimony, the burden is upon the appellant to show error, as every presumption will be indulged in favor of the ruling of the trial court.
4. PLEADING AND PRACTICE—EXCEPTIONS BY BYSTANDERS.—In order to preserve exceptions by bystanders, under Kirby's Digest, § § 6225-6226, it is necessary that these exceptions be first presented to the trial court for allowance, and it must also appear that he rejected the same.
5. PLEADING AND PRACTICE—EXCEPTIONS BY BYSTANDERS—HOW SAVED.—It is a sufficient compliance with the statute, if the exceptions made by the aid of bystanders are presented to the trial judge, and if it is shown by affidavit that the exceptions were presented to the trial judge and rejected by him.
6. PLEADING AND PRACTICE—EXCEPTIONS BY AID OF BYSTANDERS—HOW PRESERVED—DUTY OF JUDGE.—While a trial judge should certify the fact of the presentation to him and the rejection by him of exceptions prepared by the aid of bystanders, if he positively refuses to do so, then, that fact may be made to appear by affidavit, and he may be compelled to do so by mandamus.

7. CRIMINAL PROCEDURE—ACTION OF COURT IN THE ABSENCE OF THE DEFENDANT.—In a criminal prosecution, after the jury had retired to consider their verdict, they addressed a question to the trial judge in writing, and which the trial judge answered in writing, all of which was done in the absence of the defendant and his counsel. *Held*, the action of the court constituted reversible error.

8. HOMICIDE—SUFFICIENCY OF THE EVIDENCE.—In a prosecution for homicide, the evidence held sufficient to warrant the returning of a verdict finding the accused guilty of the crime of murder in the first degree.

Appeal from Woodruff Circuit Court, Northern District; *J. F. Summers,* Special Judge; reversed.

E. M. Carl Lee and *F. E. Wilson,* for appellant.

Under the act of May 31, 1909, this court will consider all errors prejudicial whether exceptions were saved or not. A continuance should have been granted. Defendant was diligent. The refusal was a flagrant abuse of the discretion of the court. 60 Ark. 564; 71 *Id.* 182; 100 *Id.* 301; 73 *Id.* 180. Two days is not a reasonable time. 12 Cyc. 503, 535; 95 Ark. 273; 50 *Id.* 49.

2. The court erred in admitting the evidence of J. B. Kittrell. It was hearsay.

3. The court erred in receiving and answering the note from the jury. The defendant was absent. No prejudice need be shown. Kirby's Dig., § 2339; 24 Ark. 620; 108 *Id.* 192; 44 *Id.* 331. All communications between the judge and jury after the jury has retired, etc., must be in open court, the accused being present. 12 Cyc. 681; 8 Ind. 439; 23 Ill. 283.

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

1. The continuance was properly refused. Matters of continuance are peculiarly within the discretion of the court. 109 Ark. 410.

2. Kittrell's testimony was admissible as showing a confession of guilt.

3. There was no error in the court receiving the note from the jury. 114 Ark. 452.

WOOD, J. Appellant was convicted of the crime of murder in the first degree. The indictment in due form

charged the appellant of the crime of murder in the first degree in the killing of one John Harris.

(1) I. Appellant moved the court to continue the case on account of the absence of Pomp Pearson. Pomp Pearson was the father of the appellant. His testimony as set forth in the motion for a continuance would tend to show an alibi. Treating the testimony, therefore, as material, did the court err in overruling appellant's motion to continue the case to allow him to procure the testimony of this witness, which he set up could be done at the succeeding term of the court? On the motion to continue the court heard the testimony of certain witnesses who were deputized to serve the subpoena on the witness, Pomp Pearson. One witness testified that he went to Pearson's house and was informed by Pearson's wife that he was not at home but would probably return that evening. The officer did not go back to Pearson's home that evening for the purpose of serving the subpoena.

One witness testified that Pearson had forty acres of land in his farm, and that if the case was continued until the next term he supposed he could be had. The sheriff testified that the officer whom he deputized to serve the subpoena on Pomp Pearson reported that he could not find him. He then sent his regular deputy to Pomp's home and he also reported that he was not there and had not been seen at home since Tuesday before. One Ira Stewart testified that he was told that Pearson was "afraid to come on account of his connection with stealing cotton." Another witness testified that Pearson, in company with Scipio Jones, a lawyer of Little Rock, called at his office on Friday afternoon before the trial, which was had the following Wednesday, and that the purpose of their visit was to employ him to assist in the defense of the appellant, but that he informed them that he had been employed by the prosecution.

The court overruled the motion for a continuance, and in so doing did not abuse its discretion. The absent witness being the father of appellant, if appellant could have proved by him the facts as set up in his motion for a continuance, it seems but reasonable that he would have

been present. If, as indicated by witness Stewart, Pomp Pearson had absented himself from the court and was concealing himself because of fear of prosecution, the same fear would likely cause him to conceal himself at the subsequent term as well, and there was no reasonable assurance, therefore, that he could be had at the following term of the court, and nothing was set up in the motion and nothing in the evidence indicating that there was a greater probability of securing the presence of the absent witness at the following term.

The presence of appellant's father, Pomp Pearson, in Augusta the week before, showing that he was interested in his son's defense, warranted the court in finding that he was in the community, but for some reason, unexplained, was concealing himself from the court's process. It was within the discretion of the court, under these circumstances, to refuse to continue the case. Appellant did not show that he would be or could be in any better situation to procure the testimony of Pomp Pearson at the succeeding term. It was incumbent upon appellant, under the circumstances, to explain the absence of the father and to set up and show some reason for believing that if the case was continued his presence could be had at the subsequent term. The mere statement of these things in the motion was not sufficient. *Sullivan* v. *State*, 109 Ark. 407, p. 410.

Appellant also asked that the cause be continued on account of the absence of a witness by the name of Ira Johnson, but appellant fails to show that there was any person living in the neighborhood by the name of Ira Johnson, while there was affirmative testimony on behalf of the State to the effect that there was no person in the county by the name of Ira Johnson. The court, under this showing, correctly held that the motion to continue was not sufficient.

(2-3) II. J. B. Kittrell, the special officer who brought appellant from Oklahoma, where he had been arrested after the killing occurred, was talking with the appellant on the train and appellant told the witness that he was not the man who did the shooting. Appellant told

witness that on the occasion when Harris was killed he (appellant) was in the wagon with the negro who killed Harris, and that when he heard some one coming he (appellant) jumped out of the wagon and ran off in the field. He told the witness that after the shooting the negro who did the shooting caught up with him (appellant) and this negro was badly shot himself and gave out and that appellant left him and went on. Appellant told witness then about his leaving the country and the places where he had been.

The testimony of the witness Kittrell was competent as evidence against appellant. It tended to show a confession on the part of appellant to the effect that he was present when Harris was killed. He denied that he was the party who fired the fatal shot, and stated that another negro did the shooting. The credibility of his testimony was for the jury. There is nothing in the record to show why these statements were made to the officer, and it does not appear that they were elicited under the influence of any threats of punishment or promises of immunity from punishment held out by the officer.

The court admitted the testimony, and must have found, therefore, that the statements were freely and voluntarily made; for otherwise these statements of appellant, in the nature of a confession, would have been incompetent. The appellant must show error, as every presumption is indulged in favor of the ruling of the trial court; and, in the absence of testimony tending to show that these statements were not freely and voluntarily made, we must hold that the ruling of the court was correct in admitting them. There is nothing in the record to show that the ruling of the court was not in accord with the law as announced by this court concerning the admissibility of confessions in many cases. Some of the more recent ones are *Dewein* v. *State,* 114 Ark. 472; *Greenwood* v. *State,* 107 Ark. 568.

III. There are certain affidavits in the transcript to the effect that after the jury had retired to consider their verdict, and after they had been out for several hours, one of them called the sheriff to the door of the room in

which they were deliberating and handed him a note addressed to the trial judge. The note was substantially as follows: "If the jury should find the defendant guilty as charged in the indictment with a recommendation for leniency, has your honor the authority and will you assess his punishment at twenty-one years in the State penitentiary or for life?" The affidavits were to the effect that the court answered the above note as follows: "No." That when this communication was had between the court and the jury neither the defendant nor his attorneys were present and they knew nothing about it.

There is no reference in the bill of exceptions to this proceeding and no reference therein to these affidavits having been presented to the trial judge and of his refusal to consider the same; and nothing in the bill of exceptions to indicate that such proceeding was had or to identify the affidavits by which it is sought to prove that there was such a proceeding.

Counsel for appellant contend that they preserved their exceptions to the above proceedings under sections 6225 and 6226 of Kirby's Digest, which provide:

"Sec. 6225. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing and present it to the judge for his allowance and signature. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings as part of the record, but not spread at large on the order book. If the writing is not true, the judge shall correct it, or suggest the correction to be made, and, when corrected, sign it.

"Sec. 6226. If the party excepting is not satisfied with the correction, upon his procuring the signatures of two bystanders attesting the truth of his exception as by him prepared, the same shall be filed as part of the record, etc."

In *Fordyce* v. *Jackson,* 56 Ark. 600, we said: "The appellants attempt to add to the bill of exceptions allowed by the trial judge by presenting certificates filed with the circuit clerk and affidavits attesting the truth of his addi-

tional exceptions. But their effort must prove futile, because the record fails to show that the omitted exceptions were presented to the judge for allowance and rejected by him. It is only where the exceptions are presented to the judge for allowance and are rejected by him that the statute permits them to be preserved by the certificate and affidavits by bystanders. When the judge rejects any part of the bill of exceptions presented to him for allowance by either party, he should certify that fact, if the aggrieved party desires, in the bill of exceptions. The foundation is then laid for preserving the excluded exceptions by the aid of bystanders. If the judge refuses to certify this disallowance of any matter, it is time enough then to attempt to bring that fact upon the record by the bystanders. For aught that appears here, the judge allowed the bill of exceptions, presented to him by the appellant. There is no intimation to the contrary in the bill of exceptions, the certificates or the affidavits."

(4) It thus appears that in order to preserve exceptions by the bystanders, under the statute, it is necessary that these exceptions be first presented to the trial court for allowance, and it must also appear that he rejected the same. See, also, *Vaughan* v. *State,* 57 Ark. 7. In *Fordyce* v. *Jackson, supra,* it is pointed out that the proper method of showing that the judge did reject the same is by his certificate in the bill of exceptions to that effect.

In the above case there was no showing of any kind, either by the bill of exceptions, the certificate or the affidavits, that the excluded exceptions had first been presented to the trial judge. The court does not hold that the certificate of the circuit judge in the bill of exceptions showing that he had rejected the exceptions made by the aid of bystanders was the only method of showing that such exceptions had been presented and rejected by the trial court. On the contrary, the intimation there is that if the certificates or affidavits had shown such fact this would have been sufficient.

In *Boone* v. *Goodlett,* 71 Ark. 577, the appellant tendered a bill of exceptions to the trial judge for his signa-

ture and he refused to sign the same, but amended it by interlineations and erasures. Thereupon, appellant filed the bill of exceptions as amended and a statement in the form of an affidavit by his attorney, in which he stated that he presented the bill of exceptions without erasures or interlineations and that the judge had amended it as before stated, and the appellant filed the affidavits of bystanders to the effect that the bill of exceptions was correct as prepared and was tendered for signatures by the judge, who made the amendment by erasure and interlineation. Judge BATTLE, speaking for the court concerning this state of facts, said: "This is a substantial compliance with the statutes. The part of the bill of exceptions that was signed by the judge appears in that instrument over his signature. The amendment appears in the bill of exceptions, and the affidavits of the bystanders show that it was made by the judge. It is true that the judge did not certify that he made the amendment. This was not absolutely necessary. * * * The statutes do not provide that it should be shown in any particular manner."

(5) Under the rule thus announced it is a sufficient compliance with the statute if the exceptions made by the aid of bystanders are presented to the trial judge, and if it is shown by affidavit that the exceptions were presented to the trial judge and rejected by him.

In *Boone* v. *Goodlett, supra,* the attorney for the appellant filed an affidavit to the effect that he presented the bill of exceptions without erasures or interlineations and that the judge had amended it, and that he was not satisfied with the amendment, and that the exceptions as prepared by him (the attorney) were correct. The court, speaking of this affidavit of the attorney, said: "The attorney of the appellant was not a bystander, and his affidavit was not admissible to show that the bill of exceptions presented to the judge was true, but it was competent to show that the appellant was not satisfied with the amendments."

Very much the same thing was done in the instant case. The attorney for the appellant filed an affidavit in

which he states that he presented the exception prepared by him and attested by the bystanders to the judge for his signature and certificate, and that the judge not only refused to certify to the same as correct, but refused to make any corrections in the same and refused to allow the same as prepared, and refused to certify his disapproval thereof in the bill of exceptions.

(6) While the trial judge, in every case, as suggested in the above cases, should certify the fact of the presentation and rejection by him of the exceptions prepared by the aid of bystanders, if he positively refuses to do so, then, under the authority of the above cases, that fact may be made to appear by affidavit. It will rarely occur, however, that a trial judge will refuse to certify the fact of such presentation and rejection, if such be the fact, and hence a resort to the less satisfactory method of making such proof will seldom be necessary. His duty under the statute is clearly defined by the above decisions, and where he positively refuses to take any action at all upon the exceptions as thus presented he could be compelled to do so by mandamus. See *Springfield* v. *Fulk,* 96 Ark. 316. However, such seems to be the case now under review, and upon reconsideration we have reached the conclusion that the exception as prepared by him should have been allowed.

(7) Therefore, treating the exception as true, the court erred in communicating with the jury in the manner set up in this exception in the absence of the defendant and his counsel. This inquiry on the part of the jury and the answer thereto by the court was tantamount to giving instructions to the jury in the absence of the defendant and his counsel. If the appellant or his counsel had been present, then they might have objected to the court's answering the inquiry in any manner at all, and they might have objected to the answer that the court gave. It is unnecessary to determine whether the answer was correct.

In *Kinnemer* v. *State,* 66 Ark. 206, the court reread the instructions to the jury in the absence of the defendant exactly as at first given before the jury retired to

consider of their verdict. Of this procedure, we said: "The instructions could not be reread in his absence, for, although they were read 'exactly as at first given,' the defendant had the right to know and see that such was the case, and to be present for that purpose." Citing *Brown* v. *State,* 24 Ark. 620; *Bearden* v. *State,* 44 Ark. 331. See also *Stroope* v. *State,* 72 Ark. 379-80.

(8) IV. There was evidence to sustain the verdict. While the testimony was conflicting there was evidence adduced on behalf of the State tending to show that appellant, before the killing, had brought a bale of cotton into the town of Grays, Woodruff County, Arkansas, and had sold the same; that the next day an officer came to town in company with a man who claimed this bale of cotton; that a warrant was issued for appellant, and the deceased, Harris, was deputized to serve it; that he was accompanied by one who knew appellant and went with the officer to identify him; that they met appellant as he was returning from Augusta on a starlight night; that appellant was driving a wagon; that Harris and the man accompanying him rode up to the wagon and Harris told appellant that he had a warrant for his arrest and asked the party with him who knew appellant to search him; that as this party started to appellant to search him appellant shot Harris.

This testimony was sufficient to warrant the jury in finding that appellant wilfully and with malice aforethought, after deliberation and premeditation, shot and killed Harris. They were therefore warranted in returning a verdict finding appellant guilty of the crime of murder in the first degree. See *Jim Harris* v. *State,* 119 Ark. 85, and cases cited. For the error indicated, the judgment is reversed and the cause remanded for a new trial.

HELVERING v. McDOUGAL.

Opinion delivered June 7, 1915.

SCHOOL DISTRICTS—FORMATION—DISMEMBERMENT OF SINGLE SCHOOL DISTRICT.—The county court has no power to dismember a single school district by taking away a part of its territory and adding it to, or forming a common school district with it and other territory.

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

Eugene Cypert, for appellant.

The county court has no power to detach, or take away, a part of a single school district and add it to a common school district. 60 Ark. 124; Kirby's Dig., § § 7668, 7540-7543.

No brief for appellee.

HART, J. Appellants prosecute this appeal to reverse a judgment of the circuit court in the matter of the creation of School District No. 33 in White County, Arkansas.

The county court in creating the district took away from Bradford Single School District a part of its territory and used it in the formation of District No. 33.

We have heretofore held that the county court has no power to dismember a single school district by taking away a part of its territory and adding it to or forming a common school district with it and other territory. *Cotter Special School District No.* 50 v. *District No.* 53, 111 Ark. 79.

See, also, *Crow* v. *Special School District No.* 2, 102 Ark. 401, where we held that territory once organized and established into a rural special school district, under act of May 31, 1909,* as amended by act of April 7, 1911,† can not be cut off and included within another rural special school district.

It follows that the judgment must be reversed; and the petition of appellees will be dismissed.

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*Act 321, Acts 1909.

†Act 169, Acts 1911.—(Rep.)

WITT v. STATE.

Opinion delivered June 7, 1915.

LARCENY—POSSESSION OF STOLEN GOODS—OTHER GOODS—PRESUMPTION.—A trunk belonging to the prosecuting witness was stolen; the trunk contained various articles, among others silk stockings which were found in defendant's possession three weeks after the theft. *Held*, the jury will be warranted in presuming, under the evidence, that the defendant stole the trunk and all its contents.

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

Killgore & Joiner, for appellant.

There was no evidence to sustain the verdict. The guilt was not proven beyond a reasonable doubt.

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

The evidence is sufficient. 109 Ark. 130; *Ib.* 138.

HART, J. Mike Witt prosecutes this appeal to reverse a judgment of conviction against him for grand larceny.

On the evening of July 4, 1914, Idell Malone returned from Camden to Waldo, in Columbia County, Arkansas, on the train. She was not able to obtain a conveyance for her trunk at that time and left it in the depot that night. The next morning her trunk was missing and has never been found.

She testified that the trunk was worth ten or twelve dollars; that it had in it three dresses which were worth about ten dollars; and six pairs of silk stockings worth $4.75.

About three weeks after the disappearance of the trunk appellant and his wife were arrested charged with the theft of the trunk and its contents. During the examining trial the father of the prosecuting witness went with appellant to his house to search for the stolen goods and appellant opened a drawer and showed him five pairs of silk stockings which he said he had bought in the town of Magnolia, though he did not remember at what store he bought them. These stockings were carried into court

and were identified by the prosecuting witness as belonging to her. She testified that she identified some of the stockings by darned places in them which she had made herself, and one pair by stains on them caused by wearing them with a pair of slippers which had faded on them. She said she bought them at Camden.

The appellant testified at the trial that he bought the stockings at a certain store in Magnolia. He denied stealing the trunk, and stated that he knew nothing whatever about it until arrested.

A clerk in the store referred to testified that the store carried stockings similar to the ones exhibited to him but said that he did not know whether the stockings had been sold to appellant.

The father of the prosecuting witness testified that at the time the stockings were found in appellant's house he asked appellant where he had bought them, and that he replied he did not know, but said that the stockings had never been worn.

At the examining trial the prosecuting witnesses also identified a pair of stockings then being worn by the wife of appellant as belonging to her.

The only ground upon which the judgment is sought to be reversed is that the evidence is not sufficient to support the verdict.

The trunk of appellant and its contents were stolen and secreted by some one. Three weeks thereafter appellant and his wife were arrested charged with the crime. At the time of the arrest, appellant's wife had on a pair of stockings which the prosecuting witness identified as her own, and as having been in her trunk at the time it was stolen. Five other pairs of silk stockings were found at the house of appellant and identified by the prosecuting witness as belonging to her, and as having been in the trunk. She identified the stockings by darned places on them and by stains on them. Appellant did not attempt to explain his possession of the stockings except by saying that he had bought them new at a certain store. To corroborate his statement, he introduced a clerk of that store, who stated that the store carried goods of a

similar quality, but stated that he did not remember whether or not he sold any stockings to the appellant. This presented a question of fact for the jury to determine as to whether appellant's claim of title was made honestly or whether it was false. If his claim of ownership by purchase from the store was untrue, this was a strong inference of his guilt; for the prosecuting witness positively identified the stockings in his possession as belonging to her and as having been in the stolen trunk. Of course, if the jury believed the testimony of the prosecuting witness they were warranted in believing that appellant stole the six pairs of stockings of the value of $4.75 from her.

Counsel for appellant contend that even if it be conceded appellant stole the stockings valued at $4.75, that the jury erred in finding appellant guilty of grand larceny. It will be remembered, however, that the prosecuting witness testified that the stockings were in a trunk along with other goods of more than the value of $10. It is evident that the person who stole the stockings stole the trunk; or at least the jury might have inferred this fact, for, as we have already seen, appellant claimed title to the goods in himself and stated that he had purchased them at a store and that they had never been worn.

On the other hand, the prosecuting witness stated that they had been worn, and that some of them had been darned by her. When we consider this fact, together with the further fact that they were found in the possession of appellant about three weeks after the trunk was stolen, we think the jury was warranted in finding that the trunk and all its contents were stolen by appellant. *Wiley* v. *State,* 92 Ark. 586; *Gunter* v. *State,* 79 Ark. 432.

It follows that the judgment must be affirmed.

JONES v. SEWER IMPROVEMENT DISTRICT NO. 3 OF ROGERS.

Opinion delivered June 7, 1915.

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT DISTRICTS—OFFICERS—LIABILITY.—In the absence of a statute making them liable, an action will not lie against a municipal corporation or local improvement district, or the officers thereof, the same being agencies of the State for governmental purposes.

2. SEWER IMPROVEMET DISTRICTS—TAKING OF PRIVATE PROPERTY—COMPENSATION.—Sewer improvement districts may be formed in cities, and outlets therefor secured outside the corporate limits of the city, and as the Constitution forbids the taking of private property for public use without just compensation, the grant of the Legislature to cities and towns to form sewer improvement districts, and to obtain an outlet therefor, outside the corporate limits of such municipality, imposes upon such corporation the correlative duty to make just compensation for property so taken.

3. MUNICIPAL CORPORATIONS — POLLUTING STREAM — SEWAGE — LIABILITY—COMPENSATION.—The turning of sewage by a municipal corporation into a stream to the injury of lower riparian owners, is within the constitutional provision requiring compensation for damaging property for public use, and the damages should be assessed on the theory of a permanent taking under the right of eminent domain.

4. SEWAGE—POLLUTION OF STREAM—MEASURE OF DAMAGES.—The measure of damages to a riparian owner from the use of a stream as an outlet for sewage, by a municipal corporation, is the difference in the value of the land before and after the stream was so used.

5. SEWERS—NUISANCE—DUTY OF MUNICIPAL CORPORATION.—It is the duty of a municipal corporation, to so maintain its sewer system, and the outlets thereof, so that they shall not be a nuisance to property owners.

6. SEWERS—TREATMENT OF SEWAGE CHEMICALLY—DUTY OF COMMISSIONERS.—Where it appeared to have been practicable, and could be done at a reasonable cost, *held*, it was the duty of certain sewer commissioners, to so treat the sewage in the septic tank, as to destroy the odors thereof, and render the same otherwise unobjectionable, and that it was the duty of the municipal corporation to maintain the sewer system in that manner.

7. SEWERS—NUISANCE—EVIDENCE.—Evidence held to show that a septic tank, as maintained by a city, constituted a nuisance by reason of odors arising therefrom, and the nature of the material discharged into a stream, and that the statutes authorizing the construction and maintenance of sewer systems, did not contemplate or authorize the maintenance of nuisances.

8. SEWERS—NUISANCES—LIMITATIONS.—The fact that sewers are of permanent construction, does not render the nuisance, if any, permanent, also, and when a sewer system was so constructed and maintained as to constitute a nuisance, the nuisance is of a continuing or recurring nature, and an action by plaintiffs on account of the nuisance is not barred by the three-year statute of limitations.

9. NUISANCE—MAINTENANCE OF SEWER—EQUITABLE RELIEF—EQUITY JURISDICTION.—Where the construction and maintenance of a sewer constitutes a nuisance, the municipal corporation, sewer district, or their officers, may be enjoined from creating a nuisance, or to abate one already created by them.

10. SEWER DISTRICTS—COMMISSIONERS—AUTHORITY—CONTROL BY CITY.—The object of the organization of a sewer district and the authority of its board of commissioners is limited to the construction of the sewer and paying for same; and when the improvement is completed it becomes subject to the control of the city.

Appeal from Benton Chancery Court; *T. H. Humphrey,* Chancellor; reversed.

Rice & Dickson, for appellant.

1. A flagrant and dangerous nuisance was proven. 102 Ark. 288; 85 *Id.* 553-4; 5 Pom. Eq., § 539; 93 Ark. 53; 77 Am. St. Rep. 335; 92 S. W. 931-2; 41 Am. St. 367; 50 *Id.* 168; Spelling on Injunction (2 ed.), § 676; 15 Cyc. 728; 54 Ark. 144; Kirby's Dig., § 3965; 63 Pac. 557; 60 S. W. 593; 51 Pac. 557; 47 S. W. 70. The injunction should have been made permanent, after a reasonable time to repair. Cases, *supra.* The individual members of the board were liable. 103 Ark. 270. The nuisance was continuing and grew more aggravated. It is immaterial how appellees acquired their property or right-of-way, whether under the law of eminent domain or by purchase. Where one uses his property so unreasonably as to annoy, injure or endanger the comfort, health or safety of another, * * * he creates a nuisance. It is no defense that the business is conducted in a careful manner. 102 Ark. 288. The acquiring of the right-of-way by condemnation does not give the right to maintain a nuisance. 93 Ark. 53; 77 Am. St. 53; 92 S. W. 931.

Oral consent is not sufficient to warrant the establishment of the plant, or the discharge of water on a party's

land, and it may be recalled. 41 Am. St. 367; 42 *Id.* 840. A company is liable to damages and to be enjoined from further contamination of a stream already contaminated. 50 Am. St. 168. A public agent is liable, and injunction will be against it, if irreparable injury is done. Spelling on Inj. (2 ed.), § 876.

The petition and ordinance does not authorize appellees to empty their refuse on appellant's premises. 103 Ark. 270.

The appellees, *pro se.*

1. Appellees were not trespassers. Kirby's Digest, § § 5674, 2921; 103 Ark. 270.

2. The board could lawfully go outside the city limits to procure an outlet for the sewer and enter on appellants' lands and appropriate same as an outlet, but appellants were entitled to just compensation for damages in a suit at law. They have already exercised that right. Kirby's Dig., § § 2921, 5674; 107 Ark. 442; *El Dorado* v. *Scruggs,* 113 Ark. 239.

3. The allegations of nuisances were not proved.

HART, J. R. C. Jones and Martin Wheatley instituted separate actions in the chancery court against the city of Rogers, Sewer Improvement District No. 3 of the city of Rogers, and the individuals comprising the board of commissioners of said improvement district. The causes were consolidated for the purpose of trial.

Among other allegations contained in the complaint are the following:

That the plaintiffs are farmers and reside on their farms near the city of Rogers, in Benton County, Arkansas.

That a natural drain or water course runs through their land in which water flows the year round.

That a sewer improvement district was organized in the city of Rogers and sewers constructed under it.

That plaintiffs' farms were situated within a mile of the city limits, and that they resided thereon.

And that a septic tank was constructed near their farms and that the effluent from it flowed through the natural drain or water course on their land.

The allegations of the complaint state that the septic tank was maintained in such a manner as to constitute a nuisance and the prayer of the plaintiffs is that the nuisance be abated and the defendants restrained from maintaining a septic tank in such a way as to constitute a nuisance.

The cause of action against the city of Rogers was dismissed by plaintiffs and upon a hearing of the cause the chancellor dismissed the complaint for want of equity. The plaintiffs have appealed.

(1) In the absence of a statute making them liable we have held that an action for tort will not lie against a municipal corporation or local improvement district or the officers thereof because such corporation and their officers are merely agents of the State for governmental purposes. For cases in point with reference to municipal corporations and their officers, see the following: *Browne* v. *Bentonville,* 94 Ark. 80; *Franks* v. *Holly Grove,* 93 Ark. 250; *Gregg* v. *Hatcher,* 94 Ark. 54; *Gray* v. *Batesville,* 74 Ark. 519; *Fort Smith* v. *Dodson,* 51 Ark. 447; *Fort Smith* v. *York,* 52 Ark. 84; *Arkadelphia* v. *Windham,* 49 Ark. 139; *Trammel* v. *Russellville,* 34 Ark. 105.

For cases in point as to improvement districts and their officers, see: *Board of Improvement of Sewer District No.* 2 v. *Moreland,* 94 Ark. 380; *Wood* v. *Drainage District No.* 2 *of Conway County,* 110 Ark. 416.

Article 2, section 22, of our Constitution provides that private property shall not be taken, appropriated or damaged for public use without just compensation.

(2) Under our statute, sewer improvement districts may be formed in cities and outlets therefor secured outside the corporate limits of the city. See *Kraft* v. *Smothers,* 103 Ark. 270.

As the Constitution forbids the taking of private property for public use without just compensation, the grant of the Legislature to cities and towns to form sewer improvement districts and to obtain an outlet therefor

outside the corporate limits of such municipality imposes upon such corporations the correlative duty to make just compensation for property so taken.

(3) In the exercise of this power we have held that the turning of sewage by a municipal corporation into a stream to the injury of lower riparian owners is within the constitutional provision requiring compensation for damaging property for public use, and that in such cases the damages should be assessed on the theory of a permanent taking under the right of eminent domain. *McLaughlin* v. *City of Hope,* 107 Ark. 442.

The same principle was recognized in the *City of El Dorado et al.* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846, where the sewer improvement district commissioners constructed a sewer and appropriated the property of a land owner outside of the limits of the corporation for the purpose of discharging the effluent from the septic tank of the sewer district.

In the case at bar the plaintiffs instituted actions in the circuit court for the taking and damaging of their property by the sewer improvement district and recovered judgments therefor. As we have already seen, the flow from the septic tank emptied into a natural drain or water course which flowed through plaintiffs' land and which contained water throughout the year.

(4) The measure of damages to a riparian owner from the use of a stream as an outlet for sewage is the difference in value of the land before and after the stream was so used. This rule was laid down in the case of *McLaughlin* v. *City of Hope, supra,* and *City of El Dorado* v. *Scruggs, supra.*

(5) In the circuit court the plaintiffs were allowed to recover damages according to this rule, that is to say, they were entitled to and allowed to recover damages for the land taken and damaged by the construction of the sewer. The damages allowed in such cases are those which result from a proper construction of a sewer. According to the allegations of the complaint, after the sewer was constructed it was maintained in such a way as to constitute a nuisance. The right to construct sew-

ers and drains implies no right to create a nuisance, public or private. It is the duty of the commissioners of the sewer district to construct the sewer so that it will not become a nuisance to any neighborhood or to any particular inhabitant thereof; and it is the duty of the city after the sewer has been turned over to it to avoid the same result by properly maintaining and repairing the sewer after it is constructed. In Joyce on Nuisances, paragraph 284, page 373, is said:

"Where municipal, quasi-municipal, and public bodies generally proceed to exercise, or do exercise their powers in constructing and maintaining great public works of a sanitary nature, such as a sewerage system, and the question of the extent of or limitations upon their powers has come before the courts, these powers and the rights of the public and of private individuals in connection therewith have occasioned much discussion. But notwithstanding certain decisions not in harmony herewith, it may be stated that even though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its powers in such a manner as to create by a disposal of its sewage a private nuisance without making compensation for the injury inflicted or being responsible in damages therefor or liable to equitable restraint in a proper case, nor can these public bodies exercise their powers in such a manner as to create a public nuisance for the grant presumes a lawful exercise of the power conferred and the authority to create a nuisance will not be inferred." See, also, 2 Dillon, Municipal Corporations (4 ed.), ¶ 1047, (5 ed.), § 1740.

(6) The right conferred upon the sewer commissioners to construct the sewer system and to obtain an outlet therefor outside the city limits, carried with it the power to condemn lands necessary for the outlet and for the construction of the septic tank and filter beds. In the suit brought in the circuit court the plaintiffs recovered damages for all injuries to their property as were the nat-

ural and necessary result of the construction of the sewer system. While it was lawful to construct the sewer system and the plaintiffs have received compensation for the injury to their property incident to the construction thereof, it by no means follows, that either the city authorities or the sewer commissioners have the right to act in excess of the powers conferred upon them by law. In short, it was the duty of the sewer commissioners to use due care in the construction of the sewer system, and the same duty devolved upon the city authorities in the operation and maintenance thereof.

The record shows that it was practicable at a reasonable cost as part of the construction of the sewer system to chemically treat the sewage in the septic tank so that the solid matter was reduced to a liquid form, and the noxious and harmful odors would to a great extent be eliminated. It was the duty of the sewer commissioners to adopt such a method in the construction of the sewer system and it was likewise the duty of the city authorities to use such a method in the maintenance of the system.

This brings us to the question of whether the sewer system was operated and maintained in such a manner as to constitute a nuisance.

The record in this case is long. Numerous witnesses were called to testify, and their evidence to a considerable extent is conflicting.

The evidence on the part of the defendants tends to show that the sewer and the septic tank were constructed in a proper manner and that there was no serious pollution of the air and no deposit of fecal matter or other solid substance on the lands of the plaintiffs or on other lands adjacent to the septic tank.

On the other hand, the testimony on the part of the plaintiffs establishes the fact that when septic tanks, filtering beds and other devices for purifying sewage are constructed, operated and maintained in a proper manner, the solid matter which goes into the septic tank is reduced to a liquid form and that the flow from the septic tank is practically odorless and that no noxious odors of any serious consequence emanate from the septic tank;

that the contents of the septic tank are chemically treated in such a way that the liquid which flows therefrom contains but little impure matter.

Several witnesses, including physicians and other experts, testified that they had been on the land adjacent to the septic tank and on the land of the plaintiffs and that fecal matter and other solid substances were allowed to flow from the tank along with impure water and that they were precipitated upon the lands of the plaintiffs. They testified as to the volume of such solid substances as were allowed to flow from the tank and to the intensity of the odors therefrom.

No useful purpose could be served by stating this testimony in detail; it is sufficient to say in a general way that the testimony showed that the odor came from the decaying and putrefying organic matter contained in the septic tank and that these offensive odors were an indication of weak septic action and lack of purification. Some of the water which flowed from the tank was chemically treated and found to contain colon bacilli and to produce 75 per cent gas. The evidence of the experts shows that this could have been avoided by a proper operation and maintenance of the sewer system.

(7) After a careful consideration of the whole record, we are of the opinion that the clear preponderance of the evidence shows that the sewer system was operated and maintained in such a way as to constitute a nuisance. Our statute authorizing cities and towns to form improvement districts for the construction of a system of sewers did not intend to authorize the creation of a nuisance.

(8) The defendants pleaded the statute of limitations. The sewer system was created and put in operation in April, 1910, and the sewage has been continuously discharged on the lands of the plaintiffs for a period of three years thereafter. We do not agree with the contention of the defendants, however, that the action is barred by the statute of limitations. The mere fact that sewers are of permanent construction does not render the nuisance, if any, permanent also. As we have already

seen, the nuisance in the present case arose from faulty operation and maintenance of the sewer. It was, therefore, of a continuing or recurring nature, and the action of plaintiffs was not barred.

(9) The action of the defendants in negligently maintaining the sewer approximately and efficiently contributed to the nuisance. Thus the fundamental basis of all equity jurisdiction in tort manifests itself and the right of the plaintiffs to equitable relief is clear and indisputable. Pomeroy's Equity Jurisprudence, Vol. 5, § 514. See, also, *Durfey* v. *Thalheimer*, 85 Ark. 544; Joyce on Nuisances, § 284, page 373.

As we have already seen, this court has uniformly held that neither municipal corporations nor local improvement districts nor their officers may be sued at law for tort; but it does not follow that in a proper case they may not be enjoined from creating a nuisance or be required to abate one already created by them. Indeed, this affords ground for equitable relief in actions like this.

(10) The object of the organization of a sewer district and the authority of its board of commissioners is limited to the construction of the sewer and paying for same. When completed, they become subject to the control of the city. *Pine Bluff Water Co.* v. *Sewer District*, 56 Ark. 205; *City of El Dorado* v. *Scruggs, supra.*

There is some conflict in the testimony as to whether or not the construction of the sewer has been completed. The record shows that the sewer has been in operation several years and that owing to faulty construction its operation has created a nuisance. This defect the commissioners have tried to remedy, but they have not yet succeeded. It does not definitely appear from the record whether or not the sewer has been turned over to the city authorities. It does show that the plaintiffs dismissed their cause of action against the city authorities. This they should not have done, and, inasmuch as the decree must be reversed for the causes above stated, they will be permitted to amend their complaint, if they are advised so to do, to again make the city a party to the ac-

tion; and the chancellor will be directed to enjoin the city authorities or sewer commissioners, whichever now have control of the operation and maintenance of the sewer system, from operating and maintaining it so as to create or continue a nuisance on the lands of the plaintiffs.

It is so ordered.

KILPATRICK v. ROWAN.

Opinion delivered June 7, 1915.

1. TRIAL—RIGHT TO OPEN AND CLOSE—ACTION ON NOTE—NON COMPOS DEFENDANT.—In an action on a promissory note, the defendant's guardian answered, denied liability on the ground that the defendant was *non compos mentis*, when the note was executed; *held*, the burden of proof was on the plaintiff and he had the right to open and close the argument.
2. APPEAL AND ERROR—GROUNDS FOR REVERSAL NOT RAISED BELOW.—A ground for reversal can not be raised on appeal, which was not incorporated in the motion for a new trial.
3. EVIDENCE—PAYMENT OF CONSIDERATION.—It is competent to show that the consideration has not been paid as recited in a written instrument.
4. ACTIONS—TRANSFER—ACTION ON NOTE.—An action is triable at law, which is brought on a promissory note, and the plea interposed that the defendant was *non compos mentis* when he executed the note and it is proper for the law court to refuse to transfer the cause to equity.

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

STATEMENT BY THE COURT.

Appellee brought suit against William Kilpatrick on a promissory note for $4,000, alleged to have been executed by said Kilpatrick as consideration for the sale of a certain tract of land conveyed to him on the 9th day of April, 1912, by a warranty deed.

The complaint alleged that the note recited that no lien was retained for the purchase money and that a guardian had been appointed for said Kilpatrick in September, 1912, on the alleged ground of insanity.

The guardian answered, making a statutory denial of the allegations relative to the sale of the land and the execution of the note, and alleged further the incompetency of the defendant to contract at the time and that plaintiff had on the 5th day of August, 1912, conveyed certain other lands to said Kilpatrick for a certain designated consideration. That his said ward was *non compos mentis* at the time and incapable of making the contract and that all of the notes and deeds, including those sued on should be cancelled and the property reconveyed to the plaintiff by authority of the chancery court. That the title should be divested from the defendant, Kilpatrick, and vested in the plaintiff and moved to transfer the cause to equity, which motion was denied.

The note was introduced in evidence and it was shown by the testimony of Mr. Young, a notary public, that the note was executed by Kilpatrick at the time the deed of conveyance of the land was made to him by Rowan and wife.

Rowan also testified relative to the transaction over the objections of the guardian. There was testimony relating to the value of the lands and to the mental capacity of the maker of the note.

The jury returned a verdict in favor of the plaintiff for the amount of the note sued on, from the judgment upon which this appeal is prosecuted.

H. B. Means and *Wm. R. Duffie,* for appellant.

1. The transfer to equity should have been allowed. The matter was *exclusively of equitable jurisdiction,* and should have been settled in one suit. 1 Pom. Eq. Jur., § 254; 53 Ark. 303; 87 *Id.* 85.

2. Transactions with insane persons can not be proven. Kirby's Dig., § 3093.

3. Defendant was entitled to open and close the argument, the burden of proof being upon him. 82 Ark. 331.

J. C. Ross and *D. D. Glover,* for appellee.

1. The motion to transfer was properly denied. The law court had jurisdiction. 93 Ark. 103; 105 *Id.* 5.

2. Kirby's Digest, § 3093, does not apply, but if it was error to admit the testimony of Rowan, it was waived. 66 Ark. 292; 67 *Id.* 47; 75 *Id.* 251. The facts testified by Rowan were otherwise proved, and the testimony was not prejudicial. 68 Ark. 607; 74 *Id.* 417; 82 *Id.* 447; 105 *Id.* 180.

3. It is permissible to show by parol evidence the real consideration for a deed for right-of-way. 86 Ark. 309; 90 *Id.* 426; 99 *Id.* 218.

4. The objection to testimony was not made at the trial, and was not preserved in the motion for new trial. 79 Ark. 470; 105 *Id.* 353; 85 *Id.* 396-405; 110 *Id.* 379-388.

5. The burden was on plaintiff, and he had the right to open and close the argument. 82 Ark. 331.

KIRBY, J., (after stating the facts). (1) It is contended for appellant that the court erred in refusing him permission to open and close the argument to the jury and also in permitting the appellee to testify about the transaction with the ward of appellant.

The statute provides that "The burden of proof in the whole action lies on the party who would be defeated, if no evidence were given on either side" (section 3107, Kirby's Digest), and also that it is the duty of the guardian of a person of unsound mind to file an answer denying the material allegations of the complaint, prejudicial to such defendant. Section 6107, Kirby's Digest.

The answer herein denied the execution of the note sued on, and if no evidence had been introduced, judgment must necessarily have been rendered for the defendant, and this notwithstanding there was no plea of *non est factum.* The genuineness of the instrument could have been contested under the denials of the answer. *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 109; *Hall* v. *Ray,* 85 Ark. 272.

Since the burden of proof was on the plaintiff, he had the right to open and close the argument, and the court committed no error in its ruling upon the question. Section 6196, Subdivision 6, Kirby's Digest.

(2) No exceptions and objections to the testimony of appellee relating to the transaction with the ward, William Kilpatrick, are incorporated in the motion for a new trial as grounds therefor and same are thereby waived. *St. Louis S. W. Ry. Co.* v. *McNeil,* 79 Ark. 470; *Thomas* v. *Jackson,* 105 Ark. 353; *Burrow* v. *Hot Springs,* 85 Ark. 405.

(3) The grounds numbered 11 and 12 of the motion for a new trial are the only ones that even mention anything relative thereto and in one, it is claimed that the court erred in permitting the note sued on to be exhibited in evidence and considered by the jury, and in the other that the court erred in permitting the appellee to contradict the recitals in the deed of conveyance acknowledging the payment of $4,000 in cash. Neither of these assignments disclose that the objection was made to the competency of the witness to testify about a transaction with the ward.

The appellant guardian, himself, introduced the deed of conveyance with its recital of payment in evidence upon cross-examination of the appellee, and it is complained that the court erred in allowing the witness to contradict the recitals of the deed. It is competent, however, to show that the consideration has not been paid as recited in the written instrument. *Cox* v. *Smith,* 99 Ark. 218; *Magill Lbr. Co.* v. *Lane-White Lbr. Co.,* 90 Ark. 426.

Appellee after the recital of the deed acknowledging payment was introduced in evidence by appellant, stated that he took the note in payment of the purchase money of the land and that no lien was retained therefor. He was testifying about the deed made by himself and at the instance of the guardian in doing so. Moreover, the testimony of disinterested witnesses showed the execution of the note by William Kilpatrick and there was no testimony attempted to be introduced showing the same had been paid, except the recital of the deed already mentioned.

(4) Neither did the court err in refusing to transfer the cause to equity. Appellee had the right to bring his action upon the note in a court of law and to have a trial

thereof by a jury and appellant's remedy at law was adequate, since he had the right to show that his ward was incompetent to transact business at the time of the execution of the note sued on, as a defense thereto. The answer in fact did not set up any equitable relief to which appellant was entitled.

The evidence tends strongly to show that William Kilpatrick was of unsound mind and not capable of contracting at the time of the transaction and execution of the note and that he was overreached and imposed upon in the sale of the lands at the price agreed upon, but all the issues were submitted to the jury under fair instructions and they have found in appellee's favor, and the verdict is not without sufficient evidence to sustain it.

The record discloses no prejudicial error and the judgment is affirmed.

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

Opinion delivered June 7, 1915.

1. CARRIERS—OPERATION OF TRAIN—INJURY TO PASSENGER—PRESUMPTION.—A *prima facie* case of negligence is made out against a railroad company by proof of an injury to a passenger while boarding or alighting from a train, caused by the operation of the train.
2. CARRIERS—OPERATION OF TRAIN—INJURY TO PASSENGER—CONFLICT OF LAWS.—The presumption of negligence arises in a suit brought in this jurisdiction upon proof of the fact of injury to a passenger by the operation of a railroad train in another State, where no such rule obtains, such presumption relating to the burden of proof and is governed by the law of the forum.
3. CARRIERS—OPERATION OF TRAIN—INJURY TO PASSENGER—BURDEN OF PROOF.—In an action for damages for personal injuries, caused by the operation of a train, the burden is upon the plaintiff to show the fact of injury by the operation of the train, and the damage resulting therefrom.
4. CARRIERS—INJURY TO PASSENGER—OPERATION OF TRAIN.—It is prejudicial error to tell the jury, in an action for damages for personal injuries caused by the operation of a train, that plaintiff assumed the risk of injury, when she became a passenger and attempted to board the said train, while the same was at a stop at a station to

receive passengers, by reason of a lurch or jerk of the train, while the same was at a stop.

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

STATEMENT BY THE COURT.

This cause is revived here in the name of Amis, appellant's administrator, because of her death pending the appeal.

Plaintiff brought this suit for personal injuries alleged to have been received while she was attempting to board defendant's train at Alexandria, La., alleging that she started to step from the box to the lower step of the car; that it lurched suddenly backward and threw her against the steps and as she straightened up it lurched forward and caught her foot in the space between the tread of the lowest step and the rise between the steps and that she fell backward, straining and injuring her leg permanently.

Her testimony tended to support the allegations of the complaint, and physicians testified that she had sustained severe injuries to her left foot.

On the other hand, the testimony for the railroad company tended to show that there was no jerk or lurch of the train whatever during the time passengers were getting on, on the occasion when plaintiff claimed to be injured and none of the crew saw her falling and that no complaint was made that she had received an injury.

Her reputation was shown to be bad, and the proof also tended strongly to show that the steps of the coach were solid metal, with no space whatever between the tread and the rise and that there was no defect therein and no place where her foot could have been caught or fastened.

Other witnesses testified that she had received an injury to her foot at the town of Eros, La., where she stepped through a bridge or defective sidewalk, or into a pile of refuse of some kind and that she was crippled thereby.

The court charged the jury, giving over appellant's objection instructions numbered 2, 14 and 15, as follows:

"2. The burden is upon the plaintiff in this case to prove all of the material allegations in her complaint, and before she can recover, she must prove these by a preponderance of the evidence; that is, a greater weight of the evidence, and unless she has done so, you must find for the defendant.

14. You are instructed that unless plaintiff has shown by a preponderance or greater weight of the evidence that the injuries alleged in her complaint are the result of some negligent act of the defendant, its agents or servants, then she can not recover, it matters not how she may have received her injuries, or what the extent of her injuries is.

15. You are instructed that even though you may believe from the evidence that plaintiff fell while she was attempting to board the train, and even though you may further believe that she was injured by the fall; yet this is not sufficient to entitle her to recover, unless she go further and prove by a greater weight of the evidence that the cause of such fall was some act of negligence on the part of the railway company, and if she fell from some other cause other than some act of negligence, on the part of the railway company, then she can not recover, and your verdict will be for the defendant."

And also 12 and 13, as follows:

"12. You are instructed that when one becomes a passenger on a railroad train, that he assumes all risk of being injured by the usual and ordinary lurches and jerks of the train; and if plaintiff's alleged injuries occurred from such lurch or jerk, then she can not recover, and your verdict will be for the defendant.

"13. You are instructed that contributory negligence on the part of the plaintiff, if any degree, however small, will bar a recovery on her part; therefore, if you believe from the evidence that plaintiff was guilty of negligence in the least degree which contributed to her injury, then she can not recover, and your verdict will be for the defendant."

The jury returned a verdict against plaintiff, and from the judgment thereon this appeal is prosecuted.

Wynne & Harrison, for appellant.

1. A *prima facie* case of negligence is made against a railway company by proof of an injury caused by the operation of its train, and thereupon the burden is upon the company to show that it was not negligent. Kirby's Dig., § 6773; 73 Ark. 548; 81 *Id.* 579; 83 *Id.* 221; 87 *Id.* 581; 87 *Id.* 308; 113 Ark. 265. The instructions placed the burden on plaintiff to show negligence. This was error.

2. Instruction No. 12 was erroneous and prejudicial. 87 Ark. 581-308; 215 Fed. Rep. 37; 108 La. 423; 111 La. 395, etc.

3. Instructions 11 and 13 are abstract. 101 Ark. 537.

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

1. The burden was on plaintiff to prove negligence. 16 Cyc. 934-5; 74 Ark. 607; 57 *Id.* 136; Kirby's Dig., § § 3106-7.

2. To hold a carrier liable for injury to a passenger by reason of a jolt of the car, or jerk, plaintiff must show that it was caused by the carrier's negligence. 7 L. R. A. (N. S.) 1076. 73 Ark. 548 does not apply here.

3. The twelfth instruction was not erroneous. While it is the duty of the carrier to use the highest degree of care practicable, it is not responsible for injuries from jerks and bumps of cars usually incident to such trains when operated with such care. 2 Moore on Carriers, p. 1220; 58 S. W. 526; 72 *Id.* 717; 36 *Id.* 247; 5 N. Y. 63; 135 Ala. 417; 7 L. R. A. (N. S.) 1078.

KIRBY, J., (after stating the facts). (1) The rule is so well established in this State as to be no longer questioned that a *prima facie* case of negligence is made out against a railroad company by proof of an injury to a passenger caused by the operation of its train. Section 6773, Kirby's Digest; *Barringer* v. *St. Louis, I. M. & S. Ry. Co.,* 73 Ark. 548; *K. C. Sou. Ry. Co.* v. *Davis,* 83

Ark. 221; *St. Louis, I. M. & S. Ry. Co.* v. *Stell,* 87 Ark. 308; *St. Louis & S. F. Rd. Co.* v. *Coy,* 113 Ark. 265, 168 S. W. 1106.

And the rule is the same when the injury results from the operation of the train to the passenger while boarding or alighting from the train. *St. Louis, I. M. & S. Ry. Co.* v. *Stell, supra; Kansas City S. Ry. Co.* v. *Davis, supra; St. Louis, I. M. & S. Ry. Co* v. *Briggs,* 87 Ark. 581; *Choctaw, Okla. & Gulf Rd. Co.* v. *Hickey,* 81 Ark. 579; *St. Louis, I. M. & S. Ry. Co.* v. *Williams,* 117 Ark. 329.

(2) The presumption of negligence arises in a suit brought in this jurisdiction upon proof of the fact of injury to a passenger by the operation of a railroad train in another State where no such rule obtains, such presumption relating to the burden of proof and being governed by the law of the forum. *St. Louis & S. F. Ry. Co.* v. *Coy,* 113 Ark. 265, 168 S. W. 1106.

It is contended that said instructions 2, 14 and 15 contravene this well established rule of law and that the court erred in giving them.

(3) Instruction numbered 2 only tells the jury that the burden is upon the plaintiff to prove the material allegations of her complaint by a preponderance of the evidence and there was no error in giving it, the plaintiff being required to prove by a preponderance of the testimony that she was injured while attempting to board the train by the sudden lurching or jerking of it. Such facts being proved, the presumption arises that the railroad company was negligent without any further proof of any negligent act upon its part.

This presumption of law, however, does not affect the burden of proof nor relieve plaintiff from showing the fact of injury by the operation of the train and the damage resulting therefrom. 16 Cyc. 934-5; *Prescott & N. W. Ry. Co.* v. *Brown,* 74 Ark. 607; *Railway* v. *Taylor,* 57 Ark. 136; Kirby's Digest, § § 3106, 3107.

The only question for the jury was whether plaintiff was jerked or thrown down by the starting, jerking or

lurching of the train while she was attempting to board it as a passenger, and after it had come to a stop for that purpose, and by instructions 14 and 15, the court only meant to tell the jury that notwithstanding appellant proved she fell and was injured while attempting to board the train, she must go further and establish the fact that the fall was caused by some negligent act of the railroad company, or, in other words, by the jerking and lurching of the train after it had stopped to take on passengers, which was the only question of negligence submitted to the jury for their consideration.

If appellant feared that the jury did not understand or might be misled by the particular language of the instruction, she should have made a specific objection thereto and the court would doubtless have eliminated it.

(4) We agree with appellant's contention that instruction numbered 12 is erroneous and prejudicial. It is not a correct statement of the law relating to the case made. This appellant was attempting to board the train after it stopped and during the reasonable time it was supposed to stand for allowing passengers to embark, and the train was not expected to move, lurch or jerk in such a way as to endanger her safety in so doing, and she assumed no risk of injury therefrom, as the instruction erroneously told the jury. For the error in giving this instruction, the judgment will be reversed.

Instructions numbered 11 and 13, relating to the duty of appellee not to hold its train more than a reasonable time for the embarkation of passengers and that contributory negligence upon the part of the plaintiff in attempting to board the train, would bar her recovery, appear to be abstract, there being no testimony in the record to support them.

For the error in giving said instruction numbered 12, the judgment is reversed and the cause remanded for a new trial.

McKENZIE v. CROWLEY, ADMINISTRATOR.

Opinion delivered June 7, 1915.

ADMINISTRATION—APPEAL FROM ORDER OF PROBATE COURT—BOND FOR COSTS. —A physician presented a claim for professional services rendered deceased during his last illness. The claim was disallowed, and the probate court gave judgment in the physician's favor for a sum less than his claim. *Held*, on an appeal from this order to the circuit court, that the claimant was not required to give a bond for costs under Kirby's Digest, § 1348, as amended by Act No. 327, Acts 1909, p. 956.

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

W. W. Bandy, for appellant.

There is no ambiguity in the statute. The words, "judgment creditor," were used in their legally accepted sense, and that this is true is shown by the words joined to them by the conjunction "or," the words "heir, devisee, legatee."

To hold that the phrase, "judgment creditor," embraces the class of claims, such as accounts, notes, etc., which, when presented to the probate court, might be partly allowed, such partial allowance making a judgment creditor of the claimant, would result in making a proviso broader than the act. 46 Ark. 306.

To construe this phrase to embrace claimants whose demands have been only partially allowed by the probate court leads to an absurdity, and the Legislature will not be presumed to have intended to do an absurd thing. 143 U. S. 457; 40 Ark. 431. See also 48 Ark. 307; 61 Ark. 226, 241.

No brief filed for appellee.

SMITH, J. Appellant presented to appellee, as administrator of the estate of B. H. Crowley, Sr., a properly verified account for services rendered as a physician during the last illness of appellee's intestate. The claim amounted to $56, and was disallowed by the administrator. Appellant then presented the claim to the probate court, where he was allowed $6, and he prayed, and was

granted, an appeal to the circuit court. Appellee filed a motion in the circuit court to dismiss the appeal because appellant had failed to file in the probate court a bond to cover the costs of the appeal. The circuit court sustained the motion and dismissed the appeal. Exceptions were duly saved, and this appeal has been prosecuted from that order.

The appeal involves the construction of Act No. 327 of the Acts of 1909, found at page 956. This act was an amendment of section 1348 of Kirby's Digest, and the assumption is that it was passed to cure the deficiency of the law pointed out in the opinion of this court in the case of *Hall* v. *Rutherford,* 89 Ark. 553. In that case it was held that the administrator was the proper party to represent the estate in the matter of allowing or defending claims against it, and the right of appeal from adverse orders involving the estate was held to be a right to be exercised by the administrator and was denied persons interested in the estate who had not been made parties to the record. Section 1348 granted a year in which to take an appeal to the circuit court from the probate court.

The act of 1909, above referred to, made no change in section 1348 of Kirby's Digest, except to add the provision that any heir, devisee, legatee, or judgment creditor of the estate who feels aggrieved may at any time within six months after the rendition thereof prosecute an appeal to the circuit court from any final order or judgment of the probate court by filing an affidavit and prayer for appeal with the clerk of the probate court, together with a bond to pay the costs of the appeal if the judgment of the probate court is affirmed. This amendatory act further provides that, upon the filing of the affidavit and bond for costs the court shall make an order granting the appeal at the term at which such judgment or final order was rendered, or at any term within six months thereafter. And the act further provided that any such heir, devisee, legatee or judgment creditor of the estate may likewise, upon executing a bond for costs, prosecute an appeal to the Supreme Court from the circuit court.

The court below took the view that appellant having been allowed a portion of his demand became a judgment creditor, and could appeal only by complying with the amendatory act, and the appeal was dismissed because the bond had not been given.

The holder of a demand or claim against an intestate had the right of appeal from any adverse order affecting such demand or claim independently of the act of 1909, and that act did not profess to confer that right upon him nor to regulate the manner in which he should exercise that right. It gave the right of appeal to the persons named, who did not previously have it, and whose status was fixed at the death of the intestate and who were supposed to be chiefly interested in the *corpus* of the estate.

If this act was held applicable to the demand holder who was seeking to probate his claim or demand, then a bond for costs would be essential upon an appeal from a judgment allowing less than the face of the demand, while no bond for costs would be required if the demand was wholly rejected. The same requirements are provided for an appeal from the circuit court to the Supreme Court as are provided for an appeal from the probate court to the circuit court. But in the prosecution of these appeals the litigant who had wholly failed to establish any part of his demand would be favored over the litigant who had succeeded in part. The bond would be essential in the one case, and not in the other. No question is involved in this case of the right of one creditor who has probated his demand to resist the right of another creditor to probate his.

We think this act of 1909 should be construed to apply only to those classes whose right of appeal was created by the act, and that its requirement of a bond for the prosecution of an appeal is not to be extended to control the right of appeal of those persons whose right was not created by the amendatory act. The court below erred, therefore, in dismissing appellant's appeal for the want

of a bond for costs, and the judgment of the court below will be reversed and the cause remanded for a hearing upon the merits of the case.

THIBAULT v. MCHANEY, RECEIVER.

Opinion delivered March 22, 1915.

1. IMPROVEMENT DISTRICTS—REPEAL OF STATUTE CREATING—ALLOWANCE OF CLAIMS FOR PERMANENT WORK.—Where the estimated cost of an improvement contemplated exceeds the benefits, the Legislature has no power in a repealing act which validated the assessments, to authorize the chancery court to allow claims for permanent work done under contract with the Board of Directors of the improvement district.
2. IMPROVEMENT DISTRICTS—ESTIMATED COST OF IMPROVEMENT—BENEFITS—LEGISLATIVE ACT VALIDATING ASSESSMENTS.—Where the estimated cost of an improvement contemplated, exceeds the benefits to be derived therefrom, an act of the Legislature validating an assessment for such improvement, is arbitrary and unconstitutional.
3. IMPROVEMENT DISTRICTS—TAKING PROPERTY WITHOUT COMPENSATION—EXCESS OF ASSESSMENT OVER BENEFITS.—To subject the lands of an improvement district to the payment of claims based on contracts for permanent work, in excess of the benefits to be derived, amounts to a taking of private property for public use without compensation.
4. IMPROVEMENT DISTRICTS—CONTRACTS OF BOARD IN EXCESS OF AUTHORITY—RIGHT OF PROPERTY OWNERS TO OBJECT.—The owners of land in an improvement district may set up in the chancery court, the invalidity of contracts made with the board of directors for permanent work, where the same were made before an assessment of benefits was made.
5. IMPROVEMENT DISTRICTS—ASSESSMENT OF BENEFITS—CONTRACT FOR PERMANENT WORK BEFORE MAKING ASSESSMENTS.—The directors of an improvement district who enter upon contracts for permanent work, and have the same executed in advance of an assessment of benefits will be held to have usurped functions foreign to their powers under the statute creating the improvement district, and such contracts will be held to be void. Act 420, page 1112, Acts of 1907, as amended by Act 104, Acts of 1909, page 303.
6. ESTOPPEL—CONTRACTS MADE BY BOARD OF IMPROVEMENT—ESTOPPEL OF LAND OWNERS.—There can be no estoppel in a contractor's favor,

and against land owners, if the subsequent proceedings in the creation of an improvement district failed to warrant the action previously taken by the board of directors of the improvement district.

7. IMPROVEMENT DISTRICTS—LEGISLATIVE ACT ABOLISHING DISTRICT—PROVISION FOR PRELIMINARY EXPENSES.—Where a local improvement district has been created for the purpose of benefiting the real property included therein, it is within the power of the Legislature, if it abolishes such district, to provide for the preliminary expenses, that is, those expenses which have been incurred in the formation of the district, and in all such proceedings as were necessary, and as were had, in determining the feasibility of the improvement contemplated.

8. IMPROVEMENT DISTRICTS—ALLOWANCE FOR PRELIMINARY EXPENSES—ANTICIPATED BENEFITS.—Anticipated benefits, though never realized, will justify an allowance for the preliminary expenses incurred in determining whether a contemplated improvement can be made at a cost not to exceed the benefits finally assessed.

9. IMPROVEMENT DISTRICTS—"PRELIMINARY EXPENSES."—"Preliminary expenses" include the cost incurred in litigation to determine whether or not the act creating the district was valid, and attorney's fees as counsel to the board in the preliminary work of organization; also such costs as expenses for maps, plats, surveys of land and for engineering expenses in preparing the plans and specifications.

10. IMPROVEMENT DISTRICTS—PAYMENT FOR PRELIMINARY EXPENSES.—Act 127, page 534, of the Acts of 1913, repealing the act creating Fourche Drainage District in Pulaski County, construed as intending to provide for the payment, out of the assessment returned on the lands in the district, of the preliminary expenses incurred in the creation of the drainage district and in ascertaining the feasibility of the proposed improvement, *held* valid.

11. IMPROVEMENT DISTRICTS—PRELIMINARY EXPENSES—BASIS FOR SPECIAL TAX TO PAY SAME.—The assessed value of the anticipated benefits, which the Legislature validated by Act 127, page 534, of the Acts of 1913, for the purpose of paying the preliminary expenses of the Fourche Drainage District, for the purpose of paying the preliminary expenses incurred, will form the basis upon which the special tax must be levied to pay these expenses.

12. IMPROVEMENT DISTRICTS — PRELIMINARY EXPENSES — ASSESSMENT AGAINST LANDS.—To meet the constitutional requirement of equality and uniformity, the preliminary expenses, incurred in the formation of an improvement district must bear equally upon all the lands included in the district in proportion to the value of the anticipated benefits assessed against these lands.

13. IMPROVEMENT DISTRICTS—ASSESSMENT AGAINST LANDS—UNEQUAL ASSESSMENTS.—Certain lands included in a levee district were also included within the boundary of a drainage district. *Held*, in assessing the property within the drainage district, for benefits, the land within the levee district can not be assessed for greater benefits than the land in the drainage district, which was not included in the levee district.

14. IMPROVEMENT DISTRICTS—ASSESSMENT OF BENEFITS—UNIFORMITY.—The improvement contemplated in Act 420, page 1112, Acts of 1907, as amended by Act of 1909, page 304, can not be arbitrarily divided into sections so as to prevent the assessment from being uniform upon all the property designated in the district according to the basis of the valuation of anticipated benefits from the improvements.

15. IMPROVEMENT DISTRICTS—EXPENSES FOR PRELIMINARY WORK—BENEFITS—LEGISLATIVE DETERMINATION.—By Act 420, page 1112, of the Acts of 1907, as amended by Act of 1909, page 304, creating the Fourche Drainage District, the Legislature did not determine for itself that the benefit would exceed the cost of the work contemplated in the creation of the district, but left that to be ascertained by the Board of Assessors, which the commissioners of the district were authorized to employ.

16. IMPROVEMENT DISTRICTS—TESTIMONY IN EX PARTE PETITIONS—PAYMENT OF PRELIMINARY EXPENSES.—Under proceedings in the chancery court under Act 127, page 534, Acts of 1913, repealing the act creating the Fourche Drainage District, the recitals in the decree showed that the proceedings by which it was sought to close up the affairs of the drainage district and to adjust and allow all claims against it, were treated as a unit, and all the pleadings and the testimony had in any of the *ex parte* petitions were available in any part of the proceedings.

17. IMPROVEMENT DISTRICTS—LEGISLATIVE ACT ABOLISHING—PRESUMPTION AS TO AMOUNT OF BENEFITS.—The Legislature of 1913, by Act 127, page 534, of the Acts of 1913, in abolishing the Fourche Drainage District, did so for the reason that it ascertained that the improvement contemplated under Act 420, page 1112, of the Acts of 1907, would cost more than the benefits to be derived therefrom.

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

STATEMENT BY THE COURT.

The Fourche Drainage District was created by special act of the Legislature approved May 28, 1907, Act No. 420, Acts of 1907, page 1112.

The above act was amended by an act approved April 6, 1909, Acts of 1909, page 304. Both the original act and the amendatory act were expressly repealed by Act No. 127, approved March 3, 1913, Acts 1913, page 534. The second section of Act No. 127, Acts of 1913, contains the repealing clause, and is as follows:

"Jurisdiction is hereby conferred on the Pulaski Chancery Court to wind up the affairs of said district, and to that end all persons having claims against the district are required to present the same to said court for adjudication within three months after the passage of this act. Said court shall adjudicate said claims and shall appoint its receiver to collect upon the assessment of benefits heretofore made a sum sufficient to pay all claims found to be due, the tax necessary for the payment thereof to be divided into five installments as near equal as possible."

The board of directors of the Fourche Drainage District filed a petition in the chancery court setting up that "the district has made all the plans necessary for the public improvement contemplated by the act of its creation, has done a very considerable amount of work, has made numerous contracts and has incurred a large amount of indebtedness."

They prayed the chancery court to assume jurisdiction under the repealing act and to appoint a receiver and to proceed to wind up the affairs of the district in accordance with the provisions of that act. The court assumed jurisdiction, appointed E. L. McHaney as receiver, and made an order requiring the parties having claims against the district to file same with the clerk of the chancery court within three months after March 3, 1913.

Claims were presented by various parties amounting in the aggregate to over $100,000. Certain property owners in the district whose lands had been assessed, attacked the claims on the ground that they were not incurred as "preliminary and initial steps" for the purpose of determining the feasibility of the improvement contemplated by the improvement district, but were for permanent work done under contracts, which were made by the board of directors of the drainage district without authority.

Among the claims presented were those of various trust companies, for money advanced the district to pay for the permanent work that was done under these contracts, which the property owners alleged the directors had no authority to borrow. The property owners alleged that these trust companies knew at the time that they loaned the money to the district, that the money was to be used for the purpose of paying debts that had been incurred by the district without authority. They alleged that the work done resulted in no benefit to their lands, and to compel the property owners in the district to pay the debts thus incurred by the directors, would be depriving them of their property without due process of law in violation of the State and Federal Constitutions. Responses were filed to the intervention of the property owners denying its allegations and alleging that the contractors had full authority to proceed to make the contracts as they did, and to borrow the money from the trust companies, and that the money was advanced by these companies "for the legitimate purposes of the district. That the money was loaned to enable the directors of the district to pay contractors and others to whom the district was justly indebted." The allegation of the complaint that the lands of the interveners received no benefit from the expenditures was denied.

The court, after hearing the testimony, allowed the claims of the appellees, amounting in the aggregate to over $100,000.

The Fourche Levee District, which we will hereafter designate "Levee District," was organized by Act No. 183, Special Acts 1911, page 479. The lands in the levee district had already been embraced in the drainage district. The court found that the contractors of the levee district arranged with the contractors of the drainage district to build the levees needed by the levee district. That these levees were built by the drainage district, and that the lands in the levee district were benefited by this work.

The court directed its master, who was also the receiver of the drainage district, to determine the exact cost

of the levee, and "indicate upon the assessment rolls of the drainage district the land located in the levee district, and extend against said lands such sums out of the benefit already assessed, as would raise a sum sufficient to pay the cost of the levee; that after deducting the cost of the levee from the total indebtedness of the drainage district, the receiver should extend opposite each tract in the drainage district a *pro rata* of the assessments already made, sufficient to pay the balance of the indebtedness found due by the drainage district as indicated in its decree."

The levee district set up that the improvements made by the drainage district were without the consent of the property owners in the levee district, and were of no benefit unless other and different improvements were made, which would have to be made by the levee district at a great expense before any benefit could be realized.

The master reported that the drainage district built certain levees, which he described, that cost the drainage district $53,796.64, and which he reported should be borne by the drainage district as a whole; he reported $35,000 as the sum which, "in equity and justice should be borne by the property benefited by said levee, which is all the property within the limits of the Fourche Levee District."

The Fourche Levee District filed exceptions to the report of the master. These exceptions set forth that all the lands in the drainage district had been assessed on the basis that the improvements made would benefit all the lands in proportion to the amounts assessed against these lands; that the master erred in changing the assessments so as to place against the lands in the levee district a greater amount than was intended by the assessors, and was contrary to the act of March 3, 1913, dissolving the drainage district. The exceptions further specified that the master erred in certain designated amounts allowed against the levee district as its proportion of the expenses incurred, and in not allowing credits for money expended

by the levee district which should be charged to the drainage district.

The court overruled the exceptions of the levee district. The court entered a supplementary decree reciting the filing of the assessment rolls, describing the property upon which the taxes were to be assessed, and showing the assessment against each piece of property and confirming these assessments and directing the receiver to collect these assessments as follows:

"Ten per cent of the benefits as assessed by the board of assessors of the Fourche Drainage District on all property situated in the Fourche Drainage District, except the property situated in the Fourche Levee District, and upon all property situated in Fourche Levee District an assessment of ten per cent on the benefits assessed by the board of assessors of the Fourche Drainage District for the common purpose of paying the debts and expenses, and 20 per cent additional on the same by reason of the special benefits arising from the building of the levee, paid for out of funds borrowed by the directors of the Fourche Drainage District."

The court decreed that the assessments should be paid in five installments, or greater sums, at the option of taxpayers, and fixed a time for the payment of the first installment of assessment and declared the same a lien on the real estate from the time of the decree, directed the receiver to give notice annually of the time of the payment of assessments, and appointed a collector to collect these assessments. The court retained control of the cause for such further orders and decrees as might be necessary.

The Fourche Levee District and W. C. Ratcliffe, for themselves and others owning land in the levee district, filed protests against the levy of taxes against the lands, setting up, among other things, "that the receiver had placed a levy of 10 per cent on all lands outside of the levee district, and had arbitrarily placed a levy of thirty per cent on all land in the levee district contrary to the act of March 3, 1913, which contemplates a uniform percentage upon the assessment of benefits heretofore

made;" that the assessment was "unjust, confiscatory and discriminatory, and would result in the destruction of the rights of property without benefit and without compensation, contrary to the provisions of the Constitutions of Arkansas and of the United States."

Other exceptions were filed by one of the property owners, setting forth that the assessment exceeded the worth of the property and benefits derived from the improvement contemplated; that the assessors placed a nominal assessment of benefits on property in the city, and an excessive assessment upon property beyond the city limits and upon unplotted lands within the city, making same unjust and discriminatory.

These protests were overruled, and from the final decree entered, this appeal has been duly prosecuted. Such other facts as are necessary will be stated in the opinion.

Ratcliffe & Ratcliffe, for appellants.

1. The levy of the extra assessment of 20 per cent upon the lands was invalid. 59 Ark. 344; Page & Jones, Taxation by Assessment, § § 222, 223; 49 Ark. 199; 59 *Id.* 344; Page & Jones, 229-234; 39 A. L. R. 456; 86 Ark. 1, 9; 253 Ill. 578; 32 Ark. 31, 38-9; 107 Ark. 285; 172 U. S. 269; 75 Ark. 126; 66 *Id.* 466; Suth. Stat. Const., § 332; Cooley's Const. Lim., 253; 150 Ill. 80; 143 *Id.* 92; 48 Ark. 370; *Ib.* 251; 107 *Id.* 285, 290; 80 *Id.* 98; Page & Jones, § 867.

2. Only debts incurred for preliminary expenses could be allowed. 106 Ark. 296; 39 Ark. L. R. 456. Nothing could be allowed for permanent work. 32 Ark. 31, 39; 83 *Id.* 54; 86 *Id.* 1; 172 U. S. 269; 176 Ill. App. 455; 258 Ill. 509; 248 *Id.* 42; 79 Ark. 229; 109 *Id.* 60; 211 Ill. 241; 148 *Id.* 632; 213 *Id.* 620; 48 Ark. 370; 107 *Id.* 285, 289; 111 Mass. 454.

J. W. Blackwood, for appellee.

1. The Act of 1913 gave the chancery court power to collect upon the assessments of benefits a sum sufficient to pay all claims found to be due. The act does not limit the court to initial or preliminary expenses.

The Legislature had the power to validate the assessments. Besides, the property owners were estopped. 59 Ark. 344; 70 *Id.* 451; 115 Ark. 88; 112 Ark. 357; 107 Ark. 285; 98 Ark. 113; 81 *Id.* 562; 104 *Id.* 425; 72 *Id.* 126; 103 *Id.* 132; 83 *Id.* 344; 100 *Id.* 369; 97 *Id.* 322.

2. All questions as to the validity of the assessments have been settled. 113 Ark. 363; 99 Ark. 100; 103 *Id.* 109.

WOOD, J., (after stating the facts). I. The first question is whether or not the chancery court under the act could allow claims arising under contracts made with the directors of the drainage district for work done of a permanent nature as contemplated by the improvement district in advance of an assessment of benefits.

In *Kirst* v. *Street Improvement District No.* 120, 86 Ark. 1-8, we said: "Special assessments for local improvements find their only justification in the peculiar and special benefits which such improvements bestow upon the particular property assessed. Any exaction in excess of the special benefits is, to the extent of such excess, a taking of property without compensation." See also *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54; *St. Louis S. W. Ry. Co.* v. *Board of Directors, etc.,* 81 Ark. 562. See, also, *Cribbs* v. *Benedict,* 64 Ark. 555-61; *Alexander* v. *Bd. of Directors Crawford County Levee District,* 97 Ark. 322; *Board of Directors Crawford County Levee District* v. *Dunbar,* 107 Ark. 285-290.

In the recent case of *Cherry* v. *Bowman,* 106 Ark. 39, the board of directors of an improvement district in a city entered into a contract for the work to be done contemplated by the improvement district before there was an assessment of the benefits. It was sought in that case to restrain the board from proceeding to carry out the terms of the contract. In that case we held that there was no inhibition against letting the contract for the improvement before the assessments had been made. The basis of the refusal to grant the injunction prayed was expressed as follows:

"There is no showing or contention that the contractor is about to proceed or threatens to proceed with the execution of his contract before those matters herein mentioned are determined, and which must be determined before his contract becomes binding on the district." One of the matters mentioned as being necessary to determine before the contract became binding on the district was "that the cost shall not exceed the benefits."

The statute creating the Fourche Drainage District provides that the assessment books prepared by the assessors shall show the value of the lands without the improvements contemplated by the act, and the estimated increased value by reason of such improvements." The law, therefore, creating the drainage district put into any contract which its directors might make for the improvements contemplated by the act, the provision that there should be an assessment of benefits before any contract can be entered into that would be binding on the district or the land of the property owners included therein. *Cherry* v. *Bowman, supra,* is authority for holding that while a tentative contract might be entered into for the improvement contemplated in advance of the assessment of benefits, yet such contract could not be performed or consummated by doing the work contemplated and would not be operative and binding on the district or the lands included therein, until there had been an assessment of benefits.

In *Fellows* v. *McHaney,* 113 Ark. 363, 168 S. W. 1099, speaking of act of 1913 repealing the act creating the drainage district, we said: "By this act of 1913, the Legislature ascertained and declared that the assessment previously made was a proper one, and validated it, and its action in so doing is beyond judicial review, in the absence of a showing that the assessment so validated was arbitrarily made, regardless of benefit, or a showing that no benefit could possibly accrue from the improvement sought to be made to the property sought to be taxed. In that case there were no allegations that the "lands would not have been benefited at all by the improvements" the conten-

tion simply being that "the assessment as validated by the Legislature was unequal and unjust." But in the case at bar, it was alleged and proved that the cost of the improvement contemplated by the district would exceed the value of the benefits returned by the board of assessors as finally equalized under the act by such board sitting as a board of equalization.

The amount for which the act creating the district authorized a bond issue was $150,000. The directors soon after the creation of the district issued a statement in the form of a letter to the land owners in which they set forth that the engineers estimated that the work could be done for $150,000, and it was estimated that the total cost to the property owners would be about one per cent of the assessed value. The above letter was circulated before the board had final plans drawn for the work. The work under these final plans was estimated to cost over $1,500,000. The board entered into contracts amounting to $1,000,000, and work had been done and debts created under these contracts to the amount of over $100,000 before the assessment of benefits contemplated by the act was completed, which occurred January 22, 1913. This final assessment of the total benefits, according to the testimony of the assessors which is not challenged or controverted, showed that the benefits would be less than the estimated cost of the work to be done. The estimated cost of the work to be done did not include interest on the bonds which the statute provides shall run from ten to twenty years, nor did it include the cost of maintenance.

(1-2-3) Such were the affairs of the district when the Legislature passed the repealing act validating the assessment. But this act could not and did not validate the unauthorized contracts into which the board had entered and the claims for amounts which had accrued under these contracts. But as we have seen in the case at bar, it is alleged, and the uncontroverted proof shows, that the estimated cost of the improvement contemplated exceeded the benefits. Such being the case, the Legisla-

ture itself had no power to authorize the chancery court to allow claims for permanent work done under contracts with the board of directors of the drainage district. To subject the lands of the drainage district to the payment of such claims would be taking of private property for public use without compensation. Where the uncontroverted facts show, as they do here, that the estimated cost of the improvement contemplated exceeds the benefits to be derived therefrom, an act of the Legislature validating an assessment for such improvement would be arbitrary and unconstitutional. *Peay* v. *City of Little Rock,* 32 Ark. 31-39; *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54; *Kirst* v. *Street Improvement District,* 86 Ark. 1.

(4-5-6) The contracts made for permanent work to be done in advance of the assessment of benefits, and the claims arising thereunder for work done, were premature and void, and under the facts of this record are not binding upon the lands of the drainage district. The land owners of the improvement district were not estopped from setting up the invalidity of the contracts made with the board of directors for permanent work. The districts were created by acts of the Legislature and the duties of its directors were defined. The act creating the district, as amended, provided for the improvement contemplated to be made without the consent of the owners of property in the district; and the proceedings under the statute were, therefore, *in invitum,* so far as the property owners were concerned. The property owners were not called upon to protest against the making of the proposed improvement, for they had a right to assume that the board of directors would comply with the Constitution and statute and not provide for an improvement, the cost of which would exceed the actual benefit to their property, and until the assessment of benefits had been made, they could not know that the cost of the improvement would exceed the benefits. In entering upon contracts for permanent work and having the same executed in advance of an assessment of bene-

fits, the directors were usurping functions foreign to their powers under the statute creating the improvement district. In *Newport* v. *Railway Co.*, 58 Ark. 275, it is said "the doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers"; and in *Watkins* v. *Griffith*, 59 Ark. 344-361, the court quotes the above and also from *Mulligan* v. *Smith*, 59 Cal. 233, as follows: "It was the duty of those who were authorized to exercise powers which might bind the real property of defendant to see that the provisions of the statute under which they acted were complied with." In the recent case of *Cherry* v. *Bowman, supra,* we again recognize the doctrine that there can be no estoppel in the contractor's favor if the subsequent proceedings in the creation of an improvement district fail to warrant the action previously taken. Here, as we have seen, the proceedings of the directors in having the permanent work done in advance of the assessment of benefits were wholly unauthorized.

II. To sustain the act of the Legislature, we must presume that the word "claims" as used was intended to mean only such claims as were valid under the law creating the drainage district. No others will be binding on the owners of real property in the district.

What claims were valid?

(7-8-9) In the recent case of *Board of Directors* v. *Dumbar, supra,* we held that where an improvement district is dissolved or dismembered "the Legislature may, in order to provide for payment of expenses incurred in initiating or forwarding the improvement, authorize an assessment based on the benefits which were anticipated," and in *Davis* v. *Chicot County Drainage District et al.*, 166 S. W. 170, 112 Ark. 357, where an improvement district was dissolved, we said: "The right of the Legislature to apportion the preliminary expense of a dismembered improvement district in proportion to the anticipated or prospective benefits is asserted in the case of *Board of Directors* v. *Dumbar, supra.*" According to these cases, where a local improvement district has been

created for the purpose of benefiting the real property included therein, it is in the power of the Legislature, if it abolishes such district, to provide for the preliminary expenses, that is, those expenses that have been incurred in the formation of the district, and in all such proceedings as were necessary, and as were had, in determining the feasibility of the improvement contemplated. Anticipated benefits, though never realized, will justify an allowance for the preliminary expenses incurred in determining whether the contemplated improvement can be made at a cost not to exceed the benefit finally assessed. Under the terms "preliminary expenses" would be included the cost incurred in litigation to determine whether or not the act creating the district was valid, and attorney's fees as counsel to the board in the preliminary work of organization, etc.; such costs as expenses for maps, plats, surveys of land and for engineering expenses in preparing the plans and specifications. In other words, all expenses incident to the investigation by which it is sought to determine whether the value of the benefits to the lands by the improvement contemplated would exceed the cost of such improvement and thereby warrant its completion.

(10) It follows that the act under review should be construed as intending to provide for the payment, out of the assessment returned on the lands in the district, of the preliminary expenses incurred in the creation of the drainage district, and in ascertaining the feasibility of the proposed improvement. As thus construed, it is a valid act.

III. (11-12) The assessed value of the anticipated benefits, which the Legislature has validated for the purpose of paying the preliminary expenses incurred, forms the basis upon which the special tax must be levied to pay these expenses. The Fourche Drainage District was one entire project which included, in order to carry out the improvement contemplated, the building of levees and the digging of canals, ditches, etc. The preliminary expenses incurred were in determining the feasibility of the en-

tire scheme, considering all the work that was necessary to be done in order to consummate it. To meet the constitutional requirement of equality and uniformity, these preliminary expenses must bear equally upon all lands included in the drainage district in proportion to the value of the anticipated benefits assessed against these lands. *Shibley* v. *Fort Smith & Van Buren District,* 96 Ark. 417. For the purposes of the assessment of the value of anticipated benefits and the levy of the tax based on such assessment to pay preliminary expenses, all of the lands included in the drainage district embracing the lands in the levee district must be regarded as similarly situated. The assessment was made upon the lands included in the levee district not for the purpose of ascertaining the feasibility of building levees in that district independent of the improvement contemplated by the drainage district, but the assessment was made upon these lands because they were included in, and were a part of the drainage district, and the building of the levees was an essential part of the improvement contemplated by the creation of the drainage district.

(13) So far as the scheme of the Fourche Drainage District is concerned, the lands in the levee district were also included within the drainage district and stood in the same relation to the drainage district as all the other lands embraced in the drainage district; the lands were assessed for the improvement contemplated by the drainage district considered as a completed project and the assessment was made because they were the lands of the drainage district and without reference to their being also included in a separate levee district. The expenses incurred were incident to the determination of the feasibility of the project contemplated by the drainage district and not for any purpose connected with the creation of the levee district considered separate and apart from the drainage district.

No authority can be found in the act abolishing the drainage district for the levy of an extra assessment of 20 per cent upon the lands included in that portion of

the drainage district known as the Fourche Levee District. The levy of the special tax must be in the same proportion according to the value of the assessed benefits upon all the lands included in the drainage district, without regard to the fact of their being also included within the levee district. The levy of this extra assessment is in conflict with the provisions of our Constitution and statutes requiring uniformity and equality in taxation. To validate this extra assessment on that portion of the lands in the drainage district included within the levee district would be tantamount to exempting the lands in the drainage district outside of the territory embraced in the levee district of their just and equal proportion of the tax, and requiring the particular lands in the levee district to bear an unequal burden. This can not be done. See *Davis, as Collector,* v. *Gaines,* 48 Ark. 370; *Town of Monticello* v. *Banks,* 48 Ark. 251.

The preliminary expenses that were incurred were for the common benefit of all the property included in the drainage district, and all of this property must share alike in the payment of the expenses. See *Board* v. *Dunbar,* 107 Ark., *supra.*

(14) The improvement that was contemplated can not be arbitrarily divided into sections so as to prevent the assessment from being uniform upon all the property designated in the district according to the basis of the value of anticipated benefits from the improvements. See 2 Page & Jones, Taxation by Assessment, § 688.

IV. The decree of the court was based upon a misconception of the power conferred upon it by the statute under review abolishing the drainage district, and was erroneous insofar as it allowed indiscriminately, claims arising out of contracts for permanent work, and claims for preliminary expenses, and in ordering the levy of an extra tax of 20 per cent upon the lands in the levee district in addition to the tax of 10 per cent upon all the lands in the drainage district.

The decree is, therefore, reversed and the cause is remanded with directions to ascertain from this record,

and other testimony if necessary, the claims for preliminary expenses, and to allow these claims; and also to allow the claims of the trust companies or others whose money was furnished to pay the claims for preliminary expenses to the extent and for the amounts only of such preliminary expenses; and to disallow and dismiss all claims for permanent work, and for such other and further proceedings looking to the adjustment and payment of the claims allowed as may be necessary and not inconsistent with this opinion.

HART and SMITH, JJ., dissenting.

OPINION ON REHEARING.

WOOD, J. I. It is insisted on rehearing that when the Legislature created the Fourche Drainage District and invested its board of commissioners with power and made it their duty to do the work designated in the act—that is, to effectually drain the Fourche bottoms and other land within said district—that this gave the board the right to enter into contracts for doing the work contemplated, to borrow money necessary to meet the obligations incurred by reason of these contracts; that the language of the act is in effect mandatory and leaves no power to determine whether the cost of the contemplated improvements would exceed the benefits to be derived therefrom; that the Legislature had determined for itself that the benefits would exceed the cost of the improvements, and that therefore the court erred in holding that contracts for permanent work to be done in advance of the assessment of benefits were premature and not binding on the land of the district.

(15) But we adhere to our opinion that the proper construction of the act is that the Legislature did not determine for itself that the benefits would exceed the cost of the work contemplated in the creation of the district, but left that to be ascertained by the board of assessors, which the commissioners of the district were authorized to employ. This is clearly shown by the language used in sections 6, 7, 8 and 9 of the act.

Section 6 provides for a board of assessors who "shall make an assessment of all the land," etc., entering on the books provided for the purpose, "the value thereof *without the improvements contemplated by this act and the estimated increased value thereof by reason of such improvements.*"

Section 7 provides that the assessors "shall make their assessment at such time as they may be directed to do so by the board of directors, and shall place in the hands of the president of the board of directors their report of assessment," etc. This section also provides for a hearing before the board of assessors of the complaints of the property owners who may be "aggrieved by the action of the board of assessors." And it constitutes the board of assessors a board of equalization to "adjust any erroneous or wrongful assessments," and it makes "their assessment as adjusted" the assessment of the district.

Section 8 provides that the board of directors "shall have the power, and it is hereby made their duty to assess, levy and designate a tax upon the increased value of betterment estimated to accrue from improvements contemplated by this act upon all lands, * * * but such tax shall not exceed 6 per cent per annum of the betterment accruing to said property," etc.

Section 9 provides for the collection of the taxes levied upon the basis of said assessment and prescribes the manner of procedure against the lands in event the taxes are not paid within the time prescribed for such payment.

Without going into any detailed analysis of these provisions, it is plain that when they are all considered together and in connection with the other provisions of the act, as they must be, that the Legislature did not determine in advance that the benefits to accrue would exceed the cost of the improvement contemplated in the creation of the drainage district. But, on the contrary, the language of the above sections of the act shows that the Legislature intended that before the permanent work of improvement should be undertaken and completed that

an assessment of benefits should be made which would exceed the cost of the improvement contemplated by the act. Necessarily this is true, for otherwise, as shown in the original opinion, the act would have been in conflict with the Constitution. Art. 2, § 22, Const. 1874. The act clearly provides that the assessment should be made by "the board of assessors" employed by the board of commissioners of the district, and it designates the property to be assessed and prescribes the manner in which the assessors shall proceed to make the assessment. The language in which the above provisions are couched excludes the idea that the Legislature determined for itself in advance that the benefits of the contemplated improvement would exceed the cost thereof. If the Legislature had determined in advance that the benefits to be derived from the contemplated improvement would exceed the cost thereof, it would have doubtless directed the levy of a tax upon the basis of a certain per cent of the assessed value of the property or declared in so many words that the lands in the district would be benefited by the improvement so much an acre on the rural property or so much a lot or square foot on the city property, and would have directed the levee of a tax upon the basis of the benefits thus declared. The language used in the Act of 1907 is entirely inappropriate to express an assessment of benefits made by the Legislature in advance, and if the Legislature had intended to assess the benefits itself without the interposition of a board of assessors, the phraseology to express such an assessment would have been entirely different. It is different in all the instances that have come under our observation where the Legislature has determined for itself in advance that the benefits to be derived from an improvement provided for would exceed the cost of such improvement. Therefore, we differ radically with counsel for appellees in their construction of the act in this particular. The decision of the court was grounded primarily upon the above construction of the act, which was purely a question of law; and after a careful consideration of the able and exhaust-

ive briefs of counsel on rehearing, we are still of the opinion that this construction which we have given to the Act of 1907 is the proper one and the only one that can be reasonably given it.

II. The next contention made in the briefs for rehearing is that the court erred in holding that the cost of the improvement contemplated would exceed the value of the benefits assessed. In the original opinion we said "in the case at bar it is alleged, and the uncontroverted proof shows, that the estimated cost of the improvement contemplated exceeded the benefits." Counsel for the appellants in their original brief stated as follows: "The final assessment shows the total benefits to be fifty to seventy-five thousand less than the estimated cost of work to be done." Again, "The total assessed betterment was one million five hundred thousand dollars. The total cost of the work planned was more than one million five hundred thousand dollars." Again, "In the present instance, the cost of the work exceeded beyond all reason the total benefits that would result from the work." These statements were nowhere challenged in the briefs of counsel for the appellees or for the receiver. On the contrary, in their original briefs counsel for appellees and for the receiver seem to have relied upon former decisions of this court, especially in the case of *Fellows* v. *McHaney,* 113 Ark. 363, 168 S. W. 1099, as having determined that Act No. 420, approved May 28, 1907, was a legislative assessment of benefits exceeding the cost of the improvement contemplated, and that therefore the assessment of benefits was not open to question. Counsel for appellees in their original brief say, "It was settled by this court in *Fellows* v. *McHaney* that the assessment now complained of had become a legislative assessment and not open to question." Again, speaking of the Act of 1913, they say, "The act merely says that the court shall collect upon the assessment of benefits heretofore made a sum sufficient to pay all claims found to be due. The matter was sent to a court of equity in order that it might do equity. The assessment is confirmed and stands as the

assessment of the district. And counsel for the receiver say, "All questions as to the validity of this district and validity of the assessments have been settled by the decision of this court," citing *Fellows* v. *McHaney, supra,* and other cases. And again, "Practically all of the questions involved here were considered and decided in the case of *Board of Directors of Crawford County Levee District* v. *Dunbar,*" etc. Since learned counsel for the appellees, and for the receiver, did not challenge the truth of the statements of facts made and relied upon in the brief of appellants, as above set out, the court was led to believe that counsel for appellees and the receiver, while conceding the truth of the facts as above stated in the briefs of counsel for appellants, nevertheless contended that the issue was settled in their favor by former decisions of this court, and especially *Fellows* v. *McHaney, supra,* to the effect that the Legislature had determined for itself in advance that the benefits to be derived from the improvement contemplated by the Act of 1907 would exceed the cost thereof, and that this issue of fact was therefore not open to question. We were thus led into the mistake of saying "that the uncontroverted proof shows that the estimated cost of the improvement contemplated exceeded the benefits" and proceeded to treat the cause as if there were no controversy upon this issue of fact and disposed of the contentions of learned counsel for appellees that the above issue of fact had been foreclosed in their favor by the opinion in *Fellows* v. *McHaney.*

After carefully considering the briefs on rehearing, we believe our characterization of the issues was substantially correct. Appellees filed their petitions setting forth their several claims, some for preliminary expenses, others for permanent work done, and others for money furnished the board to pay for the work that was done. These claims were contested by the appellants, and in the responses filed by the receiver to all the claims it was alleged "that the same was not necessarily an expense incurred in advance of the enjoyment of the benefits, and

was not a necessary and initial expense incurred by the district as originally organized; that the same was not properly based upon the benefits reasonably anticipated and was not for expenses incurred for the common benefit of property in the district and was not in proportion to the anticipated benefits; that the said debt was incurred, if incurred at all, by the abuse of the authority of the board of directors of the district and should not be made a burden upon the taxpayers of said district." In an intervention filed by the Braddock Land & Granite Company, attacking the claims of the four trust companies, it was alleged as follows: "That the board of directors were authorized to make only expenditures necessary for the initial and preliminary steps for the construction of the contemplated improvements which included only the necessary surveys, maps and attorneys' fees and such other things as are comprehended in the terms 'preliminary and initial steps' prerequisite to determining what was necessary to be done prior to the commencement of the actual construction of the improvements contemplated by the Act of 1907 and whether or not such improvements could be made under the provisions of said act. That the board of directors of Fourche Drainage District, in disregard of the limitation of their authority under the Act of 1907, and in excess of their authority, before it was determined that said improvements could be constructed, made large expenditures that can not be embraced in the preliminary and initial steps for which alone said board of directors were authorized to expend money or to incur debts on behalf of the district. That the total amount of such debts, in excess of and beyond the preliminary and initial work, and in excess of the authority of the board, was about one hundred thousand dollars. That the sums claimed by the trust companies are for money loaned to the board of directors to pay such unauthorized debts. * * * That the Fourche Drainage District, and especially the lands owned by the interveners, received no benefit from the expenditure of said money, but that the lands of the interveners were

injured and damaged; that to allow the claim of the trust companies and to charge them against the lands would violate constitutional rights, and that the said claims should be disallowed, except so far as they were for money expended for preliminary and initial work." The trust companies filed responses to the intervention of the Braddock Land & Granite Company and Nettie F. Riffle, denying the lack of authority in the district to make expenditures other than those necessary for the preliminary or initial expenses, and in the responses to the intervention of two of these trust companies it was alleged "that the delivery of the bonds was delayed because the assessment of benefits had not been made and filed and the said bonds could not be approved by counsel until the assessment of benefits had been made and confirmed." Certain land owners filed protests against the levy of taxes, in which they set forth: "That the assessment was unjust, confiscatory and discriminatory, and would result in the destruction of the rights of property without benefit and without compensation, contrary to the provisions of the Constitution of Arkansas and of the United States." Other exceptions set forth that the assessment "exceeded the worth of the property and benefits derived from the improvement contemplated." Thus while it was not alleged *in haec verba* "that the cost of the improvement contemplated by the district would exceed the value of the benefits returned by the board of assessors," the above allegations of the pleadings do clearly show that such was their effect, and we were not in error, therefore, in so stating.

However, we do not regard it as material or important that this issue should have been raised by specific allegations in the pleadings to that effect. It was an issue that was necessarily raised by the presentation of claims under the act and by the contest of those claims on the grounds that no claim should be allowed other than those for preliminary expenses.

The statement in the opinion, towit, "The uncontroverted proof shows that the estimated cost of the im-

provement contemplated exceeded the benefits," we find is not accurate for the reason that Judge Kavanaugh testified that "the directors figured that the cost of the work would be $950,000;" and the engineer of the district, Mr. Lund, testified that the estimated cost of the completed work of construction was $900,000. On the other hand, Mr. Polk, who was a member of the board of assessors, testified, "We knew just what the estimated cost of the district would be. * * * We were trying to adjust those assessments to see if we could not meet the requirements of the cost of the district. I think on our wind-up we were from fifty to seventy-five thousand in our equalization below the actual cost they had estimated of doing the work." The testimony of Mr. Moore, another member of the board of assessors, was as follows: "The assessors were told by the directors of the drainage district the approximate amount that the work would cost. Their assessment as first made was more than the estimated cost of the work, but after being equalized was less than the cost of the improvement. There was never any assessment that was equal to the cost of the improvement." So it was not accurate to say that the uncontroverted proof showed that the cost of the improvement exceeded the assessment of benefits.

The above testimony was elicited upon the hearing of some of the *ex parte* petitions of the claimants, and counsel for the trust companies contend that this testimony was not introduced on the hearing of their claims and that it would therefore be obviously unfair and contrary to the rules of practice to have the testimony considered in order to invalidate their claims. They say, "There is no testimony in the record bearing on this issue, and there is none introduced on the hearing of the claims of our clients that tends to sustain the issue."

(16) The decree of the court allowing the claims of the trust companies, appellants, and other claimants, recites as follows: "All of the claims are submitted to the court upon the claims filed with the receiver and the response of the receiver thereto, and upon the intervention

of the Braddock Land & Granite Company and Nettie F. Riffle, and the response of the receiver thereto, and upon the deposition of the following witnesses taken *ore tenus* by consent" (naming them) "to be used as evidence in all the claims and issues arising herein wherever competent, material or pertinent." So the recitals of the decree show that the proceedings by which it was sought to close up the affairs of the drainage district and to adjust and allow all claims were treated as a unit, and all the pleadings and the testimony had in any of the *ex parte* petitions were available in any part of the proceedings. Therefore, it is not correct to say that there was no testimony in the record bearing upon the claims of the trust companies tending to show that the cost of the improvements exceeded the assessed benefits.

But even if the contention of counsel in this respect were correct, still the claims of the trust companies would necessarily fail, for the burden was upon the claimants to show that their claims were valid under the Act of 1913. That act abolishes the drainage district and makes provision for the allowance of claims. As we have shown in the opinion, the word "claims" as used in the act necessarily meant valid claims, and no claims could be valid for permanent work done until it was first determined that the benefits to be derived from the improvement would exceed the cost thereof. Every presumption must be indulged in favor of the validity of the Act of 1913. It can not be presumed that the Legislature of 1913 validated the assessment made under the Act of 1907 as a legislative assessment of benefits to exceed the cost of the improvement contemplated by that act; for if the Legislature of 1913 had so determined, then its act in abolishing the district would be unconstitutional and void, because to abolish the district, and burden the real property therein with assessments to discharge the obligation of valid contracts made with the board of commissioners for the permanent improvement contemplated which were not made would deprive the land owners of

their property without due process of law. Const. 1874, art. 2, § 21.

Therefore, in order to uphold the Act of 1913, it must be presumed that the Legislature ascertained that there had been no assessment of benefits to exceed the cost of improvement and that the assessment of benefits as made under the provisions of the act of 1907 was in an amount less than the estimated cost of the improvement therein provided for.

In 6 R. C. L., section 101, it is stated: "If it was required that the Legislature should have evidence of particular facts in order properly to pass a statute, it is presumed that such evidence was actually and properly before the legislative body and that it acted on a full knowledge of the facts." See also sections 111 and 112.

In *Sweet* v. *Rechel,* 159 U. S. 380-393, the Supreme Court of the United States said: "It is a well settled rule of constitutional exposition that if a statue may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

(17) Therefore, it will be presumed that the Legislature of 1913 in abolishing this district, did so for the reason that it ascertained that the improvement contemplated under the Act of 1907 would cost more than the benefits to be derived therefrom. This is the only reason that would justify their act in abolishing the district; for, as above stated, otherwise to abolish a district after valid contracts had been let for the permanent work to be done, and after work had been done under these contracts and money furnished thereunder, would violate the well known provision of the Constitution prohibiting the impairing of the obligation of contracts and depriving parties of their property without due process of law.

In the recent case of *Morgan Engineering Company* v. *Cache River Drainage District,* 115 Ark. 437, 172 S. W. 1020, we said: "It is well settled under our Constitution that the Legislature may not pass an act impairing the obligation of a contract." That was a case where a drain-

age district had been abolished, and the court was passing upon the question of the allowance of the claims of an engineering company for the preliminary expenses of surveying, the filing of plans, etc.

The appellees claim under the act, and the burden was upon them to show that their claims were valid. Since the Legislature abolished the drainage district for the reason, as we must presume, that the cost of the improvement exceeded the benefits, the only claims that would be valid, and that could be allowed, under former decisions of this court, as we endeavored to show in the original opinion, were claims for preliminary expenses. If any reason existed for abolishing the district other than that the cost of the improvement contemplated would exceed the benefits, it devolved upon the appellees to prove it, and they have not done so. In our opinion greater weight should be given to the testimony of the members of the board of assessors, whose duty it was to make the assessment of benefits. Their testimony shows that they knew what the estimated cost of the district would be, and that they were trying to adjust the assessment of benefits so as to see if they could not meet "the requirements of the cost of the district." It was their duty to finally adjust and equalize these assessments. Certainly it could not be correctly stated that the testimony of the two witnesses who testified as to the estimated cost of the work should be given greater weight than the testimony of the members of the board of assessors, who, after knowing what this estimated cost would be, testified that after they had equalized the assessment of benefits there was never any assessment that was equal to the cost of the improvement. But even if the testimony were evenly balanced on this issue, which is the utmost in favor of the appellees that could be said of it, still the burden of proof being upon the appellees they must necessarily fail.

The motion for rehearing is therefore overruled.

HODGES BROTHERS v. BANK OF COVE.

Opinion delivered June 14, 1915.

1. SALES—DELIVERY—INTENTION—COMPLETED SALE.—In a sale of chattels, delivery is a question of intention of the parties, as manifested by overt acts, and a sale will be treated as completed where any act has been done which was intended by the parties as a delivery.

2. SALES—SALE OF TIES—EXECUTORY CONTRACT—OPPORTUNITY TO INSPECT TITLE.—Under a written contract to purchase ties, the purchaser was given the right to inspect same before acceptance, and the sale was not complete until the ties passed the inspection, and it was a question for the jury, whether there was such an inspection as would pass title.

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

Thos. W. Clark and *J. I. Alley,* for appellant.

1. Where a contract is unambiguous it is the duty of the court to construe it and declare its meaning and effect, and not the province of the jury. 171 S. W. 140; 67 Ark. 553; 2 Parsons on Cont. (8 ed.), 492, 610; Clark on Cont. (Hornbook Series), p. 564; 81 Ark. 337.

2. The delivery to appellants was complete and passed the title. 102 Ark. 344; 19 *Id.* 573; 31 *Id.* 155; 37 *Id.* 483; 54 *Id.* 305; 90 *Id.* 131; 91 *Id.* 240; 62 *Id.* 592; 68 *Id.* 307; 63 *Id.* 232; 35 *Id.* 304. The peremptory instruction should have been given as requested by appellants. There was nothing to submit to the jury. Constructive delivery was complete.

Elmer J. Lundy, for appellee.

1. The title to the ties did not pass until they were loaded and inspected. The court properly instructed the jury. 81 Ark. 337; 89 *Id.* 368, 374; 102 *Id.* 344; 72 *Id.* 141; 91 Ark. 240; 102 *Id.* 88-91; 106 *Id.* 482; 107 *Id.* 224. The question as to the intention of the parties is for the jury. There was not even constructive delivery under the contract. Cases, *supra.*

MCCULLOCH, C. J. Appellee sued one Coleman for debt due on open account and caused a lot of railroad ties to be seized under an order of general attachment. Ap-

pellants filed an interplea, claiming title to the attached property under purchase from Coleman, and this is an appeal from a judgment against them condemning the property for sale under the attachment.

Coleman was engaged in the business of manufacturing and selling railroad ties, and on January 27, 1913, entered into a written contract with appellants whereby he agreed to sell and deliver to them all of his output of ties during the year 1913. The agreement was that he was to sell all the ties he manufactured to appellants at certain prices stipulated in the writing, the same to be delivered on board cars on the tracks of the Kansas City Southern Railroad Company between Mena and De Queen, Arkansas. The contract contained the following clause:

"We agree to advance 90 per cent on all No. 1 ties on railroad sidings convenient for loading, upon receipt of report signed by you, or, on return from a trip over said territory for the purpose of checking and branding said ties the remaining 10 per cent due when ties are loaded. You to load ties promptly on arrival of inspector. We are not to accept less than even car loads of ties at any station on final settlement. All ties bought of you in future on above territory are to be branded "J. H." connected, which shall be recognized as our brand. We agree to give thirty days' notice, if we decide to discontinue buying 7x9x8 ties, taking all you have ready to load at expiration of thirty days."

One of the appellants testified orally, giving an account in detail of the transaction, and stating that the ties were, under the contract, to be inspected by an inspector of the railroad company when ready for delivery, and that the settlement was to be made according to that inspection. He testified also that these particular ties were accepted by appellants and that he (witness) went over the road and branded the ties and spotted them and gave a check for the amount due under the contract. The ties were not, however, according to the evidence,

inspected by the railroad inspector and loaded on the cars.

Appellants insisted in the trial below that they were entitled to a peremptory instruction, which was by the court refused, and they excepted to the instructions given by the court solely on the ground that there was no issue to submit to the jury. The only question, therefore, presented on this appeal is whether or not there is sufficient evidence to support the verdict in appellee's favor—in other words, whether the evidence concerning delivery of the ties to appellants so as to pass the title to them was conflicting, for there is no other issue in the case. There was no actual, manual delivery, but it is contended that the constructive delivery was complete.

In the case of *Lynch* v. *Daggett,* 62 Ark. 592, this court (quoting the syllabus) held: "A sale of specific personal property may be final and complete, where such is the intent of the parties, although something remains to be done subsequently by the seller as part of the consideration of the contract, as to deliver the property at a place named."

In *Guion Mercantile Co.* v. *Campbell,* 91 Ark. 240, we said: "The title to personal property will pass and the sale be complete if it is the intention of the parties to transfer the title on the one part and to accept same on the other, and in pursuance thereof a delivery is made, even though something remains to be done; as, for example, the fixing of the quantity or exact value of the property or the payment of the purchase money."

(1) It has been uniformly ruled by this court that delivery is a question of intention of the parties, as manifested by overt acts, and that a sale of chattels will be treated as complete where any act has been done which was intended by the parties as a delivery. *Shaul* v. *Harrington,* 54 Ark. 305; *Elgin* v. *Barker,* 106 Ark. 482.

In the case of *Deutsch* v. *Dunham,* 72 Ark. 141, there was a written contract for the sale of lumber to be manufactured, and the contract contained a stipulation that it was to be delivered at a certain place and inspected. The

court held that there being no delivery the sale was not complete so as to justify the purchaser under the contract to maintain replevin for possession of the lumber. In the opinion it was said: "The contract being executory, it is clear that appellant could not be compelled to accept the lumber until he had an opportunity to inspect it in order to ascertain whether it was such as appellees stipulated to saw. * * * It is equally clear that the inspection was necessary in this case to ascertain the grades of the lumber, in order to determine the amount to be paid according to the stipulated prices. Both parties were interested in, and protected by, the stipulation that an inspection should be made. Hence, it was required, and, on account of the purposes for which it was evidently to be made, became a condition to be performed before the title to the lumber vested in appellant, and a complete sale to him was made. * * * There was no delivery of the lumber to appellant, actual or constructive. The transfer of the title to the property depended upon the intention of the parties."

And again, in the case of *Summit Lumber Co.* v. *Sheppard,* 102 Ark. 88, we held (quoting from the syllabus) that "where a contract of sale leaves something to be done as between the vendor and vendee, as to ascertain the amount, quantity or price, before the title shall pass, the sale would not be complete; but if the title actually passed, the sale is binding, though something remains to be done to determine the total quantity of the property sold or the total price thereof."

(2) There was an issue of fact in this case to be submitted to the jury for the determination of the question whether the title to the railroad ties passed to appellants under their executory contract of purchase entered into with Coleman, and there was sufficient evidence to sustain the verdict of the jury in favor of appellee on that issue. The contract is to some extent ambiguous in that it does not show clearly who is to make the inspection. It does provide, however, that a part of the purchase price was to be reserved until the ties should be inspected

and loaded on the car, and the oral testimony adduced by appellants themselves shows that the inspection was to be made by the railroad inspector and that the ties were to be paid for according to his inspection.

The clause of the contract stipulating that appellants were not to accept less than "even car loads of the ties at any station on final settlement" shows that there was to be no final acceptance until the ties were loaded on the cars. At any rate, appellants treated the contract as ambiguous and offered oral testimony which was accepted, and which, together with the written contract, shows that there was to be no completed sale until final acceptance when the ties passed the inspection of the railroad inspector and were loaded on the cars. This brings the case squarely within the decision of this court in *Deutsch* v. *Dunham, supra.* One of the appellants testified, it is true, that he accepted the ties before they were loaded, and paid for them and marked them, but upon the whole there was sufficient evidence to go to the jury for determination of the question whether there was such an acceptance as would pass the title under the contract. That issue was settled by the jury upon legally sufficient evidence, and the judgment is therefore affirmed.

STATE v. BUNCH.

Opinion delivered June 14, 1915.

1. INDICTMENT—CHARGE OF SPECIFIC OFFENSE—CAPTION AND BODY OF INDICTMENT.—An erroneous designation in the caption concerning the character of the offense does not affect the validity of the indictment, if in the body thereof, the facts are stated with sufficient certainty to charge a specific offense.

2. BRIBERY—PUBLIC OFFENSE—WHO MAY BE SUBJECT OF.—Under Kirby's Digest, § 1602, which provides for the indictment and punishment of any one who shall bribe "any member of the general assembly * * * or person holding any place of profit or trust, under any law of the State, or under the order of either house of the General Assembly," it is an offense to bribe any person performing a public function, pursuant to the laws of the State.

3. BRIBERY—PUBLIC FUNCTIONARIES.—All attempts to bribe persons performing public functions, are included in Kirby's Digest, § 1602, which denounces the crime of attempting to bribe a "person holding any place of profit or trust, under any law of the State, or under the order of either house of the General Assembly."

4. BRIBERY—PUBLIC FUNCTIONARY—ACTS CONSTITUTING BRIBERY.—The offense of bribery, as denounced in Kirby's Digest, § 1602, is made complete, if there is any attempt to influence the decision of the engineer of a certain road improvement district, in any matter which falls within his duties under the laws of the State, whether such duty is prescribed specifically, or merely in general terms.

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

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

1. The indictment is sufficient. Martin was an officer and held a place of profit and trust under the laws of this State. Kirby's Digest, § 1602; Acts 1909, p. 1155. The indictment follows substantially the language of the statute.

A. J. Johnson and *E. W. Brockman,* for appellee.

1. The employment of an engineer by the board did not constitute him an officer under the law. Kirby's Dig., § 1602; Acts 1909, p. 1151-1155; 29 Ark. 299; 5 L. R. A. 814; 84 Ark. 540; 69 *Id.* 460; 36 Miss. 273; 6 Wall. 385; 103 U. S. 5; 63 Am. St. 174; 58 Wis. 144; 88 N. C. 133; 122 *Id.* 495; 145 *Id.* 476; 66 *Id.* 59; 84 Ark. 540; *Ib.* 537.

Martin was an employee merely. 51 N. J. L. 240; 42 N. Y. St. Cl. 481; 17 Ill. 191; 31 Atl. 384; 123 Mo. 43.

McCULLOCH, C. J. The State appeals from a judgment of the circuit court of Lincoln County sustaining a demurrer to the following indictment:

"The Grand Jury of Lincoln County, in the name and by the authority of the State of Arkansas, accuse T. H. Bunch of the crime of attempting to bribe a public officer committed as follows, towit: That on and before the 1st day of March, 1914, and for three months thereafter one H. R. Carter was holding a place of profit and trust under the laws of this State, towit, that of State Highway

Engineer, and by virtue of his said office it became and was his duty to draw plans and specifications for the construction of a public highway in Lincoln County, Arkansas, in a certain road district therein organized under the laws of said State and known as Road Improvement District No. 1, said district being then and there an improvement district organized and formed under and in accordance with the laws of the State of Arkansas for the purpose of improving and building a public highway in said Lincoln County that in pursuance of his duty as such highway engineer he, the said H. R. Carter, prepared and furnished said road improvement district plans and specifications for the construction of said public highway, that on or about the first day of February, 1914, the board of directors of said Road Improvement District No. 1 entered into a contract with said T. H. Bunch to construct said highway in accordance with said plans and specifications and immediately thereafter the said T. H. Bunch entered upon and began and continued the work of building said highway by means of laborers and servants employed by him for that purpose that the said board of directors of said Road Improvement District No. 1 employed H. A. Martin as supervising and inspecting engineer and it thereupon and thereby became and was his duty as such to inspect and approve or reject the materials used by said contractor, T. H. Bunch, and his servants and employees in the construction of said highway to see that they conformed with said specifications according to the contract between the said T. H. Bunch and the board of directors of said road improvement district and to supervise the construction of said road and see that same was built by said contractor in accordance with the plans and specifications aforesaid that by virtue of his said employment the said H. A. Martin was on and for sixty days before and after the 19th day of May, 1914, holding a place of trust and profit under the laws of this State, and charged with official duties as hereinbefore stated, that on or about the first day of May, 1914, the said H. A. Martin, in pursuance of his

official duties as such supervising and inspecting engineer, inspected certain material, towit, crushed rock, which was then and there being used by said contractor in the construction of said road, and notified the agents and servants employed by the said contractor, T. H. Bunch, that the same was not of the kind and quality required by the specifications and contract but of a different kind and inferior quality, and demanded that said material be not used in the building of said road; that thereafter, towit, on the 19th day of May, 1914, in the county of Lincoln and State aforesaid, the said T. H. Bunch fraudulently intending and contriving to wrong, cheat and defraud the said board of directors of said Road Improvement District No. 1 and the taxpayers of the said district, and corruptly, fraudulently and feloniously contriving and intending to corrupt and influence the official acts, decisions and conduct of the said H. A. Martin in his official capacity as supervising and inspecting engineer of said Road Improvement District No. 1 by means of a bribe, present and reward of pecuniary value, towit, the sum of one hundred dollars, did then and there wilfully, unlawfully, fraudulently, corruptly and feloniously cause to be delivered to the said H. A. Martin a draft or check commonly called a piece of exchange, drawn on May 19, 1914, by the Twin City Bank of Argenta, Arkansas, on the National Bank of Commerce at St. Louis, Missouri, signed by Bernice Laster as the assistant cashier of said Twin City Bank, for the sum of one hundred dollars, payable to the order of the said H. A. Martin, by the name of Allen Martin, and did then and there wilfully, unlawfully, fraudulently and feloniously request the said H. A. Martin not to interfere with or further object to the use of such improper and inferior rock being used by said T. H. Bunch and servants in the construction of said road contrary to the statutes made and provided and against the peace and dignity of the State of Arkansas."

It will be seen from an analysis of the language of the indictment that it charges appellee with bribing one H. A. Martin, who was the engineer of a certain road improve-

ment district in Lincoln County, for the purpose of influencing his decision in passing upon the quality of crushed rock to be used in the construction of the road.

The statute under which the indictment was found reads as follows: "If any person shall, directly or indirectly, promise, offer to give, or cause or procure to be promised, offered or given, any money, goods, right in action, bribe, present or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present or reward, or any other valuable thing whatever, to any member of the General Assembly of the State of Arkansas, after his election as such member, and either before or after he shall have qualified and taken his seat, or to any officer of the State, or person holding any place of profit or trust, under any law of the State, or under the order of either house of the General Assembly, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending, or may by law, or under the Constitution of the State, be brought before him in his official capacity, or in his place of trust or profit, and shall be convicted thereof, such person so offering, promising, or giving, or causing, or procuring to be promised, offered or given, any such money, goods, right in action, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right in action, bribe, present or reward, or other valuable thing whatever, and the member, officer or person who shall in any wise accept or receive the same, or any part thereof, shall be liable to indictment in any court having jurisdiction, and shall, upon conviction thereof, be fined in any sum not exceeding double the amount so offered, promised or given, and be imprisoned in the penitentiary not exceeding two years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such office, place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted shall for-

ever be disqualified to hold any office of trust or profit under the Constitution or laws of this State." Kirby's Digest, § 1602.

(1) It is first contended by counsel for appellee, in support of the court's ruling, that the indictment is defective because it charges the crime of "attempting to bribe a public officer" without describing the public office or setting out that the person named was in fact a public officer. It is true that in the caption of the indictment the offense is named as that of "attempting to bribe a public officer," but the body of the indictment does not attempt to set forth that offense. On the contrary, it charges the crime of attempting to bribe a certain person, who, it is alleged, was a person holding a place of profit and trust under the laws of the State, if that be an offense. The statutes of this State provide that an indictment shall be sufficient if it can be understood therefrom "that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction according to the right of the case." Kirby's Digest, § 2228, third subdivision; and that an indictment is sufficient if it contains "a statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended." Kirby's Digest, § 2243, second subdivision. An erroneous designation in the caption concerning the character of the offense does not affect the validity of the indictment if in the body thereof the facts are stated with sufficient certainty to charge a specific offense. *Lacefield* v. *State,* 34 Ark. 275; *Johnson* v. *State,* 36 Ark. 242; *Williams* v. *State,* 47 Ark. 230; *State* v. *Culbreath,* 71 Ark. 80; *Harrington* v. *State,* 77 Ark. 480; *Kelley* v. *State,* 102 Ark. 651.

In *Williams* v. *State, supra,* it was said to be unimportant what offense was named in the caption if "the particular offense of which defendant was accused was made distinct and certain by the statement of the circumstances of its commission, in the body of the count." And in

State v. *Culbreath, supra,* the court said: "The name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the indictment."

(2) It is clear from the body of the indictment in this case that the State intended to charge the appellee with the crime of attempting to bribe, not a public officer, but a person holding a place of profit or trust under the laws of the State. The accused could not have been misled by the misdescription of the offense in the caption, and if the facts set forth in the body of the indictment constitute a public offense then the indictment is sufficient.

The principal contention in support of the court's ruling, and the one which doubtless sets forth the reasons upon which the trial court based its decision, is that the phrase "person holding any place of profit or trust under any law of the State" is synonymous with the term "public office," and that the indictment is not sufficient unless it charges that the person attempted to be bribed was a public officer. We can not give our assent to that construction of the statute, for to do so would be to entirely eliminate the phrase above quoted and to emasculate the statute and defeat its manifest purpose in some respects.

Counsel for appellee rely on certain cases involving the question of the right to hold more than one office under provisions of Constitutions and statutes using language, in some respects similar to that in the statute now under examination; but an examination of those cases cited in the brief will show that the provisions construed in those cases are not indentical with our statute. For instance, the North Carolina cases construe a clause of the Constitution which provides that "no person holding any office or place of trust or profit under the United States, etc., * * * shall hold or exercise any other office or place of trust or profit under the authority of this State." It was held there that the phrase "place of trust or profit under the authority of this State" was synonymous with

the preceding word "office," and that persons holding office were not disqualified from performing other public functions. *Clark* v. *Stanley,* 66 N. C. 59; *Doyle* v. *Raleigh,* 89 N. C. 133.

It is obvious from an analysis of our statute, however, that an entirely different meaning was intended, and, as before stated, if we thus limit the language regarding persons holding a place of profit or trust, it gives it no meaning whatever and amounts to an elimination of that much of the statute. In the first place, if that interpretation be placed upon the statue, there is no statutory offense of bribery except as to acts which relate to members of the General Assembly and other State officers. There would be no statute at all relating to bribery of a county or township officer or any persons who discharged public functions unless they be members of the General Assembly or other State officers. The statute was intended to be comprehensive, and it obviously was not the intention of the lawmakers to limit it merely to members of the General Assembly and other State officers. The statute relates to "any person holding any place of profit or trust under any law of the State," and it seems clear that the lawmakers meant to make it an offense to bribe any person performing a public function pursuant to the laws of the State. In addition to that, the statute adds the words "or under the order of either house of the General Assembly," and surely it can not be plausibly urged that the Legislature has any authority to create a public office merely by an order. An office must be created by the Constitution or statutes of the State, and to provide for the bribing of an officer "under the order of either house of the General Assembly," would be a contradiction of terms, as there could be no such thing as an office created in that way.

(3) Again, it is provided in the statute that such persons so offering or giving the reward, together with "the member, officer or person who shall in any wise accept or receive the same" shall be liable to indictment, etc. Now, it is clear from that language that the Legis-

lature meant, in speaking of a person, to designate others than those who hold public office, and when this language is considered with the preceding language already quoted, it shows that something more was meant in designating a "person holding any place of profit or trust" than a member of the Legislature or other officer of the State. Originally, the offense of bribery could only be based upon a reward offered or given to a judge or other person concerned in the administration of public justice (5 Cyc. of Law, 1040), but even at common law the offense, on account of the enormity of its moral effect, was greatly broadened so that it applied to almost any kind of an officer or person performing a public function. Most of the American statutes on the subject are more comprehensive than the common law definition, and our statute is particularly so, it being obvious that the lawmakers intended to include all attempts to bribe persons performing public functions. The courts very generally hold that the statute applies to a *de facto* officer. 5 Cyc. of Law, 1041; *Diggs* v. *State,* 49 Ala. 311; *State* v. *Duncan,* 153 Ind. 318.

In the Indiana case just cited, there was an indictment for an attempt to bribe a road engineer appointed by the county board of commissioners, and the indictment was predicated on a statute which made it unlawful for a "person holding an office of trust or profit under the laws of the State" to solicit or accept a bribe. The court held that the engineer thus appointed was a *de facto* officer, although not a resident of the county, and that a public offense was charged. In disposing of the question, the court said: "Bribery is an offense against public justice. The essence of it is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience." In that case the engineer himself was the accused party in the indictment, but the case of *State* v. *Ray,* 153 Ind. 334, involved a prosecution of another party for conspiring to bribe the engineer, and the court held that the facts constituted an offense under the bribery statute.

In *State* v. *Gardner,* 54 Ohio St. 24, 31 L. R. A. 660, the court held that one charged with offering a bribe to a city commissioner could not defend on the ground that the statute under which such city commissioner held office was unconstitutional, and in disposing of the case the court said: "How is the corruption, the guilt of one who attempts to pollute the fountains of justice by bribing its acting officers, and thus cheat his neighbors and the community, any the less substantial, or the State's case against him any the less meritorious, because it may turn out that the officer's title would not stand the test of a *quo warranto?*"

We find two Federal cases which reach very closely to the question now before us, and we think are correct interpretations of the law. The first is *United States* v. *Van Leuven,* 62 Fed. 62, where there was an indictment under an act of Congress which makes it bribery to offer or give any money or other thing of value "to any officer of the United States or to any person acting for or on behalf of the United States in any official function under or by virtue of any department or office of the Government thereof." The functionary sought to be bribed was a member of the board of surgeons appointed by the United States Commissioner of Pensions to examine applicants for pensions, and it was contended, as in the present case, that the statute did not make it unlawful to attempt to bribe any person other than a public officer or his deputy. The district judge before whom the case was tried delivered an opinion in which he said: "It is urged in argument that this provision of the statute requires that the person must act in an official capacity, and that this requirement can only be met when the person is an 'officer.' * * * This construction would wholly destroy the force of the second definition in section 5501. If no person can act in an official capacity, except an officer, and no one can be an officer, except one appointed in the mode provided in section 2, article 2, of the Constitution, then it was useless to place in section 5501 any other definition than that of the opening words, towit, 'Every offi-

cer.' It is clear, however, that Congress intended to include within the section persons other than those who were technically 'officers of the United States,' as that term is defined by the Supreme Court. The section includes all persons acting for or on behalf of the United States, under or by virtue of the authority of any department or office of the Government, in an official capacity."

The same statute was under consideration by one of the district courts of the United States in another case (*United States* v. *Ingham,* 97 Fed. 935), where the indictment charged an attempt to bribe a secret service operative employed by the Secretary of the Treasury to aid in the detection and suppression of crime against the revenue law, and the district judge in his opinion said: "I agree that McManus was not an 'officer' of the United States, but I am satisfied that he was a 'person acting for or on behalf of the United States in an official function, under or by authority of a department or office of the Government thereof,' and that he held a 'place of trust or profit,' within the meaning of section 5451 of the Revised Statutes. The phrase 'official function,' taken in connection with the other language of the section, is, I think, of broader scope than the defendant's counsel is willing to admit. His position is that no one can exercise an official function unless he be an 'officer' of the United States; and, if this argument is to prevail, the two provisions of the section are identical in meaning, although it is clear that Congress supposed the words to be descriptive of two distinct classes of persons. This result is to be avoided if a fair and reasonable construction will lead to a different conclusion. In my opinion such a construction is obvious, and relieves the case in hand from difficulty. The 'official function' spoken of is not necessarily a function belonging to an office held by a person acting on behalf of the United States; it may also be a function belonging to an office held by his superior, which function has been committed to the subordinate (whether he be also an officer, or a mere employee) for the purpose of being executed."

We are not aware that these cases have been reviewed or the same question passed upon in any of the appellate courts of the United States, but we are of the opinion that they are sound expositions of the law and have a direct bearing in reaching a conclusion in the construction of the statute now before us. Our conclusion is that the different terms of the statute are not synonymous and that it was the manifest purpose of the Legislature to make it an offense not only to bribe a public official but also to make it an offense to bribe any "person holding any place of profit or trust under any law of the State or under the order of either house of the General Assembly."

(4) It has also been suggested that in order to make an offense under the clause of the statute concerning the attempt to bribe a person holding a place of profit, it must be to influence such person in the discharge of some specific provision of the law, or order of one of the houses of the General Assembly. We do not think, however, that the suggestion is well founded, for public duties may be and are often conferred by statutes in general terms, and it is a very narrow view of the statute to say that there can be no offense unless the statute itself prescribes a specific duty, the discharge of which is sought to be influenced in the attempt to bribe. The present case presents a fair illustration of the weakness of such a contention. The road improvement district mentioned in the indictment was created by an act of the General Assembly and a board of directors was created with authority to construct the improvement and to employ engineers and other agents to assist in carrying out the purposes of the statute. No specific duties are pointed out in the statute, not even those of the directors themselves, it being merely enjoined upon them the duty of constructing the improvement. While the directions of the statute are general in terms, the effect can not be misunderstood, and the attempt to bribe any of the officers or authorized agents of the district in the discharge of their respective duties would be an attempt to influence their decision as public

functionaries within the meaning of the statute. Moreover, the statute does not say that it shall only be an offense to bribe a person holding a place of profit or trust merely as to his decision with respect to some specific act or duty, but the offense is created in attempting, by offer or gift of a bribe, to influence any person holding any such place of profit or trust under the law of the State in his decision upon any matter brought before him "in his place of trust or profit." Thus the offense is made complete if there is any attempt to influence his decision in any matter which falls within his duties under the laws of the State, whether such duty is specifically prescribed or merely in general terms.

We are of the opinion, therefore, that the indictment in this case charges a public offense, and that the circuit court erred in sustaining the demurrer. The judgment is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings.

HART, J., dissents on the grounds that the facts stated in the indictment do not show that the person alleged to have been bribed was performing any governmental function and therefore did not come within the terms of the statute.

BUCKLEY v. COLLINS.

Opinion delivered June 14, 1915.

1. INFANTS—RIGHT TO SUE—SUIT BY GUARDIAN—SUBSTITUTED COMPLAINT.—J. was an infant and suit was brought against defendant by A., guardian for J., *held*, it was proper, thereafter, for the justice, before whom the cause was pending, to permit the filing of a new complaint by J., through A., as next friend, the same not operating as the bringing of a new suit.
2. INFANTS—MAY SUE, HOW.—Under Kirby's Digest, § 6021, the action of an infant must be brought by his guardian or next friend, but it is nevertheless the action of the infant, no matter by whom brought.
3. MERCHANDISE CHECKS—VALIDITY—ESTOPPEL OF MAKER—CONSIDERATION.—Appellant issued certain checks which he held out as redeemable in merchandise. *Held*, when the appellant made such a representation, and the checks were issued for a valuable consider-

ation, that he could be required to redeem the same in merchandise, or refund the consideration, and where he stated that the checks in controversy, and held by appellee, were good, he would be estopped from asserting that no consideration was given therefor.

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

O. A. Featherston and *W. S. Coblentz,* for appellant.

1. It was error to allow the filing of the amended and substituted complaint. 38 S. W. 703; 94 *Id.* 277.

2. There was no consideration for the checks. The evidence shows this, and the verdict is entirely unsupported by the evidence. 70 Ark. 385; Ruling Case Law, "Appeal and Error," § 167.

W. T. Kidd, for appellee.

1. The infant, and not the next friend, is the real party. The defendant entered his appearance and filed an answer. 90 Ark. 316; 101 *Id.* 124; 71 *Id.* 258; 157 U. S. 198; 94 Ark. 178.

2. The checks were assignable by delivery. 70 Ark. 215.

3. A verdict based upon conflicting evidence is conclusive. 90 Ark. 100. If there is any evidence to sustain it, the verdict is conclusive. 102 Ark. 200.

WOOD, J. On the 7th of October, 1912, A. T. Collins, guardian for J. A. Collins, filed a claim against A. M. Buckley for $4.95 for time checks issued by Buckley. On the 18th day of October, 1912, there was filed in the justice court what is designated in the record as an amended and substituted complaint, in which it is recited as follows: "Comes the plaintiff, J. A. Collins, by his next friend, A. T. Collins, and for his cause of action states." It then sets forth that the defendant, A. M. Buckley, is engaged in the mercantile business in the town of Kimberly, Pike County, Arkansas, and that in connection with his business he issued certain checks commonly called *brozine,* good for (naming the amount) in trade; that these checks were issued to one Sanders, and were condi-

tioned that the defendant would redeem the checks during the month either in merchandise or cash when presented to him by the holder thereof. He further alleged that he owned $4.95 in these checks; that he had made demand on the defendant and he refused to redeem the same.

(1) Appellant first contends that the court erred in permitting the appellee to file what is called the amended and substituted complaint. At the time this pleading was filed there had been no written pleading filed in the justice court. The account that was filed before the justice was styled, "A. T. Collins, guardian for J. A. Collins." Although the account purported to be filed by A. T. Collins as guardian for J. A. Collins, it was not error for the court to permit the appellee, through A. T. Collins, to file what is termed the amended and substituted complaint. By so doing a new suit was not instituted, for it is the infant, and not the party who represents him in the litigation, that is the real party to the suit. As is said in *Morgan* v. *Potter,* 157 U. S. 195-8: "It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem,* by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend."

(2) Under our statute "the action of an infant must be brought by his guardian or next friend." Kirby's Digest, § 6021. But whether the suit be brought by the guardian or the next friend, it is at least the suit of the infant and must be brought in the name of the infant by the guardian or the next friend. The infant can not act for himself in bringing a suit, but it is nevertheless his suit, no matter by whom brought. The mistake as to the capacity in which the party bringing the suit for the infant acts does not make it a suit by a different party. See *St. Louis, I. M. & S. Ry. Co.* v. *Haist,* 71 Ark. 258.

(3) There was evidence tending to show that the appellant put in circulation checks which read as follows:

"Good for $1 in trade. A. M. Buckley, Reedland." Appellee, who was doing business through his guardian, acquired a number of these checks, having accepted the same in exchange for merchandise, and he presented them to appellant and appellant redeemed them either in merchandise or by paying the money therefor. The particular check in controversy appellee acquired in the same way, and he presented same to appellant, demanding payment thereof either in money or merchandise and appellant refused payment.

There was proof tending to show that appellant admitted that he placed the checks in circulation and that he had been redeeming the checks which appellee presented to him.

There was proof on behalf of the appellant to the effect that he loaned the check in controversy and similar checks to one Sanders and there was no consideration received by appellant from Sanders for these checks.

The court, among others, gave the jury the following instruction: "If you believe from a preponderance of the evidence that defendant Buckley issued these checks redeemable in money to customers of his, received money for them, placed them in circulation, and they were assigned to the plaintiff in the case for a valuable consideration, then the plaintiff would be entitled to recover the amount of his checks. If, however, you find from the evidence that the defendant Buckley loaned these checks to one Sanders and that Buckley received no consideration for them, but merely loaned them as a matter of accommodation to Sanders, and Sanders put them in circulation and they came into the hands of the plaintiff Collins, then your verdict will be for the defendant."

The appellant concedes that this instruction is correct, but argues that there was no evidence to sustain the verdict. We do not agree with counsel in this contention. There was substantial evidence to sustain the verdict. These checks were assignable by delivery to the appellee. *Martin-Alexander Lumber Co.* v. *Johnson,* 70 Ark. 215.

The court correctly instructed the jury. Appellant had been cashing the same kind of checks for appellee and other parties. Appellant, when asked if these checks were good, said they were "good at his store." He stated to other parties than the appellee that "they would be paid off on the 20th;" and appellant is estopped by his conduct in the manner in which he dealt concerning these checks with the appellee from asserting that there was no consideration for them. The jury were warranted in finding that there was a consideration.

The judgment is therefore correct, and it is affirmed.

SMITH v. FIRST NATIONAL BANK OF DEWITT.

Opinion delivered June 14, 1915.

1. APPEAL AND ERROR—FORECLOSURE OF MORTGAGE—AMOUNT OF DECREE—OBJECTION TO, WHEN RAISED TOO LATE.—A. mortgaged property to B., and on a sale under a foreclosure thereof a sum sufficient to satisfy the decree was not realized. A. took no appeal from this decree. Under execution, other property was sold to satisfy the balance due, and the court overruled A.'s exceptions to the report of the commissioner and confirmed the sale. On appeal from this decree, *held*, it was too late for A. to object that the amount in the first decree against him was excessive, more than one year having elapsed since the rendition of that decree, and no appeal having been taken therefrom.
2. TRIAL—EXCEPTIONS TO REPORT—FAILURE TO OFFER PROOF—SALE ON EXECUTION.—It is the duty of the party filing exceptions to the report of a commissioner making a sale of land under execution, to prove the matters contained and alleged in the exceptions and in the absence of such proof, the judgment of the court overruling his exceptions, will be presumed to be correct.
3. EXECUTION SALE—NOTICE—PRESUMPTION.—Where property is sold under foreclosure, the record having recited that the notice was given in the manner and for the time prescribed by law, the presumption, in the absence of proof to the contrary, is that the statute in that regard, was complied with.
4. FORECLOSURE—PURCHASER—RIGHTS OF MORTGAGOR.—A's land was sold under foreclosure proceedings; the sale did not satisfy the decree, and under execution other land belonging to A. was sold and purchased by one W. A. appealed from an order of the chancellor, confirming the sale to W., and overruling A's exceptions to the re-

port of the commissioner. On this appeal, it appearing that the action of the chancellor was proper, *held*, the rights and liabilities of A. and W. *inter se*, were not affected by this appeal.

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

W. N. Carpenter, for appellant.

1. The decree was void because it included an attorney's fee as part of the debt. 76 Ark. 151; 77 *Id.* 357.

2. The commissioner's sale and the execution sale are both void for want of legal notice. Kirby's Digest, § 4923; 74 Ark. 474.

John W. Moncrief, for appellee.

1. The decree recites that the cause was heard upon the complaint, etc., "and other proof." The "other proof" is not contained in the transcript. 80 Ark. 74; 94 *Id.* 115; 98 *Id.* 266.

2. The appeal should be dismissed. The final decree was rendered more than one year before the appeal was granted by the clerk of this court. Kirby's Dig., § 1199.

3. The presumption is that the commissioner's sale was regular and legal. 1 Am. St. Rep. 701-706; 99 Am. Dec. 459-461; 89 *Id.* 545-550; 17 Am. & Eng. Enc. Law (2 ed.), 994. Due notice was given.

4. All objections to the sale were waived by failure to object before sale and confirmation. It is too late after confirmation of the sale to object for irregularities in proceedings. 24 Cyc. 39; 56 Ark. 224, 240.

5. By accepting the balance of the proceeds of the sale he acquiesced in, ratified and approved the sale. 17 A. & E. Enc. Law (2 ed.) 996; 57 Ark. 632; 53 *Id.* 514-516; 24 *Id.* 14; 41 N. E. 1027.

HART, J. This is an appeal from an order of the chancery court confirming a commissioner's sale of lands made under a decree foreclosing a mortgage. The facts are as follows:

On January 31, 1913, Martin Smith and Caroline Smith executed a note to the First National Bank of

DeWitt for $1,218.65, due sixty days after date, and the same was secured by a mortgage on real estate. On December 18, 1913, the bank instituted an action in the chancery court to foreclose the mortgage and recover judgment on the note. On February 4, 1914, judgment was rendered in favor of the bank on the note and a decree ordering the mortgage foreclosed was entered of record. The land was sold by a commissioner appointed by the court pursuant to the directions of the decree, on March 28, 1914. The bank was the highest bidder at the sale and having bid the sum of $1,000 was declared the purchaser. On the 28th day of March, 1914, an execution was issued and levied on other lands of Martin Smith to satisfy the balance of the judgment. The lands levied upon were sold under execution sale May 14, 1914, and the Henry Wrape Company became the purchaser thereof at said sale. The commissioner appointed to sell the lands under the decree of foreclosure made his report of the sale and Martin Smith filed his exceptions thereto in September, 1914. The court heard the report of the commissioner and the exceptions thereto and overruled the exceptions and confirmed the report. The defendant Smith excepted to the ruling of the court and prayed an appeal to the Supreme Court, which was granted. On March 24, 1915, the defendant Smith filed a transcript in said cause in this court and an appeal was granted by the clerk.

(1) It is first contended by counsel for Smith that the court in the foreclosure suit against him rendered judgment against him for a greater amount than was due by him to the bank. If the court made any error in the foreclosure decree we can not consider it for the reason that no appeal was taken. The decree of foreclosure was entered on the 4th day of February, 1914, and no appeal was prayed or granted. The transcript in this cause was filed on March 6, 1915. At the time the foreclosure decree was entered section 1199 of Kirby's Digest was in force and it provides that an appeal shall not be granted

except within one year next after the rendition of the judgment, order or decree sought to be reviewed.

(2) Smith, in his exceptions to the confirmation of the master's report of the sale, alleged that prior to the sale the cashier of the bank entered into an agreement with him whereby the cashier was to buy the land in his own name at the sale and was to reconvey the same to Smith. He alleged that the cashier violated this agreement and that the bank purchased the land in its own name.

It devolved upon Smith to prove the matter contained and alleged in this exception, but the record does not show that any proof whatever was offered in support of this exception, and the exception, as prepared and filed in court, was not even verified by him. Therefore, the judgment of the court overruling his exception is presumed to be correct.

(3) It is next contended by counsel for Smith that the land was not advertised under the foreclosure decree as provided by section 4923 of Kirby's Digest. Smith did not offer any proof so far as the record discloses to substantiate his exception in this regard; on the contrary, the report of the sale made by the commissioner recites that the sale was made pursuant to the decree of the court and that due notice of the time and place of said sale was given as required by law. The court overruled this exception of Smith, and there is nothing in the record to show that the court erred in that regard. The record having recited that the notice was given in the manner and for the time prescribed by law, the presumption, in the absence of proof to the contrary, is that the statute was complied with.

(4) The third contention of counsel for Smith is that the sale under execution to the Henry Wrape Company should be set aside. We need not set out his reason for asking for this relief, for that proceeding is not before the court. The Henry Wrape Company was not a party to the foreclosure suit and was not made a party thereto at any stage of the proceeding. Whatever right

Smith may have against the Henry Wrape Company is not affected by this decision; neither are the rights of the Henry Wrape Company affected by it.

It follows that the order of confirmation of the sale of land made by the commissioner will be affirmed.

RAILROAD COMMISSION OF ARKANSAS v. SALINE RIVER RAILWAY COMPANY.

Opinion delivered June 14, 1915.

1. RAILROADS—DUTY AS PUBLIC SERVICE CORPORATION—ACCEPTANCE OF CHARTER.—The franchise rights and privileges of a railroad company are granted by the State in consideration of the resulting benefits to the public; and their acceptance by the railroad company imposes upon it the duty of operating the road, when constructed, and of doing so in the manner, and for the purposes contemplated by its charter, which duties it may be compelled to perform by proper proceedings.
2. RAILROADS—CHARTER—OPERATION OF WHOLE LINE.—Where a corporation is organized for the purpose of constructing, maintaining and operating a railroad for the conveyance of persons and property, and the charter confers upon the incorporators the power to operate the road over a fixed line or lines, it can not abandon a part of its line and continue, under its charter, to operate the balance.
3. RAILROADS—DUTY TO OPERATE—LOSS.—The obligation of a railroad comporation to discharge the duties imposed by its charter, must be construed in connection with the nature and productiveness of the corporate business as a whole, the character of the service required, and the public need for its performance, and its statutory duty to operate its road may be compelled, although as an incident to its so doing, some pecuniary loss may result to it.
4. RAILROADS—OPERATION OF TRAINS—NUMBER DAILY.—Under Kirby's Digest, § 6704, a railway company operating passenger trains, must run at least one each way, daily.
5. RAILROADS—OPERATION OF TRAINS—LOSS—POWER OF RAILROAD COMMISSION.—A line of railroad nine miles in length, was operated by appellee railway company, primarily for hauling logs for a certain mill; the mill moving away, the railroad could not be operated except at a great loss; *held*, when the company was without money with which to operate the railway, that the railroad commission of the State, was without authority to order that trains be operated on the line daily.

6. RAILROAD COMMISSION—ORDERS—PUBLIC INTEREST.—An order made by the railroad commission should only be issued in the interest of the public.
7. RAILROAD COMMISSION—REASONABLENESS OF ORDERS—JURISDICTION OF COURTS.—The orders of the railroad commission must be reasonable, and whether they are is a question for the courts to decide.
8. RAILROAD COMMISSION—UNREASONABLE ORDER—REMEDY—INJUNCTION. —When the railroad commission exceeds its powers, and issues an arbitrary and unreasonable order, an injunction is a proper remedy to curb the abuse of power.
9. RAILROADS—ABANDONMENT OF LINE—CONSENT OF STATE—REMOVING TRACK.—Railroad corporations may not abandon their roads and surrender their charters, without the consent of the State; and although a railroad corporation can not be compelled to operate, because such an order would be unreasonable, the corporation is not thereby authorized to remove and dispose of ties and dismantle its road on its own motion.
10. RAILROADS—IABILITY TO OPERATE—REMEDY—RIGHT OF STATE.—When a railroad corporation is totally unable to operate, the Attorney General, in an action of *quo warranto*, may cause its charter to be forfeited because it has abandoned the operation of its road; and upon a proper application a court of equity may take charge of the affairs and property of the company, by the appointment of a receiver.

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

STATEMENT BY THE COURT.

The Saline River Railway Company instituted this action in the chancery court against the Railroad Commission and the prosecuting attorney of the Tenth Judicial Circuit of this State to restrain them from further proceeding to compel said railway company to operate its line of railroad. The facts are as follows:

The Saline River Railway Company was organized in 1901 and constructed a railroad from Draughon, a station on the Cotton Belt Railroad in Cleveland County, Arkansas, to the town of New Edinburg, a distance of nine miles. The road was completed and put in operation in December, 1901. Later it was extended to Glenn. The road was organized primarily for the purpose of hauling logs to the Saline River Lumber Company, whose plant was located at Draughon. The stockholders of the

company also hoped that by the time all the logs of the lumber company were hauled, the country would be developed to such an extent that there would be sufficient travel and business to justify the continued operation of the road.

The cost of constructing the railroad and its rolling stock and equipment was $75,000.

In the summer of 1913 the Saline River Lumber Company had cut all its timber along the line of the road and began the work of removing its plant from the station of Draughon. Draughon is a town of about 150 inhabitants and it is conceded that there will be only fifteen or twenty persons left after the lumber company's plant has been removed. New Edinburg is a town of about three hundred population and the intervening country between it and Draughon is sparsely settled.

The railroad company operated two trains each way daily upon its line of road from December, 1901, until August, 1913. At that time service from New Edinburg to Glenn was discontinued and the tracks torn up between these two points. The road was continued to be operated between Draughon and New Edinburg until November, 1913, when the train service was discontinued because there was no money with which to operate the road. On December 6, 1913, the Railroad Commission of the State of Arkansas made an order directing the railway company to resume passenger and freight service between Draughon and New Edinburg, and, as above stated, this suit was brought to enjoin the enforcement of that order.

The order provided that the railroad company should operate one train each way daily between Draughon and New Edinburg. The company has no property except its road, track and equipment, which are worth $18,000. The track is now badly out of repair and it would take $5,000 to place it in repair so that trains could be run on it with safety. The actual cost of operating one train each way daily between Draughon and New Edinburg is fifty dollars per day. The total receipts from passenger and freight service amounts to not

more than ten dollars per day. The railroad company since some time in January, 1914, has not operated a train over its line daily but only does so at infrequent intervals to haul freight to the town of New Edinburg, and this, the officers say, is done merely for the accommodation of the inhabitants of that place.

There is some testimony tending to show that the officers of the railroad company contemplate dismantling the road.

The officials have made repeated attempts to sell the road for $18,000, the value of the rails, rolling stock and other equipment of the road.

The chancellor granted the injunction as prayed for and the case is here on appeal.

Wynne & Harrison, for appellant.

1. The railway company is a public highway and common carrier. It must serve the public until relieved of its charter obligations by the State through legislative permission. 105 Ark. 314. It must operate its trains whether profitable or not, and run at least one passenger train every day. Kirby's Digest, § 6704; 38 S. W. 54; 91 Ga. 400; 216 U. S. 262; 99 Ark. 17. The order comes clearly within the scope of the powers of the commission.

2. The order of the commission was not arbitrary nor unreasonable. 216 U. S. 262; 29 Pac. 509; 99 Ark. 17.

S. Brundidge and *Harry Neelly,* for appellee.

1. The order was unreasonable, arbitrary and confiscatory. 113 Fed. 823. No corporation can be compelled to serve the public without reasonable remuneration. 11 N. E. Rep. 350; 36 Pac. 755; Morawetz on Priv. Corp., § 1119.

2. The company is insolvent, and to grant the contention of appellant would be confiscation of appellee's property. 169 U. S. 544; 125 *Id.* 650; 128 *Id.* 174; 173 *Id.* 688; 164 *Id.* 578; 134 *Id.* 418.

HART, J., (after stating the facts). (1) The franchise rights and privileges of a railroad company are granted by the State in consideration of the resulting

benefits to the public and their acceptance by the railroad company imposed upon it the duty of operating the road, when constructed, and of doing so in the manner and for the purposes contemplated by its charter, which duties it may be compelled to perform by mandamus or other proper proceedings. 33 Cyc. 635; see also cases cited in case notes to 33 Am. & Eng. Ann. Cas., p. 1256, and 50 L. R. A. (N. S.) 652.

In *Atlantic Coast Line* v. *North Carolina Corporation Commission,* 206 U. S. 1, the court said:

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

Amendment No. 4 to our Constitution conferred upon the Legislature the right to create a railroad commission, and pursuant to that authority an act was passed creating such a commission and defining the duties thereof.

Section 6704 of Kirby's Digest provides that it shall be the duty of every company operating a railroad in the State which runs passenger trains to run at least one of its passenger trains each way daily.

(2-3) The plaintiff corporation was organized for the purpose of constructing, maintaining and operating a railroad for the conveyance of persons and property. The franchise of the railroad company can only be exercised by the corporation operating its whole line of road. The charter confers upon the incorporators the power to operate the road over a fixed line or lines and it can not abandon a part of its line and continue to operate the balance under its charter. Its obligation to discharge the duties imposed by its charter must be construed in connection with the nature and productiveness of the cor-

porate business as a whole, the character of the service required and the public need for its performance. For that reason its statutory duty to operate its road may be compelled, although by doing so, as an incident, some pecuniary loss may result from rendering such service. *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262.

(4) As we have already seen, our statute requires the railroad company to operate trains each way over its line daily and penalties are provided for failure or refusal to obey that section of the act, or proper orders of the railroad commission. This brings us to the question of whether or not the order made by the railroad commission was so arbitrary or unreasonable as to be void for want of power to make it. *St. Louis, I. M. & S. Rd. Co.* v. *Bellamy,* 113 Ark. 384; *St. Louis, I. M. & S. Rd. Co.* v. *State,* 112 Ark. 147; *La. & Ark. Rd. Co.* v. *State,* 85 Ark. 12.

The fact, as above indicated, that the order made by the Railroad Commission was likely to cause pecuniary loss to the railroad company was not of itself sufficient to make the order arbitrary and unreasonable; but this fact was a circumstance to be considered in determining whether or not the order was arbitrary and unreasonable.

(5) In the case at bar the uncontroverted facts show that the cost of the construction and equipment of the railroad was $75,000 and that it now owns no property except its tracks and rolling stock; that the track is badly out of repair and that it would cost $5,000 to repair it so that passenger trains could be safely run over it; that the road now owes between $100,000 and $150,000; that it has made repeated efforts to sell its franchise and all its property for the sum of $18,000, which is the actual value of its rails and rolling stock; and that it has been unable to find a purchaser; that the actual cost of operating one train each way daily between Draughon and New Edinburg is fifty dollars and that the greatest amount of revenue which it can earn daily is not more than ten dollars.

The railroad company operated its trains from August, 1913, to some time in November of that year at this loss. This was at a season of the year when traffic over railroads in this State is usually heaviest. So, under the peculiar facts of this case, the track of the railroad is so short, and the business done by it so small that it would be unreasonable to require it to operate a train for freight and passengers. If the business done over the whole line of the road shows that to compel the operation of trains would be to entail a serious and continued loss, it would be unreasonable to prescribe and demand it, and it would not be required.

The record shows that the railroad company has no means whatever with which to operate its line of road and is unable to procure any for that purpose. It can not even sell its road for the cost of its rails and rolling stock. The record does not show that this lack of means resulted from any mismanagement of the railroad.

(6) An order made by the Railroad Commission should only be issued in the interest of the public. Under the undisputed facts there is no probability that the railroad can be operated and the Railroad Commission should not make a vain and futile order. Such action on its part is arbitrary and unreasonable. See *State of Kansas* v. *Dodge City, Montezuma & Trinidad Ry. Co.* (Kan.), 24 L. R. A. 564; *State of South Carolina* v. *Jack, Cir. Ct. of Appeals,* 4th Circuit, 145 Fed. 281; *Ohio, etc., Ry. Co.* v. *People, on Relation of Attorney General* (Illinois), 11 N. E. 347; Elliott on Railroads 2d ed., vol. 2, Sec. 1056c.

(7-8) Granting the commission power to make orders does not necessarily take away the jurisdiction of the courts. As we have already seen, the orders of the Railroad Commission must be reasonable, and whether or not they are is a question for the courts to decide. The rule is that where a tribunal, such as a board of railway commissioners, exceeds its powers and issues an arbitrary and unreasonable order, an injunction is a proper remedy to curb the abuse of power. The only difficulty

in practically applying the rule is in determining whether the commission has exceeded its powers. Elliott on Railroads, 2d ed., vol 2, Sec. 705-6.

(9) There is some testimony in the record tending to show that the officers of the railway company contemplate dismantling it. It does not follow that because we have held that the order of the Railroad Commission was arbitrary and oppressive, that the railroad company has a right to take up its rails and dispose of them on its own motion. In the case of *Freeo Valley Railroad Co.* v. *Hodges,* 105 Ark. 314, we held that since railroads are constructed for public use and the public has rights in them which should be protected, that railroad corporations are not authorized to abandon their roads and surrender their charters without the consent of the State.

(10) Under the facts disclosed in this case, the Attorney General in an action of *quo warranto* might cause the charter of the company to be forfeited because the railroad company has abandoned the operation of its road. So, too, upon proper application a court of equity could take charge of the affairs and property of the railroad company by the appointment of a receiver. Thus, the court would be able to protect the rights of creditors and stockholders and to insure, as far as practicable, the discharge of the public function of the corporation. See Elliott on Railroads, 2d ed., vol. 1, sec 539.

From the views we have expressed it follows that the decree will be affirmed.

KIRBY, J., dissents.

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

Opinion delivered June 14, 1915.

1. LICENSE—INVITATION—WHEN INFERRED.—An invitation may be inferred where there is a common interest and mutual advantage, while a license is inferred where the object is the mere pleasure or convenience of the person using it.

2. MASTER AND SERVANT—PATH BY RIGHT-OF-WAY—INVITATION BY MASTER.—Where it was for the benefit of both a master and servant for the latter to use a certain foot path by the master's right-of-way, and when the same had been so used for five years, and that fact was known to the superintendent of the master, it will be held that there was an implied invitation by the master to the servant, to use the path.

3. NEGLIGENCE—PROXIMATE CAUSE OF INJURY—RULE.—In order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances, but it is not necessary that the particular injury which did happen, should have been actually foreseen.

4. DAMAGES—PERSONAL INJURY—AMOUNT.—Where plaintiff was so severely injured by reason of the negligence of defendant railroad company, that one leg had to be amputated, and where he suffered great pain by reason of the injury, a verdict of $7,000 will not be held to be excessive.

Appeal from Bradley Circuit Court; *Turner Butler*, Judge; affirmed.

STATEMENT BY THE COURT.

R. W. Duckworth sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for personal injuries sustained by him while in its employment. He was employed by the railway company as a mechanic and worked in its shops at McGehee, Arkansas. The shops at McGehee are situated 150 or 200 yards southeast of the passenger depot and are on the east side of the main track. About 150 men are usually employed at these shops and there is a passageway across the track for them to use in coming to their work. The plaintiff lived on the east side of the tracks and about a quarter of a mile away. There was no practical way for him to go from his home to the shops on the east side of the tracks and he, as well as all other employees living in that part of town, was accustomed to walking along a beaten path on the right-of-way on the west side of the railroad track when going to or returning from their work. The residents of the town of McGehee were also accustomed to walking along this same path. About 6:30 o'clock on

the morning of the 20th of January, 1914, while the plaintiff was walking along the path on the west side of the track a wire attached to a passing train became fastened to one of his legs and he was dragged along about forty feet by the moving train. The wire then broke loose from the train and the plaintiff fell under the train. The wheels of the train ran over one of his feet and crushed it so that his leg had to be amputated. The employees had been using the path along which the plaintiff was walking since some time in 1909, and the testimony on the part of the plaintiff tends to show that the path was so used with the acquiescence and consent of the railroad officials; that the car of the superintendent was often on the sidetracks and that he could see the employees going to and from their work along this path. The testimony on the part of the plaintiff also tends to show that a great many logs were shipped into the station at McGehee and that the logs were wired to flat cars in which they were hauled and that these wires were from thirty to one hundred feet long; that it was the custom when unloading these logs to cut off one or both ends of the wires and to then place the wires back on the flat cars. Frequently loose wires, all curled up, were left lying along the track in the company's yards at McGehee. Flat cars were also frequently seen in trains on the main track at McGehee with wires attached to them and dragging along by the side of the car. Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff and the defendant has appealed.

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

1. Appellee was a bare licensee to whom the appellant owed no affirmative duty of care to avoid injuring him, but only to avoid wantonly or wilfully injuring him. 95 Ark. 190; 103 Ark. 226; 114 Ark. 218.

2. The master's duty in respect to furnishing his servant a safe place in which to work extends to such parts of his premises only as he has prepared for the ser-

vant's occupancy while doing his work. The appellee in this case was not engaged in appellant's work when he was injured. His employment called for work in the shops and yards, not upon the main line. It was not necessary for him to follow the path in going to his work, neither was it appellant's duty to make the track in question safe for his use as a pedestrian. 115 Ark. 350.

3. The court should have directed a verdict for appellant. There was no reason why appellant should have foreseen this accident. One who goes close to a passing train does so with knowledge that if there is anything protruding from any of the cars it is likely to injure him. Appellee assumed the risk and was guilty of contributory negligence in being so close to the passing train. 90 Ark. 387.

4. Appellee was fifty-seven years of age, earning $600 per year, and there was no assurance that at this age he could continue earning this amount. The verdict was excessive.

Murphy & McHaney, for appellee.

1. It is not necessary, in order to make appellant liable, that the particular injury complained of, in the particular manner in which it occurred, should have been foreseen or anticipated, but only that it might have been anticipated by the exercise of ordinary care, that some injury was likely to occur as a result of the negligence complained of. 4 L. R. A. 420; 97 Ark. 585.

2. Appellee was not a mere licensee, and the cases relied upon by appellant to support this contention do not apply. One who goes upon the premises of a railroad company upon business connected with the company or on business of mutual benefit to himself and the company, is not a licensee, but is there by invitation. 69 Ark. 489; 48 Ark. 491; 90 Ark. 278, and cases cited; 30 N. W. (Mich.) 337; 196 Mass. 575; 80 N. E. 705; 168 Mass. 261, 47 N. E. 90; 18 N. Y. 432; 27 Jones & S. 367; 126 Fed. 194; 30 S. E. 437; 52 Am. Rep. 279; 36 N. W. 591; 14 Am.

Rep. 32; 44 N. W. 270; 39 N. E. 493; 41 S. C. 468; 29 S. E. (N. C.) 784; 36 S. E. (S. C.) 700; 104 Ark. 236; 89 Ark. 103; 96 Ark. 642; 94 Fed. 323; 99 Ark. 491.

3. The verdict was not excessive. Appellee's earning capacity, about $786 per year, was not alone to be considered, although that alone justified the size of the verdict, but his extreme pain and suffering, both mental and physical, he has undergone and will continue to undergo, were also proper elements to consider.

HART, J., (after stating the facts). It is insisted by counsel for the defendant that the testimony is not sufficient to support the verdict; that the facts in this case do not bring the plaintiff within the well known rule that it is the master's duty to use ordinary care to furnish safe appliances and a safe place to work to his servants and to exercise the same degree of care to keep such appliances and place in the same condition. They contend that the duty of an employer to provide a safe place to work is limited to the place where the employee is required to be for the purposes of his employment. They rely upon the theory that the defendant was not bound to anticipate the presence of the plaintiff at the particular place where the accident occurred, on the ground that he would not have been there had he gone the usual way provided for him in going to and from the shops. In short, they urge that the duties of the plaintiff in the performance of his work did not require him to go along the path where he was injured, that he was there without any invitation or any inducement therefor by the railroad company; that he was, therefore, at most a mere licensee; that a licensee takes his license subject to all its concomitant perils; and that the licensor owes him no duty except to refrain from wilfully or wantonly injuring him and to exercise ordinary care after discovering him to be in peril. See *Chicago, Rock Island & Pacific Ry. Co.* v. *Payne,* 103 Ark. 226, and cases cited; *St. Louis, I. M. & S. Ry. Co.* v. *Tucka,* 95 Ark. 190.

We do not agree with counsel in this contention, and do not think the facts in this case bring it within the prin-

ciples of the cases above cited, and other cases decided by this court with reference to the duties of a railway company to mere licensees. There is a difference between invitation and license, and an invitation will be more readily implied in some cases than others. To illustrate, the undisputed facts in this case show that the accident occurred in 1914, and that the residents of the town as well as the employees at work in the shops had been accustomed to use the beaten path along the west side of the railroad track for more than five years and that the officials of the company knew of this fact but made no effort to prevent them from using the path. Under these circumstances a resident of the town would be a mere licensee for the reason that he used the path solely for his own pleasure and convenience.

It is conceded by counsel for the defendant that if the railroad company had provided this path as a means of egress or ingress for its employees to its shops that it would be the duty of the company to use ordinary care to keep it in a safe condition. But they contend that under the facts in this case the plaintiff had no greater rights there than the residents of the town and that he should be treated as a licensee merely.

(1-2) An invitation may be inferred where there is a common interest and mutual advantage while a license is inferred where the object is the mere pleasure or convenience of the person using it. As we have already seen, the undisputed facts show that the servants had been accustomed to walk along this path in going to and from their work in the shops for a period of more than five years before the accident in question occurred. The evidence also tends to show that there was no practical way to go from the part of the town where the plaintiff lived to the shops on the east side of the railroad. The record does show that there was a street on the west side of the railroad nearly parallel with the tracks of the railroad company which the plaintiff might have used in going to and from his work. But it appears that much hauling was done over this street and that it was cut up

with ruts and very muddy, which made it very difficult for footmen to travel over it. The beaten path used by them enabled the shopmen to reach their homes more quickly and to return to their work more promptly. It was the most direct and practical way to reach the shops from that part of the town where the plaintiff and many other employees of the defendant lived. The railroad officials, including the superintendent of the road, saw them using this path for that purpose day after day and acquiesced therein. While there was no express designation that this path be used by the servants in going to and from their work at the shops we think the jury might have inferred an implied invitation to so use it. Such use of the path was for the common interest of both the railroad company and the plaintiff for the reason that the railroad company was interested in its servants getting promptly to the shops where they worked. Under the circumstances, we think it can not be said that the plaintiff was walking along the path where he was injured solely for his own convenience; but we are of the opinion that he was rightfully there upon the implied invitation of the company. See *St. Louis, I. M. & S. Ry. Co.* v. *Schultz,* 115 Ark. 350; *St. Louis, I. M. & S. Ry. Co.* v. *Wirbel,* 104 Ark. 238.

(3) The jury might have inferred that the negligence of the railroad company in regard to the wires was the proximate cause of the injury. In order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances, but it is not necessary that the particular injury which did happen should have been actually foreseen. See *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576.

In this connection it may be said that the testimony on the part of the plaintiff shows that wires from thirty to one hundred feet long were frequently seen in the yards of the company at McGehee, where the injury in question occurred, and that such wires were frequently

seen attached to moving cars going out from the station at McGehee. We call particular attention to the following testimony:

"Q. What would become of the wires (referring to wires on flat cars after logs were unloaded)? A. I have seen them cut off; they have stakes on each side of the cars, and they run the wires backwards and forwards, three or four strands to the stakes, and then they take a stake or a rod and put it in between the wires and twist it until it is tight, to hold the logs on there; and when they get ready to unload them they just cut one side of the wire and throw the wire around; the wire hangs to the stakes on the other side, which has not been cut—then they unload the logs. Q. Have you ever seen any of those wires that were thus used in wiring on logs, lying anywhere about the main track? If so, where? A. Yes, sir; I have seen them practically all over the yard and along the main line, and I have seen flat car after flat car with wires to the stakes, and also lying loose upon the cars. Q. Have you ever seen any lying loose on or about the roadbed or track of the main line? A. I have seen them lying there from the main line about a mile or two north and south of McGehee. Q. All along? A. Yes. sir; all along wherever I have traveled. Q. Do you know anything about the underworks or attachments on passenger cars? A. Yes, sir. Q. Do you know anything about their catching up wires left on the track? A. All the brace rods under the cars lie very low next to the track; the brace rods, the long rods that go from one end of the car to the other—and they have a plank in between them. I suppose from six to eight inches wide; the rods are very close to the surface, about a foot and a half, something like that from the ground, or probably two feet."

Objections are made by counsel for the defendant to certain instructions given by the court at the instance of the plaintiff and to the refusal of the court to give certain instructions asked for by them. We do not deem it necessary to set out these instructions or to comment

upon them for the instructions given were in accord with the principles of law above announced and the questions of fact were submitted to the jury under appropriate instructions.

(4) It is finally insisted by counsel for the defendant that the verdict of the jury is excessive. The jury found for the plaintiff in the sum of $7,000 and we do not regard this amount as excessive under the circumstances of the case. The plaintiff's foot was crushed by the cars running over it; his leg was torn open six or eight inches on the calf and about half way from the knee joint. His foot was first removed by amputation and after he had been in the hospital three or four days a second operation was performed and his leg cut off just below the knee. He was compelled to stay in the hospital four months. During all this time and for a considerable time since he has suffered severe and excruciating pain. His physician testified that, though he could not state positively that the pain and suffering of plaintiff would be permanent, he believed it would last during his life. The plaintiff at the time he was injured was earning between six and seven hundred dollars a year. He was a stout, able-bodied man, was sober and industrious and his earning capacity was likely to be increased. When this is considered, in connection with the severe pain which he endured, and is likely to endure, we do not think that a verdict of $7,000 is excessive.

The judgment will be affirmed.

KIRBY, J., dissents.

FORT SMITH LIGHT & TRACTION COMPANY v. MCDONOUGH.

Opinion delivered June 14, 1915.

1. LOCAL IMPROVEMENTS—TAXATION FOR—PROPERTY BENEFITED—REAL ESTATE.—Taxation for local improvements must be confined to real estate to be benefited by the proposed improvement.

2. LOCAL IMPROVEMENTS—ASSESSMENTS—TRACKS OF STEAM RAILROADS.—Act 167, p. 402 Acts 1907, providing for the assessment of trackage

for local improvements, *held,* to cover only companies owning steam railroads.

3. STREET RAILWAYS—RIGHT TO USE OF STREETS.—Street railways merely hold a franchise to use the streets in common with other travelers, and have no right-of-way, as that term is generally understood.

4. LOCAL IMPROVEMENT—TRACKS OF STREET RAILWAY—INTERURBAN LINE.—The rails and ties composing the tracks of a street railway, lying within a municipal corporation, are not assessable for local improvement under Act 119, p. 325, Acts 1909, creating an improvement district for the purpose of constructing a bridge across the Arkansas River.

5. LOCAL IMPROVEMENTS—ASSESSMENTS—REAL AND PERSONAL PROPERTY TRACKS OF STREET RAILWAY.—The character of the occupancy of property marks the distinction between real estate and personal property, and the use of the street as a public highway for the purpose of operating a street railway, necessarily characterizes the tracks of the railway as being personal property, and not real estate.

6. INTERURBAN RAILWAYS—TRACKS WITHIN CITY—ASSESSMENT FOR LOCAL IMPROVEMENT.—The tracks of an interurban railway, lying within a city, are not to be classified as real estate for purposes of assessment for a local improvement.

7. INTERURBAN RAILWAYS—TRACKS WITHIN CITY.—The fact that lines are occupied outside a city, as an interurban railway, does not change the character of the operation nor the classification of the rights of the company owning and operating the same within the city.

8. STREET RAILWAYS—LOCAL IMPROVEMENT—TRACKS.—Under Act 119, p. 325, Acts 1909, creating the Fort Smith and Van Buren Bridge District, the tracks of street railways laid along the public streets, in a city are not subject to taxation for the construction or maintenance of a local improvement.

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

Hill, Brizzolara & Fitzhugh, for appellant.

1. This case presents a single issue, Are the tracks, rails and ties of a street railway company under a franchise assessable for bridge taxes under the Act of 1909, page 325? This court, in *Lenon* v. *Brodie,* 81 Ark. 208, finally and completely determined this issue. This decision is sustained by the great weight of authority. 1 Page & Jones on Taxation by Assessments, § 601; Hamilton on Law of Special Assessment, § 284 f. f.

2. *Lenon* v. *Brodie* has not been changed by subsequent legislation. Acts 1907, page 402, applies only to steam railroads. 69 Ark. 68.

3. Act 119, Acts 1909, 325, only provides for the assessment of real estate, and the tracks, ties and easement of a street railway are personal property. 24 App. Div. (N. Y.), 489-491; 126 N. Y. 147; 43 Hun, 119; 17 N. E. 954; 94 Pac. 194; 108 S. W. 960; 3 N. W. 84; 44 S. W. 693; Kirby's Dig., § § 5673, 6936; 81 Ark. 208. The term "railroad" or "railway" does not include street railway company. 23 How. 435; 54 N. E. 1076; 78 N. W. 1032; 61 Minn. 435; 63 N. W. 1099; 28 Minn. 373; 10 N. W. 205; 130 N. W. 71; 52 *Id.* 902; 27 *Id.* 839. Laws passed by the Legislature in regard to railways have no application to street railway companies. 77 Ark. 599; 112 Pac. 583-7; 108 S. W. 960.

4. Assessments for local improvements must be confined to real estate. 31 Minn. 354; 27 Pac. 1077; 45 N. J. L. 258; 34 Am. Rep. 451; 106 Cal. 420; 27 N. E. 282-3; 94 Pac. 1075. Nellis on Street Railways, § 179. There must be a special benefit to land to make it subject to special assessments. 96 Ark. 419. While *railroad* tracks, etc., are real estate (Kirby's Dig., § 6940) street railway tracks, etc., are personal property. Kirby's Dig., § 6936; 96 Ark. 419; 81 *Id.* 567.

James B. McDonough, for appellee.

1. The authority to levy assessments for local improvements has its source in the sovereign power of taxation. 164 U. S. 112; 96 Ark. 410. The decision by the Legislature that a "railroad," "right-of-way" and "roadbed" is benefited is conclusive. 106 Ark. 296; 104 *Id.* 425; 103 *Id.* 452.

2. The doctrine of *Lenon* v. *Brodie,* 81 Ark. 208, is not applicable. 77 Ark. 599; 64 *Id.* 420; 87 S. W. 1096; 68 Ark. 376. Appellant company is an interurban railroad, and as such has the same rights and liabilities as steam railroads. 77 Ark. 599; 105 *Id.* 294; 3 Elliott on Railroads, § § 1096ba. to 1096be.; Nellis on St. Rys., § § 146, 164; 106 N. E. 911; 169 S. W. 1045; 99 Wis. 83;

166 Pa. St. 62; 125 Iowa, 430; 81 Mo. App. 78. "Railroads" includes street railroads. 24 Ill. 52 and cases, *supra;* 178 Pa. St. 186; 147 N. W. 318; 90 Tenn. 235; 78 Conn. 291; 192 Ill. 212; 104 N. E. 1080; 1 Elliott on R. R., § 6; 68 Ark. 380; 96 S. W. 707.

3. The rule in *Lenon* v. *Brodie* has been abrogated by subsequent legislation. Acts 1907, p. 402. The language of this act includes street railways, cases *supra.*

4. *Lenon* v. *Brodie* failed to recognize that street railways and steam railroads in a street had the same rights. The court followed 187 Mass. 500, but there are many reasons why the Massachusetts rule should not be applied in Arkansas. *All* railroads are public highways and common carriers. Art. 17, § 1, Const.; Kirby's Dig., § 737. The right-of-way is real estate. 73 Ark. 302; 64 *Id.* 432; Kirby's Dig., § § 6872, 6940, 6945. 176 Ill. 501; 32 Cal. 500. Right-of-way means the roadbed and tracks. 158 Ill. 64; 72 Ark. 119; 130 Mo. App. 162.

5. Under the act of 1909 the right-of-way and roadbed is subject to tax. 115 Ark. 454. There are no exceptions and no exemptions. 119 Ark. 314; 70 S. W. 451; 69 *Id.* 68; 86 *Id.* 231; 96 *Id.* 410; 78 Ark. 468; 103 S. W. 452; 99 *Id.* 100; Page & Jones on Assessments, § 422; 195 U. S. 351; 207 *Id.* 20; 172 *Id.* 269.

MCCULLOCH, C. J. The question involved in this case is whether or not the rails and ties composing the tracks of appellant, Fort Smith Light & Traction Company, laid along the streets of the city of Fort Smith, are assessable for local improvement under the special act of the General Assembly of 1909,* creating an improvement district for the purpose of constructing a bridge across the Arkansas River. The district includes the Fort Smith District of Sebastian County and nearly all of Crawford County, and includes the whole of the cities of Fort Smith and Van Buren. Appellant operates a street railway in each of those cities, and also operates an interurban line which connects the two systems. The

*Act 119, p. 325, Acts 1909. (Rep.)

company was first organized under the statutes of this State which authorize the organization of business corporations, and was subsequently granted a charter under the Act of 1901 authorizing the organization of companies for the operation of interurban lines of railway. The statute creating the improvement district provides for the assessment of real property in the district, and a clause thereof provides that "all railroads, tramroads, right-of-way, roadbeds and appurtenances in said district shall be assessed according to benefits and increase in value in like manner as herein prescribed for real estate, except that said assessment shall be made per mile." The appellant pays taxes on its tracks outside of the two cities, which are connected thereby, but disputes the authority of the improvement district to tax the tracks inside of the city of Fort Smith, which are maintained over and along the public streets. The circuit court decided that the tracks along the public streets of Fort Smith were subject to the improvement tax, and an appeal has been prosecuted to this court.

(1) It must readily be conceded, and it is conceded by appellee, that taxation for local improvement must be confined to real estate to be benefited by the proposed improvement. Personal property is not subject to taxation for that purpose, nor was it attempted in the enactment of the statute under consideration to tax personalty. The statute expressly provides that real estate only shall be assessed, but in effect declares that railroads, tramroads, etc., shall be deemed to be real estate within the meaning of the statute. It is doubtless within the power of the Legislature to classify property of doubtful character as real estate for the purpose of making it subject to assessment for local improvements. The statutes of this State provide that the tracks and right-of-way of railroads shall be real estate for the purpose of taxation (Kirby's Digest, § § 6940-6944), and we have held that that classification makes property of that kind subject to special taxation for local improvement. *St. Louis Southwestern Railway Company* v. *Board of Directors*

Red River Levee District, 81 Ark. 562. We have decided, however, in another case, that the tracks of a street railway company laid along the streets of a city do not constitute real estate and are not subject to special taxation. *Lenon* v. *Brodie,* 81 Ark. 208. In reaching that conclusion we followed a line of Massachusetts cases holding that the franchise of a street railway company to operate along the public streets of a city or town constituted "no easement or freehold interest in the soil, or exclusive control of the highway in which a location is granted to lay tracks and operate the road." *Lorain Steel Co.* v. *Norfolk & Bristol Street Ry. Co.,* 187 Mass. 500; *New England Tel. & Tel. Co.* v. *Boston Terminal Co.,* 182 Mass. 397. The further reasoning of the cases is that "the right conferred is to use the way within its location in common with others, and not exclusively for its own benefit," and that on that account there is no interest in the soil which would constitute real estate within the meaning of the taxation statute. It is admitted that there is a conflict in the authorities on that point, but this court has taken a position on the question and there is no reason to change it.

The General Assembly of 1907* amended the improvement district laws by inserting the following provision with reference to the assessment of real estate: "And if any railroad company owning or operating a line of railway in this State shall occupy any street within said district by having lain therein its railway tracks, and by using said street as a right-of-way, then said railway tracks and right-of-way shall be subject to assessment by said board in the same manner as each lot, block or other subdivision of land provided for in this act; and the words 'blocks, lots or parcels of land,' whenever used in this act, shall include said railway track and right-of-way."

(2-3) That statute, however, is not broad enough in its terms to include the tracks of street railways, for it is obvious from the words employed that the lawmakers

*Act 167, p. 402, § 1, Acts 1907. (Rep.)

had in mind only companies owning and operating steam railways. The distinction between the two kinds of railways is so well known that the language used leaves no doubt as to which was intended. A street railway, according to our holding in *Lenon* v. *Brodie, supra,* has no right-of-way along the streets in the sense in which that term is generally understood, but is merely given a franchise to use the street in common with other travelers. The term "right-of-way" is understood to mean the exclusive right-of-way such as used by companies operating steam railway lines. This court decided in *Reichert* v. *St. Louis & S. F. Ry. Co.,* 51 Ark. 491, that a city can not grant to a railway company a right-of-way over one of its streets, for the reason that the fee belongs to the owners of the adjacent lots, subject to the easement of the public in the street, which easement does not include the use of the streets for constructing and operating steam railroads. But for the enactment of the Act of 1907, referred to above, there would have been no authority, under the doctrine of the Reichert case, *supra,* to assess the right-of-way of a steam railway along public streets for local assessments, and we are not called on now to decide whether even that kind of railroad track is subject to local taxation.

(4) We are clearly of the opinion, however, that there has been no change in the law since the decision in *Lenon* v. *Brodie, supra,* making the tracks of a street railway subject to such taxation. Nor do we think that the special statute now under consideration has any such application, for its purpose was, we think, to follow the lines of the general statutes for the purposes of taxation and make only the tracks of steam railroads subject to special tax. There is nothing in the language to justify the belief that the Legislature intended anything else.

(5-6-7) The principal argument of appellee, in support of the judgment of the trial court, is that appellant is not a street railway company within the ordinary meaning of the term, but that its organization and method of operation constitutes it an interurban line, which must

be treated under the statutes of this State as being in the same class with steam railroads. It must be remembered, however, that appellant's property in the city of Fort Smith is operated as a street railway, regardless of its operation of an interurban line. It is the character of the occupancy of the property which marks the distinction between real estate and personal property, and, according to our decision in *Lenon* v. *Brodie,* the use of the streets as a public highway for the purpose of operating a street railroad necessarily characterizes it as being personal property and not real estate. The Act of 1901 expressly provides that interurban lines shall not be authorized to condemn a right-of-way along the public streets or highways (Kirby's Digest, § 884), and therefore no basis for the assessment of that class of property as real estate can be found in that statute. But when all this is considered, the answer to the whole argument is that if even interurban lines of railroad fall within the classification found in this statute as "railroads, tramroads, right-of-way, roadbeds," etc., still that part of the tracks in the city, occupying the public streets not as an exclusive right-of-way but merely as other travelers, under the franchise granted to the company, does not fall within that classification, for the very nature of the right enjoyed under the franchise does not justify classifying it as real estate. The fact that lines are occupied out of the city as an interurban railway does not change the character of the operation nor the classification of the rights within the city, for, as before stated, it is the kind of an interest enjoyed under the franchise which distinguishes it in the classification as to the kind of property it is.

We quote with approval the following appropriate and accurate statement of the law on that subject: "But in the light of the development in recent years of the equipment, operation and use of street railroads, it is not now considered essential that a railroad company should strictly adhere to all of these characteristics in order to constitute it a street railroad, and if its

primary purpose is to operate upon streets for the transportation of passengers to and from points in a city or town or its suburbs, it is none the less a street railroad because of the fact that it also operates beyond the city limits, or between contiguous towns or cities as an interurban railroad, or for a part of its route upon property other than streets or highways, or even that it transports freight as a part of its business." 36 Cyc. 1345. There are authorities cited on appellant's brief which announce the same idea with clearness.

We agree entirely with the statement of appellee in his brief that the tracks of the railroad company can not be characterized as a street railway merely because it succeeded to the rights of such company or was first organized as such a company, but the nature of the property is to be determined by its use and the character of the interest which the law permits the owner to acquire. If it is in fact such an ownership as constitutes an interest in the soil, or if it is of such doubtful character as that the Legislature can classify it as real estate, then it is subject to taxation. If, however, there is no such interest, and the Legislature has not attempted to so classify it, it is not subject to local assessments, for, as we have already said, it is only real estate, or property which can be put into that class, that is subject to such taxation.

(8) We are of the opinion, therefore, that under the special statute creating the improvement district in question, the tracks of street railways laid along the public streets in a city are not subject to taxation for the construction or maintenance of a local improvement. The circuit court erred, and the judgment is reversed and the cause is remanded with directions to enter a judgment in appellant's favor in accordance with this opinion.

KIRBY, J., dissents.

ADAIR v. QUINCY STOVE MANUFACTURING COMPANY.

Opinion delivered June 14, 1915.

1. JUSTICES OF THE PEACE—JURISDICTION AS TO AMOUNT.—Appellee brought an action against appellant on a note in the justice court. The amount of the note was $300.44, after interest was added under the rule in Kirby's Digest, § 5385, and a payment made deducted therefrom. Appellee remitted $1.00 from the amount due and brought suit for $299.49. *Held*, the justice had jurisdiction of the action.
2. COSTS—COST BOND—NON-RESIDENT DEFENDANT.—In an action on a note against appellant by appellee, a non-resident corporation, in a justice court, appellant may, at any time before judgment, require the appellee to give a bond for costs, or have the suit dismissed, but appellant's failure to give bond is unavailing on appeal, when the record fails to show that appellee asked for a dismissal of the suit, because of the failure to give bond.

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

Walter M. Purvis, for appellant.

1. Appellee being a nonresident of this State, and having failed to file the bond for costs required by law, after motion made to require such bond, the cause should have been dismissed in the lower court, and should be dismissed here. Kirby's Dig., § 959.

2. The justice of the peace court was without jurisdiction. The law limiting the jurisdiction of a justice of the peace is founded on public policy, and no manipulation of a debt can change such jurisdiction. 77 Va. 225. The attempt by remittitur to bring this case within the jurisdiction of the justice of the peace amounts only to a manipulation of the claim so as to gain for appellee an undue advantage. Moreover, the amount remitted was not sufficient to bring the debt within the jurisdiction of the court. See 78 Ark. 176; 80 Mich. App. 43; 39 S. W. 39.

The jurisdiction of a justice of the peace will not be extended by inference or implication. 5 Ark. 27; 6 Ark. 41; 7 Ark. 305; 48 Ark. 476; 5 English (10 Ark.) 326, 333; 13 Ark. 41.

A creditor can not apply a payment so as to be inequitable or unjust to the debtor. 2 Ill. 196; 20 Tex. 772; 19 Va. 26.

L. E. Hinton, for appellee.

1. There is nothing in the record to show either that appellee is a nonresident of the State or that appellant filed any motion to dismiss for want of a cost bond. The objection was waived. 2 Ark. 109; *Id.* 68; *Id.* 109; 6 Ark. 456; 7 Ark. 118.

2. The amount claimed, not the amount due, determines the jurisdiction, subject to the provisions of the Constitution and the statutes. Art. 7, § 40, Const. 1874; Kirby's Dig., § 4552; 7 Ark. 258; 1 Ark. 275; 21 Ark. 316.

That the appellee had the right to remit one dollar, in order to bring the action within the jurisdiction of the justice of the peace is clear. 60 Ark. 146.

KIRBY, J. Appellee company brought this suit upon a note in the justice court after remitting $1 of the principal to bring it within the justice's jurisdiction and recovered judgment there, from which an appeal was taken to the circuit court, where judgment was again rendered in its favor, and from that judgment this appeal is prosecuted.

The only contention for reversal here is that the court was without jurisdiction to render the judgment. The note sued on with the endorsements is as follows:

"$316.22. Little Rock, Ark., January 23, 1914.

"Sixty days after date, I promise to pay to the order of the Quincy Stove Manufacturing Company three hundred and sixteen and 22/100 dollars at Little Rock, Ark., value received, with interest at 6 per cent per annum from date.

"No.....Due..... Tom C. Adair."

(On back of note.)

"July 17, 1914, paid $25 to be applied on principal of note as per oral agreement with Mr. Adair.

"Plaintiff remits $1 hereon and prays for judgment against defendants for $299.49, and accrued interest at the rate of 6 per cent per annum until paid."

(1) If the interest upon the note be calculated according to the partial payment rule designated in section 5385, Kirby's Digest, the interest due from the date of the partial payment of $25 on July 17, 1914, was $9.22, which when added to the principal and the payment deducted from the amount, left a balance due upon the note of $300.44.

On September 22, afterwards, plaintiff remitted $1 of the principal of the note and brought suit for $299.49.

Appellant contends that the interest from the date of the payment to the time of the credit of the $1 remitted, should have been added to the principal and the $1 taken therefrom which would not reduce the amount to the jurisdiction of the justice of the peace.

Justices of the peace are given original jurisdiction of the following matters:

"First, exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest, and concurrent jurisdiction in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest. * * *" Article 7, § 40, Constitution of 1874; Kirby's Digest, § 4552.

After the partial payment was properly credited upon the note, there remained due upon the principal $300 and some cents, and when suit was brought $1 was credited thereon and remitted, reducing the amount claimed by the plaintiff upon the note and for which judgment was asked, the amount in controversy within the meaning of the Constitution, to less than $300, exclusive of interest. *Lafferty* v. *Day*, 7 Ark. 258.

The amount of the principal of the note claimed by the plaintiff was less than $300 and the interest due thereon is not to be considered in determining the court's jurisdiction, the Constitution expressly giving the justice jurisdiction, concurrent with the circuit court "in matters of contract where the amount in controversy does not exceed the sum of $300, exclusive of interest." *Fisher* v.

Hall, 1 Ark. 275; *Chatten* v. *Heffley,* 21 Ark. 313; *Sherrill* v. *Wilson & Keach,* 29 Ark. 384.

This court held in *Hunton* v. *Luce,* 60 Ark. 146, that a plaintiff has the right to bring his action for less than the amount due him, remitting the balance in order to bring his case within the jurisdiction of justices of the peace. *Kilgore Lumber Co.* v. *Thomas,* 95 Ark. 47.

(2) There is no bill of exceptions in this record showing the proceedings in the lower court and neither does the record show that a motion was made to dismiss the cause either in the justice or circuit court, for plaintiff's failure to give bond for cost as required by law (section 959, Kirby's Digest) and the question attempted to be raised by the brief on this point can not be considered here.

There is in the record what is called an amendment to the motion for a rehearing in which it was stated that the defendant, Tom C. Adair, upon the hearing in the justice court, showed the justice that plaintiff was a nonresident corporation "and prayed that it be required to make a bond for cost."

The defendant had the right at any time before judgment was rendered to require the bond for cost given or the suit dismissed in accordance with sections 959-960, Kirby's Digest, but the record fails to show that he asked for a dismissal of the suit, because of the failure to give bond.

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

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

Opinion delivered April 12, 1915.

1. CARRIERS—DEMURRAGE CHARGE—DELAY CAUSED BY CARRIER.—A shipper may recover from a carrier a demurrage charge occasioned by the fault of the carrier.

2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.—In an action for damages because of the refusal of a carrier to deliver freight without payment of an excessive charge, where a correct judgment was rendered, the cause will not be reversed because of the giving of an improper instruction on the issue of rates.
3. CARRIERS—DELAY—RESHIPMENT CHARGES.—Where a carrier refuses to deliver certain freight until the appellee paid certain excessive charges, it will be liable for the cost of reshipping the goods to another market, the market at the first place of destination having been lost by the delay.

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

STATEMENT BY THE COURT.

R. E. Allen brought this suit against the railway company for damages for loss sustained on a shipment of a car load of hay from Braggs Oklahoma, to Benton, Arkansas, which the consignee refused to receive because of an overcharge of freight demanded by the company of $24.02, on account of which, while the charge was being adjusted, several days elapsed for which demurrage charges were made and paid, and the hay had to be reshipped to Malvern, Arkansas, at an additional expense of $10.80, before it was finally disposed of at a loss altogether of $34.84 on the car.

The action was also for $9.45 damages to a car load of hulls that got wet in transit from Little Rock to Malvern, and $2.88 on a car load of bran shipped from Illinois to Malvern for which liability is now conceded.

Judgment was rendered by default in the justice's court's and the case appealed to the circuit court.

The defendant answered there and denied there was any overcharge upon the car load of hay shipped to Benton, that same was not accepted by the consignee because of the overcharge of freight and alleged that the consignee refused to accept it because of the inferior quality of the hay; admitted that the car was reshipped from Malvern to Benton; denied that the correct freight charge was $10.80, and alleged that it should have been $35.20. Claimed also for demurrage on the car at Ben-

ton $6; denied that the plaintiff was damaged in any sum and alleged he was due the defendant a balance of $6.27 for freight on the shipment of the car of hay; denied liability for the damages on the second and third claims.

It appears from the testimony that R. E. Allen, the plaintiff, purchased the car of hay at Braggs, Oklahoma, weighing 27,080 pounds, and consigned it to shipper's order, "Notify J. S. Lucas, Malvern, Ark.," and diverted it before arrival to Lokey & Burton at Benton, Ark., where it had been sold.

The railway company demanded freight of Lokey & Burton on the weight of 35,700 pounds, which they refused to pay. After the plaintiff was notified of their refusal, he went to Benton, showed the agent of the railway company his invoice seven or eight days after the arrival of the car at Benton and the agent consented to a reduction of the freight charge to $56.87, the amount due at the interstate rate on 27,080 pounds, the correct weight.

Lokey & Burton, to whom the car had been sold, again refused to accept or receive the shipment, having purchased other hay after the railway company declined to deliver it unless freight was paid on 35,700 pounds.

Plaintiff was unable to dispose of the hay at Benton after the purchasers there declined to receive it and reshipped the car to Malvern, paying the intrastate rate of $10.83 thereon, and was also required to pay $6 demurrage on the car while at Benton.

There was no additional charge for freight in diverting the shipment consigned to Malvern to Benton since both places took the same rate from the Oklahoma point.

The agent of the railway company stated that Allen paid under protest on the shipment $91.81 freight charges including $34.93 overcharge and $10.83 was charged for carrying the car from Benton to Malvern, which was the correct rate on an intrastate shipment, that the interstate rate was higher and would amount to $35.20; that Allen would still be due the railway company $24.37, if

required to pay freight on the shipment from Benton to Malvern at the interstate rate.

The car remained at Benton nine days, and there was $6 demurrage charge collected and the agent there testified that the car should have taken the interstate rate on reshipment from Benton to Malvern, and plaintiff been required to pay $35.20 instead of $10.83 freight, making the whole charge for freight $98.07, when in fact Allen only paid $91.80, which would leave a balance due the railway company $6.27 in excess of the amount it owed him.

Lokey testified that the car of hay arrived at Benton; that the bank notified him that the bill of lading had arrived and he ascertained what the freight charges were and told the agent it was too much. He then called Mr. Allen at Malvern, informed him and was told that there was an evident mistake and to see the agent and have it corrected. The agent said he was required to charge for the weight as shown on the freight bill or waybill and declined to reduce the charge; within six or eight days afterward the agent called him up and told him the charge had been corrected. He had bought other hay in the meantime, but went to look at the hay and declined to buy it, saying it was not as good grade as he desired.

Plaintiff testified in rebuttal that Lokey & Burton made no complaint to him about the grade of the hay and that he was unable to dispose of it at Benton after the freight charges were reduced.

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

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

D. D. Glover, for appellee.

KIRBY, J., (after stating the facts). It is contended that the court erred in not directing a verdict for appellant on the first cause of action, the shipment on which the overcharge of freight was claimed, and damages,

never having lost its interstate character, and that the court erred in its instructions to the jury relative to the proper rate to be charged for the transportation of the car from Benton to Malvern after the refusal of the purchasers there to receive it.

There was no question made that the shipper did not have the right to divert the car of hay to Benton, Arkansas, notwithstanding it was consigned to Malvern, nor that Benton was not the place of delivery for the shipment.

The jury were also warranted in finding that the dealers at Benton who had purchased the hay from Allen and were to be notified of the arrival of the shipment, refused to accept the consignment because of the overcharge of freight demanded by the railroad on account of incorrect weight.

(1) The charge for demurrage was incurred on account of the delay occasioned by the railroad company in refusing to deliver the shipment without the payment of the excessive charge and the time consumed in the correction and adjustment of it, and we see no reason why the appellee should not have recovered said amount.

(2-3) The shipment from Oklahoma had reached its final destination at Benton, to which place it was rightfully diverted and where it could not be delivered because of the fault of the railway company in demanding an excessive amount of freight, and the plaintiff was then compelled to reship the hay to Malvern for a market and had the right to recover as damages the amount paid as freight charges therefor. There is no question in this case of an attempted evasion of the payment of interstate rates, as in *Porter* v. *St. Louis S. W. Ry. Co.*, 78 Ark. 182. It can make no difference that the court instructed the jury that if the railway company was the cause of the hay not being delivered at Benton and afterward accepted the car for shipment to Malvern on an intrastate rate, which it collected, that it would be estopped to claim a higher rate and defeat the action, and also that the shipment in question was an interstate one and that

the railway company had the right to apply and charge the interstate rates and at no time was it deprived of the interstate character and at no time were the State rates applicable. Without regard to said instructions given, the right result has been reached and the correct judgment rendered.

The railway company wrongfully caused the delay at Benton, according to the finding of the jury, and could not retain the amount charged for demurrage for such delay and the plaintiff had the right to reship the car of hay, which could not be sold at Benton because of its negligence, to a market where it could be disposed of with as little loss as possible, and the company was liable for the overcharge of freight collected and the damages, which in this case amounted only to the demurrage charge and the freight charges paid from Benton to Malvern, regardless of which rate was applied.

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

SEITZ v. MERIWETHER.

Opinion delivered April 26, 1915.

1. CHANCERY JURISDICTION—ACCOUNTS—MASTER.—Chancery courts have jurisdiction to settle and adjust long and complicated accounts, and to do so the chancellor may appoint a master, trained in the work, to examine the accounts, to take testimony in reference thereto, and to direct him to report his finding to the court. The chancellor then has authority to modify the report of the master after exceptions thereto have been made.
2. LEVEE AND DRAINAGE DISTRICTS—CONSTRUCTION OF DITCH—COMPLIANCE WITH CONTRACT.—The contractors employed to construct an improvement by a levee and drainage district, *held*, in the construction of a certain ditch, to have complied with the terms of the contract.
3. DRAINAGE DISTRICTS—CONSTRUCTION—COMPENSATION TO CONTRACTOR.—A contractor agreed to dig and refill a muck ditch for a certain amount. *Held*, where the contractor used dynamite in excavating the muck ditch, he was not entitled to anything over the contract price for refilling the same.
4. DRAINAGE DISTRICTS—COMPENSATION TO CONTRACTORS—EXTRAS.—The amount allowed the contractors for extras, by the chancellor, held not to be against the preponderance of the testimony.

5. DRAINAGE DISTRICTS—ERROR IN SURVEY—RIGHT OF CONTRACTOR.—The contractor, constructing a drainage ditch, will be entitled to compensation for earth removed, which was not provided for in the contract because of an error in the original survey.

6. DRAINAGE DISTRICTS—COMPENSATION TO ENGINEER—ERRONEOUS STATEMENT AS TO SALARIES OF ASSISTANTS.—The engineer of a drainage district turned into the district amounts due his assistants as salaries, amounts in excess of the salaries actually due, and retained the excess. *Held*, in a settlement with the district, the engineer would be charged with this excess retained by him.

7. DRAINAGE AND LEVEE DISTRICTS—COMPENSATION TO CONTRACTOR—CLEARING RIGHT-OF WAY.—The contractor for a drainage and levee district will be allowed compensation for clearing a right-of-way, when the work was done with the knowledge of the engineer, and when the district reaped the benefit of the work done.

Appeal from Greene Chancery Court; *Charles D. Frierson*, Judge; modified and affirmed.

Spence & Dudley, R. E. L. Johnson and *Burr, Stewart & Burr*, for appellants.

1. The court had no jurisdiction to adjust the accounts; that was a matter for the board of directors of the district. 5 Pom. Eq. Jur., § § 342, 346. The board of directors are not shown to have been guilty of any illegal, wrongful or dishonest official acts. No fraud is shown. 106 Ark. 310. There was no misappropriation of funds or illegal payments. 114 Ark. 289.

2. Ancillary or alternative relief in equity can not be granted unless the bill states an equitable cause of action and is established by the proof. The allegations of the complaint are not true. 168 Fed. 756; 16 Cyc. 111; 37 Ark. 164; 105 U. S. 430; 1 Ark. 31; 83 *Id.* 554.

3. The contractors should have been allowed for refilling the muck ditch. This is a question of law, as the facts are undisputed.

4. The court erred in its allowances for clearing right-of-way, and for fill and excavation.

5. Interest should have been allowed.

6. Clerical errors were made in the reports, which should be corrected. 47 Ark. 317, 320. One can not ratify and yet repudiate the same transaction in one breath.

7. Mitchell had the right to employ assistants and make the settlements as he did under the arrangement made with the board. His accounts were filed with the board for more than five years and were allowed without question. The board and district are now estopped from questioning the allowances and the master erred in charging these various amounts as overcharges.

8. The master erred in disallowing Mitchell's claims for superintendency, instrument hire, etc.

M. P. Huddleston, D. G. Beauchamp and *Block & Kirsch,* for appellees.

1. The jurisdiction was settled on the first appeal. 169 S. W. 1175.

2. The chancellor's construction as to the refill of muck ditch was correct.

3. The finding as to right-of-way was supported by the evidence and was properly sustained by the chancellor.

4. The claim for extra yardage was properly disallowed. The work had not been allowed by the engineer, nor had a bill been presented to the board.

5. Interest was properly refused.

6. It was the duty of the board to withhold 15 per cent of the engineer's estimates. The board had no powers nor duties except those expressly conferred by the statute. Acts 1905, p. 442; 114 Ark. 289; 94 Ark. 380; 93 *Id.* 491.

7. An engineer has no authority to change the terms of a contract. 100 Ark. 166. Nor can the board do so where the contract is let to the lowest bidder as required by statute. 93 N. W. 911; 97 *Id.* 420; 75 N. Y. 65; 43 N. E. 216; 135 Ala. 187.

8. On the whole case the decree should be sustained except as to errors in refusing to order the contractors charged up with interest, etc., and in allowing compensation for the muck ditch, as to which items the decree should be reversed and an accounting ordered.

HART, J. By special Act No. 172, passed by the General Assembly of 1905, a levee and drainage district to be composed of certain designated territory in Clay and Greene Counties, was established. See Acts of 1905, page 429.

The directors were appointed and the district was duly established in accordance with the terms of the act. The directors then proceeded with the construction of the improvement.

In June, 1912, two of the directors of the district and certain taxpayers within the district instituted a suit in chancery court against the remaining directors and against A. V. Wills & Son, with whom a contract had been made for the construction of the improvement, and J. D. Mitchell, who had been elected engineer for the district.

In the complaint it was alleged that the contractors were making overcharges and were being paid in excess of the contract price. It was also alleged that the contractors and the engineer had been guilty of fraud in certain respects. The court ordered a reference to a special master of the accounts between the district and the contractors, and of the accounts between the district and the engineer. The special master was instructed to report in accordance with directions given him. An appeal was taken to this court and an opinion was handed down on all matters pertaining to the decree which we held to be final and appealable. The court, however, held that the decree against the contractors and the engineer for an accounting was not final and could not be reviewed by us because the report of the master had not then come in and the finding of the chancery court was not for any definite amount against the contractors and the engineer. Therefore, the appeal of the engineer and of the contractors as to the state of accounts between them respectively and the board of directors was dismissed as being premature. See *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. 1175.

Upon a remand of the case and the coming in of the report of the special master, the chancellor found that the contractors, A. V. Wills & Son, were indebted to the district in the sum of $4,634.32; and that J. D. Mitchell, the engineer, was indebted to the district in the sum of $1,435.13. A decree was entered accordingly, and to reverse that decree, the contractors and the engineer have prosecuted this appeal.

It is first insisted by counsel for the defendants that the court had no jurisdiction to adjust the accounts between the district and the contractors and the engineer. This question was decided adversely to their contention on the former appeal, which is the law of the case. Moreover, we are of the opinion that our decision on the appeal in this respect was correct. It appears from the record that the board of directors elected J. D. Mitchell as engineer for the district and made a contract with A. V. Wills & Son for the construction of the improvement provided for in the statute. The contractors proceeded with the construction work and had been so engaged for several years before the suit against them was instituted. Thus it will be seen that the accounts ran over a period of several years. They consisted of numerous items. Mistakes are alleged in the accounts on both sides. Many of the vouchers for the payment of the contractors have been lost. A great many of the monthly estimates prepared by the engineer were also lost. All these matters are to be considered in the adjustment of the accounts.

(1) In such cases the chancellor has power to appoint a master trained in the work to examine the accounts, to take testimony in reference thereto, and to direct him to report his finding to the court. The chancellor then has authority to consider and modify the report of the master after exceptions thereto have been made. All these are cogent reasons why the accounts could be better settled by the machinery of a court of equity than by a jury. The jurisdiction of a court of chancery to settle and adjust long and complicated ac-

counts such as appear from the record in this case is well established by former decisions of this court. *Trapnall* v. *Hill,* 31 Ark. 345; *Smith* v. *Stack,* 89 Ark. 143; *Bagnell Tie & Timber Co.* v. *Goodrich,* 82 Ark. 547; *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326.

It is insisted by counsel for the contractors that the court erred in not allowing them payment for the refilling of the muck ditch. The muck ditch was an excavation "not to exceed in depth eighteen inches and in width three feet," to be dug as designated by the engineer. The contract contemplated that it should be dug along the center line of the base of the levee and provided that "a muck ditch not to exceed in depth eighteen inches and to exceed in width three feet shall be dug as designated by the engineer; such muck ditch shall be filled with earth free from perishable materials as may be taken with a dredge boat dipper. Stump holes and others that may be necessary in preparation work shall be filled and compacted as prescribed for muck ditch."

The contract also provides that "The contractor agrees to accept the following prices as full compensation for the completion of the work specified or implied in this contract, namely, the sum of $3.50 per rod for muck ditch."

In preparation for the construction work the contractors first cleared the right-of-way by cutting down the trees on it. They used dynamite in blowing out the stumps and for a part of the way the blowing out of the stumps formed a ditch along the right-of-way, although the ditch was not constructed in a straight line as contemplated in the contract. Where the stumps were not close enough together to form a continuous ditch the earth between the stumps was blown out in order to form a ditch.

The contractors testified that it would have been cheaper for them to have dug out the stumps but that they blew them out with dynamite in order that they might clear the right-of-way of obstructions and construct the muck ditch at the same time.

(2) The chancellor found that in doing this they practically constructed the muck ditch along the whole line of the levee and that their work in this respect was a substantial compliance with the contract. Much testimony was taken on both sides, and after a careful consideration of it we do not deem it necessary to set out the testimony in detail, but think it sufficient to say that the finding of the chancellor to the effect that the contractors constructed a muck ditch in substantial compliance with the terms of the contract should be upheld.

(3) It is contended by counsel for the defendants that the contractors are entitled to payment for refilling the muck ditch, and this is the principal item of contention between the contractors and the board of directors of the levee district. We do not agree with counsel in this contention. We have set forth above the terms of the contract on this question. After setting forth the dimensions of the ditch, the contract provides that it shall be filled with earth free from perishable material; and another clause provides that the contractor is to receive $3.50 per rod for the muck ditch. Thus it will be seen that the contract itself provides that the muck ditch shall be dug and refilled for the sum of $3.50 per rod, and this was all that the contractors were entitled to receive for that work.

The testimony on the part of the contractors tends to show that in blowing out the stumps and preparing the muck ditch, all of the excavated dirt was blown away from the right-of-way and could not be used in filling the ditch. Therefore, they contend, they should be allowed to charge for refilling the muck ditch.

In the first place, it may be said that the contractors chose their own method of constructing the muck ditch, and the fact that they chose a method by means of which the excavated dirt was blown away from the right-of-way of the levee does not offer any reason why they should be paid again for refilling the muck ditch. They chose their own way of construcing the muck ditch, and, as we have already seen, it was provided by the terms of the contract

itself that they should receive $3.50 per rod for the construction of the muck ditch, and this included the refilling of it.

The amount of dirt necessary to refill the muck ditch was 16,142 cubic yards, which, at the contract price of sixteen cents per cubic yard, amounted to $2,582.72, making, with $390.34 interest, a total of $2,973.06. The chancellor correctly decided that the contractors were not entitled to this amount. Therefore, the master in his original report, for convenience, added this to the total payments reported received by the contractors, thinking that the contractors already had been given credit for the whole of the 16,142 cubic yards necessary to refill the muck ditch. It turned out that it had been given no credit for 12,242 cubic yards which, at the contract price, would amount to $1,958.62. So the master corrected his report so as to give the contractors credit for this amount. They had received credit for the remaining 3,900 cubic yards, which at the contract price of sixteen cents per cubic yard amounted to $624.10 principal and $94.29 interest, or a total of $718.39, which the master finally properly charged the contractors with on account of the muck ditch.

(4) It is also contended by counsel for the contractors that the court erred in its allowance to them for clearing something more than thirty-five acres of additional right-of-way for the big slough ditch. It is conceded that this comes under the head of extra work which was to be paid for at the actual reasonable cost plus 15 per cent. The master allowed the contractors $35 per acre for this work. This, with the 15 per cent, was the amount approved by the court and allowed the contractors.

It is contended by the contractors that the reasonable cost of clearing this land was $45 per acre, which, with the 15 per cent added, would amount to nearly $50. They contend that the court should have allowed them this amount. The testimony is somewhat conflicting on this point, but after a careful consideration of it we are in-

clined to think the chancellor was right in the amount allowed the contractors; at least it may be said that his finding in that respect is not against the preponderance of the evidence.

It is next contended by counsel for the defendants that the court erred in not allowing them an item of $1,750 for throwing dirt on one side of the ditch between certain stations. The master disallowed this claim and the court approved his action. Under the terms of the contract the engineer had the right to order the dirt to be put on one side between these stations. It is not contended that his action in making the order was arbitrary. The contractors at the time recognized the right of the engineer to make the order and did not make any additional claim on that account at that time. We think the court properly disallowed this claim.

(5) It is next insisted that the court erred in disallowing a credit for $1,227.78. This claim is made by the contractors because of error in estimating the amount of yardage when the first survey was made between stations numbered 260 and 244. They claim 7,673.6 cubic yards, for which they were entitled to pay at sixteen cents per cubic yard. The master disallowed this claim because that work had been done something over two years before the suit was filed and because the contractors had not theretofore made any claim for it.

The contractors claimed that the reason they did not put in a claim for this yardage sooner was because of an error in the survey which they had not discovered. They testified that when the survey was first made the rod was put down on the levee and rested on the top of some smart weeds and flags and did not go down into the earth and that this mistake caused them to get pay for a less amount of yardage than they actually moved. They said that afterward they knew that they were moving more earth than they were getting pay for, and a resurvey was made, the rod being placed down to the bottom of the levee as it should have been, and the amount now claimed by them

is the additional amount which should have been paid them at that time.

We think the chancellor erred in not allowing this claim. This is upon the principle that whoever demands equity should do equity. This rule applies to one party as well as to the other, and it would be as unjust to allow the board of directors or taxpayers to avail themselves of the mistakes against the contractors and to exact a strict settlement in other respects as it would be to allow the contractors to claim excessive credits. See *Trimble* v. *James,* 40 Ark. 407; *Dyer* v. *Jacoway,* 50 Ark. 217; *McLeod* v. *Griffis,* 51 Ark. 14.

(6) As to the state of the accounts between the board of directors and the engineer, but little need be said. Mitchell was elected engineer for the district by the board of directors, and as such engineer had the authority to appoint assistants. He appointed a number of assistant engineers and agreed to pay and did pay them certain stated salaries. He turned in their salaries to the board of directors at a greater amount than he paid them and retained the excess. The court properly charged him with the difference between what he actually paid his assistants and the amount for which he took credit from the board, and this constitutes the basis of the judgment against him.

It follows that the decree against him must be affirmed.

In the adjustment of the accounts between the contractors and the board of directors it may be said that the chancellor and the special master not only made a careful and patient examination of the accounts themselves, but in addition took much testimony in order to ascertain their correctness.

We have in turn made a careful and patient examination of the record, and, except as to the item of $1,227.78, think the finding of the chancellor on the various items was not against the preponderance of the evidence.

The record does not disclose at exactly what time the work was done for which the credit of $1,227.78 was

allowed, except that it shows that it was done more than two years before the filing of the report of the master. Therefore, the contractors will be entitled to 6 per cent interest on this amount for two years, and this amounts to $147.33, making a total amount of $1,375.11.

The chancellor found that $4,634.32 was due by the contractors to the district. After deducting the above claim, there will be due the district $3,259.20, and the decree for that amount will be affirmed.

ON REHEARING.

HART, J. (7) After due consideration of the petition of the appellants for rehearing, we have concluded that the contractors should be allowed $344.35 additional for clearing right-of-way. It is true the engineer testified that he did not order this additional right-of-way cleared, and Wills testified that he did not remember whether or not the engineer ordered him to clear it. Wills does say, however, that this additional right-of-way was cut with the knowledge of both the engineer and his assistant, who was on the ground when the work was done. He further stated that it was the understanding at the time that the levee would have to be extended over this ground and this was subsequently done. So it will be seen that the additional clearing was actually done by the contractors and that the levee district reaped the benefit of their labor. Under these circumstances it would be inequitable not to allow the amount; and it is ordered that the sum of $344.35 be deducted from the judgment against the contractors.

Counsel for appellants also insist that the contractors should be allowed other additional claims for excavation, namely: Stations 950-955, Plum Thickett, 1,542.5 cubic yards, at 16 cents, $246.80; Stations 1155-1170, Tuttle's Ridge, 8,152.15 cubic yards, at 16 cents, $1,304.34; and Stations 1198-1214, Hog Donec, 6,371.92 cubic yards, at 16 cents, $1,019.50.

These three claims originated in the requirement of the levee inspector that the contractors dig the borrow

pit of the levee four and one-half feet deeper at the three points above mentioned. The engineer required this to be done in order to bring the borrow pit of the levee to grade to serve the purpose of a drainage ditch. The contract provided that the work should be constructed by a flowing dredge, etc., so as to leave good drainage for the lands adjacent. The engineer construed this clause of the contract to mean that the borrow pit should be so constructed as to act as a drainage ditch for the adjacent lands, and, on that account, ordered the contractor to dig the borrow pit four and one-half feet deeper at the points mentioned.

This work was done nearly four years before suit was instituted and the contractor never put in any claim for the work until some time after he had filed his answer to the present suit. It is evident then that he acquiesced in the construction placed upon this clause of the contract by the engineer, and we are of the opinion that the chancellor correctly denied the claims now asked for by him.

The petition for rehearing as to these three claims will be denied.

AMERICAN MANUFACTURING COMPANY v. HELENA HARDWARE COMPANY.

Opinion delivered May 3, 1915.

1. BILLS AND NOTES—BONA FIDES—BURDEN OF PROOF.—The maker of a note, who admits the execution thereof, must establish by proof, any defense thereto which he alleges.
2. SALES—FAILURE OF CONSIDERATION—SUBSTITUTED AGREEMENT.—The parties to a contract in an advertising campaign for a contest for an automobile and other prizes, agreed to substitute another automobile for the one named in the contract. *Held*, under the facts there was no failure of consideration, when the substituted automobile was delivered in a reasonable time.

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

Fink & Dinning, for appellant.

There is no evidence that appellant violated the terms of the agreement, and the burden of proving a

breach of the contract was on appellee. The proof as to the advertising matter certainly is not sufficient. But if there had been a breach in that respect, appellee is in no position to complain after having received and appropriated the benefits under the contract.

Appellee undertook to reserve to itself the right to refuse payment until all goods were received. There is no such provision in the contract, and its act in so doing constituted the first breach of the contract. 105 Ark. 233.

Moore, Vineyard & Satterfield, for appellee.

1. There was a breach by the appellant of the contract in the matter of the bond, in substituting for the bond prepared by appellee's attorney, which it had agreed to execute, another bond which was void, at least as to the surety. It purports to be executed by the American Surety Company of New York, by one Shonner, "resident vice president," and one Powell, "resident assistant secretary." There are no such officers as these recognized in law, and if there were such officers, their authority to bind the surety company or to execute the bond in question would have to be shown, it will not be presumed. 62 Ark. 33; 98 Ark. 168.

2. Counsel review the evidence and say that appellee did not receive the automobile; that appellant did not ship it until it was a physical impossibility to have derived any benefits from the contest, and that appellant failed to carry out its agreement by failing and refusing to deliver the advertising matter specified in the contract, and necessary to put on the contest.

SMITH, J. On October 20, 1911, the appellant entered into a contract with appellee to inaugurate an advertising campaign in the nature of a contest for an automobile and other prizes. The contract contained an order for an automobile and sixteen dinner sets and a large amount of literature and advertising matter necessary to put on the contest. The order was given upon condition that the hardware company's sales would be increased $40,000 within the twelve months next follow-

ing the contest. The contest was to begin immediately and close May 1 following, covering a period of six months. Pursuant to the contract, appellee deposited in the Bank of Helena its check for $150 and ten notes for $150 each, payable monthly, and this action was begun as a suit on these notes. These notes and the check were to be delivered to the appellant when a required bond was executed. The bond prepared by appellant's attorney was not executed, but another bond was returned in its place. It is not shown that the conditions of the bonds differed in any material respect. The president of the appellee company testified that he examined the bond which was in fact sent and accepted it and thereafter forwarded a check to cover the first payment.

As has been said, the contract was entered into in October and the contest was to close the following May, and it was provided in the contract that in the event the gross sales of appellee were not increased $40,000 that the appellant should return to appellee a part of the $1,650, which constituted the consideration for the contract, to be proportioned upon the difference in the amount of the increase, if any, in said gross sales and the sum of $40,000.

In its answer appellee pleaded failure of consideration, and also that the plaintiff had failed to carry out a campaign of advertising for the benefit of defendant's business which was provided for in the contract. Appellee filed a counter-claim and prayed judgment for the $150 of purchase money, which it paid, and for the further sum of $49 in freight which it had also paid upon the receipt of the automobile.

The instructions in the case were very brief, and appellee's position was stated in the court's instruction as follows:

"The defendant, Helena Hardware Company, alleges that the notes in question are without consideration, in that the plaintiff failed to comply with the terms and conditions of its contract; that is, the contract entered into between the plaintiff and defendant, and that they failed

to furnish the automobile in question within the time, or a reasonable time, after the execution of this contract. So if you find from the evidence in this case that the notes in question are without consideration, then you will find for the defendant."

The court stated the converse of this proposition and directed the jury to find for appellant if they found from the evidence that appellant had complied with the terms and conditions of the contract.

The court further told the jury that if they found for appellee they would find for such amount as appellee had paid out by way of expense or otherwise.

Appellant requested only one instruction, which was as follows:

"You are instructed that if on or about February 15, 1912, the defendant agreed to accept a car different from the one mentioned in the contract in lieu thereof, then the jury should determine whether or not the car was delivered within a reasonable time after that, and, if so, to find for the plaintiff."

Having admitted the execution of the notes, appellee assumed the burden of proof, and there was no other evidence than that offered in its behalf. The president of the appellee company testified that he had never received the advertising matter which appellant agreed to furnish. He testified that a box of advertising matter was received, and that upon opening it he found that some of it related to a similar contest being held in Marianna, and other portions of it related to a like contest being conducted in Oklahoma. He admitted, however, that upon notifying appellant of this fact he was advised to look further into the box, where he would find the necessary advertising matter; but that he did not obey this direction and did not know whether the box contained the advertising matter or not. This witness also testified that the automobile was not shipped at the time contracted for, and that the automobile shipped was not the one mentioned in the contract; but he admitted that on February 13, 1912, he had a conversation with the president of the appellant

company, at which time he agreed to accept the car which was shipped in lieu of the one described in the contract; and he admits the receipt of this car about the 4th of March thereafter. He denied, however, that appellee had ever had the car in its possession, but admitted that his company paid the freight on the car and put it on exhibition in a garage in that city. He further admitted that upon the failure of his company to pay the purchase money notes as they matured the appellant company undertook to recover the possession of the automobile and brought an action in replevin for that purpose, which was resisted by appellee, and that this suit had subsequently been dismissed by the appellant company.

The jury returned a verdict in favor of appellee for the initial payment of $150 and for the $49 in freight paid by appellee.

We think the instruction requested by appellant should have been given. The parties had the right to agree to the substitution of another car for the one contracted for and to waive the time within which it should be shipped, and if delivery was made within a reasonable time thereafter appellee would have no right to refuse to pay for the car because the one originally contracted for had not been delivered. It does not appear from appellee's own evidence that appellant failed in any other respect to perform its contract, and if there was no breach of the contract by a failure to deliver the automobile, appellant was entitled to a judgment. This was the effect of the instruction which was refused, and the judgment of the court below must therefore be reversed and the cause will be remanded for a new trial.

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

Opinion delivered June 14, 1915.

1. RAILROADS—CONDITION OF DEPOT BUILDING.—A railway company is bound only to the exercise of ordinary care to keep and maintain its depot houses and approaches thereto in a safe condition for the protection of passengers and other persons who may be rightfully about such premises in other than the capacity of passengers.
2. RAILROADS—CONDITION OF DEPOT BUILDING—INJURY TO VISITOR—DUTY OF CARE.—A person rightfully upon a railway company's depot premises is bound to exercise ordinary care for his own safety and usually to the exercise of such care as is commensurate with the apparent danger to be avoided under the particular condition.
3. RAILROADS—INJURY TO VISITOR AT STATION—CONTRIBUTORY NEGLIGENCE.—Plaintiff, a visitor at defendant railroad's depot building, was injured by reason of the removal of certain steps, occasioned by the act of defendant company in undertaking to move the depot building. *Held*, plaintiff was bound to the exercise of ordinary care for her own protection, which was greater under the facts, than if conditions surrounding the building had been normal, with the usual stationary steps in use.

Appeal from Crawford Circuit Court; *Jeptha H. Evans*, Judge; affirmed.

STATEMENT BY THE COURT.

Plaintiff brought this suit against the railway company for damages for personal injuries alleged to have been caused by the negligence of said company in failing to provide steps to the waiting room of its depot building at Mulberry, Arkansas.

The facts substantially are that plaintiff, a young lady school teacher, whose father was a drayman or operated a transfer of freight, at Mulberry, from the station to the merchants about the town, was in the habit of collecting the freight bills for the freight delivered by her father. On the day the injury occurred, the company was moving its depot building, and it was raised about two or three feet, on jacks, and a plank, two inches thick by eight inches wide and ten feet long, was put up from the ground into the door for people to enter upon, the steps having been removed. It was necessary for plain-

tiff to enter the door in order to reach the office of the agent and get the freight bills, and the agent was at the door when she came and assisted her to enter the building as she walked the plank. After she got the freight bills, she came back out of the door, and, upon her first step on the plank, she said it careened or turned and she fell to the ground on her hands and knees and was severely injured. The physician testified to her injury.

She made no complaint at the time and no one saw her fall, although there were several people working about the building, some of the men, eight or ten, being under the house at the jacks.

She went on up town and collected the bills and returned shortly with the money and with two or three other friends, at which time she laughingly said something about the plank and that she had fallen off of it when she started up town. She stated that the plank did not turn over and seemed to be in the same position after she fell as it was when she stepped on it.

Others testified that the plank would naturally spring a little when the weight of a person was put upon it; that it was about ten feet long, one end resting on the ground and the other on the door sill, which was about two and one-half feet from the ground. It was not claimed that the plank slipped or fell out of the door.

One witness stated that the end of the plank on the ground rested unevenly, the ground not being level.

Other witnesses testified that there was no danger at all in using the plank in place of steps to get in the door, one saying that he had been over it as many as 100 times and noticed no unusual spring or movement of it.

There was testimony relative to the earning capacity of the plaintiff and the permanency of the injury.

Evidence upon the part of the appellant tended strongly to show that appellee's injury was the result of a fall from a horse by which she was thrown shortly before the alleged fall from the plank in the door of the depot building.

Some of the witnesses stated that she was so affected within a few days after the fall from the horse that she could not arise from her chair in the school room, that she screamed with pain and it took two or three men to assist her to get into her buggy.

The court instructed the jury, refusing to give at appellant's request instruction numbered 4, as follows:

"The court instructs the jury that if you find from the evidence in this case that the depot at the town of Mulberry, where plaintiff was injured, was being removed at the time of her injury, that workmen were engaged in working upon it, and that the plank which was being used to enter the negro waiting room was of a temporary character and that plaintiff knew and appreciated the condition that existed, that under the law she was required to exercise for her own protection a higher degree of care than she would if such condition did not exist."

It also refused appellant's requested instruction, telling the jury that no presumption of negligence arose because of the injury.

From the judgment upon the verdict returned against it, the railway company prosecutes this appeal.

Thos. B. Pryor, for appellant.

1. Plaintiff knew the condition of the depot. 93 Ark. 205 and 63 Ark. 427 are conclusive of this case. The exercise of ordinary care is the measure of the duty of a public carrier at stations. Hutch. on Car., § § 935, 941; Thompson on Negl., § § 274, 278; 90 Ark. 378; 70 *Id.* 136; 65 *Id.* 255; 96 *Id.* 311; 79 *Id.* 76. Negligence must proved; it can not be inferred. 82 Ark. 372. The damages are excessive.

Sam R. Chew, for appellee.

1. The proof in this case brings it squarely within the rule and principle expressed in 1 Thompson on Negligence, § § 994, 996, 1002. The damages awarded are reasonable.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in its refusal to give said requested instruction.

(1) A railway company is bound only to the exercise of ordinary care to keep and maintain its depot houses and approaches thereto in safe condition for the protection of passengers and other "persons who may be rightfully about such premises in other than the capacity of passengers." *St. Louis, I. M. & S. Ry. Co.* v. *Woods,* 96 Ark. 315; *Huddleston* v. *St. Louis, I. M. & S. Ry. Co.,* 90 Ark. 378; *Hodge-Downey Construction Co.* v. *Carson,* 100 Ark. 436.

(2-3) The court instructed the jury properly on this point, and it is also true that the person rightfully upon such premises is bound to exercise ordinary care for his own safety, and usually to the exercise of such care as is commensurate with the apparent danger to be avoided under the particular condition. The said instruction, however, is not an accurate statement of the law, for the plaintiff, notwithstanding she knew that the depot building was being removed and the workmen were engaged upon it at the time, and that the plank was only a temporary substitute for steps and appreciated the condition as it existed, was only bound to the exercise of ordinary care for her own protection, which would have been greater care, of course, than was required if the condition had been normal with the usual stationary steps for entry into the room.

The instruction in saying she was required under the condition existing "to exercise for her own protection a higher degree of care than she would if such condition did not exist", was incorrect and might have been misleading, indicating that care of a higher degree than ordinary care was required. It is true, as appellant contends, that the instructions given did not include the idea embodied in this one and tell the jury that appellee was required to be more watchful of the condition and careful for her safety under the circumstances as they existed, than if the conditions were usual and normal, and appellant was

entitled to an instruction of this kind, if it had asked a correct one, which it failed to do, as we have already said.

Neither was an error committed in refusing appellant's request to tell the jury that no presumption of negligence arose because of the injury, and that the facts must be proved, etc., since the court instructed the jury properly that the burden of proof was upon the plaintiff, to show by a preponderance of the testimony the negligence of the defendant from which the injury resulted.

The question of contributory negligence under the circumstances of this case was one for the jury, as was also the question of the damages resulting from the injury, and while it might have found the issues in appellant's favor, upon both propositions with substantial testimony to sustain the verdict, it found in favor of the appellee, and its verdict is conclusive upon these matters here.

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

NELSON v. PIERCE.

Opinion delivered June 14, 1915.

1. REDEMPTION—NATURE OF RIGHT.—Redemption is a privilege, a favor conferred by statute and does not exist independent of it, and the requirements of the statute must be substantially complied with by those seeking to avail themselves of the privilege.
2. TAX SALES—TIME OF REDEMPTION.—Lands were sold to appellee in June, 1911, for the non-payment of the taxes of 1910, *held*, an action to redeem, filed in February, 1914, more than two years after the date of the sale, which did not question the validity of the sale, but which sought only to redeem from it, no deed having been made to appellee, was not brought in time.

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

Allyn Smith, for appellant.

1. The complaint stated a cause of action. The title of a delinquent owner is cut off only by the tax deed, and it is the tax deed only that is *prima facie* evidence of the validity of the tax sale. The deed not having been

executed, the burden was on the purchaser, if he denied the plaintiff's allegation of the right to redeem, to show the validity of the tax proceedings under which he claimed; and not until the issuance of the deed would the burden of proof shift to the delinquent owner to show the defects in the tax proceedings. Kirby's Dig., § § 7095, 7103, 7104; 21 Cal. 291; 82 Am. Dec. 738; 4 Wheat. 77; 5 *Id.* 116; 6 *Id.* 119; 7 Cow. 88; 17 Am. Dec. 502; 4 Hill, 92; 40 Am. Dec. 259; 89 *Id.* 773; 60 *Id.* 636; 25 Md. 153; 42 Ala. 289; 23 Conn. 189.

2. The title to the land is in the delinquent owner until the tax deed is actually issued, and until that time he has the right to redeem.

Z. M. Horton, for appellee.

The demurrer was properly sustained. The complaint on its face shows that appellant did not offer to redeem until after the expiration of two years from the date of the tax sale, and offers no reason why he should be allowed to redeem other than the fact that no deed had been issued. The right to redeem is a statutory privilege only, and under the statutes he could redeem only *within* two years. Kirby's Dig., § 7095; see also § § 7094, 7096 to 7102 inclusive; 51 Ark. 453; 80 Ark. 43; 28 Ark. 304; 76 Ark. 551; 37 Cyc. 1392; 110 Wis. 296.

SMITH, J. Appellant was the plaintiff below, and alleged in his complaint that he was the owner of certain lands there described, which had been sold to appellee, F. F. Pierce, in June, 1911, for the nonpayment of the State and county taxes for the year 1910; but that no deed had been executed and that the lands were, therefore, subject to redemption. Appellant alleged a tender to the county treasurer of a sum sufficient to redeem from said sale, and he prayed that he be allowed to redeem from the said sale and that the county clerk be required to issue him a redemption certificate, and that the certificate of purchase issued to the tax purchaser be cancelled and held for naught.

Appellees demurred to the complaint on the ground that the facts stated did not constitute a cause of action under the laws of this State; and the court sustained the demurrer and dismissed the complaint, and this appeal has been prosecuted from that order.

Appellant bases his cause of action upon sections 7095, 7103 and 7104 of Kirby's Digest. Section 7095 of Kirby's Digest provides that all lots sold for taxes under the laws of this State may be redeemed at any time within two years from and after the sale thereof, with a proviso that lands and lots belonging to certain persons under disability may be redeemed at any time within two years after the expiration of such disability.

Section 7103 provides that at any time after the lapse of two years from the time of sale of any tract of land for taxes, if the same shall remain unredeemed, the clerk of the county court, on production of the certificate of purchase, shall execute and deliver to the purchaser a deed of conveyance for the tract or lot described in such certificate, and that section also provides a form of deed to be so executed. Section 7104 of Kirby's Digest provides that the deed provided for by section 7103 shall be signed by the clerk of the county court in his official capacity and acknowledged by him before some officer authorized by law to take acknowledgments of deeds, and when thus executed shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the lands conveyed, and also all the right, title and claim of the State and county thereto, and shall be *prima facie* evidence that all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done.

Appellant insists that the effect of the sections quoted is to give the owner of the property the absolute right to redeem his land from any sale for taxes for a pe-

riod of two years after the date of the sale, and that there is a presumptive right to redeem at any time prior to the execution of a deed by the clerk to the tax purchaser.

The complaint did not allege that the tax sale from which appellant seeks to redeem was void, but he says that this allegation is unnecessary for the reason that at all times prior to the execution of the tax deed the burden rests upon the tax purchaser to establish the validity of the tax sale upon which his purchase is based; that the *prima facie* presumption of regularity arises only upon the execution of the deed, and that there is no presumption of regularity prior to that time.

(1-2) It is unnecessary here to decide the correctness of this position, as the tax purchaser is not seeking to assert any right under the tax sale. Upon the contrary, this is an action to redeem, and affirmative relief is asked only by the appellant. This court has frequently held that "redemption is a privilege, conferred by statute; it does not exist independent of it. *Thompson* v. *Sherrill,* 51 Ark. 453, 458; *Craig* v. *Flanagin,* 21 Ark. 322. The requirements of the statute ought to be substantially complied with by those seeking to avail themselves of the privilege." *Cook* v. *Jones,* 80 Ark. 48. The complaint in this cause was filed on the 4th of February, 1914, which was more than two years subsequent to the date of the tax sale, and as appellant does not question the validity of the tax sale, but seeks only to redeem from it, we must hold that he has not made his application to redeem within the time limited by the statute for that purpose and that the action of the court below in sustaining the demurrer to his complaint was proper.

Affirmed.

KARNOPP v. FORT SMITH LIGHT & TRACTION COMPANY.

Opinion delivered June 14, 1915.

1. STREET RAILWAYS—INJURY TO PERSON ON STREET—NEGLIGENCE.—Plaintiff was struck by a moving street car, and severely injured, while she was pursuing a dog, which she believed to be in danger. In an action for damages against the street car company, in fixing liability it is for the jury to say whether, under all the circumstances, plaintiff's act was a negligent one, and the determination of that question will depend upon the finding of the jury as to whether a reasonably prudent person, under the circumstances, would have so acted.
2. STREET RAILWAYS—INJURY TO PEDESTRIAN—DUTY OF MOTORMAN—PRESUMPTION.—The motorman of a street car has the right to assume that a pedestrian or other traveler on the street railway's track, who is apprised of the approach of the car, will act under the impulse of self-preservation, and get off the track in time to save himself from injury; however, the motorman is not entitled to indulge that presumption after he reaches the point of danger, but he must keep his car under control, so that if it turns out that the traveler is insensible to his danger, or if he be unable to extricate himself from danger, he can still give warning to stop the car in time to avoid injury.
3. STREET RAILWAYS—DUTY OF PEDESTRIANS TO LOOK AND LISTEN.—A person crossing the tracks of a street railway is required to exercise care to look and listen for approaching cars, but is not held to the same high duty as a person crossing a steam railway crossing; however, the duty to look and listen is not an absolute duty, and it is not negligence *per se* to fail to look and listen for approaching cars before crossing, and such failure is negligence only where the situation and surrounding circumstances are such that a person of ordinary prudence would have looked and listened.
4. TRIAL—INSTRUCTING JURY—READING FROM OPINION OF SUPREME COURT.—In instructing the jury, it is the duty of the court, in referring to opinions of the Supreme Court, to make a concrete application of the law as stated in the opinion, to the issues joined in the case on trial; and while it is not commendable practice for the trial court to read extensively from an opinion of the Supreme Court, in instructing the jury, such action will not be held to be prejudicial.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; reversed.

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

1. Instruction 6 is abstract and misleading, ignores all the admitted facts and makes the street car supreme

in the street, protecting it almost absolutely from liability. 32 So. 797; 44 Fla. 354; 14 Ky. Law Rep. 663; 99 Me. 149; 99 Mo. 509.

2. In instruction 10 the court in effect tells the jury that appellant had no right to be on the street; that the motorman owed her no duty to see her, in the first place, and that even if he had seen her, still he would be justified in assuming that she would get out of the place of danger without any duty resting upon him to stop or check the car in order to avoid injuring her, until he actually discovered her in a perilous position and unable to get into a place of safety. 127 Mo. 12; 27 Ky. Law Rep. 316.

3. Instruction 11 does not correctly apply the law to the facts in the case upon the subject of contributory negligence. It emphasizes the requirement that appellant must prove by a preponderance of the evidence that the motorman *actually saw her,* totally ignoring his *duty to see her* under the circumstances. 15 Tex. Civ. App. 229; 35 Ind. 467; 37 Ill. 548; 74 N. Y. App. Div. 505.

4. The court erred in refusing to give instruction 1, requested by appellant. 144 U. S. 408; 74 Ala. 150; 53 Conn. 461; 103 Ill. 161; 40 Pa. St. 399.

5. The court erred in reading to the jury as an instruction a part of the opinion in the case of *Little Rock Railway & Electric Company* v. *Sledge,* 108 Ark., at pages 102 and 108, the circumstances of which case were entirely different from this case. It was inapplicable, abstract and misleading as applied to the facts of this case.

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

1. One who deliberately walks in close proximity to a street car track with his back to an approaching car, without looking, is, as a matter of law, guilty of contributory negligence. 80 Ark. 169, and cases cited.

2. Instruction 6 was correct. It was practically a copy of an instruction given in *Little Rock Railway & Electric Co.* v. *Green,* 78 Ark. 129.

3. The motorman in charge of the car had the right to presume that appellant would remain in a place of

safety and not go into danger, and the motorman was under no duty to stop or check the car until he discovered appellant in a perilous position. Instruction 10 was right. 78 Ark. 129; 93 Ill. App. 387.

4. Instruction 11 was correct as applied to the facts in evidence. 62 Ark. 164.

SMITH, J. This action was brought by appellant to recover damages to compensate an injury received by her in a collision with one of appellee's street cars. Appellant was chasing a young bird dog on the street to get it off the street and out of the danger of passing cars, and in doing so fell and the car ran over her foot, necessitating its amputation. There is a sharp conflict in the evidence as to the circumstances under which she was injured, the evidence on her part being to the effect that she fell in front of the car and that the entire car ran over her foot; while that on the part of the appellee is to the effect that she fell under the side of the car, causing her to be thrown to the ground, and that the rear truck only passed over her foot. The proof shows that Fifth Street cars stopped at Garrison Avenue and did not go beyond that point but remained there a short time before making the return trip. The evidence on the part of appellant was that the cars waited five minutes before beginning the return trip. Appellant testified that when she saw the dog on the track she followed him about half way between the car track and the gutter, when the dog turned back toward the track, and then ran along the rail of the track, and while she knew the car had reached Garrison Avenue, she supposed it would remain there the usual length of time before returning, but that the car returned sooner than she expected and struck her without warning.

The court gave a number of instructions, and of these the appellant complains of instructions numbered 6, 10 and 11, given at the instance of appellee; and she also complains of the action of the court in refusing to give an instruction numbered 1, requested by her.

These instructions 6, 10 and 11, given at the instance of appellee, are as follows:

"6. If the employees of the street railway company in charge of its car, see a person upon the street along by the side of the car track, in front of an approaching car, they have a right to rely upon human experience and presume that she will act upon principles of common sense and the motive of self-preservation common to people in general, and will not attempt to go upon or cross the track in front of the approaching car, and may go on without checking the speed of the car until they see she is likely to go upon the track in front of the approaching car, when it would be their duty to give extra alarm by bell or gong, and, if that is not heeded, then as a last resort to check its speed or stop the car if possible in time to avoid the accident."

"10. The motorman in charge of defendant's car had a right to presume that plaintiff would remain in a place of safety and would not go into a place of danger, and there was no duty resting on the motorman to stop or check said car, until he actually discovered plaintiff in a perilous position and unable to get into a place of safety."

"11. If you believe from the evidence that plaintiff went upon or so close to defendant's street car track, immediately in front of an approaching car at a time and place when her view was unobstructed and where she could have seen the approaching car had she looked or heard the car had she listened, then the court instructs you that the plaintiff was guilty of negligence contributing to her own injury, which would bar her recovery in this action, unless the plaintiff should show by a preponderance of the evidence, that defendant's motorman actually saw her in a perilous position and likely to be struck and injured by said car and failed to exercise ordinary care to prevent said injury after so discovering plaintiff's peril."

Instruction numbered 1, requested by appellant and refused by the court, was to the effect that if at the time

appellant went upon the street she saw the car 300 yards distant standing in accordance with a custom, known to her, or remaining standing five or more minutes before starting on return trip; and if she at the time reasonably anticipated that her errand upon the street could and would be accomplished before the return of the car, and if before the injury she had no knowledge of the approach of the car, then the jury would be warranted in finding that she was not negligent in not looking back, if, indeed, she did not at the time look back for the approach of the car.

We think none of these instructions should have been given.

(1) Instruction numbered 1, requested by appellant, relieved her of all duty to look and listen or to be aware of the approach of the street car while she chased the dog down the track, if she believed she could accomplish her errand of pursuing and overtaking the dog before the car began its return trip. This instruction was erroneous for the reason, among others, that it was not shown how much of the five minutes had expired before appellant commenced chasing the dog, but even though none of it had expired, the jury should have been permitted to say whether under all the circumstances, appellant's act was a negligent one, and the determination of that question would have depended, of course, upon the finding of the jury as to whether or not a reasonably prudent person under the circumstances would have so acted.

(2) Instruction numbered 10, set out above, declares the law which would have been applicable to an injury to a trespasser upon a railroad track prior to the passage of the Lookout Statute of 1911*; and instructions 6 and 11 do not correctly state the right of pedestrians to use the street. An instruction in substantially the language of instruction numbered 6 was disapproved by this court in the case of *Pankey* v. *Little Rock Ry. & Elec. Co.*, 117 Ark. 337, 174 S. W. 1170, where in disapproving the instruction it was said:

*Act 284, p. 275, Public Acts of 1911 (Rep.).

"Stating the rule in other language, the motorman has the right to assume that a pedestrian or other traveler on the track who is apprised of the approach of the car will act under the impulse of self-preservation and get off in time to save himself from injury. Yet the motorman is not entitled to indulge that presumption after he reaches the point of danger, but he must keep his car under control so that if perchance it turns out that the traveler is insensible to his danger or be unable to extricate himself from danger he can still give warning or stop the car in time to avoid injury."

(3) The instruction numbered 11, imposed upon appellant the same absolute duty of looking and listening as would have been imposed upon her at a railroad crossing. This instruction tells the jury that if appellant's view was unobstructed and she could have seen the approaching car had she looked, or could have heard the car had she listened, she was guilty of contributory negligence and could not recover unless the motorman saw her perilous position in time to have averted the injury after discovering her peril. The duty of pedestrians to look and listen was considered in the case of *Little Rock Ry. & Elec. Co.* v. *Sledge,* 108 Ark. 95, in which case we quoted the rule as stated in 36 Cyc., page 1537, as follows:

"As a general rule, it is the duty of a person about to cross a street railroad track to exercise ordinary care and diligence, according to the circumstances, to look and listen for approaching cars in time to avoid an accident, and, if he sees an approaching car in close proximity, to stop until it passes, although he need not exercise the same high degree of care in this respect as is required in crossing a steam railroad. He must look and listen at the time and place which will be reasonably effective to afford him information of the presence of an approaching car, and ordinarily must look and listen in both directions, and must continue to look and listen until he is safely across, and if he goes along heedlessly * * * and allows his attention to become so absorbed that he gives no heed to his danger by reason whereof he is injured, he is guilty of con-

tributory negligence precluding a recovery, notwithstanding negligence on the part of the company, unless the company wilfully or wantonly inflicts the injury, or fails to exercise ordinary care to avoid injuring him after discovering his peril. But ordinarily a person is not required to stop to look and listen before crossing, except where the circumstances, as where the view is temporarily obstructed, are such as to require stopping in order to properly look or listen. As a general rule, however, the duty to look and listen is not an absolute duty, and it is not negligence *per se* to fail to look and listen for approaching cars before crossing, but such failure is negligence only when the situation and surrounding circumstances are such that a person of ordinary prudence would have looked and listened."

(4) Complaint is also made of the action of the trial court in reading extensively from the opinion in the Sledge case, *supra*.

This is not a practice to be commended, as it is ordinarily preferable for the court to make a concrete application of the law as stated in the opinion in any case to the issues joined in the case on trial. But no prejudice resulted from this action of the court.

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

NEAS v. WHITENER-LONDON REALTY COMPANY.

Opinion delivered June 14, 1915.

1. DEEDS—DESCRIPTION—RANGE.—Lands were described in a deed of trust as sections 26 and 35 in township 12 north, without giving any range number; *held*, where there were lands in township 12 north, in several ranges, that therefore the description in the deed of trust was insufficient to convey the legal title to the lands attempted to be described.
2. VENDOR AND PURCHASER—MORTGAGED PROPERTY—INNOCENT PURCHASER—CONSTRUCTIVE NOTICE.—A. mortgaged certain lands to B., but omitted the range number, which was essential to a correct description, from the description in the mortgage; after B. had had the mortgage recorded, A. sold the lands to C., a *bona fide* pur-

chaser. *Held*, C. was not put on notice, constructive or otherwise, of the mortgage to B., in which the lands were defectively described.

Appeal from Mississippi Chancery Court, Osceola District; *Charles D. Frierson*, Chancellor; reversed.

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

1. In this case the distinction between a deed and a mortgage or deed of trust is to be observed, in this: If one sells and conveys land by deed to another, and a third party, with knowledge of such sale, afterward buys the same land from the grantor in the first deed, he obtains no interest in the land, even though the deed was not recorded, but this is not true of a mortgage. A mortgage may be good between the parties, though not acknowledged or recorded, but it constitutes no lien upon the mortgaged property as against a stranger unless it is acknowledged and recorded, or, in this State, filed for record, and this is true even though the third party had actual notice of its existence. Kirby's Dig., § § 763, 5396; 9 Ark. 112; 20 Ark. 190; 18 Ark. 105; 49 Ark. 459; 68 Ark. 168; 25 Ark. 152; 41 Ark. 186; 56 Ark. 88.

2. A description which omits the range in which the land lies, and contains no other words of description by which the land sought to be conveyed can be identified, does not constitute, when filed or recorded, constructive notice of what land was intended to be conveyed. 41 Ark. 70; 43 Ark. 350; 54 Ark. 91; 35 Ark. 470, 477, 478, and cases cited; 30 Ark. 660; 3 Ark. 58; 51 N. E. 243; 41 N. E. 1054; 61 Pac. 820, 822; 33 So. 21, 22; 34 So. 602; 38 So. 957; 28 S. W. 551, 552; 24 S. W. 502; 34 N. W. 871; 46 N. Y. 384, 7 Am. Rep. 355; 51 Am. Dec. 769, 782, 783; 48 Ark. 419-425; 2 Devlin on Deeds (3 ed.), § 654; 20 Ia. 121, 89 Am. Dec. 517; 8 Vt. 172, 30 Am. Dec. 459; 110 Am. St. Rep. 924-932.

A mortgage can not be constructive notice of anything not contained in it; and the recording of this deed is constructive notice of that only which would become actual notice to one who read the deed or had actual knowledge of what it contained. Warvelle on Abstracts (3 ed.), § 62; 7 Cal. 292; 10 Vt. 555; 1 Johns Ch. 288.

Hawthorne & Hawthorne, for appellee.

The mortgage or deed of trust sufficiently describes the lands. They were in two townships in the same range, and the range number having been mentioned once, it would follow that all the lands were in the same range, unless they were described as being in a different range; but as a matter of precaution appellee asked for a reformation. 57 So. 836. If, however, the description as given was not in itself sufficient, there was at least enough there, when taken in connection with other facts appearing on the record, the deed from appellee to Lilly, and the timber deed from appellee to Chapman & Dewey Land Company, in both of which these same lands were correctly described, to put appellants upon inquiry, and a mere casual inquiry would have disclosed that the sections in question were in range 8 east. 87 Ark. 492; 108 Ark. 490; 50 Ark. 327; 35 Ark. 103; 70 Ark. 253; 2 N. E. 735; 54 Ark. 158; 51 Ark. 410; 52 Ark. 278; *Id.* 371; 111 Ark. 368; 46 Ark. 70.

If Neas was a purchaser for value without notice of appellees mortgage at the time he paid Lilly the $5,000 balance, he had constructive notice of the pendency of the suit of appellee and others to foreclose a vendor's lien and deed of trust in the United States District Court, which was filed, and a summons was issued and served on Lilly more than a month prior to the date this payment was made by Neas to Lilly. 25 Cyc. 1478; 134 Fed. 503.

SMITH, J. Appellee, Whitener-London Realty Company, hereinafter designated as the realty company, was the plaintiff below, and instituted this suit for the purpose of reforming and foreclosing a deed of trust executed in its favor by one O. R. Lilly. The realty company conveyed to Lilly on October 25, 1910, a large body of land, all of which was situated in township 13 north, range 8 east, Mississippi County, Arkansas, except two sections numbered 26 and 35, which were situated in township 12 north, range 8 east. This deed recited that it was subject to a timber contract theretofore made by the realty company with the Chapman & Dewey Lumber Company. The deed to Lilly recited that the consideration of $34,947 had been fully paid. On March 3, 1911, Lilly executed to W.

B. Flannigan, as trustee for the realty company, a deed of trust to secure notes aggregating the sum of $17,298.50, the balance due on the purchase price of the lands. This trust deed accurately described the lands lying in township 13 north, range 8 east, but described sections 26 and 35, as being in township 12 without giving any range number. Lilly was indebted to appellant D. H. Robinson in the sum of $6,000, and to secure the payment of this sum, which was evidenced by a promissory note for that amount, and which note was assigned to, and is now owned, by one J. W. Pumphrey, executed a deed of trust on said sections 26 and 35 in township 12 north, range 8 east. The date of this deed was April 12, 1911. Lilly later negotiated a trade with appellant Neas for the sale of section 35, township 12 north, range 8 east, for a consideration of $8,500, and executed a deed to Neas conveying said section of land on the 14th day of October, 1911. The deed of trust from Lilly in favor of the realty company was filed for record on the 23d day of March, 1911, while the deed to Lilly from the realty company was filed on the 14th of March, 1911, and all of the other conveyances herein mentioned were filed for record subsequent to those dates.

When Neas was negotiating with Lilly for the purchase of the section above described he procured an abstract of title to that section of land, which was made by a competent abstracter, and from the certificate of this abstracter it appears that the abstract purported to show all conveyances and liens of every kind affecting said land. There is some proof in the record to the effect that Robinson and Lilly were associated together in business, and that after taking a deed of trust in his favor on both sections 26 and 35 to secure the payment of the $6,000 due him from Lilly, Robinson thereafter, without any consideration, released his deed of trust insofar as section 35 was concerned. But it was shown that he considered Lilly as solvent, and he stated that he would have satisfied his deed of trust entirely had he been requested so to do. It is not necessary, however, to review the transactions be-

tween Lilly and Robinson, as the court below made no finding that Robinson was not an innocent purchaser except insofar as he was affected with constructive notice of the prior deed of trust from Lilly to Flannigan, as trustee.

The realty company filed suit in the Federal Court at Jonesboro on the 28th of March, 1912, in which it asked a reformation of the deed of trust to Flannigan by the insertion of the omitted range, and a foreclosure of that instrument; but this suit was never prosecuted to a final decree, and was dismissed on the 28th day of December, 1912. During the pendency of this suit in the Federal Court, Neas paid to Lilly the balance of the purchase money due on section 35, but Neas had not been made a party to this suit in the Federal Court, and had no actual knowledge of its existence.

The court below held that the registration of the deed of trust from Lilly to Flannigan was constructive notice of its existence, and that it constituted a lien prior to the subsequent conveyances. There is no circumstance in proof to support a finding that Neas was not a *bona fide* purchaser for value, and while there are some circumstances in proof which tend in a measure to show that Robinson may not have been, yet the chancellor did not make that finding of fact, nor is it now contended that the evidence is sufficient to establish that fact, but it is urged that both Robinson and Neas had such constructive notice of the Flannigan deed of trust that the conveyances to them must be held subject to that lien. The determination of the correctness of this view is, therefore, the question in the case.

Section 762 of Kirby's Digest provides that every instrument of writing affecting the title, in law or equity, to any real or personal property which is required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county.

Section 763 of Kirby's Digest provides that no instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or

equity shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated.

Section 5396 of Kirby's Digest provides that every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage.

(1) The description of sections 26 and 35 in the Flannigan deed of trust was insufficient to convey the legal title to those lands. It is shown without dispute that there were lands in township 12 north, in addition to those in range 8 east, there being townships numbered 12 north, 9 east; 12 north, 10 east; and 12 north, 11 east, and 12 north, 12 east. The designation of the range was, therefore, essential to a proper description of these sections.

In the case of *Howell* v. *Rye,* 35 Ark. 470 (to quote the syllabus), the court said:

"When a deed does not mention the township and range in which the land is situated, and no boundaries, natural or artificial objects, or other means for identifying the land, are given, on its face, is bad for uncertainty; and the grantor may make a new deed correcting the mistake and omission, which would be good between them."

To the same effect, see *Fuller* v. *Fellows,* 30 Ark. 657; *Mooney* v. *Cooledge,* 30 Ark. 640; *Doe* v. *Porter,* 3 Ark. 18; *Howell* v. *Rye,* 35 Ark. 470; *Cooper* v. *White,* 30 Ark. 513.

(2) Appellee concedes the insufficiency of the description when it prays that the same be reformed, and the court granted the prayer of that petition and decreed reformation of the deed by the insertion of the omitted

range. But appellee says that inasmuch as its deed of trust had been properly acknowledged and recorded, it thereupon became constructive notice to appellants and all others, not only of all recitals contained in it, but that its registry charged appellants and all others with the knowledge of all facts which would have been discovered by the inquiry which would have been suggested had they read the deed as recorded, that is, that this mortgage conveyed the same lands in township 13, range 8 east, which Lilly had purchased from the realty company when he purchased the two sections in township 12-8, and that as all the lands were conveyed to him by the same deed a perusal of this deed of trust would have suggested to him the necessity of inquiring whether or not the deed of trust was not in fact intended to convey the lands in township 12 north, range 8, as well as the lands in township 13 north, range 8. In effect appellees contend that the registry of the deed of trust was constructive notice of all its recitals and notice of all facts which could have been ascertained by the pursuit of the inquiry which its recitals would have suggested.

A somewhat similar contention was made in the case of *Bluff City Lumber Co.* v. *Bank of Clarksville,* 95 Ark. 1. In that case a deed of trust had been recorded which recited the dissolution of a partnership, and it was there contended that as all persons were charged with constructive notice of the instrument itself, they were likewise charged with the recitals contained in that instrument, and the trial court had been asked, but had refused, to give an instruction so declaring the law. Mr. Justice Battle, speaking for the court, said:

"The appellants contend that the trial court erred in refusing to so instruct; but it did not. The record of a deed is only constructive notice of that for which it is required. As it is not required to give notice of the dissolution of partnership, it does not subserve that purpose. Kirby's Digest, section 762."

It is said in the third edition of Warvelle on Abstracts, section 62, that "The doctrine of constructive notice under registration laws has always been regarded as

a harsh necessity, and the statutes which create it have always been subjected to a rigid construction."

The case of *Stead* v. *Grosfield,* 34 N. W. 871, involved a question very similar to the one now under consideration. The syllabus in that case is as follows:

"On February 17, 1873, B., the owner of certain property, executed a mortgage, under the foreclosure of which the defendant claimed title. The property was vacant and unoccupied. This mortgage failed to mention the block in which the lot was located. On July 12, 1875, B. executed another mortgage upon the same property to the plaintiff, in which it was correctly described. The plaintiff was ignorant of the existence of the defendant's mortgage. *Held,* that the first mortgage and its foreclosure were void for uncertainty of description, and that plaintiff's title must prevail."

In the case of *Laughlin* v. *Tips,* 28 S. W. 551, through the inaccuracy of the description employed, the question of the identity of the land conveyed was involved. But it was there contended that inasmuch as the first deed, which was of record, was intended to convey the tract of land in controversy, the subsequent purchaser stood charged with knowledge of that fact because the identity could have been known by investigation. But in disposing of this question, it was said:

"The deed does not, of itself, give notice that the tract of land sold by W. T. Lytle to appellant was the same sold by him to John T. Lytle and James Speed; and in order to make it effective, it became necessary to show that the two deeds conveyed the same tract, and that this was known to appellant at the time he purchased. Purchasers are only charged with constructive notice of the facts actually exhibited by the record, and not with such as might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make. *Taylor* v. *Harrison,* 47 Tex. 454. Registration is constructive notice only of what appears on the face of the deed, as registered. *McLouth* v. *Hurt,* 51 Tex. 115."

A very similar question was under consideration by the Supreme Court of Mississippi in the case of *Simmons* v. *Hutchinson,* 33 So. 21, in which case that court said:

"Constructive notice arising from the record of a muniment of title is imputed to purchasers and creditors from a mere presumption of law, and it imputes only such knowledge as the instrument there recorded discloses, and not what a diligent inquiry into its meaning might disclose. The registration of an instrument is constructive notice to the world of the contents of the paper there recorded or intended to be recorded, and of its particular contents only, and it will have no operation or effect unless the original instrument correctly and sufficiently describes the premises which are to be affected. The effect of the registration law is to impute to a purchaser notice of what the instrument recorded or intended to be recorded actually conveys, and has no operation in the way of putting him upon inquiry as to what premises were intended to be conveyed, unless they be substantially described therein. 2 Pom. Eq. Jur., sections 653, 654."

In the case of *American Inv. Co.* v. *Coulter,* 61 Pac. 820, a mortgage had described a tract of land as being in range 17 when it was in fact in range 7, and the Supreme Court of Kansas held that the record of the mortgage itself which had an improper range, and, therefore, an imperfect description was not sufficient to charge subsequent grantees with constructive notice that the mortgage conveyed or was intended to convey the land in range 7.

An old case on this subject and one that is cited in all of the more recent cases is that of *Lally* v. *Holland,* 1 Swan (Tenn.) 396. In that case a court of chancery was asked to reform a deed of trust in which a mistake had been made as to the name of the bargainer, and as to that of the slave conveyed by the deed, and to enforce it as reformed against one who, subsequent to the execution of the deed, had purchased the slave without notice. In that case it was said:

"Again, registration is constructive notice in respect to such instruments only, as are authorized and required by law to be registered, and are duly registered in com-

pliance with law. 1 Story's Eq., section 404. And, furthermore, registration is constructive notice only, of what appears on the face of the deed as registered. 2 Humph. 116; 1 Johns. Ch. R. 299. If the registration be not authorized or required by law; or if the registry itself be not in compliance with the requirements of the law; or if, upon the face of the deed as registered, the property purporting to be conveyed, be not truly and properly described, the act of registration is treated as a mere nullity, and, of course, can not affect the subsequent purchaser with constructive notice. The object of registration is to give notice to creditors and subsequent purchasers. They have the right to presume that the instrument, as registered, speaks the truth, and expresses fully the true intention of the parties. They can not be expected or required to look beyond the face of the paper as it appears on the register's books; nor can they be charged with notice of anything beyond."

A more recent case and one which reviews a great many authorities is that of *Bailey* v. *Galpin,* 41 N. W. 1054. In that case a deed had been recorded to a town lot which failed to state the block in which the lot was situated, and in that case, as here, it was contended that inasmuch as the deed had been recorded, that fact made it constructive notice to all subsequent purchasers of the property intended to be conveyed. Justice Vanderburgh, speaking for the Supreme Court of Minnesota, said:

"The legal title to land does not pass by deed unless so described that it can be identified or located by referring to or following out the description as given, and the effect of the record as constructive notice merely, can not be aided or supplemented by proof of the actual intentions of the parties to the deed, not disclosed by the record. *Tice* v. *Freeman,* 30 Minn. 391, 15 N. W. Rep. 674; *Parrett* v. *Shaubhut,* 5 Minn. 331. * * * But if the description in the deed is so defective and inaccurate that the subject of the grant is not properly identified or indicated, so that a reformation of the instrument is required, the legal title will not pass. *Roberts* v. *Grace,* 16 Minn. 134. Here the description is confessedly defective on its face. It is not

aided by the addition of particulars containing a correct description or identification, or pointing to it, as might be done, by reference to a previous deed or well known name or locality, or anything of the kind. * * *

"We come now to consider, in the next place, whether the record of the deed—there being no actual notice—was constructive notice to the plaintiffs of the equitable rights of the defendant, as between her and her grantors, to a reformation of the deed. But this could not well be; for, if the description in the deed is altogether insufficient to locate or identify the property and pass the title, it would not be constructive notice at all to the plaintiffs, and they were not bound to notice it or look for it. *Simmons* v. *Fuller*, 17 Minn. 490; *Roberts* v. *Grace*, 16 Minn. 135; Martind. Conv., section 276, *et seq.* It is intended that the record be a correct and sufficient source of information, and the statute did not mean to put purchasers upon further inquiry by virtue of its operation making the fact of registration constructive notice; and parties are understood to purchase upon the faith of the title as appearing of record. *Frost* v. *Beekman*, 1 Johns. Ch. 298; *Ledyard* v. *Butler*, 9 Paige 136; *Jackson* v. *How*, 19 Johns. 83; *Fort* v. *Burch*, 6 Barb. 74. It is the settled rule that registration is constructive notice only of what appears on the face of the deed, and of the description of the premises therein. And if upon the face of the deed as registered, the property in controversy is not so described as to identify it with reasonable certainty, the record can not be notice to subsequent *bona fide* purchasers. *Roberts* v. *Grace, supra*, 136; Will. Eq. Jur. *256. Under the registration laws, it is sometimes said in a loose and general way that the record of a deed is constructive notice to all the world, but this means simply that the record is open to all, and is notice to interested parties; and, strictly speaking, a purchaser has not by law constructive notice of all matters of record, but only of such as the title deeds of the estate show upon their face, or refer or direct him to. And the *bona fide* purchaser is not constructively bound to look further than the information afforded by the record of such deeds. The record of a deed is notice

only to those who are bound to search for it. *Dexter* v. *Harris,* 2 Mason, 536; *Maul* v. *Rider,* 59 Pa. St. 167; *Sanger* v. *Craigue,* 10 Vt. 555; *Thomson* v. *Wilcox,* 7 Lans. 376.

"The distinction between constructive and actual notice is also to be noticed. Constructive notice of the contents of a deed arises as an inference or presumption of law from the mere fact of record, and is in law equivalent to actual notice of what appears upon the face of the record to the party bound to search for it, whether he has seen or known of it or not; that is, constructive notice under the recording acts may bind the title, but does not bind the conscience; while actual notice binds the conscience of the party. *Underwood* v. *Courtown,* 2 Schoales & L. 66. Hence, where the attention of an interested party is directed to a defective deed, or the recorded copy thereof, he may get actual knowledge of the facts sufficient to affect his conscience, and put him upon inquiry, so as to charge him with notice, which would not otherwise be legally attributable to him from the record only. Thomas, Mortg., section 491. In this case it is only upon the assumption in advance that the plaintiffs knew in fact of the existence of the defendant's deed or the description therein, or were chargeable with notice by the record thereof, that it can be claimed that they were put upon inquiry, or that the title of these lots was bound by it. But they had no actual notice of it. The search made for them did not disclose it. The land was not known by such description. They were not put upon inquiry as to the particulars of the transaction, and they could not be constructively bound by a deed which did not describe the land, and inquiry of the parties to that deed did not become a duty, since they had no notice in fact. *Maul* v. *Rider,* 59 Pa. St. 167. As was said in *Barnard* v. *Campau,* 29 Mich. 163, 164, in general, it will not be disputed that one who seeks a benefit from the recording laws must incur all the risks of the failure to have his papers spread upon the record in proper form. An equitable construction can not be placed upon such laws, by which they may be made to give constructive notice of things the records

do not show. And in *Frost* v. *Beekman, supra,* 1 Johns, ch. 299, the chancellor says: 'The registry was intended to contain within itself all the knowledge of the deed necessary for the purchaser's safety.' The defendant was at fault in not seasonably examining and correcting the description in her deed; and where one of two innocent parties must suffer, the loss ought justly to fall on that one whose error has led to it. *Thomson* v. *Wilcox,* 7 Lans. 380."

We have quoted extensively from that case, as it involves the question under consideration here, and the reasoning of the court is decisive of the point at issue, although we are not called upon to approve the statement that one seeking the benefit of the recording laws must incur all the risks of failure to have his papers spread upon the record in proper form, as we have held that one is required only to properly file his instrument for record. *Ghio* v. *Byrne,* 59 Ark. 280; *Case* v. *Hargadine,* 43 Ark. 144; *Oats* v. *Walls,* 28 Ark. 244. It would be unreasonable to extend the provisions of the registry laws so as to impose upon one who has only constructive notice, the duties resting upon one who has actual knowledge. Good faith requires of that man who has actual knowledge of any existing fact, to pursue such inquiry as would be suggested to an ordinarily prudent man by that knowledge, and equity charges him with the knowledge which he would have thus obtained had he made that inquiry. But we find no cases which impose this duty upon him who has only constructive notice. Constructive notice relates only to the instrument as recorded, and if the instrument is insufficient to give the necessary notice, then knowledge is not to be imputed. The deed of trust to Flannigan being one which requires reformation, its registry imputes no knowledge that range 8 had been omitted, and appellants having no actual knowledge of its existence are, therefore, innocent purchasers without notice, and the conveyances to them are superior to the Flannigan deed of trust.

The decree of the chancellor is therefore reversed and this cause will be remanded with directions to enter a decree in accordance with this opinion.

STATE *Ex rel.* NORWOOD, ATTORNEY GENERAL *v.* NEW YORK LIFE INSURANCE COMPANY.

Opinion delivered December 14, 1914.

1. FOREIGN COPORATIONS—RIGHT TO DO BUSINESS IN STATE—GRANT OF FRANCHISE.—A foreign corporation has no right to carry on an insurance business for which it may be organized, in this State, in common with domestic corporations and the citizens of this State; if it is permitted, or granted a franchise or license, to do business in this State, such permission or license to exercise its corporate powers is a privilege.
2. WORDS AND PHRASES—"PRIVILEGES," "PURSUITS," "OCCUPATIONS" DEFINED.—The words "pursuits" and "occupations" are synonymous, and are used in their common acceptation to denote the principal business, vocation, employment, calling or trade of individuals, that but for some constitutional or statutory inhibition, could be exercised and enjoyed as of common right; but the word "privileges," as used in the Constitution of 1868 is not synonymous with the words "pursuits" and "occupations."
3. CONSTITUTIONAL LAW—TAXATION—"ALL PRIVILEGES" OF NO REAL USE TO SOCIETY.—The Constitution of 1868 which provides that all privileges * * * that are of no real use to society shall be taxed for certain purposes is not limited to privileges enjoyed by individuals, but includes also a franchise or privilege granted to a corporation to transact business in the State.
4. REVENUE—TAXATION OF LIFE INSURANCE COMPANIES—PRIVILEGE OF DOING BUSINESS.—Under article 10, section 17, of the Constitution of 1868, which provides that "the General Assembly shall tax all privileges, pursuits and occupations that are of no real use to society; all others shall be exempt, * * *" the act of April 25, 1873 (Kirby's Digest, section 4365), which attempted to tax life insurance companies for the privilege of doing business in the State, *held*, to be unconstitutional and void.
5. FOREIGN CORPORATIONS—FRANCHISE—PRIVILEGE—TAXATION.—The franchise or right of a foreign corporation is a privilege and can not be taxed under the provisions of the Constitution expressly exempting all "privileges" from taxation.
6. INSURANCE COMPANIES—TAXATION OF—NATURE OF BUSINESS—CONSTITUTIONAL LIMITATION.—The franchise or privilege of conducting an insurance business is a useful occupation within the meaning of article 10, section 17, of the Constitution of 1868, which exempts from taxation all privileges which are of real use to society.
7. APPEAL AND ERROR—JUDGMENTS—SUFFICIENCY OF PLEADING AND PROOF.—Where the allegations of a complaint, alleged that an insurance company did not pay certain taxes, and the proof failed to show the amount of defendant's property on the day fixed by the statute

for filing schedules, *held*, the pleading and proof were too uncertain to show a right in the State to collect such taxes.

8. TAXATION—EXEMPTIONS—RECEIPTS OF INSURANCE COMPANY.—Act 1874-5, page 191 (Kirby's Digest, § 4338) levying an annual tax of 2½ per cent on the net receipts of all insurance companies doing business in the State, "in lieu of all other taxes and license fees," is not void as an exemption from taxation under the Constitution of 1874, article 16, section 6; nor is it void under section 5, which provides that all property shall be taxed according to its value, and no species at a higher rate than another.

9. TAXATION—RECEIPTS OF INSURANCE COMPANIES—RIGHT OF MUNICIPAL CORPORATION.—The provision of Kirby's Digest, § 4338 (§ 4, p. 191, Acts 1874-5), which makes the tax there imposed in lieu of all other taxes, is void, for depriving counties, school districts, and municipal corporations of the right to tax net receipts of insurance companies.

10. LICENSES—OCCUPATION TAX—INSURANCE COMPANIES.—The annual tax on the net receipts of an insurance company, doing business in the State, imposed by Kirby's Digest, § 4338 (§ 4, p. 191, Acts 1874-5) is valid as an occupation tax, since the Legislature has complete control over foreign and domestic corporations.

11. CONSTITUTIONAL LIMITATIONS—CONSTRUCTION OF STATUTES.—In construing a statute, the courts will adopt such a construction as will validate the same, if possible.

12. STATUTES—EFFECT OF PARTIAL INVALIDITY.—The entire act of 1874-5, p. 191, § 4 (Kirby's Digest, § 4338), is not rendered invalid, because one provision, levying a certain tax on insurance companies, is invalid.

13. TAXATION—RECEIPT OF INSURANCE COMPANY—OCCUPATION TAX—COLLECTION.—The duty of the Auditor under Kirby's Digest, § 4338, levying a tax on the net receipts of insurance companies, was merely to complete the percentage of the net receipts, and he did not act as an assessing board, whose findings would be conclusive and not reviewable, and the State may, in a proper action, collect past-due taxes, not paid because the defendant had made improper statements as to the amount of its receipts.

14. TAXATION—COLLECTION OF BACK TAXES—METHOD.—The Auditor may adopt any common law remedy to collect back taxes, and the remedy against insurance companies, as set out in Kirby's Digest, § 4338, is not exclusive. The Attorney General is the proper party to bring suit.

15. TAXATION—INSURANCE COMPANIES—OCCUPATION TAX—RECEIPTS.—Under Kirby's Digest, § 4338, in determining the net amount of the receipts of an insurance company for purposes of levying an occupation tax, the company may not deduct cash surrender payments from its receipts.

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

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellant; *A. W. Dobyns, W. G. Riddick* and *W. H. Rector,* Special Counsel.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

WOOD, J. This suit was brought by the Attorney General, on behalf of the State, to recover of appellee certain excise taxes alleged to be due under the act of April 25, 1873, and certain property taxes alleged to be due under the act of February 27, 1875. (Kirby's Digest, § 4338).

The Attorney General, in his brief, concedes here that the act of 1875, under which he seeks to recover property taxes, is unconstitutional and void, and he asks only for a decree recovering the excise taxes alleged to be due under the act of 1873, which is as follows:

"It shall be the duty of every company or association of another State, authorized to transact business in this State, to make report to the Auditor in the month of January of each year, under oath of the president, secretary or agent thereof, showing the entire amount of premiums of every character or description received by said company or association in this State during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the State treasury a tax of three per centum upon said premiums, and the Auditor shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury." Kirby's Digest, section 4365.

Article 10, section 17, of the Constitution of 1868, under which the act was passed, provides as follows:

"The General Assembly shall tax all privileges, pursuits and occupations that are of no real use to society; all others shall be exempt, and the amount thus raised shall be paid into the treasury."

In *State* v. *Martin,* 60 Ark. 343, we said: "We must keep to the front certain familiar but unvarying rules when we come to interpret the provisions of any section of a Constitution. (1) Unambiguous words need no interpretation. (2) Where construction is necessary, words must be given their obvious and natural meaning. (3) The words or provisions under consideration must be construed with reference to every other provision, so as to preserve harmony in the whole instrument. (4) The intent of the framers, gathered from both the letter and spirit of the instrument, is the law."

Applying these familiar rules in the construction of the section of the Constitution under consideration, there can be no doubt as to its meaning. The language is really so plain that it needs no interpretation. It is a positive command to the General Assembly to tax "all privileges, pursuits and occupations that are of no real use to society," and as positively inhibits the Legislature from taxing those "privileges, pursuits, and occupations," that are of real use to society, for, after saying that the General Assembly shall tax "all privileges, pursuits and occupations that are of no real use to society," it expressly provides that "all others shall be exempt." The section contains a mandate and an inhibition. The one is as express and positive as the other.

Corporations are creatures of the State. But they are composed of, and are owned, controlled and managed by individuals. The special right or power conferred upon individuals to organize themselves into a corporation and to transact business in the form and under the name of a corporation is a privilege.

In *International Trust Co.* v. *American Loan & Trust Co.,* 62 Minn. 501, Judge Mitchell, speaking for the court, defined a privilege as follows: "A privilege as distinguished from a mere power, is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with 'franchise,' and means a special privilege conferred by the State, which does not belong to citizens generally of common right, and

which can not be enjoyed or exercised without legislative authority." See, also, 19 Cyc. p. 1452, and authorities cited in note 12, Words and Phrases, "privilege."

(1) A foreign corporation has no right to carry on an insurance business, for which it may be organized, in common with domestic corporations and the citizens of this State. If it is permitted, or granted a franchise or license, to do business in this State, such permission or license to exercise its corporate powers is a privilege.

(2) Learned counsel for appellant contend that the word "privileges," as used in the Constitution of 1868, is limited by the words "pursuits" and "occupations," which follow it, has something of the general meaning of those terms, and that the Legislature had in mind "privileges," "pursuits" and "occupations" of individuals, and not corporations. The plain language of the section under consideration does not warrant such construction. The words "pursuits" and "occupations" are synonymous, and are used in their common acceptation to denote the principal business, vocation, employment, calling or trade of individuals, that but for some constitutional or statutory inhibition, could be exercised and enjoyed as of common right. But the word "*privileges*" is not used in the Constitution in the same sense as the words "*pursuits*" and "*occupations,*" and it has an entirely different meaning. The word "privilege" is not defined by any literary or legal lexicographer as synonymous with the words "pursuit" and "occupations." See "Privilege," Black's, Anderson's, Rapalje's, Bouvier's Law Dictionaries, Words & Phrases, Funk & Wagnall's Standard Dictionary, Webster's Dictionary, Century Dictionary.

Then what sanction have we for saying that the framers of the Constitution of 1868 used the word "privileges" in a sense different from both its literary and legal meaning. To give the word "privileges," a different meaning from that already expressed would be doing violence to the familiar and fundamental rules of construction above referred to. The rule of *ejusdem generis* does not apply.

(3) The language "all privileges" is exceedingly comprehensive, and we do not feel justified in saying that it is limited to privileges enjoyed by individuals, and that it does not contemplate the franchise or privilege granted to corporations to transact business in the State.

Nor, under this broad and all-embracing language, are we authorized to hold that the framers of the Constitution did not have in mind to limit the power of the Legislature to tax foreign corporations for the "privilege" of doing business in this State. To so hold would be far away from the plain language in which the provision is couched. Our present Constitution and the Constitutions adopted before the Constitution of 1868 contain, in substance, the following provision: "The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper." Article 16, section 5, Constitution 1874; article 7 (Revenue), section 2, Constitution 1836; article 7 (Revenue), section 2, Constitution 1861; article 9 (Revenue), section 2, Constitution 1864.

Counsel contend that if article 10, section 17, of the Constitution of 1868 was a limitation upon the power of the Legislature to prescribe the terms and conditions upon which corporations might operate in this State, that the provision of the Constitutions above quoted is a like limitation. *Non sequitur.*

In *Baker* v. *State,* 44 Ark. 134-7, Judge Cockrill, citing and speaking of the cases in which this court had passed upon the provision of the Constitutions above mentioned, giving to the General Assembly the power to "tax merchants, hawkers, peddlers, exhibitions, and privileges," said:

"All of the cases in this court before and since *Washington* v. *State, supra,* concede that the Legislature can restrain or prohibit the use of any property or the exercise of any business or calling, if deemed to be against good policy or injurious to the public morals, but in the case last mentioned it was said that this restraint could not be exercised for the purpose of raising a State revenue by means of a license, because the act of licensing

would admit that it was neither immoral nor injurious. The idea that the State necessarily lends its countenance to everything that is licensed or taxed rests upon an apparent fallacy, for these are among the surest means of burdening recognized evils beyond existence, or by severe discipline, holding them within bounds, and the authority of the case in this respect has been disregarded by this court. We do not understand this case, reading it all together, to limit the power of legislation for State purposes to the taxation of such privileges as were technically known as such at the common law, notwithstanding an expression to that effect occurs in the opinion. We think the Legislature is not restrained by anything in the organic law from laying a tax on the franchise of a corporation, and the reasoning of the learned judge who delivered the opinion in Washington's case *supra,* leads to that conclusion."

"The corporation owes its existence to the State, and the right to enjoy this privilege is the subject of taxation."

"In the case of a foreign corporation the tax or license is paid for the privilege of exercising its corporate powers in the State."

Thus the court held, under a constitutional provision granting to the General Assembly the power to tax "privileges," that the Legislature could lay a tax on the franchise of a corporation; that the right to enjoy the privilege was the subject of taxation; that the tax or license is paid for the "privilege" of exercising its corporate powers in the State.

(4-5) This decision is authority for holding, as we do, that the franchise or license of a foreign corporation is a privilege and can not be taxed under the provisions of a Constitution expressly exempting all "privileges" from taxation. The difference between the provision of the Constitution of 1868, under review, and that of the present Constitution and the Constitutions prior to 1868, above referred to, is as wide as the poles.

Under the Constitution of 1868, all the "privileges" that are of real use to society are exempt from taxation,

whereas, under the provision of the present Constitution and the Constitutions prior to 1868, the General Assembly was expressly granted the power to tax "privileges," and under this power the court held, of course, that the Legislature "is not restrained by anything in the organic law from laying a tax on the franchise of a corporation;" that such privilege is subject to taxation. But, conversely, the reasoning shows that if the court had been considering the provisions of a Constitution expressly prohibiting the taxation of privileges, as we have here, the holding would have been that the Legislature did not have the power to tax the franchise or privilege of a corporation to do business in the State.

Now, in the absence of constitutional limitation or inhibition, the Legislature had supreme power to grant to or withhold from foreign corporations the privilege of exercising their corporate powers within this State. They could have excluded them entirely or admitted them upon such terms as they deemed proper. *State* v. *Lancashire Fire Ins. Co.*, 66 Ark. 466. We must assume that the framers of the Constitution were familiar with this well established principle. We must assume also that they were familiar with the provisions of prior Constitutions, particularly the one then in existence, on the subject of revenue, which Judge Cockrill, in *Baker* v. *State, supra,* said did not restrain the Legislature "from laying a tax on the franchise of a corporation." Then if the makers of the Constitution of 1868 did intend to grant to the General Assembly the power to lay taxes on the franchise of corporations, why did they not copy the provisions of the then existing Constitution on that subject? Or why were they not silent, in which event the Legislature would have had the power? It is no answer to these questions to say that the framers of the Constitution by the use of the words "all privileges," did not have in mind the laying of taxes on the franchise of corporations, for, as Judge Cockrill says, "the right of the corporation to enjoy this privilege is the subject of taxation."

It necessarily follows that when the framers of the Constitution declared that "all privileges" of real use to

society "shall be exempt" that they meant what they said, and intended thereby to exempt "privileges" of corporations that were of real use to society.

So much for the very letter of the Constitution. But if the letter were doubtful, then we should look to the spirit, and may consider the history of the times—the environment of the convention—to ascertain its intention. *Hartford Fire Ins. Co.* v. *State,* 76 Ark. 303. Only three years before the State had emerged from a maelstrom of desolating war, in which her capital was engulfed, her industries destroyed, and by which her people were impoverished to the last degree. To stimulate the influx of foreign capital, in order to restore and increase her financial enterprises, and to again put her people on the road toward a permanent prosperity, the framers of the Constitution under these circumstances wrote into the organic law the exemption from taxation of all "privileges" that were of real use to society. Such was their manifest purpose to rehabilitate the State as soon as practicable in her financial resources and to lift her from the fearful ruin that the war had wrought.

(6) That the franchise or privilege of conducting an insurance business is a useful occupation is not open to question. A business which provides indemnity to widows and orphans or other relatives for the loss occasioned by the death of one upon whom they are dependent, and a business that provides indemnity for the loss of property by fire or other casualty must be considered by all reasonable minds as of real benefit to society, and the Legislature could not arbitrarily determine otherwise.

Our conclusion, therefore, is that the provision of section 10 of the act of April 25, 1873, is unconstitutional and void. Having reached this conclusion, it is unnecessary to discuss other questions.

The decree is therefore affirmed.

McCULLOCH, C. J., and KIRBY, J., concur in judgment.

OPINION ON MODIFICATION.

McCULLOCH, C. J. The majority of the judges adhere to the conclusion announced in the former opinion

to the effect that the act of April 25, 1873, imposing a tax on foreign insurance corporations doing business in this State was in conflict with a provision of the Constitution then in force and therefore void. That was all the court decided, but counsel on both sides ask that we go further and decide other questions in the case. Counsel for the State asks us to decide the questions, which they claim are involved in the appeal, whether or not the funds of foreign insurance corporations temporarily held in bank for transmission to the home office are taxable here under general laws for *ad valorem* tax; and also whether or not notes, mortgages and other credits of such corporations held against debtors in this State are subject to taxation. Appellee's counsel ask us to decide, on cross-appeal, questions relating to the right of the Attorney General to maintain this suit, the effect of the statute of limitations on a suit to recover county, school and municipal taxes, and also the validity of the act of February 27, 1875, laying a tax of two and one-half per centum on net receipts of all insurance companies doing business in the State.

(7) The chancellor decided that the act of 1875 was a valid enactment, and that it operated as a repeal of the act of 1873. He decided also that in ascertaining the amount of net receipts of insurance companies, sums paid out as cash surrender value on contracts of insurance should not be deducted, and rendered a decree against appellee for the sum of $504.23 for the amount of wrongful deductions from the amount of cash payments from taxable net receipts. The allegations of the complaint were too vague, and the proof not sufficiently definite to justify the court in passing on the question of the State's right to collect back taxes, that is to say *ad valorem* property taxes; therefore, we can not treat the question as being properly raised. The allegation of the complaint is merely a general one, that the defendant owned property during the years named on which it failed to assess and pay taxes, without any specification of the years or the amounts. The allegations are too indefinite to constitute a statement of a cause of action. Insurance companies,

like individuals, are required to list their property subject to taxation in the State, and to assess the amount on hand the first Monday in June of each year. Kirby's Digest, 6906. *Dallas County* v. *Banks,* 87 Ark. 484; *Dallas County* v. *Home Fire Ins. Co.,* 97 Ark. 254. The meager proof taken in this case does not show what appellee had on hand in the State on the first Monday in June of any year or that any property was on hand at that time. All that the proof shows is that the company had a system of weekly transmission of premiums to the home office, the amounts being held in bank for that purpose. The court would not have been justified in rendering any decree against appellee under the pleadings and proof in the case, therefore, we must pretermit any discussion of law bearing upon the questions which counsel for the State now raise.

This view of the case disposes of the question raised by counsel for appellee concerning the bar of the statute of limitations against the claim for collection of county, school and municipal taxes. It is not contended that the statute of limitations runs against the State, and as the State recovered in this case for unpaid portions of the occupation tax due on net receipts, there was no right of action enforced in favor of a county, municipality or school districts against which the statute of limitations could be pleaded. Therefore, we decline to go into any discussion of the question whether the statute can be pleaded against a suit to recover taxes for the benefit of counties, school districts and municipalities.

(8-9) This brings us to a consideration of the question whether or not the act of 1875, prescribing a tax of two and one-half per centum on net receipts is valid, and that question must be tested in the light of this court's conclusion that the prior act of 1873 was void. The act of 1875 reads as follows:

"Every company doing insurance business in this State shall file with the Auditor, at the same time with its annual statement, a sworn statement of its net receipts in this State for the year ending on the thirty-first day of December, after deducting losses and commissions from

its gross receipts, and shall pay into the State treasury, on or before the first of March, a tax of two and one-half per centum on such net receipts, and such tax shall be in lieu of all other taxes—State, county or municipal—on such receipts, nor shall any city, town or municipality impose any license fee or privilege tax upon any company, or the agent of any company, for the privilege of transacting such business of insurance." Kirby's Digest, section 4338.

The statute just quoted is section 4 of the act of 1875, the purpose of which was to amend the act of 1873 in certain particulars. The first amendment brought about under the new statute was to change the control from the insurance commissioner to the Auditor, and then to change the amount of the taxes to be paid by insurance companies doing business in the State. The act of 1873, so far as the requirement of payment of taxes, applied only to foreign insurance companies, but the amendment under the act of 1875 made the requirement apply to all companies doing business in the State, which, of course, included both domestic and foreign corporations. The act of 1873, it will be observed, imposed a tax of three per centum on gross receipts, while the act of 1875 reduced the exaction so as to impose a tax only of two and one-half per centum on such net receipts, and to make that tax in lieu of all other taxes on such receipts. The contention is that that feature of the statute which makes the payment of the percentage on net receipts, in lieu of all taxes, operates as an exemption from other taxes on such receipts and void as being in conflict with provisions of our Constitution to the effect that all laws exempting property from taxation shall be void. Article 16, section 6, Constitution of 1874. We do not think that provision of the act of 1875 is an exemption, strictly speaking, within the meaning of the constitutional provision above referred to, but it does violate another provision of the Constitution which requires uniformity and equality in taxation, and for that reason is void. *Ex parte Fort Smith & Van Buren Bridge Co.*, 62 Ark. 461. It is also void for the reason that it deprives counties, school districts and munici-

palities of the right to exact taxation from this kind of property. So far as State taxes is concerned, it is not an exemption, for the Legislature evidently determined that the tax so exacted would amount to as much as an *ad valorem* tax on the net receipts. It does in fact exceed the amount of taxes for State purposes which may be levied under the Constitution. Section 8, article 16, limits the amount of State taxes to one per centum of the assessed valuation of the property.

(10-11) Treating this part of the act as void, the question arises then whether or not it affects the validity of the statute as a whole; in other words, if that part should be stricken out, is the statute valid in so far as it imposes a tax on net receipts? We are clearly of the opinion that the statute imposes an occupation tax and was intended as such. It would be void if treated in any other light, for it would violate the uniformity clause of the Constitution if it were treated as a property tax. The Legislature had complete control over the matter of imposing terms upon corporations, both domestic and foreign, and had the power to lay this imposition as an occupation tax. We must indulge the presumption that the Legislature intended to confine its activities within constitutional limits and to impose such a tax as was authorized by the organic law. In other words, it is our duty to give the act such construction as will make it valid, if that is consistent with the language used, rather than a construction that will render it invalid. There is a case cited by counsel for appellee which fully sustains our conclusion and is directly in point. *Atlanta National Building & Loan Association* v. *Stewart,* 109 Ga. 80.

(12) Are the two provisions of the act separable so that the validity of one may be preserved after the other is discarded? We think that they are separable, and notwithstanding the invalidity of that part of the section prescribing that the occupation tax so paid shall be in lieu of the *ad valorem* property tax, that part which imposes the occupation tax is valid. This is true, in the first place, for the obvious reason that the Legislature intended to provide some imposition by way of an occupation tax

upon insurance companies doing business in the State, and there is no reason to suppose that if they had had in mind that the provision making the tax to be in lieu of all other taxes was invalid, they would not have imposed the occupation tax. We can not, under those circumstances, assume that they would not have laid the imposition or that they would have lessened it by reason of the fact that it was not to be in lieu of the property tax. The law-makers were, in other words, dealing with the subject of an occupation tax, and we must assume that they intended to impose that part of the tax, regardless of the consequences in other respects.

There is also another cogent reason why we should not indulge the presumption that the Legislature would not have imposed this occupation tax if they had known that the provision for its being in lieu of other taxes would be held invalid. It is this: The act of 1873 prescribed a much more onerous imposition upon foreign corporations, and that statute still remained on the books and had had the effect of driving insurance companies from the State and keeping them beyond its boundaries. We know, as a part of the history of the State, that there were at that time no domestic insurance companies, and it is perfectly manifest that the Legislature in passing the act of 1875 meant to lessen the burdens imposed upon insurance companies so as to invite them into the State to do business. The law-makers, therefore, in carrying out their intention to lessen the burden, did so by reducing the tax from three per centum on gross receipts to two and one-half per centum on net receipts, and went still further and made that in lieu of the *ad valorem* property tax. Now, when the illegal provision is stricken out of the statute, it still operates as a lessening of the burden imposed by the former statute, and it would be doing violence to the obvious intention of the Legislature to assume that because they were not permitted to make this tax in lieu of the property tax that they would not have lessened that burden at all. There is no escape from the conclusion that the Legislature dealt with the subject under the impression that the act of 1873 was valid and still in force,

for the new statute was enacted as an amendment to the old one. So, the conclusion we reach is that the act of 1875 is valid insofar as it imposes an occupation tax of two and one-half per centum on net receipts of insurance companies.

(13-14) It is contended on behalf of appellee that the Attorney General has no authority to institute a suit to go behind settlements made by the Auditor with the insurance companies, and recover for unpaid portions of an occupation tax. It is true there is no statute on this subject; for the act of 1913, amendatory of prior statutes, giving the Attorney General authority to institute actions to recover unpaid taxes on property which had escaped taxation by reason of having been assessed upon the wrong basis or on account of under-valuation, applies only to suits to recover property tax, and not an occupation tax. It was necessary to pass such a statute because the policy of the State has always been to make the findings of assessing boards conclusive and not reviewable at the instance of the taxing power except where the statute expressly gives the right of review. But the payment of this occupation tax is not based upon any assessment, and the Auditor does not act as an assessing board for the reason that the tax is imposed automatically on the amount of net receipts as shown by the settlements filed by the Auditor. The fact that the Auditor is required to withhold the certificate or license to do business does not make him an assessing officer in the sense that his findings are conclusive in the absence of a statute giving authority to some officer to sue. The tax is a liability which the State may recover in any action where it is shown that the proper amount was not paid. The statutory remedy whereby the privilege of doing business may be withheld by the Auditor until the tax be paid is not conclusive, and the State may adopt any common law remedy for collecting the amount due. *The Dollar Savings Bank* v. *United States,* 19 Wall. 227; *State* v. *Fleming,* 112 Ala. 179; *State* v. *Nashville Savings Bank,* 16 Lea (Tenn.) 111; *State of North Carolina* v. *Georgia Co.,* 19 L. R. A. 485. The Attorney General being the law officer of the State,

it is his duty to institute such actions. No special statutory authority is therefore necessary for this kind of an action.

(15) The judgment against appellee for the amount of the unpaid balance due on the occupation tax is correct. The court was right in its construction of the law in deciding that cash surrender payments could not properly be deducted in ascertaining the amount of net receipts for the reason that the cash surrender value under a policy is part of the contract and constitutes a continuing liability of the company which does not enter into the computation of the amount of net receipts. That part of the decree is also affirmed.

The writer and Mr. Justice Kirby concur in the judgment of affirmance, but do not agree to that result upon the grounds set forth in the former opinion, for we think the act of 1873 was not void, but that it was repealed by the act of 1875. The act of 1873 was not a privilege tax within the meaning of that provision of the Constitution which prohibits the imposition of taxes upon "privileges, pursuits and occupations," other than those of no real use to society. It must be remembered that this statute applied only to foreign corporations, and it was obviously intended by the Legislature as an imposition of terms upon which foreign corporations might do business in the State. The constitutional provision referred to related, in our opinion, merely to the taxation of privileges of those who were doing business in the State, and was not intended to restrict the power of the Legislature in prescribing the terms upon which foreign corporations might come here to do business. The Constitution of the State is not a grant of powers to the Legislature, but is merely a limitation upon the legislative power; therefore, where the Constitution is silent, the Legislature has full power. There is nothing in the Constitution of 1868 which in express terms restricted the power of the Legislature over foreign corporations, and the law-makers were therefore left unrestricted upon that subject. We think it is a stretch of meaning of the clause of the Constitution referred to to say that it prohibited the Legislature from placing any

burdens or obstacles in the way of foreign corporations doing business in the State. It is elemental that foreign corporations have no rights here except those which the State sees fit to confer. *State* v. *Lancashire Ins. Co.,* 66 Ark. 466; *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110. The privilege of doing business here may be entirely withheld, and there is nothing in the Constitution of 1868 which forbade the Legislature from excluding foreign corporations altogether. In fact, they were already excluded unless the law-makers saw fit to let them enter our domain. The effect of this decision is that under a provision of this sort, the Legislature can not impose any terms upon which foreign corporations may come here, because, forsooth, it operates as a tax upon the privilege. We think that the Legislature had unrestricted power over that subject, and that the act of 1873 was valid.

WOOD, J., dissenting. 1. That portion of the act of February 27, 1875, contained in section 4338 of Kirby's Digest lays a property tax and is unconstitutional and void. In plain terms it imposes a "tax of two and one-half per centum on the net receipts" of insurance companies doing business in this State, and in express terms says "such tax shall be in lieu of all other taxes—State, county or municipal—on such receipts." It thus fixes a definite rate on one species of property (net receipts) without any reference whatever to the general rate of taxation on other property in the State. The rate of State taxes on other property in the State was much lower than two and one-half per cent, and the municipal and county taxes varied, some being higher and some lower. So, the rate of State taxes fixed by this statute on the net receipts of insurance companies was not equal and uniform throughout the State, with the rate of taxation imposed on other species of property. Section 5, article 16, Constitution 1874, provides "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such a manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected,

shall be taxed higher than another species of equal value." A similar provision is contained in all the Constitutions prior to the present one, and this court, from the first to the last has invariably ruled under this provision that "The Legislature had no power to discriminate, and fix upon one description or species of property, a greater tax than that fixed by law upon every other description or species of property of equal value, subjected to taxation." *Stevens and Wood* v. *State,* 2 Ark. 291; *Fletcher* v. *Oliver,* 25 Ark. 289; *Little Rock & Ft. Smith Ry.* v. *Worthen,* 46 Ark. 312-27; *Ex parte Ft. Smith & Van Buren Bridge Company,* 62 Ark. 461.

It follows that the act as a property tax is in plain violation of the Constitution. But if the act was intended simply to fix an occupation tax, or a tax on the privilege of doing business in the State, then it would not be unconstitutional, for the present Constitution contains no inhibition against an occupation tax on insurance companies or requiring that such taxes shall be equal and uniform.

2. The act of 1875, *supra,* has all the earmarks of a property tax and none of the distinguishing features of an occupation tax. If the Legislature had intended to impose an excise tax, entirely different language would have been employed. We must resolve every doubt in favor of the constitutionality of the statute, but should not give the language used a meaning obviously not intended. The intention must be gathered from the language used, giving some effect, if possible, to every part of the act. When these familiar rules of construction are followed here, there is no escape from the conclusion that the act now under review was intended to *lay a tax on property.* The language "shall pay a tax on net receipts" shows a property tax was intended. "Net receipts" are property. Then the words "such tax shall be in lieu of all other taxes—State, county or municipal—on such net receipts" show conclusively to our minds that the Legislature intended that the tax imposed by the act was "in lieu of State, county and municipal property taxes." If the Legislature had intended by this act to lay an occupation tax, would it not have said so in plain terms, or used language

from which such meaning could be reasonably inferred? For instance, if the Legislature had intended to lay an occupation tax, would it not have designated it in such plain terms as an "occupation" or "privilege" tax? The act makes no provision for forfeiture of the right to do business. It does not provide that the Auditor shall not issue the license to do business unless the tax is paid. In all statutes laying a privilege or occupation tax, some such language as the above is usually employed. See *New York Life Ins. Co.* v. *Bradley,* 65 S. E. 434-36. At the time of the passage of this act, the only privilege tax in existence was imposed by the act of 1873. That act at that time was in full force and effect, and if the Legislature of 1875 had intended the act under review as a substitute for the State privilege tax of 1873, it would have said so in plain terms, or used language that would have indicated a purpose to lay a privilege tax.

Numerous authorities are cited in the exhaustive brief of appellant to show that the act of 1875 lays a property tax and as such is in plain violation of the Constitution. It is conceded in the majority opinion that the clause "in lieu of all other taxes—State, county or municipal—on such receipts" violates that provision of the Constitution which requires uniformity and equality in taxation, and for that reason is void. This demonstrates conclusively the correctness of my conclusion. For, if it were a privilege tax, it could not violate any provision of our Constitution as to uniformity and equality of taxation, because, as we have seen, there is no provision of our Constitution requiring equality and uniformity in occupation taxes.

3. But the majority decides that the first part of the section laying the "tax on net receipts" is an occupation tax and that the clause "in lieu of all other taxes * * * on such receipts," although a property tax, may be eliminated, and the act thus upheld. We do not see how it is possible to so treat this act without entering the domain of legislation. The manifest purpose of the Legislature, as gathered from the whole act, and especially that clause which expressly says the tax levied shall be "in

lieu of all other taxes," was to provide for a commuted property tax. The purpose of so doing at that time was to lessen the burdens imposed upon insurance companies. But this could not be done by laying upon domestic companies an occupation tax which at that time they were not paying, nor by laying upon foreign companies an occupation tax in addition to the tax of three per centum for the privilege of doing business, which they were then paying under the act of 1873. The purpose of the Legislature being to lessen instead of increasing the burden of taxation at that time, it would not have passed the act with the "in lieu" clause eliminated. For with that clause eliminated, the insurance companies would have had to pay not only the two and one-half per centum, but the regular State, county and municipal taxes, which the Legislature thought by this "in lieu" clause it was eliminating. Even if the Legislature had intended the two and one-half per centum as an occupation tax, if it had known that the clause "in lieu of, etc.," was to be eliminated, who can say that it would not have made the tax, as an occupation tax, much less than two and one-half per centum. It seems to us that the "in lieu" clause so colors and permeates the whole enactment, that such clause can not be taken out and still leave such an act as the Legislature would have passed. On the contrary, by striking out the "in lieu" clause, we know that the purpose of the Legislature has been ignored, and an act entirely different from what was contemplated has been substituted. That, under our system of government, should not be done. *Ex parte Deeds*, 75 Ark. 542.

"If it is manifest from an inspection of the law itself that the invalid portion formed an inducement to its passage, the entire act will fail. It is not necessary that the invalid portion of an act of the Legislature should have operated as the sole inducement to the passage of the law to render the same void. It will have that effect if the void part to any extent influenced the Legislature in passing the statute." *State ex rel.* v. *Poynter*, 59 Neb. 417.

I therefore dissent from that part of the opinion which holds that section 4338 of Kirby's Digest is valid

as imposing an occupation tax. In other respects, I concur.

JUSTICE SMITH concurs in this dissent.

HOOTEN v. STATE USE CROSS COUNTY.

Opinion delivered June 21, 1915.

1. CONVERSION—BANK DRAFT.—A draft, drawn on a bank, may be the subject of conversion. Anything which is the subject of property, and is of a personal nature, is the subject of conversion.
2. CONVERSION—WHAT CONSTITUTES.—Any distinct act of dominion, wrongfully exerted over another's property in denial of his right, or inconsistent with it, is a conversion.
3. CONVERSION—BANK DRAFT.—A county treasurer, being short in his account, procured, through H. and G., a draft from a certain bank, payable to the treasurer, individually, to be used in his settlement with the county; the county court required the treasurer to endorse the draft to himself as treasurer. The three parties then returned the draft to the bank from which it had been procured. *Held*, when the draft was delivered to the county treasurer, individually, it became his property, and when he endorsed it to himself as treasurer, it became the property of the county, and when it was returned to the bank, the three parties were guilty of a conversion of the money represented by the draft, and became liable for the same to the State for the use of the county.
4. CONVERSION—BANK DRAFT—LIABILITY OF BANK—KNOWLEDGE OF CASHIER.—Where the cashier of the drawer bank, knew the facts so set out above, the bank also will be liable for the conversion of the draft, upon receiving back the draft.
5. BILLS AND NOTES—PURCHASER OF UNENDORSED CHECK—TITLE.—The purchaser of a check who obtains title without the endorsement of the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses.
6. BILLS AND NOTES—UNENDORSED DRAFT—PUBLIC FUNDS.—A draft was made payable to H., he endorsed the same to himself as treasurer of Cross County. *Held*, a bank which thereafter received the draft without further endorsement, took the same with knowledge that the funds, represented by the draft, were the property of the county.
7. CONVERSION—BANK DRAFT—INTEREST.—Interest may be added on property converted from the date of the conversion.
8. SURETY BOND—EXECUTION—AUTHORITY OF LOCAL AGENT.—A surety bond, executed by a local agent, without authority, will not be bind-

ing on the company, where the bond was for the benefit of the county, and the county judge had knowledge of the lack of authority of the local agent.

9. SURETY COMPANIES—UNAUTHORIZED ACT OF AGENT—REPUTATION.—The local agent of a surety company, executed a bond as surety for a county official, and held, under the evidence, that the surety company did not ratify the unauthorized act.

Appeal from Cross Chancery Court; *Charles D. Frierson,* Chancellor on exchange; reversed in part; affirmed in part.

Benjamin Harris and *Gordon Frierson,* for appellant Merchants & Planters Bank & Trust Company.

1. Liability can not be fixed upon this appellant on account of the conduct or the knowledge of Hooten and Going. They at no time in the transaction acted or assumed to act for the bank, or in their capacity as directors or officers of the bank. 57 Fed. 20; 118 Fed. 789; 6 Am. & Eng. Ann. Cases 675.

The principal is liable for the tortious acts of agents only when the same are done in the course of their employment. 75 Ark. 579; 31 Cyc. 1584.

2. The fact that Frayser at one time discussed with Going the matter of the bank's signing Hammett's bond is a circumstance which can only afford ground for suspicion or conjecture, and is not sufficient to prove fraud. 11 Ark. 378; 9 Ark. 482; 22 Ark. 184; 96 Ark. 65.

Fraud will not be inferred where a statement may as well have been made from a good motive as from a bad, or where an act may as well have been done from a good motive as from a bad motive. 9 Ark. 485; 11 Ark. 378.

3. When Hooten presented his check and demanded the bank draft, Frayser had no discretion in the matter. Had he refused to honor the check, the bank would have been liable, if damage had resulted from the refusal. 56 Ark. 508, and cases cited; 67 Miss. 60, 6 So. 615; 3 Ruling Case Law, 177.

Frayser had no such actual knowledge of fraud as would make it his duty to pursue a course entirely different from the ordinary course of banking buisness. He would not be authorized so to act upon mere surmise, sus-

picion or conjecture. 67 Miss. 60; 27 Am. & Eng. Ann. Cases, 1342 and note; 56 Ark. 508.

Appellees were not damaged by reason of the failure to call for the treasurer's endorsement, and if they lost nothing by reason of this failure, there is no liability on the bank. 96 Ark. 379; 7 Ark. 171; 79 Ark. 160; *Id.* 266; 91 Ark. 310; 94 Ark. 26; 12 Ark. 296; 71 Ark. 305; 74 Ark. 68; 43 Ark. 454; 53 Ark. 275.

Allen Hughes, for appellants Hooten and Going.

1. Appellants are not liable in conversion or for receiving what they knew to be stolen property, as claimed by appellees' counsel.

The draft never passed out of the treasurer's hands and into the hands of the county or into any depository for the county, nor was it intermingled with any county funds.

The act of the county judge in counting it could not invest the county or the several road and school districts thereof with any title to the drafts. None of the plaintiffs ever acquired by these transactions any character of title to the draft that would entitle them to recover either the specific property or for the conversion thereof. 2 Cooley on Torts (3 ed.), 848, and note 85.

2. Appellants are not liable as co-conspirators to cheat and defraud the road and school districts. The alleged conspiracy, if any, is not in itself actionable. 1 Cooley on Torts (3 ed.), 210 and notes; 3 Joyce on Damages, § 2231 and note 1.

The loss to the county, the road districts and the school districts resulted from Hammett's prior defalcations, or his subsequent embezzlements, which were the proximate causes of the loss and damage sustained by the plaintiffs. Bowers on Actionable Misrepresentations, 149.

3. The court erred in including interest on the amount of the draft from July 29, 1912, as a part of the judgment against appellants. No demand had been made on them for delivery of the money. On unliquidated demands, interest is not recoverable. Sedgwick on Damages (6 ed.), 377. Treated as a judgment based on the charge

of conspiracy to cheat and defraud, or an action for deceit, interest is recoverable only from date of the judgment. 86 Ark. 600, 608.

M. P. Huddleston, N. F. Lamb and *Archer Wheatley,* for appellees and cross-appellants.

1. Going, Hooten and the Merchants & Planters Bank & Trust Company are liable in conversion. When the draft was returned to the bank, the title to it was in Hammett, as county treasurer. Going and Hooten had actual knowledge of this title, and the character of the endorsement imparted the same information to the bank. Moreover, Frayser had prior knowledge of the shortage, and, at the time he issued the draft, knew that it was to be used by Hammett in his settlement. Hammett had no right to endorse it to any person except for deposit to his credit as county treasurer. 29 Ark. 500-509; 102 N. E. 363; 104 N. E. 845.

A bank or other person receiving a draft endorsed as this one was, can take no more than an equitable title, and receives its subject to all defenses and to all the rights of other parties in it or its proceeds. 99 Ark. 458; 5 R. C. L., Bills & Notes, § 59, p. 536; 48 Pac. 197-201; 22 N. W. 12; 85 Fed. 120; 12 So. 512; 58 Pac. 447; 47 Conn. 417-427; 22 S. E. 127-129; 58 N. E. 1057; 56 Fed. 849-853; 11 N. W. 758; 44 Pac. 446; 77 N. W. 1083; 75 N. W. 786.

2. The above named appellants are also liable as co-conspirators to cheat and defraud the plaintiff school districts and road districts. 70 N. E. 27; 101 Ind. 293-308; 60 Atl. 74-80; 12 N. E. 865 (952), 17 N. E. 898; 2 Bishop New Crim. Law, § 190; 3 Chitty Crim. Law, § § 1141-1143; 4 Wend. 229; 3 Greenleaf on Evidence, § 93.

3. They are also liable as the recipients of what they knew to be stolen property. The draft was made payable to Hammett individually. When he endorsed it to himself as treasurer, it became the property of the plaintiffs, and it became unlawful for Hammett or any other person to use the draft otherwise than for deposit to his account as treasurer, as provided by statute, Kirby's Dig., § 7176; article 16, section 12, Const.; Kirby's Dig., § 1842; *Id.,* § § 6292, 6293; 82 N. C. 308; 38 Pac. 926.

4. The Bank of Commerce of Earle, is liable for the draft issued by it to James H. Hammett. When returned, the endorsements, erasures and forgeries appearing upon the back of the draft were of such character as to charge the bank with notice that the draft was the property of A. H. Hammett, treasurer of Cross County. See authorities cited under division 1, *supra*. See, also, on the question of the forgery and erasure, 28 S. E. 622; 31 Conn. 170; 122 N. W. 466; 30 S. W. 245; 6 Mo. App. 200; 70 Mo. 643; 67 Ga. 494; 39 Mo. 369; 64 N. E. 54; 99 N. W. 879; 6 Ill. 475; 106 S. W. 833; 7 Cyc. 949; 67 N. W. 845; Joyce on Defenses to Commercial Paper, § 474; 89 Atl. 639.

5. The Massachusetts Bonding & Insurance Company is liable: (1) Under the facts presented in this record, Ogan and Daltroff, the agents at Wynne, were general agents of the bonding company, not special agents. 48 Ark. 138-145; 103 Ark. 79; 65 S. W. 841; 10 So. 304; 41 N. E. 888; 26 Me. 84; 52 N. W. 866; 20 Pac. 771; 67 Atl. 399; 101 Pac. 564; 82 N. E. 52; 84 N. E. 540; 85 N. E. 793; 96 Ark. 456; 49 Ark. 320; 100 Ark. 360.

Apparently the agents at Wynne had authority to execute the bond after communicating with Holly Springs by 'phone, or after telling the county judge that they had done so, who had the right to presume that they had performed their duty in that respect, and in dealing with them, and through them with the company, he was not bound by any further restrictions, limitations or private instructions of which he had no information, given by the principal to its agents. 90 Ark. 301; 4 N. E. 20; 94 N. W. 510; 90 S. W. 737; 5 Atl. 504; 64 N. W. 1100; 54 N. W. 811; 92 N. W. 58; 104 N. W. 319; 10 Wall. 604, 19 L. Ed. 1008; 60 S. W. 10; 3 S. W. 486; 74 S. W. 72; 16 So. 29; 73 S. W. 881; 79 S. W. 1013; 23 So. 259; 122 Fed. 228; 135 Fed. 636; 68 S. E. 19; 21 L. R. A. 409.

II. The bonding company ratified the act of the agents at Wynne in executing the bond.

When the principal learns that his agent has exceeded his authority, the former must act promptly if he desires to repudiate, and such repudiation must consist of notice

given to the third party. A mere wrangle between the principal and agent is not sufficient. 96 Ark. 505; 60 Mich. 150; 26 Ill. 447; 96 U. S. 640; 11 Ark. 189; 99 Ark. 358; 50 Ark. 458; 13 Fed. 74; 11 S. W. 1024; 97 Pac. 433; 47 Pac. 721; 49 Atl. 1121; 80 N. W. 48; 69 Pa. St. 426; 139 Pac. 234; 10 Ala. 755; 69 Ala. 373; 70 Ky. 334; 70 Mo. 290; 58 Tenn. 579; 43 Vt. 133; 40 Wis. 431; 51 Miss. 21.

Hawthorne & Hawthorne, for appellees.

1. Appellants were guilty of conversion, and the evidence clearly shows that the appellant bank entered into the conspiracy as fully and completely as either of the other defendants. Pomeroy, Equity Jur. 1048; 75 N. Y. 547; 29 L. R. A. (N. S.) 908; 18 L. R. A. (N. S.) 630; 21 Ark. 260; 31 Ark. 272.

2. On behalf of the sureties in the first and second bonds, we submit the question which set of sureties, if either, is secondarily liable for the $1,000 and the $13,000. See 13 Mass. 208.

The sureties are not liable for interest on the money until after a proper demand was made upon them or their principal for delivery of the money. 29 L. R. A. (N. S.) 362; 55 *Id.* 381.

They are not liable upon either bond for any sum of money which was tendered to the county court on July 29, 1912. 1 L. R. A. 118, and notes.

Bradshaw, Rhoton & Helm, for Massachusetts Bonding & Insurance Company.

1. The authority of Ogan and Daltroff as agents was in writing and was limited to the execution of only two or three kinds of bonds and in limited amounts. Whatever authority they had was fully disclosed to the county judge. The agents at Wynne were special agents. Persons dealing with special agents must look to their authority. 17 Ark. 154; 23 Ark. 411; 74 Ark. 557; 92 Ark. 315; 81 Ark. 202; 104 Ark. 150; 105 Ark. 111; 34 Ark. 246; 41 Ark. 177; 51 Ark. 483; 62 Ark. 33; 65 Ark. 144; 105 Ark. 680; 96 Ark. 105.

2. There was no ratification of the execution of this bond. Ratification must be made with full knowledge of

the material circumstances and facts, and ignorance of such material facts will render an alleged ratification ineffectual. 64 Ark. 217; 29 Ark. 131; 11 Ark. 189.

HART, J. At the general election in September, 1908, A. H. Hammett was elected treasurer of Cross County. He duly qualified as such treasurer and executed a bond in the sum of $50,000 with F. D. Rolfe and others as his sureties. At the general election in 1910 he was again elected treasurer and executed a second bond in the sum of $65,000 with W. H. Harrell and others as his sureties. In the summer of 1912, during his second term of office, he made a settlement with the county court, and the sureties on his first and second bond were released. He then executed a new bond in the sum of $80,000, which purported to have been signed by the Massachusetts Bonding & Insurance Company as his surety. There arose a question as to whether the Massachusetts Bonding & Insurance Company had authorized its agents to sign the bond and at the same term of the county court an order was made setting aside the former order releasing the sureties on the first and second bond. Subsequently, it was ascertained that Hammett had defaulted in his office as treasurer of Cross County, and the amount of such defalcation was ascertained to be more than $21,000. The present action was instituted by the State of Arkansas for the use of Cross County against the sureties on Hammett's first and second bond, the Massachusetts Bonding & Insurance Company, J. C. Hooten, L. C. Going, the Merchants & Planters Bank & Trust Company, who, it is alleged, converted to their own use funds belonging to the county and in the custody of said treasurer to the amount, principal and interest, of something over $14,000, and against J. H. Hammett and the Bank of Commerce of Earle, Arkansas, who, it is alleged, converted to their own use funds of the county in the custody of said treasurer to the amount of $1,000 and the accrued interest.

The chancellor found that A. H. Hammett, as treasurer of Cross County, had defaulted in the sum of over $21,000, and the correctness of this finding is conceded.

The chancellor also found that L. C. Going, J. C. Hooten and the Merchants and Planters Bank & Trust Company, of Harrisburg, Arkansas, were primarily liable for the amount of money which it is alleged they converted and judgment was rendered against them for that sum.

The chancellor also found that J. H. Hammett was primarily liable for the sum of $1,000 and interest, which it is alleged he and the Bank of Commerce, of Earle, Arkansas, converted to their own use, and judgment was rendered against him for that amount, and the Bank of Commerce was discharged from any liability thereon.

The chancellor found that much the greater part of the defalcation of the treasurer occurred during the term of his first bond and judgment was rendered against the sureties on that bond in the sum of over $17,000.

Judgment was rendered against the sureties on the second bond for the defalcation which occurred during his second term of office.

The chancellor held that the Massachusetts Bonding & Insurance Company had never signed the bond for which it was sought to be held liable, and had never authorized its agents to do so. Judgment was rendered dismissing the complaint against the bonding company.

The case is here on appeal.

It is contended by counsel for Going, Hooten and the Merchants & Planters Bank & Trust Company, of Harrisburg, that they are not liable for the amount for which judgment was rendered against them.

On the question of their liability, M. H. Frayser, cashier of the bank, testified, substantially, as follows:

I have been cashier of the Merchants & Planters' Bank since November, 1906; in July, 1912, J. C. Hooten, who was then sheriff and collector of Poinsett County, was also president of the bank, and had been for about two months prior to that time; he continued as president until January, 1913; L. C. Going was at the time a director of the bank, and was its attorney; on July 26, 1912, the bank, through me as its cashier, issued a draft for $13,000 payable to the order of A. H. Hammett. The draft

was drawn upon the Mechanics-American National Bank of St. Louis, our correspondent there; Mr. Hooten gave his check on funds in the bank in his custody as collector of Poinsett County for the amount; my recollection is that his check was payable to the bank, and not to Hammett; I gave the draft to Mr. Hooten; if the draft had taken its regular course, it would have been sent to the bank on which it was drawn; the draft did not take that course, but was returned to the bank three or four days after it was drawn; the ledger shows that it was returned July 30, 1912; the draft when it was returned, was endorsed by A. H. Hammett, individually, to himself as treasurer; I knew Mr. Hammett personally and had met him and Mr. Going at Wynne some three or four weeks before this time, but did not talk about the alleged shortage of Mr. Hammett with him; Mr. Going spoke to me about the shortage a week or two before the draft was issued; Going was Mr. Hammett's attorney, and I knew from what he told me that Hammett would need some money in settling with the county court of Cross County, as treasurer.

J. C. Hooten testified: The draft in question was drawn at my solicitation, and was delivered by the cashier to me; I gave it to L. C. Going; he told me he wanted to borrow it for A. H. Hammett; I returned the draft to the bank on July 30, 1912; it was either delivered to me by Mr. Going or I received it through the mail; I knew that there was a rumor with reference to Hammett's shortage, and that there was a great deal of discussion about it; I refused to let Hammett have the money as treasurer, but agreed to let him have it as an individual; there was no understanding as to whether the draft should go through the regular course and be cashed at the St. Louis bank on which it was drawn; I was told that I would get the money back in a short time; I was at Wynne the day the settlement of Hammett was made with the county judge on July 29, 1912, and was in the courthouse a part of the time while the settlement was being made; neither Mr. Hammett nor Mr. Going gave me any written memoranda that the money had been borrowed; I trusted to Mr. Going's word that it would be returned; after the

settlement was made in the courthouse at Wynne, Going and I got in an automobile and came back to Harrisburg; we came by Mr. Hammett's house, and Going went in and talked to him a few minutes; I knew that the draft enabled Mr. Hammett to make his settlement with the county court because I heard them talking about it during the settlement.

The draft was introduced in evidence and, with the endorsements, is as follows:

"MERCHANTS AND PLANTERS BANK & TRUST COMPANY.

"Merchants & Planters Bank. No. 7912.

"Harrisburg, Arkansas, July 26, 1912.

"Pay to the order of A. H. Hammett $13,000 (thirteen thousand) dollars, in current funds. M. H. Frayser, Cashier.

"To Mechanics-American National Bank, St. Louis, Mo.

(Endorsed.) "Pay to the order of A. H. Hammett, treasurer of Cross County, Arkansas." (Signed) A. H. Hammett. Pay to the order of J. C. Hooten (then comes a space, beneath which is written "Treasurer of Cross County, Arkansas.")

L. C. Going testified as follows: I was Hammett's attorney and think the draft in question was returned by mail to Mr. Hooten by Mr. Hammett; I am sure I did not receive it from Hammett; Mr. Hooten delivered the draft to me at Wynne and the draft was used in making the settlement of Hammett, as treasurer, with the county court of Cross County; I had learned that $13,000 would be required by Mr. Hammett to make his settlement as treasurer, and arranged to get the money for that purpose; the draft was payable to A. H. Hammett, individually, and he was required by the county court to endorse the draft to himself as treasurer.

(1-2) Under this state of facts it can not be doubted that the draft was converted by Going and Hooten. "Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent with it, is a conversion." Cooley on Torts (3 ed.), vol. 2, p. 859.

"Anything which is the subject of property, and is of a personal nature, is the subject of conversion." *Id.* 856.

(3) From the above testimony it appears that Going procured Hooten to arrange to get $13,000 for Hammett to use in his settlement as treasurer with the county court. Hooten procured the cashier of the bank to issue a draft upon a bank in St. Louis for the sum of $13,000, payable to A. H. Hammett, individually. This draft was delivered to Going for the purpose of being delivered to Hammett to be used in his settlement. When the draft was delivered to Hammett it became his individual property and represented that much money. The county court would not accept a draft payable to Hammett individually in his settlement as treasurer of the county; Hammett then endorsed the draft to himself as treasurer of the county, and the county judge accepted the draft in settlement. By this endorsement, Hammett transferred the funds from himself as an individual to himself as treasurer of the county. As such treasurer, he was custodian of the funds of the county and the money represented by the draft thereafter belonged to the county. Neither Hammett, Hooten or Going had any right to it. When they returned the draft to the bank at Harrisburg without collecting it and placing it to the credit of Cross County, they converted the money represented by the draft to their own use and became liable for it to the State for the use of the county.

(4) It is contended, however, that the bank at Harrisburg is not liable. We think it is liable for two reasons: in the first place, the cashier of the bank knew that Hammett was reported to be short in his accounts as treasurer of the county and that the draft was procured to be used in his settlement with the county court. The cashier of the bank is its chief executive officer, through whom its financial operations are conducted, and by whom its debts are received and paid and its securities taken and transferred. By virtue of his office, he is generally entrusted with the bank's funds and securities, and charged with the duty of superintending its books, pay-

ments and receipts as a moneyed institution. Mitchie on Banks and Banking, vol. 1, section 54; *Id.*, section 102; 3 R. C. L., section 71, page 444.

It follows that the knowledge of the cashier was the knowledge of the bank. The cashier knew that the funds were loaned that Hammett might make his settlement as treasurer of Cross County with the county court, and thereby make good a shortage in his account. The bank, therefore, knew that the money represented by the draft was to become the property of Cross County, and that thereafter Hammett would have no title to the money, and would only be entitled to hold it as custodian for the county by virtue of his office as treasurer.

Hence, we are of the opinion that under the facts in this case, the bank was also liable for the conversion of the draft. In addition to this it will be noted that the county court required Hammett to endorse the draft and make it payable to himself as treasurer of Cross County. When the draft was delivered back to Hooten, it was not again endorsed by Hammett. It was endorsed by Hooten as treasurer of Cross County. Hooten was not treasurer of Cross County, but was sheriff and collector of Poinsett County. It was evidently the intention to have Hammett endorse the check back as treasurer of Cross County, but he did not do so, and the draft was returned to Hooten unendorsed by him.

(5) It is well settled that the purchaser of a check who obtains title without the endorsement by the payee holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration without notice of the existence of such equities and defenses. 5 R. C. L., par. 59, p. 536.

(6) The draft, by the endorsement of Hammett as an individual to himself as treasurer of the county, became the property of the county. It was not thereafter endorsed by Hammett either individually or as treasurer of the county, and when the check was returned to the bank at Harrisburg in this condition, the bank was charged with knowledge that the draft was the property of Cross County because that fact was apparent from the

face of the draft, and the endorsements thereon. *Webster* v. *Carter,* 99 Ark. 458. *Quincy Mutual Fire Ins. Co.* v. *International Trust Co.* (Mass.) 104 N. E. 845; *Franklin Savings Bank* v. *International Trust Co.* (Mass.), 102 N. E. 363.

(7) It will be noted that the draft was returned to the bank at Harrisburg on July 30, 1912, and was thereafter claimed to be the property of the bank. The chancellor charged the bank, Hooten and Going with interest at the rate of 6 per cent per annum from that date, and it is urged by their counsel that this was error. The reason given is that on unliquidated demands interest is not recoverable. A sufficient answer to that argument is to say that the amount recovered was not an unliquidated demand. It was definite and certain. Besides that, this court has uniformly held that interest may be added on property converted from the date of the conversion.

It is next contended by counsel for the State that the Bank of Commerce, of Earle, Arkansas, is liable for the $1,000 draft issued by it to James H. Hammett on July 26, 1912, and in this contention we think counsel are correct. The draft as issued was payable to A. H. Hammett or order. He endorsed it, "Pay to the order of A. H. Hammett, treasurer of Cross County, Arkansas. (Signed) A. H. Hammett." No other endorsement appears on it. When the draft was returned to the bank on August 5, the letter "J" had been written over the letter "A" in the name of A. H. Hammett, preceding the words, "treasurer of Cross County, Arkansas." The alteration is shown to be clearly apparent. Following the name A. H. Hammett, the words "treasurer of Cross County" had been erased. The original words, however, are shown to be clearly discernible and were so to the cashier and bookkeeper of the bank when the draft was presented to them while on the witness stand.

Under the authorities which we have already cited, the bank was charged with notice of these alterations, and if inquiry had been made, the information that the draft had already become the property of Cross County would have been obtained. Therefore, the bank took it, upon

its return, subject to the rights of Cross County. In short, the erasures and interlineations on the endorsement showed that the check had been transferred to the treasurer of Cross County, and had thereby become the property of the county.

For this reason the bank is liable and the chancellor erred in rendering judgment in its favor.

(8) It is also contended by counsel for the State that the Massachusetts Bonding & Insurance Company is liable on the bond purported to have been executed by it. In this contention we think counsel are in error. It appears from the record that the company had a local agent and a local attorney in the town of Wynne, and that application was made to them to execute a bond as surety for Hammett as treasurer of Cross County. Hammett had been required by the county court to execute a new bond and fifteen days had been given him within which to execute it. On the last day he approached the local agents of the bonding company at Wynne for the purpose of procuring the company to sign his bond as surety. The local agents informed him that they had no authority to execute certain bonds of a designated amount, and that they had no authority whatever to execute the bond in question for their company. They testified, however, that they called up the general agent of the company in Mississippi, and that he told them to execute the bond and send it for their approval. The general agent of the company in Mississippi testified that he did not talk with them on the occasion in question, and that he was at that time away on his vacation, and not in the town where his office was located.

In this he is corroborated by the chief clerk in his office, who stated that he was the person who talked with the local agents at Wynne, and said that he distinctly told them that they had no authority to sign the bond in question, that his office had no such authority, and that the bond would have to be sent on to the home office for its signature.

The general agent also testified that he had no authority to issue the bond in question, and that the clerk in

his office was only given authority to sign his name to such papers as he himself had power to sign. It was shown that the county judge had knowledge of the limitation of the authority of the agents before he approved the bond.

The chancellor found that the agents had no authority either real or apparent to execute the bond, and we think his finding is not against the preponderance of the evidence.

(9) Again it is contended that the bonding company ratified the execution of the bond, but we think it is apparent from the record that it did not do so. Sometime after the bond was executed and approved by the county court it came to the knowledge of the company that it was reported to have executed such a bond, and it took immediate steps to repudiate any such action on its part and disclaimed any authority on the part of its agents to execute such a bond. It communicated at once with its general agent in Mississippi, who was thought to have directed the execution of the bond, and he at once repudiated any knowledge that it had been executed. These facts were at once communicated to the county court of Cross County.

Under these circumstances we do not think the bonding company can be said to have ratified the action of its agent in executing the bond, and are of the opinion that the chancellor was correct in holding that the bonding company was not liable.

It appears from the record that all the defalcations for which the chancellor held the sureties on the first bond occurred during Hammett's first term in office, and for that reason the chancellor correctly held the sureties on that bond liable.

It appears also that a certain part of the defalcation occurred during Hammett's second term in office and the chancellor correctly held the sureties on that bond liable therefor.

The record in the case is voluminous, and we have not attempted to set out the testimony which was before the chancellor in detail. We believe, however, that we have set out the substance of the testimony applicable to

the issues raised by the appeal. We have examined and considered the whole record carefully, and have reached the conclusion that the decision of the chancellor was correct except as to the liability of the Bank of Commerce of Earle, as indicated in the opinion. The decree of the chancellor will, therefore, be affirmed except in that regard, and that part of the decree will be reversed and judgment will be entered here in favor of the State for the use of Cross County against the Bank of Commerce of Earle, Arkansas, for the sum of $1,000, with interest thereon at the rate of 6 per cent from August 5, 1912, the date on which the draft was returned to the bank and converted by it to its own use.

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

Opinion delivered June 21, 1915.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—DEATH DUE TO INTERVENING CAUSE.—Deceased was injured by the act of his employer, defendant railway company, while he was acting in the course of his employment; about a year thereafter, deceased contracted typhoid fever and died. *Held*, typhoid fever being the cause of deceased's death, the defendant could not be held liable therefor, even though deceased's physical condition had been weakened by the former injury.
2. MASTER AND SERVANT—DEATH OF SERVANT FROM INTERVENING CAUSE—DAMAGES FOR INJURY.—Under the facts above, there might be a recovery of the damages occasioned by the injury, up to the time of the death of deceased.
3. MASTER AND SERVANT—INJURY TO SERVANT—ABROGATION OF RULE.—An employee of defendant railway company was injured, while working under a freigth car, he having failed to set out the signal required by the company for his protection, showing that he was working there; *held*, the evidence did not show that the defendant had such knowledge of the violation of the rule as to amount to an abrogation thereof.
4. MASTER AND SERVANT—INJURY TO SERVANT—ABROGATION OF RULE.—Where a master makes a rule for the protection of its servants, and an employee was injured after having failed to observe said rule, nothing done by the master, tending to lead the servant to violate the rule, short of abrogation thereof, would render the master liable for a resulting injury.

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

STATEMENT BY THE COURT.

This is a suit by the administrator of the estate of R. D. Steel, for damages to his estate and to his widow and children, for personal injuries to him, alleged to have been caused by the negligence of the railroad company, and to have produced his death.

The answer denied the allegations of the complaint and pleaded as defenses thereto assumed risk and contributory negligence on the part of deceased.

It appears from the testimony that R. D. Steel was in the employ of the railroad company as a car repairer in October, 1912, and while some switching was being done at Benton, was directed by the foreman of the repair gang, Sam McDonald, to repair some rods under certain cars that were in bad order, and while they were standing upon the passing track. He and Martin, the man working with him, went some 200 feet and got the rods and went under the cars to make the repairs, and before they had finished, another train switching, backed in on the track to couple on to the string of cars in which was the car being repaired. They shoved the cars down two or three car-lengths, moving slowly, at the rate of about a mile an hour. There was no blue flag put out by the car repairers as the rules of the company required, to indicate that men were at work upon the car, and to protect them against its being moved until the repairs were completed.

Lilburn Wright testified that he was present when the injury occurred, working on the dirt train; that he had come over from Bryant, unloaded a train load of dirt between there and Benton and was shoved in on the passing track; that the foreman of the repair gang, McDonald, told Steel and Martin to go under certain cars and repair the brake rods, or some other rods under them; that on account of the scarcity of cars, they did not switch them out of the train, and that they could put the rods on while they were putting other bad order cars on the repair track. "They

went and got the rods and brought them back, and Mr. Steel said something about the danger of going under the cars, so McDonald told Mr. Steel to go ahead and put the rods under there, and I will look after you; and, while this was being done, another engine came in from the back end and shoved these cars up some two or three car-lengths. At the time when the cars were being shoved, Steel was under the car, I presume. I saw him go under the car to put the rods under there and never paid any more attention until I heard somebody halloo. This attracted my attention, and I looked around and saw Martin giving a stop signal. About that time Steel came out from under the car, just about the time the car stopped. I can not recall just what Steel said when he came out, but he was making a howl at McDonald about not looking out for him. While this was going on, McDonald was right there with me, close enough to see this man and know what was going on, not more than twenty or thirty feet away. While Steel went under the car, he stayed right around there, and was in plain view all that time."

McDonald testified that he was car foreman for the railroad company at Benton; that Rhad Steel was working under him, had been for about forty-five days; that they were cutting down a grade at Bryant and the crew would bring over to Bryant a train of loaded cars, and the other crew would unload them. He discovered that a couple of cars had rods off of them and two others had the draw bars in bad order; and ordered the latter set on the repair track, and told Rhad Steel, the deceased, and Martin to put on the rods and where to get them, telling them first, "Don't ever go under a cut of cars without putting the blue flag out." He said he told the workmen this every morning, and they were given a card each day with the rule printed thereon as follows: "Examine personally scaffolding, tackle and all other appliances before trusting them. If your duties require you to go around, under or on cars, protect yourself with blue signals."

Witness said the repairers went under the cars without putting up the flag and the extra backed into the cut of cars on which they were working. He was standing by

"the cut of cars," and did not know they had been moved until he heard Martin call out, or laugh, and turned around and saw Rhad Steel lying upon the truss rods kicking. The cars moved a couple of car-lengths, when the train stopped, Rhad got out from under the car and came by and said, "I will see what right they have to butt in to a cut of cars I was working on." I did not know whether they had a flag up or not, but do know that if they had had a flag up, the cars would not have been moved.

It was the duty of the man at work repairing the car to put up the flag and the man who put it up, took it down, and no other had the right to remove the flag where a man was working. That the foreman could not take the flag down that was put up by a person working on a car, and there was sufficient space between the truss rods running lengthwise of the car and the bottom of the car for a man to lie upon them, and that was where Steel was when he saw him lying upon top of the rods; when the car stopped, he saw him get off of them. The cars were moved down slowly, and he could not have told they were being moved if his attention had not been attracted by Martin hollering or laughing, and turned and saw Rhad kicking down there while lying on the truss rods.

Witness stated he did not see Lilburn Wright around there at all and that he was twenty-five or thirty car-lengths away; that only he, Martin, and conductor Sheppard were present. Denied making any statement to Steel and Martin that he would protect or look out for them when they went under the car as testified by Wright, and that Steel had made any remark to him about it being dangerous to go under the cars; said it was not dangerous for him to go under the cars on the passing track after putting the flag out as the rules required.

He had seen some of the boys going to work without the flag, but had not seen Steel or others doing it along about that time; that if they did so, it was their own fault; that the flags were there in the office to be used, and that they were daily instructed and repeatedly told to use them as the rule directed when making

repairs. He said that Steel did not work long after the train bumped into the cars, that he came to where he was working on a car, about 2 or 3 o'clock, and was told to take a sledgehammer and knock the bolts out. He worked a while and knocked out one or two and claimed that his back hurt him, and quit work.

Martin, the repairer working with Steel, testified that they went to get the bottom rods to put on the cars, as directed by McDonald, the foreman; went two or three hundred feet away for them; that they did not put up the blue flag, although the rule required it done. He knew what the blue flag rule was and so did Rhad Steel; he knew it was his duty to put out the blue flag before he went under the car. "I know he knew, because he was told many times, as I was, in my presence, by McDonald about it, and we also had work cards upon which the rule is printed. Rhad Steel saw the card and knew the rule, and Mr. McDonald did not give us any assurance, or make any statement that he would protect us, and that it was not necessary to put up a blue flag. I did not see Lillburn Wright anywhere around there. He was not with me, and Foreman McDonald and Rhad Steel when the foreman requested me and Rhad to go and get the materials and make these repairs. He was not with me or Foreman McDonald when I came back with the necessary materials to make the repairs. The cars were coupled in so easy at the time that if you had not seen them move, you would not have known it. They could not have possibly coupled any easier than they did. They moved the car about a mile an hour, I suppose—just barely moving them. They moved the car between two and three car-lengths. I did not know they had coupled into the cars until they began to move, and when I observed that they moved, I got out and gave them a stop signal, and they stopped. At this time Rhad Steel was on top of the rods. The truss rods that hold the center of a car." He said they forgot to put out the flag; that he did no think about it.

The conductor testified that he did not know any one was at work on the cars when he coupled on to them, and had moved the train about two car-lengths when he got

the signal to stop, and stopped immediately; that there was no blue flag displayed, and if there had been, they would not have coupled into the string of cars.

The testimony shows further that deceased went to his home after the occurrence that day; complained of his back hurting him; and from that time on he complained of suffering pains in his back, walked with a stick, and was not able to do any further work and his health continued to decline, and his appearance indicated suffering. That he had formerly indulged in and enjoyed riding horseback, but never rode again, and that he went about this way until some time in August, 1914, when he died from typhoid fever.

His widow testified that there was a bruised place on his back and side after he claimed to have been injured, but the only abrasion of the skin was a small place on the side of his head. That he complained continually afterward of pain in his back and in the following June took fever from which he never recovered.

The first doctor who attended him after the injury found him in bed, complaining of his back, but could discover no symptoms of an injury except he thought that possibly the right side of the muscles of the back were a little larger; that he could discover no bruises, and did not really know what was the matter; that he never detected any injury to his spine after giving him the usual examination therefor. He did not think he was suffering from any injury received on the 24th of October, that would have contributed to his death in August, the following year.

All the physicians testified that typhoid fever is a germ disease caused by a well known germ, and that an injury to the deceased, such as it was claimed he received in October, would not have contributed to his death with typhoid fever the following August; that there was no relation whatever between typhoid fever and the injury and the typhoid could not have resulted from the injury.

One of the physicians stated that his lowered vitality and weakened condition resulting from the injury, might have caused him to more easily become infected with the

typhoid germ and render it less likely that he would recover from the fever.

There was testimony relative to the earning capacity of the deceased, the amount he contributed to the support of his family, as well as to his exemplary habits and his solicitude for the welfare and training of his children, and also the testimony of some witnesses that they had frequently seen people at work about Benton for the railroad company without displaying blue flags.

The court instructed the jury, giving over oppellant's objections, instructions C, D and F, as follows:

C. Although you may find that deceased was guilty of contributory negligence in going under the car without posting a signal flag, yet if you further find from the evidence that defendant's foreman knew of said negligence, and was aware that deceased was in peril, and then failed to exercise ordinary care to prevent the accident, the defendant is liable, notwithstanding the contributory negligence of deceased.

D. You are instructed that decreased was not bound by any rule of defendant company which was not brought to his attention, or which was habitually violated with the knowledge of his superior officers, and without any effort upon their part to enforce it, if you find from the evidence that the rule was habitually violated with the knowledge of deceased's superior officer, and he made no effort to enforce it, or where the usage and practice of the defendant would tend to mislead him in the violation of the rule.

F. If you find by a preponderance of the testimony that the deceased was injured, and that prior to the injury he was sound and free from disease, and that by reason of the injury his health was impaired and broken down to such an extent as to render his system more susceptible to disease and less able to resist it, and if you further find that as a result of such impaired condition of his health, he contracted typhoid fever, and that death resulted from such disease, then you are instructed that you would be warranted in finding that his death is legally attributable to the accident."

The jury returned a verdict in favor of the administrator and from the judgment the railway company brings this appeal.

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

1. It was error to give instructions C, D and F. There was no testimony that the blue flag rule was habitually violated with the foreman's knowledge. An occasional violation of a rule, or sporadic disobedience does not constitute an abrogation of a rule. The acts of servants who do what they know is prohibited, or fail to do what is prescribed, is negligence, and the proximate cause of the injury. 3 Labatt, M. & S., § 1139. Ordinarily, the question of proximate cause is for the jury. 104 Ark. 59.

2. Decedent was engaged in interstate commerce. 178 Fed. 643. It was not necessary to plead the Federal statute. 229 U. S. 156.

3. The defendant was liable for the injury to decedent's back, if due to its negligence; but not for his sufferings and death due to typhoid fever, unless that disease was proximately caused by the injury. 1 Thompson on Neg., § 70. Where a new and independent cause not under the control of a wrong-doer intervenes between the act and the injury, if such intervening cause is not a consequence of the original wrongful act and could not have been foreseen by the exercise of ordinary care, and but for such intervening cause the injury would not have happened then the latter is the proximate cause, and no recovery can be had. 1 White Personal Inj., § 25. It must appear that the injury was the natural and probable consequence of the negligence and ought to have been foreseen. 69 Ark. 402; 105 U. S. 249; 89 Ark. 58; 104 Ark. 59; 97 *Id.* 160; 229 U. S. 265; 20 Pa. St. 171; 194 *Id.* 24; 101 N. W. 795. On the subject of proximate cause, see also, 57 Am. 602; 19 *Id.* 631; 30 So. 68; 124 Fed. 113; 63 L. R. A. 416; 105 U. S. 249; 125 N. Y. App. Div. 603; 169 N. Y. 254; 72 Atl. 979; 76 *Id.* 1088; 85 N. Y. App. Div. 370; 83 N. Y. Supp. 339; 72 *Id.* 544; 42 *Id.* 789; 153 Wisc. 637; 212 Mass.

262; 112 Va. 243; *Malvern Lbr. Co.* v. *Sweeny,* 116 Ark. 56.

Bratton & Bratton and *Garner Fraser,* for appellee.

1. The Federal act has no application and was not pleaded. There was no proof that defendant was engaged in interstate commerce. 299 U. S. 156; 115 Ark. 308. Courts do not take judicial knowledge as to whether or not appellant was engaged in interstate commerce. 84 Ark. 409; 100 N. E. 337; 69 Ind. 199; 28 Ind. 429.

2. Steel's death was traceable directly to his injuries. They were the proximate cause of his death. 81 Ark. 343; 98 *Id.* 362; 106 *Id.* 92; 1 Thompson on Negl., § § 56, 59, 153; 88 S. W. 466. As to intervening events, see 1 White Personal Inj., § § 24, 25; 88 (Tex.) S. W. 466; 125 N. Y. App. Div. 603. Any wrongful act causing injury from fire, water, *disease,* * * *, etc., under circumstances which render it probable that such injury will occur, is a *primary,* efficient and *proximate* cause if harm ensues. 1 Suth. on Dam., § 38, pp. 42-44; 96 Eng. Rep. 525; 89 N. E. 525; 12 Am. Negl. Rep., 234; 29 Cyc. 499, 500, 507; 13 Cyc. 30; 18 L. R. A. 220; 95 Ark. 297; 115 N. W. 168; 82 N. E. 362; 46 So. 737; 117 N. W. 37; 127 S. W. 820; 136 *Id.* 94; 87 Ark. 579.

3. In this cause *both* the accident and the disease combined to bring about the injury and death. 83 Ala. 377; 104 Ind. 432; 129 Mo. 590; 57 Tex. 83; 139 S. W. 59; 224 U. S. 577; 65 S. E. 848; 104 S. W. 1011; 118 *Id.* 78; 61 Md. 74; Cooley on Torts, p. 70; 49 Am. Rep. 168; 36 Fed. 167, and many others. One who by negligence injures another as a result of which their system is run down and vitality lowered is responsible for the consequences thereof. 212 Mass. 262; 108 Ark. 21; *Biddle* v. *Jacobs,* 116 Ark. 82, and cases *supra.*

4. Proximate cause is ordinarily a fact for the jury. 104 Ark. 59; 46 Ark. 182.

KIRBY, J., (after stating the facts). (1) It is contended that the court erred in giving each of said instructions, and especially in the giving of instruction numbered "F," telling the jury that if it found deceased was injured and his health was thereby impaired to such an ex-

tent as to render him more susceptible to disease and less able to resist it, and it further found "that as a result of such impaired condition of his health, he contracted typhoid fever, and death resulted therefrom, that it would be warranted in finding his death was legally attributable to the injury."

It is insisted that the railroad company could in no event be held liable in damages for the death of deceased, unless its negligence would have produced his death without the intervention of the typhoid fever, which it is claimed was not a natural and probable consequence of the injury.

Thompson says: "A person who, in the prosecution of a lawful act, is guilty of negligence which, combining with a subsequent circumstance of an extraordinary nature, produces an injury to a third person, will not be answerable for the damages unless his negligence would have produced the injury, had not the extraordinary circumstances supervened. The reason is that the law holds him liable for those consequences only which were the natural and probable results of his negligence, and which, therefore, ought to have been foreseen and anticipated."

"When a new, independent cause, not under the control of the alleged wrong-doer, intervenes between the alleged wrongful act and the injury, if such intervening cause is not a consequence of the original wrongful act, and could not have been foreseen by the exercise of ordinary care, and but for such intervening cause, the injury to the plaintiff would not have resulted, then the intervening cause will be taken to be the proximate cause of the injury, and no recovery can be had from the party who is not responsible for such independent cause." 1 White, Per. Inj., 25.

In *Railway Company* v. *Bragg*, 69 Ark. 405, the court said:

"It is a fundamental rule of law that, to recover damages on account of the unintentional negligence of another, it must appear that the injury was the natural and probable consequences thereof, and that it ought to have

been foreseen in the light of the attending circumstances."

This rule was followed in *St. Louis, I. M. & S. Ry. Co.* v. *Buckner,* 89 Ark. 58; *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576; and *Helena Gas Co.* v. *Rogers,* 104 Ark. 59.

"The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural or proximate, and as may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." *Morrison* v. *Davis,* 20 Pa. St. 171; see, also, *Milwaukee, etc., Ry.* v. *Kellogg,* 94 U. S. 476.

For other cases holding the person, guilty of the negligence causing the injury, not liable for death thereafter resulting from some other cause, not the natural and probable consequence thereof, or of which it was not the proximate cause, see *Roach* v. *Kelly,* 194 Pa. 24; *Scheffer* v. *Railroad Co.,* 105 U. S. 249; *Peoples Ry. Co.* v. *Baldwin,* 72 Atl. 979, 76 *Id.* 1088; *Seifter* v. *The Brooklyn Heights Rd. Co.,* 169 N. Y. 254; *Koch* v. *Zimmerman,* 83 N. Y. Supp. 339, 85 App. Div. 370; *Hoey* v. *Metropolitan St. Ry. Co.* 72 N. Y. Supp. 544; *Allison* v. *Fredericksburg,* 112 Va. 243.

All human bodies are subject to weakness, disease and death, and although it was doubtless true as one of the physicians testified, that the vitality of Steel was so lowered and his system so weakened by the suffering from the injury caused him by the negligence of the railroad company, that he was more susceptible to disease and less able to resist it than he otherwise might have been, still the verdict can not be sustained unless there was some testimony from which it could be reasonably inferred that his death was occasioned by germs or disease caused by the injury or resulting from it as the natural and probable consequence thereof.

The attending physician testified that his death was caused from typhoid fever almost a year after the injury, and all the physicians stated that typhoid fever could not

have been produced by the injury nor as an effect arising from it, that it was never of traumatic origin. So far as the law and facts are concerned, the railroad company, through whose negligence the jury found the injury occurred was no more responsible for his death by typhoid fever, and it was no more the natural and probable consequence of the injury than if deceased had died from having been shot with a gun while in the weakened condition caused by the injury.

His death following such a shock, that might not have resulted but for his lowered vitality and weakened condition, would have been no less proximately caused thereby than was his death by typhoid fever.

The possibility that he succumbed more readily to the disease causing death than he otherwise would but for the injury, is insufficient to support the verdict and the jury should not have been told that if death resulted from typhoid fever contracted because of impaired health occasioned by the injury, rendering his system more liable to the disease and less able to resist it, that it was legally attributable to the injury.

The question of proximate cause is one ordinarily for the jury, to be determined as a fact from the particular situation in view of the facts and circumstances surrounding it. *Pulaski Gas Co.* v. *McClintock, supra.*

It is insisted that *Memphis, Dallas & Gulf Rd. Co.* v. *Steel,* 108 Ark. 14, is an authority contrary to the doctrine above announced, but such is not the case. In that case it was disclosed that the person injured was already suffering from the disease, or that the disease itself followed as a probable consequence of the injury.

Cyc. says: "An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury. Such new force must be sufficient itself to stand as the cause of the injury * * * such intervening acts must have superseded the original act, or been itself responsible for the injury. 29 Cyc. 499-500; see also, *Helena Gas Co.* v. *Rogers, supra.*

(2) The typhoid fever was an intermediate cause disconnected from the primary or original injury and self-operating which produced the death of deceased and the negligence of the railway company causing the injury was not the proximate cause thereof, and the court should have given appellant's nineteenth instruction, telling the jury it was not liable for his death. This would by no means, however, prevent a recovery of the damages occasioned by the injury to the time of the death of deceased from the intervening cause.

Instruction C tells the jury, notwithstanding it might find the deceased guilty of contributory negligence in going under the car without posting a signal flag, that if it further found from the evidence that the foreman knew of the negligence, and was aware that deceased was in peril, and failed to exercise ordinary care to prevent the injury, it would be liable notwithstanding the contributory negligence of the deceased.

The instruction was not abstract as contended, there being some testimony tending to show that the foreman had directed the deceased to go under the car and make the repairs and also agreed to protect him while so doing, and knew he was so engaged at the time.

(3) Instruction D should not have been given.

Unless the rule, known to the deceased, requiring the car repairers, and those going under and working about the cars to first post the blue signal flag for their protection was abrogated by a custom established of its habitual violation with the knowledge of the master, it was erroneous, and although there is some testimony from different witnesses tending to show that they had seen people at work about the yards at Benton, and had not seen any such signal flag posted there does not appear to have been such testimony of a continued violation of the rule known to and acquiesced in by the master, as would abrogate it. *St. Louis, I. M. & S. Ry. Co.* v. *Sharp,* 115 Ark. 308, 171 S. W. 97; *St. Louis, I. M. & S. Ry. Co.* v. *Wirbel,* 108 Ark. 437, and cases cited.

The last statement of said instruction that the deceased would not be bound by any rule of the defendant

company "where the usage and practice of the defendant would tend to mislead him in the violation of the rule" was erroneous and prejudicial in any event.

(4) If the rule was abrogated by proof of a custom of its long continued violation with the knowledge and acquiescence of the master, the violation of it by the deceased would not prevent a recovery for the injury, but since the rule was made for his protection and known to him, any usage and practice of the defendant tending to mislead him in the violation of it, short of its abrogation, would not relieve from the consequence of his negligence in violating it nor excuse him therefor.

For the errors pointed out, the judgment is reversed and the cause remanded for a new trial.

AMERICAN BAUXITE COMPANY v. BOARD OF EQUALIZATION OF SALINE COUNTY.

Opinion delivered June 21, 1915.

1. TAXATION—MINERALS AND ORES.—The statutes of the State make no provision for the assessment for taxation of ores or minerals, apart from the land.
2. TAXATION—MINERAL LANDS—"MARKET VALUE."—The assessed valuation of mineral lands for purposes of taxation is dependent upon the determination of their market value. Kirby's Digest, § 6974.
3. TAXATION—LANDS—"MARKET VALUE."—The term "market value," as used in the statute governing assessments of land for taxation means the price which the land will bring when offered for sale in the market; it is the highest price which those having the ability and the occasion to buy, are willing to pay.
4. TAXATION—LAND—MARKET VALUE.—In determining the market value of land for purposes of taxation, the character of the land may be taken into account, as well as the uses to which it may be put, the character of the soil, the timber growing on the surface, as well as the ores hidden beneath the surface, the accessibility of the land, its development, its proximity to other lands which have been so developed as to add to its value, and the quantity of other lands of a similar character adjacent to it, which would be calculated to make it more attractive to prospective purchasers, together with any other fact or circumstance which affects the property's value.
5. TAXATION—MINERAL LANDS—MARKET VALUE.—In determining the market value of mineral lands for purposes of taxation, the as-

sessor may take into account the quantity of the ore, the facilities for, and the cost of mining it, as well as any other fact or circumstance which would likely make such lands a more attractive proposition to a prospective buyer.

6. TAXATION—ASSESSMENT—MARKET VALUE—MINERAL LANDS—INCOME—PRODUCTION.—The matters mentioned above are to be considered only for the purpose of determining market value; the income-producing quality of the land enters into the consideration of the question of market value, but the income is not the thing assessed, property is assessed whether it produces income or not, and property is not taxed according to its income, and, the question of income is of importance only as it relates to and affects the market value.

7. TAXATION—MINERAL LANDS—VALUE OF ORE—SHIPMENT OUT OF STATE. —In arriving at a proper assessment of mineral lands, the uses and value of the ore, taken from the land, and shipped out of the State, can not be taken into account for any purpose other than to determine the value of the land from which it is extracted.

8. TAXATION—MINERAL LANDS—MARKET VALUE—MINING CORPORATION. —Tracts of mineral lands in a certain county, belonging to a mining corporation, are to be assessed for taxation just as other similar tracts of land in that county are assessed, that is, according to the market value of each separate parcel; and such lands are not to be assessed according to the proportionate value of the same to the lands and property of the corporation, situated in other states.

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

Mehaffy, Reid & Mehaffy and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellant.

1. The taxing authorities of Saline County should have taxed each separate tract of land involved in this appeal according to the market value of that tract. Article 16, § 5, Constitution; Kirby's Dig., § 6974; 62 Ark. 461, 463. As to what constitutes "market value," see 49 Ark. 381, 390; 25 N. J. Eq. 144-147; 27 Atl. 1057; 30 Pac. 111, 49 Kan. 17; 6 Sup. Ct. 801, 805; 117 U. S. 379; 29 L. Ed. 924; 38 Atl. 108, 90 Me. 193; 74 S. W. 370, 373; 101 Mo. App. 32; 36 Atl. 892, 60 N. J. Law 70.

The "unit theory" of taxation of appellant's property attempted to be applied by appellee, would not only be contrary to our Constitution and laws, but to the Constitution of the United States as well, as it would result

in the taxation of property outside of the State. 188 U. S. 385; 198 U. S. 341; 199 U. S. 194, 204.

2. Thirty-five per cent of the market value was the basis of valuation in Saline County in 1913, and the court, at appellant's request, should have made a finding of the valuation on thirty-five per cent of the market value.

George Vaughan and *Wm. L. Moose,* Attorney General, for appellee.

1. The unit rule of valuation is the exclusive method provided for the primary ascertainment of the value of all corporate property for tax purposes. It is a rule that has been approved by this court. 78 Ark. 192; Acts 1907, p. 1225; 94 Ark. 235; article 16, sections 5, 7 Constitution. And this doctrine is supported by many eminent authorities. 37 L. R. A. 371, notes on 63 Ark. 576; Beale on Foreign Corporations and the Taxation of Corporations, Both Foreign and Domestic, § 507; Judson on Taxation, 265, § § 239, 240, 249, 251, 260; 11 Cyclopedia of U. S. Supreme Court Reports, 449; Gray on Limitation of Taxing Power, § 61; 65 Mo. 502; 190 U. S. 413, 47 L. Ed. 1116. The Supreme Courts of numerous States have held that no distinction is justified between a foreign corporation doing business in a State, and one organized within the State, and have applied the unit rule for the apportionment of assets of foreign corporations. 116 N. C. 441, 21 S. E. 423; 39 S. E. (N. C.) 18; 143 U. S. 305; 159 N. Y. 70, 45 L. R. A. 126; 161 N. Y. 52; 185 N. Y. 546; 133 N. Y. 323; 104 Miss. 381; 55 N. Y. S. 317; 109 *Id.* 868.

2. The value of mineral lands consists largely, if not exclusively, in the value of the underlying ores, and ordinary rules for the appraisement of real estate do not apply.

To assess each separate tract of land involved in this appeal "according to its market value," is a loose method not adapted to mineral lands.

How can each separate tract be assessed "according to its market value" when there has been no sale or transfer for twenty years?

In valuing mineral lands for tax purposes, the basis is the actual or true value, as limited or defined by the

"market value" of the ore contents. 162 N. Y. 327; 17 L. R. A. 33, 37; 123 Wis. 61; 7 So. 509; 84 Atl. 761; 138 N. W. 707; 104 Pac. 180; 229 Pac. 460; 100 N. E. 561, 563.

As to the valuation of interstate properties, see 10 Atl. 849; 51 N. H. 455; 85 Me. 330; 21 L. R. A. 525; 66 N. H. 562; 90 Me. 60; 91 N. E. 638; 63 N. W. 746; 131 N. W. 669.

3. The unit rule prescribed by Kirby's Digest, § § 6936, 6937, is applicable to the valuation of appellant's property. The principles applicable in cases dealing with the property of express, railroad and telegraph companies, banks and all other industrial corporations organized for profit, also rightfully apply to this case. 29 S. W. 116; 103 Pac. 341; 90 N. W. 298, 300; 106 S. W. 247; 49 So. 404; 78 N. W. 1032; 64 N. E. 661.

SMITH, J. This is an appeal from a judgment of the circuit court of Saline County, fixing the values for taxation for the year 1913 of certain tracts of land belonging to the appellant, the American Bauxite Company. The county assessor assessed the lands at an aggregate valuation of $47,000,000, and upon an appeal from this assessment to the board of equalization, the valuation was reduced to approximately $2,500,000. This valuation was arrived at by the board of equalization by estimating that appellant's lands contained practically 5,000,000 tons of commercial bauxite, which had a value of $1 a ton, and 50 per cent of this amount was taken as the proper valuation to assess against appellant's lands upon the theory that property situated in that county was assessed at 50 per cent of its actual value.

An appeal was taken to the county court, where the assessment of the equalization board was sustained, and an appeal was prosecuted from the judgment of that court to the circuit court, where the valuations were reduced to an aggregate of $623,100, and this appeal has been prosecuted from the judgment of the court fixing these valuations.

The proof shows that the appellant company paid as high as $1 per ton royalty for bauxite, but that this was the highest royalty paid in any case.

No attempt is now made to justify the assessment made by the county assessor, but it is insisted upon the cross-appeal which was taken in this case that the judgment of the circuit court should be set aside and the assessed value, as fixed by the board of equalization, and by the county court, should be declared the true and proper valuation.

Exceedingly interesting briefs have been filed in this case, and a great many questions, both of law and fact, are discussed therein; but we find it unnecessary to review all these questions in this opinion.

The record in the case is singularly free from questions of veracity, or, for that matter, disputed questions of fact, and the appellant company appears to have manifested a most commendable frankness and candor in the production and exhibition of evidence showing the operation of its own business, and that of affiliated concerns engaged with it in the reduction of its raw material to the finished product.

Bauxite is a term given to an earth that contains aluminum in sufficient quantities to make it worth working for the extraction of aluminum. It is shown that aluminum is the third most common element in the earth, but for bauxite to have commercial value, it must contain as much as 55 per cent alumina, and not exceeding 7 per cent silica, an element the presence of which renders difficult and expensive the extraction of alumina.

The lands in question are owned by the American Bauxite Company, but it is shown that the Aluminum Company of America owns most of the stock of the appellant company, and, in addition, also owns the controlling stock of other corporations engaged in carrying the bauxite through intermediary processes. It is shown that at one time the process for the reduction of bauxite was monopolized by a patent, but that this monopoly expired with the expiration of the patent in 1903, since which time neither the aluminum company nor any other company has any special privileges from patents or secret processes, and the industry is now one which is open to any

who desire to enter it, and that there is competition in the production of aluminum, although the aluminum company was shown to be the principal concern engaged in its manufacture.

We are of opinion that, even though $1 per ton was a fair royalty value of all the bauxite owned by the appellant company, and the proof shows that this would be an excessive value for this bauxite when considered as a whole—that value could not form a proper basis for assessment, as this royalty is not paid until the bauxite has been mined, whereas the proof in the present case shows that with the facilities at hand, the appellant company will be engaged anywhere from thirty to fifty years in mining its bauxite.

Appellees insist, however, that the valuation of the several tracts of land should be arrived at by treating them as part of a profit-producing plant, of which the property of the Aluminum Company of America and all of its subsidiary companies should be treated as a unit, and that the proportion of the whole borne by the market value of the lands in Arkansas to the entire value should be added to the market value of the lands in Arkansas; and the theory is also urged that for the purposes of taxation the profit-producing capacity of the industry should be capitalized, and that the sum of money upon which a reasonable dividend is earned or profit yielded should form the basis for the assessed valuation. Bearing upon this question, numerous experts have testified, and much valuable and interesting information has been collected, and the history of this industry is gone into in great detail and in a most interesting manner. The proof shows the cost of mining a ton of bauxite, and the method and cost of its reduction to the finished product, and it is urged that these facts should be considered in determining the proper valuation for purposes of assessment of the lands in question, inasmuch as the earning of these profits is dependent upon the extraction of the bauxite from the lands in question. But the proof also shows that bauxite is found in commercial quantities in several other States.

It was shown that the appellant company bought lands in Saline and Pulaski counties, and that at the time of their purchase, the presence of the bauxite was known, and, indeed, the evidence rather tends to show that the lands do not contain the quantity of bauxite which they were estimated to contain at the time of their purchase. The appellant company paid something less than $600,000 for these lands, of which about $500,000 was paid for the 5,000 acres of land in Saline County, and these lands were assessed by the manager of the appellant company for the year 1913 at a total valuation of $492,000, or practically what the appellant company paid for them. It is not shown that there had been any considerable enhancement in the value either of bauxite or bauxite lands since appellant's purchase; yet the proof does show that the appellant company had expended large sums of money in the development of its properties, and that the result of this expenditure was to increase the market value of all of its bauxite lands. The appellant company secured the services of a mining engineer, who appraised the value of all of its property situated in Saline County, and according to his report, the assessment made by the appellant company equalled at least 50 per cent of the market value of the property.

A Mr. Gibbons, who was the superintendent of the appellant company, testified in great detail in regard to all of the facts which would enter into a consideration of the value of the lands, and only the value of the lands is involved in this litigation, as the valuation of all the appellant's personal property was agreed upon. This witness Gibbons, testified in a manner to carry conviction, and his testimony appears to be undisputed on the question of the market value of the lands, and the court made the following finding of fact in regard to his testimony:

"The court finds that the witnesses, Col. J. R. Gibbons and Mr. W. A. Rucker, are familiar with the market value of bauxite lands, and with the market value of the several tracts involved in this proceeding; and the court further finds that the testimony of each of said witnesses

is candid and truthful. By the term 'market value,' as used in this finding, the court means the price that could be obtained for each tract, considered separately and without relation to the plant, after allowing the vendor a reasonable time to find a purchaser."

This finding appears to be no mere compliment paid the evidence of Colonel Gibbons, but a finding of fact fully justified by the evidence. So far as the assessment by the equalization board was concerned, the court made the following finding of fact:

"6. The court finds that the equalization board, in making its assessment in this case, did not assess the market value of the several tracts, but proceeded on the arbitrary basis of making an estimate of the quantity of bauxite on the several tracts of land, and multiplying this estimate by $1 per ton, and dividing this product by two to give a 50 per cent value of the several tracts."

But the court refused to make the following declaration, which we number A:

"A. There is no warrant in law for treating the several tracts of land owned by the American Bauxite Company as a part of a unit of the Aluminum Company of America, and attempting to assess the said several tracts of land of the American Bauxite Company according to any proportion of the value that each or any of them may bear to all the other property or holdings of the Aluminum Company of America, nor is there any warrant for an attempt to capitalize the earnings of the Aluminum Company of America, and by this method ascertain the value of all its holdings and apportion part of the value of the whole against any or several or all of the tracts of land of the American Bauxite Company in Saline County; but the said several tracts of land of the American Bauxite Company in Saline County are to be assessed just as other similar tracts of land in Saline County are assessed, that is, according to the market value of each separate parcel."

The correctness of the action of the court in refusing to make this declaration presents the real question in the case.

Article 16, section 5, of the Constitution, provides that "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value. * * *"

(1) Pursuant to this provision of the Constitution, the Legislature enacted that "Each separate parcel of real property shall be valued at its true market value in money, excluding the value of crops growing thereon; but the price at which such real estate would sell at auction, or at a forced sale shall not be taken as the criterion of such true value." Section 6974, Kirby's Digest. But the statute has made no provision for the assessment of ore or minerals apart from the land.

(2) It thus appears that the assessed valuation of the appellant's lands should be made dependent upon the determination of their market value, and the section of Kirby's Digest quoted from (6974) indicates what the Legislature meant by the phrase, "at its true market value in money," when it provided that the price which property might bring at auction or at a forced sale should not be considered as the true value for purposes of taxation.

(3) In the case of *Little Rock Junction Railway* v. *Woodruff*, 49 Ark. 381, 390, the term "market value" was defined by this court in the following language:

"The word market conveys the idea of selling and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay." *Laser* v. *Jones*, 116 Ark. 206, 172 S. W. 1024.

(4-5-6) In the determination of the market value of a given piece of property, necessarily a great many things are to be taken into account, and much of the voluminous evidence in this record is competent as bearing upon that question, although much of it tends only in a remote de-

gree to the elucidation of that question. It is proper always in determining that question to take into account the character of the land; the uses to which it may be put; the character of the soil; the timber growing on the surface of the land as well as the ores hidden beneath; the accessibility of the land; its development; its proximity to other lands which have been so developed as to add to its own value; and the quantity of other lands of a similar character adjacent to it which would be calculated to make it more attractive to prospective purchasers, together with any other fact or circumstance which affects the property's value. But all of these questions are to be considered for the purpose at last of ascertaining the market value of the tract in question, and that is the value which must be adopted for the purposes of assessment when it has been ascertained. In determining the market value of ordinary non-mineral land, for instance, it would not be improper to consider the depth of the soil, the crops which could be profitably grown, and the relative prices of these crops. A prudent investor would consider the accessibility of any tract of land and its convenience to market, and he would also take into account the facilities for marketing his produce. So, also, with mineral lands, it would be proper to take into account the quantity of the ore, the facilities for, and cost of mining it; as well as any other fact or circumstance which would likely make such lands a more attractive proposition to a prospective buyer. But all these things are to be considered for the purpose only of ascertaining the market value of the land. The income-producing quality of the land enters into the consideration of the question of market value, but the income is not the thing assessed. Property is assessed in this State whether it produces income or not, and property is not taxed according to its income, and, indeed, the question of income is of importance only as it relates to and affects the "market value."

(7) Mr. Gibbons stated that he has listed the appellant company's lands, and had assessed them at 50 per cent of their actual market value, and there is no denial of

the truth of any statement made by him, and such being the case that valuation must be accepted as the proper one for purposes of taxation, as we can not take into account the uses made of this ore after it is shipped out of this State for any purpose other than to determine the value of the land from which it is extracted. After property is taken out of this State, it ceases to be subject to taxation within this State, and no attempt is made by the Constitution or laws of this State to impose upon such property any of the burdens of taxation.

Appellees have much to say about what they call the unit of value, or the aggregate of value, and attempt to apply to the assessment of appellant's ore the rule applied in the assessment of railroad, telegraph, telephone and express companies, where, from the very nature of the property, the value of any particular part can be determined only by a consideration of the whole. But no such rule can be applied here. For the purposes of this litigation it is immaterial what becomes of the ore after it is shipped out of this State, except as the question of its value and uses may affect the value of land from which such ore can be mined. We have the right to assess here for purposes of taxation all property of every kind lying within this State. But in the exercise of this right, we are limited by the market value of the property in this State. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194.

(8) It follows, therefore, that the court should have made the declaration numbered "A," requested by appellant, and should have assessed the lands at the values given by Mr. Gibbons, and for the error of the court in refusing thus to declare the law and to so assess appellant's lands, the judgment will be reversed and the cause will be remanded with directions to the court below to assess appellant's lands for the purposes of taxation for the year 1913 at the valuations returned by appellant.

We make this finding notwithstanding it is now urged that Colonel Gibbons fixed his valuation upon the basis of 50 per cent of the actual market value, whereas there is evidence to the effect that no property was assessed at a

higher valuation and considerable property was assessed at a smaller per cent of its market value. But the proof shows that the accepted basis for the assessment was 50 per cent of the market value, adopted alike by the assessor, the equalization board and the county court, and was the basis which the court below found had been adopted for the purpose of assessing for taxation property situated in Saline County, and we therefore adopt it, although all property was not assessed at that per cent of its market value.

ARKANSAS TRUST & BANKING COMPANY v. BISHOP.

Opinion delivered June 28, 1915.

BANKS AND BANKING—ACCEPTANCE OF CHECK—LACK OF FUNDS.—A bank will be liable to the holder of a check for the amount of the same, when it accepted the check and gave the holder a deposit slip for the amount thereof, although the drawer of the check had no funds in the bank at the time the bank accepted the check. To avoid liability the burden is on the bank to show that the deposit slip was not issued in payment of the check.

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

STATEMENT BY THE COURT.

Appellee brought suit against appellant for $25 in the justice's court, and from the judgment there against him, appealed to the circuit court, where upon a trial anew, judgment was rendered in his favor, from which this appeal has been prosecuted.

It appears from the testimony that the Simms Grocery Company was a tenant of appellee and in a failing condition, and on November 16, gave him a check for $25 on appellant's bank, where the parties kept their accounts.

Bishop took the check and in the morning presented it at the bank, and after a conversation with Hunt, the cashier, a deposit slip for said sum was given to him.

About 4 o'clock in the afternoon, the bank cashier found Bishop in a drug store adjoining the bank and of-

fered the check to him, saying the bank could not pay the check as the drawer had no funds to take care of it. Bishop refused to receive the check and the cashier mailed it to him the same day, with a charge ticket attached, showing what it was for.

The next day, or within a day or two, Bishop took the check and charge ticket to the bank and threw it back through the cashier's window.

Bishop testified that when he presented the check for payment, the cashier asked him if he wanted the money; that he replied, no, to give him a deposit slip, which was done, and said his first information that payment of the check had been refused was about 4 o'clock in the afternoon when the cashier, Mr. Hunt, told him so.

The cashier testified that when the check was presented, he looked at it and handed it back to Bishop, saying that the drawer was checking a little too much, that thereupon Bishop replied, "Well just give me a credit slip for it then," to which the cashier said "all right," and issued a deposit slip.

It was further shown that the drawer of the check was overdrawn on the 14th; made some deposits on the 16th and 17th of over $100, but there was a check for $200 in the cashier's drawer, which had been paid which was being held as a cash item until enough deposits were made to cover it.

The appellee knew that the grocery company was insolvent, and he was to be appointed trustee to wind up its affairs, and the president of the bank learned of that fact before the check was mailed to Bishop in the afternoon of the 16th. On the 17th Simms, who drew the check for the grocery company, offered to pay Bishop $25, the amount of it, which he declined, saying he was going to make the bank pay it, that he had already accepted it.

The court refused to allow the cashier to state his understanding of the transaction of issuing the deposit slip over the objection of appellant.

It was admitted that Bishop was due the bank on an overdraft, when the suit was brought $6.56.

A. D. DuLaney, for appellant.

1. There was no privity of contract between appellee and the bank, and no liability on its part unless it unconditionally accepted the check for payment, and the burden was on appellee to prove that appellant did so accept the check. 98 Ark. 7; 94 U. S. 343.

2. The cashier should have been permitted to state why he handed the check back to appellee, and what his intention was as to the check, and whether or not it was taken to be held until Simms deposited funds to cover it. The jury should have had all the facts. 7 L. R. A. (N. S.) 93; *Id.* 694, and note.

3. If the drawer of the check offered the next day to pay appellee the amount of the check, and the latter refused to accept it, and no injury had been done him, he was not entitled to recover from appellant, and the court should have instructed the jury to that effect. 146 S. W. 1034; 166 S. W. 986.

James S. Steel, J. S. Lake and *James D. Head,* for appellee.

1. Passing a deposit slip to a depositor for a check raises a presumption that the check was accepted as cash. 7 L. R. A. (N. S.) 694; 59 N. W. 987; 5 Cyc. 534-5; 91 Wis. 53. The proof in this case shows that the check was accepted as cash. See 4 Fed. Cas. No. 1985.

2. The question of privity does not arise in this case. When the cashier paid the check, he knew the status of the drawer's account, and elected to pay the check rather than to protest it or refuse payment. Having made that election without being misled by appellee, the bank must abide by it. 146 S. W. 1034; 166 S. W. 986.

KIRBY, J., (after stating the facts). The only question in this case for the decision of the jury was whether the bank accepted the check and became liable to the payment of the amount for which it issued its deposit slip to the drawee thereof. The intention of the parties to the transaction could properly have been shown for the determination of this question, and the bank having issued its regular deposit slip or ticket for the amount of the check to the drawee thereof, the burden rested upon it to

show that it was not in payment of the check. The fact that the drawer of the check offered on the following day, after hearing that payment had been refused by the bank to pay the $25 to Bishop, which he refused to receive, would not relieve the bank from liability on its deposit slip, if it accepted and paid the check therewith, and the court did not err in refusing appellant's requested instruction numbered 4.

Neither do we find any error in the court's ruling, refusing to allow the cashier to state what he thought when issuing the deposit slip, as the record does not disclose what his testimony would have been on this point.

The attorney objected to his stating what he thought, and the court said, "Just tell what you did." After several questions, he was asked, "For what purpose did you give him that slip," and upon objection, the court said, "That is a question for the jury, better state the facts that occurred there," and it is evident from the record that the court only intended to exclude the testimony of what the cashier had in mind, unless it was made known to the appellant at the time, and no error is shown to have been committed in his so doing.

In *Rogers Commission Co.* v. *Farmers Bank of Leslie,* 100 Ark. 537, the court said:

"It was not necessary to the bank's liability that it should have on deposit to the drawer's credit more than the amount of this check at the time of its presentation, for it would have become liable to its payment by an acceptance of it, and could have permitted an overdraft as it had usually done, or withheld its own check, which it claimed to have in its drawer against the account of the maker of the check, etc."

The fact that the check was not charged by the bank to the drawer's account, and that the drawer did not have sufficient funds on deposit to pay the same, could properly be considered in determining whether the bank accepted the check and paid same in the issuance of its deposit slip, but the jury under proper instructions found the issues in favor of appellee, and the judgment is affirmed.

BARBORO *v.* BOYLE.

Opinion delivered June 21, 1915.

1. RIPARIAN RIGHTS—NAVIGABLE AND NON-NAVIGABLE STREAMS.—The riparian owner upon a navigable stream, deriving title from the United States, takes only to high water mark, the title to the bed of the stream being in the State; the riparian owner upon a non-navigable stream is entitled to the center of it, ratably with the other riparian owners, the extent of his interest depending upon his frontage upon the stream.
2. WATERS—NAVIGABLE WATERS.—A lake, formerly a part of the Mississippi river, seven miles in length, with an average depth of eighteen feet, but as deep as thirty-five feet in places, and a maximum width of two thousand feet, *held* to be a navigable lake.
3. WATERS—RIGHT OF RIPARIAN OWNER TO LOWER LEVEL OF A LAKE.—Plaintiffs owned lands bordering upon a lake, the lake being connected with the river by a bayou. A levee district closed up the bayou with a levee, and the level of the lake rose five feet in consequence. *Held*, a riparian owner had the right to pump the water out of the lake so that the waters might be restored to their former level, and thus prevent the flooding of his land.
4. GAME AND FISH—RIGHT OF OWNER OF ENCLOSED LAND.—The owner of enclosed lands has the exclusive right to hunt and fish upon the same, and he is entitled to equitable relief to prevent an interference with that right.
5. GAME AND FISH—ENCLOSED LAND—NATURAL BARRIERS.—Whether or not a natural barrier may be of such a character as to serve as part of an enclosure, within the meaning of the statutes granting to the owner of enclosed lands the exclusive right to hunt and fish upon the same, is a question of fact, for each particular case, and *held*, that the boundary of certain land by a navigable lake, was not such a natural barrier as was contemplated by the statutes.

Appeal from Crittenden Chancery Court; *Charles D. Frierson*, Chancellor; affirmed.

Brown & Anderson, for appellants.

1. Horse Shoe Lake is an unnavigable body of water, and plaintiffs' title extended to the middle of the lake, as abutting owners. 82 Ark. 367; 88 *Id.* 37; 92 *Id.* 39; 104 *Id.* 154; 36 Barb. 102; 95 N. C. 331; 59 Am. Rep. 242; 39 Ark. 409. Navigability is a question of fact; if a stream or lake is navigable, then abutting owners of land only take title to the ordinary high water mark, but if unnavigable, then to the middle of the stream or lake. 67

Fed. 287; 148 *Id.* 781. The action of Government surveyors in meandering a body of water is to be considered as evidence, but is not conclusive. 175 U. S. 300; 52 Minn. 181; 18 L. R. A. 670; 127 Tenn. 601-661. The criterion is whether or not a stream is useful to the population as a means of transporting the products of field, forest or merchandise.

2. Injunction will lie to prevent trespasses where the relief is necessary to prevent multiplicity of suits, or irreparable injury. 33 Ark. 633; 67 *Id.* 413; 93 *Id.* 93. The right is certain and clear. 73 Ark. 236; 6 Can. Sp. Ct. 52; 69 Mich. 488; 36 Oh. St. 423; 33 L. R. A. 569; 148 Fed. 791; 49 N. C. 332; 53 Atl. 612; 43 Ill. 447; 8 L. R. A. 578; 19 Atl. 351; 22 Cyc. 746.

3. The submergence of the lands is entirely due to the levee, and such artificial flooding does not have the effect of ousting plaintiffs from either the possession or title thereto. 97 C. C. A. 214; 78 N. E. 42; 6 L. R. A. (N. S.) 136; 59 Ill. App. 51; 38 L. R. A. 855; 73 Ark. 236. The high banks in connection with the fences and enclosures constituted enclosed lands. 89 S. W. 1004; 76 Ark. 529.

A. B. Shafer and *E. L. Westbrook,* for appellees; *McGehee, Levingston & Farabough,* of counsel.

1. Horse Shoe Lake is navigable in the American sense. The question of navigability is one of fact. 39 Ark. 408. His finding will not be disturbed. 67 Ark. 200; 101 *Id.* 503; *Ib.* 522; 97 *Id.* 568; 148 Fed. 781. The test is, can the stream be, or is it used for the purpose of commerce for boats, rafts, vessels or logs, etc.? 90 Fed. 680; 59 Am. Dec. 209; 50 *Id.* 641; 91 *Id.* 58; 73 *Id.* 439; 84 Pac. 395; 38 Am. St. 551; 11 Am. Rep. 380; 39 Ark. 409.

2. Where the level of a navigable lake is maintained by artificial means, the rights of the public are correspondingly extended. Should appellants attempt to inclose such submerged lands, with a fence, any citizen could enjoin them. 103 Wisc. 271; 70 N. W. 1115; 78 *Id.* 185; 56 Wisc. 73. Submerged lands belong to the State in trust for the public use. 93 Wisc. 534; 33 L. R. A. 645; 100 Wisc. 86; 54 L. R. A. 790; 52 N. E. 1052; 101 Wisc.

479; 74 N. W. 185. None of these lakes are private ponds. Appellants have but a qualified right to hunt and fish on the lands or waters. 73 Ark. 236; Kirby's Digest, § 3598; 93 Ark. 92. The injunction was properly denied. 4 Eq. Jur. (Pomeroy), § 1338.

HART, J. A. S. Barboro and others, as trustees for the Five Lakes Outing Club, a voluntary, unincorporated association, instituted this action in the chancery court against Thos. R. Boyle and others for the purpose of restraining them from hunting and fishing upon lands alleged to belong to plaintiffs.

The plaintiffs held legal title to certain lands in the peninsula formed by Horse Shoe Lake in Crittenden County, Arkansas. Horse Shoe Lake, as its name implies, is a horse shoe shaped body of water, and was likely at one time a part of the bed of the Mississippi River. It is seven miles long and has an average depth of eighteen feet. It was connected with the Mississippi River by Buck Bayou, and in 1905, the St. Francis Levee District constructed its levee across Buck Bayou, and this had the effect of damming up the water in Horse Shoe Lake about five feet above its ordinary level.

In 1910, the plaintiffs installed a siphon to pump the water on the outside of the levee in such quantities as to reduce the bed of the lake to its ordinary level. After the siphon had been installed a few years, it was allowed to get out of repair and has not been used since.

It is the contention of counsel for the plaintiffs that Horse Shoe Lake is a meandered, nonnavigable body of water, and evidence was introduced by them tending to establish this fact.

On the other hand, it is the contention of the defendants that Horse Shoe Lake is a navigable body of water, and evidence was introduced by them to establish this contention.

The evidence on the question of the navigability of the lake will be considered later.

The chancellor held that Horse Shoe Lake is a navigable stream, but granted to the plaintiffs an injunction

restraining the defendants from hunting or fishing within certain limits which are stated in the decree, and which will be more particularly referred to later on.

The plaintiffs have appealed.

(1) The riparian owner upon a navigable stream, deriving title from the United States, takes only to high water mark, the title to the bed of the stream being in the State. *St. Louis, I. M. & S. Ry. Co.* v. *Ramsey,* 53 Ark. 314.

The riparian owner upon a nonnavigable stream is entitled to the center of it, ratably with the other riparian proprietors, the extent of his interest depending upon his frontage upon the lake. *Rhodes* v. *Cissel,* 82 Ark. 367; *Little* v. *Williams,* 88 Ark. 37; *Glasscock* v. *National Box Co.,* 104 Ark. 154.

The question of the navigability of Horse Shoe Lake was one of fact, and as tending to show that it was navigable, defendants introduced witnesses whose evidence tended to establish the following facts:

Horse Shoe Lake is situated in the southeast part of Crittenden County, and was probably once a part of the bed of the Mississippi River; the average width of the body of water is about a half mile, and the average depth about eighteen feet; beginning at the southeast end of the lake, there is about ten feet of water which runs out to shallow water about eighteen inches deep; further north, the lake widens out and becomes about two thousand feet wide, and the water from twenty-five to thirty feet deep; the lake is about seven miles long, and is deep enough and wide enough to float the largest steamers that ply the Mississippi River; the outside rim of the lake is a bluff bank and boats could be landed almost anywhere along it; the inside bank of the lake is sloping; there are a number of skiffs and gasoline boats on the lake used by the riparian owners; the lake is free from snags, and there is nothing to interfere with the navigation of large steamboats; the water is clear and the lake is full of all kinds of game fish; in the fall, ducks come there in vast numbers, and remain in that vicinity during the winter and at irregular inter-

vals the ripairan owners have used the lake for the purpose of carrying by boat, freight from one point on the lake to another.

The plaintiffs own a large body of land within the peninsula and it abuts the inner banks of the lake. The defendants also own land which abuts upon the lake.

The testimony on the part of plaintiffs tends to show that Horse Shoe Lake has never been used regularly for the purpose of commercial navigation, and that timber and products of the soil have been transported on the body of the lake only at irregular intervals, and never for any continuous series of years; that the soil adjacent to the lake is somewhat marshy, and is not adapted to the building of roads; and that it would be difficult to build roads leading from the lake to any populous center.

In the case of *Donnelly* v. *United States,* 228 U. S. 243, 30 Am. & Eng. Ann. Cas., 710, the court held that what should be deemed navigable water within the meaning of the local rules of property in the bed of a stream, is for the determination of the several States.

In the case of the *Little Rock, Mississippi River & Texas Rd. Co.* v. *Brooks et al.,* 39 Ark. 403, the court said:

"By the American doctrine, tide water, as a criterion of navigable character, has been discarded. Nor is it any objection to the public easement for navigation, that riparian proprietors of lands, along fresh waters, own to the thread of the stream. Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character, that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be pru-

dently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort, and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times can not be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats, or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round."

The chief contention of counsel for the plaintiffs is that the waters of the lake are not adapted to the purpose of navigation, and that they can never be used for that purpose, successfully, as a financial venture. We do not regard that as an exclusive test of the navigability of the lake.

(2) It is true the testimony shows that Horse Shoe Lake has never been employed for the purpose of commercial navigation except at irregular intervals. But the testimony of the defendants shows that it is susceptible of that use. The fact that the lake has never been employed for the purpose of transporting the products of the farmers along its banks is no evidence that it may not be so used in the future. It is the policy of this State to encourage the use of its water courses for any useful or beneficial purpose. There may be other public uses than the carrying on of commerce of pecuniary value. The culture of rice is being developed in this State, and the waters of the lake could be used for the purpose of flooding the rice fields and for other agricultural purposes. As the population of the State increases, the banks of the lake may become more thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be

needed for municipal purposes. Moreover, the waters of the lake might be used to a much greater extent—for boating for pleasure, for bathing, fishing and hunting, than they are now used. *Lamprey* v. *State,* 52 Minn. 181, 18 L. R. A. 670.

As said in the opinion in the case just cited, "to hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which can not, perhaps, be now even anticipated."

Therefore, we are of the opinion that Horse Shoe Lake is navigable within the meaning and spirit of our former decisions. The chancellor granted an injunction in favor of the plaintiffs, and decreed that the defendants should not hunt or fish within certain defined limits, and it is contended by counsel for the plaintiffs that the court erred in defining those limits.

From the southwest corner of Horse Shoe Lake Buck Bayou extends into the Mississippi River. When the St. Francis Levee District built its levee across Buck Bayou in 1905, it caused the waters of Horse Shoe Lake to be raised about five feet, and the plaintiffs' lands being on the side of the lake where the bank sloped, this resulted in the flooding of some of their property. In 1910 they installed a siphon for the purpose of drawing up the water within the lake and emptying it on the outside of the levee, and in this way reducing the waters of the lake to their former level. In about two years the siphon became choked up, and was not used any further.

(3) It may be said that the St. Francis Levee District was given the power to construct a levee, and, by the exercise of the right of eminent domain, to take whatever lands were necessary for that purpose. They did not acquire the lands of plaintiffs either by purchase or by the exercise of the right of eminent domain, and therefore plaintiffs had the right to pump the water out of the lake so that the waters might be restored to their former level, and thus prevent the flooding of their lands. When this right is conceded to plaintiffs, it is contended by their

counsel that the chancery court erred in defining the limits of their lands upon which the defendants might hunt and fish. But we need not consider this question for the reason that we are of the opinion that the chancellor should not have issued any injunction.

In the early settlement of this State, there was much waste and forest land, and an abundance of all kinds of game on them. It was never considered that a person hunting upon the uninclosed lands of another was a trespasser. See *Bizzell* v. *Booker,* 16 Ark. 308.

(4) By section 1913 of Kirby's Digest, which was enacted January 21, 1875, persons were prohibited from ranging or hunting on the enclosed land of another without the consent of the owner previously obtained, and such acts constitute a trespass. A like section is contained in the game law passed at the recent session of the Legislature, and approved March 11, 1915. Thus it will be seen that a person has the exclusive right to hunt and fish upon his enclosed land and private grounds, and that he should be entitled to equitable relief to prevent interference with that right.

If it should be urged that injunctive relief should not be granted in such cases because a civil action for trespass would lie against the defendants, and that the offending parties might be prosecuted criminally under the statute above referred to, it may be said that such action upon the part of the land owner would require a multiplicity of suits and would afford no adequate relief.

Our statute makes it unlawful to express or carry beyond the limits of the State any game fish or game of any description, and the statute has been held to be a valid one. *Fritz* v. *State,* 88 Ark. 571.

The record shows that the plaintiffs have expended much money upon their property, and that the right to hunt and fish on it is highly prized by them. As we have already seen, they have the exclusive right to hunt and fish on their own lands when they are enclosed. To hold that such rights are not of sufficient importance for the court to protect them by injunction, would be to deprive property owners of substantial rights, and to encourage

wrong-doers in trespassing on their lands, for there could be no substantial recovery in a civil action for trespass.

Counsel for plaintiffs contend that the lands are enclosed, and that for that reason they are entitled to injunctive relief. The record shows that the lands border upon the side of the bank of the lake which slopes, and that a fence was built around that part of the land which did not border upon the lake, but that the greater part of their land did border upon the lake.

(5) Whether or not a natural barrier may be of such a character as to serve as part of an enclosure depends upon the peculiar facts of each case. See *Dowdle* v. *Wheeler,* 76 Ark. 529.

Whether or not they are in any given case is a question of fact. In determining that question, the quality, locality, character and condition of the land sought to be appropriated or set apart from the adjoining land for the exclusive use of the parties who erected the barrier, should be considered. The size of the tract, its condition and appropriate use, with the surrounding circumstances, should be considered in determining whether the natural barriers, taken in connection with the artificial barriers are sufficient to notify the public that the land has been appropriated, and to impart to the claim of appropriation the indication of ownership which is necessary.

The banks of the lake on the outer rim are steep, but the inside banks next to the land of the plaintiffs are sloping. The land rises gradually, and it is difficult to tell where the high water mark is on that side of the lake. As we have already seen, the title to the bed of the lake to high water mark is in the State for the use of the public, and the public have a right to hunt and fish therein. There is nothing on the bank adjacent to plaintiff's land to indicate where the high water mark is; and, under these circumstances, we do not think the bank of the lake is sufficient indication of the ownership of the plaintiffs, taken in connection with the artificial barriers, to constitute an enclosure.

For the reason that the public has a right to hunt on the unenclosed lands of another, the chancellor should not

have granted any injunction. But the defendants have not taken an appeal in this case, and the injunction granted by the chancellor must stand.

It follows that the decree will be affirmed.

COLE v. BURNETT.

Opinion delivered June 21, 1915.

1. PARTITION—EQUITY JURISDICTION—ISSUE OF TITLE—PRACTICE.—Where plaintiff's title is disputed, equity will decline jurisdiction, in an action looking to a partition of the land, to try the question of title, and will dismiss plaintiff's complaint without prejudice, or the court may retain the bill for a reasonable time until the issue of title has been determined at law.
2. EQUITY JURISDICTION—PARTITION—ISSUE OF TITLE.—Where plaintiff in a partition proceeding, voluntarily submitted the issue of the title to the lands involved, to the chancery court, he will not be heard to complain on appeal, that the court had no jurisdiction.
3. EVIDENCE — TITLE TO LAND — TESTIMONY OF GRANTOR — CONFLICTING CLAIMS.—Where plaintiff claimed an interest in certain lands, by reason of a warranty deed from one T., it is competent for T. to testify in person, that he had also deeded the land to another; T. is a competent witness to testify to any fact within his own knowledge pertaining to the issues in the case.
4. APPEAL AND ERROR—FINDINGS OF CHANCELLOR—FACTS.—Findings of fact made by a chancellor will not be disturbed on appeal, unless they are against the clear preponderance of the evidence.
5. PROPERTY—TITLE TO REAL ESTATE.—The finding of the chancellor that the title to certain property was good in defendants, as against a claimant to an interest therein, through the same grantor, held to be supported by the evidence.

Appeal from Greene Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

Geo. A. Burr and *R. E. L. Johnson,* for appellant.

1. The court erred in retaining jurisdiction of the cause, and in rendering a final decree dismissing the complaint for want of equity. Adverse possession and the seven years' statute of limitations were pleaded in the answer, plaintiff's title was denied, and also that he was a tenant in common; and proof was introduced to establish the plea, sufficient, if not controverted, to establish an

adverse holding of the land. The complaint ought to have been dismissed without prejudice to another action at law to try out defendants' plea of adverse possession. 91 Ark. 26; 47 Ark. 235; 71 Ark. 544; 75 Ark. 6; 88 Ark. 610; 27 Ark. 77; 40 Ark. 155; 44 Ark. 344.

2. The decree is not sustained by the proof. The testimony of G. W. Treadaway, regarding what he claims was a verbal sale of his interest to J. T. Burnett, was incompetent because he had made appellant a warranty deed, and could not be heard to testify as to a prior verbal sale of his interest to some other person. The most that could be made of the transaction of sale as testified to by this witness would be that there was an executory contract of sale as between himself and Burnett, and would not be sufficient in law upon which to base an adverse claim of title against a co-tenant. 2 Am. & Eng. Enc. of L. 495; 100 Cal. 158; 34 Pac. 667.

It devolved upon the appellees to establish by satisfactory, clear and unequivocal proof that there was an ouster as against G. W. Treadaway and appellant by their father. Acts of disseizin must be unequivocal, and clear proof is always required. 2 Am. & Eng. Enc. of L. 49; *Id.* 491; *Id.* 499. See, also, 38 Cyc. 37.

No brief filed for appellees.

HART, J. On July 16, 1913, J. W. Cole filed a complaint in the chancery court against B. B. Burnett and A. C. Burnett, in which he alleged that he and the defendants were owners as tenants in common of eighty acres of land situated in Greene County, Arkansas, that he was the owner by purchase of an undivided two-fifths interest in said land, and that the defendants were owners of an undivided three-fifths interest therein. The prayer of the complaint was that the lands be partitioned according to the respective interests of the plaintiff and the defendants.

The defendants filed an answer in which they denied that they were tenants in common with the plaintiff in and to said land. They denied that the plaintiff had any title whatever in and to said land, averred that they were the

owners thereof as heirs of their father, and that he had purchased the land in his lifetime. They also set up title by adverse possession.

The facts, as developed by the defendants, are as follows:

Richard Treadaway was the original owner of the lands, and they were his homestead. He died some time during the Civil War and left surviving him his widow, who is now living and has been confined to the insane asylum ever since two or three years before this suit was instituted. He also left surviving him five children, namely, W. B. Treadaway, G. W. Treadaway, B. C. Treadaway, Mary Howard and Thomas J. Treadaway. John T. Burnett married Mary Howard, who was a half-sister of the other children, and went into possession of the lands in controversy in 1869, and remained in possession of it until his death about sixteen years ago. It is admitted that he purchased the interest of three of the heirs before he went into possession of the lands. In 1883 he obtained a warranty deed from Thomas J. Burnett for his undivided one-fifth interest in the lands, and the consideration recited in the deed is thirty dollars. John T. Burnett paid the taxes on the land and made various improvements on it up to the time of his death, about sixteen years before the institution of this action. After his death the widow and their two children, the defendants in this action, remained in possession of the land, and paid the taxes on it until the time Mrs. Burnett was placed in the insane asylum. Since that time the defendants have been in possession of the land.

The deposition of G. W. Treadaway was taken by consent September 22, 1914, and he testified that he had sold his undivided one-fifth interest in the land to John Burnett about thirty-five years ago, but that no deed was executed by him; that in 1873 he went to Burnett and Burnett paid him $10 for his interest; that about sixteen years ago he met the plaintiff Cole on the train, and the question of his interest came up, and he agreed to sell Cole his interest for $15, and some time thereafter, in

1896 or 1897, he executed a deed to Cole for his interest. He first stated that Burnett lived seven or eight years after he sold his interest to Cole, but subsequently stated that Burnett lived only four or five years after the execution of his interest to Cole.

G. W. Treadaway also stated that he told the plaintiff he had sold the land to John T. Burnett, and further stated that Burnett had not paid him all the money he thought was due him. He stated also that he went to Burnett and asked him for a further payment for his interest stating that he thought he ought to receive as much as the other heirs had received for their share, and that Burnett refused to pay him any more; that he made an agreement with Cole whereby he sold the interest of his brother Thomas J. Treadaway to Cole for $20; that he told his brother about this sale, and his brother authorized him to execute a deed to Cole for his interest; that pursuant to this direction he executed a deed to Cole for the undivided interest of his brother, and signed his brother's name to the deed; and that Cole paid him $15 for his own interest.

The defendants, who were, respectively, twenty-six and twenty-eight years of age, testified that they lived on the land with their father until he died, and that they had never heard of the plaintiff Cole, or their uncle, G. W. Treadaway, claiming any interest in the land while their father lived; and that their father claimed to own the land while he lived, and that they had claimed it since his death.

The plaintiff testified in his own behalf, and said that he agreed to pay G. W. Treadaway $15 for his undivided one-fifth interest, and at the same time agreed to pay him $20 for his brother, Thomas J. Treadaway's interest; that before the deed was executed and the sale consummated he examined the records, and found that the title was in the Treadaway heirs; that the deeds were executed and delivered to him, and the money paid by him to G. W. Treadaway; that G. W. Treadaway did not tell him that he had previously sold his interest to John T. Burnett;

that he had lived near the land and had known John T. Burnett nearly all his life; that after he had secured the deeds from the Treadaways, he told Burnett about purchasing their interest, and said that Burnett "got sore" about it, but did not claim that he owned their interest; that the deed from T. J. Treadaway to Burnett was filed for record between the time he first investigated the record, and the time he procured and filed for record the deed from T. J. Treadaway to himself; that after Burnett died, he met his widow and told her that as long as she stayed on the place and kept it up, he would not deprive her of her home; that soon after she was placed in the State insane asylum, he took action looking to the establishment of his title to an undivided two-fifths interest in the land.

The chancery court decreed that the plaintiff's complaint should be dismissed for want of equity and the plaintiff has appealed.

It is contended by counsel for the plaintiff that the court erred in retaining jurisdiction of the cause, and in rendering a final decree dismissing the complaint of the plaintiff for want of equity. In support of their contention, they rely upon numerous decisions of this court to the effect that partition can not be had of land held adversely, or the title to which is in dispute, unless the lands be vacant or not in actual possession. *London* v. *Overby,* 40 Ark. 155; *Cannon* v. *Stevens,* 88 Ark. 610; *LaCotts* v. *Pike,* 91 Ark. 26; *Hill* v. *Cherokee Construction Co.,* 99 Ark. 84.

(1-2) Where the plaintiff's title is disputed, our decisions have been uniformly to the effect that courts of equity will decline jurisdiction to try the question of title, if the rule is invoked. In such cases the complaint will be dismissed without prejudice, or, in analogy to the case of dower, the court will retain the bill for a reasonable time until the issue of title has been determined by a court of law. Had the plaintiff invoked the rule, it would have been the duty of the chancery court to have dismissed his complaint without prejudice, or to have retained the cause for a reasonable time with liberty to the plaintiff to bring

such action as he might be advised to establish his title. The record does not show that the plaintiff invoked the rule in this case. On the contrary, issue was joined on the question of title and depositions were taken, and that question, by consent so far as the record discloses, was presented to the court for determination. The plaintiff made no motion to transfer the cause to the law court, and made no objection to the jurisdiction of the chancery court to try the question of title. Having voluntarily submitted the issue of title to the chancery court, he can not now be heard to complain that such court had no jurisdiction. *Cribbs* v. *Walker,* 74 Ark. 104; *Apple* v. *Apple,* 105 Ark. 669, and cases cited; *Farmer* v. *Towers,* 106 Ark. 123.

(3) It is next contended by counsel for the plaintiff that the court erred in admitting the testimony of George W. Treadaway to the effect that he had sold the land to John T. Burnett. Counsel insists that Treadaway, having given a warranty deed to the plaintiff, should not be permitted to contradict the terms of that deed.

It is a familiar rule of law that the acts and declarations of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. But that rule has no application here. The declarations of Treadaway were not introduced in evidence. He testified himself. He was a competent witness, and, like any other witness, might testify to any fact within his own knowledge pertaining to the issues in the case. His testimony was as to facts within his own knowledge and the question of their truth or falsity was for the court trying the case.

(4-5) This brings us to the question as to whether the decision of the chancellor on the issue of title was correct. According to the uniform current of decisions in this State, findings of facts made by a chancellor will not be disturbed on appeal, unless they are against the clear preponderance of the evidence. G. W. Treadaway testified that he had sold the land to John T. Burnett in 1873, and that Burnett paid him $10 for his interest. Burnett was then in possession of the land, having purchased the

interest of the other heirs, and continued in possession until his death, paying the taxes on the land and making improvements on it. After his death, his widow and children remained in possession of the land until the present suit was instituted. Burnett's two sons, although they were small when their father died, testified that neither their uncle G. W. Treadaway, nor the plaintiff Cole, claimed any interest in the land during their father's lifetime. Cole permitted Mrs. Burnett and her children to remain on the land, and to pay taxes thereon for a number of years after Burnett's death. It is true that he said he did this because of his respect for Burnett's widow; and he denies that G. W. Treadaway told him that he had sold his interest in the land to Burnett, or that Burnett ever claimed to own that interest before his death. We think, however, that the surrounding circumstances tend to corroborate the testimony of the defendants, and are of the opinion that the finding of the chancellor is not against the clear preponderance of the evidence and should be upheld.

The decree will be affirmed.

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

Opinion delivered June 28, 1915.

1. CARRIERS—INJURY TO PASSENGER—DUTY OF CARE.—In an action for damages against a railroad company, growing out of personal injuries, an instruction that a carrier of passengers is required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted to prevent accidents to passengers, is erroneous, and was properly refused.
2. CARRIERS—INJURY TO PASSENGER—DUTY OF CARE.—While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril.
3. CARRIERS—DUTY TO PASSENGERS.—Independently of their pecuniary ability to do so, carriers are required to provide all things necessary to the security of passengers, reasonably consistent with their

business, and appropriate to the means of conveyance employed by them.

4. RAILROADS—INJURY TO PASSENGER—LOOKOUT STATUTE.—The lookout statute has no application to a case where plaintiff, a passenger, was injured while attempting to board a passenger train, after the same had stopped.

5. CARRIERS—INJURY TO PASSENGER BOARDING TRAIN AT PLACE NOT A SCHEDULED STOP.—Although defendant's train was not scheduled to stop at a certain place, when it did stop there, and plaintiff attempted to board the same as a passenger, it was the duty of the carrier to stop sufficiently long to permit plaintiff to board the train.

6. CARRIERS—DUTY TO PASSENGERS AT STATIONS.—A carrier is required at any station, when it is under the duty to anticipate the presence of passengers, to exercise the degree of care necessary, under the circumstances, for the protection of such passengers.

7. RAILROADS—INJURY TO PASSENGER BOARDING TRAIN—PRESUMPTION.—Where a passenger, while attempting to board or alight from a train, is injured by the operation of the same, a presumption of negligence on the part of the defendant arises in favor of such passenger.

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

C. F. Greenlee, for appellant.

1. Instruction 1, given at appellee's request, does not correctly state the law. It is immaterial whether the train was scheduled to stop at Wheatley for passengers or not; the fact is that it did stop there, and took on passengers when there were any waiting. The conductor was bound to see appellant if he looked in the direction of the platform, for she was in plain view. Likewise the other employees of appellee were there and should have taken notice of any passengers present, and if they failed in this, appellee was liable. 110 Ark. 522; *Id.* 232; 111 Ark. 129; 101 Ark. 424, 431, 432.

2. An instruction given by the court on its own motion was erroneous in that it told the jury that if the plaintiff was negligent in getting on the train in the manner and at the time she did, she could not recover, even though they found that the defendant was negligent. 76 Ark. 524.

3. It was error also to instruct the jury, in effect, that it was not the duty of appellee's employees to keep a

lookout even for passengers, unless a train was scheduled to stop at a certain point, etc. 83 Ark. 61-68.

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

1. The instructions given presented the case more favorably for the appellant than the law justified.

2. The testimony on the part of appellee was contradicted by the appellant, and the verdict of the jury ought to settle the case in favor of appellee on the facts.

SMITH, J. Appellant brought this suit to recover damages to compensate an injury sustained by her while attempting to board one of appellee's passenger trains at Wheatley, a station upon the line of appellee's road. Appellant came over the Missouri & North Arkansas Railroad from Cotton Plant to Wheatley, and arrived at the last named place about 10 o'clock P. M. of March 6, 1914, and she remained at the depot at Wheatley until 2:20 o'clock A. M. of March 7, at which time the train on which she expected to take passage arrived. This train was going west, and the engine stopped just before reaching the crossing of the M. & N. A. Rd. The depot at Wheatley was north of the track of appellee, and the mailbox was at the depot. The coach for colored people on which appellant undertook to embark, was east of the depot and east of the mailbox, and the mailbox was only a few feet north of the railroad track. Appellant described the circumstances of her injury as follows: "When the train run up to the depot and stopped, I come out of the depot and started back toward the colored coach, and met the porter, and I stepped up on the first step, but they didn't have any stool there, so I caught a-hold to the rod on this side next to the baggage car, and so I stepped on the first step, and the train made a snatch and threw me, and I went right down between the corner of the steps and the wheel, and the conductor, he held my hand to that left-hand rod until the train stopped, and the porter hadn't never got on the train. There wasn't no one on the ground. The conductor was out there on that little vestibule, and when the train stopped he held to my hand and the colored porter, he helped me on the train."

The testimony on the part of the appellee was to the effect that the conductor and the porter immediately after the train reached Wheatley both walked forward to attend to the changing of the mail pouches. That they saw nothing of any person who seemed to be trying to or desired to get on the train. That as soon as this change was made, they gave the signal for the train to proceed, and started back to get on themselves. That the train was moving when the conductor stepped on. That immediately after he had gotten on, he heard somebody scream, and looked around him and saw the appellant holding on to the train. He immediately pulled the bell cord to stop the train, and held the appellant to keep her from falling. The porter had not yet gotten on the train. The train stopped as soon as it could be stopped, and the porter, who had gotten to the steps by that time, helped the appellant on the train.

The proof further showed that Wheatley was not a regular station for this train, although it always stopped there on account of the crossing and for the exchange of mail, and that passengers were discharged there, and were also received at that station, and that passengers were so received and discharged on an average of about every other stop of the train.

(1) A number of instructions were asked by the appellant, several of which were given, and exceptions were duly saved to the court's refusal to give the others. These instructions which were refused dealt generally with the degree of care which should have been exercised by the appellee in regard to prospective passengers; while others were prepared under the theory that the lookout statute applied to the facts stated.

Instruction numbered 1, for instance, asked by appellant, which was refused by the court, told the jury that carriers are required to do all that human care, vigilance and foresight can reasonably do in view of the character and mode of conveyance adopted to prevent accidents to passengers.

This instruction has been repeatedly condemned by this court. For the giving of an instruction containing this language, the case of *St. Louis, I. M. & S. Ry. Co.* v. *Purifoy,* 99 Ark. 366, was reversed. In condemning that instruction, Justice BATTLE, speaking for the court, in the case of *Ark. Midland Ry. Co.* v. *Canman,* 52 Ark. 417, said:

(2-3) "'Railroad companies are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger reasonably consistent with their business and appropriate to the means of conveyance employed by them, and to adopt the highest degree of practicable care, diligence and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same.' The above is the correct rule. 2 Hutch. on Carriers, section 897. The instruction did not conform to the above rule, and is in conflict with many of our later decisions."

(4) We think no error was committed by the court in refusing to give the instructions based upon the lookout statute, as that statute has no application to the facts here stated. A correct statement of the carrier's duty under such circumstances is found in the language quoted from the *Purifoy* case, and the court gave other instructions, to which no exceptions appear to have been saved, declaring the duty of the carrier under the circumstances.

But over the objection of appellant the court gave an instruction numbered 1, which reads as follows:

"You are instructed that if you find from the evidence that the train in question was not scheduled to stop for passengers, or to take on passengers at Wheatley, the conductor was under no obligation to look around for passengers when the train stopped at that place."

(5-6) This is not a correct declaration of the law, and the giving of this instruction is error calling for the reversal of the case. It would make no difference that this train was not scheduled to stop for and take on passengers at Wheatley, provided it did in fact take on and discharge passengers at that station, and the proof is undisputed that such was the custom of the railroad company. The instruction given at the request of appellee is not a correct statement of the carrier's duty to passengers even at flag stations. The carrier is required at any station where it is under the duty to anticipate the presence of passengers to exercise the degree of care necessary under the circumstances for the protection of such passengers. The carrier can not say it was unaware of their presence, if its duty required it to know that passengers might be present, and where this duty rests upon it it is required to allow passengers a reasonable time to get aboard the train after they are given an opportunity to do so. And if without allowing such reasonable time the train is started, and the passenger is injured, the railway company is liable. *St. Louis, I. M. & S. Ry. Co.* v. *Wright,* 105 Ark. 269.

(7) The proof in this case is directly conflicting; and under the evidence on the part of appellee, there is no liability on account of appellant's injury, and we would not reverse this case had the cause been submitted to the jury under proper instructions. Appellant's evidence, however, if believed by the jury, is sufficient to warrant a recovery in her favor, for if she was injured in the manner stated by her, she was a passenger and was entitled to the benefit of the presumption which arises upon proof of injury from the operation of appellee's train. In the re-

cent case of *Huckaby* v. *St. Louis, I. M. & S. Ry. Co.*, 119 Ark. 179, which cites other cases to the same effect, we said that, where an injury results, from the operation of the train, to the passenger while boarding or alighting from the train, the presumption of negligence arises in favor of such passenger.

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

DOBBS v. TOWN OF GILLETT.

Opinion delivered June 21, 1915.

1. EMINENT DOMAIN—PROPERTY TAKEN WITHOUT CONDEMNATION—REMEDY OF LAND OWNER.—Where a municipal corporation possesses the right to take property by eminent domain, and does take property which might have been condemned by an exercise of that power, the remedy of the land owner is to sue for damages at law, and is not to seek mandatory process to compel withdrawal.
2. TITLE—EQUITABLE OWNERSHIP—DEFENSE OF POSSESSION.—The owner of an equitable title can not maintain ejectment, but he may defend his own possession under such title.
3. EQUITY JURISDICTION—CONDEMNATION OF LAND—INJUNCTION—DAMAGES.—Where a land owner sought to restrain the maintenance of a drainage ditch across his land, a finding by the chancery court, that he could not restrain the same, was proper, but his remedy for damages for the taking of his property, can not properly be shut off by the decree in that action, where the matter of damages was not there in issue.
4. MUNICIPAL CORPORATIONS—DRAINAGE OF STREETS.—The right of municipal corporation to construct a drainage system for the city, can not be abridged because water is thrown thereby upon one of its streets as a consequence; the fact that the city has not discharged its duty to drain one street, does not prevent the improvement of other streets and public places.

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

John W. Moncrief, for appellants.

1. The only ditch involved in this case is the "new ditch," as it is called. Since this suit was filed, Dobbs has acquired title to the land on which the "old ditch" was constructed. The decree takes away from him lands which

belong to him without any compensation. The error is prejudicial. 103 Ark. 312-315. No condemnation proceedings were ever instituted. Dobbs' title is complete, but, if not, his actual possession under an enclosure is notice to the world of an equitable title. 33 Ark. 119; 41 *Id.* 169; 91 Va. 397; 39 Neb. 741; 23 N. E. 1110; 80 S. W. 842.

2. Injunction was the proper remedy. 79 N. E. 27-32; 9 Am. & Eng. Enc. Law (2 ed.), 37, 38.

Botts & O'Daniel, for appellees.

1. Petitioners had no title at the time the suit was filed. 36 Ark. 456; 65 *Id.* 610; 107 *Id.* 374; 72 *Id.* 498; 111 *Id.* 606; 83 *Id.* 74.

2. The town had authority to exercise the right of eminent domain. Kirby's Digest, § § 2906, 5456-8.

3. Plaintiffs remedy was exclusively at law for damages. 51 Ark. 235-251; 84 *Id.* 366; 31 *Id.* 506; 45 *Id.* 252; 69 *Id.* 104; 79 *Id.* 154; 80 *Id.* 503; 107 *Id.* 449.

McCULLOCH, C. J. The plaintiff, W. W. Dobbs, and others, are the owners of real property in the incorporated town of Gillett, and instituted this action against the municipality to restrain the latter in maintaining a ditch constructed across lands claimed to be owned by plaintiff Dobbs. Dobbs seeks relief on the ground that the ditch was constructed over his lands, but the ground for relief asserted by the other plaintiffs is that the water is diverted through this ditch from its natural drain-way and cast upon Park Avenue, one of the streets of the town, which is thus overflowed on to the adjoining lots of these plaintiffs. The chancellor denied the relief prayed for by each of the plaintiffs, and they have appealed to this court. The relief sought by the plaintiffs being upon separate grounds, it is proper to discuss the issues separately, though the parties joined in one action.

(1) Plaintiff Dobbs owns a block of ground fronting west on Sixth Street and north on Park Avenue. He also owns a strip on the west side of Sixth Street, over which, he contends, the ditch was constructed. The controversy between him and the town arises as to his ownership and possession of that strip, or, rather, as to the width of it.

He contends that he owns up to the line of what is called the Thomas Addition, which constitutes a strip 170 feet wide running north and south between Sixth Street and the line of the Thomas Addition. The contention of the defendant is that Dobbs owns only 140 feet of the strip, and that the ditch is not constructed along his part of it. Dobbs purchased from one Leslie, and it is conceded that the description in the original deed did not cover the thirty feet involved in this controversy. He was in possession of it, and had it under fence, however, when the ditch was dug, and the evidence on his part tended to show that when he purchased from Leslie the agreement was that he was to have up to the line of the Thomas Addition. After the commencement of this suit, Leslie executed to Dobbs another deed, correcting the description so as to vest the legal title in Dobbs to the whole of the land in controversy. The evidence is sufficient to show, in other words, that at the time the ditch was constructed, Dobbs was in possession of the disputed strip under an equitable title, and that he acquired the legal title since the commencement of the action. The evidence is also undisputed that when the town authorities went there to open the ditch, Dobbs and his wife consented to the construction of the ditch on condition that it should be afterward determined whether or not they owned the land. Pursuant to that understanding, they withdrew their fence, which enclosed this strip. They consented to the construction of the ditch, but not unconditionally so as to cut off their right to claim compensation for the taking of the property. Now, the right of the city to condemn the property of the plaintiff Dobbs is clearly granted by the statutes of the State. Kirby's Digest, section 2906. In addition to that, the plaintiffs consented to the taking of the property for that purpose, and even though that consent was conditional, they have no right to withdraw it so as to force the town to discontinue the maintenance of the ditch. It has been decided by this court in many cases that where the right of eminent domain exists, and property is taken which might be condemned by the exercise

of that power, the remedy is to sue for damages, and not to seek mandatory process to compel withdrawal. This doctrine is announced in railroad cases, but the principle is the same with respect to municipal corporations which have the right to condemn for public use, but have taken the property without proceeding regularly by condemnaation. We have held in those cases that the remedy is at law to recover damages which might have been assessed in condemnation proceedings. *Organ* v. *Memphis & Little Rock Railroad Co.*, 51 Ark. 235. The chancery court was correct, therefore, in refusing to grant equitable relief to Dobbs, for his remedy at law is adequate and complete.

(2-3) The court went further, however, than it was necessary to go, and decided that Dobbs had no title which would justify him in objecting to the construction of the ditch. We think the proof tended to show that Dobbs had the equitable title, and was in possession of the property, and that the proof was sufficient to establish that fact. The owner of an equitable title can not maintain ejectment, but can defend his possession under such title. If he has any remedy for the recovery of damages for the wrongful taking of his property, that relief should not be cut off by the decision in this case. He did not ask for such relief, and the facts stated in the complaint do not show the extent to which he has sustained injury, if at all. Therefore, it was not the duty of the court to transfer the cause so as to enable him to pursue his remedy at law. He was insisting upon relief which could only be granted in equity, and therefore the court properly heard the cause upon its merits and decided it against him. But the decree was broader than was necessary in settling the rights of the parties so far as concerns the equitable relief sought in the complaint, and it will be modified so as not to operate to the prejudice of the plaintiff Dobbs in the assertion of whatever remedy that may be open to him at law.

Now, as to the relief of plaintiff Wallace and others: They owned property fronting on Park Avenue, and allege in their complaint that the municipality has, in the

construction of this ditch, wrongfully gathered up surface water, diverted it from its natural course, and cast it upon Park Avenue, causing that street to be flooded and the surface water to be forced over on the property of the plaintiffs. The proof shows that there is a drainway running in a northwesterly course across the northeast corner of the Thomas Addition, and crossing Park Avenue west of the property of the plaintiff Wallace. There is a controversy as to whether that was a natural or an artificial drainway, but we think according to the preponderance of the evidence it was artificial. At any rate, the town, several years ago, caused a ditch to be dug from the point south of the Thomas Addition running almost due north to connect with the drainway running across the Thomas Addition. That is referred to as the old ditch, and there is no controversy about the maintenance of that as a drainway. The ditch in controversy was constructed from the point where the old ditch runs into the drainway which crosses the Thomas Addition and runs due north from that point to Park Avenue. The Thomas ditch has been dammed up, and all of the water now finds its way through the new ditch, which is involved in this controversy. There is some evidence tending to show that the water carried to Park Avenue puts that highway in a bad condition for travel, but the testimony is conflicting on that point as to whether any real damage is done to the highway. There is no proof in the record, so far as abstracted, that the lands of the plaintiffs are damaged in any way, and if they are entitled to any relief at all, it must be solely upon the ground of the damage done to Park Avenue.

(4) There is also a controversy as to whether the natural drainway of the lands north of the old ditch is through the Thomas land or whether it is along the course of this ditch. We can not say that the preponderance of the testimony shows that the natural drainway was over the Thomas Addition. The chancellor, we assume, found that the new ditch was dug along the natural drainway, and the evidence does not preponderate against that find-

ing. The municipality had the right to dig the drainway, and it can not be prevented from constructing that improvement merely because an additional quantity of water is cast upon Park Avenue. It becomes the duty of the municipality to take care of all of its public streets and to properly drain them. The fact that it has not discharged that duty with respect to one of the streets does not prevent the improvement of other streets and public places. The proof shows that it was necessary to construct this ditch in order to carry off stagnant water, and if Park Avenue was damaged as a highway by reason of the fact that more water was cast upon it than would readily drain off, it was the duty of the municipality to provide some method of draining it, but the remedy of the adjoining property owners was not to prevent the first improvement, but to seek through proper channels to have the municipality exercise its duty with respect to improvement of Park Avenue. That was a matter within the power of the town council, and that is the tribunal where affirmative relief must be sought, so far as the improvement of the public street is concerned.

There is some conflict in the authorities as to what the rights of these plaintiffs would be if the facts were that surface water was gathered up and forced through unnatural channels, and cast upon the street, and thence upon their land. Such is not the state of the case that we have here, for the proof shows that the water was not diverted from a natural drainway, nor does it show that the property of the plaintiffs was injured thereby.

The decree of the chancery court is therefore affirmed with the modification indicated above with respect to the rights of the plaintiff Dobbs.

ELDER v. JOHNSON.

Opinion delivered June 28, 1915.

1. WATERS—EXTENT OF RIPARIAN RIGHTS.—Where land touches a lake only at a point, the owner of the land can not take any appreciable interest in the lake, if the lake is divided amoung the riparian owners, in accordance with the rules of law for the division of the same.

2. WATERS—RIPARIAN RIGHTS—SWAMP LANDS—EVIDENCE.—The owner of certain surveyed land, *held* not to have established his right to a larger tract of land, which was part of a swamp land tract, which had been conveyed to a third person by the State, after a compromise agreement had been made between the State and the United States, that the said larger tract was swamp land.

Appeal from Greene Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

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

If the land involved here bordered on a nonnavigable lake at the time of the original survey in 1847, appellant has title under his riparian rights between parallel lines to the center of the lake as it existed at the time of the Government survey. 88 Ark. 37; 82 Ark. 367.

Appellees have introduced no proof denying the existence of the lake at the time of the survey, or even at the present time, neither is there any showing that the Government has ever challenged the correctness of the original survey. Appellees can not impeach the correctness of that survey. 128 U. S. 691; 158 U. S. 253; 197 U. S. 510.

R. E. L. Johnson and *Burr, Stewart & Burr,* for appellees.

1. The decree was correct on the facts and should be affirmed. The evidence introduced by appellees on the remand of the case was not an attempt to challenge the correctness of the original survey, but was sufficient to show that at the time of that survey the land in question was land and not lake bed, and to overcome appellant's apparent riparian rights.

SMITH, J. This cause has once before been before this court, where a full statement of the facts was made. 92 Ark. 30. In the original opinion on the former appeal, it was held that Elder had a valid title to all the land in controversy, but there was an additional opinion upon the motion for rehearing in which, for the reasons there stated, the conclusion was reached that Elder's claim by adverse possession could not be sustained, and the court there said:

"This conclusion makes it necessary to give attention to another feature of the case not discussed in the original opinion. The tract of land in controversy was, at the time of the Government survey in the year 1846, within the meandered lines of Cache Lake, according to the official plat of that survey, and the plaintiff is the owner of a tract of 17.92 acres abutting on the meandered line. This gives the plaintiff the *prima facie* title to the center of the lake by virtue of his apparent riparian rights. *Little* v. *Williams,* 88 Ark. 37; *Rhodes* v. *Cissel,* 82 Ark. 367.

"But a mistake in the survey is subject to correction by the Government. *Little* v. *Williams, supra.*

"The United States Government in 1885 patented to the State of Arkansas all of the unsurveyed lands in this and certain other townships as swamp and overflowed land, and it does not appear that the land department ever caused another survey to be made and officially determined that the area in controversy was land, instead of lake-bed, at the time of the original survey. The patent does not specifically describe the several tracts of land, but in general terms conveys 'all of the unsurveyed land' in the township named. If it was in fact land, instead of lake-bed, at the time of the original survey (of which there is no direct proof in this record), the subsequent patent by the Government of unsurveyed land conveyed the title to the State of Arkansas, and the State, in turn, conveyed it to Jones, the defendants' grantor. And if it be found that the land department of the United States has officially declared this particular tract to have been land, instead of lake-bed, at the time of the original survey, that would overturn the *prima facie* riparian rights of the plaintiff.

"These matters are not sufficiently developed in the records for us to reach a decision as to the rights of the parties on this branch of the case. We can not determine whether the facts of the case fall within the doctrine announced in *Little* v. *Williams, supra,* or of *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338.

"The plaintiff is not entitled to an affirmance of the decree on the strength of his *prima facie* showing of riparian rights, for it is obvious that, if he be given that portion of the land between parallel or converging lines running to the center of the lake, he would not be entitled to all of the land in controversy; and we can not tell from this record how much, if any, he would be entitled to. Inasmuch as this branch of the case was not fully developed, we will leave it open for further proceedings in the chancery court, with leave to both parties to introduce further testimony."

Upon the remand of the cause a trial was had of the issue, for the decision of which, the case had been reversed. At the trial the appellant introduced the field notes for section 27, township 19 north, range 5 east, and offered no other evidence. On behalf of appellees, the following evidence was introduced: A certified copy of the field notes and the plat of the township showing Cache Lake; a certified copy of Swamp List No. 23; which instrument shows the selection and approval of 2,417.17 acres of land under the swamp land grant of September 28, 1850. Among the lands embraced in this certificate was a tract described as "Unsurveyed part of section 27, township 19 north, range 5 east, containing 480.88 acres." And the certificate recited that the foregoing tracts of land, embracing an area of 2,417.17 acres, "are shown to be swamp land by evidence on file in this office, and are free from conflict by sale or otherwise." This certificate was duly attested, and there was introduced a patent which recited that the several tracts or parcels of land therein described, including the unsurveyed part of section 27, township 19 north, range 5 east, had been selected as "swamp and overflowed lands." There was also introduced the record of the Arkansas Compromise which had been approved by Congress on April 29, 1898. Under the compromise, the deed from the State to John B. Jones dated October 2, 1884, for the fractional northeast section 27, township 19 north, range 5 east, containing 142.08 acres was confirmed. Appellees also offered in evidence two depositions of C. E. Waddell, the county surveyor of

that county, who testified that he had surveyed the land in question at the request of appellant, and that this survey had been made in accordance with the field notes, and that there are 480.88 acres of unsurveyed land in section 27, and the 142.08 acres in the northeast quarter of said section in dispute is a part and parcel of the 480.88 acres, and that there was a strip of land of a triangular shape between the 17.92 acre tract and the lake, and from his testimony as to the character and size of the timber on this strip, the conclusion necessarily follows that this strip was land, and not lake, at the time of the Government survey in 1847. Waddell's evidence does show, however, that in running the north line of appellant's land, the corner called for by the field notes is near, if not on, the bank of the lake, and thus the triangle is formed with appellant's east line and the bank of the lake forming two sides of the triangle and the short side of the triangle is the south side, so that appellant's land touches the lake only at a point, if at all.

Appellant insists that his title to the small tract of surveyed land containing 17.92 acres gives to him as a riparian owner the remainder of that quarter section containing 142.08 acres, but he, of course, concedes that he does not otherwise have title to it. But the record set out above demonstrates that the remainder of the quarter section was land, and not lake. The swamp land certificate No. 23, which was approved by the commissioner of the general land office, and the Secretary of the Interior, recites that the tracts of land described in that certificate "are shown to be swamp land by evidence on file in this office, and are free from conflict by sale or otherwise." The compromise settlement between the State and the United States recognizes the existence of 142.08 acres of swamp land in this quarter section, and confirmed a conveyance from the State through which appellees claim. Moreover, the proof is not clear that appellant's land touches the lake at all, and if it does it is only at a point, and, therefore, appellant could take no appreciable interest in the lake if it were divided among the riparian owners in accordance with the rules for the division thereof.

We think from the evidence the chancellor must necessarily have found, although the decree recites no finding of fact, that the disputed area was in fact land, instead of lake, at the time of the original survey, and that this fact has been officially recognized by the land department of the United States as evidenced by the instruments referred to above. Such being the state of the record, the decree was properly rendered for appellee. *Little* v. *Williams,* 88 Ark. 37; *Chapman & Dewey Lbr. Co.* v. *St. Francis Levee District,* 232 U. S. 186. Affirmed.

GORDY HARRIS v. STATE.

Opinion delivered June 21, 1915.

1. PERJURY—MATERIALITY OF FALSE TESTIMONY.—In a criminal prosecution for grand larceny of a certain cow, deceased as a witness for defendant, testified falsely, as to the number of head of cattle that he had sold to a partner of the prosecuting witness. *Held,* the testimony, though false, could not be made the basis of a prosecution for perjury, since it was not material to the issue of whether defendant had stolen a certain cow.
2. PERJURY—MATERIALITY OF FALSE TESTIMONY.—In perjury cases it is not necessary that the false testimony should tend directly to prove the particular issue in the trial in which it is given, but if it is circumstantially material or tends to support or give credit to the witnesses with respect to the main fact, or to discredit a witness, it is sufficient to constitute the basis of the charge.

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

Geo. M. LeCroy, for appellant.

1. The materiality of the evidence on which perjury is assigned, must be established by the evidence, and can not be left to presumption or influence. 32 Ark. 197; 32 Iowa 403; 99 Ark. 631; 64 *Id.* 474; 86 *Id.* 525, etc. The alleged false testimony was not material.

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

1. The court left it to the jury to say whether the testimony was material or not. 88 Ark. 115-118.

2. The State did show that the evidence was material, and that appellant swore falsely. 53 Ark. 95; Cyc. (Perjury), p. 1419, note 5, 657; Kirby's Digest, § 1968; 110 Ark. 549, 553.

McCULLOCH, C. J. This is an appeal from a judgment convicting the defendant, Gordy Harris, of the crime of perjury. The substance of the charge set forth in the indictment is that in a certain criminal case on trial in the circuit court of Union County, wherein one Hez McLemore was being tried upon the charge of grand larceny in stealing a cow, the property of C. H. Murphy, the defendant herein was sworn as a witness, and testified that he had sold one Cage McLemore ten or eleven head of cattle and no more, whereas in truth, and in fact he had sold to Cage McLemore 20 or 21 head of cattle. It is alleged in the indictment that the said testimony was false, and that it was material to the issue presented in that trial.

There are numerous assignments of error, but we content ourselves with the discussion of the sole question whether or not the alleged false testimony was material to the issue in the trial in which it was given, for we have reached the conclusion that a decision of that question determines the case.

The testimony shows the following state of the record in the case of *State* v. *Hez McLemore,* in which defendant's alleged false testimony was given: Hez McLemore was accused of stealing a certain cow, described as a cow with a crumpled horn and branded with the letter "M" on the left hip, which said cow was alleged to have been the property of C. H. Murphy. Murphy and Cage McLemore, the brother of Hez, had been engaged in the cattle business and had purchased several hundred head of cattle with money furnished by Murphy. The agreement between them was that Murphy should furnish the money, and Cage McLemore should buy the cattle and put them in the range, and that when sold, there should be a certain division of the profits. The proof shows that there were as many as 245 head of cattle in the range at one time, but

when they were finally gotten up there were 83 of them missing. There was subsequently another contract entered into between those parties whereby the legal title of Cage McLemore passed to Murphy, and he became the sole owner of the cattle. The cow with the crumpled horn was, according to the proof adduced by the State in that case, one of the number purchased by Cage McLemore for Murphy, and was one of the 83 missing cattle. There was an improvised slaughter pen concealed in a thicket near Hez McLemore's house, and the crumpled horns of this cow were found at that place. The theory of the State was that all of the missing cattle were stolen from the range by Hez McLemore and were butchered at the concealed slaughter pen in the thicket near his house. The defendant, Gordy Harris, was also indicted for participation in the offense. Defendant is a brother-in-law of the two McLemores, and in the trial of Hez he was introduced as a witness in the latter's behalf. He testified that he bought from one Sandy Simmons a cow with a crumpled horn and butchered it himself at the concealed slaughter pen in question, and that the horns found by the State's witnesses at the pen are those that were taken from the Sandy Simmons cow. Hez McLemore was convicted in that trial, but on appeal to this court the judgment of conviction was reversed on account of two errors of the court, one was the giving of an instruction, telling the jury in substance that they could convict the defendant in that case if they found that he had stolen *any* cow, the property of Murphy, within three years before the finding of the indictment. *McLemore* v. *State,* 111 Ark. 457.

The defendant Harris testified in the trial, in addition to that part of his testimony already referred to, that he and Hez McLemore had been buying cattle together and butchering the same and peddling the meat at Felsenthal, Arkansas. He testified that there had been bought 44 head of cattle, some of which belonged to him individually, and the remainder to him and Hez in partnership and that out of that number they had butchered 15 or 18. His statement was that he had butchered 10 or 12 of his

individual cattle, and that 5 or 6 of the partnership cattle had also been butchered.

The testimony which is now alleged to have been false was brought out on cross-examination. He was asked the question whether or not he had sold cattle to Cage McLemore for Murphy, and he replied that he had sold 10 or 11. There was an effort during his cross-examination to show by the checks which had been given to him by Cage McLemore, that he had been paid for 21 head of cattle. The testimony in the present case shows conclusively that the various checks were given to the defendant by Cage McLemore for sums aggregating the price of 21 head of cattle, but the defendant satisfactorily showed by the testimony of himself and other witnesses that two of the checks did not represent sales of cattle to McLemore, but did represent money which McLemore had borrowed from him to pay for two head of cattle bought from certain other parties, one Sinclair and one Taylor. He showed that Cage McLemore bought a cow from Sinclair and did not have the money to pay for it at the time, and that he (defendant) furnished the money, and later Cage McLemore gave him one of the checks in question to return the sum of money so advanced, twelve or thirteen dollars. One of the other checks was represented by the price of a cow which defendant bought from Taylor for McLemore and paid for it, and McLemore gave him a check to reimburse him for the amount so paid. So it may be said that the undisputed testimony in this case established the fact that the defendant sold to Cage McLemore 19 head of cattle, and that he testified in the former trial that he only sold 10 or 11 head of cattle to McLemore. He undertakes now to explain by showing that the additional 8 head of cattle were partnership property, and that when he spoke of the sale of the 10 or 11 head of cattle sold to McLemore he meant his individual cattle, and did not take into account the 8 head of partnership cattle. The whole of his testimony in the former trial was reproduced before the jury in the trial of this case, and, notwithstanding the attempted explanation, his testimony was open to the con-

struction that he had withheld the fact of the sale of the additional number of cattle, and had falsely testified that he only sold 10 or 11 head to McLemore.

(1) Now, the question is whether or not this testimony was material in the investigation of the charge against Hez McLemore. We are of the opinion that it was not material, and that it can not, for that reason, be made the basis of the charge of perjury. The inquiry in that case was whether or not Hez McLemore stole the cow with the crumpled horn, alleged to belong to Murphy, and the substance of defendant's testimony was that that cow did not belong to Murphy, or at least that the cow which had the crumpled horn found at the concealed slaughter pen, was the one that he (defendant) bought from Sandy Simmons and slaughtered at that place. It was entirely proper and material to cross-examine defendant as to how many cattle he had, what disposition he had made of them, and how many had been killed at the slaughter pen; but we are entirely unable to discover what materiality there was in showing how many he sold to Cage McLemore. He testified in that trial that he had purchased 44 head of cattle; that 15 or 18 of them had been slaughtered, and 10 or 11 had been sold to Cage McLemore. He was not asked to account for the balance of the cattle, and it was not shown either in that case or this, what became of those that were not so disposed of. In the former case the prosecuting attorney asked the defendant whether he had sold cattle to anybody else except Cage McLemore, and he replied that he had not sold to any one. But the question was not asked him what became of the remainder of the 44 head of cattle, and he did not state whether they were still on hand, or had died, or strayed away, or what had become of them. This discrepancy of 8 head of cattle, in accounting for the number sold to Cage McLemore, could not, as it appears to us, have had any bearing upon the issues in that case, or even upon the question of the credibility of the witness himself.

(2) We adhere to the rule often announced by this court that in perjury cases it is not necessary that the

false testimony should tend directly to prove the particular issue in the trial in which it is given, but if it is circumstantially material or tends to support or give credit to the witnesses with respect to the main fact, or to discredit a witness, it is sufficient to constitute the basis of the charge. *Robertson* v. *State,* 54 Ark. 604; *Scott* v. *State,* 77 Ark. 455; *Lewis* v. *State,* 78 Ark. 567; *Smith* v. *State,* 91 Ark. 200. But, in any event, the materiality of the testimony must be shown, and as an illustration of that rule, the decision of this court in *Marvin* v. *State,* 53 Ark. 395, may be examined with profit. According to the truth of the matter, as shown in the testimony adduced in the trial of the present case, 37 of the 44 head of cattle bought by defendant were accounted for; whereas, according to the false testimony adduced in the other trial, only 29 were accounted for; but, as before stated, we are unable to see how the difference of 8 head of cattle could have been material. With the remainder of the cattle unaccounted for, or any attempt to account for them, this discrepancy could not have even affected the credibility of defendant as a witness in the particular inquiry concerning the question whether or not Hez McLemore had stolen the cow with the crumpled horn.

The case has been fully developed by the State, so far as concerns all matters affecting the materiality of the alleged false testimony, and no useful purpose would be served by remanding the case for a new trial. The judgment is therefore reversed and the cause dismissd.

JIMMERSON v. FORDYCE LUMBER COMPANY.

Opinion delivered June 28, 1915.

1. EJECTMENT—CERTIFICATE OF ENTRY.—The holder of a certificate of entry may maintain an action of ejectment.

2. JUDGMENTS—BINDING EFFECT—MATTERS WHICH MIGHT HAVE BEEN RAISED.—Parties to litigation must present all their defenses thereto, and they will be bound upon any issue which might have been adjudicated.

3. TITLE—ISSUANCE OF PATENT—RELATION BACK.—A patent, when issued, relates back to the initial step in the procurement of the title, namely the original entry.

4. TITLE—PATENT—CERTIFICATE OF ENTRY.—A patent relates back to the entry, upon which it is based, and an adjudication of title after the initial step is taken, in obtaining the certificate of entry, will bar any further litigation concerning those rights, after the issuance of the patent.

Appeal from Cleveland Circuit Court; *H. W. Wells*, Judge; affirmed.

Bratton & Bratton, for appellant.

1. The plea of *res adjudicata* can not be sustained. The judgment in ejectment was rendered before the issuance of the patent. The compliance with the homestead laws and the issuance of a patent constituted a new title never adjudicated. 106 Ark. 125, 131; 98 *Id.* 33; 94 *Id.* 221; 39 *Id.* 120; 55 *Id.* 286; 8 Ark. 344; 95 *Id.* 438; 71 *Id.* 491; 149 Fed. 694; 6 *Id.* 379; 4 Okla. 272; 3 *Id.* 649; 114 U. S. 47; 116 *Id.* 48.

S. F. Morton and *Woodson Moseley*, for appellee.

1. The *plea* of *res adjudicata* was properly sustained. The final judgment in the former case is a complete bar. 4 Wall. 174; 199 U. S. 142; 67 Am. St. 484; 113 Mich. 565; Kirby's Dig., § 2738; 23 How. 235; 32 Cyc. 817; 49 Ark. 87.

2. In an action at law by a patentee, it is competent to set up a prior equitable title in bar. 1 Black 132; 26 Ark. 54; 29 *Id.* 560; 32 Cyc. 207, 208; 101 U. S. 260.

McCULLOCH, C. J. This is an ejectment suit, the plaintiff Jimmerson claiming title under a patent issued to him from the general land office of the United States pursuant to a homestead entry made April 4, 1905. The defendant pleads a former adjudication in another action between the parties in bar of the right of the plaintiff to recover in this action.

It appears from the pleadings that the defendant asserted title to the lands in controversy under an entry made with the register and receiver of the land office of

the United States anterior to the date of plaintiff's homestead entry. Plaintiff took possession under his entry, and in the year 1907, defendant instituted an action against him in the circuit court of the county where the land is situated to recover possession thereof, claiming title under said entry made with the United States land office. There was a jury trial of that case which resulted in a judgment in favor of the defendant in the present case. No appeal was prosecuted from that judgment, and it stands unreversed and in full force. Plaintiff remained in possession of the land until the year 1913, when the defendant sought to enforce the judgment against him by issuance of process thereon, and he instituted an action in the chancery court to enjoin the defendant from causing the judgment to be executed. The chancery court decided the cause in favor of the defendant, and on appeal, this court affirmed the judgment. We decided that the circuit court had jurisdiction in the ejectment suit, and that the plaintiff could not "set up in a court of equity, as a ground for enjoining the enforcement of the judgment at law, matters which he might have, but neglected to interpose in the defense of the suit at law." At the conclusion of the opinion, the following was added: "Appellant, however, alleges in his complaint that since the determination of the ejectment suit against him, the Interior Department of the United States has issued to him a patent to the land, and we do not in this opinion wish to be understood as denying him his right to assert his title in a proper suit in the proper forum." 106 Ark. 127.

The plaintiff then instituted the present action to recover possession, and insists that the language quoted above is decisive of his right to assert his title in this suit. We are of the opinion, however, that it was only meant to exclude from the opinion in that case any determination of what the plaintiff's rights would be in an action at law asserting his title. We did not mean to decide a question which was not then before us, and did not attempt to do so. In fact, the judgment in the ejectment suit was not in the record of the case then under consideration.

(1-2) The trial court overruled the demurrer to the answer of the defendant, setting up the former judgment in the ejectment suit in bar of the present action, and the question presented here is whether or not the answer tendered an issue which constituted a defense to this action. It will be noted from the recital of facts that both parties claimed under certificates of entry, which were sufficient under the statutes of this State to authorize the holder to maintain an action of ejectment. Kirby's Digest, section 2738. It is true, also, that that suit was an adjudication of all the rights of both parties concerning the subject-matter of the litigation. The plaintiff in the present suit, who was the defendant in that suit, was in possession under a certificate of entry which constituted equitable title and was sufficient to afford a defense against one who did not have a better title. It was the duty of the plaintiff to present all of his defenses in that case, and he is bound upon any issue which might have been then adjudicated. *Daniel* v. *Garner,* 71 Ark. 484. The record shows that the plaintiff did in fact, set up a defense under his homestead certificate and that the issue was decided against him.

(3) That judgment adjudicated, between these parties, the title and right of possession, and the only question presented now is whether or not the issuance of the patent subsequent to the rendition of that judgment constituted a new title which was not covered by that adjudication. We are of the opinion that it was not a new title, for it has frequently been decided by the Supreme Court of the United States that a patent, when issued, relates back to the initial step in the procurement of the title, which is, of course, the original entry. *Stark* v. *Starrs,* 6 Wall. 402; *Hussman* v. *Durham,* 165 U. S. 144.

(4) That being true, it follows that an adjudication of the rights of the parties after the initial step is taken, in a case where those rights may be adjudicated, will bar any further litigation concerning those rights after the issuance of the patent. We do not overlook the decision of the Supreme Court of the United States in *Gibson* v. *Chouteau,* 13 Wall. 92, where that court said that "the

doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land," and held that a statute of limitations did not run before the issuance of a patent so as to intercept the legal title which was subsequently conveyed by the issuance of the patent. While it is true that the statute of limitations will not run so as to bar the assertion of title under the patent, it is different where there has been an adjudication of rights within the court's jurisdiction, and that constitutes a bar to further litigation on the subject, even though the judgment was rendered prior to the issuance of the patent. That is, we think, conceded in the opinion in the case just referred to where the court recognized the power of the States, pursuant to their own statutes, to authorize the adjudication in their own courts of equities between parties concerning entries in the United States land office, or patents issued pursuant thereto. To hold otherwise would be to restrict the adjudication merely to the temporary right of occupancy. The action of ejectment is a possessory action, but the title to the property sought to be recovered may be, and in this instance was, adjudicated. The adjudication of the title before the issuance of the patent has the same force as an adjudication afterward, for, as before stated, the patent relates back to the entry which was in force at the time the title was adjudicated in the former case. We hold, therefore, that the former judgment was conclusive of all the rights in the present case, and bars the plaintiff's right to recover the land under a claim which was asserted at that time.

There is no question involved here of jurisdiction of the court to determine the rights of rival claimants while a controversy was pending between them before the proper officer of the Interior Department, for, as we said when the case that was here before (106 Ark. 127), there is no controversy pending there.

Judgment affirmed.

LEROY v. HARWOOD.

Opinion delivered June 28, 1915.

1. VENDOR AND PURCHASER—CONTRACT OF PURCHASE—GOOD TITLE.—Where a contract for the sale of land provided that the vendor would furnish to the purchaser, a title satisfactory to the purchaser's attorney, the purchaser is not bound to accept a title which the purchaser's attorney considered doubtful.
2. VENDOR AND PURCHASER—CONTRACT OF PURCHASE—GOOD TITLE.—Under a contract to convey land, the vendor was the surviving partner of a firm, to whom the land in issue had been conveyed as trustee for his partner, in order to secure a debt due the firm; after the partner's death the land was deeded to his administrator, and without notice to the administrator, heirs or creditors of deceased, the probate court ordered a conveyance to the surviving partner, and later ordered the surviving partner and administrator to join in executing a conveyance to the purchaser in the contract; *Held*, the purchaser having deposited money to be paid when a deed was accepted, was entitled to recover back the same, the title offered by the vendor being, at least, doubtful, and the purchaser's attorney, in rejecting said title, can not be said to have acted arbitrarily.
4. CANCELLATION OF DEEDS—REMEDY OF PURCHASER—AMENDMENT BY VENDOR.—Where the vendor, under a contract to sell land, failed to comply with the contract, to make a title that the purchaser's attorney would approve, and the purchaser has rescinded the trade, the vendor can not thereafter amend his answer, bring in new parties, and seek to prove that he might thereafter be able to make a good title.

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

STATEMENT BY THE COURT.

This suit was instituted by the appellee against the appellant to rescind and cancel a contract which appellee alleged was entered into between the parties, and which is as follows: "It is agreed by and between Joe Leroy and Undine Harwood wherein the said Joe Leroy agrees to sell to the said Undine Harwood northwest quarter of the northeast quarter of section 14, township 3 south, of range 19 west, lying in Garland County, Arkansas, for a consideration of twenty-five hundred dollars in cash. It appearing that certain claims probated against the estate of M. Soncini, deceased, are now a lien against the said

property, it is agreed that the said Undine Harwood will pay to the Citizens National Bank the said sum of money to be paid to the said Joe Leroy when the title to the said property is cleared satisfactory to her attorney, Jas. S. McConnell, and to be paid at his direction. The said Joe Leroy agrees to deliver possession of the said property immediately and to execute a deed to be held in escrow until the title is so satisfied and cleared as aforesaid and same to be delivered to the said Undine Harwood when her said attorney passes the said title. The said Joe Leroy agrees that in case he fails or refuses to cause the said claim to be satisfied he will forfeit and pay, and now deposits with the said bank the sum of $200 as a forfeit to pay to the said Undine Harwood for her trouble and expense in occupying the said property, and she, the said Undine Harwood, agrees to deliver up possession of the said property upon demand if this deal is not finally consummated." Signed by the parties May 27, 1914.

Appellee alleged a compliance with the contract on her part by the depositing with the Citizens National Bank the sum of $2,500, which was to be paid to the appellant when he had performed the contract on his part. She alleged that the appellant had failed to deposit the $200 which he was required to do under his contract, and "had failed and neglected to furnish or offer to furnish to the plaintiff a conveyance to the said property, conveying to the plaintiff a title satisfactory to her said attorney, Jas. S. McConnell;" that upon such failure on the part of the appellant, she had made demand on the bank for the return of the $2,500, and that the bank had refused to return the same. She therefore prayed that the agreement be rescinded and cancelled, and that the bank be required to return the $2,500 with interest.

Appellant answered, admitting the contract and the deposit of the $2,500 with the bank by the appellee, as alleged, but denied that he had neglected and refused to deposit the $200. He alleged that he offered to deposit the $200 in the bank when appellee or her agent took possession of the property as contemplated in the agreement;

that appellee had refused to take possession of the property and declined to pursue the agreement further, and had notified the appellant. He denied that he had failed to comply with the terms of the contract requiring him to furnish the appellee a conveyance of title satisfactory to her attorney. He alleged that he deposited in escrow a warranty deed to be delivered to the appellee, which deed conveyed a fee simple title unencumbered, and that appellee's attorney arbitrarily refused to be satisfied with the deed. He set up that he had instructed the bank not to return the $2,500 to the appellee for the reason that he had complied with the terms of the agreement on his part, and was himself entitled to the $2,500, and, by way of cross-complaint, he asked that the bank be ordered to pay him the $2,500. He exhibited with his answer deeds that he had tendered to the appellee.

The bank delivered the money and papers that had been deposited with it in court, and was discharged.

The appellee testified that at the time the agreement was entered into, the appellant represented that he could make a clear title to the land; that something was said about claims probated against the estate of M. Soncini, and that she agreed to pay the $2,500, and appellant was to give her a clear title. Appellant would not deposit the $200 in the bank, according to his contract. Appellee complied with the contract on her part by depositing the $2,500 in the bank.

On June 22, 1914, appellee, by letter, demanded of the appellant to be released from the contract, and demanded the return of the $2,500, stating as her reason for so doing that appellant had failed, on his part, to comply with the contract. She stated that he had failed to make a title that was clear, and that her attorney was not satisfied with it. She testified that it was expected when the agreement was executed that appellant would have a limited time in which to satisfy and clear the title; that in case he did not do so, the $200 was to be paid to her for her trouble and expense in occupying the property. She relied upon her attorney's judgment and opinion as to ap-

pellant's being able to convey a good title. Her attorney advised her that the deeds placed by the appellant in the bank did not give her a clear title. The failure of the appellant to deposit the $200 was not the reason her attorney urged that the title was not good.

It was shown by the appellee, and also her brother, that the latter was present at the time the agreement was entered into between appellee and appellant, and that appellant represented that he would make a good title that would be satisfactory to her attorney. Appellee's brother was to occupy the place, but did not do so because the attorney informed her that appellant could not make her a clear title.

Appellee's attorney testified substantially as follows: Appellant and appellee were negotiating for the sale of a certain tract of land, and were in a hurry to close the transaction, and asked him for his opinion on an abstract that had been presented by the appellant; that upon examining the abstract, he was in doubt about the title, but advised the appellee that he believed an additional deed from the administrator of the estate of Mario Soncini to appellant, for which a petition had been filed, would enable the appellant to make appellee a good deed, inasmuch as appellant represented that he was a partner of Mario Soncini, deceased; that acting upon this belief and opinion, the contract was drawn up by him and entered into between the parties in order to enable appellant to take such steps as would give appellee title to the property, all of which appellant represented that he could and would do. After the agreement was entered into witness made a complete investigation of all the records referred to in the abstract of title that had been presented by appellant and the records of the Garland County Probate Court; that the abstract showed that there was of record on the 28th day of April, 1913, a deed of trust on the lands described in the contract, executed by Z. J. Mooney and wife to Joe Leroy as trustee for Mario Soncini. The consideration named in the deed was $1,550, bearing interest. The abstract showed that Mark Brizzolara, as administrator

of the estate of Mario Soncini, petitioned the probate court to allow him to compromise the debt due from Mooney and to accept a conveyance of the property as administrator, and that an order was entered showing that the petition was granted and the administrator was authorized to accept the conveyance in settlement of the debt due by Mooney to the estate of Soncini. The abstract also contained an order of the probate court directing the administrator of the estate of Soncini to execute to Joe Leroy a conveyance of said property. It also showed that Joe Leroy petitioned the probate court, stating the partnership existed between him and M. Soncini, and asked "that the administrator be authorized to execute a conveyance of the property to him as the surviving partner; that the administrator of the estate of Soncini also petitioned the probate court for an order directing him, as such administrator, to execute the deed of conveyance to Leroy as the surviving partner of Soncini, setting up that the debt from Mooney was a debt of the partnership; that the order of the Garland Probate Court was accordingly made as above mentioned, directing the administrator to make the deed to appellant as surviving partner; that the records of the Garland County Probate Court examined by the witness showed that there were five or six thousand dollars worth of claims probated against the estate of M. Soncini, and that the records did not show that these claims had been satisfied. Witness testified that after making the investigation of the above records and examining the authorities with reference to the property of estates and the property of partnerships, he was convinced that there was no way by which he could ascertain from the records whether the property was really the property of the partnership or whether it was the property of the estate of M. Soncini. He ascertained that Soncini had a widow and two minor children who were interested in his estate. After making these investigations, on June 8, 1914, he wrote appellant concerning the sale of the property to appellee, notifying him that as the attorney for appellee, he had come to the conclusion that the deed executed by the appellant and placed in es-

crow with the Citizens National Bank would not convey the title to the property. In this letter, he states: "There is so much conflict in the orders of the probate court and the rights of yourself and the rights of the heirs of M. Soncini, these being minors, that I do not think that you have legal right to convey the title, and sooner or later there would be litigation over it. So I have advised Mrs. Harwood that my former opinion as to the title conveyed by the deed executed is erroneous. Believing as I do about the title, I can not conscientiously direct the payment of the purchase price, and have advised her brother by wire not to incur any expense in preparing to move here."

He also advised the appellee that the deed delivered to the Citizens National Bank in escrow by the appellant at the time she deposited her money there would not convey her the title in fee simple, and that if she accepted it, she would have a clouded title. Witness also prepared a notice, and sent the same to appellant and to the bank, to the effect that he would not approve the title.

After this appellant petitioned the probate court to authorize the administrator of the estate of M. Soncini to execute a conveyance to the appellee, which order was granted, and Mark Brizzolara, as administrator of the estate of Soncini, was ordered to execute the deed and deliver the same to the Citizens National Bank. Witness, on behalf of Mrs. Harwood, demanded payment of the $2,500 by the bank. At the time the final account of the administrator had been filed, but had not been approved, and the claims which had been probated against the estate of Soncini had not been completely satisfied by the records of the probate court.

The appellant testified in his own behalf substantially as follows: He was associated in business with M. Soncini in his lifetime as a partner. One Mooney became indebted to the firm in the sum of $1,530, and gave a mortgage on the land described in the contract to secure the same. Mooney did not pay the indebtedness, and appellant took a deed to the land for it. His testimony and the

exhibits thereto showed that the deed here referred to was made by Mooney to the administrator of the estate of M. Soncini, deceased, through a petition of the administrator and an order of the probate court authorizing the administrator to accept a deed from Mooney "in full settlement of the indebtedness due by the said Mooney to the estate of said Mario Soncini."

The testimony of appellant and the exhibits thereto also show that on the petition of the appellant to the probate court, the probate court made the following order: "That said Mark Brizzolara, as the administrator of said M. Soncini, execute to Joe Leroy as surviving partner of the said firm of Soncini & Leroy, a deed to the above described land." (That is, the land described in the contract.)

Witness further testified that the mortgage of Mooney under which he acquired the land was made in the name of M. Soncini; that Soncini represented Soncini & Leroy. He was trustee in the deed of trust and took possession of the property when the deed was delivered. He made a warranty deed to the land described in the complaint and deposited the same in the bank. McConnell objected to this deed because there was another deed made and signed by appellant as the surviving partner of the estate of M. Soncini, and also by Mark Brizzolara as administrator of the estate of M. Soncini, conveying the same land to the appellee. This latter deed was made in pursuance of an order of the probate court directing the administrator of M. Soncini "to join with Joe Leroy as surviving partner of the firm of M. Soncini in the sale of said lands for a cash consideration of not less than $2,000," the order reciting, "the court being satisfied that it would be to the best interest of the estate to sell same as the court may direct."

This witness further testified that the debts of the estate of M. Soncini had been paid; that his understanding of the agreement was that the $200 mentioned was to be paid when appellee or her brother had taken possession of the land; that there had been no demand upon him for

the deposit of the $200, and that his failure to deposit the $200 was not given as a reason for not accepting the deed. He stated that after Soncini's death, he conducted the partnership business as the surviving partner, and when everything was settled up he took charge of the business.

After the testimony was heard upon the above issues and after the argument of the cause, on December 3, 1914, appellant filed a petition asking leave to introduce further testimony in regard to the partnership that existed between appellant and M. Soncini, and in regard to the indebtedness of Mooney as an asset of the partnership, and asked leave to make the widow and children of M. Soncini and the administrator of his estate parties "to the end that same may be contested, and that the title to the said land may be confirmed in the said Joe Leroy as the surviving partner, and that the deeds heretofore executed by the said Joe Leroy and Mark Brizzolara, administrator, to Undine Harwood be declared to convey a valid and subsisting title in fee simple to said land."

The court denied this petition and entered a decree cancelling the agreement for the sale of the lands, and ordered the clerk of the court to pay to the appellee the $2,500 in his hands, together with interest at 6 per cent from the 30th day of June, 1914. To reverse this decree is the object of this appeal.

Rector & Sawyer, for appellant.

1. The court erred in the conclusion that under the agreement and the acts of the parties in connection therewith, the appellant bound himself to furnish *an abstract* which showed a title satisfactory to appellee's counsel. We find no agreement either implied or otherwise, that appellant was to be bound by the abstract alone. It is clear that if appellee was relying upon a showing made by the abstract alone, such provision would have been inserted in the agreement. 39 Cyc. 1516.

2. The chancellor says in his opinion: "If it requires evidence *aliunde* from the records to make a per-

fect title, then it is not a perfect title, for, to sustain the same parol evidence must be resorted to."

The agreement only calls for a title satisfactory to appellee's counsel. All parties were aware of the claims of partnership between appellant and Soncini, deceased. Parol testimony is competent in showing the chain of title, to establish the partnership and the fact that the debt was a partnership debt. 39 Cyc. 1458; 64 N. J. Eq., 263.

3. As to the probate court records and deeds thereunder: The status of the property at the death of the decedent, fixes the character of the property, and nothing else can change it. The property was as personalty in the hands of the administrator, and he had a right to sell it without an order of court, and such sale would be valid, unless tainted with fraud in which the purchaser participated. 18 Cyc. 351, 352. Appellant, as surviving partner of Soncini, was entitled to the assets of the partnership. 18 Cyc. 224. In this case the partnership asset was a debt due by Mooney; its character was not changed by being converted into land by the administrator, sanctioned by the surviving partner, and, necessarily, the property at the conclusion of the partnership, would have come to the personal representative, the administrator. 69 Ark. 242; 83 Ark. 313; 48 Ark. 563; 30 Cyc. 630. Appellant had the right to receive the land from the administrator in payment of the debt due by the firm to him. The probate court had authority under the statute to make disposition of this property. Kirby's Digest, § 87.

4. Appellee's counsel could not arbitrarily or capriciously reject the title. Having accepted the trust reposed in him by both parties, he was under the duty to do everything that the circumstances and conditions demanded to ascertain whether or not the title offered by the two deeds was a merchantable title. 94 Ark. 268.

Appellee *pro se.*

1. Appellant has failed to perform the stipulations of the agreement sufficiently to demand specific performance of appellee. The deposit of the $200 stipulated for

was not made, and this is admitted. Such deposit was a necessary part of the agreement. 65 Ark. 320; 105 Ark. 171.

2. That the refusal of appellee's counsel to approve the title was not arbitrary or capricious is sufficiently established by the chancellor's opinion. 66 Ark. 433.

3. If the partnership affairs were settled, as stated in counsel's brief, appellant had no right to this property. It belonged to the heirs, and, if partnership property, went to them as real estate. 69 Ark. 237; 48 Ark. 563.

If it was property of the estate, the administrator held it as a mere trustee for those beneficially interested. 18 Cyc. 354.

Probate sales not in substantial conformity with the statute are void. Kirby's Digest, § 3793; 106 Ark. 563.

WOOD, J., (after stating the facts). (1) The contract in suit was an executory agreement under which the appellant, for the consideration named, was to convey to the appellee the tract of land described by deed which would give her a clear title to the satisfaction of her attorney. The contract itself and the testimony of the parties thereto, which is not in conflict with the written contract, show that both parties contemplated that the appellee, for the consideration named, should acquire a fee simple title to the land, and the contract and the uncontroverted evidence show that before the appellee paid the purchase money, the appellant should execute to her a deed giving her a title which to her attorney appeared to be satisfactory. In other words, this contract was tantamount to an executory agreement for the conveyance of land by a warranty deed, and one which her attorney, from an examination of the title, could pronounce clear and satisfactory.

In *Tupy* v. *Kocourek*, 66 Ark. 433, we held that "one who contracts and pays his money for a title to land ought to get, not only a title that he can hold against all adverse comers, but one that he can hold without reasonable apprehension of its being assailed, and one that he can readily transfer if he desires, in the market."

In *Whitener-London Realty Co.* v. *Ritter*, 94 Ark. 263, we held that, "Under a contract for the sale of timber

which stipulated that the vendor should furnish a conveyance and abstract of title to be approved by the vendee's attorney, the vendee is entitled to a return of the purchase money paid by him where the abstract of title tendered by the vendor was submitted to the vendee's attorney and rejected by him in good faith."

Of course, it was not contemplated by the parties to the contract under review that the attorney of the appellee should arbitrarily or capriciously disapprove the title tendered by the appellant. But if he did not do this, and in good faith passed upon the title and declared the same unsatisfactory because, in his judgment, the title was not clear, then the appellee was not bound to pay the purchase money, although the title in fact might prove to be perfect.

(2) Now the appellant contends that he complied with the contract on his part when he tendered to the appellee a warranty deed and an abstract of title showing that the land involved had, by order of the probate court, been deeded by the original owner to the administrator of the estate of Soncini and by the administrator to the appellant as the surviving partner of Soncini, and by the administrator of Soncini, in conjunction with appellant as surviving partner of Soncini, to the appellee.

The chancery court, as indicated in a written opinion, went into an investigation of the title thus tendered and decided that the probate court had no jurisdiction to try and determine the ownership of this property. The chancellor found that the petition of Leroy to have the property conveyed by the administrator of Soncini to him as the surviving partner of Soncini "was filed, and acted on by the probate court on the same day; that the administrator, heirs and creditors were not notified or heard."

The uncontroverted proof shows that the land in controversy was conveyed to the administrator of the estate of Soncini for a debt, and was by the administrator of the estate of Soncini conveyed to the appellant as

the surviving partner of Soncini, and by appellant as the surviving partner jointly with the administrator of the estate of Soncini to the appellee. It was shown that Soncini had a widow and heirs surviving him. Such being the case, it is unnecessary for us to determine the issue as to whether the probate court had jurisdiction under the statute to make these various orders and whether such orders in fact made the title perfect in the appellant. The probate court ordered the administrator of the estate of Soncini to convey the land to appellant as the surviving partner of Soncini. If this order was valid when executed, then certainly thereafter the probate court would have no power to direct the administrator to join in a conveyance of the same land to appellee. These orders were inconsistent and contradictory.

The attorney for the appellee, upon an investigation of this title which appellant tendered as a compliance with his contract, was not satisfied that the same would give to the appellee a clear title, and he wrote to the appellant, in part, as follows: "There is so much conflict in the orders of the probate court and the rights of yourself and the rights of the heirs of M. Soncini, these heirs being minors, that I do not think that you have the legal right to convey the title, and sooner or later there will be litigation over it."

The learned chancellor himself, after a thorough examination of the records and an elaborate review of the facts and the law, announces his conclusion on this point as follows: "I would not have accepted this title offered by defendant as a perfect one or recommended same to a client as perfect."

(3) It can not be said, in view of the above record, that the attorney of the appellee acted arbitrarialy or capriciously in disapproving the title tendered by the appellant. It suffices to say that the attorney was warranted in his conclusion that such title did not meet the requirements of the contract under the rule announced in *Tupy* v. *Kocourek, supra.* The appellant therefore

did not comply with his contract, and the court did not err in refusing to permit him to amend his pleadings and to bring in new parties in order to enable him to take proof to show that he might be able to thereafter perfect his title if the same was not already perfect.

The decree was in all things correct and it is affirmed.

LITTLE v. STATE.

Opinion delivered June 21, 1915.

1. LARCENY—GIST OF THE CRIME.—The gist of the crime of larceny is that the property must be taken with a felonious intent.
2. EVIDENCE—LARCENY—EVIDENCE OF PERMISSION—HEARSAY.—In a prosecution for larceny of an agricultural instrument, it is competent to prove that the owner told a third party that the defendant could take the property, and that the third party communicated to the defendant, what the owner had said; such testimony is not hearsay.

Appeal from Sebastian Circuit Court, Fort Smith District; *John H. Holland,* Special Judge; reversed.

STATEMENT BY THE COURT.

Appellant was indicted, charged with the crime of stealing a cultivator, the property of Olin T. Brewer, alleged to be of the value of $15. The indictment was in correct form. He was convicted of the crime of petit larceny and prosecutes this appeal.

The proof on behalf of the State tended to show that one Brewer owned the cultivator and had owned the same for about six years. He left the cultivator at the place where he had formerly been in the mercantile business, standing out against the yard fence on a vacant lot. It was in good condition when he got it; had never been used; he had not sold the cultivator. He went to get a repair off of the same and it was gone. He saw Jesse Little and said to him: "Jesse, I understand that you got my cultivator and I want you to bring it back home." Jesse told the witness that he wanted the wheels

to make a wheelbarrow to haul fertilizer into the garden. The cultivator was taken in the day time.

This witness was asked the following question: "Q. Mr. Brewer, did Floyd Little have a conversation with you a few days prior to the time the defendant is alleged to have taken the cultivator in which he asked you if he and the defendant could get the cultivator, and you told him that he could get all or any part of it." And answered: "I don't remember."

Many witnesses were introduced, testifying both on behalf of the State and the defendant, whose testimony was to the effect that the appellant about 2 or 3 o'clock in the afternoon took the cultivator off of the vacant lot where it was situated; that he carried it out in the middle of the street and fastened it to his father's wagon. While he was doing this, several parties were standing on the street laughing and teasing him about the cultivator.

Witnesses testified that it was an old cultivator and that several of its pieces were missing. One witness said that it had a tongue and a neck yoke. Another said that it had a tongue and he couldn't remember whether it had any other pieces or not. Another said it was an old piece of cultivator. One of the witnesses stated that the appellant stated in reply to a party who spoke to him about the cultivator, that he "was going to take the wheels to make a wagon to haul manure into the garden."

Appellant offered to prove by his brother that prior to the taking of the cultivator he (appellant) requested his brother to see Mr. Brewer, the owner of the cultivator, and to ask him about the matter. That his brother did see Brewer, who told him "to take the cultivator or any part of it and do whatever he wanted to do with it." And that his brother told him (appellant) what Brewer had said. The court ruled that any conversation between Brewer and the brother of appellant concerning the taking of the cultivator was competent, but that it was not competent to prove that the brother afterwards com-

municated to appellant that Brewer had given him permission to take the cultivator; that such testimony was hearsay. Appellant objected and duly excepted to the ruling of the court, and made this ruling one of the grounds of his motion for a new trial.

Covington & Grant, for appellant.

1. The elements of larceny are not present. The taking, to constitute larceny, must be done with the intent to steal—with a felonious intent. Kirby's Dig., § 1825; 91 Ark. 492, 495.

2. The exclusion of the testimony of Floyd Little to the effect that he, at appellants' request, called on Mr. Brewer and asked him if they could have the cultivator, to which he replied that they could have all or any part of it, and that the witness told appellant what Brewer said, was reversible error. *Supra.*

Any evidence that would tend to show good faith on the part of appellant, would be competent. *Supra;* 94 Ark. 324.

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

1. The intent with which appellant carried off the cultivator was a matter for the jury. The verdict is supported by the evidence. 109 Ark. 138; *Id.* 130.

2. What Floyd Little told appellant of the conversation with Brewer, was not admissible. It was mere hearsay and in the nature of a self-serving declaration.

WOOD, J., (after stating the facts). In *Douglass* v. *State,* 91 Ark. 492, we said: "In order to constitute larceny, the taking must be done with felonious intent; the taking of the property and its possession is only a fact, and in itself it is not sufficient to raise a presumption of a guilty intent; and, standing alone, it would not be sufficient to sustain a conviction of larceny." Citing *Mason* v. *State,* 32 Ark. 238; *Gooch* v. *State,* 60 Ark. 5; *Sutton* v. *State,* 67 Ark. 155; *Jones* v. *State,* 85 Ark. 360.

The court erred in refusing to allow appellant to prove that the owner of the cultivator had told appellant's brother that appellant might take the cultivator, and that this permission on the part of the owner had been communicated to appellant. This was not in the nature of hearsay testimony, but was evidence tending to prove a substantive fact, towit, the permission of the owner for appellant to take the cultivator, which was a very material fact; for, as is shown, the gist of the offense of larceny is that the property must be taken with a felonious intent. It is not hearsay evidence to prove that the owner told a third party that the appellant could take the property, and that this party communicated to appellant what the owner said. If the owner did give such permission to appellant's brother, it was a fact which it was competent for appellant to prove. And if the witness communicated this information to appellant, this was also a fact which it was competent for appellant to prove by the witness who communicated the information, and was not in the nature of hearsay testimony.

The proffered testimony was not an offer to prove what appellant's brother said, but it was an offer to show that the owner of the property did grant permission for appellant to take the same, and an offer to show the fact that this permission had been communicated to appellant. The testimony was as competent in this form as if it had been testified to either by the owner of the property himself or by the appellant. The fact that permission was granted and communicated to appellant through the intervention of an agent or third party did not make it hearsay evidence.

The court therefore erred in excluding the proffered testimony, and for this error the judgment is reversed and the cause is remanded for a new trial.

MARYLAND CASUALTY COMPANY v. MALONEY.

Opinion delivered June 28, 1915.

1. EVIDENCE—OBJECTION TO TESTIMONY—WAIVER—PRIVILEGE.—In an action to recover on an accident policy held by deceased, plaintiff, by introducing testimony concerning the cause of the death of deceased, does not waive the right to object to testimony of certain physicians, offered by defendant, as to the cause of the accident.
2. EVIDENCE—PRIVILEGE—WAIVER—FAILURE TO OBJECT—RIGHT TO OBJECT AT SUBSEQUENT TRIAL.—A party litigant does not waive his right to object to the introduction of certain privileged testimony at a second trial of a cause, where he failed to object to the same at the first trial.
3. INSURANCE—ACCIDENT INSURANCE—PENALTY.—In an action on an accident insurance policy, the assessment of the statutory penalty of 12 per cent held proper; the statutory penalty is assessed in addition to interest.
4. INSURANCE — ACCIDENT INSURANCE—ATTORNEY'S FEES.—When the amount recovered on an accident policy was $5,000, the allowance of an attorney's fee of $2,000 will be held excessive, and the fee will be reduced to $500.

Appeal from Drew Circuit Court; *H. W. Wells,* Judge; modified and affirmed.

Williamson & Williamson, for appellant.

1. In all blood-poisoning cases caused from without, there must be a chain of causation from the accident to death, which must have its origin in an abrasion of the skin or wound of some kind. 85 Fed. 401; 97 N. W. 91; 11 L. R. A. (N. S.) 1069; 8 *Id.* 68; 5 *Id.* 926. Where there is no abrasion or wound, there is no *septicaemia,* and there can be no recovery. 154 Fed. 484; 11 L. R. A. (N. S.) 1069; 8 *Id.* 68. This was a bed sore case and not covered by the policy. The verdict was based on presumption. Juries are not allowed to speculate as to which of two causes produced the injury. 57 N. W. 169; 116 Ark. 82; 92 U. S. 281, etc.

2. Appellee waived her privilege to exclude the testimony of Drs. Smith and Herbert. When once waived it is waived forever. 111 Ark. 559; 4 Wigmore on Ev., § § 2380, 3347, 2388; 98 Ark. 357; 103 Ark. 201; 104 N. Y. 352; 165 S. W. 748; 40 Cyc. 2405, (j); 8 A. & E. Ann.

Cas. 653; 59 N. Y. App. Div. 369; 69 N. Y. Supp. 551; 109 Cal. 442.

3. It was error to allow the 12 per cent penalty and attorney's fee is excessive. 111 Ark. 570-1; 88 *Id.* 556; 92 Ark. 378; 155 Fed. 54.

James C. Knox, Patrick Henry and *Robert C. Knox,* for appellee.

1. The merits of this case were decided on the former appeal. The court decided the evidence was sufficient, which binds all parties. 99 Ark. 218; 93 *Id.* 168, etc. On application for a directed verdict, the evidence of the opposite party is admitted to be true. 11 How. 373; 24 Atl. 992; 47 N. W. 290; 5 *Id.* 710.

2. There is not two equally probable theories in this case as to the cause. 114 Ark. 112, governs this case. See 107 Ark. 476.

3. Appellee had not lost her right to object to the testimony of Drs. Herbert and Smith. Their testimony was incompetent and a waiver of the privilege on the first trial does not prevent her from claiming it on the second trial. Kirby's Dig., § 3098; 6 L. R. A. (N. S.) 1003; 45 N. W. 977; 59 U. S. (Law Ed.) 210; 156 S. W. 699; 131 Pac. 534; 85 N. E. 837; 71 N. E. 251; 78 Ga. 733, etc.

4. Appellant was not prejudiced by the exclusion of the testimony. 95 Ark. 155; 82 *Id.* 214. Besides it was not competent. 103 Ark. 202.

5. The penalty and attorney's fee were properly allowed. The fees were reasonable—not excessive. The statute allows the penalty and a reasonable attorney's fee.

McCULLOCH, C. J. This is an action to recover upon a policy of accident insurance issued by defendant, Maryland Casualty Company, to Edward S. Maloney, the husband of the plaintiff. It is alleged that plaintiff's husband, while confined to his bed by illness and was being attended by a hired nurse, received an accidental injury to his coccyx bone by the nurse striking it in attempting to place a bed pan under him; that an abrasion of the

skin was caused; and that infection started at the place which produced blood poisoning and that his death resulted from it.

The case has been here once before on the appeal of the plaintiff and we reversed the judgment in defendant's favor and remanded the cause for a new trial. The second trial of the case resulted in a verdict in favor of the plaintiff and defendant has appealed.

On the former appeal the case turned principally on the question whether notice of the accident had been given in compliance with the terms of the policy so as to fix the liability on the insurer, and we held that proper notice had been given. Other questions were, however, decided on the appeal, and one of the questions so decided was that there was sufficient evidence to warrant a recovery in plaintiff's favor. The case was tried upon substantially the same testimony as in the former case, with the exception of the testimony of certain physicians which will be mentioned hereafter. We must therefore treat the question as settled that the evidence adduced is sufficient to warrant recovery by the plaintiff.

The only questions worthy of discussion on the present appeal relate to the ruling of the court upon the admissibility of the testimony of two physicians, or rather the competency of the witnesses and the right of the plaintiff to object to the introduction of such testimony at this trial, having allowed the testimony to go to the jury without objection at the former trial.

The defendant offered the testimony of two physicians who attended the deceased during his last illness and offered to establish by them facts and circumstances which would show that deceased did not receive any accidental injury in the region of the coccyx bone or elsewhere, and that his death resulted from another cause. The same testimony was offered by the defendant at the former trial and was admitted in evidence without objection. It is insisted now that the plaintiff waived the privilege of excluding such testimony. The first ground urged for such waiver is that the plaintiff herself made

an issue as to the cause of her husband's death, and that that gave the defendant the right to introduce any testimony which tended to meet that issue, even testimony of the attending physicians of deceased.

The argument on this point is based principally upon the decision of this court in *National Annuity Association* v. *McCall,* 103 Ark. 201. But the question involved in that case was entirely different from that involved in the present inquiry. In that case the plaintiff, who was the beneficiary in an insurance policy, had received a certain sum of money from the company which was paid by way of compromise of her claim and in satisfaction of the policy. She signed a written release, but attempted at the trial to escape its effects by showing that its execution was procured by fraudulent statements of the attending physician of the deceased concerning the cause of the death of the insured. The plaintiff adduced testimony to the effect that the adjuster of the company induced her to enter into the compromise and execute the release by bringing before her Dr. Pringle, the attending physician of deceased, who, she claimed, made false representations to her concerning the cause of her husband's death. On the trial of that issue the company offered to prove by the testimony of Dr. Pringle that the statements he made to the plaintiff concerning the cause of her husband's death, at the time she executed the release, were true, but the trial court refused to admit the testimony and we held that that constituted error which called for a reversal of the judgment. Our view of the law which formed the basis of that decision was that the plaintiff had herself made an issue as to the truth or falsity of the statement of the physician, and testified concerning the same, which made it necessary for the introduction of the testimony of the physician himself, and that that constituted a waiver of the privilege. In the opinion we said: "The appellee has herself made competent the testimony of this attending physician by claiming that it was upon his statement that she acted in executing the release, the effect of which she

seeks to avoid by reason of the claim that this statement was false. She has therefore required the disclosure by this witness of the cause of her husband's death, and has thereby waived the privilege to object thereto, and her adversary is entitled to the benefit of that waiver."

(1) The principle which controlled in that case has no application here, for the plaintiff had not introduced the physicians, nor had she tendered an issue which made it necessary that they be introduced. The mere fact that she alleged the cause of the accident did not open the way for the introduction of witnesses which it was her privilege under the statute to exclude. There are many of our decisions which are against the view that merely because a right of action is predicated upon an alleged injury of a certain character, the statutory privilege of objecting to the testimony of attending physicians is waived. *M. & N. A. Rd. Co.* v. *Daniels,* 98 Ark. 352; *K. C. So. Ry. Co.* v. *Miller,* 117 Ark. 396.

We said in the former opinion in this case that the testimony was not competent, but called attention to the fact that no objection to its introduction was made in the trial below. Counsel for the defendant insist that it was unnecessary, therefore, to pass upon the question of the competency of the testimony, and that the language of the opinion with reference to that question was *dictum.* There is some force in that suggestion, but the question is now squarely presented, and our conclusion is that the trial court was correct in holding that the plaintiff had not waived the right to object to the testimony by introducing testimony concerning the cause of the death of her husband.

(2) The remaining contention is that plaintiff waived her right to object by allowing the testimony to go to the jury in the former trial. In other words, it is contended that the failure to object to the testimony at the former trial operated as a waiver which was irrevocable, and extended through the further stages of the case. That question is one which is by no means free from doubt; and while it is said in some quarters that the authorities

are overwhelmingly preponderating in favor of the rule that where there is once a waiver it continues through a subsequent trial, we do not find such to be the case. In two case notes reporting the decision of the Missouri Supreme Court in *Elliott* v. *Kansas City,* 198 Mo. 593, where the rule is announced that a waiver in one trial is irrevocable and becomes effective in another trial, the authorities are fully reviewed and it is shown in each of the notes that the authorities on the subject are meager and do not greatly preponderate either way. 6 L. R. A. (N. S.) 1082; 8 Am. & Eng. Ann. Cas. 660.

In the first note referred to above it is said: "There are many cases which hold generally that, where a privilege is once waived, it can not be claimed again at will; and also many cases which hold that it can not be waived in part and claimed in part, or, as has been said, it can not be used as a sword and a shield at the same time. But the cases are fairly evenly divided upon the question whether the waiver of a privilege upon one trial will prevent its being claimed upon a second."

Decisions of the courts of Missouri, New York, Massachusetts, Maine and Indiana tend to support the view that a privilege once waived can not be claimed in a subsequent trial. *Elliott* v. *Kansas City, supra; People* v. *Bloom,* 193 N. Y. 1; *Green* v. *Crapo,* 181 Mass. 55; *Whiting Ex parte,* 110 Me. 232; *P. C., C. & St. Louis Ry. Co.* v. *O'Conner,* 171 Ind. 686.

The reasons given for this view of the law are not found to be harmonious in the cases which adhere to it, nor do all of those cases announce a rule which would apply in the case now before us. In some of the cases the plaintiff had at the former trial introduced the witness whose testimony was privileged, and it was held that that constituted a waiver which could not be withdrawn at a subsequent trial. The New York court, in the case cited, held that even where the former testimony was given in another trial, the privilege could not be withdrawn. That was a criminal case where the accused was being prosecuted for the crime of perjury alleged to have been com-

mitted in a civil case, and it was held that because he allowed the privileged testimony to go to the jury in the civil case he had waived the privilege and could not renew it in the criminal case. There are several New York cases, and the thought seems to run through them all that the principle involved was that the statutory privilege was intended as a shield, and could not be converted into a sword by taking advantage of the privilege after having once waived it for the purpose of making use of the testimony. That principle has no application to the facts of the present case for the reason that the plaintiff did not introduce the testimony, and merely failed to object either through inadvertence or indifference. The New York court in an early case laid down the contrary rule by holding that where a party had waived the privilege at one trial, he could claim it at a new trial in the same case. *Gratton* v. *Insurance Company,* 92 N. Y. 274. The other view of it was taken in the subsequent cases without expressly overruling the *Gratton* case. Professor Wigmore shows very plainly that he has scant patience with the statutory rule establishing the privilege, and he rather vehemently insists that it should be restricted as far as possible, and that when once waived under any circumstances, the privilege can not be reclaimed. 4 Wigmore on Evidence, section 2380 *et seq.*

Another basis for the decisions in support of that view is that the sole purpose of the statute is to provide for secrecy concerning those matters which are intended to be confidential, and that when once the facts are published to the world, the reason for preventing further disclosures has ceased. We have said in some cases that the statute was enacted "as a matter of public policy to prevent physicians from disclosing to the world the infirmities of their patients." *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554. That is undoubtedly a correct statement, but it is not a complete one, for the statute itself relates entirely to introduction of evidence, and not to disclosures in any other way; and the mere fact that the world may have the information does not abrogate the right of a

party in whose favor the privilege exists to claim protection from disclosure in the trial of rights before a court or jury. *Arizona & New Mexico Ry. Co.* v. *Clark,* 235 U. S. 669. The statute is wholly ineffectual to prevent a public disclosure, but it can be enforced so far as preventing the violation of such a privilege by an attempt to improperly disclose testimony at a trial of an action, and such is the purpose of the statute, though it is correct to say that it was prompted by the policy which encourages such confidential relations as between physician and patient and forbids the disclosure of the same.

We think the sounder view is that the mere fact that testimony has been given at a former trial does not necessarily constitute a waiver which is irrevocable at a subsequent trial of the cause. In this view of the matter, we are influenced not only by what seems to us to be the better reason, but by the well considered opinions of other courts. *Briesenmeister* v. *Supreme Lodge Knights of Pythias,* 81 Mich. 525; *Burgess* v. *Sims Drug Co.,* 114 Ia. 275.

In the Iowa case cited above, Mr. Justice McClain, speaking for the court, said: "As to the testimony at the former trial, it seems to us that the waiver resulting therefrom should be confined to the trial in which the waiver is made. Our statute relates to the giving of testimony, not to the publication in general of the privileged matter, and it seems to us clear that any waiver resulting from the giving or introduction of testimony on a trial should be limited to that trial." In the same case, the court, in declining to follow the New York cases, said: "We do not agree to the reasoning in that case, which would seem to lead to the result that, if the privileged communication is in any way made public by the patient, the privilege is waived for all time, whereas we understand to be well settled that a communication to a third person by the patient or client will not be a waiver of the right to insist on the privilege when it is sought to have the disclosure made by the way of testimony in open court."

We do not mean to lay down the rule unqualifiedly that waivers made under all circumstances may be withdrawn, for there may be cases in which an element of estoppel appears, which would prevent the withdrawal. We do not even find it necessary to decide that the waiver may be withdrawn where the party in whose favor it exists has, at a former trial, introduced the testimony of the witness; nor do we hold that the waiver may be withdrawn if it is shown that the other party has been misled by a failure at a former trial to object to the testimony. No such element appears in the present case, and we are of the opinion that the better view of it is that simply a failure to object at a former trial does not constitute an irrevocable waiver of the privilege.

(3) It is also contended that the court erred in allowing a penalty of 12 per cent. under the statute in addition to interest at the legal rate, and that the amount of attorney's fee allowed by the court under the terms of the statute is excessive. We are of the opinion that there was no error in assessing a penalty of 12 per cent., for that is strictly in accordance with the statute. The penalty does not take the place of interest, but it is in addition thereto.

(4) But we think the allowance made by the court for attorney's fees is clearly excessive. The amount of the policy was $5,000, and the court allowed a fee of $2,000. In the case of *Mutual Life Insurance Co.* v. *Owen, supra,* we decided that an allowance of $2,000 as attorney's fee was excessive, where the suit was to recover on a policy for $10,000, and in disposing of the matter, we quoted from *Merchants Fire Ins. Co.* v. *McAdams,* 88 Ark. 550, where we said that the fee authorized by the statute contemplated "such a fee as would be reasonable for a litigant to pay his attorney for prosecuting the case, and not a speculative or contingent fee based upon the uncertainty of the result of the litigation." To this ought to be added the statement that it is not expected that a plaintiff should be allowed a fee based upon multiplicity of counsel, as it was not intended by the law-makers to authorize the penalizing of an insurance company by requiring payment

of the fees of as many attorneys as the plaintiff may see fit to employ. The purpose of the statute was to require the recalcitrant company to pay the amount necessarily expended in procuring counsel to prosecute the case. We think that a fee of $500 is sufficient to allow in the present case, and the judgment will be reduced to that extent.

In all other respects the judgment will be affirmed.

MERRIMAC MANUFACTURING COMPANY v. BIBB.

Opinion delivered June 28, 1915.

1. CONTRACTS—SALESMAN'S CONTRACT — RESTRICTION — VIOLATION — EVIDENCE OF HARMFULNESS.—A. agreed to act as traveling salesman for B. and specifically agreed not to carry or engage in selling other goods as a side-line. In an action by A. for commissions it appeared that he had sold other goods as a side-line. *Held*, this was a clear breach of the contract, and the action of the trial court in admitting evidence that the sale of the side-line goods did not conflict with the performance of A's. contract with B., was prejudicial error.
2. CONTRACTS—SALESMAN'S CONTRACT—BREACH BY OBLIGOR—REMEDY OF SALESMAN.—A. agreed to sell goods for B. as a traveling salesman. *Held*, where B. committed a breach of the contract by a refusal to pay A. commissions earned under the contract, that A. might continue to perform the contract, and sue B. for all commissions earned, or he might treat B's. act as a repudiation of the contract, and sue B. both for commissions already earned, and also such commissions as he would have earned thereafter.
3. CONTRACTS—BREACH—DEFAULT BY PLAINTIFF.—The obligee in a contract is not entitled to sue the obligor for damages resulting from a breach thereof, irrespective of whether the obligee is himself also in default or not.
4. CONTRACTS—SALESMAN'S CONTRACT—BREACH—SIDE-LINE—RECOVERY.—A. contracted to sell goods for B., agreeing not to carry a side-line. A. committed a breach of the contract by carrying a side-line; in an action by A. to recover commissions earned, it is error to charge the jury that A's. right to recover depended upon B's. knowledge that he was carrying a side-line; but A. might recover, under the contract, commissions on all orders, sent in by him under the contract, and accepted by B.
5. SERVICE—DEFECT—CURE BY APPEAL.—Appellant, having appealed from a judgment of the circuit court, can not complain of imperfect service had on him there.

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

S. Brundidge, Jr., and *Harry Neelly,* for appellant.

1. The complaint alleged, and the answer expressly denied, that appellant was a corporation. The corporate character of appellant was thus put in issue, and it devolved upon the appellee to prove the same. There was no attempt to prove that appellant was a corporation, but on the contrary, appellant's evidence showed that it was a co-partnership. The peremptory instruction requested by appellant should have been given. 28 Ark. 263; 13 Ark. 462; 84 Ark. 277.

2. The court erred in refusing to give instruction 2, requested by appellant. It was a correct instruction under the terms of the contract and other evidence.

3. The court erred in permitting appellee to testify from a statement prepared by his attorney. It was not a memorandum prepared by the witness, and should have been excluded. 111 Ark. 596.

4. The court erred in permitting the appellee to testify in effect that his selling the side line did not conflict with the line of goods carried for appellant, but rather did it good. It was a mere opinion, and an attempt to justify his breach of the contract. 95 Ark. 157, and cases cited.

Bratton & Bratton, for appellee.

1. When the appellant executed a bond to secure the release of the money in the hands of garnishees, and, without raising any question as to its corporate capacity, filed the bond, the recitals of the bond taken in connection with the allegation of the complaint, amounted to an admission of corporate existence. It was also an entry of appearance by the appellant sued as a corporation. Kirby's Digest, § 373.

Moreover, appellant's attempted denial is a mere negative pregnant, not sufficient to put its corporate existence in issue. Kirby's Digest, § 6098; 84 Ark. 411; 72 Ark. 66; 33 Ark. 222; Bayless Code Pl. & Pr. 365; 1 Enc. Pl. & Pr. 796; 51 S. W. 1072; 30 Cal. 211; 115 Pac. 48; 116

App. Div. (N. Y.) 861; 5 Okla. 683; 105 S. W. 943; 104 Pac. 462; 68 Neb. 385; 4 Ore. 289.

2. Instruction 2, requested by appellant, was not warranted by the evidence. Appellee by a substantial compliance with the contract, fulfilled his part of it, and, not only so, did more than the law required of him to entitle him to full commission. 19 Mich. 211; 70 Pac. 1108; 44 Pac. 1069; 72 Pac. 717; 116 Cal. 242. A substantial compliance was all that appellant could exact. 64 Ark. 34; 97 Ark. 278; 36 Ill. App. 621.

3. When by its own fault appellant breached the contract by failing to remit to appellee the commission earned and due to him, thereby preventing him from devoting his entire time to the sale of appellant's line of goods, appellee was justified in taking up the side line in order to meet his traveling expenses, and lost its right under its contract with appellant. 91 Ark. 433; 80 Ark. 288; 78 Ark. 336; 97 Ark. 533.

HART, J. On the 15th day of July, 1912, R. L. Bibb, of Little Rock, Arkansas, and the Merrimac Manufacturing Company, of New York City, entered into a written contract, whereby the former agreed to travel for the latter, and to devote his entire time, zeal and energy toward selling its goods in the States of Arkansas and Missouri, and to carry no side line whatever. The Merrimac Manufacturing Company agreed to pay Bibb a commission of 10 per cent on all accepted orders, including mail orders, —house sales coming from his territory; the company further agreed to pay him 5 per cent. of all accepted orders, and to notify him of all declined orders within thirty days after the receipt of same. The company also agreed to continue the contract at the expiration of the first season, provided Bibb had sold $20,000 worth of goods for the fall season of 1912 and spring season of 1913. Bibb instituted this suit to recover commissions alleged to be due him, and writs of garnishment were issued against certain residents of the State of Arkansas who are alleged to be indebted to the defendant company.

R. L. Bibb testified substantially as follows: I commenced to sell goods for the Merrimac Manufacturing

Company, under a contract which is the foundation of this action, in the fall of 1912, and continued as such salesman during the spring season of 1913; during the spring of 1913, the company failed to send me 5 per cent. on accepted orders, as provided in the contract, and failed to notify me within thirty days of the declination of any order. Under the contract, they were to pay me for all orders accepted coming from my territory, but one of their representatives came into my territory and sold goods without my consent, and they refused to pay me a commission on the same. They are indebted to me in the sum of something over $2,500.

Evidence introduced on the part of the defendant company is substantially as follows: The Merrimac Manufacturing Company is a partnership composed of Morris Marks and Aaron M. Marks; the company is engaged in the manufacture and sale of clothing in the city of New York; during the spring of 1913 the plaintiff, without the consent of the defendants, sold clothing for another firm as a side line. The company admitted that one of their representatives sold goods in certain described territory in the State of Arkansas, but said it was with the consent of the plaintiff, because he could not make all of the territory. The company filed an itemized account of all the sales made by the plaintiff, and stated that they had paid him all the commissions due him.

In rebuttal the plaintiff testified that he carried a side line which consisted of pawn-broker's goods, overcoats and pants, and stated that he did this because the defendants refused to pay him the commission due him under the contract, and that he was unable to pay his traveling expenses without carrying this side line. He further testified that he devoted all the time he could to the defendant's business, and never tried to sell goods for the other firm he represented until he had first worked each point for the defendants. This side line, he said, did not conflict with the line he carried for the defendants, but rather did it good.

The jury returned a verdict for the plaintiff, and from the judgment rendered, the defendants have appealed.

The defendants saved their exceptions to the testimony of the plaintiff to the effect that the side line carried by him did not conflict with his sale of the line of goods carried for the defendants, but rather aided it, and assigned as error the action of the court in admitting this testimony. In this contention we think counsel for the defendants are correct. Counsel for the plaintiff seeks to uphold the action of the court upon the authority of *Fitzgerald* v. *LaPorte,* 64 Ark. 34, and *Mitchell* v. *Caplinger,* 97 Ark. 278, and other cases of a like character.

In those cases the court held that a substantial performance is all that is required to authorize a recovery under a contract, the additional cost of a literal compliance with the contract being taken into consideration in assessing damages. We do not think those cases have any application to the facts of the present case. It is true, the plaintiff testified that he used all reasonable means and diligence to further the interests of the defendants; but the contract, by its express terms, provided that the plaintiff should not carry any side line, and it is the duty of courts to enforce contracts according to their terms.

(1) According to the undisputed testimony, the defendants were engaged in the manufacture and sale of clothing; the side line carried by the plaintiff also consisted of clothing. It is true this side line consisted of clothing purchased at a pawn-broker's shop, but the testimony of the defendants tended to show that this side line conflicted with plaintiff's duties under their contract. But be that as it may, the contract, as we have already seen, in express terms provided that the plaintiff should not carry any side line during the time he worked for the defendants, and the carrying of a side line was in plain violation of the terms of the contract.

We think the admission of the testimony to the effect that the side line did not conflict with plaintiff's duties under the contract was prejudicial to the rights of the de-

fendants. This is emphasized by an instruction given by the court, which is as follows:

"I instruct you that if you find from all the evidence in the case that the plaintiff violated his contract by carrying side lines, or was selling goods for another house, it would preclude him from recovery in this case, unless you should further find that the defendant first violated its contract by not making payments as called for in the contract. If you should so find, then the defendant can not complain of the plaintiff's breach of contract, and the plaintiff should recover any amount you may find to be due him as unpaid commissions."

It will be remembered that the plaintiff claimed certain amounts due him as commissions for selling defendant's goods under the contract. The defendants denied that they owed the plaintiff anything. The instruction in effect tells the jury that if they should find that the defendants first violated the contract by not making payments as provided for therein, that they could not then complain of any breach of the contract by the plaintiff, and that the latter would be entitled to recover any amount due him as unpaid commissions.

(2) Of course, if the defendants had first committed a breach of the contract, they had no right to suppose that plaintiff, by thereafter performing the contract on his part, waived any breach of the contract on their part. In such case, the plaintiff would have had the right to continue the performance of the contract according to its terms and might have maintained an action against the defendants for the whole amount of the commissions due him; or, he might have treated the refusal of the defendants to pay him the commissions provided for in the contract as a manifestation of an intention on their part not to perform the contract according to its terms, and sued, not only for the commissions already earned by him under the contract, but also for such commissions as he would have earned thereafter. See *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336.

(3) The fact that the defendants first committed a breach of the contract would not entitle the plaintiff to recover the whole of the amount of the commissions provided for in the contract regardless of the fact as to whether or not he himself committed a breach of the contract.

Counsel for the defendants also assign as error the action of the court in refusing to give instruction numbered 2, asked for by them. That instruction is as follows:

"The jury are instructed that if you find from the evidence that the plaintiff entered into a contract with the defendant company to work for them in the capacity of salesman, and agreed to devote his entire time and attention to the selling of defendant's goods and wares and agreed to carry no side line, and that in violation of the terms of said contract the plaintiff sold goods for other parties, and did carry a side line, then this would be a breach of the contract, and your verdict will be for the defendant unless you find they knew of such breach and acquiesced therein."

(4) The court properly refused to give this instruction. It made the right of the plaintiff to recover anything depend upon whether or not the defendants knew that the plaintiff had committed a breach of the contract by carrying a side line. The contract, by its express terms, provided that the plaintiff should not carry a side line, and the plaintiff committed a breach thereof by doing so. Notwithstanding this, he was entitled to recover commissions on all orders sent in by himself and accepted by the company, but was not entitled to recover on mail orders or orders sent in by other representatives of the company traveling in the same territory.

(5) It is also contended by counsel for the defendants that the court erred in refusing to quash the service of summons on the defendants. We need not consider that, however, because the defendants, by appealing from the judgment rendered against them are now in court, and no further service on them is required. *Beal-Doyle*

Dry Goods Co. v. *Odd Fellows Building Co.*, 109 Ark. 77; *W. T. Adams Machine Co.* v. *Castleberry*, 84 Ark. 573; *Holloway* v. *Holloway*, 85 Ark. 431.

For the error in admitting the testimony of the plaintiff to the effect that the side line carried by him did not conflict with his duties to the defendants, but rather did them good, the judgment is reversed and the cause remanded.

NUTT *v.* FRY.

Opinion delivered June 21, 1915.

1. TRIAL—INTRODUCTION OF TESTIMONY AFTER RESTING CASE.—The action of the trial court in permitting plaintiff to introduce further testimony after resting his case, will not be controlled on appeal, unless there was a manifest abuse of the discretion.
2. APPEAL AND ERROR—BURDEN OF PROOF—OBJECTION—MOTION FOR NEW TRIAL.—Appellant may not contend on appeal that the trial court erred in its ruling as to whom the burden of proof rested upon, when he made no objection to the ruling of the court, nor set out the error as a ground for a new trial in his motion therefor.
3. APPEAL AND ERROR—REQUESTS FOR INSTRUCTED VERDICT.—A trial is in effect without a jury, where each party asked for an instructed verdict without asking other instructions.
4. CONTRACTS—ASSIGNMENT—DUE-BILL.—Appellee held a contract to cut a right-of-way for a drainage district; this he assigned to appellant, taking a due-bill from appellant therefor, in which appellant agreed to pay appellee a certain sum when he was paid by the district, *held*, that evidence was admissible to show what the district had paid appellant, and that a recovery had on the due-bill, would, under the evidence, be sustained.

Appeal from Lawrence Circuit Court, Eastern District; *John B. McCaleb*, Special Judge; affirmed.

STATEMENT BY THE COURT.

F. A. Fry brought this suit in the justice court against S. M. Nutt upon a due bill and alleged that said S. M. Nutt was due him the sum of $45 with 6 per cent interest, "from.....being the date the said defendant was paid the first money upon Ditch No. 2 of the Greene and Lawrence Drainage District, and that he had failed and refused to pay the same, etc." The due bill reads:

"November 30, 1911, due F. A. Fry $45, to be paid when collected for cutting Rite-of-Way No. 2 to be paid when first money collected on sed Rite-of-Way.—S. M. Nutt."

Defendant plead fraud and failure of consideration, and judgment was rendered in his favor in the justice court, from which Fry appealed to the circuit court.

On trial there the due bill was introduced in evidence, and its execution admitted and Nutt testified that he executed it in consideration that Fry would transfer to him his contract for cutting a certain portion of the right-of-way for Ditch No. 2 in Greene County. That after the contract was assigned to him, he went to Mr. Miller, the representative of the ditching contractors, to have it approved, and was told that the contract had been forfeited, and he would not approve it. He then made a contract with the principal contractors to cut a portion of the same right-of-way for which Fry had held the contract that had been assigned to him. He did not tell Fry that the contractors had declined to approve the transfer of the contract to him, nor that they claimed it was forfeited until some time after the transfer, and when Fry was insisting upon payment. Neither did he ask for the return of the due bill as he did not regard it worth anything.

Fry testified that he had the contract to clear the designated portion of the right-of-way for the ditch, and sold and transferred it to S. M. Nutt at his request for $45, as evidenced by the due bill, and that his contract was not forfeited at the time of the sale and transfer of it; and that he had never been notified by either the contractors digging the ditch nor Nutt that it was claimed to be forfeited until long after the transfer of the contract and execution of the due bill, and when he was insisting upon the payment of it.

Miller, the superintendent of the clearing of the right-of-way, testified that Nutt did some work on the right-of-way for No. 2, and was paid about 75 per cent. of the cost; that this money was paid to Nutt, "who cut the right-of-way that was contracted to Fry originally;" that

it was paid in the spring of 1912, 75 per cent. of the amount completed each month, and that up to June he had been paid something like $150. This witness also stated that he had cancelled the contract with Fry, and proceeded under the new contract afterward made with Nutt, which omitted two miles of the right-of-way included in original contract with Fry.

Each party requested an instructed verdict, and the court directed a verdict in Fry's favor, from the judgment upon which this appeal is prosecuted.

T. A. Turner, for appellant.

1. Plaintiff failed to show that any moneys had been paid or collected. 1 L. R. A. (N. S.) 1120-5; 40 Ark. 185. No consideration was proven. 14 Ark. 390; 7 L. R. A. (N. S.) 1035. The burden of proof was on plaintiff. It was error to admit testimony after plaintiff rested his case. A verdict should have been directed for defendant.

J. N. Beakley, for appellee.

1. The abstract does not comply with the rules. 112 Ark. 118; 55 Ark. 547.

2. This is a case of invited error. The complaint will be considered amended if defective.

3. No abuse of discretion by the court is shown in admitting testimony after plaintiff rested. 115 Ark. 230; 116 Ark. 30.

4. A general assignment that the verdict is contrary to the law and evidence is not sufficient. 117 Ark. 198.

5. A jury was waived. 117 Ark. 145; 100 Ark. 73; 92 *Id.* 278.

KIRBY, J., (after stating the facts). The case is not well abstracted, but sufficiently so, that it will not be dismissed for noncompliance with the rule. It appears that after the due bill was read in evidence, plaintiff rested his case, the defendant was examined, withdrew his testimony upon leave of the court, and asked a peremptory instruction, contending that the testimony did

not show that any moneys had been paid to or received by him from the contractors for cutting the right-of-way, and insisting that it was necessary to prove that fact in order to recover.

The court denied the motion for a directed verdict, and the testimony was re-submitted, after which defendant renewed his motion for a directed verdict several times at other stages of the proceedings, which was denied.

(1) It is insisted that the court erred in denying said motion and in permitting the introduction of the testimony over appellant's objection after plaintiff had rested his case. The conduct of the trial is within the discretion of the court, which permitted the introduction of other testimony by the plaintiff after he had introduced the due bill and rested, and unless there was a manifest abuse of this discretion, his action in permitting the introduction of such testimony, will not be controlled here, and the cause reversed because of it. It was doubtless the court's purpose in permitting it to ascertain the truth of the matter to be determined in furtherance of justice, and he could in the exercise of such discretion permit the introduction of other testimony, notwithstanding the plaintiff may before have announced that his evidence was all in, and we do not find any abuse of discretion in his doing so. *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79; *St. Louis, I. M. & S. Ry. Co.* v. *Grimsley,* 90 Ark. 64; *Garner* v. *State,* 97 Ark. 63.

(2) Appellant is not in a position to contend here that the court erred in its ruling as to whom the burden of proof rested upon, since he made no objection to it, neither did he allege same as a ground for a new trial in his motion therefor. *Jenkins* v. *Quick,* 105 Ark. 467; *American Ins. Co.* v. *Haynie,* 91 Ark. 43; *Cammack* v. *Southwestern Fire Ins. Co.,* 88 Ark. 505; *Singer Mfg. Co.* v. *Reeves Lumber Co.,* 95 Ark. 363; *Thielman* v. *Reinsch,* 103 Ark. 307; *Boshears* v. *Johnson,* 101 Ark. 120.

(3) The trial was before the court without a jury in effect, since each party asked for an instructed verdict

without asking other instructions. Under this condition we have held that the decision of the jury was waived and the matter at issue submitted to a trial by the court, whose decision in directing a verdict has the same effect as would have been given to the verdict of the jury upon the issue without such direction. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 73; *Supreme Tribe of Ben Hur* v. *Gailey,* 117 Ark. 145.

(4) The statement filed before the justice alleges that the defendant has been owing the sum claimed, "from the date the said defendant was paid the first money on Ditch No. 2 of the Greene and Lawrence Drainage District," and it was competent to show that he had received the money for cutting the right-of-way mentioned in the due bill, since it states, "the amount was to be paid out of the first money when collected for cutting the right-of-way." The testimony shows that he received $150 or more for cutting that portion of the right-of-way for which appellee had a contract to do the work, which he assigned to appellant, receiving in consideration, the due bill sued upon.

Appellant, it is true, testified that the contract was transferred to him, but also that he received no benefit from it, the principal contractors he said having declared it forfeited and cancelled it and given him a new contract to cut the same right-of-way. Appellee denied that his contract was forfeited, however, and the right of the contractors to cancel it, and the record does not show what the contract was, appellant claiming to have lost it after it was transferred and delivered to him by the appellee.

The testimony is sufficient to support the judgment, which is affirmed.

O'NEILL v. LYRIC AMUSEMENT COMPANY.

Opinion delivered June 28, 1915.

1. MORTGAGES—UNRECORDED MORTGAGE—PRIORITY OVER MECHANICS' LIENHOLDER.—A mortgage, which can not be recorded under the statute, because of a defective acknowledgment, will not take precedence over the holders of mechanics' liens, which have been perfected

under the statute, although the mortgage was executed before the work was done, upon which the mechanics' liens are based.

2. MORTGAGES—DATE OF PRIORITY.—A mortgage dates its priority from the time it is filed for record.

3. MECHANICS' LIENS—MATERIALS FURNISHED—ELECTRIC LIGHTING FIXTURES.—Electric lighting fixtures, installed in a building to be used as a moving picture house, are included within the meaning of the statute, giving a person a lien upon a building for materials furnished in its construction.

4. MECHANICS' LIENS—MATERIALS FURNISHED—TIME FOR FILING LIEN.—The time fixed by the statute for filing a material man's lien, when the materials are delivered from time to time, but under one contract, runs from the date the last item is delivered.

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

STATEMENT BY THE COURT.

On May 30, 1913, T. J. O'Neil instituted this action in the chancery court against the Lyric Amusement Company, C. J. Horner, R. Woodward, Missouri Lumber Company, Klein Paint Company, J. C. Rush and William Borman to foreclose a mortgage given by the Lyric Amusement Company on its lease-hold interest in a certain building in Hot Springs, Arkansas, and to have said mortgage declared a prior lien to the claims of the other defendants who had filed mechanics' liens against the building.

On May 21, 1912, G. W. Murphy leased to the Lyric Amusement Company a three-story building in the city of Hot Springs for a period of nine years and seven months from the 1st day of June, 1912. The building had been formerly used as a hotel, and the lessee was given the right to make alterations and improvements in the building by renovating and enlarging it.

On the 31st day of August, 1912, the Lyric Amusement Company executed to the Citizens National Bank of Hot Springs its promissory note for $3,500, payable ninety days after date, and, in order to induce T. J. O'Neil to endorse the note, that it might be accepted by the bank, executed a mortgage on property described as follows:

"The lease-hold interest in and to a three-story building situated at No. 416 Central Avenue, in the said city

of Hot Springs, Arkansas, Garland County, the lower part now being prepared by the said Lyric Amusement Company as a theater; the other two floors of said building, being formerly occupied as a hotel, together with all the personal property that the said Lyric Amusement Company now have in their possession, more particularly described as follows: Three (3) pianos, one moving picture machine, five hundred (500) opera chairs on hand, scenery contracted for and all fixtures and furnishings."

The Lyric Amusement Company was a corporation, and became insolvent. The chancellor appointed a receiver to take charge of its property, which was subsequently sold under orders of the court. Its lease-hold interest was sold for the sum of $2,300, and the personal property for the sum of $1,200. The court found that the defendants furnished the Lyric Amusement Company materials and had materialmen's liens on the lease-hold interest of the Lyric Amusement Company for the amounts named in the decree, and that the mortgage executed by the Lyric Amusement Company to plaintiff O'Neill was not entitled to be recorded because it was not perfected and acknowledged as required by the statute. A decree was accordingly entered to the effect that the defendants holding mechanics' liens be first paid out of the proceeds of the sale of the lease-hold interest, and that the remainder should be paid to the mortgagee. The decree also provided that the proceeds of the personal property should be paid to the mortgagee. The case is here on appeal. Additional facts will be stated in the opinion.

Rector & Sawyer, for appellant.

1. It was error to hold that a mortgage must be recorded in order to give it priority over a mechanic's lien. Nothing can be read into a statute unless its language is ambiguous. Sections 4972 and 4974 are the two sections of the whole statute that refer to liens and mortgages, and there is no provision in either section that a mortgage or lien should be recorded. 65 Am. St. Rep. 47; 106 *Id.* 445; 71 Ark. 37; *Id.* 175; 9 Ark. 112; 30 Ark. 572.

2. The court erred in holding that the material furnished and labor done on the second and third floors, after the execution of the first mortgage would be a prior lien to the mortgage. In order to make the mechanic's liens superior to the mortgage, it was incumbent upon appellees to show that the labor performed and the materials furnished were contemplated at the time of the execution of the mortgage. Kirby's Digest, § 4974; 34 Ia. 559; 4 Cal. 175; 44 Ia. 71.

3. The lien of Rush Brothers was not filed within the time prescribed by law. Moreover, electric light bulbs or globes, or lamps, are not fixtures or permanent improvements within the meaning of the mechanic's lien law. 79 Pa. St. 403.

James E. Hogue and *C. Floyd Huff,* for appellees.

1. Our statute provides that a mortgage shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, *and not before,* and that this filing shall be notice to all persons of the existence of such mortgage. Kirby's Digest, § 5396.

An unrecorded mortgage will not defeat the lien of a stranger to the conveyance against the same property. 9 Ark. 112; 18 Ark. 90; 20 Ark. 190; 41 Ark. 186; 40 Ark. 536-540; 49 Ark. 83; *Id.* 457; 71 Ark. 505; 73 Ark. 78; 97 Ark. 432; 105 Ark. 241.

2. There was no error in holding that the material furnished and labor done on the second and third floors after the execution of the first mortgage would be a prior lien to the mortgage. 56 Ark. 608.

3. Rush Brothers' account for materials furnished and labor performed ran from the 8th day of May, 1912, to the 4th day of March, 1913. Their lien filed April 12, 1913, was within the time allowed by law.

The articles furnished in installing the system of electric lighting were necessary and were supplied to be put together in such manner as to meet the designs of the architect and builder, and the necessities and desires of the owner; and, when so put together, became one system of lighting, every part being installed and used in its

proper place, and each part useless without the others. Rush Brothers are entitled to their lien. 25 R. I. 318; 66 Miss. 339; 22 R. I. 624; 84 Am. St. Rep. 858; 138 N. Y. S. 13; 105 R. I. 875; 154 Ill. App. 308; 105 Ark. 146.

HART, J., (after stating the facts). It is conceded by counsel for the plaintiff that, owing to a defective acknowledgment, his mortgage is not entitled to be recorded; counsel insist, however, that the mortgage having been executed before the materials had been furnished, the plaintiff's lien is prior to that of the materialmen notwithstanding the fact that his mortgage was not entitled to be recorded.

The defendants have asserted a lien under section 4972 of Kirby's Digest, and counsel for the plaintiff contend that because that section does not specify recorded mortgages, it is not necessary that the mortgage should be recorded in order to give plaintiff a lien prior to that of the materialmen. In support of their contention, counsel have cited *Mathwig* v. *Mann* (Wis.), 65 Am. St. Rep. 47, and *Miller* v. *Stoddard,* 50 Minn. 272, but we do not think these cases support their contention.

Under the Wisconsin statute, the only effect of a failure of a mortgagee to record his mortgage was that it became void as against any subsequent purchaser in good faith and for a valuable consideration, and the court held that the parties claiming liens under the statute for material furnished were not subsequent purchasers in good faith, and for a valuable consideration within the meaning of the statute.

The Minnesota statute provides that mortgages, unless recorded, are void as against subsequent purchasers in good faith and for a valuable consideration, or against attachments levied, or valid judgments. The court held that under the statute there was no obligation resting upon the mortgagee to record his mortgage as against mechanics' liens, for the provisions of the statute did not apply to or extend to such liens, because they did not come within the terms of the statute; that in the absence of any statute on the subject, the court was relegated to the com-

mon law by which a registration of mortgages was not required.

(1-2) The provisions of our statute in regard to mortgages are essentially different. Section 5395 of Kirby's Digest provides the manner in which mortgages are to be proved and acknowledged, and where they are to be recorded; and section 5396 provides that every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time same is filed in the recorder's office for record, and not before; and that the filing shall be notice to all persons of the existence of such mortgage.

In construing these sections, the court has uniformly held that, though the mortgage is good between the parties thereto, though not acknowledged and recorded, it constitutes no lien upon the mortgaged property as against strangers, even though they may have actual notice of its existence. *Smead* v. *Chandler,* 71 Ark. 505.

Persons who have filed mechanics' liens under our statutes, are strangers to the mortgage, and where their liens have been perfected in accordance with the terms of the statute, we are of the opinion that such liens are prior to those acquired by a mortgagee who has not filed his mortgage for record. We are strengthened in this view by section 4972 of the Digest, which gives materialmen a preference over prior liens with certain exceptions, not now necessary to be named. The language of the statute is that the materialmen shall have a lien in certain cases in preference to any prior lien or encumbrance or mortgage. In the connection in which it is used, it is evident to our minds that the framers of the statute used the word "mortgage" in the sense of a valid mortgage which constituted a lien upon the property. As we have already seen, under our statutes a mortgage is only a lien on the mortgaged property from the time the same is filed for record, and not before. The mortgage dates its priority from the time it is filed for record. Supporting this view, see *Morris County Bank* v. *Rockway Mfg. Co.,*

14 N. J. Eq., 189; *Thielman* v. *Carr*, 75 Ill. 385; Rockel on Mechanics' Liens, § 161.

(3) It is conceded by counsel for the plaintiff that all the lien claimants have lienable claims except J. C. Rush; as to him, two contentions are made to defeat his lien. The first is that his claim was not filed within ninety days after the materials were furnished as required by the statute; and the second is that the materials furnished were not lienable claims under our statute.

The property leased by the Lyric Amusement Company was a three-story building formerly used as a hotel, and it was the intention of the company to change it into a theater for moving pictures and vaudeville. This change was provided for in the lease. It will be remembered that the lease was for a period of nine years and seven months from the 1st day of June, 1912. The lower floor of the building was changed and subsequently alterations were made in the second and third floors. To make the building available for use as a moving picture show, it was necessary to exclude sunlight, and use artificial light. Electricity was chosen for that purpose. The Lyric Amusement Company made a contract with J. C. Rush to furnish all the material needed for that purpose. The agreement was that the material should be furnished along as needed and ordered by the company. The walls were decorated in a special manner and it was the intention of the company to install the electric light fixtures in such a manner as to show the decorations to the best advantage. Specially designed fixtures were furnished for that purpose, and it was the intention of the lessee that these fixtures should become a permanent part of the building. They were incorporated into the building in such a manner as to be a part of it. Part of the materials furnished were used in making a sign in front of the building. Globes were furnished which were screwed into sockets made for them. Of course, these globes could be unscrewed and fitted into other sockets, and they would also wear out by constant use. It appears from the record, however, that all the materials furnished by Rush

were incorporated into the building and made a part of it, and that it was the intention of the lessee to install them in the building and make them a permanent part of it. In short, they were installed in the building as a component part of it, and it was intended that they remain there until they wore out. They were essential to the successful operation of the building as a moving picture and vaudeville theater, and were designed for that use. They were reasonably necessary for the purpose for which they were placed in the building and under the circumstances, we think the materials were furnished for the improvement of the building within the meaning of the statute. See Rockel on Mechanics' Liens, section 18; *Scannevin & Potter* v. *Consolidated Mineral Water Co.,* 25 R. I. 318; *J. I. Mulholland* v. *Thompson-Houston Electric Co.,* 66 Miss. 339; *McFarlane* v. *Foley,* 27 Ind. App. 484, 87 Am. St. Rep. 264; *Pacific Sash and Door Co.* v. *Bumiller* (Cal.), 41 L. R. A. (N. S.) 296; *Wahle-Phillips Co.* v. *Fifty-Ninth Street Madison Avenue Co.,* 138 N. Y. S. 13; *Canning* v. *Owen,* 22 R. I. 624, 84 Am. St. Rep. 858.

(4) In regard to the claim that the lien was not filed in time, it may be said that though the materials were furnished in installments and at intervals, they were furnished under one contract and for the same improvement. The parties intended that they should be included in one account, and, under the circumstances, we think the entire account should be treated as a continuous and connected transaction. In such cases the time fixed by the statute within which to file a lien runs from the date of the last item. Rockel on Mechanics' Liens, par. 94; 27 Cyc. 145; see, also, *Joplin Sash & Door Works* v. *Oklahoma Presbyterian College for Girls* (Okla.), 43 L. R. A. (N. S.) 158.

It follows that the decree must be affirmed.

PITTS v. STATE.

Opinion delivered June 21, 1915.

1. CRIMINAL PROCEDURE—INDICTMENT—SPECIAL JUDGE.—An indictment returned by the grand jury into court and received by a special judge occupying the bench, who was not elected to try the particular case, is valid.
2. LIQUOR—ILLEGAL SALE—"BLIND TIGER."—Evidence held sufficient to support a conviction of defendant for the illegal sale of liquor by the "blind tiger" device.

Appeal from Sebastian Circuit Court; Fort Smith District; *Paul Little,* Judge; affirmed.

C. T. Wetherby, for appellant.

1. The court erred in not quashing the indictment. The indictment must be brought into court, presented by the foreman of the grand jury and filed with the clerk. The special judge had no authority to receive the indictment. Kirby's Digest, § 2226; 33 Ark. 815; *Ib.* 180; 24 *Id.* 626.

2. The verdict was contrary to the law and the evidence. Defendant was not charged with selling liquor, but with *keeping same for sale,* by means of a *device* known as a "blind tiger." The presence of liquor in the building raises no presumption of guilt. The goods were lawfully there, and no *prima facie* case was made by the testimony. The sale by the girl was an open one; there was no device.

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

1. There is nothing in the bill of exceptions to show that the indictment was received by a special judge. 107 Ark. 29.

2. The evidence sustains the conviction. 45 Ark. 176.

KIRBY, J. Appellant prosecutes this appeal from a judgment of conviction, for violating the liquor laws, upon the charge of selling liquors in a certain building in Fort Smith, upstairs and down, known as the "Social Club Saloon Building," by device known as a "blind tiger," and urges for reversal that the court erred in refusing to

quash the indictment, and that the verdict is not supported by sufficient testimony.

In the motion to quash, it was alleged that the indictment charging the appellant with the offense was returned into court by a grand jury and received and filed by a special judge, who was duly elected for the hearing of certain other cases, and occupying the bench at the time of the return of the indictment.

The motion for a new trial states that the court erred in refusing to allow appellant to prove by the court record that the indictment was returned into court and received by the special judge elected to try other cases, and also that the court refused this offer, stating that he had investigated the matter, and knew that the indictment had been returned into court before him, the regular judge.

The bill of exceptions does not contain any testimony whatever relative to the matter, nor the court's refusal to grant the motion to quash, except the statement in the motion for a new trial, that it was denied because the court had investigated the matter, and knew that the indictment was regularly returned into court while the regular judge was presiding.

(1) It is doubtful if there is anything in the record that requires a decision of the question whether an indictment may be returned by the grand jury into court and received by a special judge occupying the bench, who was not elected to try the particular case. The record does not disclose what particular cases or defendants, the special judge was elected to try, and the notation at the top of the page of the court record showing certain indictments returned into open court by the grand jury (Jno. H. Vaughan, special judge), is not conclusive that the indictment herein was not received when the regular judge was presiding.

Treating the question as raised, however, we do not think the fact that an indictment was received in open court from the grand jury and docketed by order of the special judge presiding would affect its validity or furnish sufficient grounds for it being quashed. The law only

requires that the indictment be returned into open court by the grand jury and filed with the clerk, and there is no reason why the special judge holding court may not have this done.

The purpose of having the indictment so returned is to give it authenticity as a formal charge against the defendant made by the grand jury and the special judge holding the court in which it is so returned has authority to receive the indictment returned by the grand jury, and make the appropriate orders for filing and docketing, whether it is in a case to be tried by him or not. He is the court for all such purposes at the time, even though he may have been elected only to try particular cases.

It appears from the testimony that appellant was a licensed liquor dealer in the city of Fort Smith, and that his saloon was closed on the 1st of August, 1914, on account of the provisions of Act No. 59 of the Legislature of 1913, not having been complied with.

The stock of liquors, according to his statement, was kept downstairs in his house, above which a rooming house was conducted, until it could be determined whether the sale of liquors would again be authorized in Fort Smith.

C. J. Flocks testified his place of business was next to that of appellant; that appellant would frequently come in and ask him if he wanted a drink, they would go upstairs and get a bottle of beer, that he paid appellant for it or rather give him 25 cents for the two bottles of beer that they drank. Appellant brought the beer into the front room upstairs; they sat by a small table with a crochet cover on it and drank it, and that he laid down a quarter on the table upon leaving. That he did this twice; that he had before been drinking with appellant, and thought he ought to begin paying for the drinks. He had been accustomed to drinking in appellant's saloon before it was closed by operation of law.

Another witness testified that he understood there was liquor for sale upstairs in Pitts' place, after the saloon was closed, and upon two occasions went up the

stairs into this room and saw a girl, who inquired what he wanted. That upon his replying "whiskey," she went out of the room and shortly returned bringing the quantity of liquor he called for and he paid her the money and went out.

Appellant testified that he knew nothing whatever about the whiskey being purchased from the girl; that he did not authorize the sale of it, and stated that it was evidently stolen by the girl and one Jones, who had worked for him, and that he had discharged her on that account. He stated that he kept the upstairs of his house for a rooming house, and was only keeping the liquors down stairs, waiting to see if the saloons could not be again opened upon the first of the year. This girl had the key to the down stairs part of the building, or could get it any time on applying to appellant's wife, and he said she was supposed to go down through the saloon to get into the back yard, as it was the most convenient way.

He admitted having invited Flocks to his place to take a drink with him, but denied that he had ever been paid any money by Flocks, or that he had ever seen any left upon the table by him.

(2) The testimony, we think, is sufficient to sustain the verdict. It was the purpose of the statute, under which appellant was indicted, as said in *Glass* v. *State,* 45 Ark. 176, "to suppress clandestine or indirect sales of liquors in communities where open sales could not be licensed, and also in communities where a license might have been obtained, but the seller undertook to sell without one."

The blind tiger is a device or contrivance resorted to to evade the operation of the law by the liquor seller who sought to ply his vocation, and at the same time to conceal his criminal agency in the action of selling. *Glass* v. *State, supra.*

Here was appellant's house, with the upstairs conducted as a rooming house, and a stock of liquors in the lower story formerly conducted as a saloon, with a girl in his employ who had access to the liquors, and who fur-

nished persons who inquired upstairs therefor, with the kind and quantity desired, after going out of the room, where it was ordered by the prospective customer and getting it, and took the pay therefor.

It is true the appellant said he had no knowledge of the liquors being sold by this girl, and received none of the money therefor, and that he discharged her upon ascertaining the condition, but the jury looked not with favor upon his statement.

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

SMITH, J., dissents.

ROGERS v. CUNNINGHAM.

Opinion delivered June 28, 1915.

1. DEEDS—VALIDITY—OLD AGE.—In the absence of fraud or undue influence, mere weakness of mind resulting from old age is not ground for setting aside a deed, provided the grantor was capable of understanding the nature and effect of the deed under consideration.
2. EVIDENCE—MENTAL CONDITION—OPINION OF NON-EXPERTS.—On the issue of incapacity or mental condition, the opinion of non-expert witnesses is admissible only, when taken in connection with the facts upon which such opinion is based; the specific facts upon which such opinions are based, must first be stated by other witnesses, or the testimony must show that such close and intimate relations have existed between the parties testifying and the person alleged to be mentally unsound, as to lead to a conclusion that their opinions will be justified by their opportunities for observing the person alleged to be mentally unsound.
3. EVIDENCE—MENTAL CAPACITY—NON-EXPERT TESTIMONY.—In weighing the evidence of witnesses as to alleged mental incapacity, bias and interest of witnesses and their means and opportunities of knowing the matters about which they testify must be considered, and the testimony of each witness must be read in the light of the other testimony.
4. DEEDS—VALIDITY—MENTAL INCAPACITY—BURDEN OF PROOF.—The burden is upon the plaintiff and father, who, having deeded lands to his children, seeks to set aside the deeds on the ground of mental incapacity at the time he executed the same.
5. DEEDS—DEED TO CHILDREN—MENTAL CAPACITY—VALIDITY.—Plaintiff, an old man, deeded certain lands to defendants, two of his chil-

dren. It appeared that defendants had lived with, and cared for, their father and mother for a great many years, and that they all had lived together harmoniously, and the son, one of the defendants, had worked the home place and provided for his parents. *Held*, in an action by the father to set aside the deeds, on account of his mental incapacity at the time, that the plaintiff failed to show that he was mentally incapable, and that under the evidence the deeds were valid.

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

Z. M. Horton, for appellants.

1. The burden was on the plaintiff to show that at the time he made the deeds he did not possess sufficient intelligence to understand and appreciate the nature of his act, and to show any fraud or undue influence on the part of the defendants inducing the execution of the deeds. 27 Ark. 166; 70 Ark. 173, 174; 97 Ark. 450; 22 Cyc. 1109-1112. To show that a grantor in a deed was at the time of its execution old and infirm, and in his dotage, is not sufficient to overthrow the conveyance. 49 Ark. 367, and authorities cited. Underhill on Wills, 205, § 144, and authorities cited in note 1.

2. Opinions of non-expert witnesses are not admissible unless they first detail the facts upon which their opinions are founded. 61 Ark. 244.

Gus Seawel, for appellee.

1. The findings of a chancellor upon the facts in evidence will not be disturbed on appeal, unless they are clearly contrary to the preponderance of the testimony. 96 Ark. 171; 90 Ark. 40; *Id.* 156; 89 Ark. 132; 88 Ark. 615; 41 Ark. 292; 42 Ark. 521.

2. When, through age, decrepitude, affliction or disease, a man becomes imbecile and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside in chancery. 15 Ark. 555, 597; 105 Ark. 44, 47; 73 Ark. 170.

HART, J. On March 28, 1913, S. B. Cunningham, Sr., instituted this action in the chancery court against Nancy A. Rogers, his daughter, and E. B. Cunningham, his son,

to set aside two deeds to land executed by him in their favor. He alleged that the deeds were obtained without any consideration, and that because of his age and a severe illness, his mind and body became so impaired that he was, at the time the deeds were made, incapable of transacting any business. The defendants denied that the plaintiff's mental faculties were impaired to such an extent that he did not understand what he was doing at the time he executed the deeds. The chancellor, after hearing the evidence, found the issues in favor of the plaintiff, and a decree was entered cancelling and setting aside the deeds. The defendants have appealed.

(1) The law is well settled that, in the absence of fraud or undue influence, mere weakness of mind resulting from old age, is no ground for setting aside a deed, provided the grantor was capable of understanding the nature and effect of the deed under consideration. *McCulloch* v. *Campbell,* 49 Ark. 367; Pomeroy's Equity Jurisprudence (3 ed.), volume 2, section 947.

S. B. Cunningham, Sr., owned a tract of land in Baxter County on which he and his family resided. His children had all married and left home, except the youngest son, E. B. Cunningham. He returned from school at the age of twenty-three, and, on account of the advanced age of his father and mother, decided to remain on the farm and take care of them. At that time there were about fifteen acres of land under cultivation. Cunningham remained home with his parents until he was thirty-five years of age. During this time he had the actual management of the farm and increased the cultivated land so that now there are about fifty or sixty acres in cultivation. The place has a rental value of about $140 a year.

A few years after E. B. Cunningham took charge of the farm, Mrs. Nancy Rogers was separated from her husband and with her two little children, returned to the home of her parents. She continued to reside with them there until two or three years before this suit was brought. She then removed to the town of Norfolk, in Baxter County, and her parents went with her.

On January 8, 1912, the plaintiff executed to her a deed to 130 acres of the land above referred to, and on the same day executed to his son, E. B. Cunningham, a deed to thirty acres of said land. The plaintiff and his wife, after the execution of the deeds, continued to reside with Mrs. Rogers until the death of plaintiff's wife in September, 1912. A short time after this the plaintiff went to visit a daughter who resided in Missouri, and on October 17, 1913, instituted this action to set aside the deeds. The deeds are sought to be set aside solely on the ground of mental incapacity on the part of the plaintiff.

It is claimed that the plaintiff was in his dotage at the time he executed the deeds, and that both mind and body were impaired by old age, coupled with a severe illness, and to such an extent that he was unable to understand what he was doing when he executed the deeds. There is no imputation of mental unsoundness, except that which resulted from old age coupled with his illness.

The question then is, did the plaintiff, when he executed the deeds in question on January 8, 1912, understand the effect of his act?

(2) Before entering into a discussion of the evidence, it may be well to determine what effect is to be given to it. When a person's mental condition or incapacity is in question, the opinions of witnesses who are not experts as to such capacity is only admissible in evidence, when taken in connection with the facts upon which such opinions are based. Before such evidence is admissible, the specific facts upon which such opinions are based must first be stated by the witnesses, or the testimony must show that such close and intimate relations have existed between the parties testifying and the person alleged to be mentally unsound, as to lead to a conclusion that their opinions will be justified by their opportunities for observing the person alleged to be mentally unsound. *Williams* v. *Fulkes,* 103 Ark. 196; *Pulaski County* v. *Hill,* 97 Ark. 450.

(3) It may also be stated that in weighing the evidence of witnesses, bias and interest of witnesses, and

their means and opportunities of knowing the matters about which they testify, must all be considered, and the testimony of each witness must be read in the light of the other testimony.

On behalf of the plaintiff, C. H. Blevens testified that he was a neighbor of the plaintiff, and had known him about thirty years; that on the date on which the deed was executed, the plaintiff was mentally and physically very weak; that he knew as a fact that the plaintiff was not capable of transacting any business where good judgment and a money consideration were involved. The witness further stated that Mrs. Rogers had been separated from her husband about sixteen years, and returned to her father's home without any means of support, and that her father had supported her ever since.

Two other witnesses testified that about the time the plaintiff executed the deeds, he was weak mentally, and that he sometimes understood what he was doing, and sometimes did not understand what he was doing.

Another neighbor and his wife testified that they were frequently at the house of the plaintiff, and did not think he was mentally capable of executing the deeds when they were signed.

W. J. Cunningham, a son of the plaintiff, testified that he lived within two or three miles of the plaintiff and visited him as often as once a month; that during the fall of 1911 he had a severe spell of sickness and had never recovered from it; that he did not consider him capable of transacting any business of any kind at the time the deeds were executed.

J. H. Cunningham, another son, testified that his father was ill during the fall of 1911 and spring of 1912, and that from his observation of and conversations with his father he did not consider him capable of executing deeds or transacting any business of any kind during that time.

Another son who lived about twenty-four miles away also testified that his father was not mentally competent

to sign the deeds in question at the time they were signed, but does not say how often he visited his father.

Mary Hogue testified that she lived at Springfield, Missouri, and that her father was not mentally capable of executing the deeds in question at the time they were executed, but she does not say how often she visited her father or what opportunities she had to know his mental condition. She said that some time after his wife's death in 1912, the plaintiff came to visit her, and remained there until this suit was brought.

Another neighbor testified that he had known the plaintiff a great many years, and that he had been failing physically for quite a number of years, and said that on one or two occasions, he had noticed that his mind had become weak.

A physician who attended plaintiff's wife in her last illness, and who attended plaintiff in his illness during the fall of 1911, testified that at the time plaintiff's wife died, he was not in his right mind. He also stated that during the illness of the plaintiff in 1911, he was suffering from bilious fever and paralysis of the sensory nerve to such an extent that he was out of his head, and that the disease left him in a nervous and excited condition.

The plaintiff testified in his own behalf, and said that he did not know what he was doing at the time he executed the deeds; that the deeds were presented to him by an older son, D. Cunningham, and that something compelled him to sign them, and that he did not realize what he had done until some time afterward, and that he then at once tried to have them cancelled. He further stated that his daughter came home after her separation from her husband, and that he supported her until he went to reside with his daughter, who lived in Missouri. He also testified that he supported his son, the defendant, E. B. Cunningham.

On behalf of the defendants, G. E. Cunningham testified that, at the request of his father, he surveyed the lands in controversy, and that his father told him at the time that he wanted to make a deed to the lands to the de-

fendants; that he made no representations whatever to his father to induce him to make the deeds; that what he did was at the request and under the direction of his father; that after he surveyed the land, his father became ill, and the matter was dropped until his father got up; that his father again brought up the subject, and that he, pursuant to his father's directions, prepared the deeds and brought an officer over to take the acknowledgments of his father and mother to the deeds; that the defendant, E. B. Cunningham, was not present when the deeds were executed; and that though his father was weak in body, his mind was perfectly clear.

Another witness testified that four or five years before the deeds were executed, he spoke to the plaintiff about buying some timber on the land, and that the plaintiff refused to sell the timber to him, stating that he intended that the defendants should have the lands because they had stayed with them, and had taken care of them after the other children had gone.

A school teacher testified that he accompanied the defendant, E. B. Cunningham, home at the time he left school, and stayed all night with him; that the plaintiff and his wife told him that they wanted their youngest son and Mrs. Nancy Rogers to have the land. The mother, he said, insisted that the land upon which the house stood should go to the daughter, and that the son should have the uncleared land. This conversation occurred about seventeen years before the institution of this suit.

Another witness, a merchant in Norfolk, testified that Mrs. Nancy Rogers had an account with his store, and that she always paid her bills; that he frequently saw the plaintiff in his store, and that there was nothing in his actions to indicate that he was incapable of transacting his business; that he had known him a great many years, and that he was just as he had always been, except that he was more feeble as he grew older.

Another witness testified that about eight years before the bringing of this suit, he heard a conversation between the plaintiff and his wife and the defendants, in

which both the plaintiff and his wife stated that they wanted the defendants to have the place. This witness was at that time boarding at their house.

Mrs. Rogers testified that after her separation from her husband, she returned to her father's house and lived there until they removed to town about three years before the institution of this suit; that her father and mother were feeble in body, and not able to work much, but that their minds were clear and that they fully understood what they were doing when the deeds in question were executed; that she and her children worked around the place and helped to care for her father and mother; that when they removed to town, her parents went with her and lived in the house which their son, G. E. Cunningham, had helped to build for her; that she did nothing whatever to induce her father and mother to execute the deeds in question, but that they executed them of their own free will and volition; that her father and mother continued to live with her after the deeds were executed until the death of her mother in September, 1912; that a short time after this her father left to visit her sister in Missouri, but that it was understood at the time that he would return and make his home with her; and that he remained with her sister in Missouri, and never did return to her.

E. B. Cunningham testified that it was his intention to become a school teacher, but that when he returned home in his twenty-third year and saw that his father and mother were growing feeble, and all their other children having left them, he thought it best to stay there with them; that he had charge of the farm and managed it until he was thirty-five years old; that when he returned from school there were fifteen acres in cultivation, and that he afterward increased the cleared land until there were between fifty and sixty acres; that during all this time he paid the taxes on the farm either from the proceeds of the farm, or from money which he himself made; that he would sometimes go off and work for wages elsewhere, but that whether he was on the farm or off at work, he devoted the proceeds of his labor to the support of his par-

ents; that the rental value of the farm was not sufficient to support them; and that afterward he homesteaded another piece of land, and when he married, went to reside on it.

We have only attempted to set out the substance of the evidence. It would be impracticable to set it out in detail, and would be of no value to specifically review it.

It is the contention of counsel for the plaintiff that at the time the deeds were executed, the plaintiff was in his dotage with body and mind enfeebled by a long and severe sickness, and that on this account, he was incapable of understanding what he was doing. They say that it is unreasonable to believe that the plaintiff would divest himself of all his possessions at a time when he was old and feeble. They claim that the case falls within the rule announced in *Morton* v. *Davis,* 105 Ark. 44, where it was held that when a person from age, affliction or disease, becomes incapable of managing his affairs, an improvident conveyance of his property will be set aside in equity.

We do not think the facts bring the case within the rule there announced. The deeds in question were reasonable to the grantees and just to the grantors. It is true that the deeds do not recite that they are given in consideration that the grantees should support the grantors during their natural life; but it appears from the record that the plaintiff had resided with the defendants for about sixteen years before the plaintiff's wife died, and there is nothing in the record which indicated that any friction whatever existed between the parties. The defendant, E. B. Cunningham, had stayed with his parents from the age of twenty-three to thirty-five. And Mrs. Rogers, after her separation from her husband, came home, and they all lived together in harmony, so far as the record discloses. When the son married and went to live on a piece of land he had acquired near by, he still looked after his parents, who remained on their homestead with Mrs. Rogers. When Mrs. Rogers moved to town, her parents went with her, and, as before stated, re-

sided there until the mother died, which was several months after the execution of the deeds.

Under these circumstances, it is natural to presume that they intended that their father should continue to reside with her until his death, and Mrs. Rogers testified that this was her understanding.

(4) It will be noted that only three of the disinterested witnesses for the plaintiff testified that the plaintiff was mentally incompetent at all times during the fall of 1911 and spring of 1912. The other two disinterested witnesses testified that at times he was capable of transacting business, and that at other times he was not. It devolved upon the plaintiff to show that he was incapable at the particular time when the deeds were executed. His own testimony, taken more than a year later, shows that at the time it was given, he was quite capable of understanding everything he did. His own testimony refutes the idea that he was incapable at all times.

In reference to the testimony of his children, it may be said that Mrs. Hogue lived in another State, and the record does not show what opportunities, if any, she had to know her father's mental condition at the time the deed was executed.

Another of his children who testified that he was mentally incompetent, admitted that although he lived within three miles of his father's home, he did not visit him more than once a month.

Another son testified that he lived more than twenty miles away, and, although he stated that his father was mentally incompetent, he does not state how often he visited him.

Another son testified that he lived nearby, visited his father frequently, and that he was incompetent at the time he executed the deeds.

Several witnesses for the defendants testified that at intervals during the past seventeen years, the plaintiff had declared his intention of executing a deed to the lands in favor of the defendants.

G. E. Cunningham, a son of the plaintiff, testified that he surveyed the land at the request of his father, who declared to him his intention of executing deeds to the lands to the defendants, and that the deeds were prepared by him and presented to his father for execution pursuant to his direction. This son had no interest in the matter except to carry out his father's wishes. He gave his sister several lots when she removed to town and assisted her to build a house on them. He understood and expected his parents to live with her.

The officer who took the acknowledgment of the plaintiff to the deeds, testified that he knew him well, and had known him many years, and that though the plaintiff appeared feeble in body, his mind seemed to be clear, and that he fully understood what he was doing.

Mrs. Rogers also testified that he understood what he was doing on the day he executed the deeds.

So, it will be seen that all the witnesses who were present when the deeds were executed, testified that the plaintiff fully understood what he was doing when he executed them, and that he executed them of his own volition.

A consideration of the plaintiff's own testimony shows that his mind had not become so impaired by old age that he did not understand what he was doing; and when it is considered that the plaintiff had lived with both of the defendants most of the time during the past sixteen years, and with one of them all of the time, and that their relations had always been harmonious, we think these facts, taken in connection with other facts and circumstances, show that the plaintiff was capable of understanding what he was doing at the time he executed the deeds in question.

It is true plaintiff testified that he had supported Mrs. Rogers out of the proceeds of his farm, and had also aided his son, Ed; but it will be remembered that the rental value of the farm is now only $140 per annum with fifty acres in cultivation. When Ed took charge, there were only fifteen acres in cultivation. It is evident therefore that the labor and management of the children was

necessary to supplement the income from the farm. It was natural for the parents to make a deed of their small holdings to their children, who had remained with them and provided for them in their old age; and that the greater part of this should be given to the daughter whose husband had left her. The father, in executing the deeds, only carried out his intentions as expressed at intervals during the whole time he lived with the defendants.

(5) A careful reading of the whole record in the case leads us to the conclusion that the clear preponderance of the testimony shows that the plaintiff was mentally competent when he executed the deeds, and we are of the opinion that the chancellor erred in holding to the contrary.

Upon the views we have expressed 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.

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

Opinion delivered June 21, 1915.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.—An employee of a railway company was engaged in repair work, which could best be done by the use of a jack, but which was frequently done with a prize-pole; the employee using the prize-pole, the same slipped, inflicting an injury upon him, of which he died; *Held*, the deceased assumed the risk attendant upon the work which he was performing.
2. RAILROADS—INJURY TO EMPLOYEE—"RAILROAD HAZARDS."—An employee of a railroad company was injured while engaged in repairing a car, by the slipping of a prize-pole, with which he was attempting to move a car wheel, *held*, the work did not expose the employee to those peculiar hazards which are incident to and connected with the physical use and operation of a line of railroad, and the work in which he was engaged did not bring him within the protection of Act 88, p. 55, Public Acts of 1911.

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

STATEMENT BY THE COURT.

This is an appeal from a judgment for $10,000 recovered by appellee against the appellant for the alleged negligent killing of her husband, Robert M. Wiseman. The facts are substantially as follows:

Wiseman was employed by appellant as a car repairer at McGehee, Arkansas. He had been engaged in such work for several months. On the 14th of April, 1913, he and one Duckworth, a fellow-servant, were engaged in the work of "brassing a car," that is, taking out the old and putting new brass in the journal box. Duckworth describes the manner in which they were doing this work as follows: "We would take what we call a journal jack, a small jack, and set it under the journal box and jack the box up so as to get the brass out—lighten up on it and take the brass out and put the new one in. Frequently, in jacking that up, the wheel would come with it. When the wheel comes up, we have to prize it down or take a jack and jack it down. The wheel has to come down before you can get the brass in. We had taken out the brass—had the box jacked up and had to pull the wheel down. The proper and customary way of getting the wheel down was to use the jack if we had it; if not, we used a prize pole. The jack is the safest way. I do not think there is any danger at all in doing the work with a jack. On this occasion, we were using a prize pole to prize the wheel down. When we jacked the car up, the wheel rose with it."

The witness then testifies that he and Wiseman looked up and down the track for a jack to prize the wheel down, and did not find one. So Duckworth took a prize pole and prized the wheel down. Wiseman took the brass and wedge out and carried the old brass to the supply room to get a new one. When Wiseman came back he picked up the prize pole, turned it edgewise in order to make it strong enough to pull the wheel down, and as he pulled up on it, it whirled and turned away, and the pole slipped and struck him in the side. The foreman had complained on different occasions about being short on jacks. If a jack had been used, there could have been no slipping.

The work was done both ways. If they had jacks, they jacked the wheel down, and if they didn't, they would get a prize pole. The scantling, used as a prize pole, was two inches thick and four inches wide, and something like eight or ten feet long.

The witness J. W. Goodwin testified that he was the foreman of the car repair department at McGehee. He describes the way the work was done as follows: "The first thing they do in order to allow the box to come up in order to take the brass out, place a jack under the journal box and jack it up high enough for the brass to come out; that throws the wheel down in order to bring the brass up; that is the proper method of taking the brass out. There has been a practice of putting a jack under the box, raising it up and putting a pole under them to bear the wheel down. This is a method that has been used and practiced a good deal."

The witness was asked what was the usual way of doing it, and answered, "Well, there is about as much use one way as the other. I suppose, about half and half." Witness had always told the men to put the jacks under there for the reason that it was much easier for them to do it. Wiseman nor any one else ever made any complaint about the insufficiency of jacks. If they did, witness would tell them to wait until the other men who were using the jacks got through with them. That was the case when the jacks were all in use at one time.

Appellee, as administratrix of the estate of her husband, Robert M. Wiseman, brought this suit against the appellant to recover damages for herself as widow and for the minor children. She alleged that the appellant was negligent in failing to furnish a sufficient number of jack-screws to enable Wiseman to do the work assigned to him as a car repairer, and that he was directed instead to elevate the car by means of a scantling or prize pole, and that in the use of the same by him, the same slipped, turned over and struck him in the breast, resulting in injuries from which he died. The answer denied the allegations of negligence and damages, and set up the defense

of contributory negligence and assumed risk. The appellant asked the court to instruct the jury to return a verdict in its favor, which the court refused.

The appellant, among other instructions, asked the court to tell the jury, in substance, that if Wiseman was injured as a result of the manner or method which had been adopted by appellant or its servants in doing the work in which he was engaged, and that he knew of such method or manner of doing the work, and continued in the employment of the appellant without complaint, he assumed the risk, and their verdict should be for the appellant.

The court refused the above prayers and appellant duly saved its exceptions. The court submitted the cause to the jury on the issues of the alleged negligence of appellant and comparative contributory negligence of Wiseman. The appellant objected to the court's instructions, because they ignored the issue of assumed risk.

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

1. The court's instructions ignored the issues of contributory negligence and assumed risk by deceased. 113 Ark. 60; 87 Ark. 576; 1 White on Personal Injuries, § 25.

2. The injury was accidental and there was no negligence on defendant's part. Wiseman's negligence was the proximate cause of the injury, and a verdict should have been directed for defendant. Cases *supra.*

3. The verdict is excessive. 117 Ark. 198.

J. C. Brown and *Ben D. Brickhouse,* for appellee.

1. The slipping of the pole, we admit, was accidental, but defendant failed to provide proper appliances, or use ordinary care in providing same. The action is based on the common-law liability of carriers and Act No. 88, Acts 1911. Labatt on Master & Servant, volume 3 (2 ed.), pp. 2498, 2502, 2563.

2. Contributory negligence of a fellow-servant does not preclude a recovery for an injury to an employee of which the proximate cause was the failure of the employer

to furnish suitable appliance. 56 Kans. 109; 42 Pac. 343; 4 Labatt, M. & S., p. 4790; 15 C. C. A. 52; 67 Fed. 881. The master must be free from negligence. 81 Va. 7; 12 Minn. 357; 77 S. E. 863; 125 Pac. 67; 87 Kans. 571. The question of negligence was one for the jury. 139 N. W. 142; 76 N. E. 261; 137 Pac. 755; 153 Ill. App. 511.

3. Defendant's negligence was the proximate cause of the injury. 4 Labatt, M. & S., p. 4784; 106 U. S. 700; 69 Fed. 823; 80 N. W. 561; 136 N. W. 323.

4. The doctrine of "assumed risk" does not apply here. 116 Ark. 461; 60 Ark. 558; 76 *Id.* 234.

WOOD, J., (after stating the facts). The uncontroverted evidence shows that the work of letting down the wheel, in which Wiseman was engaged at the time of his injury, was done by the use of a jack if the employees had a jack for that purpose, and, if not, it was done by using a prize pole. Wiseman had been engaged in this work for several months. Instead of waiting until he could procure a jack, which was the safest way of doing it, and without making any complaint to his foreman that he had no jack for the purpose, he undertook to do the work in the customary way when there were no jacks at hand, by the use of a prize pole, and while so doing, the pole slipped and he received the injury from which he died.

(1) The foreman testified that he had always told the men to put the jacks under there for the reason that it was easier for them to do it, but that it was done about as much one way as the other. Wiseman, being familiar with this method of doing the work, and knowing and appreciating the danger incident thereto, in deliberately choosing this manner of doing it, must be held to have assumed the risk. It was one of the ordinary dangers of the service when performed in this way. See, 3 Labatt's Master & Servant, section 1166.

If the use of the scantling was dangerous, which it proved to be, Wiseman knew and appreciated it, and it therefore was a risk which he assumed. See Crawford's Digest, vol. 5, p. 1079, f., "Risks assumed by a servant."

(2) To avoid the effect of this doctrine of assumed risk, appellee invokes Act No. 88, approved March 8, 1911, of the Acts of 1911. That act was construed by us in the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 377. Ingram, with others, was engaged in removing some old guard rails from two bridges on the line of railroad, and they were using these guard rails as skids, or running boards over which piling was being rolled from a push car into a flat car. This flat car was standing on the sidetrack of the railroad. In that case, Judge Hart, speaking for the court, said: "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. * * * 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 another 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."

The purpose of the Act of 1911 was not to include all the employees engaged in every department of the service. *K. C. & M. Ry. Co.* v. *Huff,* 116 Ark. 461, 173 S. W. 419; *Ry.* v. *Ingram, supra.* But its design was for the protection of those whose work exposed them to those "characteristic dangers peculiarly connected with the operation of railroads known as 'railroad hazards.'" *Peter Johnson* v. *Great Northern Ry. Co.,* 104 Minn. 444, 116 N. W. 936.

"Railroad Hazards," in the sense of this statute, are those peculiar dangers to which employees are exposed while they are engaged in work connected with, and neces-

sary to the operation or running of trains over a line of railroad. In *Railway Company* v. *Ingram, supra,* we said: "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 facts show the sense in which the words "use and operation of a railroad" were employed. The words "use and operation of a railroad" as used in the opinion relate to that department of the service in which employees, at the time of their injury, are actually engaged in the running of trains or in work that is incident thereto or intimately connected therewith.

It would be a difficult task to determine in advance and to define specifically what cases may fall within the purview of the statute. Each case will depend upon its own peculiar facts as developed. But the undisputed facts of the present record show that Wiseman, at the time of his injury, was engaged in the work of repairing a car in the shops at McGehee. This work in no manner exposed him to those peculiar hazards which are incident to, and connected with, the physical use and operation of a line of railroad, and the work in which he was engaged did not bring him within the protection of Act No. 88, of the Acts of 1911, as construed by us in *Railway Company* v. *Ingram, supra.*

In *Potter* v. *Chicago, Rock Island & Pacific Ry. Co.,* 46 Iowa, 399, it was held that the liability of a railway company to an employee injured in a machine shop is determinable by the common law, and not by the statute, since such employee, within the meaning of the statute, was not engaged in "the operation of a railroad." And in *Hathaway* v. *Illinois Cent. Ry. Co.,* 92 Iowa 337, it was held that an engine dispatcher who was assisting a machinist in placing a spring in one of defendant's locomotives was not engaged in work "in any manner connected with the use and operation of a railroad" within the meaning of those terms as employed in the statute.

The construction we have placed upon the statute is the same as if the above terms were embodied in it and were used in the sense above indicated. The court erred in its ruling upon the instructions.

The judgment is therefore reversed and the cause dismissed.

SALLEE v. SECURITY BANK & TRUST COMPANY.

Opinion delivered June 21, 1915.

1. BILLS AND NOTES—CONSIDERATION—PURCHASE OR LOAN—QUESTION OF FACT.—In an action on a note, of which the holder claimed to be a *bona fide* holder in due course, the issue of whether the note was taken by the holder as security for a loan, or by way of purchase, is, under the evidence, a question for the jury.
2. BILLS AND NOTES—CONSIDERATION—NOTICE.—Where a note was presented to appellee for discount, by one who claimed to be acting for the payee, there was nothing to put the appellee upon notice that the note was executed without consideration, and that endorsements thereon were for accommodation.

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

STATEMENT BY THE COURT.

Appellee brought this suit against the appellants on a promissory note for $1,155 payable to the order of M. W. Cobbs, bearing interest at the rate of 10 per cent per annum from maturity until paid, signed by the Morton Mercantile & Handle Company, through Wm. M. Isom, its president and manager. The note was indorsed by Rolfe, Block, Cobbs and R. P. Sallee. The appellee alleged that it purchased the note in good faith and for value prior to its maturity, in due course of business. It alleged that the note was past due, and that demand had been made of appellants for its payment, and they had refused.

The appellants answered. The answer set up that the maker of the note agreed with the appellee to pay interest in advance at the rate of 10 per cent per annum, and a bonus of $50 for the use and forbearance of said

money; that the payee of the note had no interest in it, and only permitted the note to be made payable to him in order to carry out the corrupt agreement made by the appellee with the handle company through its president; that the loan was made by the appellee to the handle company knowingly and intentionally, with the corrupt intention to receive a greater rate of interest than 10 per cent. per annum, and that the contract was therefore void for usury. Appellants also denied specifically the allegations as to the purchase of the note.

Appellee replied to the answer, in which it set up in detail the circumstances under which it alleged that it purchased the note. It denied that it had any knowledge whatever that Cobbs, the payee, had no real interest in the note or the funds arising therefrom, but stated in substance that it purchased the note at an agreed discount of $105, in the usual course of banking business, before the maturity thereof, and in good faith, without any agreement whatever to make a loan of money to the maker, the handle company, and reiterates that it purchased the note as the property of the payee.

G. O. Light, cashier of the appellee bank, testified in substance that the note in controversy was first presented to him for discount by Wm. M. Isom, who purported to represent Cobbs. He told Isom that he would buy the note if Cobbs would take $1,050 for it. Witness objected to the note in the form it was first presented on account of the name of the original payee appearing to have been erased and another substituted. Isom requested witness to fix up a note payable to Cobbs, which witness did. Passing over unnecessary details in his testimony, it suffices to say that the witness testified that at the time of the negotiations there was no conversation between witness and Isom about lending the Morton Mercantile & Handle Company any money, or about the bank's lending Cobbs any money. The proposition came to witness purely as a proposition of discount from M. W. Cobbs. The note was payable to Cobbs, and nothing was said about borrowing or loaning. It was a straight sale and purchase. The

matter of the amount of the discount was understood before the matter was closed. Cobbs' name and the others appeared upon the note as indorsers, and he paid out the money as stated on Isom's order. He understood that Cobbs was entitled to the funds, and declined to pay same out except on his order. The matter was closed up by witness's check, as cashier, based upon a draft drawn by Isom in favor of the Wynne Bank, accompanied with an order from Cobbs to pay over the proceeds to Isom or his order.

Witness Cobbs testified on behalf of appellants substantially as follows: That the two notes had been made out in his name at the suggestion of Isom. That while the note in controversy was made payable to him (Cobbs), he was not interested in the proceeds. He denied that he ever requested or directed the appellee to discount the note for him, or to have anything to do with it. He understood that a mortgage was to be given in his favor, and Isom stated that he was going to sell the note. He signed the order for the appellee to pay over the proceeds of the note to Isom.

Witness Sallee testified that he was the last indorser. He had known Isom for two years, but was unacquainted with the other indorsers. Isom asked witness to sign the note, and, upon being informed as to who the other indorsers were, he agreed to do so. Witness understood that the money was to go to the handle company. Witness did not know anything about Cobbs. He signed the note because he had told Isom he would do so.

Witness Isom testified that the first note he presented to the appellee bank was payable to Cobbs. He told the cashier that he was willing to discount it for fifty dollars in addition to the interest, but the cashier declined to accept it because the note was defaced. The cashier stated, however, that if the note were put in proper shape, the bank would arrange to handle it. "All understood that Cobbs was used as a go-between. The last note was made payable to him." Witness informed the cashier of appellee that Cobbs was not worth the money, and that he was

not to get anything out of it, and witness was much surprised that the mortgage was drawn in Cobbs' favor when Cobbs had merely been used as a go-between for accommodation. Witness told the cashier that the money received on the note was to go to the Morton Mercantile & Handle Company. He further stated that the cashier said to him that the bank could not accept the note payable to the bank because in that shape it could not take the fifty dollars bonus. Continuing, the witness says: "The last and first notes were both payable to Cobbs, while the second was payable to the bank."

Light testified in rebuttal, denying that the matter of using Cobbs' name as a go-between was discussed between him and Isom, and further denying that there was anything said about a loan or bonus between them. He further stated that no note payable to the bank and trust company had ever been presented to the bank, and therefore he stated that it could not be true, as stated by Isom, that the second note was payable to the bank, and he therefore says they could not have refused to accept such a note, because no such note was presented.

Witness Sallee, being recalled, corroborated the testimony of Isom by stating that he had indorsed, at the request of Isom, a note for $1,155, payable to the Security Bank & Trust Company, and had returned same to Isom about the time the loan was being negotiated. But he further stated that he did not know whether the note had ever been presented to the bank and trust company. The note was indorsed by Rolfe, Block, Cobbs and himself.

The appellants asked the court to instruct the jury as follows: "(1) You are instructed that the paying and receiving a greater rate of interest than 10 per cent. per annum as a loan of money is *prima facie* evidence of a corrupt agreement, notwithstanding the parties to the loan acted in ignorance of the law." The court refused appellants' prayer, and they duly excepted.

The court instructed the jury, on its own motion, in effect that contracts for a greater rate of interest than 10 per cent. per annum were void. That if the note in contro-

versy was made as the result of a corrupt agreement entered into between the parties, whereby the one was to pay, and the other to receive more than 10 per cent. per annum for the use and forbearance of money, that the same was a loan and usurious and void; that the burden of proving usury was upon those who alleged it, and if the jury found from a preponderance of the evidence that the agreement between the handle company and plaintiff was that the note sued on was to be made to Cobbs, and that Cobbs had no interest in the note or the proceeds arising therefrom, and received no part of the proceeds, and that it was so understood between plaintiff and the handle company, that this would only constitute a cloak or cover for a usurious agreement.

Other instructions were given, presenting to the jury the issue as to whether the transaction evidenced by the note in suit was one for a loan of money or a sale of the note.

The only ground of error assigned in the motion for new trial in the ruling of the court upon the instructions is that of the court's refusal to give appellants' prayer No. 1. There was a verdict in favor of the appellee for the amount of the note and interest. Judgment was entered in its favor for that sum, and this appeal has been duly prosecuted.

Holifield & Harrison, Killough & Lines and *Block & Kirsch,* for appellants.

1. This was accommodation paper. Dan. on Neg. Inst. (3 ed.), § 189; Tiedeman, Bills & Notes, § 54; 107 Mass. 552. If such note is sold or discounted for more than 10 per cent, the transaction is usurious. 41 Ark. 331; Daniel Neg. Inst. (3 ed.), § 191; Tiedeman, Bills & Notes, § 54; 29 Am. & E. Enc. Law (2 ed.), 477, 478; 25 Am. & E. Anno. Cases, 886; 99 Am. Dec. 251.

R. E. L. Johnson, for appellee.

1. No question of accommodation paper was raised below. 101 Ark. 95; 75 *Id.* 76; 88 *Id.* 189.

2. But, if it had been, the doctrine does not apply here. The handle company was the maker of both notes,

and Cobbs was the payee. The transaction was made with Isom, and the jury has settled all questions of fact under proper instructions. Isom was Cobbs' agent in procuring the discount. 41 Ark. 331, does not apply.

3. There was no usury in the matter. 91 Ark. 458, and numerous cases cited. Appellee was simply an innocent purchaser for value, and without notice.

WOOD, J., (after stating the facts). (1) The only issue in this case was whether or not the appellee acquired the note in controversy by discount and purchase thereof, or whether or not appellee acquired the same by an agreement with the maker thereof for a loan. This issue, as to whether the appellee purchased the note or obtained the same for a loan of money, was sharply drawn, and there was a decided conflict in the evidence. The issue was properly submitted to the jury, and there was evidence to sustain their verdict.

The court did not err in refusing appellants' prayer for instruction, because that prayer assumed that the transaction in evidence was a loan of money and ignored the testimony on behalf of the appellee tending to prove that the transaction was a sale of the note.

Appellants contend that the note in controversy was offered to appellee for discount by the maker, and that this fact showed that the indorsements were for accommodation; and that inasmuch as the discount from the face value was greater than that allowed under our Constitution and statutes for a loan, the same was therefore usurious and void. To sustain this contention, appellants rely upon the case of *German Bank* v. *DeShon,* 41 Ark. 331. But it was a question for the jury as to whether the note in controversy was offered for discount and sale by the maker, and the jury have settled that issue in favor of the appellee upon evidence amply sufficient to sustain the verdict. The maker of the note was the Morton Mercantile & Handle Company, and Isom was the president of that company. But the testimony on behalf of the appellee tended to show that Isom was not proposing to discount the note for that company at all. On the contrary, the

testimony of the appellee's cashier was unequivocal to the effect that the proposition came to him purely as one of discount from M. W. Cobbs. "Isom," said he, "purported to represent M. W. Cobbs. The note was payable to Cobbs, and nothing was said about borrowing or loaning or bonus. The proposition was offered to sell me the note, and when the time came to talk business, I made a price that I could not give more than $1,050 for a $1,155 note. If Mr. Cobbs was willing to take that, I could handle the paper for him." While Isom testified that he told Light, the cashier of appellee, that he was trying to borrow the money for the Morton Mercantile & Handle Company, this conflict in the evidence made it purely a question for the jury as to whether Isom, in the negotiations with the appellee, claimed to be the agent of Cobbs, the payee of the note, or the agent of the handle company, the maker thereof. It being settled in favor of the appellee that Isom, in discounting the note in controversy, held himself out as the agent of the payee, and not of the maker, the case is thus clearly distinguished on the facts from the case of *German Bank* v. *Deshon,* upon which appellants rely for a reversal.

In that case, one Fatherly executed his note for the sum of $1,650, bearing interest at 10 per cent per annum, payable to his own order, and which was indorsed by Francis E. Ashley and A. G. DeShon. The note was executed and indorsed for the purpose of borrowing money. After the note was indorsed by Ashley and DeShon, Fatherly discounted the same for the sum of $1,608.75 to Blocher, and indorsed and delivered the note to him, and paid Blocher in addition the sum of ten dollars. Blocher thus had notice that the note had been indorsed for accommodation, and that it was being negotiated by the maker for a loan, and he agreed with the maker Fatherly, to take the note upon Fatherly, paying him in addition to the 10 per cent., the sum of ten dollars, making a greater rate of interest than that allowed to be taken for the use of money, and making the note usurious at the time it was first put in circulation. Blocher transferred the note to

the German Bank for value without notice. The bank brought suit against the maker of the note and the indorsers. Usury was set up as a defense. In that case there was a verdict and judgment declaring the transaction usurious, and in sustaining the judgment, this court said: "The jury evidently found, first, that the note sued on was transferred and delivered to Blocher by Fatherly in consideration of a loan of money; secondly, that Fatherly paid Blocher the sum of ten dollars in part consideration of the money loaned, and that in the discount of the note and the ten dollars there was paid to and received by Blocher, pursuant to an agreement coeval with the loan, more than ten per centum per annum interest for the use of the money loaned."

And in holding that the facts as thus found by the jury constituted usury, the court further said: "Where parties to a contract for a loan knowingly agree to pay and receive more than 10 per centum per annum for the use of the money borrowed, this, in the sense of the law, is a corrupt agreement. If it be the real intention of the parties to receive or reserve a given rate of interest, and that rate proves to be usurious, the contract will be void for usury, whether the parties knew the interest to be usurious or not. * * * If the note in question was transferred and delivered by Fatherly to Blocher, in consideration of money loaned, and it was void on account of usury in the hands of Blocher, it was likewise void in the hands of the German bank, notwithstanding it was transferred to the bank for a valuable consideration before maturity, and without notice of the usury."

(2) But here the facts were entirely different. The jury have found, and were warranted in finding, that the note was not presented to the appellee for discount by the maker, but that it was presented by one who claimed to be acting for the payee. Such being the fact, there was nothing to put appellee upon notice that the endorsements were for accommodation, and that the note was executed to Cobbs without any consideration therefor.

Learned counsel for the appellants assume that the uncontroverted evidence shows that the note in controversy was presented to the appellee for discount by the maker thereof. Hence, they contend here that the verdict and judgment should have been in favor of the appellants under the doctrine of the case of *German Bank* v. *DeShon*, *supra*. But, as we have shown, this is a misapprehension of the facts, and hence the doctrine of the above mentioned case has no application.

The trial court announced the law applicable to the evidence adduced under the issue presented, in conformity with many decisions of this court on the subject of usury. See, *Briggs* v. *Steele*, 91 Ark. 458, and cases there cited.

The judgment is correct, and it is therefore affirmed.

SCOTT *v.* MCCRAW, PERKINS & WEBBER COMPANY.

Opinion delivered June 21, 1915.

1. FRAUDULENT CONVEYANCES—DEED FROM HUSBAND TO WIFE.—A deed executed by a husband to his wife, *held*, under the evidence, not to be fraudulent as to creditors.
2. FRAUDULENT CONVEYANCES—DEED OF TRUST—HUSBAND AND WIFE.—Where appellant, knowing that an action was to be brought against him, executed a deed of trust to his wife, conveying all his property, the same will be held fraudulent as to a judgment creditor, and where the chancery court has found the deed of trust to be fraudulent, it properly should order the sale of the property, which has been uncovered by the decree, to satisfy the debt due to the creditor.
3. FRAUDULENT CONVEYANCES—DECREE—PAYMENT OF JUDGMENT.—Where property was fraudulently conveyed in fraud of creditors, the chancery court may order the same sold to satisfy the debt, but *held*, the allowance of a period of but five days, in which the debtor might pay the debt, before the property would be sold, is unreasonably short.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; reversed in part and affirmed in part.

Baldy Vinson, S. M. Wassell and *Miles & Wade*, for appellants.

1. The court erred in vacating the deed of trust from Doctor Scott to his wife. There was no testimony other than the deposition of Mr. Ketchum, the attorney for appellee. The insolvency of Doctor Scott is not shown, but if conceded, the decree should be reversed on authority of 76 Ark. 252. An insolvent husband, when justly indebted to his wife, may, without fraud, prefer such claim to that of other creditors, even though the result be to deprive other creditors of the means to satisfy their claims. The burden of proof was on appellee. The fraud must be proven. 56 L. R. A. 817, and notes, 824. The recital of a consideration in the conveyance is sufficient proof of consideration until the contrary appears. 4 Ill. App. 112; 31 Md. 240; 116 Pa. 190. Fraud is not presumed, and a conveyance by a debtor to his wife in satisfaction of a *bona fide* debt raises no inference of fraud. 147 Ind. 417; 64 Mo. 239; 3 Md. Chy. 167; 109 N. C. 268. A conveyance of real estate by an insolvent husband to his wife, in fulfillment of an agreement to repay her for real estate sold belonging to her, is not fraudulent as to creditors in the absence of proof of fraudulent intent of both grantor and wife, or knowledge of the wife of the fraudulent intent. 59 N. Y. S. R. 331; 112 N. C. 180; 46 Ark. 542; 74 Ark. 161; 56 *Id.* 259; 99 *Id.* 45; 110 *Id.* 354; 109 *Id.* 151.

2. It was error to vacate the deed to Mrs. Scott for lot 10, block 9. The true and equitable title to this has been in Mrs. Scott all the time. 47 Ark. 111.

3. It was error to order the sale of the property, especially on such short notice. 1 Head (Tenn.) 385; 18 Gratt (Va.) 739.

Riddick & Dobyns, for appellee.

1. Both the deed of trust and deed were fraudulent and void as to creditors. 20 Cyc. 450; 16 *Id.* 1064; 41 So. 575; 116 Am. St. 208; 65 S. W. 722; 18 Am. St. 894; 38 *Id.* 656; 76 Ark. 252; 68 *Id.* 162; 42 S. W. 183; 74 Ark. 161;

86 *Id.* 225; 56 *Id.* 73; 76 *Id.* 509; 96 *Id.* 531; 101 *Id.* 573; 73 *Id.* 174; 25 Pa. Sup. Ct. 300.

2. There was no error in ordering the property sold. 33 Ark. 328; *Ib.* 454; 112 N. W. 550; 64 Ark. 656; 76 *Id.* 553.

SMITH, J. Appellee was the plaintiff below, and alleged in its complaint that on the 27th day of March, 1914, it recovered a judgment against appellant, Dr. S. A. Scott, for the sum of $2,303.29, with interest, and that the suit on which this judgment was obtained was filed on the 16th of June, 1913, and that in anticipation of the filing of this suit, Doctor Scott had executed a voluntary conveyance to his wife to lot No. 10, in block No. 9, of Sheldon's Addition to the city of Little Rock. The date of the deed to Mrs. Scott was October 21, 1913. Before the date of the submission of this cause, the complaint was amended to allege that on the ..... day of June, 1913, appellant Doctor Scott had executed a deed of trust in favor of his wife to certain other property there described, and that this conveyance was a voluntary one for the fraudulent purpose of enabling appellants to cheat, hinder and delay appellee in the collection of its just demand against Doctor Scott.

After appellee had recovered judgment against Doctor Scott in the original suit, he prosecuted an appeal to this court, and appellee prosecuted a cross-appeal, and we have only recently handed down an opinion upon that appeal. See *Scott* v. *McCraw, Perkins & Webber Co.,* 119 Ark. 133.

Upon the trial of the cause brought to uncover the property alleged to have been fraudulently conveyed by Doctor Scott to his wife, and for her use and benefit, the court found that the said deed and the deed of trust were voluntary conveyances executed for the fraudulent purpose of defeating appellee in the collection of its judgment, and it was there decreed that if said judgment was not paid within five days, together with the interest and all costs, that the property there uncovered should be sold

by the clerk of the chancery court as commissioner named for that purpose.

Appellants complain alike of the action of the court in decreeing said conveyances to be fraudulent, and of the court's action in decreeing a sale of said land by the commissioner named for that purpose, and it is now urged that in no event should said lands be sold by the commissioner of the court, but that a sale thereof, if made at all, should be made under an execution duly levied upon said property.

(1) We think the court erroneously found that the deed from appellant Scott to his wife for the said lot No. 10, block 9, was fraudulent. The facts appear to be that Doctor Scott had but little, if any, property of his own at the time of his marriage, but that his wife acquired, through her father, a very valuable estate. That the health of appellant's wife had failed and she was brought to Little Rock for treatment, whereupon the said lot which adjoined the homestead was purchased. The proof appears reasonably certain that the initial cash payment of one-third made at the time of the purchase of this lot was advanced by Mrs. Scott's father, and that it was intended that the title to the lot should be taken in her name. It also appears reasonably certain that the remaining payments were made with funds belonging to his wife, and he testified that, although these remaining payments were made after the deed had been taken in his own name, it was understood and agreed that when the purchase money had been paid, and the vendor's lien for the purchase money had been satisfied, he should then convey said lot to his wife, and that he did so convey it to her within ten days after the last of the purchase money had been paid.

(2) But the facts appear to be otherwise with reference to the lands described in the deed of trust, which recited that it had been executed for the purpose of securing an indebtedness of $16,000 due by appellant to his wife. We think the chancellor's finding that this con-

veyance was a voluntary one and was executed for the purpose of putting the property beyond the reach of appellee is not contrary to the preponderance of the evidence. It was alleged and admitted that appellant Scott conveyed in this deed of trust all of his property, and if the conveyance is a valid one, it renders him wholly insolvent. Mrs. Scott owned extensive and valuable farming land in Chicot County, Arkansas, and the town of Eudora was laid off on her land, and appellant received large sums of money from the rent of these lands and from the sale of lots in the town of Eudora. Appellant bought and sold real property on an extensive scale, and while some of his investments proved to be profitable, he lost money on most of them. During this time appellant Scott had accounts in several banks, some of which he kept in the name of his wife, but all of these accounts were subject to his check, and were drawn upon in the name of his wife by him, and no attempt appears to have been made to keep any separate account of the money received from the rent or sale of any of his wife's property, and there is nothing to indicate that the use which he made of his wife's money was intended as a loan, and no notes were ever given, nor was there other evidence that these transactions were loans, although the use of this money extended over a period of about nine years. The proof shows that on the 5th of June, 1913, an attorney representing appellee called on appellant Scott at his home in the city of Little Rock, and demanded payment of the sum due appellee, but failing to get satisfaction, notified appellant Scott that suit would be filed against him at once to collect the account. On the 10th of June thereafter, the deed of trust conveying the property in question to Mrs. Scott was filed for record in Chicot County, and on the 18th day of June thereafter the same instrument was filed for record in Pulaski County. And while the proof does not show the value of the property so conveyed, it is admitted that it embraced everything owned by appellant Scott.

In the case of *Waters* v. *Merit Pants Co.,* 76 Ark. 254, it was said:

"It is settled by the decisions of this court that an insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of other creditors, and make valid appropriation of his property to pay it, even though the result be to deprive other creditors of the means to satisfy their claims. But such transactions between husband and wife are viewed by the courts with suspicion, and the perfect good faith of the transaction must be established by proof. Where the wife asserts, as a consideration for conveyance of his property to her, a claim of debt against her insolvent husband for money loaned to him many years previous, no note or other written evidence of an agreement to repay being shown to have been executed, and the alleged debt having become stale by long lapse of time, as in this case, her bare statement should be corroborated by some other evidence of the existence of a valid debt, before the courts can accept it in support of the conveyance."

There is no evidence of this indebtedness except that of appellant, and as has been said, there was no note or other writing evidencing its existence. Appellant dealt with the property in question as his own, and it formed in part at least the basis of the credit extended him. *Goodrich* v. *Bagnell Timber Co.,* 105 Ark. 90.

Nor do we think any error was committed by the court in ordering the sale of the property which had been uncovered by the decree of the court. In the case of *Merchants & Farmers Bank* v. *Harris,* 113 Ark. 111, it was said:

"The chancery court having acquired jurisdiction for the purpose of setting aside the fraudulent conveyance, should not only grant the relief prayed for in that respect, but should proceed to enforce the lien by ordering the land in controversy sold to satisfy the judgment in favor of appellant. The chancery court, having assumed jurisdiction for one purpose, will retain it for all and grant all the relief, legal or equitable, to which the parties are entitled.

See *Apperson* v. *Ford,* 23 Ark. 746; *Apperson* v. *Burgett,* 33 Ark. 328; *Cribbs* v. *Walker,* 74 Ark. 104; *Dugan* v. *Kelly,* 75 Ark. 55; *Dickinson* v. *Arkansas City Imp. Co.,* 77 Ark. 576."

(3) We think, however, that an unreasonably short time was allowed to appellant in which to pay the judgment, and that under the circumstances more than five days should have been allowed for this purpose, and that the decree of the court below must be reversed on that account. Likewise, the decree in so far as it adjudges the conveyance of the said lot No. 10, block No. 9, to have been fraudulent is reversed, but as to the property described in the deed of trust, the decree is affirmed. The cause will be remanded with directions to the court below to enter a decree in accordance with this opinion.

McCULLOCH, C. J., disqualified and not participating.

SECURITY MUTUAL LIFE INSURANCE COMPANY *v.* LITTLE.

Opinion delivered June 28, 1915.

1. CONTRACTS—VOID CONTRACT—RECOVERY OF MONEY PAID THEREUNDER.—Courts will not aid any party to a contract which is void as against public policy, either to enforce its provisions on the one hand, or by permitting the recovery of money paid in the performance of its conditions, on the other.
2. CONTRACTS—VOID CONTRACT—RECOVERY OF CONSIDERATION.—Appellees insured the lives of certain persons in appellant insurance company, giving notes for the premiums, which notes appellees paid. *Held,* the contract between the parties being void as against public policy, appellees having no insurable interest in the parties whose lives were insured, that they could not recover from appellant the amount paid out as premiums.

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

W. N. Ivie, for appellant.

1. The complaint shows on its face that the contracts out of which this litigation developed were wagering contracts and contrary to public policy. It is the settled rule that where a contract is illegal because contrary to posi-

tive law, or against public policy, an action can not be maintained either to enforce it directly, or to recover the value of services rendered under it, or money paid on it. 47 Ark. 378; 91 Ark. 205; 81 Ark. 48; 112 Va. 780; 21 Am. & Eng. Ann. Cas. 1088; 4 *Id.* 712, 714, 716; 9 Cyc. 546; 63 Ark. 318, 322.

2. The payments were voluntary, with full knowledge of all the facts, and for this reason appellees can not recover. 102 Ark. 152; 49 Ark. 70; 70 Ark. 5; 72 Ark. 552; 86 Ark. 178; 92 Ark. 306.

Dick Rice and *Jeff Rice,* for appellees.

1. The complaint alleges not only that the policies are non-enforcible because they are wagering contracts, etc., but also that the proposition of taking out these policies was *proposed by appellant's agent* and executed by him, and that appellees *acted in good faith* in the transaction, executed their notes for the first year's premium, which were sold and the proceeds thereof *were received and retained by the appellant.* This is not a case where the parties are *in pari delicto,* or of the appellees attempting to enforce an illegal contract, but rather an action for money had and received, as appears by this allegation of the complaint: "Plaintiffs further allege that the defendant is indebted to the plaintiffs in the sum of $2,087.73, which was received by the defendant for plaintiff's use." 31 Ark. 385; 110 Ark. 578; 45 L. R. A. 243; 75 N. E. 941; 98 Ark. 52; 25 Cyc. 708; 70 N. E. 258, 262; 64 Ia. 101, 19 N. W. 865; 27 Cyc. 874; 43 N. Y. 273.

2. Under the allegations of the complaint to the effect that the Arkansas National Bank recovered a judgment against the appellees on the notes, which was afterwards affirmed on appeal, the question of voluntary payment passes out of the case. Compulsory payment of a judgment can not be classed as voluntary. 49 Ark. 70; 27 Cyc. 866; 50 N. E. 86; 18 S. W. 260.

SMITH, J. This cause was tried in the court below upon an agreed statement of facts from which it appears that on and prior to April 7, 1913, the appellees, who

were the plaintiffs below, were the school directors for the Special School District of Rogers, Benton County, and in order to provide means for the payment of bonds in the sum of $35,000.00, issued by said district, they took out eighteen policies of life insurance upon the lives of young men residing in that district for the aggregate sum of $35,000. The amount of the first year's premium on all of said policies was $1,674.20, and it was agreed at the time of issuing these policies that if the district did not have the money with which to pay these premiums that the agent of the life insurance company would accept the note of said district for the premium, endorsed by appellees. That the policies were issued and the appellees signed two notes for the total amount of the premiums, each bearing interest at the rate of 10 per cent. per annum from date until paid, and delivered them to the agent in payment of said premium. The agreed statement of facts further recited that the agent endorsed and sold said notes before maturity to the Arkansas National Bank, of Fayetteville, and, as the agent for the insurance company received the face of the notes, a large part of which was paid to the defendant company. That thereafter the bank was informed by appellees' attorney that said policies were void, and the bank immediately made a written demand upon said insurance company for the return of said money, which the company refused to pay, and thereupon the bank instituted suit on said notes against appellees and the insurance agent, and recovered judgment on said notes against appellees and the agent for the face of the notes with the accrued interest. That said insurance policies were held by the Supreme Court to be illegal, null and void, as contrary to public policy in the case of *Little et al* v. *Arkansas National Bank, of Fayetteville,* 105 Ark. 281, for the reason that said school district and appellees had no insurable interest in the lives of the young men on whose lives said policies were issued. That appellees had been compelled to pay, and have paid, the amount of said judg-

ment, with all costs. Appellees now sue to recover this amount.

It appears from the opinion of this court in the case of *Little et al.* v. *Arkansas National Bank,* 113 Ark. 72, 167 S. W. 75, that appellees resisted the payment of these notes, and finally paid them only after an adjudication by this court of their liability to the bank for the reason stated in the opinion in that case.

Appellees recovered judgment in the court below for the entire amount paid by them, and this appeal questions their right to maintain this suit.

The former opinions in this case have decided that the notes out of which this litigation arose were void as between the parties thereto because it was based upon a consideration which was held to be in contravention of public policy, and the suit to recover this money necessarily involves an inquiry into the circumstances under which it was paid. In the case of *Martin* v. *Hodge,* 47 Ark. 378, this court said:

"The test to determine whether a plaintiff is entitled to recover in an action like this or not, is his ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery." See, also, *Burks* v. *Harris,* 91 Ark. 205; *Wood* v. *Stewart,* 81 Ark. 48.

Appellees insist that they are not seeking to enforce any right growing out of the contracts of insurance. But we think this is the effect of their action. They can not recover here without showing circumstances under which the money was paid, and when this is done, it appears that the litigation is bottomed upon a contract which was illegal because it was contrary to public policy.

In the case of *Edwards* v. *Randle,* 63 Ark. 318, a contract was made for the sale of the fixtures of a post office, in which the vendor, who was the postmaster, agreed to resign his office and recommend the appointment of the

vendee as his successor. The purchase price of the fixtures was paid, but there was a subsequent refusal on the part of the vendor to perform, whereupon the vendee sued to recover the money paid by him under this contract. In that case it was held that the contract was void because its subject-matter was contrary to public policy, and in holding that the vendee had no right to maintain the suit it was said: "The court can not lend its aid to either party in respect to any claim or thing involved in such a contract."

The case of *Roller* v. *Murray,* 112 Va. 780, is annotated in 27 Am. & Eng. Ann. Cases, 1080, where an extensive case note is found, citing many authorities on this subject. That was a case in which an attorney sued for services performed under a contract which had been held to be champertous and void because it was an agreement by an attorney to undertake to carry on litigation at his own risk, or without cost to his client, for a share of the recovery. Discussing the general principles involved in the right to maintain such a suit, it was said:

"On the other hand, it is also well settled, as a general rule, that where the contract is illegal because contrary to positive law or against public policy, an action can not be maintained either to enforce it directly or to recover the value of services rendered under it, or money paid on it."

Continuing, the court quoted from 9 Cyc. 546, as follows:

" 'The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore, neither a court of law nor a court of equity will aid the one in enforcing it or give damages for a breach of it, or set it aside at the suit of the other; or when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, when the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right

to have either enforcement of, or relief from, the illegal agreement. * * * Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, can not be recovered back where the parties are in *pari delicto,* and goods delivered or lands conveyed under an illegal agreement are subject to the same rule.' "

We further quote from that case as follows:

"Pollock, in his work on Contracts (Wald's Ed.), after stating the general rule, that money or property paid or delivered under an unlawful agreement can not be recovered back, says, that 'the principle proper in this class of cases is that persons who have entered into dealings forbidden by law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. As it is sometimes expressed, the court is neutral between the parties.' "

Accepting the view of the law that the courts should not lend their aid to any party to a contract which is void as against public policy, either by enforcing its provisions, on the one hand, or by permitting the recovery of money paid in the performance of its conditions, on the other, we must hold that this suit can not be maintained, and the judgment of the court below will, therefore, be reversed and the cause will be dismissed.

STATE v. HALLER.

Opinion delivered June 21, 1915.

LARCENY—ANIMAL—DESCRIPTION.—An indictment charged defendant with stealing "one cow (bull), the personal property of * * *." *Held,* there was no variance between the indictment and proof, where the proof showed that a "bull" was the subject of the larceny, that the word "bull" used parenthetically in the indictment, qualified and explained the meaning of the word "cow," and shows that it was intended as a generic term; the indictment was sufficiently clear to indicate a male animal of the kind described, and the proof therefore conformed to the allegations of the indictment.

Appeal from Arkansas Circuit Court, Southern District; *John L. Ingram,* Special Judge; error declared.

Wm. L. Moose,, Attorney General, and *Jno. P. Streepey,* Assistant Attorney General, for appellant; *J. B. Reed,* Prosecuting Attorney, and *Carmichael, Brooks, Powers & Rector,* of counsel.

1. This appeal is prosecuted to settle the law. Is there fatal variance between the allegation in the indictment and the proof? We think not. Our statutes are very liberal and provide that no indictment is sufficient, nor is the judgment, etc., affected by any defect not prejudicial to the substantial rights of the defendant. Kirby's Dig., § 2229. An indictment is sufficient if it states the offense in ordinary and concise language, so as to enable a person of common understanding to know what is intended. *Ib.,* § § 2241-2-3. The word "cow" often includes other members of the same species. 49 Cal. 67; 55 Ala. 150; 39 Ala. 365; 31 Minn. 541; 16 Kans. 293; 11 Gray, 211; 10 Ver. 433; 40 *Id.* 641; 7 Iredell 210; 17 S. W. 745. These decisions show that "cow" is a generic term. See also 34 Ark. 160, and 60 *Id.* 218.

2. The word "bull" in parenthesis qualifies the meaning of the sentence which precedes it. 3 C. C. A. 440; 94 Ark. 400. The indictment charged the larceny of a male cow, or a male of the cow family.

No brief filed for appellee.

McCULLOCH, C. J. The defendants were tried under an indictment charging the crime of larceny in the following words: "The said E. C. Haller, L. C. Haller and Emmett McGraw, in the district, county and State aforesaid, on the 20th day of August, A. D. 1913, one cow (bull), the personal property of E. B. Lafargue and Loyd Lafargue, did unlawfully and feloniously steal, take and carry away against the peace and dignity of the State of Arkansas."

On the trial of the case the proof adduced by the State tended to show that the defendants stole a bull, the property of the parties named in the indictment, and the court gave a peremptory instruction in favor of the de-

fendants on the ground that there was a fatal variance between the allegation and the proof concerning the description of the property. A verdict was rendered in defendants' favor, pursuant to the instruction of the court, and the State has appealed from the judgment rendered upon the verdict.

The pleader evidently intended to make use of a generic term in writing the word cow, and it is so understood colloquially, for, as mentioned in the brief, we often hear the word "cow-pony" or "cow doctor" or "cow-man" or "cow-puncher" used as having reference to cattle, meaning it as a generic term. Strictly speaking it is not so, for *Bos* is the generic word denoting animals of that kind. Either ox or cattle is also generic. But the word cow is, as before stated, used colloquially as a generic term, and it is evident that the pleader in this case intended it in that sense. That is made manifest when the parenthetical qualifying word "bull" is considered, and the use of that word evidently was intended to specify the male of the species. When both words are considered, and the way in which they are used, there can be no mistaking the meaning of the pleader, and proof of the stealing of a bull accorded with the allegation of the indictment. The word "bull," used parenthetically, as it was in this indictment, qualified and explained the meaning of the other word and shows it was intended as a generic term.

Our statute provides that an indictment shall be sufficient if "the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case" (Kirby's Digest, § 2228); and if the allegations relate the facts constituting the offense "in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." (Kirby's Digest, § 2243).

The liberality of our code of criminal practice is illustrated in the decision of this court in *State* v. *Gooch,* 60 Ark. 218, and we think according to the liberal rule laid down in that case the indictment was sufficiently

clear to indicate an animal of that kind of the male species, and that the proof in this case conformed to the allegations of the indictment.

The acquittal of the defendants operates as a bar to any further prosecution, but the error of the trial court is hereby declared.

TANNER v. JOHNSON.

Opinion delivered June 28, 1915.

1. PRINCIPAL AND SURETY—ELECTION OF REMEDY—DISCHARGE OF SURETY—SALE OF CHATTELS.—Plaintiff sold a team of horses to one T., T. giving his note therefor, and plaintiff retaining title until the note was paid. Before paying the note T. sold the horses, and paid the proceeds of the sale to the surety on his note to the plaintiff; plaintiff then brought replevin against the purchaser, but lost the suit, *Held*, the surety could not then resist a claim for payment of the note, made by plaintiff, on the ground that plaintiff had rescinded the contract of sale by suing in replevin; the surety having received the proceeds of the sale could not be damaged by the action.
2. ELECTION OF REMEDIES—JUDGMENT—REMEDIES AGAINST DIFFERENT PERSONS.—Plaintiff sold horses to T., retaining title, and taking a note from T., with a surety thereon; T. sold the horses, delivering the proceeds of the sale to his surety. Plaintiff then brought replevin against this purchaser, but lost the suit; *held*, the bringing of the replevin suit was not such an election of remedies as would prevent the plaintiff from suing on the note, and had there been a judgment in the replevin suit, it would not have been *res adjudicata*, there being no privity of contract between those liable on the note, and those sued in replevin.

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

STATEMENT BY THE COURT.

Appellant Tanner purchased from the appellee, Johnson, a team of horses and executed a note for $225, bearing interest at 10 per cent. per annum from date until paid. It was recited in the note as follows: "The title to stock retained till note is paid."

Tanner was a tenant on Johnson's place and he claims that Johnson had sold cotton belonging to him

which amounted to enough to pay the note. Hence, he sold the horses which he had bought from Johnson. Some time after this (the evidence does not disclose how long) Johnson brought a suit in replevin before a justice of the peace against the party to whom Tanner had sold the horses, claiming that Tanner had not paid for the same and that he (Johnson) was the owner thereof. That suit went to trial and resulted in a verdict in favor of the defendant. Thereafter appellee brought the present suit in a justice court against the appellant on the note by filing the same. Appellants answered, admitting the execution of the note and made their answer a cross-complaint against Johnson and prayed for judgment against the appellee. They set up that they had been released from the indebtedness evidenced by the note because, prior to the bringing of this suit appellee had elected to rescind the sale and retake the property.

On the trial appellants offered to prove that appellee, prior to the institution of this suit, had instituted a suit in replevin for the horses for which the note was given. The appellee admitted the truth of the offered testimony. but objected to its competency, and the court ruled that the testimony was incompetent. This ruling is the only ground urged here for a reversal of the judgment that was returned in favor of the appellee, the appellants conceding that the verdict of the jury is conclusive and that the cause should be affirmed unless the court erred in refusing to admit the proffered testimony. Other facts stated in the opinion.

O. R. Stewart and *A. S. Tanner,* for appellants.

1. It was error to admit proof of appellee's election of remedies and in sustaining appellee's objection to the admission that appellee had made an election before the institution of this suit. This was a conditional sale and Johnson had the right of election of remedies. 78 Ark. 569; 91 *Id.* 319; 67 *Id.* 206.

2. An election was made by the first suit and a waiver resulted. 64 Ark. 213. The debt was cancelled.

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

1. After Tanner sold the horses appellee could not bring an action of replevin and rescind the contract. 50 Ark. 229.

2. The proof offered of election cuts no figure in the case. The cases cited by appellant do not have any bearing on the case. The judgment is right and should be affirmed.

WOOD, J., (after stating the facts). Appellant Stewart was surety on the note which Tanner executed to Johnson in consideration of the purchase price for the horses, of which Johnson retained title. When Tanner sold these horses before the note was paid he turned over the proceeds of the sale to Stewart. Stewart, therefore, is not damaged and is not in an attitude to resist the payment of the note nor to claim that appellee Johnson elected to rescind the contract evidenced by the note by instituting the suit in replevin for the horses, on which he had retained title.

While the record shows that Johnson instituted a suit in replevin for the horses and that a verdict was returned against him and in favor of the defendant in that suit, there is nothing in the record to indicate the ground upon which such verdict was based, and nothing in the present record, as abstracted, to show that final judgment was entered against Johnson upon that verdict. Neither of the appellants here were parties to that suit, and even if a judgment had been rendered there it could not be pleaded here as *res adjudicata* of the present suit, nor was the institution of the suit in replevin and the mere fact of the rendering of a verdict in favor of the defendant in that suit against appellee Johnson any evidence that appellee had made an election between the remedies which he had on the contract evidenced by the note in controversy. These remedies were either to sue the appellants in replevin to recover the property, if they failed to deliver the same to the appellee on demand after the note became due, or to waive title to the property and the right to sue for the possession of the same, and in

lieu thereof to treat the sale as complete and ask for judgment on the note.

When Tanner sold the horses and possession thereof was delivered to a third party, he placed it beyond the power of the appellee Johnson to sue him (Tanner) and his surety, Stewart, for the possession of these horses. They can not set up that a suit instituted by appellee Johnson against a third party for the possession of the horses was an election between remedies that Johnson had against them on their note.

It is conceded that the verdict of the jury correctly settled the issue that they had not paid the note sued on. Nothing in this record discovers on what grounds as before stated, the suit instituted by the appellee in replevin was determined against him. Whatever might have been those grounds, the appellants can not avail themselves of them as a defense to the present suit, and the doctrine of the election of remedies has no application. The authorities cited by the appellants are not in point. In all of those cases, the suits in which it was held that there was an election of remedies were between the parties to the original contract, or their assignees; there was a privity of contract. In this case it is not pretended that there was any privity of contract between the appellants and the parties whom the appellee sued in replevin to recover the horses which appellant Tanner had sold. As against the appellants the appellee has never sought any remedy except to recover the amount due on their note.

The court, therefore, correctly ruled that the proffered evidence was not competent as a defense to the suit on the note. The judgment is, therefore, affirmed.

WAKIN v. WAKIN.

Opinion delivered June 28, 1915.

1. WITNESSES—AGE—COMPETENCY—UNDERSTANDING OF OATH.—A witness who is nineteen years of age will be presumed to have common discretion and understanding, until the contrary appears. When a witness by his testimony shows that he has sufficient

natural intelligence and had sufficient understanding to apprehend the nature of an oath, he should be allowed to testify.

2. WITNESSES—COMPETENCY—DISCRETION OF COURT.—The question of a minor's competency is addressed to the discretion of the trial judge, and in the absence of a clear abuse or manifest error, the judicial discretion is not reviewable.

3. TORTS—INDUCING BREACH OF CONTRACT.—One H. was under indictment, and to procure his release, pending trial, A. executed a bond to the State conditioned upon H's. appearing for trial. A. procured B. also to execute the bond, mortgaging certain property to B. to secure him from any loss. One W. induced H. to disappear. *Held*, W. was liable in an action by A. for resultant damages.

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

STATEMENT BY THE COURT.

Appellees sued the appellant, alleging in substance, that one Hamisey was, at the May term, 1913, of the district court of Bowie County, Texas, in seven different indictments, charged with the illegal sale of whiskey, which was a felony under the Texas laws, and bail was fixed in each case at $100; that Hamisey had executed bond for his appearance; that the appellee Davis Wakin was the step-father and appellee Sarah Wakin the mother of Hamisey; that appellees at the instigation of appellant procured two persons named Kuhl to become surety on Hamisey's bond, and in order to indemnify them as sureties on the bonds, appellees at appellant's instigation, executed and delivered to the Kuhl's a mortgage or deed of trust on a certain brick building in Texarkana; that the bonds constituted a contract between Hamisey and the Kuhls by the terms of which Hamisey was to appear at the district court of Bowie County, Texas, and in case of his failure to do so the Kuhls had contracted to pay to the State of Texas the amount mentioned in the bonds; that by reason of the contract of indemnity between the Kuhls and the appellees, appellees were to indemnify the Kuhls in case there was a forfeiture of the bonds by Hamisey, and therefore appellees were the real parties in interest; that Hamisey was released from prison upon

the execution of these bonds, and that the appellant Wakin conspired with him to have him leave the jurisdiction of the court of Texas and thereby forfeit his bond; that he did leave the State of Texas and forfeit his bond; that appellees endeavored to apprehend Hamisey and to bring him before the court, and in their effort they necessarily expended the sum of $667.02; that from June 15, 1913, when Hamisey fled, until December 1, 1913, when he was apprehended, appellees had suffered a loss from their business in their efforts to apprehend Hamisey in the sum of $1,000.00. They set forth that they had expended in all $1,696.40, which represented the actual damages they had sustained by reason of the forfeiture which they allege that the appellant had caused, and prayed for judgment in that sum, and for $1,000.00 punitive damages which they alleged they had suffered by reason of appellant's willful act in inducing Hamisey to leave the jurisdiction of the Texas court and to forfeit his bond. The answer denied the allegations of the complaint.

The undisputed evidence showed that the bonds were executed in the manner alleged in the complaint; that the Kuhls were sureties on the bonds; that appellees executed a deed of trust to the Kuhls on property which was ample security to them for the amount they were obliged to pay in case of a forfeiture of the bonds; that the deed of trust was executed to secure the Kuhls against liability by virtue of becoming sureties on the bonds of Hamisey; that judgments of forfeiture were taken on the bonds, and that on the surrender of Hamisey these judgments were set aside, and that the costs of the proceedings were $29.40.

Appellees, over the objection of appellant, were permitted to read the deposition of Hamisey. The ground of objection urged was that Hamisey was not a qualified witness. Hamisey was asked if he understood the meaning of an oath and answered that he did; that he understood that an oath meant for the witness to swear; that it meant for him to swear to tell the truth. He was asked if he swore to a lie what the result would be, if any, and

answered, "I don't know what the result would be; it would be life in the penitentiary."

The testimony of Hamisey tended to show that he was 19 years of age, and that the appellee Sarah Wakin was his mother. He was arrested in Texarkana for the illegal sale of whiskey and was placed in jail on that charge. His mother fixed up his bond and he was released from jail. He came back to Texarkana, Texas, and stayed with his mother eight or nine days. He had no money. In Texarkana the appellant told the witness that they were going to send him to the penitentiary for five years, and appellant said that he would give witness money for him to leave town; that appellant told witness to go back to the old country; told him to see a certain party in New York who would give him money to go to the old country. Appellant gave witness $25.00 and told witness to see appellant's brother George, when he got to Little Rock, who would also give him $25.00. The witness left that night and went to Little Rock and went to see appellant's brother George, who was running a saloon for appellant, and he bought a ticket for witness to St. Louis by way of Memphis.

Before witness was placed in jail at Texarkana he sold whiskey for appellant in Texarkana, Arkansas and Texas. The appellant delivered the whiskey to him and he sold it at 25 cents a pint.

The appellees then introduced testimony tending to show the amounts that had been expended by them in endeavoring to procure the arrest of Hamisey after he fled the State of Texas. It is not contended by the appellant that the sums were not expended by the appellee in an effort to secure the arrest and return of Hamisey to the State of Texas in order to have the forfeiture set aside.

The appellant, in his testimony, stated that he was the owner of a saloon in Little Rock, run by his brother, George Wakin. He did not furnish Hamisey with whiskey to peddle on the Texas side and had nothing to do with the making of his bonds. He had pleaded guilty in

seven or eight cases in Miller County for taking orders for intoxicating liquors. George Wakin testified that appellant did not tell him to give Hamisey any money.

The court instructed the jury to the effect that if appellant did induce and encourage Hamisey to leave the State and forfeit his bonds, by which the appellees were damaged as alleged in their complaint, that the verdict should be in their favor, and instructed them to take into consideration, in measuring the damages, the expenses that the appellees had incurred in procuring the arrest of Hamisey and his return to Texas, and any costs for which they were liable on account of the forfeiture proceedings.

There was a general objection to this instruction, which was overruled. The appellant requested a peremptory instruction, which was overruled.

The jury returned a verdict in favor of the appellees in the sum of $349.96. Judgment was rendered in their favor for this amount and appellant has duly prosecuted this appeal.

M. E. Sanderson and *John N. Cook,* for appellant.

1. Sam Hamisey was incompetent to testify; he did not understand the obligation of an oath, and had no knowledge of a place of rewards or punishment. 25 Ark. 92; 93 *Id.* 138; 109 *Id.* 345.

2. The contract was not made for the benefit of appellants, and they were strangers to it, and the breach of it was not the proximate cause of the injury. They could not sue on it. 43 S. E. 419; 60 S. W. 1058. The money they spent was to protect the bondsmen, but their liability to the bondsmen was in no way connected with the liability of the bondsmen to the State of Texas. 98 Cal. 578; 15 S. W. 57; 43 S. W. 419; 66 Ark. 68. As to remoteness and non-liability see 56 Ark. 279; 55 *Id.* 510; 76 *Id.* 430.

3. Appellees' attorney's closing argument was clearly improper.

Louis Josephs, R. P. Dorough and *Will Steel,* for appellees.

1. Sam Hamisey was a competent witness. 93 ARK. 158; 25 *Id.* 92.

2. The breach of the contract was the proximate cause of the injury. Persons who aid another to violate a contract, even with a stranger, to his injury, are liable. 86 Ark. 130; 38 Cyc. 508; 64 Ark. 221.

3. The objection to the argument of attorney is frivolous. But if improper, it was harmless.

WOOD, J., (after stating the facts). (1) Sam Hamisey was 19 years of age. It must therefore be presumed that he had common discretion and understanding until the contrary appears. There is nothing in the record to show to the contrary. But his testimony does show that he had sufficient natural intelligence and had sufficient understanding to apprehend the nature and effect of an oath. When such is the case, a witness should be allowed to testify. See *Flanagin* v. *State,* 25 Ark. 92.

(2) The question of this witness' competency was addressed largely to the discretion of the trial judge, and "in the absence of clear abuse or manifest error the judicial discretion is not reviewable." *Crosby* v. *State,* 93 Ark. 158.

The presumption of competency was not overcome by an examination of the witness touching his sense of a moral responsibility to tell the truth under oath, and nothing was elicited tending to show that the witness did not understand that he was under a moral as well as a legal obligation to tell the truth under oath. The court did not err therefore in admitting his testimony.

(3) The appellant contends that the court should have given a peremptory instruction in his favor. He contends that appellees were wholly disconnected with the contract which they alleged was broken and that a violation of the contract by Hamisey was not the proximate cause of any damage to them. In *Mahoney* v. *Roberts,* 86 Ark. 130, we held: "That persons who aid another to

violate a contract with a stranger, whether for the purpose of injuring the latter or for the purpose of obtaining some benefit for themselves at the latter's expense, to his injury, are guilty of an actionable wrong and are liable for damages."

The contract between Hamisey and the Kuhls and the State of Texas, evidenced by the bonds and the contract between the Kuhls and appellees were so interrelated that a violation of the obligations of the bond by a failure of Hamisey to make his appearance necessarily matured the liabilities of the appellees to the Kuhls under the mortgage. The testimony tended to show that the appellant and Hamisey knew that these contracts were made at the same time, and that they knew the purpose of both contracts. Therefore, when appellant induced Hamisey to violate the provisions of his bonds, as the jury were warranted in finding, this violation was the proximate cause of the damage which the appellees sustained by reason of the violation of such bond and for which, under the doctrine in *Mahoney* v. *Roberts, supra,* the appellant was liable. The instructions of the court were therefore correct.

We have considered the objection urged to certain remarks of counsel and find no reversible error in the ruling of the court concerning the same, and we do not deem them of sufficient importance to set forth in the opinion.

The judgment is correct and it is accordingly affirmed.

McCULLOCH, C. J., (dissenting). The majority of the judges hold appellants liable in this case upon the doctrine that a person who induces one of the parties to a contract to break it is liable to the other party for any damages resulting from such breach. That doctrine was first announced by one of the English courts in the case of *Lumley* v. *Gye,* 2 El. & Bl. 216, and has since been followed by a great many of the courts in England and in America. It was followed by this court in the case of *Mahoney* v. *Roberts,* 86 Ark. 130. It is, I think, pushing

the doctrine too far to apply it to the facts of the present case. It has never been applied except in cases where one of the parties to an express contract was induced to break the contract. It is unsafe to carry it to the extent of holding that liability is created by inducing one to break an implied contract, for there is always an implied contract to discharge a legal duty, and to carry the doctrine far enough to apply to contracts of that sort would be too remote. There was no contract, either express or implied, between appellees and Hamisey for the latter to break. Hamisey made no express contract with any one, not even with the Kuhls, the sureties on his bond. If any contractual rights between the two existed, it was merely an implied contract. But the only contract which appellees entered into was with the Kuhls, and that was a personal one to indemnify the latter against loss on the bond which they executed for Hamisey's appearance. There being no contract between appellees and Hamisey, the doctrine of the cases just referred to has no application.

Appellant's alleged conduct in inducing Hamisey to run away did not cause a breach of any contract with appellees. That conduct was entirely too remote to be the subject-matter of an action sounding in tort. One of the decisions of this court is, I think, in point on that question. In *Gerson* v. *Slemons*, 30 Ark. 50, this court held (quoting from syllabus) that "Where two persons contract with reference to an event that is contingent upon the act of a stranger, the latter can not be held liable for damages resulting from a failure of the contract, though it may have grown out of his omission to perform the act upon which the contingency depended." Now, the application of that decision to the facts of the present case is this: Hamisey, by running away, did not render himself liable to the appellees, even though the loss resulted by his omission to appear according to the terms of his bond. It follows, therefore, that if Hamisey himself would not be liable, *a fortiori*, appellants would not be liable for inducing him to run away.

The question of remoteness is illustrated by a decision of the Massachusetts court which I think is in point. *Anthony* v. *Slaid,* 11 Met. (Mass.) 290. The plaintiff in that case was the contractor for the support of the poor of a certain town and sought to recover damages from the defendant on the grounds that the latter's wife (for whose acts he was responsible) had assaulted and injured one of the town paupers, thereby increasing the expenses of the plaintiff in performing his contract. The court, in denying liability, said: "It is not by means of any natural or legal relation between the plaintiff and the party injured, that the plaintiff sustains any loss by the act of the defendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. If such a principle be admitted, we do not see why the consequence would not follow, as stated in the argument for the defendants, that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person, who becomes a pauper, the town might maintain an action, with a *per quod,* for damages."

Another reason why appellees are not entitled to recover is that appellees were not required to make good their bond of indemnity by paying the amount thereof. Their damage accrued by reason of expenses incurred in bringing Hamisey back, so that there would be no liability on the bond. That state of the case renders the alleged wrongful act of appellants still more remote from plaintiff's injury and still further lessens ground for liability.

I am unable to bring myself to the conclusion that there is any liability in this case, and I therefore record my dissent.

BALDWIN v. STATE.

Opinion delivered July 5, 1915.

1. APPEAL AND ERROR—VERDICT OF JURY—CONCLUSIVENESS ON APPEAL.—Where the record contains evidence which is legally sufficient to sustain a verdict, the verdict will not be disturbed on appeal, unless it appears that errors of law have occurred which may have operated to the prejudice of the losing party.

2. CRIMINAL LAW—CONTINUANCES.—Where defendants were arrested on March 12, 1915, and lodged in jail, being indicted on March 29, 1915, the trial court will not be held to have abused its discretion, in refusing to grant defendants a postponement, when their cases were called for trial on April 1, 1915.

3. CONTINUANCES—ABSENT WITNESSES—DISCRETION OF COURT.—Where a continuance for five days was asked, in a criminal prosecution on account of absent witnesses, where the testimony sought to be introduced was merely cumulative, the trial court will not be held to have committed error in refusing it.

4. TRIAL—CROSS-EXAMINATION—DISCRETION OF COURT.—The extent of cross-examination of a witness is in some measure within the control and discretion of the trial court; it is the duty of the trial judge to see that it is not unduly prolonged, nor that useless and immaterial questions are asked, nor that questions relating to undisputed matters are repeated.

5. EVIDENCE—OPINION TESTIMONY—ADMISSIBILITY.—In a prosecution for a bank robbery, it was not improper for the court to refuse to permit the answering of the question, "In that country is fifteen or twenty miles regarded as a great distance?" The same calling merely for the opinion of the witness on a matter which could be shown by more direct and definite statements of fact.

6. EVIDENCE—CHARACTER OF DEFENDANT—CRIMINAL PROSECUTION.—In a prosecution of defendant for the crime of bank robbery, it was proper to exclude the following question asked by defendant's counsel on the issue of defendant's reputation and character, "Has there been anything in his conduct as a peaceable, law-abiding man, that has caused it to be discussed?"

7. APPEAL AND ERROR—EXCLUSION OF TESTIMONY—PREJUDICE, SHOWN HOW.—Counsel for appellant asked witness a certain question, which the court refused to permit him to answer, and counsel excepted to the ruling of the court assigning it as prejudicial error. *Held*, it not appearing from the record what the appellant expected the answer of the witness to be, that the prejudicial effect of the ruling of the court was not shown.

8. APPEAL AND ERROR—EVIDENCE—IMPROPER QUESTION—NEGATIVE ANSWER.—In a criminal prosecution, the court permitted the prosecution to recall a witness, and to ask him if he had not stated certain things with reference to the identity of the accused and the person committing the crime; *held*, there was no prejudice in asking the question, when the witness answered it in the negative.

9. TRIAL—IMPROPER ARGUMENT—REMOVAL OF PREJUDICE.—The prejudice arising from improper argument and remarks of counsel may be removed by a proper admonition by the court to the jury.

10. CRIMINAL LAW—MOTION FOR NEW TRIAL—RIGHT OF DEFENDANT TO ATTEND HEARING.—The provisions of the Constitution and the statutes, relating to the right of the accused to be present at all stages of his trial, relate merely to the trial itself, and as a trial ends with the verdict of the jury, there is no denial of the constitutional or statutory right in hearing and considering the motion for a new trial in the absence of the defendant himself.

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

Geo. W. Richardson, A. D. DuLaney and *Otis Wingo*, for appellant.

1. A continuance should have been granted; defendants were unduly hastened to trial. 94 Ark. 545.

2. The evidence is legally insufficient to support the verdict.

3. An *alibi* was proven.

4. The court erroneously excluded testimony material to the defense. Kirby's Digest, § 3135.

5. The remarks of the State's counsel were prejudicial.

Abe Collins, prosecuting attorney, for appellee.

Argues the facts and contends that the evidence is ample to sustain a conviction, and that there are no errors of law.

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

1. The continuance was properly refused. 60 Ark. 161-7; 108 Ark. 594; 118 Ark. 402-9; 79 *Id.* 594; 82 *Id.* 203; 86 *Id.* 317; 89 *Id.* 46; 100 *Id.* 149; 103 *Id.* 119.

2. The evidence fully sustains the verdict. 109 Ark. 130; *Ib.* 138.

3. There was error in excluding testimony. 80 Ark. 201; 86 *Id.* 108.

4. There were no prejudicial remarks.

McCULLOCH, C. J. The defendants, Hood and Jim Baldwin, were convicted of robbing the Bank of Gillham, a banking institution in the town of Gillham, in Sevier County, Arkansas. The defendants are brothers, and reside in the State of Oklahoma, about seventy or seventy-five miles from Gillham, and about ten miles from the town of Bismark, Oklahoma. The bank robbery occurred about 10:30 o'clock in the morning of Wednesday, March 3, 1915, the president of the bank, Dr. B. E. Hendricks, and Noah Rodgers, the bookkeeper, and a Mr. Sinclair being in the bank at the time. It was a very dark, rainy day, and at that particular hour the rain was pouring down in torrents. Two men walked into the bank, and when they approached the cashier's window, Rodgers, the bookkeeper, walked up to the window to wait on them, supposing they were customers. The men leveled their pistols at Rodgers, commanding him to throw up his hands, and they also pointed their pistols at Hendricks and Sinclair, who were sitting at the stove behind the railing, and compelled them, too, to throw up their hands. One of the men walked behind the railing and searched Hendricks and Sinclair, the other one remaining at the window. They threw down a sack on the floor and commanded Rodgers to go into the vault and get the bank's money and put it in the sack, which Rodgers did, pursuant to the command. He got the sum of $994.94, which was placed in the sack and made way with by the robbers. The robbers, when they secured the booty, required the three men in the bank to accompany them out into the street to a horse rack where the robbers had hitched their

horses. The three men were required to walk on up the hill away from the horse rack, which they did for a distance of twenty-five or thirty yards, and the robbers mounted their horses and made good their escape.

On Sunday, March 7, John Ross, a police officer, and J. G. Parker, a deputy sheriff, started out from Gillham to trail the robbers, Ross testifies that he saw the men as they galloped away and recognized one of them as Hood Baldwin, and that a short time afterward, during the same day, he examined the tracks of the horses at the rack and followed the tracks out of town as far as the Rolling Fork creek, and the next day took up the trail again and followed it about fourteen miles. He and Parker claim to have started the trail of the horses a few miles out from Gillham, along the public road, and followed it into Oklahoma, losing it at or near Glover creek. From there they went to Broken Bow, Oklahoma, thence back, in company with a couple of Oklahoma officers, to the town of Glover, and thence to Golden, and from there to the home of Louis Baldwin, a brother of the defendants. The next day they went over to Jim Baldwin's and found him and Hood Baldwin and a man named Anderson there, and arrested all three of them, and brought them back to Gillham.

Ross and Parker testified, as before stated, that they followed the tracks of the horses to Glover creek, and that the track of the larger horse was not seen on the other side of that creek, but that they picked up the track of the smaller horse on the other side of the creek. They found a black pony or horse at Jim Baldwin's, which answered the description of the small horse, and carried it back to Gillham with the prisoners for identification.

The defendants are identified by Rodgers, Hendricks and Sinclair as the men who entered the bank and robbed it. Rodgers positively identifies them both. Hendricks is positive in his identification of Jim Baldwin, but less positive as to Hood. Sinclair is positive in his identification of Hood Baldwin, but stated that he was not so positive in his identification of Jim Baldwin. The men

who robbed the bank are referred to by these witnesses as being of different sizes, one of them being spoken of as the "big robber," and the other as the "little man." In their identification they speak of Hood Baldwin as the "big robber," or the larger of the two, and of Jim Baldwin as the "little man." The witnesses state that after the men had walked up to the bank window and required those inside the railing to hold up their hands, Jim Baldwin remained at the window while Hood Baldwin went behind the railing and searched Sinclair and Doctor Hendricks and compelled Rodgers to go into the vault and get the money. Rodgers stated that Hood Baldwin accompanied him into the vault. There is other evidence, direct and circumstantial, in the identification of the two defendants as the two men who robbed the bank. The two horses they rode were described, one of them a large gray horse, and the other a small dark bay or black horse. Ross testified that as the robbers rode out of town, the gray horse fell, and he recognized the rider as defendant Hood Baldwin. Ed Wilder, who lives three-quarters of a mile west of Gillham, and his wife both testified that they saw two men riding by their house that morning, going toward Gillham, one of them on a brown horse and the other on a gray horse, and that between 10:30 and 11:30 o'clock, the same day, the men returned from the direction of Gillham, running their horses at full speed, and they identified the men as the two Baldwins. H. H. King, who lives seven miles from Gillham, in the direction of Hochatown, Oklahoma, testified that on the morning the bank was robbed he saw two men, answering the description of the defendants, riding by his house, one riding a gray horse, and the other a brown; and that on the Friday before that he saw these two men driving the same horses to a buggy, going in the direction of Gillham, and that late in the afternoon of that day they returned along the same route and by the same mode of conveyance.

The defendants produced a large number of witnesses, from near their homes in Oklahoma, who testified as to their good reputation for honesty, etc., in the com-

munity in which they live. They also introduced the testimony of witnesses that tended strongly to establish an alibi. Hood Baldwin testified that he was at home on his farm on March 3 and remained there all day, and he produced several witnesses who were there that day, and testified that he did not leave home. The undisputed evidence is that a terrific rainstorm prevailed all over that country on March 3, and that the rainfall was so heavy that all the streams in western Arkansas and eastern Oklahoma were overflowed. Witnesses were introduced who testified that Jim Baldwin was in Bismark, Oklahoma, on March 3. A merchant at that place testified that Jim Baldwin came into his store on March 3 and made purchases, and that he gave him a cash ticket of the purchases. He produced the duplicate ticket showing the date, March 3, and Jim Baldwin himself produced the original ticket showing the purchases made by him on that date. Another witness testified that he was present in the store at Bismark on March 3, and saw Jim Baldwin there, and saw him make various purchases from the merchant who testified in the case. The testimony of other witnesses tended to establish the fact that Jim Baldwin was in Bismark on March 3, and if that was true, it was impossible for him to have robbed the Bank of Gillham. Both of the accused men testified as witnesses in the case, and they gave a detailed account of their whereabouts on the day of the robbery, and for a day or two preceding and a day or two succeeding that date.

(1) Counsel for the accused argue very earnestly and forcefully, both in the brief and in the oral argument, that the great preponderance of the testimony is in favor of the defendants, to the effect that they were in Oklahoma on the day that the Bank of Gillham was robbed, and that they could not have been at Gillham on that day. Counsel rely, too, upon certain alleged discrepancies in the testimony of the witnesses who pretend to identify the accused as the men who robbed the bank. It can not be said, though, that there is not testimony of a very substantial nature identifying the defendants as the guilty

parties. The testimony is undoubtedly legally sufficient to support the verdict. It is very difficult for judges of an appellate court to determine, merely from reading the record, where the real weight of the testimony lies. That can not be determined merely by comparison of the number of witnesses on the respective sides who testify on any given issue. Much is left, necessarily, to the judgment and fair discretion of the men composing the jury, who have the opportunity to hear the witnesses testify and observe their demeanor while upon the witness stand. That is the reason why, under our system of laws the weight and sufficiency of the evidence in trials at law are left to the trial jury. It is too well settled for further controversy that when we find in the record testimony which is legally sufficient to sustain the verdict, it is our duty as judges of the appellate court to leave the verdict undisturbed, unless it appears that errors of law have occurred which might have operated to the prejudice of the losing party.

(2) Counsel assign a number of rulings of the court as errors which they insist prejudiced the rights of their clients. In the first place, it is argued that the defendants were hurried into trial without an opportunity to prepare their defense and to submit it to the jury. The defendants were brought back to Gillham under arrest on March 12, and were confined in jail until they were indicted at an adjourned term of the circuit court on March 29, the court having adjourned over from March 5, 1915, to that date. They waived arraignment on April 1, and, after entering pleas of not guilty, filed a motion for a postponement until April 5, which the court overruled, and the trial was begun. The defendants had from the date they were brought back to Sevier County, March 12, until April 1, to prepare for trial, and it can not be said under those circumstances that the court abused its discretion in prematurely forcing them to trial. They asked for the postponement in order to procure the attendance of witnesses Marlie Adams and Ab Ashford. The names of other witnesses were included in the motion, but it ap-

pears that the attendance of the other witnesses was procured. The attendance of neither Adams nor Ashford was procured. It is alleged in the motion that Adams would testify, if present, that he resided with his father near Gillham, and that he recognized one Mobbs as one of the parties who rode out from Gillham on the day of the bank robbery. It is alleged that Ashford would testify, if present, that he was acquainted with the defendants, and that on the day of the bank robbery he saw two men at or near Mountain Fork, in McCurtain County, Oklahoma, going westward, who were riding horses of the same description as the description given of the horses said to belong to the men who committed the robbery; and that when he first saw the parties he thought they were the defendants, but that when he got closer to them he ascertained that they were other parties who were strangers to him, and not the defendants.

(3) The allegations of the petition, except that which relates to the substance of the testimony of the absent witnesses, are entirely formal, and it is not shown specifically where the two absent witnesses were, nor was any reason given why their attendance could not have been procured along with the numerous other witnesses who were brought from Oklahoma. It was shown by the State on the hearing of the motion that Adams had left the country some time before that date, and it was not shown that his attendance could have been procured. The witness stated that when Adams left he went in company with a man who was accused of another crime, and that Adams himself said that he was going away on account of having seduced a girl in the neighborhood. The defendant only asked for a postponement until April 5, and it was not shown that there was any probability of being able to get either of the witnesses. It does not appear from the motion where Ashford lived nor where he was at the time of the trial. We do not think that enough was shown with respect to either one of the witnesses to justify us in finding that the court abused its discretion in overruling the motion. The defendants did in fact procure a large number of witnesses who testified

both as to their reputations for honesty and also as to the fact that they were at their homes and could not have been in Gillham on the day of the bank robbery. The testimony of the two absent witnesses, while not of the precise character of testimony as that of other witnesses who were introduced, was, after all, in the nature of cumulative evidence, and the court was not bound to postpone the trial to give time to produce it. At least, it can not be said that there was an abuse of discretion in so refusing to give further time.

(4) It is next argued that the court erred in interrupting the cross-examination of witness Parker, and in commenting upon the conduct of counsel in conducting the cross-examination. Parker, as will be remembered, was, according to the testimony, one of the parties who trailed the defendants into Oklahoma, arrested them and brought them back to Arkansas. After the cross-examination had progressed to a considerable length, counsel asked the witness this question: "When was it you started out on this trailing expedition with reference to the date the bank was robbed?" Mr. Lake, one of the counsel assisting the prosecution, then remarked: "He has already stated that it was on Sunday he started out." The court then made the following ruling and comment: "It isn't proper to repeat on cross-examination the same things he testified and said on direct examination. It is a waste of time for you to repeat the same things on cross-examination. That is not cross-examination at all. He stated twice that he started out on Sunday, the 6th of March." It is insisted that the court erred, not only in interrupting the cross-examination and in holding as a matter of law that repetition of questions propounded on direct examination was not proper cross-examination, but that the comment of the court tended to discredit defendants' counsel before the jury and to bolster up the witness being cross-examined. We do not think there is any prejudicial error apparent from the incident or that it is at all probable that any prejudice could have resulted. The witness had in fact stated more than once that he and Ross started out

on the trip in search of the robbers—on the trailing expedition, to use the words of defendants' counsel—on the Sunday following the robbery of the bank, and in this the witness was corroborated by the undisputed evidence of Ross. There was no dispute on that point, and the court was correct in stating to the jury that that fact was undisputed, and it can not be seen that any prejudice resulted from stopping the cross-examination on so plain a proposition. The extent of cross-examination of a witness is in some measure within the control and discretion of the trial court. It is the duty of the trial judge to see that it is not unduly prolonged or that useless and immaterial questions are asked, or that questions relating to undisputed matters are repeated. Nor do we find anything in the language of the court which would discredit counsel for the defendants in their efforts in behalf of their clients before the jury, or bolster up the witness. The court merely stated his views on the subject and mentioned the undisputed testimony on the point involved. There was no error.

(5) It is urged that the court erred in refusing to permit the defendant's counsel to ask witness Britton the following question, with respect to the topography of the locality in Oklahoma where defendants lived: "In that country, is fifteen or twenty miles regarded as a great distance?" The witnesses were permitted to testify concerning the topography of the country, and the fact that it was very sparsely settled, and the court was correct in excluding the question stated above. It called merely for the opinion of the witness on a matter which could be shown by more direct and definite statement of facts.

(6-7) Another assignment relates to the examination of the same witness where the court refused to permit counsel for defendants to ask him whether or not the reputation of one of the defendants was "so exemplary that it had been a matter of remark and talk in the community." The question was also put in this form: "I will ask you this question, Mr. Britton, if his reputation has not been such, as a peaceable, law-abiding man, that

it has caused comment where he lives?" And again the question was asked as follows: "Has there been anything in his conduct as a peaceable, law-abiding man that has caused it to be discussed?" The court permitted counsel to ask the witness the customary questions calculated to elicit the testimony concerning the reputation of the accused in the respective communities in which they lived. All these questions were argumentative in their nature, and called for answers not contemplated by the principles of the law which admit that character of testimony. No error was committed in refusing to permit the witness to answer the questions. Another answer to the assignment is that it is not shown what the witness would have said in response to the questions. Therefore, prejudicial effect of the refusal to allow counsel to propound the questions is not apparent. It is true that these questions were propounded as a result of certain cross-examination of the witness, but we think the questions on cross-examination did not make these questions pertinent or proper.

(8) Another assignment relates to the ruling of the court in permitting the State's counsel to recall one of defendants' witnesses and ask him if he had not stated that he was satisfied, after having seen the defendants, that the officers had arrested the right parties who were the bank robbers. The witness answered that he did not make any such statement, and there the matter ended. There could have been no prejudice in asking the question when it was answered by the witness in the negative.

(9) There are several assignments of error with respect to the statements of counsel for the State in opening the case to the jury, and also in the argument to the jury after the testimony was in. The objections of the defendants were sustained, and there was no prejudice which might have resulted from the incident. At least, the court ruled in favor of the defendants upon their objections to the statements of counsel, and the remarks are not of such a character, as we can say that prejudice resulted which the court could have removed by a more emphatic ruling. The court in effect told the jury that the matters referred

to were not competent evidence and should be disregarded, and we must assume that the jury were intelligent men and were disposed to follow directions of the court.

(10) The only remaining assignment of error is that the court denied the defendants the right of being present at the time the motion for new trial was presented to the court and overruled. The record shows that on the day the motion was presented, the defendants appeared by their attorneys and requested the court to make an order causing the defendants to be brought forward in their own proper persons so as to be present at the hearing of the motion. This request was overruled. It does not appear that any new matter was presented in the motion for new trial, but the assignments therein all related to matters which occurred at the trial. There was, therefore, no hearing except upon the face of the motion itself. The constitutional guaranty is that a defendant shall have a right "to a speedy and public trial by an impartial jury," and that he shall have "compulsory process for obtaining witnesses in his favor and to be heard by himself and his counsel." Article 2, section 10, Constitution of 1874. The statutes of the State also provide that in indictments for felony, the defendant must be present during the trial. Kirby's Digest, section 2339. These provisions relate to the trial itself, and as the trial ended with the verdict of the jury, there was no denial of the constitutional or statutory right in hearing and considering the motion for new trial in the absence of the accused themselves. The steps taken subsequent to the verdict constituted merely efforts to get the verdict set aside, and did not constitute a part of the trial itself. The motion for a new trial may be presented and heard in the absence of the defendant, unless there is an issue of fact presented at the hearing or some reason shown in the nature of the presentation of the subject-matter of the motion which calls for the presence of the accused.

Mr. Bishop, in his work on Criminal Procedure (vol. 1, section 269), in speaking of the necessity for the presence of the accused at the hearing of a motion, says: "But

if it relates to a mere matter of law, or if in any other form a question simply of law is agitated, the better doctrine both in reason and authority is, that he may be absent at the argument unless the court sees fit to require his presence. For where no fact *in pais* is involved, and all is of law, there is nothing which a lay prisoner can do or suggest in the case; his interests are then wholly in the keeping of his counsel."

The same author, speaking at another place in the same volume (section 276), and after pointing out the distinction between those occasions which do require the presence of the accused, and those which do not, says: "Those distinctions conduct to the conclusion that the prisoner's presence should be required or not, at a hearing for a new trial, according to the particular question. If it is of mere law, the presence is not as of course essential; but if the defendant is not in custody, the court may demand it as a means of getting possession of him. If the hearing is attended by an inquiry into a fact, the common rule that the defendant must be present prevails."

There are authorities to the contrary, and Mr. Bishop calls attention to them; but we think that his views on the subject are sound, and that where, after the trial is ended, there is a hearing on the motion which involves no inquiry of fact, the presence of the accused is not essential.

Judgment affirmed.

ST. LOUIS, SOUTHWESTERN RAILWAY COMPANY v. WYMAN.

Opinion delivered July 5, 1915.

1. INSTRUCTIONS — DEFECTS — SPECIFIC OBJECTIONS. — Where a party claims the instructions given by the court were too restricted to properly submit the issue, it becomes the duty of the party complaining to point out to the trial court the particulars wherein it is claimed that the instructions are defective.

2. INSTRUCTIONS—IMPROPER FORM—DUTY TO ASK PROPER INSTRUCTION.—Where appellant desired certain instructions to be put in more accurate form than that used by the court, it is his duty to present a correct prayer for instruction on the issue involved, or to point out specific objections thereto.

3. CARRIERS—INJURY TO PASSENGER ON MIXED TRAIN—CONTRIBUTORY NEGLIGENCE.—In an action for damages received by plaintiff, while a passenger on a mixed train, caused by a sudden jerk, *held*, the instructions taken together properly submitted the issue of contributory negligence to the jury.

4. CARRIERS—DUTY TO PASSENGER ON MIXED TRAIN.—In the operation of mixed trains, a railroad company owes the same duty of care to its passengers as in the operation of a passenger train, and the company will be liable for a negligent handling of the same.

5. CARRIERS—DUTY TO PASSENGERS ON MIXED TRAIN.—Railroad companies owe to passengers on mixed trains the duty to exercise only such care, skill and diligence as is reasonably consistent with the transportation of passengers thereon, and a passenger on a mixed train assumes the risk incident to the starting and stopping of the train, when done with reasonable care.

6. CARRIERS—DUTY TO PASSENGER—GETTING UP BEFORE TRAIN STOPPED.—It is a question for the jury, whether a passenger on a mixed train was guilty of contributory negligence in leaving his seat before the train stopped, although there was a notice in the car warning him to remain seated until the train stopped.

7. CARRIERS—MIXED TRAIN—LEAVING SEAT BEFORE STOP—CONTRIBUTORY NEGLIGENCE.—A passenger on a mixed train is guilty of contributory negligence, where he arises from his seat before the train stops and stands in the car an unreasonable length of time, there being a notice posted in the train warning passengers not to leave their seats before the train stopped.

8. INSTRUCTIONS—ABSTRACT INSTRUCTIONS.—The trial court should refuse to instruct on a point not presented by the evidence.

9. INSTRUCTIONS—INSTRUCTION COVERED BY THOSE GIVEN.—In an action for personal injuries received by the operation of a mixed train upon which plaintiff was a passenger, it is not error to refuse to instruct the jury that plaintiff could not recover if the injury was caused by the ordinary operation of the train, when the court had already instructed the jury, that plaintiff assumed the risks necessarily incident to the operation of mixed trains.

10. DAMAGES—AMOUNT—PERSONAL INJURIES.—In an action against a railroad company for damages growing out of personal injuries received by the sudden jerk of a train, when plaintiff received injuries to his back and head, fractured his pelvis, dislocated his hip and was confined to his bed five weeks suffering great pain, a verdict of $1,750 will not be held to be excessive.

Appeal from Monroe Circuit Court; *Thomas C. Trimble*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellee instituted this action against the appellant for damages for personal injuries. He alleged that he was a passenger on appellant's train from Brinkley to Clarendon. That upon arriving at Clarendon, the train came to a stop, and that while standing in the aisle waiting for another passenger ahead of him to get off, the defendant's employees caused the train to be jerked and started with such force that plaintiff was thrown violently backwards and received severe injuries to his back and thigh. The answer denied the material allegations of the complaint and set up contributory negligence on the part of the appellee.

The appellee testified that he was a passenger on appellant's mixed freight and passenger train from Brinkley to Clarendon. That some one hallooed out "Clarendon;" that he remained in his seat until the train "came to a dead stop," and then got up and went as far as the last seat, then the bump came that threw him ten feet or more; he fell on his grip; his head hit the side of the seat; he fractured his pelvis and dislocated his hip. He didn't discover that he was seriously hurt until he had gone up to the hotel and had called on five or six merchants. Appellee was a drummer. He then details the expense to which he was put. He stated that the movement of the train at the time of his injury was very extraordinary. Other witnesses testified, corroborating the testimony of the appellee to the effect that the train had stopped before he arose from his seat, and that it gave a sudden jerk and appellee fell; that the jerk was a hard one. One of the witnesses stated that the train moved something like half a car-length.

On behalf of the appellant, witness Donaldson testified that he was on appellant's train at the time that appellee was injured; that appellee was standing. He was asked this question: "Was Mr. Wyman standing?" And answered, "Well, I was standing before he was." He further testified that the train had not been stopped before witness arose to depart. The train stopped first at

the water tank. The second stop was right at the depot. As they got into town, witness got up and was standing with his hand holding to the back, of the seat. Wyman was standing on the opposite side. Witness was waiting for the jar to come, and when it came, Wyman was thrown back and several parties rushed up to him, thinking that he was hurt. When the train stopped for the station is the time when Wyman fell. The witness further stated that the jar on this occasion was not any more unusual nor any harder than "what is ordinary on freight trains."

The conductor testified that they stopped for water at Clarendon, and after that they proceeded to the depot. The train pulled down and made a stop for the passengers to get out. The train did not make a second stop for passengers to alight. The coach was provided with air brakes and the air was connected. When the train stopped, and the air was released, there was a little bit of slack. There were sixteen cars in the train and the slack would amount to four or five inches per car. There was a sign in the car in large letters informing all persons to keep their seats until the train came to a full standstill.

The court gave the following instructions at the instance of appellee:

"No. 1. You are told that, while the plaintiff, in taking passage upon a mixed train assumed the risk of necessary and usual jolts and jars, and this did not relieve the railroad company from exercising the same high degree of care in the handling of its train as if he was riding on a regular passenger train to avoid injuring him. The risk of usual jolts and jars assumed by plaintiff is the risk incident to the mode of conveyance, and does not relax the rule as to the high degree of care to be exercised by the servants of the defendant to avoid injuring passengers, so, in this case, if you believe that the plaintiff was without fault and would not have been injured if the defendant's servants had exercised such high degree of care, your verdict would be for the plaintiff."

"No. 2. You are instructed that while a passenger riding upon a freight train assumes the risks and hazards

that are incident to the operation of a freight train, yet it is the general duty of the carrier to use due care for the safety of the passengers and freight trains carrying passengers can not be operated carelessly without subjecting the company to liability any more than a passenger train, and the operatives in charge of a freight train can not any more overlook the due care of their passengers than can the operatives of a passenger train, and, although plaintiff in this case was a passenger upon a freight train, yet, if you find from the evidence that defendant's operatives in charge of said train failed to use due care for plaintiff's safety or negligently or carelessly operated said train or moved the caboose connected therewith in which plaintiff was a passenger, and that by reason thereof he was injured, your verdict should be for the plaintiff."

Appellant objected generally to the giving of each of these instructions, and duly saved its exceptions.

The court refused the following prayers for instruction by appellant:

"No. 1. The jury are instructed to return a verdict for the defendant."

"No. 2. You are instructed that it is the duty of passengers traveling upon freight trains or mixed trains to maintain their seats until the train shall arrive at a station and come to a full stop before arising to their feet for the purpose of getting off, and if you find from the evidence in this case that the plaintiff arose to his feet before the train upon which he was injured came to a full stop and he was standing up before the train stopped, and was thrown by the checking of the train or stopping of same, then your verdict should be for the defendant."

"No. 4. The jury are instructed that if they find from the testimony that the defendant brought its train to a standstill and that the plaintiff immediately thereafter arose to depart from said train, and while he was standing upon his feet, the train moved by reason of its inherent construction, that is, by reason of a slack of the train, without the engineer making any attempt to move

the train, and that the accident resulted from a slack or voluntary movement of the train after it had stopped, then the defendant is not liable."

The court granted appellant's prayer No. 3, which is as follows:

"No. 3. The jury are instructed that railway companies in the transportation of passengers upon freight or mixed trains are only required to exercise such care and skill and diligence as is reasonably consistent with the transportation of passengers upon mixed trains, as they can not in the nature of things exercise the same care in stopping and starting mixed trains as they can passenger trains, and whenever a passenger embarks upon a mixed train, he assumes the risks incidental to the stopping and starting of such trains, provided the carrier exercises all care and skill that is reasonably consistent in operating its trains."

The jury returned a verdict in favor of the appellee for $1,750, and from a judgment in its favor for that sum this appeal has been duly prosecuted. Such other facts as may be necessary will be stated in the opinion.

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

1. There was a sign posted in the car warning all passengers to remain seated until the train stopped. Plaintiff violated this warning and was injured. The company is not liable. 97 Ark. 507; 87 *Id.* 101, 109, 572; 83 *Id.* 22; 79 *Id.* 335; 93 *Id.* 240; 95 *Id.* 220; 74 *Id.* 31; 71 *Id.* 590.

2. The court erred in giving and refusing instructions. 57 Ark. 517, 287; 99 *Id.* 366; 52 *Id.* 248.

G. Otis Bogle and *Harry H. Myers,* for appellee.

1. Appellee was a regular passenger and did not leave his seat until the train stopped. He was injured by a sudden jerk, which is *prima facie* evidence of negligence. Kirby's Dig., § 6773; 83 Ark. 214; 103 S. R. 603; 73 *Id.* 543; 63 Ark. 636. As to risks assumed by passengers, see 98 Ark. 82. The rule as to due care is the same as to freight, mixed and passenger trains. 76 Ark. 520;

83 *Id.* 22; 87 *Id.* 109; 90 *Id.* 494; 95 *Id.* 220; 94 *Id.* 75; 93 *Id.* 119; 94 *Id.* 126; 105 Ark. 269; 52 Ark. 517.

Passengers must have sufficient time to alight with safety. 6 Cyc. 612; 98 Fed. 963; 147 U. S. 571; 101 Ark. 183; 73 *Id.* 548. Where a passenger exercising due care and diligence in alighting, is injured by a sudden jerk of the train, the carrier is liable. 84 S. W. 175; 88 S. W. 767; 96 Ark. 339; 102 *Id.* 533; 87 *Id.* 581-602; 105 Ark. 22; 87 Ark. 101. There is no error in the instructions, and the verdict is sustained by the evidence. 86 Ark. 587; 88 *Id.* 12; 90 *Id.* 108.

WOOD, J., (after stating the facts). (1-3) I. The appellant contends that the effect of the instructions numbered 1 and 2, given at the instance of the appellee, was to make appellant's liability depend upon the issue as to whether or not the employees of appellant were negligent in the operation of the train, and that these instructions excluded from the jury the issue of contributory negligence. The court, in instructions on its own motion, told the jury that the theory of appellant's defense was that the allegations set up by the appellee in his complaint were not true, and that he was not injured, or "if he was injured, it was caused by his own negligence." When the instructions are considered together, as they must be, they are not open to the criticism which appellant makes of them. By the instruction given on the court's own motion, and the first instruction given at appellee's request, the court submitted to the jury the issue of contributory negligence. Appellant made only a general objection to instruction No. 1. If appellant conceived at the trial, as it now contends here, that this instruction was too restricted to submit the issue of contributory negligence, its duty to the trial court was to point out the particulars wherein it claimed the instruction was defective. By these instructions, the court grounded the appellee's right to recover upon the fact that appellant was negligent, and that he was without fault. They were told "your verdict would be for the plaintiff if you believe that the plaintiff was without fault," etc. While this direction was couched

in general terms, it conveyed to the jury, in connection with the instruction given on the court's own motion stating the issues by the respective parties, the idea that the appellee's right to recover depended upon the issue as to whether or not he was free from contributory negligence. True, the court, if requested, should have framed instruction No. 2 so as to have embodied the idea that appellee was not entitled to recover if the jury found from the evidence that his own negligence contributed to cause the injury of which he complained. But the appellant made no such specific request as this, and it is manifest when these instructions are considered as a whole that the jury were not authorized to render a verdict in favor of the appellee if they found from the evidence that his own negligence contributed to the injury. While the instructions were not strictly in technical form, the criticism to be made of them relates more to verbiage than substance, and it was the duty of the appellant, if it desired the instructions put in more accurate verbiage, to present a correct prayer for instruction on the issue of contributory negligence; or, as before stated, to point out by specific objections to the court below the defect it now urges to these instructions.

(4-5) Instructions numbered 1 and 2, given at the instance of the appellee, and instruction numbered 3, given at the instance of the appellant, presented the law applicable to such cases, in conformity with the doctrine announced by this court in *St. Louis, I. M. & S. Ry. Co.* v. *Hartung,* 95 Ark. 220; *Arkansas, etc. Rd. Co.* v. *Wingfield,* 94 Ark. 75; *St. Louis S. W. Ry. Co.* v. *Jackson,* 93 Ark. 119, and cases cited.

(6-7) II. Appellants' prayer for instruction No. 2, in effect told the jury that if the appellee arose to his feet and was standing up before the train came to a full stop, he was guilty of contributory negligence, and could not recover. The court did not err in refusing to grant this prayer. Even though the jury might have found that the appellee arose to his feet before the train came to a full stop and that he was standing in the aisle before the train

came to a full stop, this would not constitute contributory negligence as a matter of law, and it would still be a question for the jury to say under the circumstances as to whether the appellee was guilty of negligence.

In *Pasley* v. *St. Louis, I. M. & S. Ry. Co.*, 83 Ark. 22, Judge Riddick, speaking for the court, said: "It can not be said as a matter of law that every time a passenger on a freight train arises from his seat he is guilty of negligence. It is only when his standing is so protracted or so uncalled for that the court can say as a matter of law that it was unnecessary and imprudent that the question of his negligence will be taken from the jury."

It can not be said as a matter of law that passengers on mixed freight and passenger trains are guilty of contributory negligence if they arise from their seats before these trains come to a full stop at the stations which are the destinations of such passengers. As to whether they are guilty of contributory negligence would be a question depending on the circumstances. The speed the train is making at the time it approaches the station; the length of time the passenger has been standing before the train comes to a stop at his destination; the obstructions that are in his way, the causes actuating him to arise to his feet; and, in fact, all the surrounding conditions are to be considered. The mere fact that a passenger has been warned by a notice posted in the train not to arise before the train comes to a full stop would not make him guilty of contributory negligence as a matter of law if he failed to heed such warning. It would be the duty of the jury, of course, where such warning was posted and where it was shown that the passenger had, or by the exercise of ordinary care could have had, knowledge of such warning, to take into consideration these facts in connection with the other circumstances in determining whether or not the passenger was guilty of contributory negligence. And if the undisputed evidence showed that the passenger, having such warning, arose from his seat and stood in the car an unreasonable length of time, then it would be the duty of the court to declare as a matter of law that

the passenger was guilty of contributory negligence. See *St. Louis, I. M. & S. Ry. Co.* v. *Harmon,* 85 Ark. 503. In cases where the uncontroverted evidence shows that no man of ordinary prudence under the circumstances would have arisen to his feet and stood while the train was still in motion, notwithstanding a warning given against such conduct on the part of the passenger, then the court may declare as a matter of law that the passenger was guilty of negligence contributing to his injury and direct the jury to so find. Such, for instance, was the case of *Krumm* v. *St. Louis, I. M. & S. Ry. Co.,* 71 Ark. 590.

(8) But this is not like that case. Here the question as to whether or not appellee was guilty of contributory negligence was properly submitted to the jury, just as it was in the cases of *St. L., I. M. & Sou. Ry. Co.* v. *Richardson,* 87 Ark. 101; *St. L., I. M. & Sou. Ry. Co.* v. *Brabbzson,* 87 Ark. 109; *St. L., I. M. & Sou. Ry. Co.* v. *Gilbreath,* 87 Ark. 572; *St. L., I. M. & Sou. Ry. Co.* v. *Billingsley,* 79 Ark. 335; *St. L., I. M. & Sou. Ry. Co.* v. *Hartung, supra;* and *St. L., I. M. & Sou. Ry. Co.* v. *Taylor,* 74 Ark. 31.

(9) III. The court did not err in refusing appellant's prayer for instruction No. 4. There was no testimony to warrant the jury in finding that the appellee's injury was caused by reason of the slack or voluntary movement of the train after it had stopped. True, the testimony showed that there were sixteen cars in the train, and that when a train of that character was stopped and the air released, there would be "a little slack," and in a train of that length that the slack would be about six and two-thirds feet; but there was no testimony to show that this slack would produce a sudden and violent movement of the train after the same had stopped. On the contrary, the testimony on behalf of the appellant showed that there was no violence whatever." The conductor stated: "There was no violence whatever." The uncontradicted evidence was that appellee's injury, if he was injured, was caused by a sudden jerk, and in the absence of testimony tending to show that the sudden jerk was or could have been produced by the inherent construction of a train of that character, or by the slack or voluntary

movement of the train after it was stopped, there was no testimony upon which to predicate a finding that the injury was produced by the voluntary movement of the train, and the instruction was therefore abstract. Moreover, even if the instructions were not abstract, the appellant got the benefit of the direction sought to be conveyed by it in the instructions which the court gave, in which the jury were told that appellee assumed the risk of the "necessary and usual jolts and jars," the "risk incidental to the stopping and starting of such trains." The appellant was therefore not prejudiced by the ruling of the court.

(10) IV. We are unable to say that the verdict is excessive. The credibility of the witnesses who testified as to the nature of appellee's injuries was for the jury. They have accepted the testimony of these witnesses; and giving the testimony its strongest probative force in appellee's favor, it was sufficient to sustain the verdict. The appellee's testimony showed that he was severely injured in his back and hip. He was confined to his bed for five weeks, and his suffering was intense. The testimony of physicians who attended him tends to show that his injury was serious and his suffering severe. We find no basis in the testimony to warrant us in reducing the amount of the verdict.

The judgment is therefore affirmed.

COST v. FIDLER.

Opinion delivered July 5, 1915.

NEGLIGENCE—PERSONAL INJURY—ELECTRIC FAN—CONTRIBUTORY NEGLIGENCE.—Plaintiff, a visitor in defendant's pool hall, sustained injuries to his hand, when, while sitting before an electric fan to cool himself, he raised his hand to stretch himself, and striking the fan sustained the injury complained of. *Held*, although defendant was negligent in maintaining the fan unguarded, that plaintiff's contributory negligence in placing his hand against the fan which he knew to be unguarded would bar a recovery.

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

STATEMENT BY THE COURT.

This suit was instituted by appellee against appellants to recover damages alleged to have been sustained by him through the negligence of the appellants in operating an electric fan without having the same protected by a guard. The appellee alleged, in substance, that the appellants were operating six electric fans in their pool hall, into which they invited the public; that he, upon the invitation of the appellants, entered the pool hall and became a patron thereof, and that while using ordinary care for his safety, he was severely injured by coming in contact with the unguarded fan which was being used by appellants to cool the atmosphere for the comfort of their patrons in their pool hall.

The appellants denied the allegations of negligence and injury, and set up, by way of affirmative defense, that if the appellee was injured, his own negligence contributed to his injury, and that he also assumed the risk.

The appellee himself testified that on the day of the injury he went into the pool hall of appellants and played one game of pool; that there were six electric fans on the wall, about five or five and a half feet from the floor, arranged three on each side, facing each other; that they were known as "16" fans, which had been installed about a week before. They were all kept running when he noticed them. After playing one game opposite the fan by which he was injured, he sat down in a chair which was about thirty inches high, and talked with the party he had been playing with, the chairs being arranged along the wall and the fan was to the right of the one he sat in; that it was a very hot day, and he put his hand up to stretch like a man naturally would, and laid his hand on the fan, after which the fan was stopped; that the fan was without a guard; that the blades struck his wrist, causing the injury; that it would have been impossible for him to have been hurt had there been a guard on the fan.

On cross-examination he stated that he "guessed he noticed the guard was off of the fan the day before the day of the injury." There was no guard on the fan at

the time it was put in; that at the time he sat down on the day of the injury, he knew there was no guard, but was not thinking about it. He didn't know whether he stopped and cooled off before the fan or not before he sat down.

Several witnesses testified on behalf of the appellants that the appellee, on the day of the injury and prior thereto, stood in front of this fan and cooled himself off; that the guard was off of the fan. It was shown that appellant M. A. Cost had given directions for no one to use the fan, as it had the guard off. The appellant testified that the fan had no guard on it because there was a screw loose on the guard when he put it there, and he had the electrician take it off; that appellee knew that this guard was taken off; that he would go to that fan and start it himself and that he (appellant) would go and cut it out. He noticed appellee at different times pull his chair out in front of the fan and cool himself off prior to the day of the injury. He did not see the appellee start the fan that day, but saw him standing in front of it cooling himself off just before the injury.

The appellants moved the court to instruct the jury to return a verdict in their favor, which motion was by the court overruled, and to which appellants duly excepted and made this ruling of the court one of their grounds in the motion for a new trial. The verdict and judgment were in favor of the appellee in the sum of $100, and this appeal has been duly prosecuted.

W. P. Smith, for appellants.

No one is liable for an injury caused by negligence when the plaintiff, by his own negligence, contributed to the injury, unless it was a wilful injury, or one resulting from the want of ordinary care on the part of the company or person to avert it after the negligence has been discovered. 95 Ark. 192; 36 *Id.* 71; 45 *Id.* 250; 47 *Id.* 497; 77 *Id.* 401-4; 81 *Id.* 522-525. The burden is upon defendant to show contributory negligence unless it appears from the plaintiff's evidence. 101 Ark. 429. The legal sufficiency of the evidence is one for the court. 97 Ark. 442.

Appellee *pro se.*

Where one expressly, or by implication, invites others to come upon his premises for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger and must render the place reasonably safe for the visit. Cooley on Torts (2 ed.), 1 L. R. A. (N. S.) 427, and note; 3 *Id.* 1134 and note and 982; 94 Am. St. 488; Whittaker-Smith, Neg., 10, 215. Where there is uncertainty of negligence or contributory negligence, the question is one of fact for the jury. 100 Ark. 55; 68 *Id.* 291; 29 Cyc. 631-7, 640 B.

WOOD, J., (after stating the facts). Conceding that the appellants were negligent in maintaining the fan in their pool room in its unguarded condition, the uncontroverted testimony of the appellee himself and the other witnesses shows that the appellee negligently placed his hand against the fan which he knew to be without any guard. He therefore negligently contributed to his own hurt, and the court erred in not so instructing the jury. The judgment is therefore reversed and the cause is dismissed.

BRICKEY *v.* COTTER, ADMINISTRATOR.

Opinion delivered July 5, 1915.

MORTGAGES—ADMINISTRATOR IN POSSESSION—RIGHT OF MORTGAGEE TO RENTS COLLECTED.—The administrator of deceased mortgagor was in possession of lands, upon which appellants held a deed of trust. *Held,* the possession of the administrator was the same as that of a mortgagor in possession, and appellants would not be entitled to the rents from the lands, where they were not in possession of the same, and had made no attempt to obtain possession.

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

STATEMENT BY THE COURT.

In December, 1913, appellants, under the power conferred in various deeds of trust held by them, advertised for sale the lands embraced in those deeds. Thereupon various unsecured creditors of Peter Brickey, the maker

of the deeds of trust, applied to the probate court for the appointment of an administrator, and after the appointment of the administrator, he and others instituted a suit in the chancery court, alleging that Peter Brickey was the owner of the lands described in the various deeds of trust at the time of his death; that the indebtedness secured by some of these deeds of trust was barred by limitations; that Brickey did not owe the amount alleged to be due under all of the various deeds of trust, and that the lands which the appellants were proposing to sell under said deeds were of greater value than the amount of the indebtedness due; that Brickey was indebted to them as well as to the appellants, and that a sale under the terms of the deeds of trust as advertised would result in loss to the other creditors of Peter Brickey because the property, if sold as a whole, would not bring a price equal to that at a sale in separate parcels; that the sale, if made as advertised, would prevent any fair and reasonable price being offered for the land, and would result in a sacrifice of the assets of the estate of Peter Brickey, deceased. They alleged that the purpose of the appellants in so advertising the lands was with a view to acquiring the property embraced in the deeds of trust for a much smaller sum of money than their real value. They set up if an adjustment were had of the amounts due the appellants under prior mortgages, and an accounting showing the real condition of the indebtedness, the lands, when sold to pay the same, would result in a large surplus after discharging the indebtedness due the appellants under their trust deed, and that such surplus would be assets in the hands of the administrator for the payment of other debts due by the estate of Peter Brickey. They prayed that an injunction issue restraining the appellants from foreclosing their trust deeds in the manner advertised by them, and that an accounting be had and the assets of the estate of Peter Brickey be marshalled so as to permit the appellees to have such of these assets as were not necessary to discharge the indebtedness due appellants paid to the other creditors of the estate.

The appellants answered the complaint of appellees, admitting the death of Brickey, the appointment of the administrator, and their attempt to foreclose the trust deeds as set up in the complaint. They denied that the value of the property was equal to their debt, and made their answer a cross-complaint, setting up and describing the lands included in their trust deeds, giving the dates and the amount of indebtedness covered by each, and prayed that others, heirs of Peter Brickey, and his administrator, be made parties; that judgment be rendered in their favor against the administrator of the estate for the sum due them under their trust deeds, and that if same were not paid within twenty days that the property be sold by order of the chancery court through a commissioner duly appointed for that purpose; that a receiver be appointed "to take charge of the real estate mentioned in the herein described deeds of trust, to rent out the same and collect the rents therefrom and apply said amounts to the payment of the notes herein mentioned, or hold the same subject to the orders of the court."

The cause was presented at the March term, 1914, of the chancery court, and was taken under advisement by the chancellor and a decision rendered by him in July.

The court found that all the indebtednesses alleged to be due under the various deeds of trust were valid, except the sum of $3,000, included in one of these, which was barred by the statute of limitations. The court rendered a decree ordering the lands to be sold and appointed a commissioner to execute the same, which he did on the 20th day of October, 1914. The amount for which the lands were sold was much less than the sum which had been decreed in favor of the appellants. The lands were bought in by the appellants. The commissioner made his report to the November term of the court, and the sale was confirmed.

After this, towit, December 11, 1914, the appellants instituted this suit against the appellees, setting up in their complaint substantially the above facts, and alleging in addition that the appellants, as cross-complainants

in the original suit instituted by the administrator and others, had prayed for the appointment of a receiver, and that no receiver was appointed; that appellee Cotter, as administrator, had rented out the land for the sum of $2,000 for the year 1914, and had collected the same or had notes evidencing the amount due in his possession. They set up that, having begun proper proceedings to get possession of the property that inasmuch as the amount for which the property sold under the decree of the chancery court was not sufficient to pay the indebtedness due them under the decree of the court, they, having become purchasers of the land, were entitled to the rents for the year 1914, to be applied on the balance due them under the decree. They therefore prayed that a receiver be appointed to collect such rents as had not been collected for the year 1914, and that appellee Cotter be directed to pay over any amount of rent collected by him as administrator for the year 1914 to the receiver, and asking that appellee Cotter be named as receiver.

Appellees demurred to the complaint, setting up that the facts alleged do not constitute a cause of action. The court sustained the demurrer and entered a judgment dismissing the complaint, from which this appeal has been duly prosecuted.

W. J. Lamb, for appellants.

When default was made in the payment of the notes and interest, secured by the deeds of trust, and the land was advertised for sale, appellants were at once entitled to possession and rents and profits provided the *corpus* was insufficient to pay the debt. When the answer and cross-complaint was filed, appellants were entitled to rents and profits. The chancellor misinterpreted our decisions. 68 Ark. 586; 97 *Id.* 262.

Daggett & Daggett and *Roleson & McCulloch,* for appellee.

If appellants have any ground to contend for rents and profits, it must be under Kirby's Digest, § 6354. The questions here are settled by 68 Ark. 586, and 97 Ark. 262.

WOOD, J., (after stating the facts). When suit was instituted against appellants to enjoin them from foreclosing their trust deeds under the power contained therein the appellants, while denying the allegations of the complaint in that suit, did not ask that the complaint be dismissed and that they be allowed to foreclose under the power contained in their trust deeds. On the contrary, they made their answer a cross-complaint, in which they set up the indebtedness alleged to be due them by the estate of Peter Brickey, deceased, and prayed that the chancery court grant them a decree for the amount of that indebtedness, and that the deeds of trust securing such indebtedness be foreclosed by the chancery court, and that the lands securing the indebtedness be sold by the orders of the chancery court. While in their cross-complaint they allege that the estate of Peter Brickey was insolvent, and that the indebtedness due them from the estate was in excess of the value of the lands given as security therefor, and while they asked that a receiver be appointed to take charge of the real estate and to rent out the same and collect the rents and hold the same subject to the orders of the court, yet they did not insist on a ruling of the court as to the appointment of such receiver. It does not appear that any testimony was introduced on that issue. They did not demand any ruling of the court granting the prayer of their complaint in that particular; but, on the contrary, they permitted the administrator to hold the possession of the lands until after the sale was made under the orders of the chancery court and allowed the administrator to retain the possession of said lands until the commissioner made his final report to the court, and their deeds were confirmed. If appellants had taken the necessary steps to prove the allegations of their cross-complaint, to the effect that the lands were insufficient in value to discharge their mortgage debt, and that the estate of Peter Brickey was insolvent, and had demanded of the chancery court, on this showing, that a receiver be appointed, then they would be in a position, if the chan-

cery court had denied their request, to urge that they were entitled to the rents for 1914. But, as they did not do this, they are in the attitude of consenting that the administrator of Brickey should hold the possession of the lands as a tenant by sufferance.

We held in *Reynolds, Admr.*, v. *Canal & Banking Co.*, 30 Ark. 520, that a mortgagee was not entitled to the rents and profits until he had taken possession, or the necessary steps to obtain possession. Here the facts set forth in the complaint are not sufficient to show that the appellants, as the mortgagees or beneficiaries in the deeds of trust, had taken the necessary steps after asking for a foreclosure of their deeds of trust through the chancery court, to deprive the mortgagor, or, in this case, the administrator of his estate, of the right to the possession of the premises during the foreclosure proceedings. If Peter Brickey had been living and had instituted the same proceedings to enjoin the appellants from proceeding to foreclose the deeds of trust under the power contained therein, making the same allegations as his administrator made in the suit to enjoin, he would have been entitled to the relief prayed upon proving the facts alleged. And if the appellants, instead of insisting on their right to foreclose under the power and asking affirmative relief of that sort, had answered merely denying the allegations, and then, by way of cross-complaint, had asked the chancery court to foreclose the deeds of trust, and had introduced proof to show that the mortgaged property was probably insufficient to discharge the indebtedness of Peter Brickey to them, and had not insisted on the court appointing a receiver until after the sale had been made and confirmed, and until after Brickey had collected the rents for 1914, then they would not be entitled to these rents by virtue of their purchase at the foreclosure sale, and would not be in a position to compel Brickey to account to them for such rents. The administrator's status in this suit is precisely the same as would have been Peter Brickey's in the case supposed.

The facts set forth in the complaint and admitted by the demurrer show that at the time of the institution of this suit, which was December 11, 1914, the appellee, Cotter, as administrator of the estate of Peter Brickey, deceased, had collected the rents for the year 1914, or taken notes for the same, as the property of the estate. The facts show that the commissioner sold the lands, under the order of the chancery court, in October and reported the same to the November term, when the same was confirmed. Appellants, therefore, did not acquire their title under the foreclosure proceedings until the confirmation of the sale, and during all this time they had permitted the administrator of the estate of Peter Brickey to retain possession of the lands and had not attempted to disturb his possession until, as the allegations of their complaint of December 11 show, he had collected the rents for the year 1914, as the administrator of the estate.

In *Deisch* v. *Moore,* 97 Ark. 262, this court held that "a purchaser at a mortgage sale is not entitled to recover from the mortgagor in possession the rents and profits during the period allowed for redemption." And in *North American Trust Co.* v. *Burrow,* 68 Ark. 584, we said: "The status of the owner of the equity of redemption in possession and during the period allowed for redemption, is that of a tenant by sufferance, who is not required to pay rent."

These principles are applicable here; for the possession of the administrator of the estate of Peter Brickey, as we have seen under the admitted facts, was the same as that of a mortgagor in possession, at least until the confirmation of the sale to appellants under the decree of the chancery court. Up to this time the appellants had neither taken possession nor the necessary steps to give them possession. The decree is therefore affirmed.

VAUGHAN v. BLAKEMORE.

Opinion delivered July 5, 1915.

CORPORATIONS—SUBSCRIPTION FOR STOCK—FAILURE—LIABILITY ON SUBSCRIPTION.—Appellant, with others, purchased stock in a certain bank, giving his note therefor. Thereafter the bank failed. *Held*, appellant was liable to pay into the bank the amount of his note, the same to be distributed among other stockholders who had paid for the stock subscribed in the bank; and where appellant had purchased shares belonging to other stockholders, that stock would share in the distribution of the amount which he must pay in.

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

Thomas & Lee, for appellant.

1. The chancellor failed to follow the directions of this court, and the decree should be reversed with directions to enter a decree against appellant, Vaughan, in the sum of $1,000, and order same to be distributed *pro rata* between the stockholders. 110 Ark. 39-42.

Brundidge & Neelly, for appellee.

There is no error in the decree. The only liability in this case is for the amount paid in by the stockholders. 110 Ark. 39-42. The suit was brought for the benefit of plaintiff or any other stockholder. Other creditors were proper parties, but not necessary parties. 1 Cook on Corporations (4 ed.), par. 205. The other stockholders have not asked any relief.

WOOD, J. This is the second appeal in this cause. Appellees Blakemore and McElwee were stockholders in the Bank of Des Arc. That bank is now defunct. They had paid in 40 per cent. of the amount of stock subscribed by them. They, with one A. L. Moody, another stockholder since deceased, instituted this suit against G. W. Edmondson, Emmet Vaughan, J. T. Bogard, and J. R. B. Moore, as directors, alleging that through the negligence of the directors the bank was wrecked, and seeking to hold them liable as directors for the amount paid for their stock.

When the cause was tried the first time, judgment was rendered in favor of the appellees, and on appeal to this court the judgment of the lower court was affirmed as against G. W. Edmondson and J. R. B. Moore. The appeal was dismissed as to the appellee Moody. The cause was reversed on the former appeal as to the appellant Vaughan, and remanded for further proceedings. The case on the first appeal is reported in 110 Ark. 39.

On the former appeal we said: "It appears, however, that defendant Vaughan and several other stockholders never paid any part of their subscriptions to the capital stock, but gave notes therefor, which were afterward canceled by the directors. The corporation, acting through its directors, had no right to cancel the notes for the stock subscriptions as against creditors nor as against other stockholders who had paid their subscriptions. Those who had paid were, to the extent of their payments on stock, creditors of the corporation, and are entitled to have the liability against other stockholders enforced. Such liability is for the percentage paid in by stockholders, so that the amount can be treated as a part of the assets of the corporation for distribution."

After remand of the cause, the chancery court heard the same, as the decree recites, "upon the complaint, with its exhibits; the answer of the defendant Vaughan, together with its exhibits; the depositions of witnesses (naming them); together with the opinion of the Supreme Court heretofore rendered in this cause." The court thereupon found as follows: "That the defendant Vaughan had executed his note for $1,000 in payment of a call made by the directors upon the stockholders of the Bank of Des Arc, which note was never paid, nor any part thereof, and said note having been canceled by said board of directors, and it further appearing that said Vaughan had purchased all the stock of the Bank of Des Arc, with the exception of that owned by the plaintiffs, doth adjudge that the plaintiffs (naming the appellees), do recover of appellant, towit: Ed McElwee $200, E. C. Blakemore $200, and Charles G. Myers, administrator,

$400, same being the amounts due them as distributive shares of the amount due them by said defendant Vaughan."

The appellant testified in substance, and his evidence is undisputed, that at a stockholders' meeting the notes given for stock were authorized to be canceled upon a consideration of a surrender of the stock. He had executed a note in the sum of $1,000 in payment for $2,500 of stock subscribed for by him in the Bank of Des Arc, and that this note was, under the resolution of the stockholders, canceled, and his stock surrendered. He also testified that he owned all of the stock of the Bank of Des Arc except that owned by Edmondson and J. R. B. Moore. That he purchased the same at 50c on the dollar. Edmondson testified that he was the president of the bank; that the note of $1,000 was to pay the $2,500 of stock subscribed for by Vaughan, which note was canceled by the board.

On the former appeal we said: "It was not developed in the case what would be the distributive share of the plaintiffs and the additional amount to be paid in by defendant Vaughan and other defaulting stockholders. These are equities that should be adjusted, and as the case was not developed on that theory, it can be sent back for further proof."

It thus appears that the court erred in its decree. Under the directions of this court on the former appeal, the chancery court should have entered a decree against the appellant in the sum of $1,000, with interest, the same being the amount of his liability to the other stockholders who had paid their stock subscriptions. The court then should have entered an order directing that this sum be distributed among all the stockholders who were entitled thereto, *pro rata.* If appellant was the *bona fide* holder of all the shares of stock that had been subscribed, except that owned by Edmondson and J. R. B. Moore, and appellees Blakemore and McElwee, he was entitled to have all of his shares of stock considered in the distribution of the $1,000. Appellant had the right to purchase the stock held by other stockholders. Appellant says that he bought all of the stock of the Bank of Des Arc, except that

owned by Edmondson and J. R. B. Moore, at 50c on the dollar, but there is no testimony in the record showing whether or not those who owned this stock had paid the percentage required of them. Of course, if those who had originally subscribed for the stock had not paid for the same on the same basis or percentage as was paid by others, then this stock could not be taken into consideration in the *pro rata* distribution; and appellant, even though he had paid for such stock at the rate of 50c on the dollar, would not be entitled to have such stock considered in the *pro rata* distribution.

But the burden was upon the appellees. Vaughan testified that he had paid 50c on the dollar for this stock, and there is no testimony to show that the holders of stock from whom Vaughan purchased had not paid the same *pro rata* percentage of stock subscription as the other holders who did pay. We are of the opinion, therefore, that appellant must be held as the *bona fide* holder of this stock, and that as the holder of such stock he is entitled to have the same as well as the shares subscribed for by him considered along with the stock of Edmondson and J. R. B. Moore, the other stockholders, in the *pro rata* distribution of the $1,000.

The judgment is therefore reversed and the cause remanded with directions to the chancellor to ascertain the amount due the appellees on this basis (and for that purpose to refer the same to a master if necessary), and to render a decree in their favor for such sum, when reported.

STONE v. PRESCOTT SPECIAL SCHOOL DISTRICT.

Opinion delivered July 5, 1915.

1. CONTRACTS—IGNORANCE OF CONTENTS.—One who has an opportunity to read a contract before signing it, can not escape its obligation by saying that he signed it without having read it.

2. CONTRACTS—IGNORANCE OF CONTENTS.—Appellant can not escape the obligation of his written contract, which he could have read but did not do so, there being no allegation of any misrepresentation as to the contents of the writing which he signed.

3. CONTRACTS—SUBSCRIPTION CONTRACT—ERECTION OF PUBLIC SCHOOL—ACCEPTANCE BY SCHOOL DISTRICT.—When certain citizens signed a subscription contract agreeing to pay a certain sum annually for a number of years, for the erection of a public high school building and when the school district accepted the offer and erected the high school building, all the signers of the contract became bound by its provisions.

Appeal from Nevada Circuit Court; *J. H. Crawford,* Special Judge; affirmed.

H. E. Rouse, for appellant.

Appellant relied on representations of agents for appellee, and without reading the contract signed the same. If, through inadvertence or fraud of the agents of appellee, parts of the contract were left out, parol evidence was admissible to show that the contract sued on was not the contract entered into by appellant. 94 Ark. 577; 55 Ark. 115; 88 Ark. 385; 116 Ark. 545.

Relying upon the representations of appellee's agents, appellant accepted the offer as made, and if, without appellant's consent, appellee changed the conditions, the contract was not the contract accepted by appellant. Paragraph 2 of the answer states a defense, and the demurrer should have been overruled. 30 Ark. 195.

Every fair and reasonable intendment must be indulged in support of the answer. If its averments are defective, ambiguous or incomplete, the correct method of obtaining correction was by motion to make its allegations more definite and certain. If the facts stated in the answer, with every reasonable inference that may be drawn therefrom, constitute a good defense, the demurrer should be overruled. 96 Ark. 167; 107 Ark. 445; 101 Ark. 352; 91 Ark. 400; 93 Ark. 171.

Paragraphs 7, 8, 9 and 10 of the answer collectively stated the defense of no consideration, which is good against demurrer. 96 Ark. *supra;* 60 Ark. 612. On the question of appellant's not reading the contract, see 110 Ark. 185; 82 Ark. 105-112; 160 Mass. 477, 36 N. E. 65; 96 Ark. 371-376; 109 Ark. 299.

Paragraph 3 of the answer states a failure of consideration in that appellee promised to build the school

on land occupied by the City Park, and built it elsewhere, and agreed that appellant would not be required to pay tuition, where in fact he was required to pay tuition. This was a good defense. 6 Am. & Eng. Enc. of L. (2 ed.), 789; *Id.* 784; 60 Ark. 612; 34 Ark. 169; 96 Ark. 166, 167.

C. C. Hamby, for appellee.

Demurrer was the proper plea against the answer. By way of counterclaim or set-off appellant seeks to recover judgment in the sum of $500 as damages by reason of an alleged failure of appellee to comply with the provisions of the contract. In an action of this kind, a claim for unliquidated damages can not be pleaded as a counterclaim or set-off. Kirby's Dig., § 6104; 30 Ark. 50; 54 Ark. 187; 95 Ark. 493. Moreover, appellant asks a court of law to reform the contract by engrafting thereon certain conditions which he alleges were agreed upon at the time of signing the contract. This can not be done in a court of law. 102 Ark. 87; 108 Ark. 503.

How could these two propositions be reached except by demurrer?

Parol testimony is not admissible to vary, contradict or add to the terms of a written contract. 30 Ark. 186; 50 Ark. 393; 64 Ark. 651; 99 Ark. 224; 105 Ark. 455. See, also, 99 Ark. 289; 71 Ark. 185. There is no allegation in the answer that any one represented to appellant that the contract contained any word or condition other than it actually contained; therefore, 96 Ark. 371-376, and 109 Ark. 299 do not bear out appellant's contention.

Appellee's plea that he did not read the contract can avail him nothing when he does not allege he was overreached when he placed his signature to the instrument. 91 U. S. 50; 71 Ark. 185. Martin and Bemis, from the nature of the contract itself, represented the subscribers, and not the school district; but, if it be admitted that Bemis was a school director, his statements alone could not bind the district. 73 Ark. 194; 67 Ark. 237. Persons who deal with school officers are presumed to have knowledge of the extent of their powers. 94 Ark. 583.

SMITH, J. The complaint in this case alleged that appellant was indebted to appellee in the sum of $175, evidenced by a subscription contract, a copy of which was attached as an exhibit to the complaint, and that appellee, relying on the promise of appellant to pay the amount there subscribed by him ($50 per year for a period of ten years) borrowed large sums of money and proceeded to erect and equip a high school building, which it now maintains. That appellee would not have borrowed money nor erected said high school but for the promise of appellant and others to pay the amounts subscribed by them. The contract sued upon was as follows:

"We, the undersigned, for the purpose of erecting, equipping and maintaining a high school for the city of Prescott, Arkansas, agree to pay to the board of directors of the special school district of Prescott, Arkansas, and their successors in office, the sum set opposite our names for a term of ten years, beginning January 1, 1911, said sums to be paid in equal semi-annual installments on the 1st day of January and the 1st day of July of each year for said term of ten years, provided, however, that should any subscriber hereto die or move away from Nevada County, Arkansas, then payment by such subscriber may cease.

Name	Address	Amount
J. B. Stone.		$50.00

This subscription contract was signed by 123 citizens, who, collectively, agreed to pay the total sum of $40,750.

There was an allegation that appellant had paid no part of his subscription, and that there was due thereon for the years 1911, 1912, 1913 and the first part of 1914, the sum of $175, which, after due demand, appellant had failed to pay.

Appellant answered and alleged that Will Bemis, a director of the school district, and Matt Martin, a real estate dealer in the city of Prescott, called on him on two different occasions for the purpose of inducing him to sign said agreement, and stated and represented to him that the high school building was to be built in the city

park, across the street from the Park hotel, which was owned by the appellant, and that said high school when completed, would be a free school and no tuition would be charged the patrons of the school, and that said school was to be built by popular subscription, and appellant was to pay no taxes toward its erection, or any indebtedness incurred in its construction. Appellant further alleged that the representations were known to be false at the time they were made, and were made for the purpose of inducing him to sign said subscription contract, and that he believed said representations to be true, and was induced thereby to sign the contract.

He filed an amendment to his answer in which he alleged that he did not read over the agreement, and was not aware of the recitals of the subscription contract at the time he signed it.

The answer, however, did not allege that any false representations were made to appellant as to the contents of the subscription contract. A demurrer was filed to the answer and sustained, and upon appellant declining to plead further, judgment was rendered against him for the amount sued for, and this appeal has been duly prosecuted from that judgment.

(1) We think the demurrer should have been sustained. It has been several times said by this court that one who has an opportunity to read a contract before signing it can not escape its obligations by saying that he signed it without having read it. In the case of *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, it was claimed that a written contract for the sale of certain machines did not contain certain warranties concerning the machines which Kempner, the vendee, testified the representative of the vendor said it would contain; and he testified that he signed the contract hurriedly without having read it, but presumed it contained the warranties which the agent said would be contained in the contract. That fact was denied by the agent, who testified that Kempner had read the contract. It was there said, however, that it was unimportant whether Kempner had read the contract or not,

as he had ample opportunity to do so, and that he could not, when the contents of the writing itself were not misrepresented to him, escape the obligation of the contract by showing that he signed the contract without reading it.

(2) So, here, appellant can not escape the obligation of his written contract which he could have read, but did not do so, there being no allegation of any misrepresentations as to the contents of the writing which he signed. *Colonial & U. S. Mortgage Co.* v. *Jeter,* 71 Ark. 185.

(3) Moreover, this subscription contract does not purport to be an agreement between Bemis and Martin, on the one hand, and appellant, on the other. The names of neither Bemis nor Martin are mentioned in the contract. This was a contract which was signed by the public-spirited citizens of Prescott for the erection of a high school in that city, and each subscriber, in signing it, had the right to assume that its provisions applied alike to all the subscribers, and under the allegations of the complaint which the answer did not deny, this subscription offer was accepted by the school district, and the building contracted for was erected, and upon the acceptance of this offer, all of the signers to the contract became bound by its provisions. *Rogers* v. *Galloway Female College,* 64 Ark 627.

The judgment of the court below is therefore affirmed.

BEATRICE CREAMERY COMPANY *v.* GARNER.

Opinion delivered July 5, 1915.

1. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—LIABILITY OF AGENT.—Where an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent.

2. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—SELLER AND PURCHASER.—A. sold butter to B., making daily consignments, and B, making remittances at stated intervals. B. then made a contract with C. whereby it delivered all the butter received from A. to C. at cost price, B., however, continued making remittances to A. and A., without any knowledge of C., continued to make shipments to B.

Held, that under the facts C. would not be treated as B.'s undisclosed principal, but that C. was merely a purchaser from B.

3. ACTIONS—CONSOLIDATION.—Actions depending upon the same or substantially the same evidence, or arising out of the same transaction may be consolidated under Act 339, page 798, Acts of 1905.

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

L. E. Hinton and *Comer & Clayton*, for appellant.

1. It was error to dismiss that part of the complaint of the appellant praying for a judgment over against Garner for the sum of $1,951.02, and to consolidate that part of appellant's suit seeking to recover the $1,707.75 from Hicks. The court had jurisdiction to determine whether Hicks was trustee, and if he held the latter sum for the plaintiff. Having rightfully acquired jurisdiction for one purpose, it had jurisdiction for the purpose of granting complete relief, either legal or equitable, to which any of the parties were entitled. 70 Ark. 189; 14 Ark. 50; 37 Ark. 164, 187; *Id.* 286, 292; 75 Ark. 52, 55; 77 Ark. 570, 576. The two suits were not between the same parties at any time, and involved, in part, different issues. The court should not have consolidated them. 74 Ark. 54.

2. The contract between appellant and the Bunch Commission Company was assignable. The evidence clearly discloses an assignment of the contract. No particular words are necessary to constitute an assignment. 17 How. 353; 1 Wall. 604; 2 Am. & Eng. Enc. of L. (2 ed.), 1055; 2 Ruling Case Law, 614. After the assignment, the Bunch Company can only be held as the agent of Garner as undisclosed principal, and upon discovering the agency appellant had the right to hold the principal for the debt due it, certainly to the amount which Garner then owed and had not paid to the Bunch Company. 87 Ark. 434; 87 Ark. 374; 50 Ark. 433; 37 Fed. 49, 2 L. R. A. 749.

H. M. Trieber, for appellee Maloney, trustee.

1. The chancellor properly dismissed appellant's suit on account against Garner. No part of its complaint stated a cause of action cognizable in equity, as it did not allege that Hicks was holding the money at the time of

the suit. There is, therefore, no room for argument on the part of appellant that the chancery court, having acquired jurisdiction for one purpose, will hold it for all purposes.

2. There was no abuse of discretion in consolidating the cases. Act 339, Acts 1905; 83 Ark. 288.

3. The chancellor's findings on the merits are not against the preponderance of the evidence.

HART, J. On November 23, 1914, W. H. Garner and the German National Bank of Little Rock, Arkansas, as trustee, filed a bill of interpleader in the Pulaski Chancery Court in which the Beatrice Creamery Company, a corporation organized and doing business under the laws of the State of Oklahoma, and J. S. Maloney, as receiver of the T. H. Bunch Commission Company, a domestic corporation, were asked to be made parties defendant. The bill of interpleader alleges that during the months of September and October, 1914, the Beatrice Creamery Company shipped and consigned to the T. H. Bunch Commission Company, at Little Rock, Arkansas, butter of the value of $1,707.75; that upon the arrival of said butter at Little Rock, it was turned over by the Bunch Commission Company to W. H. Garner; that Garner sold said butter of the value of $1,707.75 to retail merchants, and that the proceeds were in his possession until October 15, 1914, when the same was paid over by him to the German National Bank of Little Rock, Arkansas, as trustee, to be held by it pending settlement of the ownership of said money; that both the Bunch Commission Company and the Beatrice Creamery Company were claiming said fund and demanding payment from the defendant Garner. The plaintiffs paid said money into the registry of the court, and asked that the receiver of the Bunch Commission Company and the Beatrice Creamery Company be compelled to interplead for said fund. The receiver of the Bunch Commission Company entered his appearance to the suit, but no service of any kind was had upon the creamery company, and that company did not enter its appearance to the action.

The Beatrice Creamery Company filed an independent action in the chancery court against W. H. Garner and W. A. Hicks, cashier of the German National Bank. The plaintiff alleges that the T. H. Bunch Commission Company entered into a contract with it whereby the creamery company agreed to sell and deliver to said commission company its output of butter which was shipped and delivered at Little Rock, Arkansas, and that said commission company was to have the exclusive right to sell the butter of the creamery company in the city of Little Rock; that subsequently the commission company assigned its contract with the creamery company to W. H. Garner, and that thereafter Garner continued to act as exclusive seller of the butter of the creamery company in Little Rock; that the creamery company since then has shipped butter to Little Rock of the contract value of $3,658.77, and that the same was accepted and received by the said Garner, but that he has failed and refused to pay for same. The complaint further alleges that Garner admitted liability for the purchase price of a part of said butter in the sum of $1,707.75, and that that amount had been paid by him to W. A. Hicks, as trustee, with the understanding that the latter should hold the same for the parties held to be entitled to it.

The prayer of the complaint is that Hicks be enjoined from paying said sum of money so held by him to any one until the final hearing of this cause, and that said amount then be paid to said creamery company to be applied as a credit on the amount alleged to be due it by said Garner, and that it have judgment against Garner for the balance alleged to be due, namely, the sum of $1,951.02.

On motion of W. H. Garner, the court ordered that that portion of the action instituted by the Beatrice Creamery Company against W. H. Garner and W. A. Hicks for $1,707.75 deposited in the registry of the court, be consolidated with the interpleader suit.

The court sustained a demurrer to the complaint of the creamery company asking a judgment against Garner for the sum of $1,951.02 and dismissed his complaint in

that respect without prejudice to his bringing an action at law.

At the hearing of the consolidated causes the testimony of W. H. Garner and T. H. Bunch was taken before the court orally, and their testimony reduced to writing and by order of the court filed as their depositions in the cause. It appears from their testimony that the T. H. Bunch Commission Company, before it became insolvent, did a large commission business in the city of Little Rock; that a part of its business was to sell butter, and that it had a contract with the Beatrice Creamery Company to take the entire output which it shipped to the city of Little Rock.

The commission company had a standing order with the creamery company for its butter and payment was usually made once a week, though at times longer intervals between payments occurred. W. H. Garner was in the employ of the Bunch Commission Company, and had charge of the sales of butter made by it to the retail merchants of Little Rock.

Subsequently, the Bunch Commission Company made an agreement with Garner whereby the latter was to take off its hands the butter consigned to it by the creamery company at the price that it paid the latter therefor; in other words, the commission company agreed with Garner to sell him the butter it received from the creamery company at the actual cost price, and Garner was thereafter to sell the butter to the retail trade of Little Rock at whatever price he desired.

The Bunch Commission Company had a rating with the creamery company, but Garner was unknown to it.

The commission company continued to receive consignments of butter from the creamery company under its contract with that company and made its remittances therefor about once a week as it had agreed to do. It turned the butter over to Garner at its actual cost, and Garner made settlements with the commission company once a week therefor.

Prior to the institution of this action the Bunch Commission Company became insolvent and a receiver was a pointed to take charge of its assets.

The court found that the T. H. Bunch Commission Company was not the agent of Garner in the purchase of the butter from the creamery company in the transaction involved in this suit and that the transaction was one of sale on open account by the creamery company to the commission company and a resale on open account by the commission company to Garner, and Garner having deposited the money in the registry of the court was discharged from all liability to either the Bunch Commission Company or the Beatrice Creamery Company. The clerk of the court, with whom the money had been deposited, was directed to pay the same to the trustee in bankruptcy of the Bunch Commission Company. The Beatrice Company has appealed.

(1) It is the well settled law of this State that where an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent. *Mississippi Valley Construction Co.* v. *Chas. T. Abeles & Co.*, 87 Ark. 374; *Bryant Lumber Co.* v. *Crist*, 87 Ark. 434.

(2) This is conceded to be the law by both parties, and it is the contention of counsel for appellees that where it is sought to hold one as an undisclosed principal for goods bought, it is essential that the intermediate party through whom the goods were secured shall have been the agent of the principal sought to be held and not his vendor, and, that the court having found that the Bunch Commission Company was the vendor of the butter to Garner and not the agent of the latter in purchasing the same, its finding of fact in that respect should not be disturbed.

It is the settled rule of this court that the findings of fact made by a chancellor will be upheld on appeal unless they are against the clear preponderance of the evidence. Tested by this rule, we think the findings of the chancellor should be upheld. The Bunch Commission Company was a corporation engaged in the general commission busi-

ness. A part of its business was to sell butter and it made a contract with the creamery company for the exclusive sale of the butter which it shipped to Little Rock. It was in the habit of receiving daily consignments of butter from the creamery on open account. The commission company had a credit with the creamery company, and nothing was said or known by the creamery company of any other party to the transaction. Garner had no credit with the creamery company, and was not known by it. He made his payments direct to the Bunch Commission Company, and the commission company sent its own checks to the creamery company in payment for the butter. At the time the contract between the Bunch Commission Company and the Beatrice Creamery Company was made, Garner was an employee of the commission company. No other contract was made by any one with the creamery company. The butter was consigned by the creamery company to the commission company under the original contract. Garner could in no sense be deemed an undisclosed principal when the original contract was made between the commission company and the creamery company. The mere fact that he subsequently agreed with the commission company to take over all consignments of butter to it from the creamery company at actual cost did not have the effect of making him an undisclosed principal.

(3) The court did not err in the consolidation of the causes under the act of May 11, 1905.* The object of this act providing for the consolidation of causes was to save a repetition of evidence and unnecessary consumption of time and costs in actions depending upon the same or substantially the same evidence or arising out of the same transaction. *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 482; *Little Rock Gas & Fuel Co. et al.* v. *Coppedge,* 116 Ark. 334, 172 S. W. 885.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Broomfield,* 83 Ark. 288, the court said that the act leaves to the discretion of the trial court the consolidation of actions

*Act 339, page 798, Acts 1905.

of like nature relative to the same questions pending before the court without reference to the identify of the parties and without restriction as to the causes of action which may be joined in the same suit.

It follows that the decree will be affirmed.

McCULLOCH, C. J., (dissenting). The undisputed evidence in this case is to the effect that Bunch Commission Company concluded to go out of the business of selling butter to retail men in Little Rock, and turned their contracts with the Beatrice Creamery Company over to Garner to receive the butter, to pay for it, and sell it. There is no conflict whatever in the evidence, and it is not sufficient to warrant the inference that there was a resale of the butter by Bunch Commission Company to Garner. Garner testified that Bunch Commission Company decided to go out of the city business, and, as a matter of accommodation to him (Garner), turned the contract with the Beatrice Creamery Company over to him, and that he "ran the business, merely using Bunch's name for the purpose of getting the butter." The testimony of T. H. Bunch was to the same effect. His statement is as follows: "It was simply a favor we were trying to extend Mr. Garner for past services; he had been faithful to us for many years. We turned the contract we had with the creamery company over to Mr. Garner, and continued to let him order the butter in our name simply as a matter of accommodation to him." They both testified that the sole reason for leaving the contract in the name of the Bunch Commission Company was that they were afraid that if they undertook to get a new contract in Garner's name, some other dealer might secure the contract with the creamery company, and it was decided that the best way was to leave the contract in the name of the Bunch Commission Company. There is no doubt about the inference which can be drawn from the statements of those two witnesses, who were the only ones who testified on the subject.

The effect of the transaction was to make it an assignment of the contract by Bunch Commission Company

to Garner, and the commission company became the agent of Garner in performing the contract for the purchase of the butter. The fact that no such relation existed at the time the original contract was made with the creamery company does not alter the law applicable to the facts of the case. The contract was executory, and the sales thereunder were consummated only when deliveries of butter were made in installments from time to time. No sale was complete until there was a delivery of the butter. Therefore, when the installments were delivered through Bunch Commission Company to Garner, the latter was an undisclosed principal in the transaction. The transaction between Bunch Commission Company and Garner contained none of the elements of a resale to the latter, for Bunch and Garner both testified that the contract was turned over to Garner, and that he was to receive the butter and pay for it in the name of Bunch Commission Company for his own benefit. Suppose that the contract had been, by formal written indorsement, transferred to Garner, and the subsequent delivery of butter made through Bunch Commission Company. Would not the commission company under those circumstances have been the agent of Garner? If that be true, it necessarily follows that under the facts of this case, the doctrine of liability of an undisclosed agency applies, for, as before stated, the effect of the transaction was to assign the contract. Bunch Commission Company, by permitting the continued use of its name in receiving deliveries of butter under the contract without disclosing Garner's connection with the transaction, rendered itself liable to the creamery company for the price of the butter so received, but Garner is liable too, for, according to the true import of the transaction, he was the real purchaser of the butter, and the debt for the price was in fact his debt, and not that of the commission company. Garner is willing to pay for the butter, and has in fact paid the amount into the registry of the court. Bunch Commission Company has no just claim to the amount so paid, and, according to settled principles of law, it should be recovered by the creamery

company, and not by the general creditors of the Bunch Commission Company.

The justice of that view is made plain by the statement in one of the textbooks on the law of agency, giving a reason for the rule of liability of an undisclosed principal: "Inasmuch as the principal must ordinarily settle with some one—being liable to the agent, perhaps upon an express contract of indemnity or reimbursement, or upon an implied one wherever the nondisclosure of the principal and the pledging of the agent's own credit do not constitute such a violation of duty as to disentitle the agent to such relief—it seems to be a convenient 'short-cut,' if nothing more, to give the third part a direct claim upon the principal, instead of requiring him to pursue the agent who will then pursue the principal. Where this is attempted before the principal has paid or settled with agent—and this seems to have been the typical case in the first instances—nothing but more or less technical rules of procedure would seem to stand in the way of it." 2 Mechem on Agency (2 ed.), section 1729.

Mr. Justice KIRBY concurs in the views here announced.

OGLESBY v. FORT SMITH DISTRICT OF SEBASTIAN COUNTY.

Opinion delivered July 5, 1915.

COUNTIES—COUNSEL FOR COUNTY—FEES—COUNTY EXPENSES.—A county judge let a contract for the construction of a county courthouse; suits were brought to restrain the building thereof, and the county judge employed special counsel to defend said suits, and in the order appointing such special counsel the county judge contracted, on behalf of the county, that they should not receive less than $1,000 each for their services; *held*, the claims of such attorneys based upon such order of the county judge would be dismissed.

Appeal from Sebastian Circuit Court, Fort Smith District; *John H. Vaughan*, Special Judge; affirmed.

Ira D. Oglesby, pro se.

While it is made the duty of the prosecuting attorney to represent the county in its litigation, it is clearly the

duty of the county judge to see that the county's interests are protected, and to this end, it is within the power of the county judge, even though the prosecuting attorney is willing and ready to serve, to employ other attorneys, if he deems it necessary, to protect the interests of the county. Kirby's Dig. § 1493; 60 Tex. 522; 13 Cal. 531; 88 N. W. 981; 28 Cyc. 642; 63 Pac. 804; 83 N. W. 388.

Appellant had the right to fix his minimum retainer in advance, and appellee, while under no obligation to employ him, yet, having done so, is bound by the contract. 4 Cyc. 987. It is no defense to say that appellee received no benefits by reason of appellant's labor. 4 Cyc. 983.

Thos. B. Pryor and *Vincent M. Miles,* for appellee.

1. It was the duty of the prosecuting attorney to represent the county in this litigation, and the county judge had no authority to employ appellant to represent the county, except to aid the county attorney or when he refuses to act. Kirby's Dig., § 6393; 32 Ark. 685. See, also, 8 Kan. 494; 24 Barb. 229; 40 N. J. L. 186.

As to the refusal or nonrefusal of the prosecuting attorney to act, there was a sharp conflict in the evidence, and the trial court's finding of this issue against the contention of appellant should stand.

2. The facts in this case are identical with and grew out of the facts in controversy in the case of *Jennings* v. *Fort Smith District of Sebastian County,* 115 Ark. 130, 171 S. W. 920, from the statement of facts by this court, in which case, it appears that the county judge, if he had any authority to employ counsel, had delegated this authority to his commissioner. Since the county judge was personally a defendant in that suit, it is fair to presume that he employed appellant to represent himself. At least, the county judge, having appointed a commissioner and authorized him to institute suit to quiet the title of the county in the proposed site for the courthouse, had no authority to proceed then to employ counsel indiscriminately in that litigation.

Appellant is chargeable with knowledge of the statutes and the limitations upon the power of the county

court, as well as the commissioner; and it is well settled that a county judge can not exceed the authority given to him under the statutes. 11 Cyc. 390; 35 Pac. 97; 24 N. E. 626; *Id.* 138; 60 Am. St. 518; 1 Dillon, Mun. Corp. 450, § 237; 86 Pac. 1012; 3 N. E. 848; 95 S. W. 1032.

3. The order of the county court rendered on October 31, 1912, sustaining a motion to vacate and set aside the order employing George W. Dodd and appellant to represent the appellee in all matters in which said county and district were interested, was an order of the *same* court vacating a previous order rendered at the *same term,* and must prevail over the alleged order of employment. 27 Ark. 295, and cases cited; 107 Ark. 415; 116 Ark. 65.

HART, J. Ira D. Oglesby, an attorney of Fort Smith, presented a claim to the county court of Sebastian County for $1,000 for legal services alleged to be due him by the Fort Smith District of Sebastian County. His claim was disallowed by the county court, and he appealed to the circuit court. There his claim was again disallowed, and he has appealed to this court. The facts, briefly stated, are as follows:

In 1911, an agitation was begun for the erection of a new courthouse for the Fort Smith District of Sebastian County. The inhabitants of the district were sharply divided on the question and mass meetings were held and numerous articles written, pro and con, in the newspapers about it. Those favoring the proposition thought that the old courthouse was unsafe and unsanitary, and that it should be torn down and a new one erected on its site. Those opposed believed that the old courthouse was adequate for its purposes, and that it was practicable to repair it at a reasonable cost so that it would last many years. The erection of a new courthouse on the site of the present one became the principal issue between the candidates for the democratic nomination for county judge at the primaries to be held in March, 1912. Judge Harp, the then county judge, favored the erection of a new courthouse, and Ezra Hester, his opponent, opposed it. Judge Harp was defeated in the primary and Judge Hester was

elected county judge at the general election in September, 1912. Judge Harp determined upon the plan of letting a contract for the erection of a new courthouse before his term of office expired. In August, 1912, he let a contract for the construction of a new courthouse. The officers of the city of Fort Smith had quarters in the courthouse, and several suits were instituted against the county judge, having for their object the prevention of the building of a new courthouse. One of the suits for that purpose was brought in the chancery court by the city of Fort Smith against the county judge. Other suits having the same object in view were instituted by various citizens of the Fort Smith District of Sebastian County.

On the 16th day of October, 1912, Judge Harp, who was still in office, made an order which was entered of record, reciting the pendency of these various suits and the necessity of employing counsel to represent the Fort Smith district in them because the prosecuting attorney had declined to do so or to take any action to protect the interests of the said district in the litigation. The order appointed George W. Dodd and Ira D. Oglesby as attorneys for said district to represent it in all the matters referred to, and provided that said attorneys should receive not less than $1,000 each for their services.

About the middle of July, Colonel Oglesby became ill and went to a hospital in the city of St. Louis and remained there until about the middle of September. During the time he was there he received papers occasionally from Fort Smith.

It was shown on the part of Colonel Oglesby that the county judge, prior to his employment, had attempted to get the prosecuting attorney to represent the interests of the Fort Smith district and that the prosecuting attorney had refused to do so. The county judge himself talked with the prosecuting attorney about it, and Mr. Dodd says that he also talked with him, and that the prosecuting attorney declined to represent the county on account of the political phase of the case. Mr. Dodd admitted that during all this time there was continuous discussion of the matter on the street, and that numerous articles written

with reference to it were published in the Fort Smith newspapers.

The prosecuting attorney himself testified that the suits with reference to the matter had been brought before he knew anything about them, and that the cases were within a few days of trial before he was consulted by the county judge in regard to the matter, and that the county judge had already employed counsel prior to this time, and that for that reason he declined to represent the Fort Smith District of the county.

On the 20th day of October, 1912, the suit of the city of Fort Smith against the Fort Smith District of Sebastian County was decided by the chancellor, and it was decreed that the county judge be enjoined from erecting a new courthouse. Judge Harp, the then county judge, directed Colonel Oglesby to immediately prepare a transcript and take an appeal to the Supreme Court, and this was done.

Judge Harp's term expired and Judge Hester became county judge on the 31st day of October, 1912, and he immediately set aside the order providing for a minimum fee of $1,000 each for Colonel Oglesby and Mr. Dodd. Colonel Oglesby attempted to prosecute the appeal of the case from the chancery court, where Judge Harp had been enjoined from erecting a new courthouse, but Judge Hester moved the Supreme Court to dismiss the appeal, and this was done. Other testimony will be referred to later on.

Certain declarations of law were asked by Colonel Oglesby, which were refused by the circuit court, and a general finding was made in favor of the Fort Smith District. Judgment was rendered accordingly.

A majority of the judges have voted to affirm the judgment in this case, but a majority of us have not agreed upon the reasons therefor.

It is the contention of Colonel Oglesby that the county court on the 16th day of October, 1912, made a legal and binding contract with him to perform legal services in which the Fort Smith District of Sebastian

County was interested, and that the incoming county judge had no right to set aside such contract.

He also contends that the object of the litigation above referred to was to settle the title of the Fort Smith District to the site on which the present courthouse in the city of Fort Smith is situated.

On the other hand, it is the contention of counsel representing the Fort Smith District of Sebastian County that Colonel Oglesby was employed to represent the interests of the county judge in erecting the courthouse, and that the title to the ground on which the present courthouse stands was not involved in any of the litigation; that Colonel Oglesby was the personal representative of the county judge; and that the county is not liable to him.

It is well settled in this State that the finding of a circuit judge sitting without a jury is as binding upon us upon appeal as the verdict of a jury. Such findings will not be disturbed on appeal if there is any substantial evidence to support them. In the application of this rule, Judge Smith and the writer have reached the conclusion that when all the facts and surrounding circumstances and the inferences which might legitimately be drawn therefrom, are considered, the circuit court was warranted in finding that Colonel Oglesby had no cause of action against the county, and that the circuit court did not err in dismissing his complaint.

Section 6392 of Kirby's Digest provides that each prosecuting attorney shall commence and prosecute actions both civil and criminal in which the State or any county in his circuit may be concerned. Section 6393 of the Digest provides that he shall defend all suits brought against the State or any county in his circuit. In the construction of the latter section, in the case of *Graham* v. *Parham,* 32 Ark. 676, the court held that it is the official duty of the prosecuting attorney to defend suits brought in the Federal Court against the county embraced in his circuit.

We think the county court has power to employ additional counsel when in his judgment the interests of the county are of sufficient importance to demand it, or, in

cases where the prosecuting attorney neglects or refuses to perform the duties imposed upon him by statute, or, where his other duties are of such character that he does not have time to properly represent the county. We are of the opinion, however, that the power of the court to employ additional counsel does not give the right, under the guise of such employment, to take the case out of the hands of the prosecuting attorney and confide its management to other attorneys without consultation with the prosecuting attorney, or for the purpose of furthering the private interests of the county judge.

It is true that evidence was adduced by the plaintiff tending to show that the prosecuting attorney had been consulted by the county judge in regard to contemplated litigation with reference to the building of the courthouse, and that he had failed and neglected to represent the county. On the other hand, the prosecuting attorney himself testified that the first information he had of the pending litigation was derived from reading the newspapers and that the county judge had already employed other counsel without consulting him. According to his testimony, the county judge superseded him with other counsel and he was justified in considering himself as having no official connection with the cases. He stated that the county judge did not talk to him until a few days before the case above referred to, which was decided in the chancery court on the 21st day of October, 1912, was heard and determined. He admits that Colonel Oglesby talked to him about the case, but says this was only a few days before the case was reached for trial.

It will be remembered that Colonel Oglesby was not employed until the 16th day of October, 1912, and that the only case in which he appeared was heard by the chancellor on the 21st day of October, 1912. It also appears that Colonel Oglesby had been in a hospital in St. Louis until the latter part of September, 1912. So, it is reasonable to presume that Colonel Oglesby did not talk with the prosecuting attorney until a few days before the case was called for trial. At any rate, the circuit court was the sole judge of the credibility of the witnesses and was

justified in finding that the county judge employed additional counsel without any appearance of incompetency or neglect of duty on the part of the prosecuting attorney.

As we have already seen, the undisputed facts show that an agitation for the erection of the new courthouse was begun in 1911, and the citizens of the district were sharply divided on the question of the expediency of erecting it. The question was an issue in the primary campaign in the spring of 1912. Judge Harp, the then county judge, asked for re-election, and one of the reasons given therefor was that he favored the erection of a new courthouse. His opponent was Ezra Hester, who was opposed to the construction of a new courthouse. That the erection of a new courthouse was one of the principal issues of the primary campaign is fairly inferable from all the circumstances. Hester was at the time county clerk. The agitation for the erection of a new courthouse was begun the year before. Colonel Oglesby testified that the people were very much divided on the question. George W. Dodd, who was also employed as an attorney in the matter by Judge Harp testified that there was friction between Judge Harp and Ezra Hester in regard to the erection of a new courthouse, and that Hester had challenged the power of the county judge in certain instances. That it was generally known that Ezra Hester was opposed to the erection of a new courthouse.

Judge Harp was defeated in the primary by Judge Hester, and the latter was elected as county judge at the general election in the following September. Judge Harp then determined to get the construction of the new courthouse under such headway before his term of office expired that it would not be practical to prevent the courthouse from being erected. In carrying out his plan, he made an order for the erection of a new courthouse on the site occupied by the old one. Certain citizens of Fort Smith instituted suits against him for the purpose of preventing the erection of a new courthouse.

To accomplish the same purpose, the city of Fort Smith, which, under a contract with the county, occupied

rooms in the present courthouse, also instituted an action in the chancery court against the county judge.

To defend these suits, Colonel Oglesby was employed on the 16th of October, 1912, and appeared as counsel for the county judge when the cause, set for October 21, 1912, was heard and determined.

The chancellor rendered an exhaustive opinion in the cause and memorialized the facts by spreading them on the record. He expressed the view that the present courthouse was safe and large enough for the needs of the district for years to come.

He further held that there was no cloud upon the title of the district to the grounds upon which the courthouse is situated, and that the city only claimed the right to occupy a part of the building under a contract it had made with the Fort Smith District of Sebastian County.

As soon as the case was decided by the chancellor the county judge ordered Colonel Oglesby to take an appeal at once. This Colonel Oglesby proceeded to do. He caused the transcript to be prepared and the appeal to be lodged in the Supreme Court at once.

When Judge Hester became county judge on the 31st day of October, 1912, he at once made an order setting aside the former order made at the same term of the court employing Colonel Oglesby. He also moved the Supreme Court to dismiss the appeal in the case above referred to, and this was done.

Colonel Oglesby never consulted him about the matter at all, but throughout the litigation acted under the direction of Judge Harp, who had made the order employing him during his term of office. Colonel Oglesby was a prominent lawyer and citizen of Fort Smith, and must have known of the controversy that had been waged for a year or more regarding the erection of a new courthouse. Under all these circumstances, we think the circuit court was justified in finding that Colonel Oglesby was acting in the interest of Judge Harp, and was not entitled to a claim for his services against Sebastian County.

For these reasons we have voted to affirm the judgment of the circuit court disallowing his claim.

Judge Kirby is of the opinion that under section 6393 of Kirby's Digest, and the record of this cause, it was beyond the power of the county judge to employ counsel to perform the duties which had been imposed by statute upon the prosecuting attorney, and that its contract with Colonel Oglesby was *ultra vires* and void. For that reason he has voted to affirm the judgment. It follows that the judgment is affirmed, and it is so ordered.

The Chief Justice and Mr. Justice Wood are of the opinion that the judgment should be reversed.

McCULLOCH, C. J., (dissenting). Two of the justices who have voted to affirm this case, declare the law to be that the county court has the power to employ counsel, in addition to the prosecuting attorney, to conduct litigation in which the county is interested. I agree unqualifiedly with that conclusion, and so does Mr. Justice Wood. That makes four of the judges who are of the opinion that the county court possesses that power. The authorities cited in appellant's brief sustain that view. Those authorities relate generally to municipal corporations, but the principle is the same that where a county or municipality has authority to direct litigation in which it is interested it may employ special counsel, and the fact that an official attorney has been provided by law does not curtail that power. Our statute (Kirby's Digest, section 1493) expressly provides that the county court shall defend cases appealed to the circuit or Supreme Court, and that all expenses incurred by reason of such defense shall be paid by the county. It is therefore necessarily implied that county courts shall provide the means for conducting litigation in which it is interested, and that includes the employment of attorneys.

Two of the judges say that while the county court has the power to employ counsel, it can not exercise that power and enter into a contract of employment with another attorney without first obtaining the consent of the prosecuting attorney, or, at least, until after he has been consulted. If there is any authority at all for employing additional counsel to represent the county in its litigation, it is to be exercised by the county court. Certainly, there

is no authority conferred by statute on the prosecuting attorney to exercise that power or to hinder its exercise by the county court. If the county court possesses the power at all, it may exercise it in disregard of the wishes of the prosecuting attorney and without consulting him. Any other view of the matter necessarily places the power in the prosecuting attorney, and not the county court. The very fact, however, that the county court contracts for the services of an attorney presupposes that the court has determined the necessity and propriety therefor; and even if the prosecuting attorney may object to the contract, it is too late to do so after it has been entered into. The prosecuting attorney might, like any other citizen, appeal from the order of the county court entering into such a contract, but he can not defeat the contract or abrogate it merely by manifesting his disapproval.

Again, it is said by the two judges whose views I am now discussing that the evidence is sufficient to warrant the conclusion that appellant was acting for the county judge personally and not for the county court. Where is that evidence found? The contract is evidenced by an order of the county court which was duly entered of record and pursuant to that contract appellant performed the services contemplated in the employment. There is no evidence whatever that Judge Harp personally employed appellant to do anything at all, and there is no suggestion anywhere in the record of any fraud or collusion between the two. Judge Harp was very earnestly in favor of building a new courthouse. Whether he was right or wrong about that, as a matter of policy or propriety, it is plain that what he did was openly done and was done as a public official representing the county, and not as an individual. As an individual he made no contract with appellant, but acting for the county he made a contract in the most solemn form. I can not see that the issues of a political campaign, which resulted in Judge Harp's defeat for re-election as a county judge, have anything whatever to do with this case. It might be different if there was any charge here of fraud and collusion between Judge Harp and appellant to defraud the county

by making a contract for the latter to perform services for the county judge as an individual and impose the payment upon the county. But such is not the state of this case. The most that can be said of it is that Judge Harp made a mistake as a matter of policy in pushing the movement to build a new courthouse.

It is treating too lightly the solemn contract of the parties to set aside the appellant's contract with the county on any such grounds as that which has been mentioned as sustaining the decision of the circuit court. I am of the opinion, therefore, that the undisputed evidence in this case shows that appellant's contract with the county court was valid, and that he performed the services and is entitled to the compensation specified in the contract. Mr. Justice Wood agrees with me in this conclusion.

BLACKWELL v. KINNEY.

Opinion delivered July 5, 1915.

1. TAX SALE—PURCHASE BY OWNER'S ATTORNEY—RIGHT OF HOLDER OF VENDOR'S LIEN.—Appellees sold lands to appellants retaining a vendor's lien, the lands were permitted to forfeit for the failure to pay certain taxes, *held*, the appellants could not permit a forfeiture and conveyance of the lands for their benefit, which would operate to defeat appellee's lien, and appellants owe the duty to inform the appellees that the lands had forfeited and that the certificate of purchase could be procured for a certain sum.
2. TAX SALE—PURCHASE BY OWNER'S ATTORNEY—DUTY TO NOTIFY HOLDER OF VENDOR'S LIEN.—Appellees sold certain lands to appellants, retaining a vendor's lien for the unpaid portion of the purchase price; when the appellees pressed appellants for the payment of the balance due, appellants' attorney wrote to appellee stating that he was attempting to procure a loan for appellants and that the money would be paid shortly. In the meantime appellants had permitted the lands to forfeit for the nonpayment of taxes; shortly after writing the letter to appellees, appellant's attorney purchased the certificate of purchase from the purchaser under the tax sale, and later transferred the lands to appellants. *Held*, the parties owed to appellees the duty to notify them of the forfeiture, and sale, and to give them an opportunity to purchase the certificate of purchase, and their failure to do so would not operate to defeat appellees in the assertion of their vendor's lien.

3. FRAUD—INFERENCE—CIRCUMSTANTIAL PROOF.—While fraud will not be presumed, it need not be shown by direct or positive evidence, but may be proved by circumstances.

Appeal from Crittenden Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellees brought this suit to enforce a vendor's lien against certain lands in Crittenden County, which they sold to John Blackwell and wife, and conveyed to her by a deed reciting the consideration of $4,000 purchase money, the receipt of $1,000 thereof and retaining a lien for the remaining $3,000, evidenced by three promissory notes for $1,000 each, due January 1, 1912, January 1, 1913, and January 1, 1914. Seven hundred dollars had been paid, and was credited on the note first due.

It is alleged that because of the negligence of the Blackwells, the lands were allowed to become delinquent for levee taxes for the year 1911, and sold therefor in January, 1912, and that by connivance and for the purpose of defrauding the plaintiffs of their interest in said notes for the purchase money, the said Blackwells conspired with the other defendants, Campbell, Beck and Shafer, so that the sale should be made to A. T. Gamble and the certificate assigned to Beck and Shafer for the use and benefit of the Blackwells, and that S. C. Blackwell is the owner of the land subject to the lien of the plaintiffs, who are entitled to judgment against the defendants, John Blackwell and S. C. Blackwell, upon the purchase money notes, and to judgment against the other defendants as to their interest in and to the real estate described. Prayer for judgment accordingly, that a lien be declared fixed against the land, and the same foreclosed.

Beck and Gamble answered, denying any conspiracy with either of the Blackwells by an agreement to purchase the land for the benefit of S. C. Blackwell, or any one else, and that the purchase was for their benefit, and alleged that A. T. Gamble purchased the lands at the commissioner's sale and transferred the certificate to Beck, as he

had the right to do, and that the purchase was made for his own benefit.

Shafer entered his appearance as a party defendant and adopted the answer of Beck, denying any conspiracy with any other person in the purchase of the land.

It appears from the testimony that appellees M. E. Kinney and his wife, Cook T. Kinney, who live in Little Rock, sold and conveyed the lands to S. C. Blackwell by deed executed February 8, 1911 for $4,000, $1,000 of which was paid, and retained a vendor's lien for the remainder of the purchase money. Seven hundred and twenty-five dollars was afterward paid, $700 of which was credited on the note due January 24, 1912, and $25 on the second note. They delivered possession of the lands to Blackwell, who was expected to pay the taxes thereon, thereafter. The lands were allowed to become delinquent for the levee taxes for the year 1911, and sold by order of the chancery court for payment thereof in January, 1912, at which sale A. T. Gamble became the purchaser. He thereafter, and after the time for the redemption had expired, sold the certificate of purchase for $500 profit to A. B. Shafer through Wheeler, and it was assigned on the 29th day of June, 1914, in blank and filled out to Beck by Shafer, he and Beck having jointly furnished the money for the purchase according to Shafer's statement.

Gamble testified that he bought a great many lands at the sales for the enforcement of liens for the levee taxes; that he sold the certificate of purchase of these lands through Wheeler to Shafer for $500 more than he paid for them, understanding at the time that the purchase was for the benefit of the Blackwells, the original owners.

Shafer was the attorney for the Blackwells, and had been for the four years they lived in that part of the country, transacting all their legal matters and being consulted by them about all matters in which they were interested. When appellees became insistent for the payment of the balance of the purchase money due upon the land, Shafer, as attorney, wrote Mrs. Kinney and her attorney, the following letters:

"Memphis, Tenn., January 27, 1913.

"Mrs. Cook T. Kinney, 1200 E. 9th St., Little Rock, Ark.

"Dear Madam: Mr. John Blackwell has brought your letter to me.

"I am endeavoring to negotiate a loan for Mr. Blackwell of this property, and as soon as it is negotiated, he will, of course, have to take up the outstanding notes.

"It will take probably thirty or sixty days to negotiate this loan, as the water is very high in front of the levee, and the rainfall has been so heavy it is a bad time to have to show the land to any prospective lender of money.

"I am sure this loan will be made, and, of course, it can not be made without taking up your notes.

"Trusting that you will not put Mr. Blackwell to any more expense in the matter, I am,

"Very respectfully,

"A. B. Shafer."

"January 1, 1914.

"Thos. E. Helm, Atty., Southern Trust Bldg, Little Rock, Ark.

"Dear Sir: I acknowledge receipt of your letter of December 30 relative to the claim of Mrs. Kinney against Mr. John Blackwell. Mr. Blackwell has been through two overflows in Crittenden County and is financially embarrassed. I do not think he will be able to pay the amount due Mrs. Kinney at maturity. I think if he is given an opportunity to work out this indebtedness that he will be able to pay all of it, but he can not do so, if forced, at present.

"I have been endeavoring to negotiate a loan for Mr. Blackwell on this property so as to pay off Mrs. Kinney, but owing to the tight condition of money matters, I have been unable so far to do so. I am in hopes that money matters will ease up within the next few months, and, if so, I do not think I will have any trouble in securing a loan of sufficient amount to pay off Mrs. Kinney.

"Yours very truly,

"A. B. Shafer."

The land had been sold for levee taxes on the 10th day of September, 1912, and the time for redemption had expired. The Blackwells discussed the question of redemption of the lands, or rather the purchase of the certificate, after the time expired, fully and frequently with their attorney, Shafer, who investigated the matter and told them at what price the certificate could be had. He said that Blackwell told him at last that he was not able to get the money to purchase the certificate, and that thereafter he bought the certificate himself, having it assigned in blank and later filled in the name of Beck. That he bought it for himself and Beck jointly, but did not put Beck's name in the assignment until after he had discussed the matter with him and ascertained that it would be agreeable.

He said: "I told Mr. Blackwell that Gamble would transfer the certificate for $500 profit, and he said it was utterly impossible for him to raise that much money, as it looked as though he was going to lose everything he had. I told him unless he would redeem the lands from Gamble, he would lose them, and he said he would have to lose them, that he couldn't raise the money, thereby leaving it open for Mr. Gamble to keep the lands or anybody else who could buy them from him. I then went to Mr. Wheeler, and through him purchased the certificate of purchase from Mr. Gamble, the assignment to be in blank with authority to me to fill in the name of any purchaser that I wanted. I represented Mr. Blackwell, and through him Mrs. Blackwell in the negotiation with Mr. Gamble personally; but when I purchased the land through Mr. Wheeler, I represented J. O. E. Beck in case the matter was satisfactory to him, and, if not, I expected to represent myself, and that was the reason I took the certificate of purchase indorsed in blank. I afterward notified Mr. Blackwell that I bought the land from Gamble for Beck. Beck then said the purchase was satisfactory to him, and I rented the land to Blackwell for the balance of the year 1914. I think it was some time in March that I made the lease to Mr. Blackwell. He paid part of the rent, but not all of it."

Shafer was made trustee in a deed of trust of certain Tennessee lands, executed by Mrs. Blackwell about two months after he purchased the certificate of purchase of these lands, to secure the payment of certain indebtedness to other creditors, and also a fee to him of $2,500. Explaining this, he said he thought the fee reasonable, that it had nothing whatever to do with the repurchase of these lands from him, but was for services already rendered and to be rendered in future to the Blackwells. He also said that Blackwell continued in the possession of the lands as a tenant. She stated, "It was for legal services for looking after and giving us general information, which he has been doing for the last five years." She also said that she supposed that she still owned the Arkansas lands. Her husband was operating them as he had done formerly, and the chickens and stock and other things were still on the place. Her testimony is vague, however, indicating that she knew but little about any of the transactions except as conducted by her husband and attorney for her.

Blackwell stated that he had made about $5,000 worth of improvements upon the lands, all of which were situated upon that portion included in the certificate of purchase at the tax sale. He also testified that he endeavored to procure a loan to buy the certificate of purchase after his attorney, Mr. Shafer told him the amount required; but was unable to do so. He did not, however, notify the appellees, or either of them, that the lands had forfeited for taxes, and that the certificate of purchase could be procured for the amount of which he had been informed by Shafer, the time of redemption having expired. Neither did Shafer communicate this information to appellees before purchasing through Wheeler the certificate of purchase, and having it assigned in blank, so he could afterward fill in the name "Beck."

The chancellor found the issues in favor of the appellees, and decreed a sale of the lands for the payment of the notes secured by the vendor's lien after payment of amount appellees paid for the certificate of purchase, from which this appeal has been prosecuted.

Roleson & McCulloch, for appellants.

1. There was and is no trust relationship between Shafer and the appellees. He was never their attorney, Gamble did not represent them and Beck did not know them. The Blackwells, if they desired to do so, would be in no position to complain, because Shafer conducted himself toward them with the utmost good faith, informed them of all the facts, and purchased from Gamble only after Blackwell told him that he could not get up the money and left Shafer free to buy if he saw proper.

His title was good, under his purchase, even against the Blackwells, in the absence of a showing that they had entrusted him with funds with which to make the purchase, or had agreed to act as their agent, or had concealed the conditions from them; and as to third parties, the law governing the relationship between attorney and client has no place in the case. 29 Ark. 489; 4 Cyc. 958, 959, note 79; 20 Ark. 583; 22 Ark. 143; 49 L. R. A. (N. S.) 1059; 29 Am. & Eng. Ann. Cases, 212; 85 N. W. 322.

2. Any question of fraud in the transaction by which Shafer acquired the title must rest upon the theory that he actually bought the land for Blackwell, that the latter still owns it, and that Shafer and Beck are holding the land for him. As to appellees, no duty rests upon Shafer to establish the fairness of the transaction, but the burden rests upon appellees to show the fraud, clearly. It will never be presumed. 11 Ark. 378; 17 Ark. 151; 33 L. R. A. (N. S.) 839; 92 Ark. 509; 20 Cyc. 413; 9 Ark. 485; 1 Story, Equity, § 190; 31 Ark. 554.

Bradshaw, Rhoton & Helm, for appellees.

1. Appellants are mistaken in their contention that there was no pre-existing trust relation between Shafer and appellees. He was the attorney for the Blackwells in this matter, and it was by means of his letters to the Kinneys and their attorney that he induced them to withhold pressing their claim against the Blackwells until the statute of limitations had run, and the tax sale to Gamble had become good. The testimony clearly shows that he was mixed up both with the Kinneys and the Blackwells in this

transaction, and he can not, after placing himself in the attitude of dealing with both parties and causing the Kinneys to delay pressing their claim, take advantage of them by purchasing the property for his own benefit. Knowing the interest of appellees in the lands, he was under the duty to inform them that the certificate of redemption could be purchased from Gamble for $500.

Shafer and Beck hold the land in trust for the Blackwells and appellees, their creditors. 74 Ark. 93; 75 Ark. 273; 99 Ark. 543.

2. The transaction was fraudulent, and can not stand. The mere fact that Blackwell remains in possession of the land, after he claims to have no interest in it, is a circumstance tending to show a secret trust, and a badge of fraud. 33 Ark. 328; 74 Ark. 186. Likewise, Shafer's concealment of his own identity by taking the certificate of purchase in the name of Beck was, especially under the circumstances, an indication of a secret trust—another badge of fraud. 26 Ark. 445; 53 Ark. 191.

The evidence is convincing that Shafer bought the certificate for Blackwell for the purpose of defrauding appellees out of their interest in the land. 57 Ark. 563.

It is true that at law, fraud must be proved; but it is sufficient in equity to show facts and circumstances from which it may be inferred. 33 Ark. 425; 24 Ark. 222. See, also, 41 Ark. 372; 92 Ark. 509; 112 Ark. 341.

KIRBY, J., (after stating the facts). Appellant contends that the purchasers of the certificate of purchase at the tax sale occupied no position of trust and owed no duty in relation to the land purchased to the appellees holding the vendor's lien for the remainder of the purchase money due thereon, that required him to give notice to appellees of the condition before purchasing the certificate or prevent their buying same and holding the lands.

It is true that Shafer was not the attorney of appellees at the time of his purchase of and the assignment of the certificate of purchase to him, and that he had never been their attorney, but that fact would not necessarily relieve him from any duty to inform the appellees that

the lands had been forfeited and sold for taxes, and the amount required to purchase the certificate of purchase.

The undisputed facts are that appellees, the former owners of the land, had a vendor's lien thereon to secure the payment of the balance of the purchase money, that the Blackwells were in possession of the land under their conveyance and bound to the payment of all the taxes thereon; that they permitted the lands to become delinquent for the levee taxes which were afterward sold at a foreclosure sale; that A. B. Shafer was the attorney of the Blackwells in all matters, and that he wrote the two letters to appellees as their attorney, set out in the statement of facts, assuring them when they became insistent for the payment of the balance of the purchase money that he was endeavoring to negotiate a loan on the Blackwell property, which he felt sure would be procured in from thirty to sixty days from then, January 27, 1913. and asking that his client be put to no further trouble and expense.

Later, on January 1, 1914, he wrote to appellee's attorney, informing him of the financial condition of the Blackwells; that they would not be able to pay the amount due the Kinney's at the maturity of the notes, but that if Blackwell was given an opportunity, he would do so; that he had failed to procure the loan of which he first wrote, but hoped that money matters would ease up within a few months, and, if so, did not think he would have any trouble in securing a loan of sufficient amount to pay the indebtedness.

The lands had been sold for taxes in September, 1912, and the time for redemption had expired when Shafer's last letter was written, and on the 28th day after writing said letter, he purchased the certificate of purchase of these lands sold at the tax sale for less than $800, and had it assigned in blank that he might afterward fill in the name of appellant, "Beck," if he desired to join in the purchase. He had often before discussed the condition with Blackwell, investigated the records to see whether the tax sale was regular, and concluded it was, and advised him to buy the certificate of purchase which Black-

well informed him he could not do, being unable to procure the money therefor.

Shafer stated he represented the Blackwells, when he personally talked with the owner of the certificate of purchase about buying it, but that he represented Beck or himself, when he bought the certificate of purchase of Gamble through Wheeler, and had it assigned in blank. He gave his individual note for the purchase money, and rented the lands to Blackwell for the year, and said that Blackwell had paid some of the rent. There was in fact, no appreciable change of possession, and Mrs. Blackwell stated that she supposed she still owned the lands as her husband was operating them as he had formerly done.

The evidence also discloses that shortly after the transfer of this certificate of purchase, Mrs. Blackwell conveyed to Shafer, as trustee, certain of her lands and property situated in the State of Tennessee, securing thereby along with indebtedness to others a fee of $2,500 to him. He testified that this had no relation whatever to the purchase of the lands in controversy, nor of their sale to the Blackwells, or his holding them for their benefit, that it was for professional services already rendered and to be subsequently rendered. The Blackwells did not notify appellees that the lands had forfeited and been sold for taxes, and that the certificate of purchase could be acquired upon the payment of a certain sum therefor, neither did Shafer give them any information of this fact, but bought the certificate of purchase twenty-seven days after assuring them that Blackwell would be able to pay the lands out if given time, and holding out the hope that he would shortly be able to negotiate a loan for him on the lands and take up the notes. Blackwell could not have permitted the land to forfeit for taxes and procured it to be bought in by another person for his benefit, and escaped the enforcement of appellee's lien thereon against the land. *Randolph* v. *Nichol,* 74 Ark. 93.

An insolvent debtor will not be allowed to permit his lands to forfeit for taxes and be bought in, in his wife's name with her means even, to defeat the payment of his debts, and such transaction will be treated so far as his

creditors are concerned, as a redemption in effect of the lands by him. *Herrin* v. *Henry,* 75 Ark. 273; *Fluke* v. *Sharum,* 118 Ark. 229.

(1) The Blackwells were bound to the payment of taxes upon the land, and they could not permit a forfeiture and conveyance thereof for their benefit that would have operated to defeat the lien of their grantors, and they owed the duty to inform appellees, the holder of the lien for the balance of the purchase money of the sale of the lands, of the fact that the certificate of purchase could be procured for a certain sum, which they were unable to pay, in order that appellees could make the payment and protect their interest.

(2) Shafer acquired all the information relative to the tax sale of the lands, finally resulting in his purchase of the certificate of purchase, the effect of which was to defeat the lien of appellees for the purchase money of the lands by reason of his relationship to appellees' grantees as their attorney, and as their attorney he also knew when he bought the certificate, that if the transaction was valid, it would defeat appellees in the collection of their debt from the Blackwells, which he had only twenty-seven days before assured them would be paid if the Blackwells were given time, and he himself hoped to be able to procure for them a loan on the lands, with which to make the payment. Under these circumstances, he owed the duty to appellees to inform them that the certificate of purchase could be had for the price demanded by the holder of it, and that the Blackwells were not able to procure the money with which to buy it before he could buy for himself and defeat their claim. He did not notify them of the fact and knew that the Blackwells had not done so when he purchased the certificate through another person, and had it assigned in blank, and equity will not permit him to defeat the lien of appellees by any such transaction, regardless of what his intentions in fact may have been in the purchase. He stands in no better position than his principal Blackwell would have occupied had the certificate been purchased by and transferred to him,

who, of course, could not have defeated appellee's lien thereby.

(3) Although it is true that fraud is never presumed, and when a transaction does not necessarily import fraud and may as well have occurred from a good as a bad motive, that fraud will not be inferred; still fraud need not be shown by direct or positive evidence, but may be proved by circumstances. *Irons* v. *Reyburn,* 11 Ark. 378; *Splawn* v. *Martin,* 17 Ark. 151; *Phelan* v. *Dalson,* 14 Ark. 79; *Russell* v. *Brooks,* 92 Ark. 518.

It may be conceded that the certificate of purchase was purchased by Shafer without any intention in fact to defraud the appellees or defeat the enforcement of their lien against the lands, and also without any agreement or intention to resell the lands to the Blackwells or hold them for their benefit, but should the law sanction the transaction disclosed by the record, it would in effect permit him to defeat them of their right and deprive them of their lien under such circumstances as would amount to legal fraud, and upon the testimony in the record, with the inferences fairly deducible therefrom, we are not able to say that the findings of the chancellor are clearly against the preponderance of the testimony. The decree is affirmed.

SMITH, J., dissents.

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

Opinion delivered July 5, 1915.

MASTER AND SERVANT—SAFE TOOLS—QUESTION FOR JURY.—Plaintiff in the employ of defendant was, in the performance of his duty, holding a chisel, which was struck by another employee with a maul. The head of the maul flew off, injuring plaintiff. *Held,* under the evidence it was a question for the jury whether the master was negligent, in not furnishing his servants with safe tools.

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

Hays & Ward, for appellant.

1. It is error on the part of the trial court to direct a verdict, where there is any legal evidence to sustain the issues in favor of the party against whom the verdict is directed. 63 Ark. 94; 76 Ark. 520 and cases cited; 95 Ark. 359. And in testing the sufficiency of the evidence, this court will give it the strongest probative force of which it is susceptible. 57 Ark. 461, and cases cited; 66 Ark. 363; 76 Ark. 520.

2. Hill and the witness Wood, who went and got the maul under the direction of the roadmaster, were fellow-servants. Wood selected the maul that he himself had broken that day, and knew that it was defective and unsafe, but did not inform Hill. This being true, appellant is liable. 93 Ark. 93; 92 Ark. 502; 89 Ark. 522; 109 Ark. 288; 107 Ark. 512.

No brief filed for appellee.

KIRBY, J. This suit was brought by appellant, administratrix of the estate of her deceased husband, John F. Hill, for damages for personal injury alleged to have been caused him by the negligence of the railway company in failing to furnish him safe tools with which to do the work he was directed to do, and engaged in at the time of the injury.

The answer denied the allegations of the complaint and pleaded contributory negligence and assumed risk in bar of the right to recover.

The court directed a verdict for the railway company, and from the judgment rendered thereon, this appeal is prosecuted.

It appears from the testimony that John F. Hill was a section foreman upon appellant's line of railway; and on the day of the injury, he had taken his section gang by the direction of the roadmaster to assist James Kelley, another section foreman in changing some steel at the wye at Dardanelle. The roadmaster, J. Y. Dollar, was present in charge of the work. He instructed Hill and one Wood, a man belonging to Kelley's gang, to shear an angle bar. This is done by one man holding a chisel on the bar, and another striking the chisel with a sledge or maul, and

driving it through the bar, cutting off that portion not desired.

Dollar directed Wood to get the maul and do the striking while Hill held the chisel on the bar. Wood went to the place where the tools belonging to the Kelley gang were kept and selected a bell maul, the best one there, and brought it back, and they began to cut off the edge of the angle bar. After he had struck several licks, eight or ten, the maul flew off the handle and broke Hill's arm between the wrist and elbow.

The head of the maul was of steel and weighed eight or ten pounds. The handle was of wood, and upon the morning of that day had been broken off. It was trimmed again and inserted and wedged into the hammer. The broken handle was used because no other handle was provided, and the head of the maul was more likely to fly off in the use of it than if the handle had not been broken or a new one had been fitted thereto. Wood knew of the condition of the maul, but said nothing about it to Hill, who was holding the chisel to be driven through the angle bar.

It was also shown that the sledges or mauls belonging to Hill's gang had not been brought upon the work, and that both of them had split and defective handles, which was known to Hill. He was in the exercise of due care at the time of the occurrence. The rule is, in determining on appeal, the correctness of a trial court's action in directing a verdict, to take that view of the evidence most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish the issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *Williams* v. *St. Louis & S. F. Ry. Co.*, 103 Ark. 401; *Soard* v. *Western Anthracite Coal & Mining Co.*, 92 Ark. 502; *Aluminum Co.* v. *Ramsey*, 89 Ark. 522.

In the last cited case the court said: "The test is, could reasonable and fair-minded men, from all the facts and circumstances adduced in evidence, have come to different conclusions as to whether or not negligence on the part of appellee might be inferred. If so, the right to draw the inference is for the jury."

The law imposes the duty upon the master to exercise ordinary care to provide its servants with reasonably safe tools and appliances with which to do their work, and under the circumstances of this case, it was a question for the jury to determine whether the railway company had performed its duty in furnishing the defective maul or hammer, by the use of which the injury occurred while the deceased was himself in the exercise of proper care for his own safety.

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

HUGHES v. ROBUCK.

Opinion delivered July 5, 1915.

1. SCHOOL DISTRICTS—DISSOLUTION—SPECIAL SCHOOL DISTRICTS.—Kirby's Digest, § 7548, providing for the dissolution of school districts, held to apply to both common school and special school districts.
2. SCHOOL DISTRICTS—LEGISLATIVE CONTROL—BOUNDARIES—CREATION.—Legislative control over the creation and boundaries of school districts is plenary, and subject only to the limitation that such action shall not impair the contracts or obligations of such districts.
3. SCHOOL DISTRICTS—DISSOLUTION.—It is error for the circuit court to quash an order of the county court, dissolving a special school district under the act of April 1, 1895 (Kirby's Digest, § 7548), because the petition asking such dissolution does not state the disposition to be made of the territory of the dissolved district.

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

Smith & McCulloch and *Daggett & Daggett*, for appellee.

1. Section 7548, of Kirby's Digest (Act April 1, 1895) does not apply to special school districts organized under the act of 1869 as amended by Acts 1909 and 1911; therefore, the county court is without authority to dissolve a special school district.

A review of the laws relating to schools leads to the conclusion that the law-makers have at all times recognized the fact that our school system has comprised two

methods of organization of territory into school districts, one, the common school district, and the other, the special district in cities and towns. In the first the method of organization and maintenance is vested in the county court; in the second there is no power, duty or authority whatever conferred upon the county court. The *county judge,* under the act of 1909, is required to call an election, on presentation of the required petition, but neither the county court nor the county judge has any voice in the organization of the district, because, when a majority of the electors vote for the creation of the district, it is *ipso facto* established. 103 Ark. 288.

The reasonable construction of the act of 1895, therefore, is that the Legislature had the two different school systems in mind in the enactment of that law, and only intended that it apply to those districts over which the county court had jurisdiction. 48 Ark. 307; 65 Ark. 529; 71 Ark. 556; 76 Ark. 309; 102 Ark. 401, 405; 111 Ark. 79; 105 Ark. 47.

2. If section 7548 does apply to special school districts, the petition filed was not in accord with the statute, and did not confer on the county court authority to dissolve the special district and re-establish the common school districts out of which the special district was formed.

The power to dissolve a district does not lie unless it is exercised in conjunction with the other power of attaching the territory to adjoining districts. 103 Ark. 446, 450.

H. F. Roleson, for appellants.

There is no reason why the provisions of section 7548 of Kirby's Digest should not apply to both common school districts and special school districts. The case of *Crow* v. *Special School District,* 102 Ark. 401, relied on by appellees, has no application to the question here. That case does not say that the above section does not apply to special school districts. It does hold that unless authority could be found in the act of 1909 for cutting off a portion of a district by the formation of a new district, no authority could be found anywhere, and that is true; but

there is authority for the dissolution of all school districts, and the act creating special school districts expressly provides that the provisions of the general school laws of the State at that time existing, or might thereafter be in force, should apply to special school districts. *Special School District No.* 33 v. *Eubanks,* 119 Ark. 117.

SMITH, J. This case involves the right of the county court to dissolve a special school district, and questions the sufficiency of a petition upon which that action was taken. The county court of Lee County had established a special school district known as Special School District H, and this district was later dissolved upon the petition of a majority of the residents thereof praying its dissolution. The petition, however, did not specify the apportionment which the petitioners desired made of the territory of the district.

Prior to the act of February 4, 1869, all school districts were of the same class, that is, were common school districts; but this act authorized the creation of special school districts in cities and towns, and conferred upon those districts certain enlarged powers, which powers have been increased by subsequent legislation. Sections 16 and 17 of this act, which are now section 7695 of Kirby's Digest, provided that "The provisions of the general school laws of the State which are now or may hereafter be in force, when not inapplicable, and so far as the same are not inconsistent with and repugnant to the provisions of this act, shall apply to districts organized under this act. * * *"

Until the passage of the act* approved April 1, 1895, entitled "An act to empower county courts to dissolve school districts," there was no authority in the law for the dissolution of either special school districts or common school districts, although there was provision in the law for the enlargement of such special districts and for changes in the boundaries of common school districts.

Section 1 of this act of 1895 provides that:

"The county courts of this State shall have power to dissolve any school district now established, or which may

*Kirby's Digest, § 7548. (Rep.)

hereafter be established in its county, and attach the territory thereof in whole or in part to an adjoining district or districts, whenever a majority of the electors residing in such district shall petition the court so to do."

(1-2) It is urged that the section quoted applies only to common school districts. But we see nothing in the act which justifies this construction. Its language is that the court shall have power to dissolve *any* school district now established; and in the face of this language we can not say that the Legislature intended this language to apply to districts of the one class, and not to districts of the other. It is said in all the cases that the legislative control over the creation and boundaries of school districts is plenary, subject only, however, to the limitation that such action shall not impair the contracts or obligations of such districts. *Special School Dist. No.* 2 v. *Special School Dist. of Texarkana,* 111 Ark. 379.

Section 3 of the act of 1895 provides for the apportionment of the indebtedness of any district which may be dissolved. But no such question is presented by the record in this case.

The judgment of the county court dissolving the special district was brought before the circuit court on certiorari, where it was asked that said judgment be quashed because of the failure of the petition upon which the judgment was pronounced to designate the districts to which the petitioners desired the territory of the dissolved district to be apportioned. But we do not concur in the view that this recital in the petition is jurisdictional. The statute does not require the petition for the dissolution of a district to designate the districts to which the petitioners desire the territory attached. This act of 1895 does not require the county court to dissolve the district upon the filing of a proper petition therefor. It merely confers upon the county court the authority to do so. A discretion abides with the court in passing upon the petition; but the court has no authority to dissolve any particular district except upon the filing of a petition conforming to the requirements of the act above quoted. The assignment of the territory of the dissolved district is one of the

things to be taken into account by the county court in determining how this discretion shall be exercised, and if the prayer of the petition is granted, the discretion of the court in the assignment of this territory is limited only by the duty of adjudging against the territory so distributed its pro rata part of the indebtedness of the district of which it was originally a part.

In the recent case of *School District No.* 45 v. *School District No.* 8, 119 Ark. 149, a somewhat similar objection was made against the granting of the prayer of a petition for the change of the boundary line between two adjoining school districts transferring three sections of land from one district and attaching it to another. The decision of the case turned upon the construction of section 7544 of Kirby's Digest, which reads as follows:

"The county court shall have the right to form new school districts or change the boundaries thereof upon a petition of a majority of all the electors residing upon the territory of the districts to be divided."

It was there held that the electors of the district to be divided only were to be taken into account; that the electors of the district to which the territory was to be attached might have their hearing before the county court, where a discretion abided to grant, or to refuse, the petition even though it conformed to the statute.

(3.) It is urged that the opinion of this court in the case of *Cox* v. *Road Improvement Dist. No.* 8, 118 Ark. 119, 176 S. W. 676, is authority for the position that the petition was void because of its failure to designate the desired distribution of the territory of the dissolved district. But we do not concur in this view. We were discussing there the jurisdictional requirements of the petition for the establishment of a road improvement district, and in that connection we said that there must be no uncertainty about the road or street to be improved; and there is no analogy between that case and this. The petition here specifies the district to be dissolved, and, as we have seen, the statute does not require the petition to state the disposition to be made of the territory of the dissolved district.

We think the court below erred in quashing the order of the county court dissolving the district, and its judgment will be reversed and the cause remanded with directions to set aside that order.

Justice KIRBY dissents.

PLANTERS FIRE INSURANCE COMPANY v. STEELE.

Opinion delivered July 12, 1915.

1. FIRE INSURANCE—CHANGE IN OCCUPANCY—VACANCY.—A fire insurance policy provided that "if said building * * * shall become vacant or unoccupied * * * or any change takes place in the title, occupancy or possession thereof whatever, then, and in every such case, this contract shall be absolutely null and void;" the owner occupied the house as a dwelling when he procured the insurance, but thereafter moved out and rented the same to a tenant; the tenant then moved out and the house burned just as the owner was preparing to reoccupy it. *Held*, under the terms thereof, the policy became void, both by reason of the vacancy and the change of occupancy which had taken place.

2. FIRE INSURANCE—TEMPORARY VACANCY—PRESUMPTION.—Where, under the terms of a fire insurance policy, the insured house was occupied as a dwelling, it is contrary to the terms of the policy to change the character of the occupancy, and where the insured moved out of the house and rented the same to a tenant, who in turn moved out, and the house was burned within a few days thereafter, while the owner was preparing to reoccupy the same, there could be no presumption that a temporary vacancy or period of unoccupancy was within the contemplation of the parties.

3. FIRE INSURANCE—UNOCCUPIED PREMISES—FURNITURE WITHIN THE INSURED HOUSE.—A fire policy provided that the same become void if the building become "vacant or unoccupied." The owner rented out the house, and the tenant departing, left a stove and table in in the building. The owner prepared at once to resume possession of the premises, and intended to assume possession of the stove and table for unpaid rent; before, however, he re-entered the house it was burned. *Held*, under the stipulations in the policy the same was void and unenforcible.

Appeal from Nevada Circuit Court; *G. R. Haynie*, Judge; reversed.

J. W. & J. W. House, Jr., for appellants.

1. Instruction No. 7 (quoted in the opinion) is erroneous. It was the duty of the court to construe the contract, and its terms should not have been left to the jury. The five days' vacancy, which occurred from the time Taylor moved out until the house was destroyed by fire, is a matter which should have been declared by the court as forfeiting the policy. 62 Ark. 348.

2. The court erred in instructing the jury that if at any time the premises became vacant and thereafter the defendant issued to plaintiff a vacancy permit, the company, by issuing such vacancy permit, waived all former vacancies. This is not the rule. An insurance company can not waive a forfeiture without full knowledge of the facts which constitute the forfeiture, and there is nothing in the record to show that the company in this case had knowledge of any vacancy of the property covered by insurance. 65 Ark. 588; 3 Cooley's Briefs on Law of Insurance, 2467.

The record shows that the policy was issued to Steele, who was then occupying the building as a home. A change of possession or occupancy violated the policy, and there is no proof that the company ever knew that the owner had abandoned the premises and surrendered it to a tenant. 67 Ark. 584-589; 72 Ark. 47.

3. A contract of insurance is a personal one, and the language of the policy shows that the company regarded it as such and expected the plaintiff to retain possession of the property. If, therefore, the property became vacant or unoccupied at any time after the issuance of the policy and the date of the loss, without the consent of the defendant, the policy became void, and the court erred in refusing to instruct the jury to that effect. The court also erred in refusing to instruct the jury that if any change occurred in the title, occupation or possession of the property covered by the insurance without the consent of the defendant, it avoided the policy. 69 Ark. 295; 62 Ark. 348; 58 N. E. 314; 36 Am. St. Rep. 907; 10 *Id.* 384; 48 *Id.* 468; 51 *Id.* 457; 2 Cooley's Briefs on Ins., § 1713 *et seq.;* Joyce on Ins., § 2238; 23 Ind. 180; 94 Ark.

596; 144 N. Y. 199; 69 Ill. 393; 38 N. E. 865; 49 N. E. 471; 75 N. W. 326; 45 S. W. 109; 53 S. W. 297; 100 Me. 481; 69 Pac. 345.

C. C. Hamby, for appellees.

1. Forfeitures are not favored in law, and, notwithstanding the strong language used in declaring the forfeiture that the policy "shall become null and void," the policy is not void, but voidable, and the party who has the right to declare it void may thereafter treat it as valid, and it will be so. 110 Am. St. Rep. 99; 35 So. 228; 135 Mass. 248; 96 Am. Dec. 83; 34 Am. Rep. 323; 60 L. R. A. 918, 93 N. W. 972.

2. The issuance of the vacancy permit waived all former vacancies. 47 L. R. A. (N. S.) 619; 3 Am. Rep. 82; 7 L. R. A. (N. S.) 629; 80 Am. St. Rep. 307.

3. The courts are uniform in holding that the answer "applicant" in the application, to the question, "Is it occupied by you or tenant?" is not within itself a warranty that the house will always be so occupied.

Occupation, as used in the policy, means that the "use to which the building is put," that is, *residence,* is not to be changed, rather than that no change of occupants can be had. 111 Am. St. Rep. 70; 70 L. R. A. (N. S.) 621; 6 Am. Rep. 331; 32 Ill. 221.

To render a policy void which provides for a forfeiture upon the property becoming vacant and unoccupied, the insurer must declare the forfeiture; and if it does not exercise this power while the insured is in default, and the premises are again occupied, the right to declare the forfeiture ceases. 108 Ill. 220; 57 Ill. App. 200; 43 N. J. L. 468; 14 N. E. 525; 63 Ind. 238; 28 Am. Rep. 116; 7 L. R. A. (N. S.) 629; 80 Am. St. Rep. 307.

The issuance of the vacancy permit was sufficient to place appellant on notice that a change of tenants would be made. The rule is that a reasonable time is allowed under policies of insurance for a change of tenants, and the court was right in this case in submitting the reasonableness of the time to the jury. Under the evidence it was a question for the jury, and not, as insisted by the ap-

pellant, for the court. 52 Am. St. Rep. 377; 34 Am. Rep. 106; 83 N. Y. 133; 23 Am. Rep. 111; 43 N. W. 682.

Appellee having this reasonable time in which to move into the building, which time had not expired, he was, to say the least of it, constructively occupying the premises when the fire occurred.

McCULLOCH, C. J. This is an action on a fire insurance policy issued by appellant company on a house owned by appellee Steele in Prescott, Arkansas. The policy was issued on November 8, 1912, and covered a period of three years. The fire occurred on July 15, 1914. The application was taken by a soliciting agent and contained a statement that the building was occupied as a private dwelling, and the answers in the application were warranted to be true. The applicant did in fact occupy the premises as a private dwelling house, but thereafter removed from the place and rented it to a tenant. The first tenant moved out and subsequently it was rented to another tenant named Taylor. Taylor vacated the premises in April, 1914, and the house remained vacant for three weeks or a month, when Taylor rented it again from Steele, the owner, and reoccupied it. He remained in the house until July 11, when he again moved out, and it was not again occupied by any one.

The proof shows that Mr. Steele, the assured, intended to move into the house on July 16, and reoccupy it as his dwelling. He was making preparations to move when the fire occurred. There is also testimony to the effect that when Taylor moved out he left a cooking stove and a table, and that the owner claimed the property as compensation for balance of rent which Taylor owed him. After Taylor moved out in April, the assured applied to the company for a vacancy permit, and the permit was issued to him for a period of thirty days from date. There is some controversy in the testimony as to the precise dates when Taylor moved out of the house and moved back into it, and also as to the date of the permit. Mr. Steele, the owner, testified that Taylor moved out in April and moved back in May, and that the permit was dated in April, and that the period of the permit had expired

when Taylor moved back into the house. A copy of the permit was introduced in evidence by the company, and showed that it was dated May 8, and was for a period of thirty days. The conflict with respect to those matters is not material, for it is undisputed that the vacancy permit had expired before Taylor moved out of the house the last time. The policy contains a stipulation that "if said building * * * shall become vacant or unoccupied, * * * or any change takes place in the title, occupancy or possession thereof whatever, then and in every such case this contract shall be absolutely null and void." Appellant pleaded, among other defenses, that there was a violation of each of those conditions of the policy.

The case was submitted to a jury, and a verdict was rendered in favor of appellees for the sum of $500, the amount of the policy. The sureties on the bond of the company were joined as defendants, and they have appealed, as well as the company itself. A receiver has been appointed for the company and has been substituted here as appellant.

(1) We are of the opinion that according to the undisputed testimony in the case, the verdict was without evidence to support it, and that the judgment for that reason must be reversed. This conclusion rests on two grounds, namely, that the house was unoccupied within the meaning of that term mentioned in the policy, and also that there was such a change in the occupancy as invalidated the policy. Upon the last point the case is ruled by *Planters' Mutual Insurance Association* v. *Dewberry,* 69 Ark. 295. The policy in that case contained a clause identical with the one in question, and we held that where the house was occupied by the applicant as a dwelling at the time of the issuance of the policy, and that a subsequent change was made by the owner's removal and a tenant taking possession, that operated as a change of occupancy within the meaning of the policy. The only difference between the two cases is that in the Dewberry case the house was occupied by a tenant at the time the fire occurred, whereas in the present case the tenant had moved out three days before the fire oc-

curred. That difference, however, is not controlling, for it is the change of occupancy which operated as a breach of the conditions of the policy; and even if it were held that the return of the owner to the property reinstated the status so as to come within the terms of the policy, that would not occur until there had been an actual re-occupancy by the owner. In this case the premises had not been occupied by the owner for a considerable length of time. There was, according to the proof, an intention on the part of the owner to re-occupy the premises, but he had not actually done so. We are therefore of the opinion that the policy was rendered void, and that there can be no recovery thereon. The policy is void also by reason of the fact that the premises were vacant and unoccupied at the time of the fire. There is some discussion in the authorities as to the distinction between the terms "vacant" and "unoccupied," and "vacant and unoccupied," and "vacant or unoccupied," but a discussion of that distinction is without importance here, for the language here is that the policy shall be void if the premises become "vacant or unoccupied." *Limburg* v. *German Fire Ins. Co.*, 90 Iowa 709, 57 N. W. 626, 23 L. R. A. 99.

The court, over objections of appellant, gave the following instruction, which we think was erroneous: "If the jury believe that Taylor went out on Saturday, and that plaintiff immediately began preparation to move in, and if the fire had not occurred, he would have moved in on Thursday morning, then the policy would not be void if the jury believe from Saturday till Thursday would be a reasonable length of time for plaintiff to get ready to move."

(2-3) There are authorities to the effect that where the insured property is occupied by a tenant, it is impliedly contemplated by the parties to the contract of insurance that "any temporary vacancy caused by or incident to such change is not within the purview of the vacancy clause." 2 Cooley's Briefs on Insurance, 1675. That principle does not apply, however, in this case for the reason that the property was occupied as a dwelling, and it was contrary to the terms of the policy to change

the character of the occupancy. *Insurance Association* v. *Dewberry, supra.* Therefore, there could be no presumption that a temporary vacancy or period of unoccupancy was within the contemplation of the parties. That point is emphasized in the case of *Barry* v. *Prescott Ins. Co.*, 35 Hun (N. Y.) 601. The facts of that case are quite similar to the facts of this case, except that the period of unoccupancy was longer. The stipulation of the present policy was unconditionally to the effect that if the building become "vacant or unoccupied," the policy should be void, and it can not be said that there was any period of time contemplated at all for unoccupancy, for the reason that the policy also provides that any change of occupancy should also operate as an avoidance of the policy. No presumption could be indulged in the face of that express stipulation. The fact that Taylor left a stove and table, which the assured expected to appropriate as compensation for balance of rent due, does not prevent this clause attaching. In order that such state of facts may constitute an occupancy, there must be a substantial quantity of furniture, evincing an actual and personal occupancy. 2 Cooley's Briefs on Insurance, 1659, 1667; *Weidert* v. *State Ins. Co.*, 19 Or. 261; *Corrigan* v. *Connecticut Ins. Co.*, 122 Mass. 299; *Cook* v. *Continental Ins. Co.*, 70 Mo. 610; *Continental Insurance Co.* v. *Kyle*, 124 Ind. 132, 9 L. R. A. 81; *Feshe* v. *Council Bluffs Ins. Co.*, 74 Iowa 676.

The policy is therefore void on both the grounds stated. Reversed and remanded for a new trial.

HENDERSON v. TOWN OF MURFREESBORO.

Opinion delivered July 12, 1915.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL—ABSENCE OF MOTION FROM BILL OF EXCEPTIONS.—Where a motion for a new trial appears in the transcript, but not in the bill of exceptions, it will be presumed on appeal that the trial court was right in overruling the motion.
2. CRIMINAL LAW—MISDEMEANOR—ABSENCE OF ACCUSED—RIGHT OF STATE TO PROCEED.—In a prosecution, where the offense charged is punishable by fine only, where the defendant voluntarily absents him-

self, the State may demand a trial notwithstanding his absence, and no constitutional right of the defendant is violated thereby.

3. TRIAL—INVOLUNTARY ABSENCE OF LITIGANT.—The trial court may not, in any case, force a trial where one of the litigating parties is involuntarily absent.

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

W. S. Coblentz, for appellant.

In view of the distance appellant lived from the place of trial and the proof of his illness submitted with the motion, it was an abuse of discretion to refuse a continuance, and to force the case into trial in the appellant's absence. 42 Ark. 273; 38 Ark. 512.

Intent is an essential element of this offense. An intent to eject, rather than to assault, was a valid defense, and no one could know so well as the appellant, what his intent was in taking hold of the prosecuting witness. 2 Ruling Case Law, § 37, p. 559. And the court erred in refusing to instruct the jury on the question of the right of the owner, to eject an offending trespasser who had been requested to leave. *Id.* § § 36, 37.

No brief filed for appellee.

McCULLOCH, C. J. This is a prosecution for violation of an ordinance of an incorporated town for the offense of assault and battery, and the defendant, Austin Henderson, was convicted in the circuit court on appeal from the court of the mayor, and his punishment fixed at a fine of one dollar. He appeals to this court.

Defendant was a merchant in the town of Murfreesboro, and is accused of committing the crime of assault and battery upon the person of Cornelius Walker, a colored woman, while she was in defendant's store. The evidence adduced by the prosecution tends to show that the defendant, without any provocation, took the woman by the collar, choked her and used a vulgar and profane epithet toward her. The testimony adduced by the defendant tends to show that the woman was the aggressor and was disposed to make trouble in the store, and

that he merely told her to go on out and finally took hold of her because she grew so abusive.

(1) The defendant was not present in person, but by counsel, and filed a motion for continuance on the ground that the defendant was sick at his home and could not attend the trial. The motion is found in the transcript, but not in the bill of exceptions, and we can not consider it on its merits and must indulge the presumption that the court was right in overruling the motion. The defendant was entitled to be present at the trial if he so desired, but the court may have found that the statements of the motion concerning the illness of the defendant were without foundation, and that the defendant had voluntarily absented himself and declined to come to court.

This brings us to the question whether or not the court had the power to try the defendant in his absence in a case in which the charge was punishable by fine only.

In the case of *Owen* v. *State,* 38 Ark. 512, the defendant was charged with the offense of malicious mischief, which is punishable by both fine and imprisonment. The defendant was not present at the trial, and the State demanded his presence and refused to go to trial without him. Thereupon the counsel for defendant offered to proceed to trial in his absence, but the court declined to permit that to be done, and dismissed the appeal for want of prosecution. In disposing of the case, this court said: "The statute provides that if the indictment be for a misdemeanor, the trial may be had in the absence of defendant, but that must be understood to apply to cases in which the accused consents to waive the right to be present."

In the recent case of *Cox* v. *City of Jonesboro,* 112 Ark. 96, being a trial for misdemeanor punishable by fine and imprisonment we held that defendant had waived his right to be present by absenting himself after the trial began, but incidentally referred with approval to the statement in the Owen case, *supra.*

The statutes of this State provide that the trial of a misdemeanor may be had in the absence of the defendant. Kirby's Digest, § 2340. It was not necessary to decide either in the Owen case or the Cox case, *supra,* that the State could not demand a trial of a misdemeanor in the voluntary absence of the defendant, but the language in those two opinions seems to lay that down as the law. The majority of the judges are unwilling to disapprove the language of those opinions, but distinguish the present case from them in that there is no punishment by imprisonment for the offense charged in this case. There is an important distinction. No jeopardy attached in a case tried under a charge merely involving punishment by fine. The court may in such cases take the case away from the jury by peremptory instruction where the evidence of the guilt of the acused is undisputed. *Stelle* v. *State,* 77 Ark. 441; *Roberts* v. *State,* 84 Ark. 564.

(2-3) It follows that in such cases, where the defendant voluntarily absents himself, the State may demand a trial notwithstanding his absence, and no constitutional right of the defendant is violated. Of course, a party to any kind of litigation, either civil or criminal, is entitled to be present at his trial whether his own testimony is important or not, and it would constitute an abuse of discretion to force a trial in the involuntary absence of one of the litigants. If, however, the litigant is absent by his own connivance or voluntary act, the court is not bound to await his pleasure but may proceed with the trial, except, as held in the cases referred to above, where he is placed in jeopardy under a charge involving punishment by confinement. We are of the opinion that since there is nothing in the record to show that the court abused its discretion in refusing to continue the case, there is nothing left except the bare question of the court's power to proceed in the defendant's absence.

It is insisted that the court erred in refusing to give an instruction submitting the right of the defendant to eject an intruder from his store. We do not think the testimony warranted the giving of an instruction in that

form, for there is nothing to show that the defendant took hold of the woman for the purpose of ejecting her from the premises. If he took hold of her at all, it was not, according to the evidence, for the purpose of removing her from the store, but because she had aroused his anger by disputing her account, and the disturbance she was making in the store by her conduct.

Judgment affirmed.

WOOD, J., (dissenting). The appellant contends that the court erred in trying him in his absence, and this is one of the grounds of his motion for a new trial.

Our statute provides, "If the indictment is for a misdemeanor a trial may be had in the absence of the defendant." Kirby's Digest, § 2340. In *Griffin* v. *State,* 37 Ark. 437-442, construing this statute, we said: "No doubt the court has the discretion to permit the trial in his absence; but, as a practice, it is not to be commended." This was said concerning a case that was tried in the absence of a defendant who was charged with the crime of Sabbath breaking and the punishment for which was only by fine, and not imprisonment. The record does not show whether the defendant waived his presence at the trial or not.

Again, in *Bridges* v. *State,* 38 Ark. 510, the defendant was tried in his absence on a charge of selling liquor to a minor. In that case his attorneys entered a plea of not guilty for him and requested that he be tried in his absence. The court declined to try him in his absence and took a forfeiture on his bond, and upon appeal from this order the court, again passing on this statute, reiterated the language used in *Griffin* v. *State, supra,* and held that the court did not abuse its discretion in refusing to permit the defendant to be tried in his absence.

In *Owen* v. *State,* 38 Ark. 512, Owen was charged, tried and convicted for the offense of malicious mischief before a justice of the peace. He appealed to the circuit court and on the date the case was set for trial in the circuit court Owen was absent. The State demanded his presence. His attorney offered to proceed to trial in his

absence, which the court declined to permit and dismissed the appeal, and from that order he appealed to this court. Again, passing upon this statute, upon the facts as above stated, we said: "The statute provides that if the indictment be for a misdemeanor the trial may be had in the absence of the defendant, but that must be understood to apply to cases in which the accused consents to waive the right to be present." And we again repeated what was said in *Griffin* v. *State* and *Bridges* v. *State, supra;* and, continuing, said: "The offense with which the appellant was charged is punishable by fine or imprisonment, or both, and the court should not, in the exercise of its discretion, permit a trial in the absence of the accused when the verdict and judgment may be for imprisonment. He should be present to be placed in confinement if convicted."

In *Martin* v. *State,* 40 Ark. 364, Martin was tried by consent of his counsel in his absence, and was found guilty and his punishment fixed at fine and imprisonment. The absence of the defendant during his trial was assigned as reversible error. The court said: "In felonies, the defendant must be present during the trial. If the indictment is for a misdemeanor, the trial may be had in his absence. But this must be by his consent, for he has the right to be confronted with his witnesses, unless he waives this right." Citing *Owen* v. *State, supra.* Continuing, the court said: "The offense for which appellant Martin was indicted is punishable by fine, and the accused may be imprisoned, and the court below should have required his presence at the trial, in order that if found guilty, and the verdict be for imprisonment as well as fine, he might be placed in confinement. But the court permitted the trial to proceed in his absence, by consent of his counsel and that of the attorney for the State. This was an error which might have been prejudicial to the State, not to the accused."

In the recent case of *Cox* v. *City of Jonesboro,* 112 Ark. 96, we said: "The trial of a misdemeanor may be had in the absence of the defendant. Kirby's Digest,

§ 2340. But the State can not demand a trial in the absence of the defendant." Citing *Owen* v. *State, supra.*

Though the opinion does not disclose, the above language was used in a case where the appellant had been tried and convicted for a misdemeanor, a part of the punishment for which might be imprisonment.

It thus appears that in none of the cases above cited has the court decided the exact question now presented, which is, can a defendant charged with a misdemeanor be tried in his absence without his consent and over his protest where the punishment for the offense charged, in case of conviction can only be by fine?

The above cases show clearly the trend of our decisions and what the court would have decided had the present issue been presented. For it will be noted that this court, in the above cases, has stated that the practice of allowing misdemeanor cases to be tried in the absence of the defendant, even where he consents or where he expressly requests it, "is not to be commended." And in three of the cases above the court has stated, in effect, that the statute prescribing that trials may be had in the absence of the defendant, must be understood to apply to cases in which the accused consents to waive the right to be present; that the State can not demand a trial in his absence. While this holding was in cases where the punishment for the misdemeanor, in case of conviction, might have been by fine or imprisonment, or both, and while the language used in those cases in reference to the above statute was in a sense therefore *obiter dictum,* nevertheless it shows what was in the mind of the judges and the trend of our decisions.

The statute must be construed, as stated in some of the above opinions, to apply to cases in which the accused consents to waive the right to be present. The statute must be construed as having been enacted for the benefit of the accused and not for the benefit of the State, for otherwise it would be in conflict with the bill of rights, which provides that, "In all criminal prosecutions the

accused shall enjoy the right to * * * be confronted with the witnesses against him." Const. of Ark., art. 2, § 10.

If the State could demand a trial in his absence and over his protest, then this would deprive him of his constitutional right to be confronted by the witnesses against him. Being for his benefit, in cases of misdemeanor where there is no imprisonment as a part of the punishment he may waive the right to be present, and in such cases the trial court may exercise its discretion to allow the trial to proceed in his absence. But even where he consents, as is shown by the above cases, it is still a matter resting within the sound discretion of the court and it can not be demanded by the State as a matter of right.

Now the record shows affirmatively that the defendant was absent in person, and that his attorneys were insisting that the cause be continued. There is no evidence in this record to warrant the conclusion that the defendant was voluntarily absent or that he was absent by connivance. Every presumption must be indulged in favor of innocence until the contrary is proved. In the absence of proof to the contrary, the presumption will be indulged that the court did not abuse its discretion in overruling appellant's motion for a continuance. But that is altogether a different proposition from indulging the presumption that the defendant was absent voluntarily or by connivance. No such presumption can be indulged. If such was the fact, it should have been established by evidence. The record shows that the appellant being absent in person through his attorneys, was demanding a continuance of his cause. In the absence of a statement in the record to the effect that the appellant waived his presence or consented to a trial in his absence, and with no evidence in the record to warrant a finding that appellant was absent voluntarily or by connivance, the court had no power to try him. In doing so, it deprived him of a right which every accused person under our Constitution enjoys and which the Legislature could not take from him. The court having concluded

that appellant's motion for continuance was not sufficient, instead of forcing him to trial over his protest, should have dismissed his appeal or declared his bond forfeited. Such we understand to be the purport of our former decisions, and such is the law.

Mr. Justice SMITH concurs in the dissent.

KENNEDY v. STATE.

Opinion delivered July 12, 1915.

1. LARCENY—LARCENY OF HOGS—SUFFICIENCY OF EVIDENCE.—In a prosecution for the larceny of certain hogs, the evidence held sufficient to support a verdict of guilty.
2. APPEAL AND ERROR—EXCEPTIONS—HOW PRESERVED.—Matters occurring under the eye of the trial judge, which form the basis of an exception, in order to be available on appeal, must be certified by the trial judge in the bill of exceptions; only incidents which occur outside the presence of the court may be brought to the attention of the court on appeal by other evidence.
3. TRIAL—SEPARATION OF JURY—PREJUDICE—BURDEN OF PROOF.—When the trial judge, during a trial, permits the jury to separate, the burden rests upon the complaining party to show that prejudice resulted therefrom.
4. TRIAL—SUSPENSION OF PROCEEDINGS—USE OF JURORS ON ANOTHER CASE—PREJUDICE.—Where the trial of a case is for any reason temporarily suspended, it is bad practice for the court to use the jurors, in the interval, in the trial of another case; but where the trial of a cause was suspended and resumed the following day, it will not be presumed that prejudice resulted to the complaining party from the fact that the trial court used some of the jurors in the trial of another case, and the burden is upon him to show wherein any prejudice resulted.

Appeal from Monroe Circuit Court; *T. C. Trimble*, Judge; affirmed.

Appellants, *pro se*.

1. Appellants review the evidence and contend that it is not sufficient to sustain a conviction even of Yates, the alleged owner of the hogs, and especially not sufficient to convict Kennedy and Helmering, who were hired to work for him, in that it does not establish a felonious intent nor establish ownership of the hogs in Scott.

2. When all the evidence had been introduced except the testimony of one witness on each side, it was prejudicial error on the part of the court to suspend the trial of this case for a day and a half while waiting for an absent witness on behalf of the State, and in the meantime to empanel four of the jurors composing the jury in this case to try another felony case, and three of the jurors to try a civil cause, and then, over the objection of appellants, to reassemble the same jury to conclude the trial of this case. 95 Ark. 428; 28 N. W. 430; 72 Ia. 759, 33 N. W. 655; 63 Fla. 61, 58 So. 131; 63 Ga. 31.

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

1. Where there is any substantial testimony upon which to base a verdict of guilt, this court will not disturb the finding of the jury. In this case the evidence is sufficient to sustain the conviction. 109 Ark. 130; *Id.* 138.

2. There was no prejudicial error in refusing to discharge the jury after the interruption of the trial on account of the absent witness. The record fails to disclose any specific objection made, or that the court was pressed to a ruling thereon.

A ground of motion for new trial which is not responsive to the ruling of the court complained of, as reflected by the bill of exceptions, will not be considered. 78 Ark. 40; 93 S. W. 55.

McCULLOCH, C. J. Appellants, John Kennedy, H. L. Yates and George Helmering, are charged with the crime of grand larceny in stealing three hogs, the property of an old colored man named William Scott. The hogs were running at large in White River bottom, and the testimony adduced by the State tends to establish the fact that appellants caught the hogs, put them in a pen and killed them, with the felonious intent to deprive the true owner of his property. Scott had fifteen hogs running in that range, all of them marked with a crop off the left ear and a split in the right ear.

A witness introduced by the State testified that he was lying in a boat, in the mouth of a bay that runs into the river, late one afternoon about sundown or dusk and saw appellants cleaning hogs on Yates' boat; the next morning he (witness) went over to the hog pen in the woods, about 150 yards from where he had seen appellants cleaning the hogs, and found the place where the hogs had been killed apparently the evening before, and saw blood and hair there. The same witness testified that he talked to Yates about the hogs and that the latter had told him that he had bought the hogs from one Morris; and that when witness said something about the law on that subject, Yates replied: "Hell, there is no law in Arkansas," adding that "there is a thousand dollars' worth of meat out there in the bottom, and I am going to have my meat out of them." That conversation, the witness stated, was about a week before he saw appellants cleaning the hogs.

Another witness testified that he saw six hogs in the pen referred to, near the river, marked crop off of the left ear and split in the right, and that shortly after the date the other witness, McDermott, had testified to seeing appellants cleaning the hogs on the boat, he went to the pen again and that some of the hogs were missing. He testified that they were large sized killing hogs.

William Scott, the colored man who lost the hogs, testified about the marks and the fact that the hogs were running in the bottom and were lost about the time that McDermott saw the appellants cleaning the hogs on the boat. He testified, also, about seeing some of the appellants in the bottoms hunting hogs.

(1) The evidence was sufficient to identify the hogs killed by appellants as the hogs of Scott which were missing about that time.

Appellants offered testimony tending to show that one Walter Morris had hogs running in the bottom, some of which were marked in the same mark as that of Scott's hogs, and that the hogs taken up were those that had belonged to Morris. They exhibited a bill of sale dated in

May preceding the time Scott's hogs were killed in November, by which writing Walter Morris sold all of his claim to Yates for the sum of $25, and described the hogs as follows:

"White and black sow and pigs, no mark. Old sow has nine shoats about five months old; nineteen pigs now, old sow under slope and swallow fork each ear; eight shoats crop in left and split in right; three crop and under half-crop in each ear; two crop off right ear." It was a question for the jury, we think, to determine whether the hogs killed by appellants were those which belonged to Scott or whether they were hogs which Yates bought from Morris. In other words, it was a question of fact to determine whether Yates' claim of ownership was made in good faith or whether it was a subterfuge to avoid punishment. It can not be said that the proof was undisputed. Morris testified that he had hogs in that range and sold his claim to Yates, and it is true that the bill of sale describes hogs marked the same as Scott's mark, but the hogs described in the bill of sale by that mark are designated as shoats, whereas the proof shows that the hogs killed by appellants bearing that mark were large size killing hogs. The bill of sale described hogs in four different marks, and some without any marks, and this fact was worthy of consideration in testing the question of good faith. The jury also had a right to consider the reckless manner in which appellant Yates asserted his right to take hogs out of the woods, saying that whether there was any law or not he proposed to get his meat out of the hogs running in the range. The testimony was, we think, legally sufficient to sustain the verdict.

Appellants claim, as another ground for reversal, that the court improperly allowed members of the jury, during a temporary suspension of the trial, to serve on other juries in cases being tried. The record shows that the trial of this case was begun on April 29, and, not being concluded at the close of that day, an adjournment was taken over until the following day, and the order

on the next day, April 30, shows that the trial was resumed and progressed to a verdict during that day. The record entry does not recite any suspension of the trial during the day. However, appellants filed with the motion for a new trial the affidavit of the clerk of the court, who stated in the affidavit that during the afternoon of April 30 the court suspended the trial of this case to await the coming of another witness, and that during that time two other cases were tried, one of them a felony case and another a civil case, and that some of the jurors in this case served as jurors in each of the other cases. The affidavit recites further that the other two trials were both concluded before the time came for resuming the trial in this case, and that when the witness came the trial of this case was resumed.

(2) We are of the opinion, in the first place, that grounds for the exceptions are not properly laid, in that the facts set forth in the affidavit of the clerk are not recited in the bill of exceptions. Matters occurring under the eye of the judge, which form the basis of an exception, should be certified by the judge in the bill of exceptions. It is only incidents which occur outside of the presence of the court which must be brought to the attention of the court by other evidence. The judge makes no mention in the bill of exceptions of any such occurrence, nor was he asked to insert the recital of such an occurrence in the bill of exceptions. Notwithstanding the affidavit of the clerk, we must assume that the judge has certified in the bill of exceptions all of the incidents of the trial which occurred in his presence. If it was thought that the judge had erroneously omitted the recital, the exception could have been preserved by the affidavits of bystanders.

(3) In the next place, we think that even if the exception had been properly preserved, there is not enough to show that anything occurred which might have operated to the prejudice of the appellants. There is nothing in the record to show that there was any objection on the part of the appellants to allowing the jury to

separate, and when a separation of the jury is allowed by a trial judge the burden rests upon the complaining party to show that prejudice resulted. All that is shown here, even if we give full effect to the affidavit of the clerk, is that some of the jurors during the temporary suspension of this trial served as jurors in other cases which were then tried. There is nothing in that of itself which could result in any prejudice, and if there was anything which occurred during the trial of the other cases which might have operated to the prejudice of these appellants, it was their duty to show it before they could ask that the verdict be set aside on that account.

(4) Appellants cite cases on their brief where courts decide that it is bad practice to interrupt a trial by a temporary suspension and trial of other causes during the intervening time. Indeed, some of the cases they cite hold that this constitutes prejudicial error for the reason that jurors are unable to carry the facts of different cases in their minds at the same time so as to be able to weigh the facts of each case with precision and care. The cases cited also cover much longer periods of time, some of them several days, in which many cases were tried during the intervening time. Now, we agree that it is bad practice for a court to take jurors from one case and use them as trial jurors in other cases. Litigants are entitled ordinarily to an uninterrupted trial so that everything may be bent to the solution of the question involved in that particular case before the minds of the jurors are vexed with other questions. But we can not agree to the view that indulgence in practice of this kind necessarily results in prejudicial error. These two trials occurred, according to the evidence of the clerk, taken in connection with the record entries, during the afternoon of April 30, and were concluded during the same afternoon, and the trial of this case was resumed and concluded the same day. The time was too short for the facts of this case to have become obscure in the minds of the jurors, and we do not think that any prejudicial effect is shown. So there is nothing in this

assignment of error, even if we treat it as having been properly brought into the record.

The judgment is therefore affirmed.

STATE *ex rel.* INDEPENDENCE COUNTY *v.* CITIZENS BANK & TRUST COMPANY.

Opinion delivered July 12, 1915.

1. CONTRACTS—ACCEPTANCE OF BENEFITS—RIGHT TO REPUDIATE.—A party who has had the benefit of an agreement can not be permitted in an action founded upon it, to question its validity.
2. COUNTY DEPOSITORY—ILLEGAL APPOINTMENT—INTEREST ON FUNDS DEPOSITED.—A bank was appointed county depository, and after holding county funds six months, was required to give up same, because its bid, looking to becoming the county depository, was not in proper form. *Held*, the bank will be required to pay to the county the interest stipulated in its agreement, for the length of time the county funds were deposited with it, under the supposed appointment.

Appeal from Independence Circuit Court; *Dene H. Coleman,* Judge; reversed.

STATEMENT BY THE COURT.

This suit was begun in the Independence Circuit Court by the appellant against the appellees to recover interest claimed to be due Independence County from the Citizens Bank & Trust Company (which, for convenience, we will hereafter designate as the bank), while acting as county depository. The appellant alleged, in substance, that the bank was duly designated as a depository for Independence County on the 13th of January, 1913, and that it executed its bond to the State of Arkansas in the sum of $100,000, with W. P. Jones, W. J. Erwin, C. F. Cole and H. C. Wade as sureties; that the bond was conditioned that the bank should faithfully fulfill its duty as such depository and should promptly pay all interests as such depository quarterly to Independence County; that in accordance with the order of the county court the funds of Independence County were turned over to the bank, and in acting as such depository it held the funds

of the county for a period of six months, when it was determined by the Supreme Court that the bid submitted by the bank to become the depository was not a legal bid, and after such decision it ceased to be or act as such depository; that the bank failed to pay the interest due the county for the time it held its funds as county depository, and is now due the county for such interest the sum of $661.69, with interest on that sum from the 12th day of July, 1913, at the rate of 6 per cent. per annum; that demand had been made upon the bondsmen above named for such sum. The complaint concluded with a prayer for the above sum, with interest, and in addition the sum of $100 damages.

A copy of the order of the county court designating the bank as the county depository and also a copy of the bond were made exhibits to the complaint. The bond, which was made an exhibit to the complaint, recites as follows:

"The condition of the above obligation is that, whereas, the said Citizens Bank & Trust Company has been selected by the county court of Independence County, Arkansas, as the depository of all funds of said county, including school funds for a period of two years from February 5, 1913, and has agreed to pay to said county and the respective funds interest on the daily balances thereof, at the rate of 4½ per cent. per annum, and has otherwise accepted said trust with all the duties and obligations appertaining thereto.

"Now, if the said Citizens Bank & Trust Company, depository as aforesaid, shall pay said interest * * * so long as funds shall be in said depository to the credit of said county; * * * and shall otherwise duly and faithfully and properly perform all and singular the duties and obligations devolving by law upon said depository, then this shall be void; otherwise, to remain in full force and effect."

The act creating county depositories, Act 208, Acts of 1907, page 485, as amended by Act 258 of the Acts of 1911, page 253, requires that the interest shall be com-

puted upon daily balances to the credit of the county, and payable quarterly. The allegations of the complaint showed that the appellee bank held the funds of appellant, Independence County, under the orders of the county court designating it as the county depository, for a period of six months, or two quarters, beginning on January 13, 1913, and ending July 12, 1913, at which latter date the Supreme Court decided that the bank was not the legal depository of Independence County because it had not made the bid in compliance with the statute creating such depositories.

The defendants entered a demurrer to the complaint, setting up that it "did not state facts sufficient to entitle plaintiff to recover thereon." The court sustained the demurrer, and plaintiff below, appellant here, electing to stand on the complaint, the court rendered judgment in favor of the defendants, appellees here, dismissing their complaint, and for costs. The plaintiff below, appellant here, duly excepted, and this appeal follows.

Hugh W. Williamson, Prosecuting Attorney, and *Samuel M. Casey,* for appellant.

1. The bank's bid was declared illegal in 109 Ark. 11. It is elementary that no one can take advantage of his own wrong or fraud. 94 Ark. 311. The bondsmen are estopped. 48 Ark. 254; 80 *Id.* 65.

2. The interest was payable quarterly on daily balances, Acts 1907, page 485, as amended by Acts 1911, page 252. The bank and bondsmen were clearly liable for six months' interest.

C. F. Cole and *McCaleb & Reeder,* for appellee.

1. There can be recovery on a bond which was void. If the bid was void as held in 109 Ark. 11, the bond was void. 30 How. Pr. 113. The obligee by its act put it out of the power of the obligor to perform the conditions of the bond. 26 Am. Dec. 180; 10 L. R. A. (N. S.) 414, 415.

2. One of the conditions of the bond was that the bank should have the money for two years. The breach of the bond rendered it void. 30 Ark. 186; 90 *Id.* 272;

10 Ark. 326. The contract was an entirety and not divisible. 52 Ark. 257; 63 *Id.* 202; 22 *Id.* 158; 43 *Id.* 275.

WOOD, J., (after stating the facts). Although the bid of the bank was illegal, as held by this court in *Casey* v. *Independence County,* 109 Ark. 11, nevertheless it had the effect of causing the county court to name the bank as depository, and the bank acting in the capacity of county depository proceeded to execute the bond, and the funds of the county were deposited with it and it had the use of these funds for a period of six months. This bid and bond were in the nature of a contract with the county to pay it the interest specified in the bid in the manner prescribed by law for county depositories during the time it held the funds. The judgment of the circuit court affirming the judgment of the county court designating the bank as depository, although appealed from and finally reversed by this court, nevertheless went into effect for a period of six months. During this time the bank, under this judgment, held and had the use of the county's funds, and it and its bondsmen must pay the interest they agreed to pay according to their bid and bond for the use of this money. To hold otherwise would be to permit them to profit by their own illegal act, not intentional, to be sure, but nevertheless such would be the effect in law. The bid of appellee bank was not immoral and no public policy forbade it. This bid was declared illegal simply because it was not in compliance with the statute. The bid and bond, as set up in the allegations of the complaint, in other words, constitute in effect an agreement between the bank and the county whereby the bank was to pay the county the sum of 4½ per cent. for the money that the county should deposit with it on daily balances to be paid quarterly.

The principle of law controlling here may be stated in the language of Mr. Justice Swayne, speaking for the Supreme Court of the United States in *Union National Bank* v. *Matthews,* 25 U. S. (L. C. P. Ed.) 188-190: "A party who has had the benefit of an agreement can not be permitted in an action founded upon it to question its va-

lidity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains."

While this is not strictly a contract *inter partes,* it is the same in legal effect and the same principle applies thereto.

The allegations of the complaint, for the purpose of this demurrer, must be taken as true, and the facts stated therein constitute a cause of action. The court, therefore erred in sustaining the appellees' demurrer thereto, and for this error the judgment is reversed and the cause remanded with directions to overrule the demurrer and for further proceedings according to law.

WATTS v. HICKS.

Opinion delivered July 12, 1915.

1. GUARDIAN AND WARD—SALE OF WARD'S LAND—NECESSARY PARTIES.—A proceeding by a guardian to obtain the sale of his ward's real estate is not an adversary proceeding, and the minor is not a necessary party, and a guardian *ad litem* need not be appointed for him.
2. GUARDIAN AND WARD—REMOVAL OF GUARDIAN FROM THE STATE.—While under the terms of the statute (Kirby's Digest, § 3778) letters of guardianship are not revoked by the removal of the guardian from the State, yet the fact of the removal of the guardian from the State is sufficient reason for severing the relation of guardian and ward and revoking the appointment.
3. GUARDIAN AND WARD—REMOVAL OF GUARDIAN FROM STATE—PETITION FOR SALE OF LAND—DUTY OF PROBATE COURT.—Where a minor's guardian removes her residence from the State, and later petitions the probate court for an order of sale of the minor's land, the county court should proceed to remove the guardian and settle her accounts with the minor, and the county court is without jurisdiction to order a sale of the minor's land, upon petition of the guardian, who had left the State.
4. INFANTS—SUPPORT—SALE OF LAND.—Where it appeared that an infant owned land bringing in a net income of about $150 a year, and that it required but $8 per month to support the infant, it would be improper to order a sale of the infant's land for the support of the infant, it appearing also that the land was likely shortly to enhance in value.

5. INFANTS—PROTECTION OF RIGHTS—NEXT FRIEND AND GUARDIAN AD LITEM.—Infants, being persons under disability, can not conduct their own legal proceedings, and the usual custom is for them to appear either by next friend or by guardian *ad litem*, the only difference between the functions to be performed by the next friend and the guardian *ad litem* being that the former prosecutes and the latter defends for the minor.
6. INFANTS—PROTECTION OF RIGHTS—NEAR RELATIVE.—Any near relative of an infant may become a party to an action to sell the lands of the infant, for the purpose of protecting the infant's interest.
7. INFANTS—SALE OF PROPERTY BY GUARDIAN—RIGHT OF INFANT, BY NEXT FRIEND, TO OBJECT.—A minor has a right to appear by next friend and object to a sale of his real estate, and to appeal from an order of the probate court directing such sale to be made by the guardian.
8. INFANTS—SALE OF LAND—OBJECTION—HOW MADE.—The guardian of an infant petitioned the county court to order a sale of the infant's real property. The infant's grandfather appeared and filed a remonstrance. *Held*, the remonstrance made by the grandfather would be treated as made by the infant's next friend, and the remonstrant may appeal to the circuit court from an order adverse to the infant's interests.

Appeal from Logan Circuit Court; *James Cochran*, Judge; affirmed.

W. A. Ratterree and *J. H. Evans*, for appellant.

1. The circuit court had no jurisdiction to hear the cause. This was an *ex parte* proceeding, and it was improper to allow appellee, the grandfather, to become a party thereto and to appeal from the judgment of the probate court to the circuit court.

In a proceeding of this kind, the guardian, who occupies a fiduciary relation, and the minor, who is the real party in interest, are the only persons who can be aggrieved by the order or judgment of the probate court. If the guardian or minor is not aggrieved, no third person, whether relative or not, can claim to be.

Under the general law, parties to legal proceedings are only those whose legal rights may in some way be affected by the judicial proceeding. Kirby's Dig., § § 6005, 6006.

Appellee occupied the relation of a friend of the court merely, and as such might properly appear in the

probate court, offer proof and be heard in opposition to the application for the order of sale; but he could not be aggrieved legally by the judgment of the court and could not appeal therefrom in the absence of a special statute authorizing it. See Kirby's Digest, § 1348, as amended by Act 327, Acts 1909. See also 89 Ark. 553; 28 Ark. 478; 47 Ark. 411; 1 Words & Phrases, "Aggrieved Parties;" 45 N. E. 706-7; 152 Ind. 546; 3 N. Y. Sup. 664; 45 S. E. 498, 118 Ga. 684.

In order to give a right of appeal, it must appear that the party appealing has some pecuniary interest or personal right which is immediately or remotely affected or concluded by the judgment appealed from. 24 R. I. 179; 6 N. H. 116; 47 Mass. 194; 128 Mass. 192. See also 140 Wis. 572; 123 N. W. 144; 1 Cyc. 283-4.

2. The evidence does not support the finding and judgment of the circuit court.

Kincannon & Kincannon, for appellee.

1. The circuit court's judgment is right and supported by the facts developed in evidence. In view of the income from the land and the prospect of increase in both the value of the land and the income, it would be ill-advised to permit its sale now while the minor is so young and the amount necessary for her support, etc., is so much smaller than it will be when she grows older; and especially would it be ill-advised from a business standpoint to sell the land and turn the proceeds over to a guardian out of the jurisdiction of the court at a time when, by her own acknowledgment, she has no property selected or in mind, in which to reinvest the fund. It might result disastrously to the ward, since the guardian would not be liable for loss resulting from error in judgment even if she acted in good faith in the reinvestment of the funds. 21 Cyc. 78, note 44.

2. Appellee, the grandfather, had the right to appeal from the judgment of the probate court.

HART, J. On the 17th of July, 1914, Lizzie Hicks filed a petition in the probate court for the southern dis-

trict of Logan County, Arkansas in which she represented that she was guardian for Frankie Hicks, a minor, and that said minor was the only heir at law of the estate of Frank Hicks, her deceased husband; that there was no personal property belonging to said estate and that the estate consisted only of a tract of land comprising about seventy acres. She asked for an order of sale for the benefit of the minor, alleging that the minor was in need of the proceeds of said land for the purpose of educating and maintaining her, and reinvesting the surplus, if any.

H. C. Hicks, grandfather of the minor, filed a remonstrance to the petition and objected, in behalf of the minor, to the sale of the land on the ground that it was not necessary and that such sale would be improvident. His reasons were set out in his remonstrance.

It was shown to the probate court that Frank Hicks, father of the minor, died in Logan County, Arkansas, and at the time of his death owned a tract of land comprising about seventy acres; that his widow was appointed guardian of the minor child; that she was a school teacher and that about a year prior to the filing of the petition for the sale of the land moved to New Mexico and carried her child with her; that her husband died October 30, 1907; that at the time the application for the sale of the land was made the minor was about seven years old; that on June 4, 1914, Lizzie Hicks married a Mr. Watts in the State of New Mexico and resided in that State with him at the time she filed her petition for the sale of the real estate.

The petition was sworn to before a notary public in that State on the 17th day of July, 1914, and was filed in the probate court on the 28th day of July, 1914. She gave her deposition to be used on the hearing before the probate court, and in that deposition testified that she had no special property in view for reinvestment and did not know what kind of property she intended to invest in for the minor. She testified that it cost her about $8 per month to support the minor while she lived

in Arkansas, but that the minor was then larger, required more clothes, was about to start to school, and that it would cost about $16 a month to support her in the future.

On the part of the remonstrant it was shown that the land was situated near the town of Booneville, and was likely to greatly increase in value in the future; that about fifty acres of the land was under cultivation and rented for $150 a year and that with proper care it could be rented for $200 a year; that the taxes on the land were between twenty and thirty dollars; that the soil was fertile; and that the land was worth about $2,500.

At the October term of the probate court the petition and remonstrance were heard by the court and an order of sale of the land was made. H. C. Hicks, grandfather of the minor, filed an affidavit for appeal to the circuit court. In the circuit court a motion was made by the petitioner to dismiss the appeal and the motion was overruled by the court. The circuit court heard the case on substantially the same state of facts as that proved in the probate court and denied the petition for the sale of the minor's land. From the judgment rendered the petitioner has duly prosecuted an appeal to this court.

(1) It is insisted by counsel for the guardian of the minor that the grandfather of the minor was improperly allowed to become a party to the proceeding and to appeal from the judgment of the probate court ordering the land sold. Therefore, they insist that the circuit court erred in refusing to dismiss the appeal. We do not agree with them in this contention. It is true that in this State a proceeding by a guardian to obtain the sale of his ward's real estate is not an adversary proceeding and on that account the minor is not a necessary party and a guardian *ad litem* need not be appointed for him.

(2) Section 3778 of Kirby's Digest provides that no person other than a resident of this State shall be appointed a guardian, and if after his appointment any guardian removes from the State his appointment shall

be revoked and proceedings had as in other cases of revocation. While under the terms of the statute the letters of guardianship are not revoked by the removal of the guardian from the State, yet the fact of the removal of the guardian from the State is sufficient reason for severing the relation of guardian and ward and revoking the appointment. 21 Cyc. 55.

(3) It appears from the record in this case that the guardian was a resident of the State of New Mexico. The probate court on its own motion, under the statute, should have proceeded to remove the guardian and to settle her accounts with the minor. It should not have made an order for the sale of the minor's land upon the petition of the guardian who had left the State and was beyond the jurisdiction of the court.

(4) Moreover, the testimony introduced by the grandfather in behalf of the minor tended to show that it was improvident to sell the lands of the minor; that the minor was young and did not require more than $8 a month for her support, and that the land was capable of being rented for $200 per annum; that the taxes amounted to only between $20 and $30; that the soil was very fertile; that the land was situated near a growing town and was likely to greatly increase in value in the near future. Under these circumstances it would not be for the best interests of the minor to sell the lands.

But it is claimed by counsel for the guardian that the probate court had no authority to allow the grandfather to be made a party to the proceedings because, as we have already seen, the proceeding for the sale of the land was not an adversary action. They contend, therefore, that the appeal should have been dismissed.

(5) Infants, being persons under disability, can not conduct their own legal proceedings, and the usual custom is for them to appear either by next friend or by guardian *ad litem,* the only difference between the functions to be performed by the next friend and the guardian *ad litem,* that the former prosecutes and the latter defends for the minor.

In the case of *Crow, Guardian,* v. *Reed,* 38 Ark. 482, the minor filed exceptions to the current settlement of her guardian with the probate court. She did not appear by next friend or special guardian. The court sustained her right to file the exceptions and in its opinion called attention to the fact that the probate judge should not wait to be moved to correct errors in accounts of guardians and said that otherwise the interest of minors might often be sacrificed by failure of vigilance on the part of near relatives or next friends. Thus it will be seen that the right of infants to form an issue as to the correctness of guardian's accounts is recognized.

(6) The right to appeal from the judgment confirming a settlement of a guardian was also recognized in the case of *Nelson* v. *Cowling,* 89 Ark. 334. By analogy, we think the probate court, under the facts and circumstances adduced in the present case, might allow any near relative of the minor to become a party to the action for the purpose of protecting the interests of the minor. When the minor, by her next friend, was allowed to become a party to the proceeding this raised an issue, not only as to whether the court had the legal right to make the sale, but also the additional question as to whether such sale was advisable; and we are of the opinion that the probate court did not err in allowing the minor, by her next friend, to appear to make objections to the sale.

(7-8) We have not copied the petition of the grandfather into the record on account of its length; but when the petition is read from its four corners it is evident that the grandfather appeared as next friend for the minor and not for his own interest. We are of the opinion that the minor had a right to appear by her next friend and object to the sale of her real estate and to appeal from an order of the probate court directing such sale to be made by the guardian. As already indicated, we are of the opinion that the remonstrance filed by the grandfather and objection made by him was as next friend for the minor and from the views we have ex-

pressed it follows that the circuit court did not err in refusing to dismiss the appeal; and that its judgment refusing to allow the sale of the minor's real estate was correct.

The judgment will be affirmed.

APPENDIX

I.

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Carr *v.* Triplett; appeal from Jefferson Chancery Court; John M. Elliott, Chancellor; affirmed May 31, 1915, *per* Wood, J.

The J. R. Watkins Medical Co. *v.* Haynes; appeal from Randolph Circuit Court; J. B. Baker, Judge; reversed May 31, 1915, *per* Kirby, J.

Pine Bluff Natural Gas Co. *v.* Guest; appeal from Jefferson Circuit Court; A. H. Rowell, Special Judge; affirmed June 14, 1915, *per* McCulloch, C. J.

Hight *v.* Shuman; appeal from Washington Circuit Court; J. S. Maples, Judge; affirmed June 28, 1915, *per* McCulloch, C. J.

Lueker *v.* Harris; appeal from Perry Circuit Court; G. W. Hendricks, Judge; affirmed June 28, 1915, *per* McCulloch, C. J.

Atkinson *v.* Atkinson; appeal from Conway Chancery Court; Jordan Sellers, Chancellor; affirmed June 28, 1915, *per* Kirby, J.

Wilhelm *v.* Young; appeal from Cross Circuit Court; W. J. Driver, Judge; affirmed July 5, 1915, *per* McCulloch, C. J.

Davis *v.* Hall; appealed from Garland Chancery Court; J. P. Henderson, Chancellor; affirmed July 12, 1915, *per* Smith, J.

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St. Louis Southwestern Railway Company *v.* Mrs. Myrtle Watts; Cleveland Circuit Court; Turner Butler, Judge; settled and appeal dismissed on appellant's motion, June 7, 1915; *per curiam.*

Western Union Telegraph Company *v.* Eliza Forgason and Charles Forgason; Cleburne Circuit Court; Geo. W. Reed, Judge; settled and appeal dismissed on appellant's motion June 21, 1915; *per curiam.*

Lee Dollins *v.* The State of Arkansas; Clay Circuit Court, Western District; W. J. Driver, Judge; appeal dismissed on appellee's motion, June 21, 1915, for failure of appellant to comply with the condition of the statute in misdemeanor cases; *per curiam.*

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J. N. Beakley *et al. v.* Hurley Moore, Minor, by W. A. Cunningham, Guardian; Lawrence Circuit Court, Western District; R. E. Jeffery, Judge; affirmed under rule 7 on appellee's motion, July 12, 1915; *per curiam.*

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