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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

ARKANSAS NATIONAL BANK *v.* JOHNSON.

Opinion delivered January 17, 1916.

1. LARCENY—OBTAINING MONEY THROUGH TRICK OR DEVICE.—Where possession of drafts and money is obtained from the owner, through a trick or device, with the intent, at the time the party receives them, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the party receiving the property is guilty of larceny.
2. BILLS AND NOTES—FRAUD—CONSIDERATION FOR A BET.—Plaintiff parted with the possession of a draft to persons participating in a fraudulent betting scheme, plaintiff, however, having no knowledge that the transaction was fraudulent; the drafts were endorsed to S., who deposited same in defendant's bank, and checked out the proceeds. *Held*, the draft was good in the hands of anyone who took the same without knowledge of the fraud.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed.

Rector & Sawyer, for appellant.

1. The court erred in not granting the peremptory instruction asked by defendant. The principle governing the relationship of Spear and the bank is that of principal and agent. 5 Cyc. 493; 78 Neb. 334; 110 N. W. 1019; 126 Am. St. 604; 102 Mass. 503.

2. One who pays a gambling obligation by check can not recover from the bank * * * even though the bank knows the purpose for which the check was drawn. 154 Ill. App. 74; Elliott on Cont., § 1019.

3. The court erred in giving instruction No. 5. Kirby's Dig., § 3687, etc. It had no place in this case. In 110 Ark. 587, the bank had *actual notice;* in this case the

proceeds were paid to Spear without any notice. No bad faith or gross negligence is shown on the part of the bank; an attempt to hold the proceeds of a stolen draft is a question of good faith. 7 Cyc. 945, cit. 61 Ark. 81. Ch. 73, Kirby's Digest, § 3687, etc., does not permit of the construction given by the court in its charge. Gambling is not larceny. The same rule applicable to a payment of a deposit is applicable to the payment of a draft for collection. 56 Ark. 508. *Actual* notice is necessary. 110 Ark. 587. A mere naked bailee who does no act and has no intent to convert to his own use, or withhold for his own use, and before demand delivers the goods back to the owner, is not guilty of conversion. *Loring* v. *Mulcahy,* 3 Allen 575.

Martin, Wootton & Martin, for appellee.

The proof shows conclusively that plaintiff was induced by fraud and deception to part with the check, and that shifted to a subsequent holder the burden of showing that he was a holder for value. 110 Ark. 578; 48 *Id.* 454. The possession of property recently stolen is evidence of guilt. It was for the jury to decide whether the bank had knowledge that the draft was stolen or not. 1 Wigmore on Evidence, § § 302-324, 325. *Rumping* v. *Ark. Nat. Bk.,* 121 Ark. 202.

Reading the instructions as a whole, there is no prejudicial error.

HART, J. Appellee sued appellant and one Ed Spear, alleging that there had been stolen from him certain drafts and a certificate of deposit and money, aggregating the sum of $5,125, and that appellant and Spear received and converted the same to their own use, knowing them to have been stolen.

Appellant answered that it had no knowledge of the drafts having been stolen, and that if it received said drafts and certificate of deposit, it received them from Spear in good faith and without knowledge or notice of any defect in Spear's title, and paid the proceeds over to him before the institution of this action. There was a trial before a jury which resulted in a verdict and judg-

ment in favor of appellee against the appellant bank and Spear. The bank alone has appealed.

Briefly stated, the facts are as follows:

Matt Johnson, a farmer from North Dakota, came to Hot Springs, Arkansas, in December, 1912, for the benefit of his health. A few days after his arrival a stranger, who called himself Anderson, made his acquaintance. Anderson said he was from Minnesota and had just sold a piece of land for $14,000 cash, which was deposited in a bank at Fargo, North Dakota. Anderson cultivated the acquaintance of Johnson, and they went around the city a good deal together. They visited the race track, and while there Anderson told Johnson of seeing a man in Minnesota who had won a large sum of money betting on horse races. A few days after this they went out to the ostrich farm, and while there saw a man standing off to one side counting what seemed to be large sums of money. Anderson called Johnson's attention to this man and told him he was the man he had seen win such a large sum of money in Minnesota. Anderson then accosted the man and told him of seeing him betting on the races in Minnesota. This man at first denied his identity, but subsequently admitted that he was the man. He gave his name as Hamilton and told them he represented some men who won large sums of money on horse races, that the men he represented had inside information so that in each race they knew which horse was going to win, that he traveled around over the country betting large sums of money for these men, and that they always telegraphed him in advance which horse was going to win, so that they never lost anything. They finally went into the pool room which was situated near the ostrich farm and Hamilton apparently placed some bets on two or three races and won. Anderson and Johnson were then persuaded to bet on another race. Johnson finally put up what money he had, a draft for $100 and a deposit slip on the Arkansas National Bank for $130, and he and Anderson also wrote out a check for $10,000 each. Hamilton took the checks and drafts and went into the pool room. In a short time he

came back with a card showing that he had made a bet for them, and the name of the horse he had bet on. A little later he got a telegram saying he had won. Hamilton gave Anderson the betting card and Anderson went into the pool room and presented the card. The man there began to figure out how much they had won, and Anderson said to him, "We have got some drafts and checks here you may as well give back to us in place of that much money." The man then took up the checks and drafts and said, "We do not know whether these papers are any good or not; we are not allowed to accept bets of drafts; I wasn't here when this bet was made, and my assistant had no authority to take this kind of bet; you will have to show me that you have the money represented by your checks." Johnson was with Anderson, and they then went back into another room, where Hamilton was and told him about it. Hamilton asked Johnson how much he thought he could raise on short notice, and Johnson replied about $5,000. Anderson stated that he had $14,000 deposited in a bank at Fargo, North Dakota. Their checks amounted to $20,000, and Johnson's $5,000 and Anderson's $14,000 thus made $19,000. Hamilton agreed to put up the balance. Johnson went to his home in North Dakota and procured a draft for $4,500 and $345 in money. The draft was turned over to Ed Spear for collection. He deposited it in the Arkansas National Bank for collection. The draft was collected by the bank and the proceeds checked out by Spear.

Proof on the part of the appellee tended to show that no money was bet on the horse races, and that the whole transaction was a scheme on the part of Anderson and Hamilton to obtain Johnson's money. Counsel for appellant admit this and also admit that the money obtained by Hamilton and Anderson from Johnson, was, under such circumstances, larceny. It was the theory of appellee that Spear had knowledge of the circumstances under which Anderson and Hamilton obtained the money from Johnson, or, at least, that appellant and Spear were possessed of sufficient information, which, if pursued by a man of

ordinary prudence, would lead to knowledge of the circumstances under which Hamilton and Anderson received the money and drafts from Johnson.

Testimony was adduced by appellee tending to show that the bank had received drafts for a large amount from Spear at different times for collection, under precisely similar circumstances; on the other hand, evidence was adduced by the appellant bank tending to show that it had no knowledge whatever of the circumstances under which Spear received the drafts and certificate of deposit, and that it received them from him for collection in good faith in the ordinary course of business.

The facts in the present case are precisely similar to the facts in the recent case of *Rumping* v. *Arkansas National Bank,* 121 Ark. 202. In that case the court held that the circumstances under which the assignment of the drafts were obtained from Rumping amounted to larceny or to obtaining money under false pretenses. The principle applicable for determining whether or not money obtained under circumstances similar to those in the present case amounts to larceny is well stated in the case of *People* v. *Tomlinson,* 102 Cal. 19, 36 Pac. 506. There the court said:

"Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by false pretenses. But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny." To the same effect see *State* v. *Ryan* (Oregon), 1 L. R. A. (N. S.) 862; *State* v. *Dobbins,* 152 Iowa 632, 132 N. W. 805, 42 L. R. A. (N. S.) 735, and case notes.

(1) In the instant case, Anderson and Hamilton were confederates. There was not to be a *bona fide* race. They intended to keep the money they received from Johnson. Johnson never intended to part with the title to his money or drafts. Although he voluntarily gave the drafts and money to Hamilton, he did not part with the title to the same. Therefore, Anderson and Hamilton obtained his drafts and money feloniously and were guilty of larceny.

(2) Counsel for appellant assign as error the action of the court in giving at the instance of appellee instruction No. 5, which is as follows:

"In this State the law provides that all bills or notes given for a bet or wager are void, and if you believe from the evidence that the defendants, or either of them, paid the money collected on the drafts in question to any person under the belief that such person had won them at gambling, such payment would not relieve him of responsibility to plaintiff."

The court erred in giving this instruction. As we have already seen, the drafts and certificate of deposit were received by Hamilton under such circumstances as amounted to larceny. Anderson and Hamilton made use of the bet as a device to secure possession of Johnson's money. The bet was not a real one, but was merely colorable or simulated for the purpose of obtaining possession of Johnson's drafts and money, and was obtained under such circumstances that it was larceny in Hamilton's appropriating it. Therefore, the instruction in question was abstract and had no proper place in the case. The court erred in giving it, and it was so held in the recent case of *Rumping* v. *Arkansas National Bank, supra,* to which reference is made for a more extended discussion of the assignment of error, which we do not deem it necessary to repeat here.

Finally it is insisted with great earnestness by counsel for appellant that it had no knowledge and was not in possession of facts leading to knowledge that the drafts and certificate of deposit in question were received by

Hamilton under circumstances which would amount to larceny, and that on this question, under the ruling of *Rumping* v. *Arkansas National Bank, supra,* the judgment should be reversed and the cause of action against it dismissed.

We expressly refrain from passing upon this question for the reason that the testimony on this branch of the case may be different on a retrial of it, or, it may be that additional testimony may be secured by either party which would turn the scale in his favor.

For the error in giving instruction No. 5, as indicated in the opinion, the judgment will be reversed and the cause remanded for a new trial.

MONK *v.* LITTLE.

Opinion delivered January 3, 1916.

1. RELIGIOUS SOCIETIES—PROPERTY DISPUTES—JURISDICTION OF THE COURTS.—Courts may properly assume jurisdiction of a dispute between different factions of a church organization, where property rights are involved.
2. RELIGIOUS SOCIETIES—CONTROL BY MAJORITY.—Where the congregation is the governing body of an individual church, the majority, if they adhere to the organization and to the doctrines of the church, are entitled to the control of the church property.
3. RELIGIOUS SOCIETIES—CONTROL OF CONGREGATION BY CHURCH COUNCIL.—A dispute arose in the congregation of a church of the Primitive Baptist denomination; a council of the denomination met and undertook to adjust the difference. *Held,* the congregation being the governing body of the church, and the council being a voluntary organization, its action being only advisory upon the congregation, was not controlling, the congregation not having agreed to abide by the decision of the council.

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

John P. Woods and *Daniel Hon,* for appellants.

Little Flock * * * Church is not an independent religious organization, but if she was, she was not of the primitive Baptist denomination, nor of any other, but an "Ishmaelite." She held her property as a church of the

religious denomination of which she was a member; she was part of an organization governed by a constitution, rules and articles of faith, etc. Constitution, § 4. Appellees are bound by the action of the council. The chancellor's findings of facts are correct, but he erred in his views as to the law. Appellants, heeding the biblical injunction of Paul, withdrew from brethren that walked disorderly and not after the tradition of the Lord. 2 Thess. 3:6; A. & E. Enc. Law, p. 353 (2 ed.); 24 Cyc. 350. Courts award property rights * * * but inquire only as to the rules and decisions of the church and its tribunals and what parties and factions adhere to them without questioning their wisdom or propriety. 24 Cyc. 350; 24 A. & E. Enc. Law, p. 350, 356 (2 ed.); 96 Ark. 123; 44 Atl. 240; 45 *Id.* 771; 48 S. W. 534; 73 Conn. 718; 49 Atl. 241. Under these cases Little was stripped of his ministerial duties until he was reconciled to his church and all the appellees are without standing with the church.

The action of the council was final and binding. 119 Ark. 128. See, also, 93 N. W. 473; 81 Mo. App. 525.

J. H. Evans, for appellees.

Upon the evidence and admissions in the record, the decree should be sustained. This court, in a case like this, takes judicial knowledge of matters of public history and common knowledge: As that Baptist churches are independent; that they are congregational; that there are no church judicatories about the individual church that have any right or power to control the action of the church with reference to any church matter. 58 L. R. A. 723. *Sanders* v. *Baggerly,* 96 Ark. 117, settles the law in this State. The leading case in this country settles the law as to the rights and powers of individual churches to the control of their property. 13 Wallace 679; 3 B. Mon. 253; 24 L. R. A. (N. S.) 696; 49 S. W. 904; Theodosia Earnest, pages 349, 251. We have carefully searched the scriptures, but find no warrant for the action of five members out of fifty-five at an irregular meeting to exclude the pastor and ten others from membership. The nearest we find are Leviticus, ch. 26-8, and Joshua, ch. 23-10.

HART, J. John B. Little and others, claiming to be members of the Little Flock Primitive Baptist Church, brought this suit in equity against Charles M. Monk and others, also claiming to be members of said church, to obtain the right to the custody of the church building of said religious society and to restrain the defendants from the use thereof.

The Little Flock Primitive Baptist Church was organized some twenty years ago in the community of Cross Roads, in Dayton Township, Greenwood District of Sebastian County, Arkansas, and at the time of the controversy which finally caused this suit, contained about forty-five members. The church in question was an independent religious society of the Primitive Baptist faith. On the second day of April, 1907, the church property in controversy in this suit was conveyed by warranty deed from the owner to the Little Flock Church of the Primitive Baptist denomination, and to its successors and assigns forever. Since the organization of the Little Flock Church, its regular time of meeting has been the second Sunday and Saturday of each month. At its regular meeting in July, 1912, a member who had been expelled from the church asked to be restored to membership and for a letter of dimission. John B. Little, who was then pastor, and ten others of the congregation, voted against his restoration, and eleven others of the congregation voted for it. So, the vote resulted in a tie, and the petition of the excluded member for restoration to the church was denied. The congregation then proceeded to elect a pastor for the ensuing year and John B. Little was again elected as its pastor. Thereafter on the 6th day of August, 1912, the defendant M. Barton, with four others, who were then members of the Little Flock Church, without any notice to the congregation, met and voted to exclude John B. Little and ten other members of the church from membership in it. Since that time there has been a division in the church, a part of the congregation worshipping with John B. Little as its pastor, and claiming to represent the church and an equal number, having

elected Doctor Monk as their pastor, worshipped with him, and also claimed to represent the church.

In December, 1911, the two factions, if such they may be called, agreed to call a council of ministers and members of the Primitive Baptist Churches to hear the case and give its advice. A council of eight, consisting of seven ministers and one layman, mostly from other States, assembled and heard the case. In May, 1912, the council rendered its decision as follows:

"We, your council, have unanimously agreed that the consideration of the evidence considered is sufficient to convince us that the acknowledgment made by W. H. Wheeler is sufficient to secure membership in any Baptist Church of our faith and order."

John B. Little and ten other members of the congregation refused to abide by the finding of the council, and as above stated refused to join in granting the church letter to W. H. Wheeler at the regular meeting in July, 1912. The faction which had chosen Little as pastor selected messengers to an association of churches of the Primitive Baptist faith; and the faction which had elected Charles Monk as its pastor also selected messengers for this association. The latter were recognized by the associtaion.

The Little Flock Primitive Baptist Church was an independent religious society, and the congregation was its governing body. According to its rules, the action of the majority of the church members at a regular church meeting is the action of the church and is final and binding unless changed by the regular action of the church itself. Councils, associations, and conventions are not church adjudicatories. The individual church congregation is the sole and only judge of its actions.

The chancellor found in favor of the plaintiffs and decreed that they were entitled to the possession and management of the church property, and the defendants were ordered to surrender possession thereof to the plaintiffs. They were also enjoined from in any way using said property without the consent of the plaintiffs. From the de-

cree entered of record, the defendants have duly prosecuted an appeal to this court.

We think the decision of the chancellor was correct. In the case of *Sanders v. Baggerly*, 96 Ark. 117, a union between the Cumberland and Presbyterian churches was involved and the court held that civil courts will not assume jurisdiction of controversies over matters purely of church doctrine or discipline where no property rights are involved. The court further held that even in cases involving civil or property rights when questions arise concerning matters of church doctrine or discipline which have been decided by a church court vested with such jurisdiction by church laws, the civil courts accept as final and conclusive, decisions of the ecclesiastical courts.

(1) In the case before us, property rights are involved, and the court properly assumed jurisdiction of the case.

(2) In the case of *Hatchett et al.* v. *Mount Pleasant Baptist Church et al.*, 46 Ark. 291, the court expressly held that in a congregational church the majority, if they have adhered to the organization and to the doctrines of the church, represent the church. The court said they control in the government of the church and have a right to select its pastor and control its property. The opinion in the case was delivered by Judge Battle, who was specially fitted to speak on the subject, not only because of his learning and eminence in the law, but also because of his long and close connection with the Baptist faith.

Under the principles announced in that case, it may be said that the plaintiffs in the case before us elected a pastor at a regular church meeting, and are entitled to the control of the church property.

(3) The attempt to expel them on the 6th day of August, by Barton and four others, was without authority unless it can be said that the action of the council was binding upon the church, and that Little and others put themselves in rebellion to the governing body of the church by refusing to abide by the decision made by the council.

As we have already seen, the congregation was the governing body of the church, and the action of the majority of the congregation is controlling. The selection of eight persons to sit as a council did not constitute the council the governing body nor require the congregation to abide by its decision. The council was a voluntary one, and its action was only advisory upon the congregation, and was not controlling.

Counsel for appellants rely upon the principles of *Arthur* v. *Norfield Parish Congregational Church* (Conn.) 49 Atl. 241, but in that case a majority of the congregation at a regular church meeting voted to accept the decision of the council, and by that act made the decision of the council the decision of the congregation. In the instant case, at a regular meeting of the congregation, the action of the council was called up for consideration and a majority of the congregation did not vote to accept it. The council not being a judicatory, its action was not conclusive of any rights.

So, it may be said in regard to the association. The fact that it recognized the messengers selected by the defendants is not an ecclesiastical decision of the governing body of the church that the defendants are right. The act of the association was advisory merely, and its decision is not binding upon the civil courts.

According to our own decisions, the congregation was the sole judicatory of the church. To the same effect see *Mason* v. *Lee,* 50 So. (Miss.) 625; see also case note to *Mack* v. *Kime,* 24 L. R. A. (N. S.) 696.

It follows from what we have said that Little and other members of the congregation were not legally expelled from the church, and that they are entitled to the control of its house of worship and other property.

The decree will, therefore, be affirmed.

HART, J., (on rehearing). Counsel for appellants, in their brief on motion to rehear, claim that we did not take into consideration a part of the church record in rendering our decision. The part to which they refer is the proceedings on Saturday before the second Sunday in

May, 1912, which was the first meeting after the council rendered its decision. The record shows that the members of the church met for divine service, and that there was a call for the peace of the church; that it was stated that the church was not in peace; that there was a motion and a second that the church abide by the decision of the council and accept its advice; that the motion was carried; that there was then a motion and second that Wheeler be given a letter, and that this motion did not carry.

This was considered by us on our former opinion. The record in the case was very voluminous, and we did not deem it necessary to state the facts at length. The whole object of calling the council and asking its advice was to obtain a letter for Wheeler who had removed to the State of Oklahoma. So it will be seen that when the record is read together that the object of the proceeding was not accomplished, that is a letter was not given to Mr. Wheeler.

That this was the object and purpose of the whole meeting is evidenced by the fact that that matter was again brought up at the July church meeting, and the church again refused to grant a letter to Mr. Wheeler.

Even if we are mistaken in this, it can not be said that appellees were in rebellion to the constituted church authorities because they did not vote to grant a letter to Mr. Wheeler, and that they were subject to expulsion from the church. A few of the members met, not at a regular church meeting, at the home of a private individual and attempted to remove appellees from the church. Their whole action was irregular and without sanction of church authority. Appellee Little was the pastor of the church and he and the other trustees rightfully held charge of the church property. The court so held and ordered appellants to surrender possession of the property to appellees.

The motion for rehearing will be denied.

SAIN v. BOGLE.

Opinion delivered January 3, 1916.

1. DRAINAGE DISTRICTS—ATTORNEYS' FEES.—The attorneys for a drainage district organized under Act 221, Acts 1911, can not be appointed until after the district has been established by the county court, and such attorneys are not allowed any compensation, by the statute, for services rendered prior to that time.
2. DRAINAGE DISTRICTS—ATTORNEYS' FEES.—A drainage district was organized under Act 221, Public Acts 1911; the validity of the organization was tested, and sustained by the chancery court, but almost immediately thereafter the district was dissolved by the Legislature. *Held*, the act contemplated the employment of but one firm of lawyers for the district, and that under the facts, a fee of $1,000 was proper in payment for the services rendered. *Semble*, but other counsel may, in the sound discretion of the court, be employed to aid in litigation against the district.
3. ATTORNEYS' FEES—PROOF.—The testimony of duly qualified witnesses given as expert opinion evidence is admissible on the issue of the value of the services of an attorney, but the opinion evidence of such expert witnesses is not conclusive, such evidence, however, is to be taken into consideration with all other evidence in the case in arriving at a conclusion as to the just and reasonable compensation for the services performed.
4. ATTORNEYS' FEES—REASONABLE FEE—PROOF.—In determining what is a reasonable attorney's fee, it is competent and proper to consider the amount and character of the services rendered, the labor, time and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys.
5. DRAINAGE DISTRICTS—ENGINEER'S FEES.—The engineers of a drainage district are entitled only to such fees as are expressly, or by necessary implication, allowed by the statute under which the district is organized, and for work actually done by them for the district.
6. DRAINAGE DISTRICTS—PRELIMINARY SURVEYS—FEE OF ENGINEERS.—It is only when a drainage district is formed that the engineers thereof are entitled to compensation for preliminary surveys.

Appeal from Monroe Chancery Court; *Jno. M. Elliott*, Chancellor; reversed.

S. S. Jefferies, for appellants.

There was fraud in the formation of the district in this; Bogle, Thomas & Lee and White & Watson entered into an agreement, which was unlawful and fraudulent, and was carried out. The contract to pay 5 per cent of the cost of construction was improvident and wasteful. Such *jobs* the law will not permit. 3 Mason 405, 415, 418. The attorneys violated their duty to their client as laid down by Judge Story. *Ib.* Our rule in fraud cases is clearly shown in 110 Ark. 335, 347, 348; 33 *Id.* 429-30; Act 279, 1909 and Act 221, 1911.

2. Contracts opposed to open, upright and fair dealings are opposed to public policy. The law will avoid contracts to do an unlawful act * * *, etc. Clark on Contracts, 301; 26 Ark. 445; 63 Ark. 318; 174 U. S. 639; 48 N. Y. 348, 362; 43 *Id.* 147; 2 Wall. 45-56; 21 U. S. 153; 35 Mass. 472-481; 135 U. S. 507; 120 Mass. 501, 147. Contracts against public policy are void. Cases *supra;* 147 N. C. 263; 15 Am. Cases, 41. The duties of a lawyer are fully defined in 73 Ark. 575. "No man can serve two masters * * *." See 4 Cyc. 920, 921, 957 and note 69; 960 and note 81, p. 963.

3. The fees allowed are excessive.

Taylor, Jones & Taylor, for White & Watson, appellees.

"The laborer is worthy of his hire."

The fee was shown to be reasonable by actual and expert testimony. No fraud was proven. The chancellor's finding should not be disturbed. The claim was created and incurred by order of the county court in a matter properly chargeable against the district. Acts 1913, p. 903. The testimony is positive and clear there was no collusion; no sinister motive, no fraud nor intended fraud in the agreement. The services were honestly and faithfully performed and the fees are not excessive. The only correct way to solve this question is by comparison and proof of what other persons have received for the same or like services.

John B. Moore, and *Thomas & Lee,* for appellees.

Under the act of 1913, p. 902, jurisdiction was given the chancery court to adjust and pay all proper claims. That was the sole purpose. The services rendered were rendered to the district. Such claims are valid. 119 Ark. 188. The district was legally organized, and the chancery court so held, and there was no appeal; that was final. Appellees were not promoters. There was no conspiracy nor fraud, nor collusion.

HART, J. This case came up on an appeal by the Cypress Creek Drainage District from an order of the chancery court allowing an engineer's fee in favor of White & Watson in the sum of $7,500 and an attorney's fee in favor of G. Otis Bogle and Thomas & Lee in the sum of $4,000 in a proceeding to settle up the claims and affairs of the drainage district. The material facts are as follows:

In September, 1911, G. Otis Bogle, as a representative of certain land owners in Monroe County, Arkansas, filed a petition to establish a drainage district running south from Brinkley and to a point near Keevil. The district was to be established under the General Acts of 1909, as amended by the Acts of 1911. See Acts of 1909, page 829, and General Acts 1911, p. 193.

J. B. White, a member of the firm of White & Watson, civil engineers, heard of the contemplated establishment of the district, and went to Brinkley to interview Mr. Bogle on the subject. He asked that his firm be appointed as engineers for the district, under the statute, and Mr. Bogle replied that the district would only comprise twelve or fourteen thousand acres of land, and he did not know whether the land owners whom he represented would be willing to go to that expense. Mr. White replied that on account of the smallness of the district, his firm would not charge anything for a preliminary survey if, in case the district should be formed his firm should be appointed engineers for it.

The preliminary survey was made by Mr. White's firm, and it reported that the proposed district was not

practicable because it had no outlet; that in order to make the proposed district a feasible one, it would be necessary to extend it twenty-five miles further south to obtain an outlet for the water.

During the fall of 1911, certain land owners who owned land south of the proposed district above referred to, went to the firm of Thomas & Lee, at Clarendon, Arkansas, and asked them to prepare a petition for the organization of a drainage district. This district was to run south from Keevil, and was not to contain any land in the district contemplated by the land owners represented by Mr. Bogle. Thomas & Lee put the land owners off for a time, but, upon being pressed to get up a petition, finally agreed to do so. About this time Mr. Bogle came to see them, and after a consultation, it was agreed that a district should be formed which should embrace both the lands in the district first contemplated by the land owners represented by Mr. Bogle and those owned by the parties represented by Thomas & Lee.

On the 10th day of January, 1912, certain land owners in Monroe County filed a petition with the county court to establish a drainage district embracing approximately 150,000 acres of land in Monroe County, Arkansas, the district to be established under the General Act to provide for the creation of drainage districts in this State, approved May 27, 1909, and the act approved April 28, 1911, amendatory thereof.

The petition was prepared by the firms of Thomas & Lee and G. Otis Bogle, and these two firms of lawyers prepared all the papers necessary for the formation of the district. The county court made an order establishing the district on the 11th day of March, 1912, and on the same day appointed G. Otis Bogle and Thomas & Lee attorneys for the district, but this order was not entered of record until the 6th day of April, 1912.

On January 10, 1912, in compliance with the provisions of the statute, a bond was signed by certain land owners and by the aforesaid attorneys, conditioned that

the petitioners would pay the expense of the preliminary survey if the drainage district was not formed.

White & Watson were appointed engineers for the district, and the commisisoners agreed to pay them 5 per cent. for their services. This included the preliminary survey, the locating survey of the drainage ditch, and the supervision of the construction of the proposed improvement. The contract made with the engineers was prepared by the aforesaid attorneys.

After the district was ordered established, the commissioners advertised for bids for the construction of the proposed improvement. A. V. Wills & Son were the successful bidders, and it was proposed to issue bonds in the sum of $350,000 to construct the improvement. Steps looking to the preparation of the contract with Wills & Son were taken by the attorneys, but no formal contract was prepared.

Certain land owners then filed a suit in the chancery court attacking the legality of the formation of the district. This suit was successfully defended by the attorneys for the district, and no appeal was taken from the decision of the chancery court holding that the district was legally organized.

The chancellor rendered his decision while the Legislature of 1913 was in session, and those who opposed the district applied to the Legislature for relief. The Cypress Creek Drainage District was dissolved by the Legislature of 1913, and an act was passed conferring jurisdiction upon the Monroe County Chancery Court to wind up its affairs. The act provided that all parties having claims against the district should be required to present the same to the chancery court for adjudication, and that a receiver should be appointed to collect the tax assessed under the act for the purpose of paying the debts of the district. Section 2 of the act provided that no claims should be allowed except such as were created and incurred by order of the county court in the matters properly chargeable against the district. See Acts of 1913, p. 902.

The court allowed White & Watson $7,500 for their services as engineers for the district; and G. Otis Bogle and Thomas & Lee a fee of $4,000 as attorneys for the district.

It is insisted by counsel for the drainage district that the facts in the record show fraud and collusion on the part of the engineers and attorneys for the district. We do not deem it necessary to set out the facts pertaining to this branch of the case, for in our opinion the facts fall short of showing fraud or collusion as charged.

We are of the opinion, however, that the fees allowed the attorneys for their services and the compensation allowed the engineers are excessive, but our opinion is not based on the ground of fraud or collusion between the attorneys and the engineers. Our conclusion is reached for the reasons which we shall now state:

We shall first take up the question of the attorneys' fees. It may be stated in the outset that, like all other cases, the attorneys must look for pay for their services to those who employ them unless there is some special provision of the statute for their payment otherwise. Section 4 of the drainage act of 1911 provides that the county court shall appoint three commissioners after it has established the drainage district, that upon their qualification the board shall prepare plans for the improvement within the district as prayed in the petition and procure estimates from competent engineers as to the cost thereof. The section further provides that for this purpose the board may employ such engineers and other agents as may be needful, such engineers to give bond as required in section 1 of the act, and that it may provide for their compensation, which, with all other necessary expenditures, including services of such attorneys as the county may employ, shall be taken as part of the cost of the improvement. See Acts 1911, p. 197.

It will be remembered that the act of 1913 gave the chancery court jurisdiction to wind up the affairs of the district and provided that no claims should be allowed except such as were created and incurred by order of the

county court in the matters properly chargeable against said district. This brings us directly to a consideration of what services of the attorneys are properly chargeable against the district.

(1) Section 4 of the drainage statute above referred to is the only section of the drainage act which provides for the employment of attorneys. From a careful reading of that section it is apparent that the framers of the statute did not intend to require the land owners affected by the drainage district to pay the attorneys for their services in getting up the drainage district. It is apparent from the decree of the chancellor and from the record in the case that the attorneys were allowed fees for services in getting up the district. In this the chancery court erred. The attorneys were not and could not be appointed under the statute until after the drainage district was established by the county court. They were appointed on the 11th day of March, 1912, and the statute did not contemplate, as we have already seen, that they should be allowed any compensation for services performed by them prior to that date. The record shows that the only services performed by them after this time was some work done by them looking to the preparation of a contract between the drainage district and A. V. Wills & Son, the successful bidders. No contract between the drainage district and the contractors was ever prepared by the attorneys. The only other service performed by the attorneys was in the defense of the suit in the chancery court brought by certain land owners seeking to attack the legality of the formation of the district. This suit was successfully defended by the attorneys, and almost immediately thereafter the Legislature passed an act to dissolve the district.

(2) When we taken into consideration the services performed by the attorneys which became legal charges against the district, measured by like services performed in other cases, we think the sum of $1,000 would be a reasonable compensation for the attorneys. In making this allowance, we take into consideration that the statute con-

templates the employment of but one firm of attorneys, and compensation is allowed on that basis. See *Seitz* v. *Meriwether,* 114 Ark. 289.

Though we hold that the statute contemplates the employment of but one attorney or firm of attorneys by the county court, we do not wish to be understood as holding that the act prevents the employment of other counsel in the sound discretion of the court in proper cases to aid in litigation against the district. There is nothing in the record, however, from which it could be inferred that additional counsel was necessary in the present case, and in order to charge for the services of more than one firm of attorneys it was incumbent upon the attorneys to show the necessity of the employment of additional counsel, and that such employment was authorized by the county court.

In the case of *Lilly* v. *Robinson Merc. Co.,* 106 Ark. 571, we held that the question of what is a reasonable attorneys' fee for services performed in a case where such inquiry arises is usually one of fact to be determined from the weight of the evidence.

Again, in *Bell & Carlton* v. *Welch,* 38 Ark. 139, it was held that the court or jury required to fix the compensation for an attorney can only assess such fee upon proper proof, which may include the testimony of other attorneys as to what would be a reasonable fee under the circumstances, taking into consideration the value of the services actually rendered. See, also, the case note to 20 Am. & Eng. Ann. Cas. at page 53.

(3) Though it is settled that the testimony of duly qualified witnesses given as expert opinion evidence is admissible on the issue of the value of the services of an attorney, it is equally well settled that the opinion evidence of such expert witnesses is not conclusive; but such evidence is to be taken in consideration with all other evidence in the case in arriving at a conclusion as to the just and reasonable compensation for the services performed. *Lilly* v. *Robinson Merc. Co., supra,* and case note to 20 Am. & Eng. Ann. Cas., p. 56.

(4) We think it fairly deducible from our own cases and from the case note above referred to that in determining what is a reasonable attorney's fee, it is competent and proper to consider the amount and character of the services rendered, the labor, time and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys.

The record in the case before us shows that Judge Hemingway, a former justice of this court, in behalf of his firm, was present and took part in the trial in the chancery case in which the legality of the formation of the district was involved, and that his firm charged and was allowed $200 for their services.

So, when the principles of law above announced are applied to the facts in this case, we think the sum of $1,000, as above stated, a reasonable compensation to be allowed the attorneys for the services which were a legal charge against the lands of the district.

(5-6) What we have said in regard to the principles of law governing the compensation to be allowed to attorneys, applies with equal force to the engineers. They are entitled to only such fees as are expressly or by necessary implication, allowed by the statute. Civil engineers were introduced who testified that the engineers in this case were entitled to a much larger fee than was allowed them by the county court, but in arriving at their opinion, they took into consideration the fact that the engineers had performed services in the smaller district which was abandoned because it was not practicable. The engineers were not entitled to anything for services performed by them looking to the establishment of that district. It is only when a district is formed that the engineers are entitled to compensation for preliminary surveys. The bond required shows this to be so. If the district is not formed, the language of the bond required by the statute is that

the signers thereof will pay such expenses. It also appears to us that the experts in their evidence took into consideration the amount of work to be performed by the engineers in the construction of the improvement. No work of this sort was performed by the engineers, and they are not entitled to any compensation for it. An examination of the whole record leads us to the conclusion that the testimony upon this branch of the case was not fully developed. In arriving at the fee to be allowed to the engineers the court should have considered only the services for which they were legally entitled to charge. Under the statute, in fixing the amount to be allowed the engineers, the court should have been governed by the rules and principles of law applicable to the fees to be allowed the attorneys for the district. This was not done by the court, and for that error the judgment in favor of the engineers must also be reversed, and, the testimony on this branch of the case not being fully developed, the cause will be remanded with directions to the chancellor to allow either party a reasonable time within which to take additional proof.

It follows from the views that we have expressed that the decree must be reversed and the cause remanded with directions to the chancellor to render a decree in accordance with this opinion.

BOWLING v. CARROLL.

Opinion delivered January 17, 1916.

1. LANDLORD AND TENANT—COVENANT TO REPAIR FENCE—BREACH—DAMAGES.—Where a landlord fails to repair a fence according to a covenant contained in a written lease, the lessee may recoup as damages, what it would have cost him to make such repairs, but not the indirect and consequential damages flowing from such failure to repair, such as the destruction of crops by the trespass of cattle.
2. LANDLORD AND TENANT—COVENANT TO REPAIR FENCE.—LIABILITY OF LESSEE.—A written lease provided that the lessor would make certain repairs on the fence of the leased premises, this the lessor failed to do. *Held*, under the lease, the lessor could not recover

damages from the lessee, where the lessee did not repair the fence, and an orchard was damaged by reason of stock breaking into the same.

3. LANDLORD AND TENANT—REPAIR OF FENCE—NOTICE BY TENANT.—Where a written contract of lease provided that the lessor should repair a certain fence on the leased premises, the lessee can not recover damages from the lessor for a failure to make such repairs, until he has given the lessor notice of the need of the same.

Appeal from Fulton Circuit Court; *J. B. Baker,* Judge; reversed.

C. E. Elmore, for appellant.

1. Carroll violated the contract by failing to take "good care of the premises," and to pay the rent as he expressly stipulated. In fact, he did nothing that the contract states. He agreed to take "special good care of the orchard," and to repair the fence. He is not entitled to damages by reason of Bowling failing to comply with his contract. 39 Ark. 344, 347; 72 Ark. 3. It was the tenant's duty to repair the fence, and he is liable to the landlord for damages. *Ib.*

The court erred in refusing instruction No. 5 for defendant, and in refusing to give No. 9 as to the measure of damages. No. 10 should have been given. *Cases supra.*

Lehman Kay, for appellee.

When the rent was paid, appellant agreed to waive all damages. As to the damages to the orchard, the jury properly found for Carroll under the court's charge, for two reasons; Bowling waived all damages and Bowling failed to repair the fences as agreed. 39 Ark. 347; 19 *Id.* 684. The verdict is sustained by the evidence, and there in no error in the instructions. 57 Ark. 557; 23 *Id.* 208, 232; 13 *Id.* 474, 285; 50 Ark. 511; 27 *Id.* 517, and many others.

The damages were not excessive. 62 Ark. 326. This court will not disturb a verdict when supported by some legal evidence, although apparently against the preponderance of the testimony. There is no testimony as to logs, lumber, windows and shingles being destroyed by Carroll, and the loss to orchard and vineyard was occasioned by Bowling's own fault.

McCULLOCH, C. J. Appellant J. P. Bowling was the plaintiff below, and instituted this action against J. W. Carroll to recover damages done to the plaintiff's farm, which had been leased to the defendant under a written contract. The contract of lease contained a covenant that the lessor should "repair all fences that may need repairing and put same in good condition by Spring," and also contained a stipulation that the lessee should "take the best of care of said premises, and especially the orchard." The plaintiff alleged in his complaint that defendant had permitted stock and cattle to go into the orchard and destroy the growing fruit trees, grape vines, etc., and thereby caused damages in the sum of $150. He also alleged that the defendant had destroyed fencing and posts of the value of $20, and shingles of the value of $2, and barn logs of the value of $3.20, besides other damages to the premises.

The defendant filed an answer denying that he had permitted the damages alleged in the complaint, and also filed a cross-complaint against the plaintiff asking damages in the sum of $144 on account of the plaintiff's failure to perform his contract with respect to repairing the fence. The case was tried before a jury, and the trial resulted in a verdict in favor of the defendant for the sum of $50. The sum of $130 was the amount stipulated in the contract for the rental price of the premises for the year in question, and the agreement was that the rent should be paid on demand. The full amount was paid by the defendant—the last payment of $75 being made in April of that year. The payment included a credit of $5 which was allowed to the defendant for repairing the fence. The contention of the plaintiff is that he had the fence repaired, and that when the defendant made some complaint on account of repairs, they examined the premises carefully and defendant agreed to make the repairs on the fence that were found to be necessary, or that he desired to be made, for the sum of $5, which was allowed as a credit on the rent. The defendant denied that he agreed to make all repairs for $5, but testified that he only agreed

to repair a certain portion of the fence for that sum, and he says that when he made the last payment, the plaintiff promised to complete the repairs on the fence, but never did so. The defendant did not in fact make any repairs on the fence except the portion he claimed he was to do for the stipulated sum of $5. He testified that it would have cost about $60 to put the fence in good repair—that is to say, in addition to the amount which the plaintiff himself spent, and that which the defendant did in the way of repairs. The proof shows very clearly that cattle got into the orchard and the vineyard, and did considerable damage to the premises.

There are various assignments of error with respect to giving and refusing instructions. We will not undertake to discuss all of the assignments, but will mention only two which we deem important. The first one worthy of discussion relates to the giving, over plaintiff's objection, of instruction No. 5, which reads as follows:

"You are instructed, that if you find that the plaintiff failed to make such repairs on the premises as by the contract, he was bound to make, and that defendant was damaged by reason of plaintiff's failure to make such repairs, and if you further find that defendant had paid the $130 rents, you will find for the defendant on this item the difference between the rental value of the place without such repairs. Unless, you further believe from a preponderance of the evidence in this case that defendant agreed to repair said fence himself."

(1) This instruction was erroneous for the reason that it lays down the wrong measure of damages for breach of the lessor's covenant to make repairs. In *Varner* v. *Rice*, 39 Ark. 344, it was said: "If the landlord failed to repair the fences, according to his covenant contained in the written lease, the defendants may recoup as damages what it would have cost them to make such repairs, but not the indirect and consequential damages flowing from such failure to repair, such as the destruction of crops by the trespasses of cattle." The same rule has been announced in other decisions of this court. In-

struction No. 5 told the jury that the measure of damages would be "the difference between the rental value of the place without such repairs," meaning, we presume, the difference between the price paid by the plaintiff and the rental value of the place without the repairs. That statement is contrary to the decisions of this court, and calls for a reversal of the case.

(2) Error is assigned in the refusal of the court to give instruction No. 9, which reads as follows: "You are further instructed that if you find by a preponderance of the evidence, that plaintiff failed to repair the fence according to the covenants contained in the written contract, that the defendant could recover only the amount that it would cost to make such repairs, and this would not justify defendant permitting and allowing cattle and stock to damage said orchard." This instruction was correct in the statement as to measure of damages upon breach of the lessor's covenant to make repairs, but the latter part of the instruction was misleading in stating that the plaintiff's failure to make repairs "would not justify defendant permitting and allowing cattle and stock to damage said orchard." The jury might have understood from the instruction that the defendant was bound to make the repairs, and would be liable for any damages to the orchard on account of his failure to do so. The contract did not compel the defendant to make the repairs at all, and he could not be subjected to liability for damages caused by the plaintiff's own fault in breaking the contract. The contract in express terms required the lessee to take care of the premises, but it did not impose any obligation on him to make repairs. He had the right to take the premises as he found them and hold them without expending anything in the way of repairs. He had the right to make the repairs, however, and recoup the cost of same against the claim for rent, but he was not compelled to do so, and his failure to do it did not subject him to liability for damage to the orchard. The instruction was erroneous because it might have misled the jury, and the court was correct in refusing to give it.

(3) Another of plaintiff's instructions refused by the court reads as follows: "10. You are instructed, that before the defendant would be entitled to any damages by reason of the failure of the plaintiff to make repairs on said fence (if you find he failed to make said repairs as set out in the contract), you must find that defendant gave notice, and that plaintiff had a reasonable time and opportunity to make said repairs."

This instruction stated the law and it should have been given. Plaintiff testified that he made all the repairs claimed to be necessary by the defendant, and he can not be held to have broken his contract unless he received notice that further repairs were necessary. There was a conflict on that point, and the jury should have been instructed concerning it. The defendant claimed that he notified the plaintiff, and that the latter promised when he received the last installment of rent to make the necessary repairs, but there was a conflict on that point.

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

FLEMING v. OATES.

Opinion delivered January 17, 1916.

AUTOMOBILES—USE OF HIGHWAYS—PASSING TEAMS GOING IN SAME DIRECTION.—The requirement in Act 134, p. 94, Public Acts of 1911, that the driver of an automobile, upon a public highway, *shall come to a full stop* when he observes that an approaching horse, ridden or driven by another traveler, is about to become frightened, does not impose the absolute duty upon the driver of the automobile to stop his machine becase a team in front, going in the same direction, appears to be frightened; under those circumstances it should be left to the trial jury to say whether, under all the circumstances of the case, the driver of the automobile has been guilty of negligence.

Appeal from Conway Circuit Court; *M. L. Davis*, Judge; reversed.

W. P. Strait, for appellant.

1. The facts do not justify a recovery in this case for negligence, and it was error to refuse to direct a ver-

dict. The undisputed evidence shows contributory negligence. This was one of those unforeseen accidents which are unexpected and unavoidable. Only ordinary prudence and care is required by the law. 96 N. Y. Supp. 45; 36 Ark. 607; 94 *Id.* 252. If after discovering the danger, it was too late to avert the accident, and the defendant did all he could to avoid the injury, then he was not guilty of negligence nor liable under the statute. 10 L. R. A. (N. S.) 655. No presumption of negligence arises by reason of the injury and the burden was on appellee to prove negligence. 97 Ark. 469.

2. The law imposes upon appellee, when in danger, the duty to exercise all the reasonable means at her command to prevent probable injury, and a failure to do so is contributory negligence. Sutherland on Dam., § 90; 105 N. S. 224; 67 Ark. 371; 102 *Id.* 251; 72 *Id.* 593; 94 *Id.* 252; 63 *Id.* 65; 81 *Id.* 5; 36 *Id.* 37; 48 *Id.* 106; 76 *Id.* 536; 59 Atl. 369; 76 N. E. 224; 74 *Id.* 615.

3. Noises incidental to motor vehicles are not in themselves evidence of negligence, and a *failure to stop the motor and machinery* is not necessarily negligence. 2 Ruling Case Law, 1193; 107 N. W. 325; 113 *Id.* 904; 14 L. R. A. (N. S.) 521; 134 Iowa 374.

4. When two or more persons unite in the joint prosecution of a common purpose, * * * the negligence of one will be implied to all. 58 L. R. A. 74; 59 Am. Rep. 340; 39 Minn. 328; 62 *Id.* 71; 74 N. W. 174; 83 *Id.* 386; 84 *Id.* 728. In several instructions requested, there was error for which the judgment should be reversed.

Edward Gordon, for appellee.

The instructions given for appellee are clearly within the law as to negligence and contributory negligence, as well as to imputed negligence. 72 Ark. 572; 58 L. R. A. 74. As to the burden of proof, see 55 Ark. 547; 74 *Id.* 320; 75 *Id.* 347. No prejudicial error appears in the court's charge to the jury; their verdict is final, as there was evidence to sustain it.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages alleged to

have arisen from the negligent act of appellant in frightening a team of horses drawing a hack in which appellee was riding. It is alleged that the team became frightened from the automobile driven by appellant, and that he was guilty of negligence in failing to exercise proper care after discovering that the team was frightened.

Mrs. Oates, the appellee, resided in Oklahoma and came to Conway County, Arkansas, to visit her relatives. She was met at Plummerville by her brother, who at the time the injury occurred was taking her out to a village north of Plummerville. As they drove along the public road, appellant approached with an automobile going in the same direction and passed them at the foot of a long hill. The horses became frightened and turned over the hack and appellee received personal injuries, for which the jury allowed her a small amount of compensation.

According to the narrative of appellee and her brother, who was driving the hack, appellant was warned that the team was frightened, but, notwithstanding that fact, he dashed by at a high rate of speed without making any effort to prevent the horses becoming further frightened. Mrs. Oates testified that they had just met another automobile, which, to some extent, frightened the team, and that when she saw the appellant in his automobile coming over the top of the hill, she rose up in the hack and waived to appellant and called out to him, begging him not to pass them, but that appellant came on at a high rate of speed with the machine making a great deal of noise, and that as he passed them, the team became very much frightened and ran away, and that turned the hack over. The testimony of appellee is corroborated by that of her brother, and perhaps by other witnesses. It was sufficient to warrant a finding that appellant failed to exercise proper care to avoid frightening the team of horses.

On the other hand, the testimony adduced by appellant and his witnesses tends to show that he was free from any fault, and that the injury was caused by recklessness of appellee's brother, who was driving the hack, and who, it is claimed, was intoxicated at the time. Appellant tes-

tified that as he came over the hill, he saw the team near the bottom of the hill, and that he shut off his engine and glided on down the hill as usual, and that as he approached the team was turned slightly to the left to permit him to pass, and that he did pass in safety, but that the horses veered a little to the right and the driver dropped the reins and lost control of them, which caused the horses to turn and upset the hack.

It is thus seen that the testimony presents a sharp conflict as to whether or not appellant was guilty of any negligence which caused the team to become frightened. The law of the case has been pretty well settled by the decisions of this court in discussing the relative rights of travelers on the road in different modes of conveyance, and the relative rights of automobilists and pedestrians. *Millsaps* v. *Brogdon,* 97 Ark. 469; *Minor* v. *Mapes,* 102 Ark. 351; *Butler* v. *Cabe,* 116 Ark. 26, 171 S. W. 1190.

There are many grounds urged here for the reversal of the judgment, but we content ourselves with a discussion of one which involves the consideration of two instructions given by the court over appellant's objection, as follows:

"2. You are instructed that if you find from the evidence that the defendant knew, or by the use of ordinary care could have known, that the team which was hitched to the said wagon was frightened at the approach of his automobile, and that he failed to stop said automobile and stop his engine, but continued toward said team, and that as a result of his failure to stop said automobile and engine, the team ran away, and thereby plaintiff was injured, you will find for plaintiff in such sum as in your judgment the evidence justifies."

"12. Whenever it shall appear that any horse, ridden or driven by any person upon any of said streets, roads and highways, is about to become frightened by the approach of any such motor vehicle it shall be the duty of the person driving or conducting such motor vehicle to cause the same to come to a full stop until such horse or horses shall have passed, and, if necessary, assist in pre-

venting accident. Any person convicted of violating this section shall be fined in any sum not to exceed two hundred dollars."

Instruction No. 12 is an exact copy of section 12 of the act of March 24, 1911,* regulating the use of automobiles upon public highways, but our conclusion is that that section has no application to the facts of the present case, and that the court erred in giving it to the jury as one of the instructions in the case. The substance of the statute is also embraced in instruction No. 2. The purpose of that statute was to require drivers of automobiles to come to a full stop when they observe that an approaching horse, ridden or driven by another traveler, is about to become frightened. The statute imposes an absolute duty on the driver of the automobile to stop, and liability for damages arises from a violation of that statute. We think, however, that the statute was not intended to impose the absolute duty upon the driver of an automobile to stop his machine because a team in front, going in the same direction, appears to be frightened, but under those circumstances, it is left to a trial jury to say whether under all the circumstances of the case the driver of the automobile has been guilty of negligence.

Doubtless the Legislature took into consideration the hardship of requiring the driver of an automobile to stop his car merely because a team in front of him appears to be frightened. The automobile, of course, travels faster than vehicles drawn by horses, and if this statute applied it would prevent the driver of an automobile from passing the slower vehicle. On the other hand, it is perfectly reasonable to require the driver of a machine, when meeting another traveler driving a team, to stop and let the team pass. The Legislature doubtless had this distinction in mind in failing to put into the statute a positive requirement that an automobile overtaking another kind of vehicle should stop, for such a requirement would impede travel almost to the extent of denying the driver of an automobile the use of the road. The lawmakers evidently

*Act 134, p. 94, Public Acts 1911.

intended to omit any definite requirement applicable to a state of facts such as is shown in this case so that the question of negligence or due care could rest upon settled principles on that subject. This case should have been submitted to the jury on the question whether appellant exercised ordinary care to avoid frightening the team, without giving to the jury the statute which imposed the absolute duty of stopping until the team got out of the way.

For the error in giving those two instructions, the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

SCULLIN, *et al.*, RECEIVERS MISSOURI & NORTH ARKANSAS RAILROAD COMPANY *v.* THOMASON.

Opinion delivered January 17, 1916.

RAILROADS—DEATH OF EMPLOYEE—JERK OF TRAIN—ORDINARY RISK.—Where deceased, a brakeman employed on defendant's freight train, was thrown from the train and killed, by a mere jerk of the train, incident to the stopping of the train at a given point, and where the train did not move at all, except for such jerk in the taking up of the slack in the train, the railroad company will not be liable for such death, such slight movements of the train being necessarily incident to the operation of trains, and being an ordinary danger, the risk of which the employee assumed when he entered the service.

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

W. B. Smith, J. Merrick Moore and *H. M. Trieber*, for appellants.

1. This case comes within Federal Employer's Liability Act, and the evidence clearly shows it to be one of assumed risk. 233 U. S. 492. No appliances were out of order or defective, nor was there any violation of the Safety Appliance Acts. 95 Ark. 560; 90 *Id.* 387; 56 *Id.* 232. Jerks and other movements in operating freight trains are common and necessary. In no other way can such trains be handled, and an experienced brakeman is

held chargeable with notice and knowledge that they are likely to occur. This is one of the ordinary risks incident to employment. 161 S. W. 246; 47 *Id.* 922; 167 *Id.* 128.

The doctrine of assumed and continued risks is well illustrated by the blocked frog cases. 82 Ark. 11; 53 *Id.* 117; 54 *Id.* 389; 77 Ark. 367. See, also, 89 Ark. 427; 93 *Id.* 564; 104 *Id.* 489; 113 *Id.* 86.

2. The evidence leaves the whole question to speculation and conjecture and hence not sufficient to sustain the verdict. 76 S. W. 502.

3. Injury or death caused by the running of a train to an employee engaged in the operation of the train raises no presumption of negligence or liability. 100 Ark. 467; 100 *Id.* 426.

H. A. Gardner, for appellee.

1. This is not a case where the cause of death is wholly speculative or conjectural. The court submitted the case to a jury on instructions embodying two grounds of negligence, viz.:

(1) Negligently shoving the train backward without signal or warning. (2) In negligently backing the engine and cars when same could have been pulled forward under the spout of the tank.

A railroad is liable for damages "for injuries done or caused by running its trains." Circumstantial evidence is sufficient to submit the case to a jury, and their finding as to negligence is conclusive. 172 Mo. App. 334. Plaintiff has met the requirements that he must establish negligence or show facts from which the jury may reasonably infer that the company was negligent. 73 Mo. 219-233. The presumption is that deceased was in the exercise of ordinary care, and this presumption is not overcome by the mere fact of injury. 171 Mo. App. 173; 106 *Id.* 657; 80 S. W. 364; 100 Mo. 680; 227 *Id.* 366; 177 Mo. App. 296; 157 S. W. 1016; 156 *Id.* 4; 73 Mo. 233; 133 Mo. App. 149; 191 U. S. 65; 81 Atl. Rep. 440.

The negligence of the company and the proximate cause of death were properly submitted to the jury. 227 Pa. 66; 75 Atl. 991; 165 Fed. 869; 24 L. R. A. 531; 29 Atl.

151; 78 *Id.* 37; 191 U. S. 64; 196 *Id.* 51; 119 Fed. 293; 150 U. S. 349; 170 *Id.* 665, etc.

2. Failure to use or exercise ordinary care is an extraordinary risk which servants do not assume. 204 Mo. 507, 521; 207 *Id.* 416; 124 Mo. App. 619; 125 *Id.* 193; 135 Mo. App. 671; 58 U. S. Law. Ed. 1070; 174 S. W. 129; 58 L. Ed. U. S. 912.

3. Deceased's contributory negligence is no defense; and there was no assumed risk. 205 U. S. 1; 169 Fed. 372; 106 S. W. 441; 94 C. C. A. 657. No proper signal was given as required by the rules of the company.

McCULLOCH, C. J. This is an action to recover damages on account of injuries sustained by reason of the death of plaintiff's intestate while working as brakeman in the service of the receivers of the railroad company. The train on which plaintiff's intestate was working was being operated in interstate traffic and plaintiff's cause of action, if any existed, is based upon the Federal statute regulating the liability of railroad employers. There was a judgment below in plaintiff's favor and the defendants have appealed.

Plaintiff's intestate, Lee Thomason, was head brakeman on a freight train, and was killed about midnight at Everton, a station in Boone County, Arkansas. There was a tank at the station, and the train, as it came to the station, was stopped at the tank for the purpose of taking water. Shortly thereafter Thomason's dead body was found under the front trucks of an oil tank car, which was the second car back of the engine. The conductor of the train, who was introduced as a witness by plaintiff, testified that when the train stopped at the tank he got out, as usual, for the purpose of walking up alongside of the train to make a casual examination as to the condition of the train, and that in making this examination he found the body of Thomason, as before stated. He testified that the last time he saw Thomason was at St. Joe, the last station at which the train was stopped before reaching Everton. There was no direct testimony showing how Thomason came to his death, but the plaintiff introduced two

witnesses whose testimony tended to show that he fell from the train while the train was being "spotted" for the water tank. The two witnesses were men who were out in front of a house a short distance from the tank, and they testified that as the train approached the tank, they saw the light of a lantern moving along the side of the oil tank car, which was a short distance behind the engine. They could not see the man holding the lantern, but could tell from the movement that it was in the hands of some person moving along the side of the tank car. They saw the reflection of the light on the side of the oil tank, and on the end of the box car in front. They testified that the train came to a stop, and immediately moved slightly backward, and then forward, and that as this movement was made, they saw the lantern fall from the side of the car. The testimony of those two witnesses justifies the inference that Thomason was walking along the running board on the tank car with his lantern in his hand, and that the jerk or movement of the train threw him off, and that he fell under the trucks and was killed. The testimony also warrants the finding that no signal was given of the movement of the train, and the plaintiff contends that this was in violation of one of the rules of the company, which provides that a signal of three blasts is to be given to indicate the backing of the train when standing. It is not contended that there was negligence in any other respect, and it must be conceded that unless the rules just referred to applied to the movement of the train when "spotting" the tender at the tank, there was no negligence of the trainmen which would render the defendants liable in this case.

We are of the opinion that, according to the undisputed evidence in this case, the train was not being moved within the meaning of the rules which require the giving of signals. The only testimony on the subject was adduced by the plaintiff, and the testimony of each of the three witnesses who testified on that subject (including the conductor) shows that the train was not being moved, but that merely the slack was being taken up in the effort

to "spot" the tender of the engine at the spout of the tank. The conductor testified that he was in the caboose when the train came to a stop at the tank, and that there was no other movement of the whole train. He said that the caboose did not move at all. The other two witnesses merely said that the train was being lined up or "spotted" at the tank, and that when it first stopped there was a backward movement, and then a forward movement without signals being given. Viewing this testimony in its strongest light, it does not warrant the inference that the train was being moved about, except that the slack was being taken up and a slight movement forward to connect the spout of the tank with the tender of the engine so as to take water.

The testimony of one of the witnesses on this point is as follows:

Q. Now, as you stood there watching, did the train stop or did the train go through the station?

A. Stopped there.

Q. Did it come to a full stop?

A. I couldn't tell for sure—it stopped there to take water, and of course, they come to the full stop for that purpose.

Q. As you noticed it did stop?

A. Yes, it stopped there right smart little while.

Q. Now, then, what did it do after it stopped?

A. I couldn't tell you; I went to bed.

Q. But before you went to bed while you were out there when the train stopped, what occurred immediately after it stopped, or soon after?

A. Never noticed anything unusual; I saw a light behind the engine drop down, but I just supposed it was a brakeman or conductor.

* * * * * * * * * *

Q. What was done just before the light went down?

A. The only thing I noticed it seems that the engine didn't get quite stopped, line up—didn't get quite lined up for the stop, and it seemed he moved his engine.

Q. Which way?

A. I couldn't say; I couldn't tell in the dark; I couldn't tell whether it was moved backward or forward.

Q. What did you hear, Mr. Cooper?

A. I heard a noise as if the slack was taken up in the cars.

Q. Tell the jury what you understand by slack.

A. The slack of a train is the slack in those drawbars, and when the engine takes up slack it makes a rattling noise.

Q. You heard the rattling noise, and it seemed as though they were taking slack?

A. Yes.

Q. At what time did you say?

A. Well, just about that time the light dropped off the car, it seems that the light dropped just as the slack of the train was moving one way or the other—I don't know which way that slack was taken.

Q. You heard the noise, and just at that time you saw the light drop down?

A. The best I remember, the light dropped just prior to the noise I heard; I couldn't tell what become of the light.

The testimony of the other witness on this subject was as follows:

Q. Now, you say that it seems they didn't quite make the right kind of a stop at the water tank; could you see anyhing about that?

A. No, sir.

Q. You couldn't tell whether they were at the right place, could you?

A. I could just see the bulk of the cars.

Q. And it just seems that they didn't stop right?

A. Yes, sir.

Q. That is just guesswork; you didn't know about that?

A. No.

Q. You said it seemed as if he couldn't go forward and that he took up the slack, you heard a noise—heard both noises?

A. Yes, sir.

Q. You can tell the difference?

A. I can tell when they take slack or go forward.

Q. You could tell from the noise when they went forward or backward? Now, you say that they went backward, and you saw this light go down, all occurred at the same time—just instantly with the backing of the cars the light went down?

A. Yes, sir.

The statement of the conductor is that the caboose was not moved at all after they stopped at the tank, and it necessarily results from his testimony, if true, that there was no movement except that the cars at the front end of the train were moved in taking up the slack, and perhaps a slight forward movement to connect with the spout of the tank. It is clear, we think, that this does not come within the rule, as the train was not being put in motion. Those rules were adopted to govern the movements of trains, and not to require signals of the jerks incident to stopping at a given point. Such movements are necessarily incident to the operation of trains, and are among the ordinary dangers, the risk of which the employees assume when they take service.

Nothing is proved in this case which supports a charge of negligence against those who were operating the train. This being true, the judgment of the trial court is without any evidence to sustain it, and it is therefore reversed and the cause is dismissed.

NELSON v. HARPER.

Opinion delivered January 17, 1916.

1. ASSIGNMENTS—CONDITIONS—RELEASE OF DEBTOR.—A provision in an assignment, which requires, as a condition precedent to participation in the funds assigned, that the creditor or creditors shall release the debtor, will render the assignment void, even though all the debtor's property is included in the assignment.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—COMPLIANCE WITH STATUTE—TITLE.—A debtor made an assignment of his property to one H. for the benefit of his creditors, which transferred the title to the property to H. as trustee for the use and benefit of all the creditors, and where H. took possession of the property, the fact that he did not file an inventory thereof, and bond, as required by the statute, did not divest the title out of him as trustee or change the character of the instrument as a general assignment for the benefit of all the creditors.
3. ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHT OF SINGLE CREDITOR.—Trust funds, or property belonging to a debtor, in the hands of a trustee or assignee for the payment of all creditors of a debtor, can not be reached by garnishment issued at the instance of one of the creditors, to have his claim satisfied in full.
4. ASSIGNMENT FOR BENEFIT OF CREDITORS—CREDITORS SHARE PRO RATA.—Where a debtor makes an assignment of his assets for the benefit of all his creditors, the same must go to all the creditors *pro rata.* (Kirby's Digest, Chap. VIII.)
5. ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUST FUNDS—GOODS HELD IN TRUST.—Goods, held in trust, by the trustee under an assignment for the benefit of creditors, can not be reached by execution.

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

STATEMENT BY THE COURT.

The Monroe Grocer Company, limited, recovered judgment against one J. P. Gathright for $52.25. Execution was issued and levied by the constable upon certain goods as the property of Gathright. R. G. Harper (appellee) instituted this suit against the plaintiff in execution and the constable to recover the possession of these goods. Harper claimed title to the property under an instrument purporting to be a deed of assignment by Gathright for the benefit of creditors in which he conveyed to Harper "as trustee for the use and benefit of all his creditors" all of his property, the deed reciting: "consisting of lands and personal property, the personal property consisting of a stock of merchandise located at my store building at Strong, Arkansas, and all book accounts and notes due me by sundry parties arising from the sale to them of merchandise and otherwise, all of said

property, both real and personal, being described in said inventory attached hereto as aforesaid."

The instrument further reciting: "This assignment conditioned, however, that the same is made with the understanding that all my creditors accept the same in full of their said debts, fully releasing me from the further payment therefrom." And the instrument contained the further recital: "It is further agreed by the undersigned that all my rights and equity of redemption in and to all lands heretofore mortgaged by me to other creditors, is hereby assigned to said R. G. Harper as trustee, for the use and benefit of my said creditors, except the land mortgaged to J. D. Gathright, being my homestead. A further condition of this assignment being that the terms hereof are to be accepted by said creditors within a reasonable time from date hereof."

Among other things in the agreed statement of facts is the following: "That said R. G. Harper, as assignee, did not make or cause to be made an inventory of the stock of merchandise before the execution and delivery of the assignment, but did cause to be made an inventory of the same prior to the issuing of the execution on the judgment mentioned, and that J. D. Nelson, as constable, before levying the execution, was duly notified of the assignment, that immediately after the assignment, the said R. G. Harper, through J. D. Gathright, took possession of said stock of merchandise, directing the said J. D. Gathright to at once take an inventory of the same, and which inventory was at once taken and in the hands of R. G. Harper before the issuance of said execution, and the keys of the storehouse were not delivered to the said R. G. Harper until after the levy of the execution.

"That no inventory or bond was ever filed by the said R. G. Harper with the circuit clerk of Union County under the law governing assignments, or otherwise; that no bond was ever made."

The mortgage referred to in the instrument purporting to be an assignment was introduced, with the instrument purporting to be the assignment, in evidence, and it

showed that Gathright mortgaged to his son 194 acres of land, three mules and a lot of cows and calves, to secure an indebtedness of $900.

The court found that the plaintiff (appellee) had title to the property and rendered judgment in his favor for the same.

Neill C. Marsh, for appellants.

The assignment is void and conveyed no title; hence, the assignee can not maintain replevin against an officer levying under a valid execution. Kirby's Dig., § § 336-7. An insolvent debtor has no right to dictate terms and coerce his creditors into releasing their debts. 2 Ruling Cases Law, 670-1, ¶ 29; 47 Ark. 367; 36 *Id.* 406; 46 *Id.* 405; 85 N. Y. 464; 57 Barb. 249; 59 Miss. 69; 53 Ark. 81; 64 *Id.* 322. Nor can he withhold a part of his property, or omit any from the assignment. Cases, *supra;* 46 Ark. 405; 64 Ark. 322; Acts 1913, Act No. 88.

The property was not *in custodia legis.* 2 Ruling Case Law, p. 702, art. 54.

R. G. Harper, per se, and *W. E. Patterson,* for appellee.

The title to the property passed to the trustee under the assignment. It became trust property for the benefit of all the creditors *pro rata,* and was not subject to garnishment. No fraud is shown. No property is withheld or omitted, and none reserved except such as was exempt by law. Kirby's Dig., § 339; 52 Ark. 30; 66 Ark. 161; 83 Ark. 182; 104 Ark. 222.

WOOD, J., (after stating the facts). (1) A provision in an assignment which requires, as a condition precedent to participation in the funds assigned, that the creditors shall release the debtor is, according to the prevailing American rule, oppressive and renders the assignment void, even though all the debtor's property is included. "This," say the authors of Ruling Case Law, "is on the ground that an insolvent debtor has no right to dictate terms which shall make him independent of his legal obligations and that it is contrary to justice and against public policy to allow debtors to coerce their

creditors into releasing their debts." 2 R. C. L., 670-671, and note. This doctrine was announced in *Collier* v. *Davis,* 47 Ark. 367, overruling *Clayton* v. *Johnson,* 36 Ark. 406, where the contrary was held.

Under the above rule, the condition in the instrument under review, requiring all the creditors of Gathright to release him from further payment of their debts as a condition precedent, rendered the instrument void under the general rule as to assignments for the benefit of creditors, in the absence of a statute to the contrary.

Under the old rule in regard to assignments for the benefit of creditors any of the creditors of Gathright could have ignored the assignment and subjected his property to the payment of their debts. But this is not the rule under our statute.

In *Richmond* v. *Mississippi Mills,* 52 Ark. 30, we said that, where a debtor executed an instrument, in whatsoever form, or by whatsoever name, with the intention of having it operate as an assignment and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment.

(2) The court was warranted in finding, under the agreed statement of facts, that the instrument under consideration constituted an assignment and it had the effect to transfer the title to the property mentioned therein to Harper as trustee for the use and benefit of all the creditors. The agreed statement of facts shows that Harper took possession of the property through J. D. Gathright, and directed him to make an inventory, which was done, and while Harper as assignee did not comply with the requirements of the statute in regard to filing his inventory and bond with the clerk of the chancery court (Kirby's Digest, § 336), that did not operate to divest the title out of him as trustee or change the character of the instrument, under the statute, as a general assignment for the benefit of all the creditors.

In *State National Bank* v. *Wheeler-Motter Merc. Co.,* 104 Ark. 222, an insolvent mercantile firm sold its stock of goods for the sum of $1,010 and turned the proceeds

over to one B. H. Kuhl for the purpose of distributing the same *pro rata* among its creditors. The transaction was merely verbal and not evidenced by any written assignment. Kuhl was vice president of the State National Bank, and the money deposited was placed to his credit on the books of the bank. The amount was sufficient to pay 25 per cent. of the debtor's liabilities. Most of the creditors agreed to accept the *pro rata* of 25 per cent., but the plaintiff creditor declined to accept that sum and brought suit in the circuit court against the debtor to recover the amount of its debt, and sued out a writ of garnishment against the bank to appropriate the funds in its hands to the payment of plaintiff's claim. The circuit court directed a verdict for the plaintiff for the full amount of its claim against the bank as garnishee. In reversing the ruling of the trial court, we said: "In the absence of a statute, funds or other property held under a void assignment for the benefit of creditors is subject to garnishment at the action of any creditor or of the assignor; but that rule is changed in this State by a statute, which provides that if, for any cause, an assignment shall be declared void, 'the same shall then be considered and treated as a general assignment of all his property, not exempt from execution, for the benefit of all his creditors *pro rata,* and said property shall be disposed of and distributed for their benefit under the orders and directions of the chancery court.'" Citing *Tapp* v. *Williams,* 83 Ark. 882, where we said: "The assignment of the debtor's assets for the benefit of all the creditors must, under the statute, go to all the creditors *pro rata.* No one of them has the right by garnishment to subject the trust fund to the payment of all his debt to the exclusion of the debts of the others."

(3-4) The doctrine of the above cases, under the agreed statement of facts, is applicable here. At the time the goods were levied on by the constable under the execution he had notice of the assignment and that the assignee, Harper, was in possession of the property under and by virtue of such assignment. Under the facts of the

above cases we held that trust funds in the hands of a trustee or assignee for the payment of all creditors of a debtor could not be reached by garnishment issued at the instance of one of the creditors to have his claim satisfied in full; that the assignment of the debtor's assets for the benefit of all the creditors must, under the statute, go to all the creditors *pro rata.*

(5) There is no well grounded distinction between trust funds held for the payment of debts and goods held in trust for the same purpose. If trust funds under the facts in the above cases could not be reached by garnishment, it necessarily follows that the goods held in trust under the facts of the instant case can not be reached by execution. The remedy of appellant grocery company for the satisfaction of its judgment, as pointed out in *Tapp* v. *Williams, supra,* was in equity against the trustee for the payment of its claim *pro rata.*

The judgment of the circuit court is therefore correct and it is affirmed.

McINTOSH MINING COMPANY *v.* RED CLOUD ZINC COMPANY OF ARKANSAS.

Opinion delivered January 17, 1916.

1. MORTGAGES—PURPOSE OF EXECUTION—DEBT SECURED.—A deed of trust was executed by a corporation to one W. as trustee for L. The evidence was conflicting on the issue whether the trust deed was executed for the purpose of securing general creditors, or of securing L. simply. *Held,* under the evidence the trust deed was executed to secure L., only.
2. MORTGAGES—RELEASE—OBJECTIONS BY GENERAL CREDITORS.—The lands of a mining corporation were subject to a deed of trust given to secure the claim of one L. Thereafter the purchaser of the lands gave a mortgage upon the same and upon the personal property of the corporation, to secure a pre-existing debt, to the original corporation, which had sold the property to the grantor of the said mortgagor. It was agreed that L. release his rights under his trust deed in order to effect this transaction. *Held,* general creditors of the corporations to which the original owner had sold the property, having no interest in the mortgage to L., could not object to the release thereof, and that the mortgage last executed to the original owner was good as against general creditors.

Appeal from Marion Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The issues and such of the facts as are undisputed are correctly stated by counsel for appellees substantially as follows: On the 3d of August, 1909, the Red Cloud Mining Company, of Rush, Arkansas, conveyed certain mining lands situated in Marion County by warranty deed to Paul A. J. Koehler and Dwight O. Wheeler for a consideration of $75,000. Five thousand dollars was paid in cash and Koehler and Wheeler executed their notes for the balance and a mortgage on the lands to secure the same.

Koehler and Wheeler, on the 10th of August, 1909, conveyed the same lands to the Red Cloud Zinc Company, of Arkansas, which company assumed the indebtedness of Koehler and Wheeler to the Red Cloud Mining Company of Rush, Arkansas.

On the 4th day of January, 1911, the Red Cloud Zinc Company, of Arkansas, executed to Sam W. Williams, as trustee for Martin W. Littleton, a mortgage upon the above lands and also upon certain personal property, consisting of mill machinery, etc., to secure a purported indebtedness of the company to Littleton of $25,000. This mortgage was a first mortgage on the personal property named therein, owned by the Red Cloud Zinc Company, of Arkansas, but was subject to the prior mortgage on the land given by Koehler and Wheeler to the Red Cloud Mining Company, of Rush, Arkansas.

On the 16th of June, 1911, the Red Cloud Zinc Company, of Arkansas, sold its property, real and personal, to the Red Cloud Zinc Company, of Delaware, and as a part of the consideration the latter company assumed the indebtedness due to the Red Cloud Mining Company, of Rush, Arkansas.

In January, 1912, the notes of Koehler and Wheeler for the original purchase money were past due and payment was demanded. The Red Cloud Zinc Company, of Delaware, which had assumed this indebtedness, and

Martin W. Littleton, who was one of the principal stockholders and owners of that company, desiring to secure an extension of time in which to pay the indebtedness, proposed that if the Red Cloud Mining Company of Rush, Arkansas, would accept a partial payment of $8,000 that the Red Cloud Zinc Company of Delaware would execute its note for the balance in lieu of the notes of Koehler and Wheeler and would cause the mortgage upon the personal property executed to Sam W. Williams, trustee for Martin W. Littleton, to be released, and would execute a new mortgage to the Red Cloud Mining Company, of Rush, Arkansas, upon the lands and personal property, so that that company would have a first mortgage upon the personal, as well as the real property. The proposition as made was accepted by the Red Cloud Mining Company, of Rush, Arkansas, and the payment was made and the mortgage executed according to the agreement.

The mortgage to Williams, trustee for Littleton, was released, and new notes and mortgage were executed to the Red Cloud Mining Company, of Rush, Arkansas, and Chas. M. Green, trustee. One note was for $6,000, due July 1, 1912, and there were four other notes for $14,-791.33 each, dated January 12, 1912, due respectively one, two and three years after date, bearing interest at the rate of five per cent. per annum. Each of these notes contained a provision that failure to pay the same when due would mature the entire indebtedness.

On the 13th of April, 1913, default having been made in the payment of the notes then past due, suit was instituted in the Marion Chancery Court by the Red Cloud Mining Company, of Rush, Arkansas, and Chas. M. Green, as trustee, to foreclose the mortgage given to secure the indebtedness.

On the 30th of April, 1913, the McIntosh Mining Company and H. H. Gallup, claiming to be general creditors of the Red Cloud Zinc Company, of Arkansas, instituted suit in the Marion Chancery Court against the Red Cloud Zinc Company, of Arkansas, the Red Cloud Zinc

Company of Delaware, the Red Cloud Mining Company, of Rush, Arkansas, and Chas. M. Green, its trustee, Charles LeVasseur, Sam Williams, individually and as trustee for Martin W. Littleton, the Bank of Yellville, Walter Layton and the Dupont Powder Company, whereby they sought judgment for the indebtedness alleged to be due them, and set up that the mortgage executed by the Red Cloud Zinc Company, of Arkansas, to Sam W. Williams, as trustee for Martin W. Littleton, was for the purpose of obtaining money with which to pay the general creditors of said zinc company, and that Littleton was trustee for the general creditors, and alleged that Littleton had no right to release this mortgage, and prayed that the mortgage executed to Sam Williams, as trustee for Littleton, on the 4th of January, 1911, be revived and foreclosed upon the personal property.

On the 27th of October, 1913, the Red Cloud Mining Company, of Rush, Arkansas, and Chas. M. Green, its trustee, answered the complaint of the McIntosh Mining Company and Howard H. Gallup, in which they denied that the mortgage executed by the Red Cloud Zinc Company, of Arkansas, on the 4th of January, 1911, to Williams as trustee for Martin W. Littleton was executed for the purpose of securing any claim or claims of general creditors, but set up that the same was executed for the purpose of securing the individual indebtedness of the mortgagor company to Martin W. Littleton. They further alleged that if the mortgage referred to in the complaint was executed for the purpose of securing general creditors that such fact did not appear upon the face of the mortgage; that the Red Cloud Mining Company, of Rush, Arkansas, and Green, trustee, had no notice of such facts, and that the mortgage, having been released by Littleton and Williams, his trustee, that plaintiffs had no claims or rights in connection with the personal property mentioned in their complaint superior to the rights of the Red Cloud Mining Company, of Rush, Arkansas, and that if plaintiffs had any rights they were inferior and subject to the rights and liens of the Red Cloud Min-

ing Company, of Rush, Arkansas, and Chas. M. Green, trustee; that long prior to the filing of the complaint by the McIntosh Mining Company and Gallup, satisfaction of the mortgage had been duly entered on the records in Marion County for the purpose of enabling the Red Cloud Zinc Company, of Delaware, to execute to the Red Cloud Mining Company, of Rush, Arkansas, and to Chas. M. Green, trustee, its first mortgage upon both the personal property, mill and machinery as well as the land mentioned in plaintiff's complaint, all of which, the defendants alleged, was at the time well known to the plaintiffs, their agents and attorneys, and acquiesced in by them.

The two suits were consolidated. The cause was submitted upon the pleadings, and depositions of witnesses, and exhibits and documentary evidence made exhibits, together with certain admissions and stipulations; and the court made findings in accordance with the undisputed facts above set forth, to which no objections are urged on this appeal. And further found that the mortgage of January 12, 1912, executed by the Red Cloud Zinc Company of Delaware, to Chas. M. Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas, was a first lien upon all real estate and personal property therein mentioned, and that, as between Chas. M. Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas, and the McIntosh Mining Company and H. H. Gallup with reference to the personal property involved, in favor of Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas. The court further found that the McIntosh Mining Company and H. H. Gallup were estopped from asserting any claim upon said personal property superior to the claims of Green and the Red Cloud Mining Company, of Rush, Arkansas.

The court found that the Red Cloud Zinc Company, of Arkansas, and the Red Cloud Zinc Company, of Delaware, were indebted to the McIntosh Mining Company in the sum of $1,156.82 and to H. H. Gallup in the sum of $915, and declared the said sums a lien upon the property

second and inferior to the lien of Chas. M. Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas.

The court also found that the McIntosh Mining Company and H. H. Gallup, as well as the other general creditors of the said Red Cloud Zinc Company, of Arkansas, and the Red Cloud Zinc Company, of Delaware, were entitled to participate with Martin W. Littleton in the mortgage executed to Martin W. Littleton and Sam W. Williams, trustee.

The court rendered a decree, among other things foreclosing the mortgage on the personal property in favor of Chas. M. Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas.

The record recites the following: "To the refusal of the court to hold that the claims of the McIntosh Mining Company and H. H. Gallup are superior and prior to the claims of Chas. M. Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas, the McIntosh Mining Company at the time objected and excepted, had their exceptions noted of record, and prayed an appeal to the Supreme Court, which is granted." Other facts will be stated in the opinion.

Allyn Smith, for appellants.

A trustee can not contract with reference to trust property to the detriment of the beneficiaries, without their consent. 174 U. S. 683; 107 Ark. 424. The McIntosh Company is entitled to a first lien to the exclusion of all other creditors. It had a right to waive the tortious taking. It had a written contract that the property would be paid for or returned and neither was done. The Red Cloud had the use for two years. Cases, *supra.*

Walker & Walker, for appellees.

Martin W. Littleton did not hold the mortgage as trustee for the general creditors, but it was a deed of trust in favor of Martin W. Littleton individually from loss on account of a loan for which he was personally liable. A trust may be enforced against a trustee, etc., or any one else having notice, but can not be enforced against one who acquires the property in good faith and

without notice of the trust or equities giving rise thereto. Especially where the *cestui que trust* had knowledge at the time of the transaction by which the property was so acquired. 39 Cyc. 526-7-8; 84 Ark. 150; 97 *Id.* 402; 49 Fed. 19.

Even if Littleton was a trustee for the creditors, it was at most a secret trust, and one dealing with the property without notice of such fact will be protected. 4 Ark. 296; 80 *Id.* 319; 107 *Id.* 321. Appellants are estopped by their acts and assent to the cancellation of the mortgage of January 4, 1911, and received benefits in money based thereon. 39 Cyc. 5656.

The decree is right and should be affirmed.

WOOD, J., (after stating the facts). *First.* The first and principal question to be determined is whether or not the mortgage of January 4, 1911, executed by the Red Cloud Zinc Company, of Arkansas, to Sam W. Williams, as trustee for Martin W. Littleton, to secure the sum of $25,000, was executed for the purpose of enabling Littleton to raise a fund of $25,000 for the benefit of the general creditors of the Red Cloud Zinc Company, of Arkansas, or whether it was for the purpose of indemnifying Littleton individually against any loss that he might sustain on account of a loan he had been instrumental in procuring for the Red Cloud Zinc Company of Arkansas, and which he had personally guaranteed. This was an issue of fact.

Witness Williams, who drew the mortgage of January 4, 1911, testified concerning it substantially as follows: Jesse M. Littleton and Capt. Charles LeVasseur were present and gave witness the information from which to draft the mortgage. Littleton stated to him the purpose for which the mortgage was drawn in the presence of LeVasseur. Witness did not know anything about that mortgage having been intended for the purpose of securing any person other than Littleton. The first that witness heard of such a purpose "was a short time before Mr. Allyn Smith filed this suit, in which he claimed it."

Jesse M. Littleton testified on this issue as follows: "On the 4th of January, 1911, I was president of the Red Cloud Zinc Company, of Arkansas, and director in said company and owned the majority of the stock in said company. On said date the Red Cloud Zinc Company, of Arkansas, did execute to Sam Williams, trustee, for the benefit of Martin W. Littleton, a mortgage on its real and personal property in Arkansas, and my means of knowing that said mortgage was executed is that I was present at the stockholders and directors meetings authorizing the execution of the note and mortgage, and as president of the company I executed it for the company. The purpose of the execution of the mortgage was to secure payment to Martin W. Littleton of the sum of $25,000, he having advanced to the company, through me, $15,000 and I having borrowed and paid in to the company $10,000. It was to secure the two amounts." After explaining that his brother had furnished to the company of which witness was president, the sum of $15,000, and that he himself had advanced the company the sum of $10,000, he then reiterates, "it (the mortgage) was executed for the purpose of securing him (Martin W. Littleton) for the sum that had already been advanced and which every officer of the company knew had been advanced in cash, and there was no thought of the general creditors being protected under the mortgage at that time, and there was no hint of it and no intention of it."

Martin W. Littleton testified concerning this as follows: "I procured for the Red Cloud Zinc Company, of Arkansas, a loan of $15,000 from the Trust Company of America, the payment of which obligation I guaranteed and this mortgage was executed to secure me against loss on account of my guaranteeing said loan."

On behalf of the appellants Charles LeVasseur testified concerning this issue substantially as follows: He was a stockholder and secretary of the Red Cloud Zinc Company, of Arkansas. As the Red Cloud Zinc Company, of Arkansas, at the beginning of 1911 was indebted to its general creditors in excess of $25,000, to protect its

general creditors it executed to Martin W. Littleton, for no other consideration, a mortgage for the sum of $25,000. At the time of the execution of the mortgage the Red Cloud Zinc Company, of Arkansas, did not owe Martin W. Littleton anything. The amount due its general creditors was a large amount. It was understood that the object of the $25,000 trust deed to Martin W. Littleton was to raise money to pay the general creditors of the Red Cloud Zinc Company, of Arkansas. Martin W. Littleton did not pay any money to the Red Cloud Zinc Company, of Arkansas, at the time of the execution of the trust deed to him on January 4, 1911."

George DeBurghen testified that "at the time of the execution of the trust deed of January 4, 1911, for $25,000, the Red Cloud Zinc Company, of Arkansas, was not indebted to Martin W. Littleton in any amount." Witness was present at a general meeting of the stockholders and it was understood and agreed at the time of the execution of this $25,000 mortgage of January 4, 1911, that if Martin W. Littleton failed to raise money thereon he was to hold said trust deed for the benefit of and to secure the general creditors of the Red Cloud Zinc Company, of Arkansas. Martin W. Littleton did not pay one cent to the Red Cloud Zinc Company, of Arkansas, at the time of the execution of the $25,000 trust deed to him."

It will thus be seen that there was a sharp conflict in the evidence on the issue as to whether or not the deed of trust of January 4, 1911, was executed for the benefit of general creditors of the Red Cloud Zinc Company, of Arkansas, or whether it was executed for the purpose of securing Martin W. Littleton individually from loss on account of a loan which he had obtained for that company and for which he had become personally liable. The deed of trust or mortgage itself shows on its face that it was executed to Sam W. Williams as trustee for Martin W. Littleton. The testimony of the draftsman of the instrument shows that such was its purpose, and the testimony of Jesse M. Littleton, who was representing his brother, Martin W., and Martin W. himself, was to the same effect.

While the testimony of LeVasseur and DeBurghen tended to show to the contrary, the preponderance of the evidence clearly shows that the instrument was what it purports to be, towit, a deed of trust to Sam W. Williams, in favor of Martin W. Littleton.

Second. The next question is whether or not the mortgage executed by the Red Cloud Zinc Company, of Delaware, on the 12th day of January, 1912, to Charles M. Green, trustee, and the Red Cloud Mining Company, of Rush, Arkansas, of the personal property mentioned therein, and in controversy here, gave to the Red Cloud Mining Company of Rush, Arkansas, and Charles M. Green, trustee, a first lien on such property.

It appears that on the 16th day of June, 1911, the Red Cloud Zinc Company, of Arkansas, sold its property, including the personal property in controversy, to the Red Cloud Zinc Company, of Delaware (hereinafter called the Delaware Company), and as a part of the consideration of that sale the Delaware Company assumed and agreed to pay the indebtedness due to the Red Cloud Mining Company, of Rush, Arkansas. The mortgage of January 12, 1912, was executed in pursuance of an agreement between the Red Cloud Mining Company, of Rush, Arkansas (hereinafter called the Rush Company), and the Delaware Company, and Martin W. Littleton, who was one of the principal stockholders in the latter company.

The indebtedness due the Rush Company which the Delaware Company had assumed was long past due, and in order to procure an extension of time of payment an agreement was entered into by the Delaware Company and Martin W. Littleton, on the one hand, and the Rush Company, on the other, to the effect that the Delaware Company would pay to the Rush Company the sum of $8,000 upon the indebtedness due and that the Delaware Company would execute its notes for the balance due in lieu of the notes of one Koehler and one Wheeler, evidencing the original indebtedness to the Rush Company, and as a further consideration for this extension of the

time of payment that the deed of trust executed to Sam Williams, trustee for the benefit of Martin W. Littleton, on January 4, 1911, should be released, and the personal property included therein should be embraced in the new mortgage to be executed by the Delaware Company to the Rush Company. This arrangement was carried out on the part of the Rush Company by its surrendering the notes of Koehler and Wheeler and accepting the $8,000 cash paid and the notes and mortgage of the Delaware Company, and on the part of the latter company by the execution of the notes and mortgage to the Rush Company and on the part of Littleton by releasing the deed of trust given for his benefit.

Since the deed of trust of January 4, 1911, as we have found, was executed for the benefit of Martin W. Littleton individually, and not to him as trustee for the benefit of the general creditors of the Red Cloud Zinc Company, of Arkansas, it follows as a necessary corollary to such finding that Littleton was the owner of this deed of trust and had the right to do with it as he pleased. The general creditors of the Red Cloud Zinc Company, of Arkansas, among whom were the appellants, had no rights in that deed of trust, and hence they had no right to object to the release of such deed of trust by Martin W. Littleton. The agreement which he and the Delaware Company entered into with the Rush Company was one which they had a right to make, and gave to the Rush Company a first lien on the personal property included in its mortgage, and the chancery court was correct in its finding to that effect.

Third. In view of the above findings, it is unnecessary to discuss the question as to whether the Red Cloud Mining Company, of Rush, Arkansas, was an innocent holder for value, and also the question as to whether or not the appellants were estopped. These interesting questions, ably presented in briefs of counsel, necessarily pass out under the conclusion which we have reached on the principal issue of fact above mentioned.

The decree is in all things correct, and it is therefore affirmed.

STOKES v. STATE.

Opinion delivered January 17, 1916.

CRIMINAL PROCEDURE—PLEA OF GUILTY IN JUSTICE COURT—RIGHT OF ACCUSED TO APPEAL.—Where a defendant plead guilty to the charge in an information filed in a justice court, he can not appeal to the circuit court, and in the latter court, change his plea to that of not guilty, and seek a jury trial there.

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

E. L. Matlock, for appellant.

The offense is barred by limitation. The plea of guilty was entered without advice of counsel, and without knowledge whether he was guilty or not of a crime. An appeal is a matter of right. Acts 1905, Act No. 151, § 1. The action in praying an appeal was a withdrawal of his plea of guilty. It was within the discretion of the court to permit the withdrawal of the plea of guilty and be tried upon a plea of not guilty. 114 Ark. 234.

Wallace Davis, Attorney General, and *Hamilton Moses,* Assistant, for appellee.

1. Wife abandonment is a continuing offense—a crime and the wife is a competent witness. Kirby's Digest, § 3092; 78 S. W. 640.

2. The offense is not barred. Kirby's Digest, § 2107; 42 Ark. 110; 108 Ark. 76; 65 N. E. 1.

HART, J. The deputy prosecuting attorney of Washington County, Arkansas, filed an information before a justice of the peace of said county, charging the defendant, Harry G. Stokes, with the statutory crime of abandoning his wife and child. See Acts 1909, page 134.

The defendant entered a plea of guilty, and his punishment was fixed by the justice of the peace at a fine of $75 and imprisonment for sixty days in the county jail.

Within the time allowed by statute he prayed and was granted an appeal to the circuit court of Washington County. When his case came on for trial in the circuit court he was permitted to withdraw his plea of guilty

and to enter a plea of not guilty. He was tried and convicted in the circuit court and the jury fixed his punishment at a fine of $350 and one years' imprisonment in the county jail.

From the judgment of conviction the defendant prosecutes this appeal.

The circuit court should have dismissed the appeal of the defendant. The defendant entered his plea of guilty before the justice of the peace. In doing so he confessed himself guilty in the manner and form as charged against him in the information.

Where the facts alleged in an information or indictment do not constitute an offense, the defendant has lost nothing by pleading guilty, and on appeal may attack the indictment or information for the first time. *Fletcher* v. *State,* 12 Ark. 169.

In the instant case we have not set out the information. It was filed under Act 52 of the Acts of 1909 and charged the defendant with the crime of wife abandonment. It was substantially in the language of the act and no objection has been made or could be made as to its form.

The defendant pleaded guilty when he was arraigned before the justice of the peace and sentence was there pronounced against him. His plea of guilty as received by the court and recorded was an admission of any offense well charged in the information. Unless it was withdrawn by leave of the court there would be nothing left to be done but for the court to pass sentence upon him. The reason is that a plea of guilty is a formal confession of guilt before the court in which the defendant is arraigned, and the court can then only pass sentence as upon a verdict. *State* v. *Wright,* 96 Ark. 203; Clark's Criminal Procedure, pp. 373, 374.

In the case of *Commonwealth* v. *Mahoney,* 115 Mass. 151, the court held that a plaintiff who pleads guilty to a complaint in the municipal court and appeals to the superior court is not entitled to a trial by jury and that unless the plea is withdrawn by special leave of the court

in which it is made, or a motion is interposed in arrest of judgment for legal defects apparent on the record, the commonwealth is entitled to have sentence passed. See, also, *Commonwealth* v. *Winton,* 108 Mass. 485, and 12 Cyc. 801.

It follows that the circuit court erred in not dismissing the appeal of the defendant and for that error the judgment will be reversed and the appeal of the defendant from the justice of the peace court to the circuit court will be dismissed.

It is so ordered.

UNITED STATES ANNUITY & LIFE INSURANCE COMPANY *v.* PEAK.

Opinion delivered January 3, 1916.

1. EVIDENCE—FRAUD—TESTIMONY AS TO CHARACTER.—Evidence of general reputation and good character is inadmissible to rebut imputations of fraud, in a civil suit; the transaction should be ascertained by its own circumstances, and not by the character of the parties.
2. INSURANCE—PAYMENT OF PREMIUM—NOTE—ACCEPTANCE BY COMPANY.—A life insurance policy was delivered to the insured and he gave his note to the local agent in payment therefor, for the first year. The agent gave the same to a bank as collateral security for a loan, and with the proceeds of the loan paid the insurance company the amount of the premium due to it; the company accepted the amount sent as payment of the amount due. *Held,* there could thereafter be no forfeiture of the policy for non-payment of the premium for the first year, because the company had treated the premium as paid.
3. LIFE INSURANCE—APPLICATION—COMPLETION OF EXAMINATION—DUTY TO DISCLOSE NEW MATTER.—Where an applicant for life insurance has done all that is required of him in making an application for a policy of life insurance, he is not, as a matter of law, before the delivery of the policy to him, required to disclose to the company the result of another medical examination for insurance in another company, as to his state of health, regardless of the fact whether he believed what he learned from the second examination or not.
4. LIFE INSURANCE—PHYSICAL CONDITION OF APPLICANT—CONCEALMENT.—After deceased had made an application for a policy of life insurance in appellant company, and had done all that was required of him, but before the delivery of the policy, deceased learned that he had chronic Bright's disease. *Held,* his failure to disclose

that fact to appellant company amounted to an intentional concealment on his part, of a material fact, and his failure to communicate it to the company, avoided the policy.

Appeal from Chicot Circuit Court; *Turner Butler*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee sued appellant to recover on a life insurance policy. The appellant is a life insurance company organized under the laws of the State of Illinois, and is authorized to transact business in the State of Arkansas. On August 14, 1913, Robert F. Peak, of Readland, Arkansas, made application in writing to appellant for a policy of life insurance in the sum of $5,000, payable to his wife, Pearl S. Peak, as beneficiary. In his application he represented and agreed that his answers to questions propounded by the company's medical examiner should be true, and should be the basis of and the consideration for the contract of insurance applied for. On the same day Peak submitted to an examination by Dr. J. W. Nichols, the local medical examiner of the company. His medical examination, among other things, contained the following:

"Does the chemical examination of the party's urine show albumen or sugar (even in traces) or any abnormality?" "No."

Doctor Nichols did not obtain a specimen of the applicant's urine on the 14th. He asked Mr. Peak for a specimen, but Peak, having passed his urine before he went to the doctor's office, could not furnish it at that time. The doctor suggested that he would go to Mr. Peak's house the next day to get a specimen, but Peak said he might be gone. The next morning the doctor received a specimen of urine represented to be the urine of Peak. The specimen was delivered to the doctor by Mrs. Annie Peak, the applicant's mother. Doctor Nichols made a careful examination of the specimen of urine received by him from the applicant's mother on the morning of the 15th of August, 1913, and found it to be normal. He had

no reason to suspect, after such an examination, that Peak was afflicted with Bright's disease.

On the 17th day of August, 1913, Peak was examined by Dr. C. P. Meriwether, of Little Rock, Arkansas, for insurance in another company. Doctor Meriwether testified as follows:

Peak looked to be in good condition. An examination, however, showed that his blood pressure was much higher than that of a normal man and an examination of his heart showed an injured condition or hypertrophy. His urine was loaded with albumen and was of low specific gravity. I found no traces of sugar, but considerable albumen. I told Peak that he might have acute or chronic Bright's disease, and that he ought to go to his family physician, and that I could not tell much about it unless I should make a microscopic examination. At his request I then made a microscopic examination. I found all kinds of casts. I then told him I thought he had Bright's disease. He told me that he was going to Roswell, New Mexico, and I told him that he ought to be under medical treatment all of the time. We got a medical directory and decided upon a physician at Roswell to whom he should go for treatment. It is not a scientific and medical possibility that the urine of Mr. Peak could have been in a normal condition on the 15th day of August, 1913, in view of the condition I found on the 17th, taking into consideration the condition of his heart, coupled with what I discovered on the microscopic and chemical examination.

Mr. Peak's application for insurance in appellant company was finally accepted on the 5th day of September, 1913. His policy was signed on the 22d day of August, 1913, and was mailed to the State agent of the company in Arkansas on September 6, 1913. The policy was delivered to Mr. Peak by the local agent of the company on the 17th day of September, 1913. The company first received information of Mr. Peak's physical condition as disclosed by the examination made by Doctor Meriwether on the 16th day of September, 1913. Immediately after it received the information, on the 17th day of September, 1913, the company sent a telegram to its State agent to

hold the policy for further instructions. The State agent called the local agent over the telephone and directed him not to deliver the policy. The policy, however, had been delivered a few hours before by the local agent to Mr. Peak.

The insured died five months and two days after the policy was delivered to him, and Bright's disease of the kidneys caused his death. Mr. Peak executed a note for $151.40, payable to the order of J. L. Carter, the local agent of the company, for the first year's premium. The local agent and the State agent deposited this note as collateral security for money borrowed by them of a local bank. They remitted to the company its share of the proceeds. In other words, they paid to the company that part of the premium which went to it. The note in question provided that it should be paid in monthly installments, and the monthly installment due June 14, 1914, was not paid. The company went to the local bank where the note was deposited as security and paid the note. The note was returned to Peak by registered mail on June 29, 1914. He tried to pay it, but the agents of the company refused payment.

Peak made no disclosure to the insurance company of what Doctor Meriwether had told him concerning his physical condition. If he had made such disclosure, the company would not have issued the policy and delivered it to him.

Testimony was introduced on the part of the company tending to show that if Peak's condition on the 17th of August was as testified to by Doctor Meriwether, his urine could not have been normal on the 15th of August, 1913. Several physicians testified to this fact. A physician for appellee testified, however, that his condition might have been normal on the 15th, and that it was possible that there might have been a rise in his blood pressure in forty-eight hours at the end of which time casts might show.

Testimony was also adduced in favor of appellee tending to show that the specimen of urine furnished to

Doctor Nichols was genuine. Evidence was also introduced tending to show that the reputation of the insured for truth and morality was good.

The jury returned a verdict in favor of appellee, and the cause is here on appeal.

L. A. Stebbins and *X. O. Pindall,* for appellant.

1. The court erred in admitting evidence of the reputation of deceased for truth and morality. 62 Ark. 267; 35 S. W. 228; 3 Caines 120; 28 Kans. 756; 68 Ia. 737; 28 N. W. 47; 56 Am. Rep. 870; 30 Ore. 211; 46 Pac. 850; 6 Cow. 673; 16 Am. Dec. 460; 1 Gray (Mass.) 529; 38 Okla. 395; 132 Pac. 1092; 49 L. R. A. (N. S.) 724 and note, 725, 728.

2. It was the duty of deceased to disclose facts material to the risk known to him while his application was pending and before its acceptance and his failure to do so renders the policy void when issued by the company in ignorance of such fact. 1 Elliott on Contracts, § 125; 25 Cyc. 797; 1 May on Ins. (3 ed.), § 190; Richards on Ins. (3 ed.), § 100; Kerr on Ins., § 141; 130 Tenn. 325; 170 S. W. 474; L. R. A. 1915, C. 153.

3. The court erred in its application of the law to the fact of the nonpayment of the installment due on the premium note on January 14, 1914. 74 Ark. 507; 86 S. W. 813; 75 Ark. 25; 86 S. W. 814; 85 Ark. 337; 108 S. W. 213. So far as the note being payable to the local agent of the company is concerned, this precise question is settled in 75 Ark. 25; 86 S. W. 814.

4. A verdict should have been directed for appellant. 81 Ark. 568; 101 *Id.* 513; 101 Ark. 513.

Baldy Vinson and *W. G. Street,* for appellee.

1. The medical examiner was the agent of the company for that purpose and Peak had a right to rely on his report as to his condition, and in the absence of fraud, the defendant is bound by his report. 109 Ill. 157. Nicoll was the appellant's agent. 71 Ark. 295; 104 *Id.* 538; 5 Ga. App. 708; 96 Am. St. 698; 24 R. I. 7; 51 Atl. 1049; 17 L. R. A. (N. S.) 1144; 115 N. W. 500; 79 S. W. 219.

2. Nonpayment of the note given and accepted as payment after knowledge of the alleged facts disclosed, as grounds of forfeiture is no defense. 41 L. R. A. (N. S.) 505; 147 S. W. 882; 149 Ky. 80. The company owned the note and Carter, its agent, had the privilege of raising money by discounting or hypothecating the note; it belonged to the company, and it is estopped to deny payment, or set up nonpayment or any other ground than fraud. 149 Ky. 80; 41 L. R. A. (N. S.) 505. Giving credit for payment of a premium waives the provision in a policy that it shall not take effect until the premium is paid while the applicant is in good health. 197 Fed. 299; 128 Ga. 491; 128 L. R. A. (N. S.) 319.

3. Proof of good character may be made where one is charged with fraud. 62 Ark. 267; 25 Conn. 465.

HART, J., (after stating the facts). (1) The cause was submitted to the jury on the theory that the main question of fact for their determination was whether or not the policy was obtained through fraud. The court instructed the jury that if the insured was affected with Bright's disease at the time he made the application, that such fact was material to the risk and avoided the policy if the insured either knew that fact or concealed it from the company, or purposely furnished the medical examiner of the company with a specimen of urine for examination which was not his own. The appellant, to maintain the charge of fraud, introduced considerable evidence tending to show that the specimen of urine examined by its medical examiner was a spurious specimen. The appellee then, by way of rebuttal, introduced witnesses who testified that they were acquainted with the general reputation of Peak for truth and morality in the neighborhood where he lived, and that that reputation was good. Counsel for appellant assigns as error the action of the court in admitting this testimony, and we think they are right. It is true there is some authority to the effect that in civil cases where a party is charged with fraud, and the charge is based only on circumstantial evidence, he may rebut the charge by proof of his good char-

acter. We think, however, the far safer rule is that in conformity to the general rules of evidence in civil cases each transaction should be ascertained by its own circumstances, and not by the character of the parties. See 16 Cyc. 1263.

In the case of *Great Western Life Ins. Co.* v. *Sparks,* 38 Okla. 395, 132 Pac. 1092, 49 L. R. A. (N. S.) 724, the court held that in an action on a life insurace policy where one of the defenses set up in the answer was that the insured had falsely and fraudulently answered certain questions propounded to him in his application for insurance, it was error to admit evidence to the effect that the general reputation of the insured for being a truthful and honest man in the neighborhood in which he resided was good for the purpose of rebutting direct evidence tending to establish the allegation of fraud.

Many cases are cited in the opinion to sustain it and many others are cited in an extensive case note to the opinion as reported.

Then, too, we think this is the effect of our decision in the case of *Powers* v. *Armstrong,* 62 Ark. 267. See, also *Stone* v. *Hawkeye Insurance Co.,* 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870; *Munkers* v. *Farmers and Merchants Insur. Co.,* 30 Oregon 211, 46 Pac. 850; *Fowler* v. *Aetna Fire Ins. Co.,* 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

(2) It is also insisted by counsel for appellant that in any event the policy had lapsed for nonpayment of the installment due on the note on the 14th day of January, 1914. It will be remembered that the applicant executed a note for the first year's premium payable to the order of J. L. Carter, the local agent of the company. Carter, who was the local soliciting agent of the company at Eudora, Ark., and the State agent of the company deposited the note with a local bank as collateral security for borrowed money. Out of the proceeds, the agents paid to the company the amount due it out of the first year's premium and retained the amount of the commissions due them. The company accepted the amount sent it as payment of the amount due it; and there could thereafter be no for-

feiture of the policy for nonpayment of the premium for the first year because the company treated the premium as paid.

(3) Finally it is insisted by counsel for appellant that it was the duty of the applicant to disclose facts coming to his knowledge material to the risk while the appellant company had his application for insurance under consideration and before its acceptance. In short, they contend that it was his duty to disclose the fact that he had been told by Doctor Meriwether that he had chronic Bright's disease, and that his failure so to do avoided the policy. They contend that the subject-matter of the contract is the life of the applicant, and that if, after the application had been made and representations forwarded to the insurer to induce them to enter into the contract, there is a change in the subject-matter of the contract, considerations of fair dealing require the applicant to disclose the change, that good faith requires the applicant to disclose to the company every fact material to the risk which came to his knowledge at any time before the contract was closed. In support of their contention, they cite *Peidmont & Arlington Life Ins. Co.* v. *Ewing, Admr.*, 92 U. S. 377; *Harris* v. *Security Mutual Life Ins. Co.*, 130 Tenn. 325, 170 S. W. 474, L. R. A. 1915 C, 153. Several cases are cited in the opinions in these cases in support of the rule, and other cases are cited in the case notes to which they refer.

We do not adopt the reasoning of these cases in their entirety. We do, however, think the rule announced there was correct when applied to the facts of those cases. For instance, in the case in 92 U. S. 377, while negotiations were still pending between the agent of the company and the applicant touching the terms of the contract, the amount of the premium and the mode of payment, a friend paid the premium to conceal from the agent the condition of the applicant, who was then *in extremis* and died in a few hours. The agent, in ignorance of the facts, delivered the policy, and the court held that no valid contract arose from the transaction. The court said:

"To hold that, when he was *in extremis,* an hour or two before he breathed his last, a friend could pay this small sum to an agent of the company, without the agent of the company having any idea of the condition of the dying man, and thus secure an obligation to pay his administrator $5,000 within sixty or ninety days, is to affirm that one party to a negotiation can delay his assent to the terms of the contract until the changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory."

In the instant case the policy had not been issued, but the applicant had done all that had been required of him. We do not think he would be required, as a matter of law, to disclose to the company the result of a medical examination for insurance in any other company regardless of the fact whether or not he in good faith believed what the medical examiner had told him. For instance, when the applicant went to Doctor Meriwether and was examined by him for life insurance in another company, and Doctor Meriwether told him that he found albumen in his urine and other indications of Bright's disease, the applicant would not be required to state this fact to appellant company unless he believed it to be true; for, if he did not believe the statement made by Doctor Meriwether, he could not be said to conceal a material fact from the company. He might believe that his kidneys were only temporarily affected, and that the physician was mistaken in believing it to be Bright's disease.

(4) The testimony in the case before us, however, went further than this. After Doctor Meriwether had examined him and told him that the results of the examination indicated that he had Bright's disease, Peak became alarmed. Doctor Meriwether told him that he could not tell much about it until he made a microscopic examination, and as a result of this examination told him he thought he had chronic Bright's disease. The applicant then told him that he intended to go to Roswell, New Mexico, at once, and Doctor Meriwether selected a physician to treat him for Bright's disease while he was out there.

Doctor Meriwether is a physician of good reputation, and there is nothing whatever in the record to dispute his testimony.

So, it may be said that the result of Doctor Meriwether's examination of the applicant was to disclose to him that he had a fatal disease, the presence of which he could not be ignorant of, and the failure to disclose his knowledge that he had chronic Bright's disease was an intentional concealment on his part of a material fact, and his failure to communicate it to the company avoided the policy. Under the undisputed facts, we think there was an element of knowledge on the part of the applicant that he had Bright's disease, and that there was an intentional concealment of this fact from the company.

For the reasons given in the opinion, the judgment will be reversed and the cause remanded for a new trial.

HALL v. HUFF.

Opinion delivered January 10, 1916.

1. JUDGMENT—VALIDITY—DIRECT ATTACK.—A direct attack in a judgment or decree is any proceeding which is instituted for the express purpose of annulling, vacating or modifying it.
2. JUDGMENTS—MOTION TO VACATE—DIRECT ATTACK.—A motion to set aside or to vacate a judgment rendered at a former term, is a direct attack upon the judgment.
3. APPEAL AND ERROR—PARTIES—APPEARANCE—FINDING OF CHANCELLOR.—The finding of the chancellor that the appearance of appellant had been entered by his attorney, held to be against the preponderance of the evidence, and to call for a reversal of the case.

Appeal from Garland Chancery Court; *Calvin T. Cotham,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

On the 15th day of March, 1915, W. H. Hall filed a petition in the chancery court of Garland County to quash an execution issued in the case of C. Floyd Huff against J. H. Hall for the sum of $1,100. His petition alleges that on the 11th day of February, 1915, the said execution was delivered to the sheriff who threatened to levy the same

upon the property of the plaintiff. A copy of the execution is attached to the petition. The plaintiff Hall further states that the judgment upon which the said execution was issued was rendered without service on him, and is void. The facts are as follows:

On the 30th day of April, 1912, C. Floyd Huff instituted an action against J. H. Hall to recover possession of an undivided one-third of certain real estate situated in the city of Hot Springs, in Garland County, Arkansas. On March 17, 1913, Huff filed what he styles an amendment to his complaint in which he states that since the institution of the suit he has learned that a part of the land described in his complaint belonged to W. H. Hall instead of J. H. Hall, and asks that W. H. Hall be made a party defendant, and that all the allegations contained in his original complaint be considered as having been made against W. H. Hall in like manner as if he had been made a defendant with J. H. Hall. He prayed that upon a final hearing of the cause, he be given the same relief against W. H. Hall that he asked for in his original complaint against J. H. Hall.

On March 17, 1913, the defendant J. H. Hall filed a motion to strike from the files the amendment to the complaint just referred to, and the grounds upon which the motion is based are stated therein. The motion was signed by Wood & Wood, attorneys for J. H. Hall. This firm of attorneys consisted of Judge J. B. Wood and his son Scott Wood. Judge J. B. Wood died in June, 1913. In September, 1913, Jethro P. Henderson, the chancellor, caused an order to be entered stating his disqualification to hear and determine the cause because he had formerly been the law partner of Judge J. B. Wood and was interested in the litigation in its incipiency. The record shows that in September, 1913, subsequent to this time, a special chancellor was elected who heard and determined the cause, entering a decree in favor of the plaintiff Huff against the defendants J. H. Hall and W. H. Hall in the sum of $1,100.

On February 21, 1914, the defendant J. H. Hall, through his attorney Scott Wood, prayed and was granted an appeal to the Supreme Court. On June 22, 1914, the Supreme Court rendered an opinion reversing the decision of the chancellor and ordering the cause remanded with directions to dismiss the complaint of the plaintiff Huff for want of equity. On the 11th day of February, 1915, the plaintiff caused an execution to be issued and placed in the hands of the sheriff with directions to levy upon the property of W. H. Hall.

The plaintiff and his attorney testified that some time after the original complaint was filed against the defendant J. H. Hall, they learned that W. H. Hall owned a part of the property embraced in the complaint; that thereupon, an amendment to the complaint asking that W. H. Hall be made a party defendant to the suit was filed; that Judge J. B. Wood, who represented the defendant J. H. Hall, agreed in open court that he would enter the appearance of W. H. Hall, and that the answer which he had filed on the part of J. H. Hall should also inure to the benefit of W. H. Hall.

They stated that they did not know whether the chancellor acted upon the motion of Judge Wood to strike from the files of the court their amendment to the complaint. They also stated that they did not know what judge occupied the bench at that time.

Judge Jethro P. Henderson, the regular chancellor, testified that he had formerly been a law partner of Judge Wood; that he had no personal recollection whatever about whether Judge Wood entered the appearance of W. H. Hall; that it was his uniform practice to make a notation on the docket where the appearance of a client was entered by an attorney; that it was insisted by counsel for both parties that he was disqualified; that he went over the facts of the case fully and prepared a written opinion in the case, but before it was delivered concluded that he might be disqualified, and on that account did not deliver his opinion; that on account of his former partnership with Judge Wood, he concluded that he might perhaps

have been connected with the firm when the employment of Judge Wood was first made by Hall.

The chancellor did not certify his disqualification until after Judge Wood's death. The record shows that he certified his disqualification in the case of "*C. Floyd Huff* v. *J. H. Hall.*" The record does not show that W. H. Hall was mentioned as a defendant in the case until the final decree was rendered.

W. H. Hall testified that Judge Wood was not employed by him nor authorized to enter his appearance to the suit in question; that he did not know that any judgment had been rendered against him until some time after the decision of the case in the Supreme Court; that he was a witness in the original case against his father but never at any time authorized Judge Wood to enter his appearance to that suit. Other facts will be referred to in the opinion.

The chancellor entered a decree dismissing the petition of W. H. Hall and from the decree rendered in favor of Huff, Hall has appealed.

Davies & Davies, for appellant.

1. The decision in *Hall* v. *Huff,* 114 Ark. 206, is decisive that Huff can, in no event recover. The complaint stated no cause of action against anybody. The judgment was void against a party not served with process, who never appeared and had no notice whatever. 62 Ark. 439; 81 *Id.* 462; 55 *Id.* 205; 102 *Id.* 255; 95 *Id.* 302; Kirby's Dig., § 4431.

2. A court always has jurisdiction to correct any abuse of its process. 3 Ark. 532; 8 *Id.* 319; 11 *Id.* 519; 38 *Id.* 435; 59 *Id.* 15. A party not served with process becomes a party by appealing. 4 Ark. 200. One not a party is not entitled to appeal. 30 Ark. 578. Where the record shows error on its face the judgment will be reversed. 46 Ark. 17; 26 *Id.* 600. Courts correct obvious errors in judgments even after the term. 33 Ark. 218.

3. Where a suit is brought against several defendants jointly, and one is not served, and judgment goes against *all,* the judgment is voidable. 23 Cyc. 690; 6

Ark. 456; 4 *Id.* 431. Upon reversal of a joint judgment on an appeal by one, takes up the whole case and the reversal inures to the benefit of all. 70 Ark. 195; 66 S. W. 922; 2 Cyc. 279; 14 N. J. Eq. 361.

James E. Hogue, for appellee.

No one, whether party or not, may impeach the record of a judgment; a record of a court of superior jurisdiction imports absolute verity and is conclusive of the facts recited between parties and privies and can not be contradicted by evidence *aliunde.* 23 Cyc. 855, 854, 856. All presumptions are in favor of the regularity of the rendition of decrees and of the entry. 77 Ark. 303; 76 *Id.* 534; 72 *Id.* 320; 97 *Id.* 76; 21 L. R. A. 848.

2. The remedy to modify a judgment is a suit at law under § § 3224, 4431, in the same court. 93 Ark. 266. At common law a judgment could not be amended after the term. 93 Ark. 234; 92 *Id.* 299; 2 *Id.* 60, 66; 5 *Id.* 23; 92 *Id.* 388.

3. The burden is on the party attacking a decree valid on its face. 93 Ark. 490. Where a judgment recites that defendants were duly served etc., it must be taken as true. 11 Ark. 519; 50 *Id.* 338; 61 *Id.* 464; 63 Ark. 513; 105 *Id.* 5. The word "defendants" is construed to mean all who were served with process or appeared. 26 Ark. 941. An erroneous judgment is binding until reversed. 8 Ark. 318; 5 *Id.* 424; 20 *Id.* 25.

4. This is what Judge Story calls a bill in the nature of a bill of review, but is really a bill to vacate a judgment for want of notice, and whether considered as a direct or collateral attack, a meritorious defense must be shown, and in this Hall has failed.

HART, J., (after stating the facts). Though it is not so denominated, the present proceeding was evidently instituted under section 4431 of Kirby's Digest to vacate a decree rendered at a former term of the chancery court on the ground that it was entered without notice to him. See *Holman* v. *Lowrance,* 102 Ark. 252; *Foohs* v. *Bilby,* 95 Ark. 302.

(1-2) A motion under the statute to vacate or set aside a judgment rendered at a former term is obviously a direct attack on the judgment. The effect on the present proceeding is to attack the judgment against W. H. Hall in favor of C. Floyd Huff rendered at a former term of the chancery court by setting it aside on the ground that no service of summons was had on the said W. H. Hall and that his appearance to the suit had not been entered. A direct attack on the judgment or decree has been defined to be any proceeding which is instituted for the express purpose of annulling, vacating or modifying it.

On the part of W. H. Hall it is contended that the decree in the former suit against him in favor of Huff was entered without any service upon him or any notice on his part that he had been made a party to the suit. The chancellor found against him on this issue and the correctness of his decision in this respect we consider to be the most serious question in the case.

(3) After a careful consideration of the whole record in this case we have reached the conclusion that the finding of the chancellor is against the preponderance of the evidence. In arriving at that conclusion we do not wish to be understood as casting any reflections upon the integrity or good faith of Huff or his attorney. We simply mean to say that when the record is considered in all its aspects and bearings, we think the preponderance of the evidence shows that they were mistaken in saying that Judge Wood entered the appearance of W. H. Hall. It appears that Hall had several actions pending against him in regard to property in Hot Springs and that Judge Wood was attorney for him in all these cases; and it is likely that they have confused the appearance of Hall entered in some of these cases with the present case. Though they have testified positively that Judge Wood entered the appearance of W. H. Hall, they have stated that they did not remember what chancellor was on the bench at the time or what disposition, if any, was made

of Judge Wood's motion to strike their amendment to the complaint from the files of the court.

Judge Wood died in June, 1913, and his motion to strike the amendment to the complaint from the files was filed on March 17, 1913. Judge Henderson must have occupied the bench at that time. He testified that counsel for both parties insisted that he was qualified to try the case and that he first considered all the testimony and prepared an opinion in the case but afterwards concluded that he was disqualified and certified his disqualification. The record shows that he certified his disqualification after Judge Wood died. It also shows that he certified his disqualification in the case of *Huff* v. *J. H. Hall.* W. H. Hall was not mentioned. This was not long after it is claimed the appearance of W. H. Hall had been entered by Judge Wood.

According to the testimony of Chancellor Henderson he had no recollection of Judge Wood having entered W. H. Hall's appearance and he stated that it was his settled practice to make a notation on his docket when the appearance of a client was entered by an attorney. The record shows that his docket does not show that the appearance of W. H. Hall was entered to the action.

Scott Wood, who was the partner and son of Judge Wood during the whole proceeding, prayed an appeal to the Supreme Court for J. H. Hall but did not ask one for W. H. Hall. The defense of the two Halls to the action would have been practically the same.

The record also shows that W. H. Hall was much interested in the case and assisted his father in the management thereof throughout the whole proceeding.

These two last mentioned facts, when considered together, are convincing testimony that neither Scott Wood nor W. H. Hall knew that the latter had been made a party to the suit and that judgment had been rendered against W. H. Hall.

As above indicated, we think the state of the record turns the scale in favor of Hall and are of the opinion that a preponderance of the evidence sustains his conten-

tion. Both Huff and his attorney were lawyers and are members of the bar of this court as well as of all the inferior courts in this State. As such they no doubt participate in the trial of many cases during the course of the year and have confused another appearance in some other case with the facts testified to in this case.

This brings us to the question of whether or not the defendant Hall has a meritorious defense to the action in which the judgment against him was obtained. On this question but little need be said. The issues against the two defendants were the same. What would constitute a defense for J. H. Hall would constitute a defense for W. H. Hall also. The transcript in the original suit was introduced in evidence in the present proceeding and this court rendered a decision reversing the decree against J. H. Hall and ordering the cause remanded with directions to dismiss the complaint against him for want of equity. See *Hall* v. *Huff*, 114 Ark. 206.

The case will, therefore, be remanded with directions to enter a decree in favor of the appellant.

WOOD, J., not participating.

KOHN, TRUSTEE, *v.* SMITH.

Opinion delivered January 17, 1916.

1. JUDGMENTS—JUDGMENT BY DEFAULT—LACHES.—An action was brought by appellant, M., against A., B. and C., in a justice court. The action was abandoned as to A. and B., and judgment was rendered in C's favor. Appellant notified C. of his intention to appeal, which he did, and in the circuit court took default judgment against C. In an action to set aside the judgment, on the ground that C. had no knowledge that the appeal was pending, *held*, under the evidence that C. and his attorneys had not exercised due care to discover the pendency of the appeal, and that the default judgment should not be set aside.
2. JUDGMENTS—DEFAULT JUDGMENT—CLERICAL MISPRISON.—M. sued A., B. and C. in a justice court, dismissing as to A. and B., judgment being rendered for C. M. appealed and the circuit clerk docketed the appeal as *M.* v. *A., B. and C. Held*, the action of the circuit Clerk was not such a clerical misprison as would justify setting aside a default judgment in M's favor against C. on the ground

that C., because of the improper docketing of the case, failed to discover that the same had been appealed and set for trial.

3. JUDGMENTS—CONTROL OF, BY CIRCUIT COURT—EXPIRATION OF TERM.—The circuit court may, under Kirby's Digest, § § 4431-3, vacate or modify its judgments, after the expiration of the term.

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

W. T. Tucker, for appellant.

1. After the lapse of the term, judgments can be set aside only under Kirby's Dig., § 4431, or by bill of review in equity. 33 Ark. 454; 53 *Id.* 114; 97 *Id.* 317; 52 *Id.* 316; 89 *Id.* 163. The court had power to set aside the judgment.

2. There was no misprision of the clerk and no fraud shown. Nor was there any unavoidable casualty or misfortune shown, preventing a defense. 104 Ark. 48. Negligence of one's own attorney is not sufficient. 12 Ark. 401; 66 *Id.* 183; 97 *Id.* 117.

3. The court had no jurisdiction to set aside the judgment. Kirby's Digest, § 4431-3. No defense was shown. 12 Ark. 401; 66 *Id.* 184.

J. W. & J. W. House, Jr. and *A. F. House,* for appellee.

The complaint meets every requirement of Kirby's Digest, § 4431. A valid and meritorious defense was alleged. The demurrer was properly overruled. 70 Ark. 161; 91 *Id.* 404. There was a misprision of the clerk (72 Pac. 427); also unavoidable casualty. 63 Ark. 323; 39 S. E. 838; 51 Pac. 896; 61 *Id.* 932; 85 N. E. 984; 83 Ark. 17. Only *prima facie* proof of the truth of the defense is necessary. 102 Ark. 252. The question of jurisdiction was not raised.

KIRBY, J. This appeal comes from a judgment of the circuit court, vacating and setting aside a judgment rendered in favor of appellant by default. It is a proceeding under section 4431, Kirby's Digest, the grounds alleged coming within sub-divisions 3 and 4 thereof for misprision of the clerk and for fraud practiced by the successful party in obtaining the judgment.

It was also alleged that the judgment was procured without notice and that plaintiff was prevented from defending the suit on account of unavoidable casualty and misfortune, and that the plaintiff and his attorney had repeatedly inquired of the clerk of the circuit court, where the cause was pending for trial, when it would be reached and had been always informed that there was no such case on the docket.

A demurrer was interposed and overruled and an answer filed and plaintiff and his attorney testified and also the attorney of appellant.

It appears from the testimony that appellant first brought suit in a justice court against Jno. J. and Orville O. Scoggins and A. L. Smith, that upon the trial it developed that he had no cause of action against the Scoggins' and the suit was abandoned as to them, the justice taking the case under advisement as to Smith. He later rendered judgment in Smith's favor, from which an appeal was taken to the circuit court.

Appellant's attorney notified Smith's attorney that he intended to take an appeal, and perfected his appeal.

The case was docketed in the circuit court as it had been in the justice's court, *Myer Kohn, Trustee,* v. *Jno. J. and Orville O. Scoggins and A. L. Smith,* the judge's docket showing the names of the parties and their attorneys, the date of the setting of the case for trial and the judgment by default upon said date.

Smith testified that he had been informed by the justice that an appeal had been taken and went frequently to the circuit clerk to inquire about it and was always informed that there was no case on the docket against him. His attorney also testified that he had made like inquiries and had been told that there was no case pending against his client, Smith. He stated further that the calendar showing the setting of the case was not sent to his firm by the clerk as was usual of all cases in which they were interested.

The attorney for appellant notified Smith's attorney that he intended to take the appeal and upon the day the

case was set for trial in the circuit court called for him over the 'phone, and was informed he was attending chancery court and not in.

The term expired after the rendition of the default judgment and it was some months thereafter before this suit was filed, it being alleged that the fact was not sooner discovered.

(1) No attempt was made to show there was any fraud practiced by the successful party in procuring the judgment and there is no evidence indicating a disposition or intention upon his part to mislead the appellee about the status of the case. His attorney was notified that an appeal had been taken, the transcript was lodged in the circuit court and the case docketed there, showing his name in the style of it and his attorney's name on the docket, although it is true that the index did not show his name in the style of the case. He had notice that an appeal had been taken and if he failed to attend and defend the suit because of statements made by the clerk of the circuit court, which satisfied him without making sufficient investigation to discover the fact; his failure to make defense resulted from his lack of diligence rather than through any fault on the part of the appellant who also called the attention of his attorney thereto, or the firm, or attempted to do so upon the day the judgment was taken. He had but to ask the clerk to show him the docket of the only two cases thereon in which Myer Kohn was appellant, in both of which the said Scoggins', whom he knew had been sued jointly with him in the justice court from which the appeal was taken, were appellees, a casual examination of which would have disclosed the pending suit against him and the date set for the trial thereof.

(2) There was no misprision of the clerk shown that would justify setting aside the judgment. The docket in fact showed the style of the case, as it had been tried in the justice court and the name of appellee as one of the defendants and a proper investigation by appellee, would have discovered that the case was pending in the circuit court for trial.

(3) The court has power to vacate or modify judgments after the expiration of the term in accordance with the procedure prescribed by said sections 4431-3, Kirby's Digest and this court is of opinion that no sufficient showing was made under the allegations of the complaint to warrant its action in setting aside the judgment by default herein. *Blackstad Merc. Co.* v. *Bond,* 104 Ark. 48; *Ayers* v. *Anderson-Tully Co.,* 89 Ark. 163; *State National Bank* v. *Neal,* 53 Ark. 113.

Some authorities are cited by appellee in support of his contention, but the cases were decided under statutes materially different from ours, excusable negligence being recognized as a ground for such relief in said jurisdictions.

The judgment is reversed and the cause remanded with instructions to dismiss the complaint to set aside said default judgment.

OWEN v. COX.

Opinion delivered January 24, 1916.

DOWER—ASSERTION OF CLAIM—ESTOPPEL BY THE RECORD.—A widow failed to make a claim for dower in lands belonging to her deceased husband, but did join with deceased's son in petitioning that certain lands be awarded to him. Defendant purchased the land from the son, relying in good faith upon the record. *Held,* the widow was estopped by the record thereafter to assert a claim for dower as against the purchaser.

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

G. G. Taylor and *E. R. Lentz,* of Missouri, for appellant.

Plaintiff was, at the time of her husband's death entitled to dower. She has never relinquished it and she was not barred by the decree in chancery, as her right to dower was not *in issue,* (34 N. J. L. 418), the leading case on this subject. This case has been followed and approved in many cases. 140 U. S. 254; 186 Mo. 633; 214 Mo. 206; 108 Ind. 517; 112 N. W. 386; 54 W. Va. 613;

1 Black on Judg. 242; 96 Ark. 545; 40 Id. 28; 9 Wheat, *Osborn* v. *Bank;* 12 Pet. (U. S.), *Kendall* v. *U. S.,* 125 S. W. 364; 106 U. S. 699; 138 *Id.* 562. She was not a party to the suit and she is not barred nor estopped. 96 Ark. 545 and cases *supra.*

E. G. Schoonover and *G. B. Oliver,* for appellee.

The proceedings in the Randolph court were authorized by Kirby's Dig., § 5770 and § 6280; 30 Cyc. 201 (16) and 20, 67. The evidence shows that she consented to the proceedings and she is bound. 30 Cyc. 153A; *Ib.* 161C; 77 Ark. 309; 84 *Id.* 557; 62 *Id.* 51. She abandoned all claim and put Wiley Owen in possession. 102 Ark. 658. A widow can convey her dower to the heir. 31 Ark. 334; 37 *Id.* 648; 62 *Id.* 313. The decree is binding on her until set aside. 34 Ark. 642; 23 Cyc. 1077. She is certainly estopped. 30 Cyc. 164G.

McCULLOCH, C. J. This is an action instituted by appellant Sarah E. Owen, in the chancery court of Randolph County, against her children and their grantees to require the assignment to her of dower in a tract of land in that county left by her husband, Thomas R. Owen, who died in the year 1894. Thomas R. Owen died, as before stated, in the year 1894, leaving surviving the appellant, his widow, and four children, and he was the owner at the time of his death of several tracts of land in Butler and Wayne counties, Missouri, and the tract in controversy situated in Randolph County, Arkansas. Dower in the Arkansas land was never assigned to the widow, nor does it appear that her dower in the Missouri land was ever assigned.

This action was not begun until the year 1913, after the lands had been decreed by the chancery court of Randolph County to Madison Wiley Owen, one of the children of Thomas R. Owen, and by him conveyed to W. D. Polk. The decree of the Randolph Chancery Court just referred to was rendered in the year 1902 on the *ex parte* petition of appellant and the heirs of Thomas R. Owen. It was alleged in the petition in that proceeding that Thomas R. Owen had intended that the Randolph County

tract of land should go to his son Madison W. Owen, and that said decedent had executed a nuncupative will. It is not alleged, however, in the complaint that the will was ever reduced to writing in accordance with the statute and it was not sought to enforce the will. The prayer of the complaint was that the title to the Randolph County tract of land be vested in said Madison W. Owen, and the court rendered a decree in accordance with that prayer, the language of the decree being as follows: "It is by the court ordered, adjudged and decreed that Wiley Owen take for his share of the lands belonging to the estate of Thomas R. Owen, deceased, as follows: (Here follows description of the land in controversy). And that the title of the same be vested in him and divested out of the other plaintiffs, and the same is hereby confirmed and held as firm and effectual forever." Shortly after the rendition of the decree, Madison W. Owen sold and conveyed the lands, and they have been occupied adversely since the date of said sale. This action was brought one day before the lapse of seven years after the conveyance of the lands by Madison W. Owen.

It is urged by appellant, in the first place, that the evidence shows affirmatively that the decree of the Randolph County chancery court, vesting the title to the lands in Madison W. Owen, was rendered without the knowledge or consent of appellant and that she did not authorize the institution of proceedings in which that decree was rendered. We have considered the testimony carefully and are of the opinion that it justified the finding that appellant authorized the proceedings. She denies that she knew anything about it, and so does her daughter, who was nineteen years of age at the time she testified, and was therefore eight years of age at the time the proceedings were had. On the other hand, appellant's son, Madison W. Owen, testified that his mother and the man who was advising her in her business affairs went with the witness to the office of the attorneys who instituted the proceedings in the chancery court and discussed with those attorneys the matter of dividing the lands between the heirs of Thomas R. Owen. That witness stated that

nothing specific was said to the attorneys about a suit in the court of Randolph County, but that it was understood in the conversation with the attorney that the lands in Randolph County were to be awarded to him (witness) and that the Missouri lands were to go to the other heirs. The attorneys who instituted the proceedings in the name of appellant and her children were reputable attorneys, and there was enough in the conversation with them, as detailed by witness Madison W. Owen, to show that they were authorized to take the necessary proceedings to carry out the intention of the parties in awarding the title to the Arkansas land to Madison W. Owen.

There was also a proceeding in the Missouri courts dividing the Missouri lands between the other heirs, subject to the dower right of the widow, but nothing was said in the Arkansas decree about the dower interest of the widow. The proceeding was manifestly instituted under the statute of this State which provides that where lands are held in joint tenancy, tenancy in common, or coparcenary, "any one or more of the persons interested may present to the circuit court a petition praying for a division and partition of such premises according to the respective rights of the parties interested therein," and that "every person entitled to dower in such premises, if the same has not been admeasured, shall be made a party to such petition." Kirby's Digest, sections 5770-5772. The purpose of requiring the dower claimant to be made a party is to allow her to assert her claim, and appellant was joined for the purpose of settling her dower rights in the land. Instead of claiming dower in that particular tract of land, she joined in the prayer that the title as against all of the parties be vested in Madison W. Owen, and we are of the opinion that she is bound by the decree rendered pursuant to her own request. There being an estoppel by the record, it is too late for appellant now to assert dower against purchasers who hold in faith of the record made by appellant herself.

The decree denying appellant the right to dower in the lands in controversy is affirmed.

HENDRICKS v. HODGES, SEC'Y STATE.

Opinion delivered January 24, 1916.

1. STATUTES—AMENDATORY STATUTES—INTERPRETATION.—Where a statute is re-enacted in substantially the same form as one already on the statute books, the presumption will be indulged that the lawmakers intended no changes other than those clearly expressed in the language of the new statute.
2. PUBLIC OFFICERS—TERMS—ELECTIONS—CONTROL BY LEGISLATURE.—By section 8, article III, of the Const. of 1874, the Legislature has the power to change the dates of biennial elections, the only limitation upon that power being that elections shall be held biennially, and within that limitation, the Legislature has absolute power to change the dates of the beginning of terms of public officers in order to conform to the changes in the dates of elections.
3. PUBLIC OFFICES—BEGINNING OF TERMS—CHANGE BY LEGISLATURE.—The Legislature, in carrying out the authority conferred upon it, to change the date of elections, may so fix the date of an election that any short or reasonable change in the beginning of terms of public offices may be made.
4. ELECTIONS—OFFICE OF CIRCUIT JUDGE—TIME OF ELECTION.—The terms of State officers, expiring in the year 1918, are not required, under act 107, page 402, Acts 1915, to be filled at the biennial election held during the year 1916.

Appeal from Pulaski Circuit Court; *Guy Fulk*, Judge; affirmed.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellant.

The decision in this case rests upon the construction of Act 107, Acts 1915. The history of the act goes back to article 3, section 8 Const. 1874. The Legislature in 1907 changed the date of the election to the 2d Monday in September in even years, etc. The Act of 1915 changed the date to the 1st Monday in November, 1916. The object was to combine State and National elections. The terms of all officers expire October 30. This appeal involves the necessity of circuit judges running for election in 1916.

1. The Constitution fixes the terms of circuit judges at four years. Art. 7, § 17.

2. Circuit judges shall be elected by the qualified electors of the several circuits. Art. 7, § 17.

3. The terms of all officers began October 30, 1874, and circuit judges held for four years from October in the year elected. 112 Ark. 291.

4. The Legislature has no more power to enlarge the term of office than it has to abridge it, and the term of office of a circuit judge is for a fixed period, regardless of who is the incumbent during the different periods. 48 Ark. 82.

There are two well defined lines of decision; (1) one is that a statute making reasonable changes in the terms for holding elections * * * though incidentally it results in extending the terms of present incumbents, does not violate the Constitution. 65 Pac. 705; 63 Kans. 505; 51 N. E. 117; 43 L. R. A. 408.

(2) The other holds that any attempt by a change in the time of election to continue an incumbent in office is void. 71 N. E. 748; 104 N. W. 197.

The main object was to provide for uniformity in elections. The whole act should stand together, and if the act is unconstitutional in this one particular, it should fail as to all. It is plain in meaning and terms. The terms of all circuit judges expire October 30, 1918, and they are required to run nearly two years before their incumbency begins. Const. Art. 19, § 5; *Jewett* v. *McConnell,* 112 Ark. 291.

Mehaffy, Reid & Mehaffy, for appellee.

There are no questions of fact involved in this case; its determination rests solely upon the construction of the Act of 1915. It should be construed so as not to conflict with the spirit and intent of the Constitution. It was the intention of the framers of the Constitution that the terms of all officers except Governor, Secretary of State, Auditor, Treasurer, Attorney General and Commissioner State Lands, etc., should begin uniformly. Const. Sched., § § 20-26; 48 Ark. 82; 112 *Id.* 291; 172 S. W. 260; Kirby's Dig., § 2850. No time being fixed by the act the terms of all officers ending in 1916 would begin as soon as the election returns are canvassed under section 2850, Kirby's Dig. This would be the latter part of November

or first part of December; but if circuit judges be required to run in 1916, they could not take their offices until the terms of the present incumbents expire, which is not in keeping with the Constitution. 107 Ark. 379; 35 Ark. 56; 37 *Id.* 491; 51 *Id.* 534; 60 *Id.* 343; 28 *Id.* 200; 3 *Id.* 285; 9 *Id.* 112; Const. Sched., § § 20-26; Kirby's Digest, § § 2850, 647-8; Const. Art. 19, § 20; 3 S. W. 867; 65 Pac. 705; 51 N. E. 117; 43 L. R. A. 408; 3 L. R. A. (N. S.) 887; 15 Minn. 199; 75 S. E. 866; 104 Pac. 860; 87 P. 870; 63 Kans. 505; 65 Pac. 705.

J. C. Hawthorne, N. F. Lamb, Eugene Sloan and *J. R. Turney.*

1. The act is unconstitutional. 48 Ark. 82; 172 S. W. 260; 163 Ind. 150; 71 N. E. 478.

2. If constitutional it does not require an election in 1916. 174 S. W. 248; Suth. Stat. Const., par. 139; 58 Pac. 50; 110 U. S. 629; *Ib.* 739; 26 A. & E. Enc. (2 ed.) 649.

Abe Collins, Amicus Curiae.

It is obvious that the terms of all circuit judges "will expire before the next general election" after 1916. 172 S. W. 260. The intent of the lawmakers must be ascertained. 2 Lewis, South. on St. Const., § 348; 76 Ark. 303. Where the language is free from ambiguity, plain and consistent, there is no room for construction. 11 Ark. 44; 46 *Id.* 159; 93 *Id.* 42; 35 *Id.* 56; 24 *Id.* 487; 104 *Id.* 583; 102 *Id.* 205; 28 *Id.* 200; 97 *Id.* 38; 20 Wend. 562; 11 N. Y. 602. Compare 46 Ark. 159; 47 *Id.* 404. *The Legislature meant what it said.* The law abhors vacancies in office. 113 Ind. 434; Mechem Pub. Officers, § 397; Throop. Pub. Officers, § 308. Each word and phrase of an act should be given meaning and effect. 11 Ark. 44; 30 *Id.* 135; 99 *Id.* 149; 89 *Id.* 378; 76 *Id.* 303; 76 *Id.* 303; 15 *Id.* 555; 2 *Id.* 229; 17 *Id.* 608; 28 *Id.* 200; 71 *Id.* 556; 67 *Id.* 552. The question is not what the Legislature meant but what its language means. 104 Ark. 583; 6 Ark. 9-12; See also, 76 *Id.* 443; 45 *Id.* 387; 47 *Id.* 388; 44 *Id.* 265.

James E. Hogue, Amicus Curiae.

The act is unconstitutional. 112 Ark. 291; 48 *Id.* 82; art. 3, § 8, Const.; *Ib.*, art. 19, § 5.

McCULLOCH, C. J. The General Assembly of 1915 enacted a statute* amending the election law of the State so as to change the date of the regular biennial election from the second Monday in September to the "next Tuesday after the first Monday in November," thus fixing a uniform date for all biennial elections, both State and National.

The statute reads as follows: "Section 1. That on the next Tuesday after the first Monday in November, 1916, and every two years thereafter there shall be held an election in each precinct and ward in this State for the election of all elective State, county and township officers whose term of office is fixed by the Constitution at two years; and State Senators in their respective districts when the terms for which senators shall have been elected shall expire before the next general election; and for judges of the Supreme and circuit courts when the terms of office of any judge shall expire before the next general election; and for United States Senators and for Representatives in Congress of the United States for each Congressional District; and for prosecuting attorneys."

Appellant conceives that the new statute requires the election of circuit judges in the year 1916, and as he is a candidate for that office in the Sixth Judicial Circuit he seeks to compel the Secretary of State to receive and file his pledge, conformable to the statute known as the Corrupt Practices Act,† which requires all candidates for district offices to file with the Secretary of State, more than thirty days before a primary election, a pledge in writing stating that they are familiar with the requirements of said statute and that they will in good faith comply with its terms.

The sole question presented for decision on this appeal is whether or not circuit judges must be elected at the election to be held during the year 1916. The contention is that the terms of circuit judges end on October 31, 1918, and that their successors must be elected in the

*Act No. 107, p. 402, Acts of 1915.

†Act 308, p. 1252, Acts of 1913.

year 1916 for the reason that it is the election next preceding the expiration of the terms. If that contention be sound, those offices will be filled at the election held nearly two years before the terms end.

It must be conceded that a literal reading of the statute sustains the contention, for the statute provides in so many words that the election shall be "for judges of the Supreme and circuit courts when the terms of office of any judge shall expire before the next general election." There are several reasons why it is apparent that the framers of the statute did not intend what a literal meaning of the statute, as a whole, would imply. In the first place, the statute provides that senators of the United States shall be elected at each biennial election, but we know that the lawmakers did not intend to accomplish that result inasmuch, as the Constitution of the United States fixes the terms of senators at six years. In the next place, the interpretation contended for by learned counsel for appellant would require all of the State Senators, those whose terms begin in the year 1918 as well as those whose terms begin in the present year, to be elected at the next election to be held in November, 1916. It is inconceivable that that was the intention of the framers of the statute, for it is certainly contrary to the policy of the State to elect senators so long a time before the commencement of their service. Besides, it would be in direct conflict with the express letter of the Constitution, which provides that the terms of senators shall begin with the dates of their election. Article 5, section 15, as amended by the Seventh amendment. It would also conflict with that section of the Constitution (Art. 5, sec. 2) which provides that terms of senators shall be divided into two classes to be filled at alternate biennial elections. Senators could not, therefore, be elected in 1916 for terms to begin in the year 1918, and that part of the statute is void if we give its language a literal meaning.

The statute would, under that interpretation, also be in conflict with another statute with reference to the elec-

tion and qualification of officers, which there is little reason to believe that the lawmakers meant to change. We refer to the statute (Kirby's Digest, section 2850), which provides that the State Board of Election Commissioners shall, within thirty days after the time allowed to make the returns of elections by county commissioners, cast up the votes and determine the result, and that all of the officers required by law "shall be immediately commissioned by the Governor." Also Kirby's Digest, section 647, which provides that all State and county officers who are required by law to be commissioned by the Governor "are required to forward the legal fee for their commissions to the Treasurer of State within sixty days after their election, and they shall, after said commissions have been received, forward within fifteen days their duplicate oath to the Secretary of State, to be by him recorded and filed in his office." The purpose of those statutes was to fix a time for canvassing the returns and to put a limit upon the time in which officers may qualify. The statute clearly contemplates that officers elected shall immediately take office and enter upon the discharge of the duties thereof. Yet, if the interpretation contended for be sustained, the Legislature has by this new statute now under consideration postponed for nearly two years the taking of office by those who are elected thereto. Surely the lawmakers have not intended, merely by implication, to change the whole policy of our laws and to repeal other statutes without giving more clear expression of that intention.

If we take into consideration the history of the legislation in this State fixing the time for holding elections, it becomes clear that there was no intention on the part of the Legislature to do more than to postpone the date of the State election so as to conform to the date of the national election. In other words, it was manifestly the sole purpose of the Legislature to consolidate elections in the State. The title of this act is "An Act fixing the time for the general election in the State of Arkansas," and it was a copy of the then existing statute, except

that the date is changed and the clause inserted about the election of United States Senators and Representatives in Congress.

(1) It will be remembered that the Constitution of 1874 was submitted to the people for adoption on October 13, 1874, and the act of submission provided for the election of officers thereunder on the same date. The schedule of the Constitution (section 20) provided that all officers thus elected should "qualify and enter upon the duties of their office within fifteen days after they shall have been duly notified of their election." The Constitution fixed the first Monday in September as the date for biennial elections in the State, but provided that the General Assembly could fix a different time. Art. 3, sec. 8. The first General Assembly after the adoption of the Constitution of 1874, which met in January, 1875, enacted a general election law, fixing the first Monday in September as the date for the regular biennial elections. The first section of that statute was in the form of the present statute, with the changes indicated above. In 1907 the General Assembly passed an amendatory statute changing the date of the general election from the first Monday in September to the second Monday in September, still preserving the identical language of the old statute. Now, in interpreting the amendatory statute, we ought to follow the well established rules of statutory construction, and one of those rules is that where a statute is re-enacted in substantially the same form as the old one, the presumption should be indulged that the lawmakers intended no changes other than those clearly expressed in the language of the new statute. 26 Am. & Eng. Ency. of Law, 649; *McDonald* v. *Hovey,* 110 U. S. 629. That idea was expressed by this court in the recent case of *State* v. *Kansas City & Memphis Railway & Bridge Co.,* 117 Ark. 606, 174 S. W. 248. In *State of Arkansas ex rel.* v. *Trulock,* 109 Ark. 556, we said that amendatory words of a statute are subject to the same rules of construction as any other parts of the statute, and that "the literal meaning may be put aside in order to carry out the obvious intention of the law-makers

as otherwise indicated." In that case we quoted with approval the following from the work of Mr. Sutherland on Statutory Construction (volume 2, section 376): "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."

We ought, therefore, to indulge the presumption that the Legislature did not intend to change the whole policy of our laws in order merely to bring about the consolidation of elections, for in framing the statute the only change actually made in the language was that of inserting the new date and also the mention of other officers (Senators and Congressmen) to conform to the requirements of the national election law.

Attention is called in one of the briefs to the policy which has always been observed by the Legislature of providing for the election of officers before the expiration of the term of the incumbent so that no vacancy would occur. This may be conceded to be true, and yet it does not necessarily follow that the Legislature failed to observe that policy in passing this statute. While it is true that terms of constitutional officers expire on October 31, and that the election in 1916 will take place after the expiration of the terms, it does not follow that there is any constitutional inhibition against the exercise of such a power by the Legislature which would result in a change in the commencement of the new terms. It is argued in one of the briefs that the whole statute is void because it necessarily results in the extension of terms of county officers, and in other quarters it is argued that the Legislature, for that reason, must be presumed to have intended the election of circuit judges before the expiration of the terms, rather than have an election a week or more after the expiration of the terms. There

is no intention manifested by the Legislature to extend the term, that is to say there is no intention to pass a statute merely for that purpose. If an extension of the terms of those now in office necessarily results from a construction of the statute which postpones the election of officers until the election to be held during the year in which the terms expire, it is a mere incident to the change in the dates of elections, and is not deemed the primary purpose of the lawmakers. The Constitution fixes the duration of terms, but does not in express words fix the beginning of terms. The precise date of commencement of terms was worked out by this court in construing the meaning of the framers of the Constitution, and it was found that because of the fact that the terms were to begin at the earliest date that officers who were elected could be commissioned, that October 31 was the date of commencement of all terms for constitutional officers. *Jewett* v. *McConnell,* 112 Ark. 291; *State, ex rel.* v. *Cotham,* 116 Ark. 36, 172 S. W. 260.

(2) There is an express grant in the Constitution to the Legislature of the power to change the dates of biennial elections. Article 3, section 8. The only limitation upon that power is that elections shall be held biennially, and, of course, the Legislature has no power to provide otherwise. Within those limitations, the Legislature has absolute power to change the dates, and this necessarily implies the power to change the dates of the beginning of terms in order to conform to the changes in the dates of elections. It is not to be thought that the framers of the Constitution meant to fix an unchangeable date for the beginning of the terms, and at the same time give complete power to the Legislature to change the date of elections. The change in the date of the term, therefore, results as a mere incident to the change in the date of the election, and we find nothing in the Constitution which prohibits that.

(3) It is true we have held that the Legislature has no power to extend the duration of terms. *Smith* v. *Askew,* 48 Ark. 82; *State ex rel. Wood* v. *Cotham, supra.* Mr. Justice Smith, in the case first cited above, used lan-

guage which is more emphatic than accurate in saying that the terms could not be extended for a single day. That language must, however, be construed with reference to the point that was then under consideration, and it is merely an authority for the statement that where the Constitution itself fixes the duration of terms, it is beyond the power of the Legislature to extend them. It must be limited, however, to the further view that there is no intention found to prevent the Legislature from carrying out the authority conferred upon that body to change the date of elections, and that any short or reasonable change in the beginning of terms, as an incident to the change in the dates, is not forbidden. There are numerous authorities cited on the briefs of counsel which sustain the view we are attempting to express now, to the effect that even in the face of constitutional provisions fixing the duration of terms of office, unless there is an express provision fixing the beginning of terms, and the power is conferred upon the lawmakers to change the dates of elections, there may be a change in the beginning of terms as a mere incident to the change in the date of elections.

The correctness of this view of the law is emphasized by the fact that the framers of our Constitution have put into that instrument a provision that "all officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." Article 19, section 5. The framers of the Constitution doubtless had such an emergency as the present one in mind when that provision was framed. At least, it is adapted to this emergency and prevents a vacancy occurring on account of the short postponement of the filling of the office by reason of the changed date of the election to a date subsequent to the expiration of the terms. The Legislature having power incidentally to change the beginning of the terms, the beginning of terms of all officers subsequently elected will be changed so as to conform to the new date fixed for elections. What the precise date for beginning of the new terms, under the new

election law, will be, it is unnecessary, on this occasion, to determine.

Among the cases on this subject some of which admit the power of the Legislature to incidentally change the dates of beginning and ending of terms of constitutional officers, the following are found to be directly in point: *Wilson* v. *Clark,* 63 Kans. 505, 65 Pac. 705; *State* v. *Menaugh,* 151 Ind. 260, 51 N. E. 117, 43 L. R. A. 408; *Gemmer* v. *State,* 71 N. E. 478; *State* v. *Galusha,* 104 N. W. 197; *State ex rel. Jones* v. *Foster* (Montana), 104 Pac. 860; *Jordan* v. *Bailey,* 37 Minn. 174, 33 N. W. 778; *Meredith* v. *Tallman,* 24 Wash. 426, 64 Pac. 759; *State, ex rel. Attorney General* v. *Ranson,* 73 Mo. 78. See, also, note to *State* v. *Plasters,* 3 L. R. A. (N. S.) 887.

In *Wilson* v. *Clark, supra,* in speaking of a statute of the State of Kansas, passed for the purpose of consolidating elections, the Supreme Court of that State said: "No constitutional provision has been found which expressly or by implication limits the Legislature in fixing the terms of district judges and county officers. A limit to the duration of terms is prescribed, but when the term shall begin and end is fairly within the authority and discretion of the Legislature. * * * The policy of the statute, as we have seen, is to secure uniformity in the beginning of official terms, and also to avoid the expense, agitation, and other disadvantages of frequent elections, * * * If the Legislature had postponed elections an unreasonable length of time, longer than was necessary to effect the avowed purpose, and so long as to betray an intention to make the offices appointive by preventing the people from choosing their officers at stated intervals and for regular terms; or if it appeared that it was done merely to extend official terms, and as a favor to incumbents of offices there might be occasion for judicial interference and condemnation."

(4) Our conclusion is that the terms of office expiring in the year 1918 are not required to be filled at the biennial election held during the present year, and that inasmuch as appellant's candidacy is premature, the

Secretary of State was correct in refusing to accept and file his pledge in conformity with the governing statute.

Judgment affirmed.

SANDS, ET AL. RECEIVERS MISSOURI & NORTH ARKANSAS RAILROAD COMPANY v. LINCH.

Opinion delivered January 24, 1916.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.—Plaintiff, an employee of defendant, was riding on a gasoline motor, belonging to defendant, and driven along the tracks of defendant by another employee. The motor car was derailed by striking a sheep, which was on the right-of-way, and which was seen a long way down the track before the accident. *Held*, under the evidence it was a question for the jury as to whether defendant was negligent in the handling of the motor car, which resulted in the injury.
2. MASTER AND SERVANT—INJURY TO SERVANT—BREACH OF STATUTORY DUTY—EVIDENCE OF NEGLIGENCE.—Act 165, Acts 1905, requiring a railroad company to maintain a fence along its right-of-way, while designed primarily for the protection of live stock, and for the benefit of the owners of such stock that might be injured by a failure to comply with the requirements of the act, nevertheless, where such failure is the proximate cause, or contributes proximately to cause a personal injury to an employee of the railroad company, or to any one else, a breach of the statutory duty may be shown as evidence of negligence on the part of the company, causing the injury.

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

STATEMENT BY THE COURT.

Appellee sued the appellants for personal injuries, alleging that he was employed by appellants as a bridge man and was riding along on appellants' track on a motor car that was in charge of a fellow employee, appellee having no duty to perform in relation thereto; that the car, through the negligence of these employees, was allowed to collide with a sheep by which it was violently thrown from the track, resulting in severe injuries to the appellee, which he described in his complaint; that it was appellants' duty, under the law, to keep its right-of-

way fenced so as to prevent sheep from getting on the track and that appellant had negligently failed to comply with that duty; that the employees had also failed to keep and maintain a careful lookout.

The appellants denied the allegations of negligence; admitted that it was their duty to maintain a fence along the right-of-way to keep stock off of the track, but alleged that the allegations of the complaint to that effect were surplusage, and moved to strike out such allegation. Appellants also set up the defenses of assumed risk and contributory negligence. The answer also contained a demurrer to that part of the complaint alleging that it was the company's duty to keep the right-of-way fenced. The demurrer to this allegation of the complaint was presented to the court and overruled.

The evidence, stated from appellee's viewpoint, and giving it the strongest probative force in his favor, tended to show that the appellee and several other employees of appellants who had been at work on appellant's bridge, at the conclusion of their day's work were traveling on a motor car to the section house. There were seven or eight men on the car. Henry Lenox was in charge of the operation of the car and Jeff Hubbs was running it. A flock of fifteen or twenty sheep was observed alongside the track, which, at that point, was enclosed on either side by a wire fence. When the sheep were sighted, under the directions of foreman Lenox the car was "slowed down." All of the frightened sheep went off of the right-of-way except two. These were within the enclosure going along by the side of the fence. Lenox then told the man who was running the car to "let her go," and it picked up speed and kept on increasing its speed until it struck the sheep. The motorman increased the speed under the direction of Lenox. He gave the order to put on more speed. At the time he gave this order the two sheep were inside the right-of-way. When the car struck the sheep all were thrown off, including the appellee, who was rendered unconscious and received the injuries for which he sues. From the point on the track where the car slowed down to the point where the accident occurred

it was some 250 or 300 yards. Appellee was sitting on the front part of the car on the corner.

The motorman testified that he could have stopped the car if he had known that everything was not in the clear, and that he would not have started the car at the high rate of speed if he had known there was a sheep on the right-of-way; that the sheep was on the foreman's (Lenox's) side and he ordered witness (the motorman) to increase the speed which he did at the time because he was thus ordered. The sheep began running through the fence all along and had all escaped except the two. One of these, about the time it got even with the car, hit a guy-wire and was thrown back and then headed for the track, making one or two jumps, and fell right on the rails, where the car hit it.

One of the witnesses stated that they were trying to make the hill and that the car would not hardly make the hill with nine or ten employees aboard unless it had a pretty good speed. There was nothing that could have been done after the car started up at the increased speed, ordered by the foreman, to have kept the same from being derailed when it struck the sheep.

Witness Bailey testified that these two sheep were seen all the way from the time they left the bunch up till the time the car was derailed. Witness was watching them all the time because they were on the same side of the track that witness was on. The foreman, Lenox, testified that he supposed he could see the right-of-way ahead of him as well as witness Bailey could.

There was testimony to the effect that sheep ran through the fence wherever they came to it near the place of the accident; that the posts were rotten and many of them were lying on the ground; that the company, through its section foreman, had been notified of this condition and requested to repair the fences, but that it failed to do so.

The court submitted the issue of the alleged negligence of appellants' employees in operating the car in instructions to which no objections have been urged here.

The court also gave instructions, to which appellants duly saved exceptions, telling the jury, in effect, that if appellants had not used ordinary care in maintaining the right-of-way fence and such negligence was a contributing cause of the injury, that appellee would not be chargeable with contributory negligence. And also instructed the jury that it was the duty of the company to keep the fence in good repair, under the statute, and that if the company failed to discharge its duty in that respect, which caused the injury to plaintiff, as the proximate result thereof, the company would be liable to him in damages.

The court refused appellants' prayer asking the court, in effect, to tell the jury that the appellants owed the appellee no duty to keep the right-of-way fenced or to keep it in repair, and that if appellee was injured by reason of such failure on the part of the appellants he would still have no right of action. Appellants duly excepted to this ruling of the court.

From a judgment in favor of appellee this appeal has been duly prosecuted.

W. B. Smith, H. M. Trieber and *J. Merrick Moore,* for appellant.

1. There was sufficient evidence to go to the jury to the effect that the accident was caused by the negligence of appellant in operating the car. 98 Ark. 202. Nor is there, as between co-employees any presumption of negligence. 74 Ark. 19; 98 *Id.* 19.

2. There is no law in this State for the protection of employees requiring appellants to fence their right-of-way. Act 165, Acts 1905. There was at common law no obligation upon railroads to fence their tracks for the protection of employees. 187 Fed. 393. See 55 Atl. 778; 15 S. W. 805; 160 Fed. 260-3. Statutes imposing burdens are strictly construed. Suth. on Stat. Const., § 290; 71 Ark. 561. The case should be reversed and dismissed.

Festus O. Butt, for appellee.

1. The peril was discovered in ample time to avert the accident.

2. The fence law of 1905 is for the protection of persons. 15 S. W. 805, overruled in 143 S. W. 252; 48 *Id.* 168; 77 *Id.* 440; 60 Fed. 370; 111 U. S. 228; 172 Ill. 379. These fence laws give a right of action to an employee or passenger. 45 Mich. 74; 50 Ill. 151; 23 Wisc. 186; 54 Cal. 418; 13 Ill. 548; 64 N. Y. 524; 29 Md. 252; 124 Mass. 158; 119 N. W. 468; 62 Wisc. 411; 60 Mo. 475; 68 *Id.* 56 76 *Id.* 286; 79 *Id.* 349; 111 N. W. 279.

WOOD, J., (after stating the facts). Appellants contend that there is no basis in the evidence for submitting to the jury the issue as to whether or not the appellants' foreman, in charge of the operation of the motor car, was negligent. Giving the evidence its strongest probative force in favor of the appellee, the jury were warranted in finding that the car, at the time of the injury, was being propelled by the motorman under the directions of the foreman, Lenox; that the motorman would not have started up the car at the high rate of speed it was traveling at the time of the injury if he had known that there were still sheep on the right-of-way; that the foreman saw that these two sheep were still on the right-of-way, within the enclosure, when he told the motorman that the rail was clear and instructed him to "let her go," that is, turn on the gasoline and increase the speed of the car; that the foreman, by the exercise of ordinary care, could have seen that the car, at its increased speed, was overtaking the fleeing sheep; that for a distance of 250 or 300 yards the car moved with its increasing speed until it overtook the frightened sheep; that at the time the sheep, dazed by contact with the guy-wire, jumped upon the track in front of the car while the same was going at too great rate of speed to avert the collision. These facts, which the jury were warranted in finding from the evidence, justified their conclusion. The evidence warranted these findings of fact, and made the issue as to whether the appellants were negligent in the manner of operating the motor car one of fact for the jury.

(2) The undisputed evidence shows that the appellants negligently failed to comply with the requirements

of Act 165 of the Acts of 1905. Section 1 of that act requires that the St. Louis & North Arkansas Railway Company shall fence its right-of-way in the counties of Carroll, Boone and Searcy. Section 2 requires that the fence shall be built on both sides of the roadbed and anywhere on the right-of-way so as to prevent stock from crossing the tracks; that the fencing material shall be close enough to keep out of said enclosure, mules, horses, cattle, hogs, sheep and goats. Section 4 requires that the company shall keep the fences in good repair, and provides that when in such condition the company shall not be liable for any stock killed or injured on the tracks so fenced; but if any stock is killed or injured on the tracks when the fence is not in good condition on account of the negligence of the company, the company shall be liable in damages in double the value of the animal so killed or injured. Section 5 renders a violation of the act a misdemeanor and fixes a fine of not less than $50 nor more than $500 for failure to comply with same.

The instructions given and refused by the court presented the issue as to whether or not a negligent failure on the part of the railroad company to comply with the terms of the act, with the injury to the appellee as the proximate result of such failure, would render the company liable to the appellee for damages on account of such injury. The appellant contends that the act was not passed for the protection of the employees, but was passed to prevent injuries to and the killing of stock and was designed exclusively for the benefit of owners of live stock in the localities affected and who were damaged by reason of having their live stock killed or injured on account of a failure of the company to comply with the requirements of the statute. In *St. Louis & S. F. Rd. Co.* v. *Kitchen,* 98 Ark. 507-516, we had under consideration a similar statute of Oklahoma. The court said: "It has been decided, under similar statutes, that the requirement is supposed to have been intended for the protection of all persons upon railroad trains who are exposed to dangers of travel, and that the person injured by reason of the omission to comply with the statute was

entitled to recover on account thereof." *Mo. Pac. Ry. Co.* v. *Hames,* 115 U. S. 522.

While the statute was designed primarily for the protection of live stock and for the benefit of the owners of such stock that might be injured by a failure to comply with the requirements of the act, nevertheless where such failure is the proximate cause or contributes proximately to cause a personal injury to an employee of the company, or anyone else, a breach of the statutory duty may be shown as evidence of negligence on the part of the company causing the injury. This principle is recognized in *Hayes* v. *Michigan Cent. Rd. Co.,* 111 U. S. 228. There the railway company, by municipal ordinance, was required to erect a fence upon the line of its road within the corporate limits for the purpose of protecting against injury to persons, and the court held that one who was injured by a failure to comply with the ordinance might recover if he established that the accident was reasonably connected with the want of precaution as the cause of the injury. Although the ordinance in that case was designed for the protection of persons generally against personal injury, yet the court shows that the same principle applicable under such an ordinance or statute is also applicable under those statutes that are passed for the protection of animals and for the benefit of their owners. For the court says: "In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence." See also in this connection *Bain* v. *Ft. Smith Light & Tr. Co.,* 116 Ark. 125, 172 S. W. 843; *Pankey* v. *L. R. Ry. & Elec. Co.,* 117 Ark. 337, 174 S. W. 1170-73.

In the case of *Atchison, T. & S. F. Ry. Co.* v. *Reesman,* 60 Fed. 370, the Court of Appeals had under review, in an action by an individual to recover damages for per-

sonal injuries, a statute of Missouri in purport very similar to the one now under review, and the court held that where an employee on the train was injured by a derailment caused by an animal getting on the track through the failure of the company to erect and maintain fences as the statute required, the company was liable. The court, through Mr. Justice Brewer, after stating the contention of the company, being the same contention as that of appellants here, said: "It is doubtless true that when a right is given by statute only those to whom the right is in terms given can avail themselves of its benefits, but it does not follow that when a duty is so imposed, a violation of that duty exposes the wrong-doer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command."

While there are authorities to the contrary, we are of the opinion that the weight of authority in this country is in favor of the rule above announced by the Court of Appeals of the Eighth Circuit, which is in accord with what we held in *St. Louis & S. F. R. Co.* v. *Kitchen, supra.* See many other cases cited in the brief of counsel for the appellee.

The judgment is therefore in all things correct, and it is affirmed.

BROWN *v.* NORRED.

Opinion delivered January 24, 1916.

CONTRACTS—WORK OF SUB-CONTRACTOR—LIABILITY FOR WORK DONE.—Where the work of a sub-contractor in clearing the right-of-way of a drainage ditch, was done in substantially the same manner as done by other sub-contractors on the same work, no plans and

specifications having been given to him, the verdict of a jury awarding the sub-contractor the amount claimed by him against the contractor, for work done, will not be disturbed on appeal, when supported by any substantial evidence.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney,* Judge; affirmed.

G. B. Oliver, for appellant.

1. Norred was a sub-contractor and was bound to perform the work according to the original contract. He was bound to know the terms and conditions of the original contract, and it can avail him nothing to say he did not know what the contract was. 37 Cyc. 340; 39 N. W. 742-46; 55 Mo. App. 107-115.

2. Instruction 2 conflicts with 3 and 4. Where both parties have agreed that a third party must accept and receive the work before it is paid for, his decision fairly made it binding. 48 Ark. 522; 68 *Id.* 155; 79 *Id.* 506; 83 *Id.* 136.

3. The court erred in its admission of evidence and the verdict is without any evidence to support it. The work done by Norred was worse than useless. It is a matter of common knowledge that a tree can be cut down much easier than the stump can be cut off after the tree has been cut.

L. Hunter, for appellee.

1. Appellee was not a sub-contractor. 93 Ark. 277, but if he was appellant is liable for the amount due. 40 Ark. 429; 76 *Id.* 1; 76 *Id.* 292; 102 *Id.* 407.

2. A substantial compliance is all that is required. 38 Ark. 197; 97 *Id.* 278; 64 *Id.* 34; 67 *Id.* 219; 88 N. Y. 648; 9 Cyc. 603. Appellant treated appellee as an independent contractor until he discovered that it might serve a nefarious convenience to contend that he was a sub-contractor. There is no error in the court's charge.

HART, J. Edward Norred sued W. R. Brown to recover an amount alleged to be due him for clearing fourteen acres of right-of-way of a drainage ditch. He recovered judgment and the defendant has appealed. The facts are as follows:

The Central Clay Drainage District was created by the Act of the Legislature of 1911,* and the district entered into a contract with the defendant Brown to construct three ditches, including the cutting of the right-of-way. Brown entered into a contract with George Holford to clear the right-of-way. Holford entered into a contract with one Petty and others to clear a part of the right-of-way for him. The plaintiff Norred also entered into a contract with Holford to clear fourteen acres of right-of-way and was to receive therefor the sum of $14 per acre and $1.35 per acre for the wood. Under his contract he was to cut down all trees on the right-of-way and to cut a part of it into wood. The only point in dispute between the parties is as to the height of the stump, it being claimed on the one hand by Norred that he cut down the trees in compliance with his contract, and on the other hand by Brown that Norred violated his contract by cutting the stumps too high.

Norred testified in his own behalf and said that when he made the contract with Holford no specifications were given him as to how the timber should be cut; that he called up Brown and asked him if Holford had the right to let the ditch contract for him and that Brown asked him what price he was to receive, that he told Brown and the latter then replied that that was all right, to go ahead and do the work and he would see that he got his money; that he then began to clear the right-of-way at a point where Petty left off and that he cut the trees as low as Petty did; that the right-of-way he was clearing was through a cypress brake and he could not cut the trees any lower on account of the swell at the butt.

Other witnesses for Norred testified that he cut the trees as low as Petty and Nelson who had cleared a part of the right-of-way and had cut them just as low as he could to get above the swell; that he cut them from four to seven and one-half feet high.

On the part of the defendant witnesses were introduced who testified that the trees were cut too high and

*Act 317, p. 856, Special Acts of 1911. (Rep.)

that it would be impossible to work the dredge boat in there at the present height of the stumps, that the stumps were so high the crane which carried the dipper would strike against the stumps so that the dirt could not be dug and removed from the right-of-way.

It may be conceded that the preponderance of the testimony was in favor of the contention of the defendant; but the case was submitted to the jury under proper instructions and we can not disturb the verdict of the jury in favor of the plaintiff, there being testimony of a substantial character to sustain it.

In the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Bogan,* 78 Ark. 173, Bogan entered into a contract to clear a part of the right-of-way at a stipulted price. The contract was in writing and further provided that the work should be done according to plans and specifications of the railway engineers in charge. The defendant was sued for the amount alleged to be due for clearing the right-of-way and offered to introduce in evidence the plans and specifications. The court refused to permit them to introduce them in evidence and the refusal of the court was assigned as error. There as here no copy of the plans and specifications were delivered to the sub-contractor and he made his contract with the principal contractor and not with the owner. There as here the sub-contractor complied with the directions given him. That is to say, according to the testimony of Norred and his witnesses he was given no specific directions as to how to clear the right-of-way but did the work in substantially the same manner as was done by other sub-contractors.

In the Bogan case it is true the engineers inspected his work from time to time and approved it but, as we have already seen, the contract there specifically provided that it should be done according to the plans and specifications. In the case before us no plans and specifications were delivered to the plaintiff and according to his own testimony and that of his witnesses, he cleared the right-of-way in substantially the same manner as was done by the other sub-contractors. It is true his testi-

mony was flatly contradicted by the testimony adduced in favor of the defendant. The conflict in the testimony, however, was settled by the verdict of the jury in plaintiff's favor.

The case was submitted to the jury under proper instructions and the judgment will be affirmed.

SANDERS v. W. B. WORTHEN CO.

Opinion delivered January 24, 1916.

1. ACTIONS—TRANSFER TO LAW—WAIVER.—Although defendant asked the chancery court to transfer an action brought against him to law, he will be held to have waived his objection to the refusal of the court to order the transfer, where no order was entered of record overruling the motion to transfer the cause.
2. ACTIONS—TRANSFER TO LAW—EXCEPTIONS.—A recital in the transcript that the chancery court refused, upon motion, to transfer a cause of action to law, is insufficient to preserve the point on appeal.
3. BANKS AND BANKING—DEPOSIT OF CHECK—TITLE—INTENTION.—The rule that, when a check is taken to a bank and the bank receives it and places the amount to the credit of the customer, the title to the check is vested in the bank, is *prima facie* merely and yields to the intention of the parties, express or implied, from the circumstances.
4. BANKS AND BANKING—DEPOSIT OF CHECK—TITLE—INTENTION.—S. drew a check on the E. Bank, to the order of one O. O. deposited same in the appellee bank, on the afternoon that he received the same, and the check was credited to his account; appellee bank kept the check until the next morning, when it was carried to the clearing house in due course; before that time O. had checked the amount out in various small amounts, the appellee bank having no notice of any infirmities in the check. That day S. stopped payment on the check, and transferred his account in the E. Bank to one A., as trustee. *Held*, the chancellor was justified in finding that it was the intention of the parties that the title to the check should pass to appellee bank, when it received the check, and credited the amount to O's. account, and that appellee bank could recover the amount of same from S., out of the fund in the E. Bank.

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

STATEMENT BY THE COURT.

W. B. Worthen Company, a banking corporation organized under the laws of the State of Arkansas, instituted this action in the chancery court against Gladys G. Sanders, R. G. Ortagus, agent, J. A. Alexander, trustee, and the Exchange National Bank. The material allegations of the complaint are as follows:

That on March 31, 1915, Gladys G. Sanders drew a check for $500 payable to R. G. Ortagus, agent, or order, on the Exchange National Bank, of Little Rock, Arkansas; that at the time Gladys G. Sanders had an account in her name in the Exchange National Bank in the sum of something more than $1,000; that on April 2, 1915, Ortagus endorsed the check and deposited it to his account with W. B. Worthen Company, and the next morning drew out checks on his account aggregating the sum of $500; that on the same day, but later in the day, Gladys G. Sanders changed her account with the Exchange National Bank and placed it in the name of J. A. Alexander, trustee, and that she notified the bank not to pay the check and the bank refused to pay same.

The prayer of the complaint was that a temporary restraining order be granted restraining the Exchange National Bank from paying any check of the said J. A. Alexander, trustee, and that the latter be enjoined from making any disposition of the funds held in his name for Gladys G.. Sanders and that on final hearing plaintiff have judgment against Gladys G. Sanders and Ortagus for the sum of $500, that Alexander be declared a trustee for Gladys G. Sanders and that the Exchange National Bank and Alexander, as trustee, be required to pay into the registry of the court a sufficient amount of the funds to pay the judgment against Gladys G. Sanders.

The cashier of the Exchange National Bank testified substantially as follows: I am familiar with the signature of Gladys Sanders and she signed the check for $500 payable to Ortagus; the $500 check came into the bank about 10 o'clock through the clearing house; each morning at 10 o'clock each bank checks up the other

banks; if Exchange National Bank has checks on Worthen Company and Worthen Company have checks on the Exchange National Bank the checks are exchanged if they are equal; if they are not equal then one owes the other the difference, which is paid; under the rules of the clearing house we have from 10 o'clock in the morning until 2 o'clock in the afternoon to return checks; within that time we received a request from Gladys G. Sanders not to pay the $500 check for the reason that it was a forgery; when we received the message not to cash the check we sent it back to Worthen Company and they sent our bank the money for it; on that day Gladys G. Sanders had an account in our bank in her own name for $1,114.53; after notifying our bank not to pay the check she came in on the same day and transferred her account to J. A. Alexander, trustee for Gladys G. Sanders.

Gordon N. Peay, president of W. B. Worthen Company, testified, in effect, as follows: The $500 check in controversy is dated March 31, 1915; Ortagus deposited it in our bank on the afternoon of April 2, 1915, and it was credited to his account and then went into the general clearing to be presented the following morning, as was the custom; on the following morning between 9 and 10 o'clock Ortagus drew checks in various small sums for five hundred dollars on his own account to cover his pay roll; our bank cashed the check for $500 by cashing the checks of Ortagus on his account and our bank is out that much money now; Ortagus has made no other deposits since that time and did not at the time have any funds to meet the checks given by him to cover his pay roll except the $500 check in controversy; I am an expert on signatures and from a comparison of the signature to the five hundred dollar check with the admitted signature of Gladys G. Sanders I find the signature to the five hundred dollar check is the genuine signature of Gladys G. Sanders.

Gladys G. Sanders testified in her own behalf and denied that she signed the check in question. She also testified as to the circumstances which induced her to give

the check to Ortagus but as these facts are not necessary to a decision of the issues raised by the appeal, they need not be stated here.

The chancellor found the issues in favor of the plaintiff, and decreed that plaintiff Worthen Company have and recover of Gladys G. Sanders the sum of $505.25 with accrued interest. It was further decreed that the Exchange National Bank and J. A. Alexander, trustee, pay into the registry of the court a sufficient amount of the funds on deposit with the bank to the credit of J. A. Alexander, trustee, to satisfy the judgment. Gladys G. Sanders and J. A. Alexander have appealed.

Henry C. Riegler, for appellants.

1. The chancery court was without jurisdiction, the remedy at law being full and complete. 5 Federal Stat. Ann., p. 188, § 5242 and p. 190, note 2; 177 U. S. 499; 189 Pa. St. 610; 42 W. N. C. (Pa.) 328; 5 Ark. 9; 34 *Id.* 354; 48 *Id.* 510; 82 *Id.* 330; 5 Enc. Dig. Ark. Rep. 694. The cause should have been transferred to the law court and submitted to a jury. 73 Ark. 462; 65 *Id.* 503. Even though the appellant had drawn the check, she had a legal right to stop payment. 118 Pa. 294; 138 Cal. 169; 31 Okla. 139. The drawing of a check is not an assignment of any part of the fund in the hands of the drawee. 27 Am. Rep. 55; 98 Ark. 1; 100 *Id.* 537; 48 N. Y. 682; 6 *Id.* 412; 57 Am. Dec. 466; 31 L. R. A. 519.

2. The answer of Ortagus was not verified. Appellant answered upon oath, denying the charges of appellee. Insofar the court is bound to accept as true the facts as to defendant Ortagus. 18 Ark. 214; 19 *Id.* 166; 24 *Id.* 410; 26 *Id.* 417.

3. Appellee is not a *bona fide* holder. Deposit of a check to account does not pass title to the bank. There must be some agreement to overcome the universal custom of banks that every deposit slip contradicts such acceptance except for collection at depositor's risk. 15 Fed. 675; 21 Am. Rep. 697; 50 Fed. 647; 150 U. S. 231; 7 L. R. A. (N. S.) 694.

3. Neither the law nor the evidence supports the judgment and the cause should be reversed and judgment entered here for appellants.

Coleman & Lewis, for appellee.

1. The chancery court had jurisdiction. This was a case of actual or constructive fraud. 14 Ark. 356; 70 *Id.* 189.

2. The account was changed with intent to defraud. The denial of her signature was an attempt to defraud. The jurisdiction of chancery to prevent fraud is clear and the mere fact of a remedy at law does not exclude chancery jurisdiction. 70 Ark. 189; 182 U. S. 478-81.

3. The decree should be affirmed. When a check is presented to a bank, and the bank receives it and places the amount to the credit of a customer, the title to the check vests in the bank. 101 Ark. 266; 119 Ark. 373. All the proof makes it beyond doubt that *she signed the check.*

HART, J., (after stating the facts). The defendant Gladys G. Sanders asked that the case be transferred from the chancery court to the circuit court and now assigns as error the action of the chancellor in failing to transfer the cause.

Under the record as presented we need not decide whether this cause was of equitable cognizance. Section 5991 of Kirby's Digest provides that an error of the plaintiff as to the kind of proceedings adopted shall not cause an abatement or dismissal of the action but merely a change into the proper proceedings by amendment in the pleadings and a transfer of the action to the proper docket.

Section 5993 of Kirby's Digest provides that such error is waived by failure to move for its correction at the time and in the manner prescribed in the statute and that such errors are waived unless excepted to at the time.

The record does not show any order of the court passing upon the motion of the defendant to transfer the cause from the chancery court to the circuit court

and under the sections of the statute above referred to the defendant will be deemed to have waived her motion.

The transcript does contain the following language: "It is agreed that the testimony shall be taken by a stenographer, the notes written and transcript used as depositions, same being taxed as costs. After reading the complaint of plaintiff by Mr. Lewis and reading the answers by Mr. Reigler a discussion arose between the attorneys for the defendants with the court as to its jurisdiction, the attorneys for defendants stating that plaintiff had an adequate remedy at law and no cause to enter this court. The court refused to transfer this cause, holding that it was within proper jurisdiction, to which defendants excepted."

(1) It was proper to agree that the testimony should be transcribed and used as depositions. The testimony of the witnesses, when transcribed, under the agreement, became a part of the record. The recital of the discussion between the attorneys for the defendant and the court did not become a part of the record. The subject of the record on appeal in chancery cases has been considered by this court in several cases. The case of *Rowe* v. *Allison,* 87 Ark. 206, cites many of our earlier cases on the subject and clearly points out what is necessary to bring matters into the record in chancery cases. Counsel for the defendants should have caused an order to be entered of record overruling the motion to transfer the cause to the circuit court. Such an order would have become a part of the record on appeal. Not having done so, defendants will be deemed to have waived their objections to the jurisdiction of the chancery court.

(2) The statement above refered to as appearing in the transcript is not even authenticated by the stenographer's certificate or by the certificate of the clerk; but even if it were, as above stated, that would be insufficient to make it a part of the record on appeal.

This brings us to a consideration of the case on its merits.

(3) When a check is taken to a bank and the bank receives it and places the amount to the credit of the customer, the title to the check is vested in the bank. The rule as stated is not an absolute rule but it is *prima facie* merely and yields to the intention of the parties, express or implied, from the circumstances. *Southern Sand & Material Co.* v. *People's Savings Bank & Trust Co.,* 101 Ark. 266; *Arkansas Trust & Banking Co.* v. *Bishop,* 119 Ark. 373, 178 S. W. 422; *Fayette National Bank* v. *Summers,* 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694, and case note.

(4) Tested by this rule, the decision of the chancellor was not against the preponderance of the evidence and must be upheld on appeal. The facts as disclosed by the record show that both banks are situated in the city of Little Rock and diagonally across the street from each other; that Ortagus deposited the check in question one afternoon and the check was credited to his account; that the bank kept the check until the next morning when it was carried to the clearing house in due course; that before that time Ortagus had checked the amount out in various small amounts to meet his pay roll; that the Worthen Company had no notice whatever of any infirmities in the check.

Under these circumstances, the chancellor was justified in finding that it was the intention of the parties that the title to the check should pass to the bank when it received it and credited the amount thereof to the account of Ortagus.

The chancellor was also warranted in finding that Gladys G. Sanders signed the check. It is true that she denied signing it, but the record shows that she also denied signing another check made payable to Ortagus but afterwards admitted having signed it. The assistant cashier of the Exchange National Bank testified that he knew her signature and that the signature to the check was her genuine signature; and the president of the Worthen Bank compared the signature to the check with the admitted genuine signature of Gladys G. Sanders

and testified that the signature to the check was the genuine signature of Gladys Sanders.

The decree is affirmed.

LONOKE COUNTY *v.* REED.

Opinion delivered January 24, 1916.

CRIMINAL LAW—PROSECUTING ATTORNEY'S FEES—LIABILITY OF COUNTY FOR COSTS—MISDEMEANOR.—A county is not liable for the fees of the prosecuting attorney, in cases of conviction for misdemeanors, where the defendant has no property and the county has not contracted to work its convicts pursuant to sections 1066-1074 of Kirby's Digest, or Act 207 of the Acts of 1909.

Appeal from Lonoke Circuit Court; *Thos. C. Trimble,* Judge; reversed and dismissed.

Chas. A. Walls, for appellant.

1. The county is not liable for prosecuting attorney's fees for convictions on indictments in the circuit court, unless there is some express authority of law for same. Such authority must be expressly conferred by statute, and it will never be inferred. Kirby's Digest, § § 2469, 2470; 44 Ark. 31-33; 10 *Id.* 467; 37 *Id.* 226; 37 *Id.* 228; 37 *Id.* 487; 102 *Id.* 106; 108 *Id.* 137.

2. The county is not liable because Lonoke County has no contractor to work out the fines and costs. Kirby's Dig., § § 1066-1074; Act 207 Acts 1909; 102 Ark. 166.

3. There must be an appropriation by the levying court for working convicts, etc. Kirby's Dig., § 1074; 85 Ark. 609-11; 68 *Id.* 22.

Joe T. Robinson, for appellee.

The question is whether in cases of conviction in circuit court upon indictments a claim for fees by the prosecuting attorney should be allowed against the county, if it has failed to enter into a contract for the hiring of county prisoners. This has never been decided by this court. The cases cited by appellant do not apply. The act of 1875 as digested in section 2469, Kirby's Digest, simply means that in misdemeanors in inferior

courts the county shall not be liable for costs. The practice varies in the several judicial districts; in some the costs are paid by the county, in others not. The provision exempts only such misdemeanors as the county is not liable in. The matter should be settled by this court for good.

HART, J. The question raised by this appeal is whether or not a county is liable for prosecuting attorney's fees in cases of conviction for misdemeanors where the defendant has no property and the county has not contracted to work its convicts pursuant to sections 1066-1074 of Kirby's Digest, or Act 207 of the Acts of 1909.

The circuit court held the county liable and the county has appealed.

The liability of the county for costs in criminal cases rests alone upon statute. This rule has been established by such a long and unbroken line of decisions in this State as to render citation of authority in support of it unnecessary. The costs include the prosecuting attorney's fee. *Phillips County* v. *Clayton,* 29 Ark. 246. Therefore, the liability of the county depends upon the construction to be given to sections 2446, 2469, 2470 and 2471 of Kirby's Digest, it being a cardinal rule of construction that statutes relating to the same subject must be construed together.

Section 2446 of Kirby's Digest is a part of section 286 of the criminal code as amended in 1871. It provides that in judgments against defendants a judgment for costs in addition to other punishment shall be rendered, and shall be taxed by the clerk for the benefit of the officers rendering the services and, in case of failure by the defendant to pay said costs, shall be paid by the county where the conviction is had.

Sections 2470 and 2471 were originally sections 205 and 206 of chapter 45 of the revised statutes. The latter section has never been amended. The former was amended by the Act of February 5, 1889. The amendment consisted in making the county liable for costs where a *nolle prosequi* was entered by the attorney for

the State. As these two sections originally stood it will be seen that the Legislature intended to make counties responsible for costs in cases, first, where the defendant is acquitted and there was no judgment against the prosecutor for costs, and, second, where the defendant is convicted but is unable to pay the costs. This is the effect of the decision in the case of *County of Ouachita* v. *Sanders, et al.,* rendered at the January term, 1850, of this court, and reported in 10 Ark. 467.

Subsequently the lawmakers amended the statute in regard to the payment of costs by the county. Section 2469 of Kirby's Digest is section 5 of the Act of February 25, 1875, being an act to establish fees. The original act used language somewhat different from the section of the digest and reads as follows:

"Fees allowed in criminal cases shall be paid by the defendant, but if sufficient property belonging to the defendant can not be found for that purpose, they shall be paid by the county where the conviction is had, except in such cases of misdemeanor, where the county is not to be liable."

The effect of the enactment of this section of the act to establish fees was to amend sections 2470 and 2471 of Kirby's Digest which were originally sections 205 and 206 of the revised statutes and to exempt the county from liability for conviction for misdemeanors. This construction of the statute was recognized in the case of *Stalcup* v. *Greenwood District of Sebastian County,* 44 Ark. 31, when the court, construing the sections just referred to, said:

"It will thus be seen that in misdemeanors there is only one contingency upon which the county is responsible, viz.:, where the defendant is acquitted and there is no judgment against the prosecutor."

Subsequently section 2470 of Kirby's Digest, which was then section 2343 of Mansfield's Digest, was amended by an act approved February 5, 1889, so as to make the county liable for the costs where the prosecuting attorney entered a *nolle prosequi.*

To hold the county liable for costs in cases of conviction for misdemeanors where the defendant has no property and where the prisoners have not been hired out by the county court pursuant to statute would be to give no effect whatever to section 2469 of Kirby's Digest which is section 5 of the Act of February 25, 1875; for that section in plain terms makes an exception in cases of misdemeanors and says that in such cases the county shall not be liable. This act was passed subsequent to the passage of sections 2446, 2470 and 2471 of Kirby's Digest and would be repugnant to them, and repeals that portion of those sections which provided that counties were liable in cases of conviction for misdemeanors.

It follows that the circuit court erred in making the allowance against the county for the fees of the prosecuting attorney and for that error the judgment will be reversed and the claim of the prosecuting attorney for fees will be dismissed here.

LEATHEM & CO. v. JACKSON COUNTY.

Opinion delivered January 24, 1916.

1. COUNTY COURTS—RATIFICATION OF UNAUTHORIZED CONTRACT.—The county court may ratify an unauthorized contract, made in behalf of the county, if the contract is one the county could have made in the first instance.
2. COUNTY COURTS—JURISDICTION IN COUNTY AFFAIRS.—Under article 7, section 28, Const. of 1874, the county courts have exclusive original jurisdiction in all matters necessary to the internal improvement and local concerns of the counties.
3. COUNTY COURTS—AUDIT OF ACCOUNTS OF COUNTY OFFICERS.—The county court has jurisdiction, and it is its duty to audit the accounts of the officers of the county named in the statute, and if found correct, to approve them, and if not, to cause them to be corrected.
4. COUNTY COURTS—AUDIT OF ACCOUNTS OF COUNTY OFFICERS—AUTHORITY.—The county court, being the general fiscal agent of the county, is possessed of a supervisory power over the collection and preservation of its funds, and it has the implied power to employ an expert accountant to audit the official accounts and public records of county officers.

5. COUNTY COURTS—AUDIT OF COUNTY BOOKS—AUTHORITY OF CIRCUIT COURT.—County courts, having authority under the Constitution to employ an accountant to audit the books of county officers, the right was not abridged by the enactment of chapter 22 of Kirby's Digest, empowering the circuit courts to appoint three commissioners of accounts for each county, to examine the books of the county officers and report their findings to the circuit court.

6. COUNTY COURTS — ADMINISTRATIVE ACTS — RATIFICATION.—When a county court is authorized to do an act purely administrative in its character, such as make a contract, it may also ratify such act, when done by the county judge in vacation and thereby bind the county as effectively as if the contract was made by the county court in the first instance.

Appeal from Jackson Circuit Court; *Dene H. Coleman,* Judge; reversed.

Jno. W. & Jos. M. Stayton, for appellants.

1. The county court had authority to make the contract. Art. 7, § 28, Const.; Kirby's Digest, § 1375; Acts 1909, p. 902 amending section 1499, Kirby's Dig.; Kirby's Dig., § § 7162-7167-7174, 1470 to 1483; 31 Ark. 571. The county court is the forum where the liability of all officers is settled and the direction of payment of all demands against the county is finally adjudicated. 14 Ark. 170; 22 *Id.* 236; 24 *Id.* 551; 44 *Id.* 225; 47 *Id.* 80; 52 *Id.* 362.

2. The duties of commissioners of accounts is defined by section 652 *et seq.,* Kirby's Digest; and it is the duty of the county judge to pass upon the correctness of their findings and audit. Acts 1883 as amended Kirby's Dig., § 640. The county court may cure all informalities in procedure by ratification. 46 Pac. 6; 114 Cal. 207. The appropriation for *county court purposes* was *made by the quorum* court and the allowance herein falls within this class. An appropriation was made; the court is not prohibited from allowing claims in excess of an appropriation. Const. Art. 16, § 12; Kirby's Dig., § 1502; 93 Ark. 14; 34 *Id.* 356; 36 *Id.* 646; 54 *Id.* 657; 34 *Id.* 310; 112 S. W. 979; 144 *Id.* 1198. Certain incidental powers germane to authorities and duties expressly delegated may always be exercised. 7 A. & E. Enc. Law (2 ed.),

987-9 and cases cited; 138 S. W. 79-81; 161 *Id.* 203; 175 Ill. App. 290.

3. A county board may contract for investigation of the books, etc., though there had been former investigations. 60 N. E. 948; 101 Ind. 403; 103 N. E. 100; 114 Cal. 419; 46 Pac. 292. Under Art. 7, § 28, Const. and section 1375 Kirby's Dig. the court had authority to make or hire an audit of the records, settlements, etc., of county officers, and an appropriation having been made the county is liable although the appropriation was exhausted. Kirby's Dig., § 640 and authorities *supra.*

Otis W. Scarborough and Campbell & Suits, for appellee.

1. The county judge had no authority to make the contract in vacation. 71 Ark. 226; 75 *Id.* 420; 86 *Id.* 596; 89 *Id.* 86; 103 *Id.* 571. *He* was not a *court* nor the county court. 2 Ark. 229; 11 Cyc. 652, 656.

2. The county court had no jurisdiction to make the contract. Const. Art. 7, § 11; 34 Ark. 188; 68 Ark. 555; 116 Ark. 65.

3. No appropriation was previously made for such an expense. Const. Art. 16, § 12; Kirby's Dig., § 1502; 53 Ark. 287; 61 *Id.* 74; 93 *Id.* 336; 83 *Id.* 275. Nor had the court any authority to make such an appropriation. 114 Ark. 278; Acts 1911, p. 21-22. The law provides for "Commissioners of Accounts" to do the work contracted for. Kirby's Dig., Ch. 22, § 625. Also the law provides for the grand jury to audit the books of the county. Kirby's Dig., § 2200. The law having cast the duty on the commissioners and grand jury the court had no authority to employ Leathem. 119 Ark. 567.

4. The county court had no authority to delegate its authority to audit. 17 N. W. 938; 52 Mich. 340; 25 N. E. 283; 125 Ind. 258; 73 N. W. 456; 53 Neb. 113; 98 N. W. 619; 123 Iowa 559; 83 N. E. 790; 181 Fed. 49; 104 C. C. A. 63.

HART, J. The county judge of Jackson County employed appellants as expert accountants to examine the books and accounts of certain officers of said county at an

agreed price. Subsequently the county court entered of record an order ratifying the employment of appellants and stating the reasons therefor. Appellants performed services under the contract in a satisfactory manner and presented to the county court a demand for $500 to be applied on their contract. A tax payer of the county filed a remonstrance. The county court made an order allowing the claim of appellants and an appeal was taken to the circuit court. The circuit court held that there was no authority in law for the county court to make the conract with appellants; that the contract as made was void; and that the order ratifying it was also void. The allowance made to appellants was set aside and the order of the county court ratifying the contract was also set aside. From the judgment rendered appellants have duly prosecuted an appeal to this court.

(1) It will be noted that the county judge first made the contract with appellants. The county court subsequently entered of record an order ratifying the contract and setting forth the reasons which caused the court to make the contract. The county may, like an individual, ratify an unauthorized contract made in its behalf if it is one the county could have made in the first instance. Such ratification will be equivalent to original authority. Second Dill. Mun. Corp. (5 ed.), section 797; *Steiner* v. *Polk County,* (Ore.) 66 Pac. 707; *Cunningham* v. *Saling,* 57 Ore. 517, 37 L. R. A. (N. S.) 1051.

The county court set forth at length in the order entered of record its reasons for making the contract with appellants. The county judge also testified at the trial of the case and gave at length his reasons therefor. It is not claimed or proved that the county court acted arbitrarily or capriciously in making the contract with appellants; nor was it claimed or proved that the contract was the result of fraud on the part of the county judge or collusion between him and appellants. The sole ground on which the contract and allowance was attacked was that the county judge was without authority to make the same. For this reason it will not be necessary to set out

the reasons given by the county judge for making the contract.

A board of county commissioners or supervisors ordinarily exercises the corporate power of the county. Such boards are in a sense the representative and guardian of the county, having the management and control of its property and financial interests and having original and exclusive jurisdiction over all matters pertaining to the county affairs. 11 Cyc. 388-9.

(2) By the Constitution of 1874 the county courts were made successors and continuations of the former boards of supervisors of the county and were given exclusive original jurisdiction in all matters necessary to the internal improvement and local concerns of their respective counties. *Dodson et al.* v. *Mayor and Town Council, Fort Smith,* 33 Ark. 508; *Worthen* v. *Roots,* 34 Ark. 356.

Article 7, section 28, of our Constitution reads as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, * * * the disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concerns of the respective counties * * *."

Section 1375 of Kirby's Digest, is as follows:

"The county court of each county shall have the following powers and jurisdictions: Exclusive original jurisdiction in all matters relating to county taxes * * * to audit, settle and direct the payment of all demands against the county * * * to disburse money for county purposes, and in all other cases that may be necessary to the internal improvement and local concerns of the respective counties."

Section 7162 of Kirby's Digest provides that all collectors, sheriffs, clerks, constables and other persons chargeable with moneys belonging to any county shall render their accounts and settle with the county court at each regular session thereof.

Section 7167 of Kirby's Digest provides that if any of the officers thus chargeable shall neglect to render their accounts or settle as aforesaid, the county court shall adjust the accounts for such delinquent, according to the best information that can be obtained and ascertain the balance due the county.

Section 7171 of Kirby's Digest provides that upon good cause being shown for setting aside such settlements the county court may re-examine, settle and adjust the same.

Section 7174 of Kirby's Digest provides that whenever any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the county court at any time within two years from the date of such settlement to reconsider and adjust the same.

Sections 1162 and 1163 of Kirby's Digest provide for settlement by the county treasurer with the county court.

(3) Thus it will be seen that, under our Constitution and laws, the county court had jurisdiction and it was its duty to audit the accounts presented by its officers named in the statute for settlement and if found correct to approve them, and if not, to cause them to be corrected.

Under the sections of the Constitution and statutes to which we have just referred the state of officers' accounts belong properly to the jurisdiction of the county court and their correctness was a proper subject of inquiry. Counsel for appellee concede that the county court represents the county and that if it conceived it to be necessary to make a detailed investigation of the official affairs of the county and to overhaul and restate the accounts of its various officers, it has the power to do so; but they insist that the employment of an expert accountant by the county court to make such investigation is a delegation of authority and that there is no law authorizing the county court to delegate its power in this respect to another.

(4) Counsel for appellants have cited decisions from several states to the effect that where the county court is the general fiscal agent of the county and is possessed of a supervisory power over the collection and preservation of its funds it has implied power to employ an expert accountant to audit the official accounts and public records of county officers. In *Duncan* v. *Lawrence County,* 101 Ind. 403, commissioners—who in that state correspond to our county courts—employed an expert accountant to examine and report on the accounts of the treasurer of the county and the accountant having done the work asked payment for his services. It was held that the commissioners had full authority with reference to the adjustment of the accounts of public officials and as an incident thereto to employ an accountant. The grounds of this decision were that the statute of that State in cases of indispensable public necessity authorizes the making of such a contract.

In the case of *Garrigus* v. *Board of Commissioners of Howard County,* 157 Ind. 103, 60 N. E. 948, it was contended that the title to the Indiana act was insufficient, that the act was, therefore, unconstitutional, and that the county board had no inherent authority to enter into the contract. The Supreme Court held the act valid, and, further, that if this was error the board had very full powers to enter into contracts for the benefit of the property of the county and that these powers were amply sufficient to sustain the contract.

The claim was made there that the board could not delegate the performance of its duty to others and the court in overruling the contention, said:

"The complaint averred that 'the existence of these claims, and each item thereof, could be ascertained only by long, laborious, and careful search of experts.' Such a search was not that of 'auditing accounts of officers,' which the statute imposed upon the board. It was plainly a duty the board could not perform, but one which, from its nature, must be committed to others. The employment of the expert accountants for the purposes named

in the agreement did not involve any abandonment or delegation of the official powers and duties of the board. The proceedings of the accountants were at all times subject to the supervision and control of the board, and the persons so empowered were mere agents and servants of the county."

See also *Bd. Commrs. Perry County* v. *Gardner,* 155 Ind. 165, 57 N. E. 908; and *Lockyear* v. *Board of Commissioners of Spencer County* (Ind.), 103 N. E. 100.

The statutes of Kentucky give the fiscal court jurisdiction "to regulate and control fiscal affairs and property of the county," and the Court of Appeals of that State held that the statute authorized the court to contract for the employment of an accountant for the purpose of investigating the affairs of the county officers. *Taylor* v. *Riney,* 161 S. W. 203. The court there said:

"The fiscal court is charged by the statute with the duty of looking after the fiscal affairs of the county, and this puts upon it the responsibility that attaches to any other business body, and, if it could not, when the occasion seemed to demand it, have an investigation made of the books, and accounts, and records of any one or more of the officers, agents, or employees of the county who have the control of or right to receive or pay out the funds of the county, the court could not, in any proper manner, perform the duty required of it in the management of the fiscal affairs of the county. There is scarcely a business institution in the State of any magnitude that does not have its books examined by some skilled accountant, and there are many good reasons why the fiscal court should be permitted to exercise this character of supervision over the persons charged with the collection or expenditure of the public funds."

In the case of *Blades* v. *Hawkins,* 240 Mo. 187, 144 S. W. 1198, 27 Am. & Eng. Ann. Cas. 1082, the court said that the statute of Missouri contained no grant of authority to the county court to employ an expert to audit and examine the books and accounts of the county and its officers; that if this authority existed it was because the law implied it as essential to the due exercise of powers

specifically vested in the county court by statute, or the performance of a duty specifically required of said tribunals. The court further said that in determining whether or not the county court had authority to employ such expert it must call to mind the duties of such a court.

There, as here, the county court is the general fiscal agent of the county and is possessed of a supervisory power over the collection and preservation of its funds. There, as here, various officials are required to report to and make settlements with the county court. The Missouri statutes contain provisions similar to our own in making it the duty of the county courts to adjust the accounts of delinquent officials and to ascertain the balance due the county. The court, after mentioning these statutes, said:

"The various provisions of the statutes demonstrate that it is not only within the power, but is the duty, of the county court to look after public funds, examine and investigate the accounts of the different officials and other persons, enforce the collection of money due the county, and order suits to be brought on the bonds of delinquents. In short, responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations, is imposed on county courts. The question for decision is whether the express delegation of those powers and duties by the Legislature carried with it the authority to employ an expert to look over books and documents in order to ascertain whether officials and other persons chargeable with public moneys had rendered correct and faithful accounts, and had made just settlements with the court. In our opinion this question ought to be answered in the affirmative. While it is true the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authorities and duties expressly delegated, and indispensable to their perform-

ance, may be exercised. 7 Am. & Eng. Enc. of Law (2 ed.) 987, 989, and cases cited in the notes."

See also *Donlevy* v. *Sims,* 175 Ill. App. 290; *Harris* v. *Gibbins,* 114 Cal. 419, 46 Pac. 292.

We regard the cases cited as squarely in point and approve the reasoning quoted from the opinions and for that reason it is not necessary to repeat what has been said on the subject.

We are not without authority on the subject in our own court. In the case of *Lee County* v. *Abrahams,* 31 Ark. 571, the court held that if the circuit court neglected to require the clerk of the circuit court to render an account during his term of office, the county court may, under its general jurisdiction, force him to settle. The court said: "But if the circuit court neglected to rule him to report during his whole term of office, we see no reason why the county court, having original jurisdiction in matters relating to county taxes, etc., might not force him to a settlement," citing Miller's Dig., section 214.

That section of Miller's Digest is section 22, chapter 41, of the revised statutes and is the same as section 7167 of Kirby's Digest.

In that case the county court employed a special attorney to examine the reports and settlements of all the county officers who were required by law to make a settlement with the county court of all funds in their hands belonging to the county and to report all delinquents. The report of the special attorney is copied in the opinion and shows that he performed such services as are usually performed by an expert accountant. It is true there is no express adjudication in that case of the right of the county court to employ a special attorney or expert accountant to audit the accounts of the county officers, but the question was not there raised. And the court by its silence recognized the authority of the county court to make the employment.

In the case of *Oglesby* v. *Fort Smith District of Sebastian County,* 119 Ark. 567, 179 S. W. 178, we held that the county court has the power in proper cases to employ

counsel other than the prosecuting attorney to represent the county in civil suits in which the county is interested. In that case we recognized that county courts can only exercise such powers and rights as are clearly granted by the language of the Constitution or acts conferring them, or such as are derived therefrom by necessary implication. If the county court in its discretion had the inherent power to employ an attorney to represent the interests of the county in a proper case, we do not see why it should not also have the power to employ an expert accountant when it becomes necessary for the best interests of the county to do so.

(5) Finally it is insisted that the court was without authority because under chapter 22 of Kirby's Digest the circuit court is empowered to appoint three commissioners of accounts for each county whose duty it shall be to examine the books of the county officers and report their findings to the circuit court. If we are correct in holding that under our Constitution and statutes the county court had the inherent power to make the contract under consideration, it is obvious that that power could not be taken away by granting similar powers to another court. Chapter 22 of Kirby's Digest was first passed in 1885, which was subsequent to the passage of the acts above referred to and discussed.

The evident purpose of the Legislature in enacting chapter 22 of Kirby's Digest was to aid in the enforcement of the criminal laws of the State. Neither the circuit court nor the grand jury had any inherent power in the matter but only had such power as was conferred upon them by the statute. The circuit courts could only act pursuant to the authority given them by the statute and are limited in the exercise of such power by the words of the statute. It is manifest that the Legislature by the passage of chapter 22 of Kirby's Digest did not intend to take away any of the powers of the county court with regard to the settlement and adjustment of the accounts of the county officers and we are of the opinion that chapter 22 did not have that effect.

It is not contended that the county court abused its discretion in making the contracts in question.

It therefore follows from what we have said that the circuit court erred in refusing to allow the claim of appellants and in setting aside the order of the county court making the contract with them. For the error the judgment will be reversed and the cause remanded with directions to render judgment in favor of appellants.

WESTERN COAL & MINING COMPANY v. HARRISON.

Opinion delivered January 24, 1916.

MASTER AND SERVANT—INJURY TO SERVANT—STANDARD EQUIPMENT—ASSUMED RISK.—Plaintiff was injured by the falling of coal down a shaft in which he was working, where the coal was being taken from the same. *Held*, when the apparatus in use was standard equipment in coal mines, the falling of the coal was, under the facts, an incident to unloading the same, and the risk of injury, being an ordinary one, and understood by the plaintiff was assumed by him.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran*, Judge; reversed.

STATEMENT BY THE COURT.

The plaintiff, Kelley Harrison, brought suit for damages for personal injury, alleged to have been caused through the negligence of the appellant company by being struck with coal falling down the main shaft of the mine from unloading the cars, because of the dumping blocks being too low.

It was also alleged that the defective condition of the blocks was known to the defendant and that its pit boss agreed to repair same.

The answer denied all the allegations of the complaint and plead contributory negligence and assumed risk as defenses.

It appears from the testimony that a piece of coal fell down the shaft and struck and injured appellee while he was at work at his accustomed duties. The testimony shows that he had been at work about a week at the sump

at the bottom of the shaft, engaged in pulling loaded coal cars on the cage or elevator to be hoisted, when the coal fell and struck him. He stated that he had spoken to the pit boss who agreed to see the superintendent and have the dumping blocks raised or the defect complained of repaired and that he continued his work only on the promise and expectation that repairs would be made, but knew that it had not been fixed up to the time of the injury.

Many witnesses testified that the dumping blocks were not too low and that it made no difference about their height, so long as they dumped or turned up the cars that were being unloaded.

Some testified that if they were too low the cars were not completely turned and some of the coal remained in, and when the cars were swung back over the shaft, spilled coal down into it.

The testimony shows also that coal frequently fell from the cars in unloading because of the oscillation or shaking of the cars when they came to the top and on account of their being loaded high with coal above the top of the car, that this coal lodged upon the buntons at times and fell down the shaft from the buntons because of the shaking of same, being displaced in unloading cars.

It was undisputed that more or less coal fell down the shaft nearly all the time in unloading and dumping the cars, so much so that the sump had to be cleaned up once a day.

The pit boss denied having made any agreement to repair or raise the dumping blocks and the testimony shows that they had been in use for two or three years at the tipple and several witnesses stated that they were of the kind and class in general use in other coal mines of the locality.

Wm. McKinley stated he had been superintendent of mines for thirty years and was acquainted with the operation of shaft mines and the method used in hoisting coal "that self dumping cages are in general use in such mines that in dumping coal off the cars where such cages

are used, pieces of coal will fall down the shaft and there is no way to prevent it. Some can be prevented by the engineer being careful, but not all." Said that the fact that the dumping blocks were from six to eight inches too low would not cause any greater amount to fall back, and if they were so constructed as to be high enough to dump the coal it would not make any difference as to the height.

Robt. Boyd stated he had had fifty-one years experience in coal mines, had been state mine superintendent and was familiar with shaft coal mines and the method of mining and hoisting coal where the self-dumping system was employed and that this method was in general use by operators in Arkansas in every field in which he had worked. "That coal will fall down in being hoisted and unloading—there is no way to prevent it. It is one of the ordinary things attending hoisting and unloading of coal on self-dumping cages and can not be prevented."

Others testified that they were familiar with the hoisting shaft and self-dumping cages at the mine where the injury occurred and it was constructed as appliances are ordinarily constructed in mines operated by careful and prudent men and such cages are in general use by coal miners throughout the United States.

Hogan said it was impossible to prevent coal falling down the shaft during the operation of such cages. Miners ordinarily load cars above the level of the bed and the motion and shaking of the cage in hoisting as well as the movement in dumping causes pieces of coal to fall off and roll down the shaft. In ordinary operation of cages, coal falls off the cars and lodges on the buntons and then falls down, and that the liability of the cager and persons working at the bottom to be hit was but an ordinary risk of the work.

H. L. Adams testified he had twenty years experience in mines and was familiar with the self-dumping cages used "and that such cages were in ordinary use in well conducted and prudently operated coal mines. They are constructed practically alike; there is no way to pre-

vent coal from falling down the shaft in hoisting or unloading coal by this method. It is impossible on account of the miners loading cars above the bed and the vibration of the car in hoisting and the tilting of it by a self-dumping apparatus will cause pieces of coal to fall off the car. He said further, that persons working around the bottom of the shaft knew this and it is one of the dangers of the work in which they are engaged and that if the blocks are in such position as the cars will dump, their being too high or too low has no effect as to the falling of the coal. If it is entirely too low, the car will not dump at all."

The court instructed the jury, refusing to give appellant's requested instruction numbered 8 as follows: and gave it as amended, over its objection, by adding the proviso: "If the jury believe that the cage used by defendant at the time plaintiff was injured was a self-dumping cage, and known by plaintiff to be such, and that such cages as were then operated by defendant, were in general use in like coal mines operated by persons of ordinary prudence and caution, and further believe from the evidence that in the ordinary and usual operation of such cages coal will fall down the shafts when the cages are used in the ordinary and usual way, then plaintiff can not recover if the evidence shows his injuries were caused by coal which fell down the shaft while coal was being hoisted and dumped in the usual and ordinary way by such self-dumping cages. Provided: you believe from the evidence that the falling of the coal was not caused by the negligence of defendant." From the judgment on the verdict against it, this appeal is prosecuted by the coal company.

Ira D. Oglesby, for appellant.

1. The evidence does not establish the negligence alleged in the complaint. If it does, it is conclusively established by the uncontradicted testimony that plaintiff is precluded from recovery upon the doctrine of assumed risk. The only negligence alleged is that the dumping blocks were too low, by reason of which lumps of coal

fell down the shaft. It was properly constructed and in good condition, and such as were in general use. The happening of the *accident* proves nothing as the doctrine of *res ipsa loquiter* can not be applied. 37 S. E. 683; 94 Mich. 35; 115 S. W. 890; 48 Me. 296; 32 N. W. 240; 43 Mich. 41; 179 U. S. 658; 48 S. E. 508; 25 C. C. A. 247; 47 Minn. 384, etc.

2. This is a clear case of *assumed risk.* Plaintiff knew the danger. 226 Fed. 495.

3. The instructions are conflicting and misleading. 89 Ark. 211; 82 *Id.* 499; 96 *Id.* 206.

4. It was error to allow witness Gother to testify that "there was something wrong" with the dumping blocks.

G. O. Patterson, for appellee.

1. The dumping blocks were too low and this caused the injury. Defendant knew of their condition and of the danger and had promised to repair the defect. This was the *proximate cause* of the injury and this is not a case of *assumed risk.* The jury found for plaintiff on both questions under proper instructions and no error is shown. Labatt on Master & Servant, volume 4, § 1572; 48 S. E. 508; Labatt, M. & S., § 1353, p. 9, 3895; 81 N. J. L. 712; 43 Iowa 662; 86 Ark. 516.

2. The evidence supports the verdict and the law is correctly embodied in the court's charge.

KIRBY, J., (after stating the facts). It is contended that the court erred in refusing said instruction as requested and in amending same and giving it as amended over appellant's objection.

The testimony is undisputed that the appliances in use at the time of the accident were installed two or three years before and it is not disclosed but that same were and had remained in the position and condition all the time until the date of the injury: that it is the kind of hoisting apparatus in general use in shaft mines and it was not shown by plaintiff to have been improperly constructed. One of his witnesses testified that the blocks were not high enough it seemed, and that the cage would

hang and coal would drop but he also stated that coal always fell back and had been doing so since the time the mine was opened and that where self-dumping cages were used that coal would fall down the shaft and there was no way to prevent it.

Another witness who testified that the blocks were too low also stated that coal would fall anyway in the unloading of cars and could not be prevented from doing so.

The evidence may be said to be uncontradicted, also that coal was frequently loaded several inches above the bed of the cars and rolled off in the ordinary hoisting of the cars and fell down the shaft or lodged on the buntons and later fell down when shaken off by unloading operations.

Said instruction numbered 8 correctly stated the law and appellant was entitled to have it given to the jury without amendment or modification. It applied the law to the facts of the case in a concrete way and no other instruction covered the point. The refusal to give it was error since it does not appear that prejudice did not result therefrom.

If the jury had found that the injury occurred as recited in the instruction, the defendant was entitled to a verdict and in any event to have the question submitted to the jury without the proviso. The burden of proof was upon the plaintiff to show that the injury occurred because of the negligence of the coal company and the jury might have been misled by this proviso into thinking that the coal company would be liable for the injury even if it occurred as set out in the instruction, unless they found that it was not caused by some other negligence of said company. It may be that the testimony is sufficient to warrant the inference that the injury occurred by coal falling from the self-dumping cages in the unloading of it, because the dumping blocks were too low, which is the only negligence alleged and an injury caused by the falling of the coal because the cars were loaded above the bed or some of the coal that had lodged on the buntons was shaken off, would not have warranted a verdict.

If the apparatus in use was standard equipment in general use in such coal mines as the evidence tended to show and the instruction told the jury, the injury to the appellee by the falling of coal down the shaft in the unloading of it was but an ordinary risk of his employment which he assumed in working as he did at the bottom of the shaft at the sump, knowing that the coal would fall. He necessarily knew the danger from the falling coal, it being obvious to any one of ordinary intelligence, and the testimony shows that he had been injured in the same way a few weeks previous to the injury for which this action was brought, while engaged in his work at the bottom of the shaft.

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

STUCKEY v. NORWOOD.

Opinion delivered January 24, 1916.

ATTORNEY'S FEES—CONTRACT BETWEEN ATTORNEYS—QUANTUM MERUIT.—Two firms of attorneys were employed to prosecute an action against a railroad company for damages for personal injuries. A member of one of the firms, without authority from or consultation with his associates, undertook to procure the assistance of a third firm to aid in the trial. In an action to determine what portion of the fees collected should be paid to each firm, *held*, that the finding of the chancellor that the third and last named firm of attorneys had no contract for a specific portion of the fee, but that they had been employed in the case and were entitled to recover on a *quantum meruit*, and allowing them a fee of $1,500, would not be disturbed on appeal.

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

Campbell & Suits, for appellants.

1. Stuckey & Stuckey were equally interested with Norwood & Grant as to the fee under the original "Grant contract" providing for one-third of the recovery. If this is true that ends the controversy. 33 Ark. 548; 7 *Id.* 321. What one partner says is binding upon the other if within the scope of the partnership. A contract

is construed most strongly against the party who wrote it. 84 Ark. 434; 90 *Id.* 88; 97 *Id.* 522. The presumption is that Stuckey and Norwood & Grant were equally interested in the fee. 12 Fed. Cas. 1027; 75 Mo. 89; 135 N. W. 27. The object and purpose of the parties and their conduct should be considered. 46 Ark. 127, 131; 105 Ark. 42.

2. It was mainly through Stuckey that Norwood & Grant were in the case. Under the merger of the Grant and Pace contract, and the novated and substituted oral contract, Stuckey & Stuckey are entitled to one-third of the whole fee, or one-half of the amount held by Pace as trustee. 7 Ark. 321; 33 Ark. 548; 6 Rul. Case Law, § 299; 67 Am. Dec. 328; 139 Am. St. 19; 56 *Id.* 656; 24 Am. Dec. 770; 92 Ark. 254.

3. The rule of *quantum meruit* does not apply. 26 Am. St. 605; 3 Ark. 324; 7 *Id.* 321; 78 *Id.* 87.

Mehaffy, Reid & Mehaffy, for appellee.

The original contract was made with Grant and Pace. Stuckey was never employed by McMichael, nor by any one authorized to contract for him. No novation nor merger of the Grant and Pace contract was ever made, whereby Stuckey was to be taken into the case, or paid a fee. No new contract was made, nor merger of the original contract. The evidence is conclusive. Stuckey merely assisted Grant as a local attorney. Pace was to have one-third of 50 per cent of the recovery and Norwood & Grant two-thirds of same. Stuckey did little in the case and was merely an assistant to the attorneys who had a contract with McMichael, and the chancellor properly applied the *quantum meruit* rule. All the authorities cited by appellant are inapplicable and his argument fails. Where there is no contract, then a reasonable compensation is all that can be allowed Stuckey. 123 Fed. 48; 70 S. W. 502; 54 *Id.* 87. $1,000 at most should be fixed as Stuckey's fee.

SMITH, J. The parties to this litigation, and the principal witnesses in the case, are lawyers of eminence and, through their joint efforts, secured a judgment in

the case of *McMichael* v. *St. Louis, Iron Mountain & Southern Ry. Co.* for $35,000. Upon appeal to this court this judgment was reduced to $25,000, and affirmed for that amount. 115 Ark. 101.

After the judgment had been collected a controversy arose between two of the law firms engaged in the case over their respective shares of the fee which they had charged their client. The evidence in the case is voluminous, and is somewhat conflicting and acrimonious, and we will not undertake to set out even a summary of the evidence of the various witnesses, but will only state our conclusion in regard to it.

McMichael sustained a very serious injury, and for some time his recovery was regarded as very doubtful, and he was brought to Little Rock for an operation and for treatment. His brother-in-law employed the firm of Norwood & Grant to represent McMichael and to sue for his damages. This contract was later reduced to writing, and by its terms it was provided that the attorneys should receive as their compensation one-third of any sum recovered from the railroad company. Before any suit was brought Judge M. M. Stuckey, of the firm of Stuckey & Stuckey, of Newport, had been consulted by members of McMichael's family, but had not been employed. In this manner he learned that some lawyer, whose name was at the time unknown to him, had consulted McMichael and had been employed in the case. Judge Stuckey called Mr. Grant, of the firm of Norwood & Grant, over the telephone, and advised him of that fact, whereupon Grant immediately prepared a complaint and sent it to the circuit clerk at Newport with directions that it be filed and process issued on it at once. This was done, and after the institution of that suit Grant stated to Judge Stuckey that he would want him to assist in the trial of the case. Only the names of Norwood & Grant were signed to this complaint. After filing this complaint Grant discovered that a trial of the case could not be had at the ensuing term of the circuit court and advised the attorney for the railroad company to make no preparations for trial at

that term. Whereupon a new suit was brought in the Independence circuit court, and the original suit was dismissed. The names only of Norwood & Grant were signed to this second complaint, as attorneys for the plaintiff.

In the meantime Norwood & Grant discovered that the other attorney concerned in the case was Mr. Frank Pace, of Little Rock, and these gentlemen took up with each other the adjustment of their respective contractual rights, as attorneys for McMichael. Pace had a contract which provided for a contingent fee of 50 per cent., but his contract was made subsequent to the one held by Norwood & Grant, but Pace knew nothing of the other contract at the time his own was made. The parties and attorneys met at Newport, while the case was pending in that county, to settle the conflicting claims of the attorneys. Grant had said to S. M. Stuckey, of the firm of Stuckey & Stuckey, that he would meet Pace for this purpose, and Stuckey told him that whatever he did would be satisfactory to him. Grant and Pace conferred with McMichael, and it was agreed that both firms should remain in the case, McMichael stating that he didn't care how many attorneys were in the case, provided they took, as the whole fee, only one-half interest in the judgment to be recovered. Pace agreed to remain in the case under his original contract, and to pay Norwood & Grant the amount called for by their contract, which was to remain in full force and effect, and to accept as his part the balance remaining after paying Norwood & Grant. After this conference Grant called at the office of Stuckey & Stuckey to advise them of his agreement with Pace, but when he reached the door of that office he was told by S. M. Stuckey that Judge Stuckey, who was the senior member of that firm, was not in, whereupon, without going into the office, Grant stated, "It is all agreed upon satisfactorily. We work upon the contract that McMichael had with Mr. Pace and third it." It is clear that the Stuckeys understood this statement to mean that a contract had been made whereby the total fee was one-half

of the amount recovered and that this sum should be divided equally among the three law firms concerned in the case, and that they continued in the case with this understanding. It is equally clear, however, that the other attorneys in the case, with the possible exception of Mr. Grant, did not so understand the agreement. Pace testified that he discussed and agreed with Grant on the per cent. of the fee which he should have for his own services, but that he did not know Judge Stuckey was in the case until he was so advised by Grant on the train going to Newport, and that the extent of the understanding was that he should be paid one-third of the fee and that Norwood & Grant should receive the per cent called for by their contract. Norwood testified that until after the trip of Grant and Pace to Newport he had never heard Stuckey's name mentioned in connection with the case, and when advised that Grant had employed him he demanded and received an explanation of that connection, and in response to Norwood's question about what the fee would be Grant said: "He will take anything we want to give him."

A Mr. Richardson was also retained in the case, and he testified that Grant told him Judge Stuckey had been employed in the case as local attorney when the case was pending at Newport, and that he had followed up the case in this employment. Richardson was himself employed as local attorney and was paid a fee of $500.

There were two written contracts for the employment and payment of attorneys, and the firm of Stuckey & Stuckey was not mentioned in either of them. Nor does Stuckey claim to have been employed by McMichael. His employment came through Grant. It was shown that Grant had removed from Newport to Little Rock, and that while at Newport Grant and Stuckey had been associated in a good many cases together, in all of which the fee had been divided equally, and Stuckey expected this to be done, in McMichael's case, both because of his previous dealing with Grant and because of the statement made by Grant to Judge Stuckey's brother. But it was

not shown that Norwood knew anything of this custom; indeed, as has been said, he knew nothing of the employment until six months after the contract with McMichael had been made.

The evidence is practically undisputed that Stuckey's rights depend upon his contract with Grant, who was Norwood's partner, and, as such, had the right to make contracts relating to the business of the co-partnership. The court below recognized this fact and stated to Grant the importance of his testimony and thereafter asked the questions to which the following answers were given.

"Q. Did you ever say anything to him (Judge Stuckey) after the conversation in which he notified you that some other party had a contract with McMichael, that you wanted him to act with you in the case, or did you just proceed without anything being said about it?

A. Well, we proceeded along, and, in his office, I told him we wanted him to do some assistance in the case.

Q. Did he know the terms of your agreement with McMichael?

A. Yes, sir; I think he did. I think McMichael told him and his wife told him. That's my recollection about it. And I guess I told him.

Q. When you informed him you wanted him to assist you in the trial of the case, did you say anything to him about the terms on which you wanted him to assist you?

A. No, sir.

Q. Now, Mr. Grant, you know what you meant by that statement. (At Stuckey's office door). Now, I want to know. Did you mean to convey the idea to Mr. Stuckey's partner that you three were to divide the fee equally or did you mean to indicate to him, as your sentence would imply, that you had made an agreement by which Mr. Pace was to have one-third of the fee obtained?

A. Judge, I made that statement. Now, what I had in my mind, I don't know.

Q. Did you intend at that time to make a contract with him by which he was to receive one-third of it? Was that your idea?

A. I didn't intend to make any contract at all with him.

Q. That's what I mean. You didn't intend at that time to make any contract, did you?

A. I wasn't making any contract. I just made that statement to him there at the door. Now, he could consider it whatever way it might be considered.

Q. I wanted to get your intention.

A. Yes, sir; I expected Judge Stuckey to be in the case and I expected him to render services in the case and expected him to be paid for his services.

Q. Was it your intention, without reference to what Judge Stuckey or his partner might have thought about your remark—did you intend at that time to make an agreement with him by which he was to have as much as you and Mr. Norwood?

A. I didn't intend to make any future agreement with him.

Q. Did you intend to make any kind of an agreement by that remark?

A. I intended him to understand he was in the case.

Q. You had already told him he was in the case?

A. Yes, sir.

Q. But you hadn't fixed the terms?

A. No, sir.

Q. At that time, did you intend, by that remark, to make a contract with him by which he was to receive as much as you and Mr. Norwood?

A. I expected him, from that statement, to be reasonably compensated."

In response to other questions the witness stated that it was his intention for them to fight along and when they got through with the case divide the money, but he stated that there was no agreement for any specific amount in case of a recovery.

It is perfectly manifest from an examination of Grant's evidence that he is in entire sympathy with Stuckey. Indeed, he very candidly avowed this friendship, and it may be assumed that he stated his agreement with Stuckey as favorably as the truth would permit.

The record shows that Pace and Norwood led in the trial of the case and briefed it both in the Supreme Court on its original submission, and upon the petition for a rehearing, and while the proof shows that Judge Stuckey was a lawyer of experience and learning, and could, no doubt, have tried the case as successfully and skillfully as the attorneys who did try it, the fact remains that it was tried by Norwood and Pace and that the service rendered by Judge Stuckey was similar to the service rendered by Mr. Richardson, that is, as local attorney assisting and advising in the case.

Pace was paid his part of the fee without question, and the evidence in regard to the discussion which took place between Norwood and Stuckey concerning Stuckey's compensation after the judgment had been collected, makes it evident that, even at that time, both Norwood and Pace regarded Judge Stuckey as only local counsel in the case.

The court found from this evidence that Stuckey & Stuckey had no contract for a specific portion of the fee, but that they had been employed in the case and were entitled to recover *quantum meruit,* and allowed a fee of $1,500. We can not say that this finding is clearly against the preponderance of the evidence.

The decree of the court below is, therefore affirmed.

LITTLE ROCK RAILWAY & ELECTRIC COMPANY *v.* BAXLEY.

Opinion delivered January 24, 1916.

STREET RAILWAYS—KILLING HORSE—DUE CARE—QUESTION FOR JURY.—Plaintiff's horse was killed by being struck by a moving street car. The motorman testified that he saw the horse before striking it, but too late to stop his car, the accident occurring in the night time. *Held,* under the evidence it was a question for the jury whether the motorman, had ne been keeping a reasonably diligent lookout, could not have stopped the car in time to have avoided the accident.

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

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellant.

The only question in this case is the right of defendant to a directed verdict. § 6773 Kirby's Digest is not applicable to street railways, and the burden was on plaintiff to show that the horse was killed through the negligence of defendant. 77 Ark. 599. Plaintiff has wholly failed to make out his case.

Winn & Pierce, for appellee.

1. The question of negligence is a mixed one of law and fact and while the law imposes duties on persons, yet it is the province of the jury to find whether these conditions have, or have not, been met. 72 Ark. 577.

2. Allowing the horse to run at large is not contributory negligence. 79 Ark. 252. Appellant can not plead the result of its own negligence in failing to furnish proper equipment to absolve it from liability. 69 Ark. 289. Appellant should have plead self-defense with his plea of contributory negligence and introduced a story revealing Kipling's "La Nuit Blanche."

SMITH, J. This is an action brought by appellee for damages for the alleged negligent killing of his horse by the operation of a street car of the appellant company at the intersection of 16th and College streets, in the City of Little Rock. The accident occured at night, on the 29th of October, 1913.

It is the contention of appellant that no actionable negligence is shown by the testimony, and that the testimony, together with all reasonable inferences that may be drawn therefrom in favor of appellee, is not sufficient to entitle appellee to have the question of appellant's negligence submitted to the jury.

The jury returned a verdict in appellee's favor for the sum of $40.00, and the sufficiency of the evidence to support this verdict is the only question raised on this appeal.

The motorman in charge of the car testified that he did not see the horse until his car was within about

20 feet of the animal, and that the horse at the time was coming across the track, that he had only time in which to reverse his power, and that this was done, and that the effect of this action was to lock the wheels of the car and reduce its speed, but that the distance was too short when he first discovered the horse to avoid striking it. The motorman's evidence was to the further effect that the accident happened at about 9:30 p. m., that the horse was only 10 or 12 feet from the track, when he first discovered it, and that the car was not running at an excessive speed.

It is urged that, upon the authority of the case of *Little Rock Ry. & Electric Co.* v *Newman,* 77 Ark. 599, a verdict should have been directed for the street car company. But the opinion in that case expressly states the fact to be that there was no proof that the motorman saw, or could have seen, the animal there struck in time, by the use of ordinary care, to have prevented striking it. Here the motorman admits having seen the animal, although he denies that he saw it in time to avoid the injury. But while his statement appears plausible and reasonable, we cannot say that the action of the jury in not accepting it, was arbitrary; but, upon the contrary, we are of the opinion that the circumstances of this case are such that reasonable minds might fairly differ in the inferences to be drawn from the testimony and that the case was, therefore, properly submitted to the jury.

The proof shows that the street was 50 feet wide, and was straight for some distance, and that there was sufficient light for the horse to have been seen for a distance of 300 feet. The motorman testifies that the horse was grazing near the track, and we can not say that the evidence is insufficient to support a finding that the motorman could and would have seen the horse in time to have stopped his car had he been keeping a reasonably diligent lookout.

The judgment of the court below will, therefore, be affirmed.

CRUCE v. MITCHELL.

Opinion delivered January 24, 1916.

1. MECHANICS' LIENS—ENFORCEMENT.—In an action by a material man against the owner of a building to have a lien declared and enforced on a building for the erection of which the material has been furnished, the original contractor is a necessary and indispensible party.
2. MECHANICS' LIENS—ENFORCEMENT—DEFECT OF PARTIES—WAIVER.—The defect of the failure of plaintiff material man, to join the contractor, in an action against the owner of a building, to have declared and enforced, a mechanics' lien upon the same, is not waived by the defendant's demurrer to the complaint, when he also filed an answer and cross-complaint, in which he asked that the contractor be made a party.
3. APPEAL AND ERROR—DEFECT OF PARTIES—JUDGMENT—PREJUDICE.—A defendant, in an action by a material man to have a lien declared and enforced on his land, is prejudiced by the error of the trial court, committed in refusing to have the original contractor made a party to the proceedings.

Appeal from Conway Circuit Court; *M. L. Davis*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee instituted this suit against appellant to recover judgment and to enforce a materialman's lien against certain buildings and the land upon which the same were situated in the town of Morrilton, Arkansas. The appellee alleged in his complaint that he was the owner of the firm of E. E. Mitchell & Co.; that the firm, on the dates and in the manner set out, in an itemized statement made a part of the complaint, sold to contractors John Patton, Jim Hanna and Jim Scanlan, who erected the C. E. Cruce building on lot 6 in block 8 of Fitzhenry property in the town of Morrilton, material for the purpose of erecting said building in the sum of $149.86; that all of the material was used in the erection of the building mentioned. The complaint alleged that the plaintiff had filed his lien as the statute required, after having given notice to C. E Cruce. The complaint makes a copy of the notice and the lien exhibits. The

appellee alleged that he had acquired a lien upon the building and ground and prayed that the same be declared and that the property be sold, etc.

To this complaint appellant interposed an answer and cross-complaint, in which was included a general demurrer. Among other things in the answer, appellant alleged that he had paid off and discharged to John Patton, Jim Hanna and Jim Scanlan all and fully the contract price agreed upon for the erection of said building; that John Patton, Jim Hanna and Jim Scanlan were to complete said building out of the material furnished them and according to the plans and specifications, and that in violation of their contract they refused so to do, to appellant's damage in the sum of $750. He further set up that the indebtedness sued on was "primarily the indebtedness of the said John Patton, Jim Hanna and Jim Scanlan, and if same is due and payable they are primarily liable therefor and are necessary and proper parties to this suit." He further set up that if the indebtedness constituted a lien against his property, that he was entitled to be subrogated to the rights of Mitchell & Co., and to have judgment against Patton, Hanna and Scanlan for any amount that he might be required to pay to discharge any lien that might be declared against his property in favor of Mitchell & Co. He also embodied in his answer a motion to transfer to equity, and prayed that Patton, Hanna and Scanlan be made parties; that appellee should recover nothing, and that the appellant (defendant) should have his title to the land quieted and confirmed, or, in the alternative, that if he was adjudged to pay the debt and same was declared a lien of his property, that he be subrogated to the rights of Mitchell and have judgment against Patton, Hanna and Scanlan for any amount that he might be required to pay in order to discharge any lien that might be declared against his property.

The motion to make the original contractors parties and to transfer to equity was overruled. The appellee thereupon entered a general demurrer to appellant's

answer and cross-complaint, which the court sustained. And the appellant electing to stand upon the pleadings as drawn, and refusing to plead further, the court entered an order dismissing appellant's answer and cross-complaint, motion to make the original contractors parties defendant, and to transfer to equity. The case was then heard by the court upon the original complaint, oral testimony and certain documentary evidence, and the court found in favor of the appellee against appellant in the sum of $149.86 and entered a judgment against appellant for that sum and declared the same a lien on the property, with orders for its sale, etc., in case the judgment was not paid. The appellant filed a motion for a new trial, setting up, among other things, that "the court erred in refusing defendant's motion to make John Patton, Jim Hanna and Jim Scanlan parties defendant herein;" that the court erred in sustaining plaintiff's demurrer to the answer, cross-complaint and motion to transfer to equity; and, that the judgment was contrary to the evidence. The motion was overruled and appellant duly prosecutes this appeal.

W. P. Strait, for appellant.

1. Appellee could not maintain a suit, or state a cause of action, entitling him to recover against the owner Cruce, without making the original contractors parties to the suit. Kirby's Digest, § § 4978, 4988; 51 L. R. A. (N. S.) 76; 4 Col. App. 165; 34 Pac. 1115; Phillips Mechanics Liens, § 397; 114 Ark. 464. A demurrer relates back to the complaint. 97 Ark. 508. If the complaint fails to state a cause of action a demurrer to the answer will not only be sustained, but will reach back to the complaint itself. 107 Ark. 289; 1 *Id.* 320; 5 *Id.* 492; 7 *Id.* 12; 18 *Id.* 269; 24 *Id.* 554; 74 *Id.* 572; 97 *Id.* 508. When an answer tenders an issue on any material fact, it is error to sustain a general demurrer. 77 Ark. 29; 27 *Id.* 34; 96 *Id.* 163.

If the answer was vague, indefinite or uncertain, the remedy is by motion to make more definite and certain,

and not by demurrer. 91 Ark. 400; 90 *Id.* 158; 89 *Id.* 136; 87 *Id.* 136.

The demurrer may be set out in or filed with the answer and all rights reserved under it. 29 Ark. 637; 30 *Id.* 547; Kirby's Digest, § 6117. See also, 44 Ark. 202; 67 *Id.* 148; 70 *Id.* 74.

2. The cause should have been transferred to equity and subrogation granted. 37 A. & E. Enc. Law, 203 and notes; 32 L. R. A. 127; 99 Am. St. 476-511.

3. It was error to render a personal judgment against appellant. 114 Ark. 464. The court also erred in condemning the lot to be sold by a commissioner. Kirby's Digest, § 4990.

Edward Gordon, for appellee.

1. There was no defect of parties. This defense must be specifically made a ground of demurrer or it is waived. Kirby's Digest, § § 6093-4, 6096; 33 Ark. 497; 34 *Id.* 73; 75 *Id.* 288; 93 *Id.* 351; 95 *Id.* 38.

2. The complaint stated a cause of action and as appellee only filed a general demurrer to the answer and cross-bill and motion to transfer to equity, it would not affect the complaint as a defect of parties can only be reached by special demurrer, and this was waived. 27 Ark. 235; 89 *Id.* 127; 93 *Id.* 173; 95 *Id.* 408; 98 *Id.* 561.

3. Appellant was not prejudiced by the personal judgment, if it was error, as the contractors appeared and testified that appellant was indebted for material $149.86 and still owed them more than that amount on the building contract.

WOOD, J., (after stating the facts). (1). The question presented by this appeal is whether or not the original contractors are necessary parties in a suit by a material man against the owner to have a lien declared and enforced on a building for the erection of which material has been furnished. The question is settled by the recent case of *Simpson* v. *J. W. Black Lumber Co.,* 114 Ark. 464, 172 S. W. 883. In that case after setting

out the statute (Kirby's Digest, § 4978) making it the duty of the contractor to defend at his own expense any action brought by any person other than the contractor to enforce a lien under the law providing for such liens, we said: "The contractor was a necessary party and should have been made co-defendant with the owners, who knew nothing about what amount of materials had been furnished, nor how much of the materials furnished had gone into the construction of the improvement. He was a necessary party both for his own and the owner's protection. The owners had the right to look to him for the payment of any judgment that might be recovered against their property for materials furnished, having contracted with him to supply such materials and paid him the contract price for the improvement, and can not be compelled to resort to another action against the contractor for the recovery of such sum of money in which the contractor would be at liberty to claim that he did not owe the materialman the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor to defend all such actions and be bound by the judgment rendered." Citing authorities. See also, in addition to the authorities there cited, *Eberle* v. *Drennan,* 51 L. R. A. (N. S.) 76.

As shown above, § 4978 of the Digest requires that in suits of this kind the original contractors shall defend the case at their own expense. Section 4986 provides that in such suits, to enforce liens created by the statute, "the parties to the contract and all other persons interested in the controversy and in the property charged with the lien" may be made parties. And § 4988 provides that the court shall make such orders in the case as will protect and enforce the rights of all interested therein.

(2) It appears from all these provisions that the lawmakers contemplated not only that the contractors in such suits are proper parties, but that they are necessary and indispensible parties for the determination of the amount of the debt as the foundation for which a judgment or decree may be rendered and declaring and

foreclosing a lien on the property for its payment. Counsel for appellee does not controvert this proposition of law, but insists that appellant, by filing a general demurrer to the complaint, waived the defect or nonjoinder of parties. Appellee relies upon the provisions of sections 6093, 6094 and 6096 of Kirby's Digest, which, in effect, provide that when there is a defect of parties appearing upon the face of the complaint that objection shall be taken thereto by a specific demurrer, and that unless so taken, when the objection appears upon the face of the complaint, the defect is waived. Citing *Murphy* v. *Myar,* 95 Ark. 38, and other cases holding to that effect. Both these cases have no application here, for the reason that the trial court's attention was specifically directed in appellant's answer and cross-complaint, which also embodied a motion to have the contractors made parties and the cause transferred to equity, that the contractors were necessary parties to the maintenance of appellee's suit. The court should have treated the allegations of appellant's answer and cross-complaint, embodying the motion to make the contractors parties, as a specific demurrer, raising the objection that the plaintiff was not entitled to maintain his suit because of a defect or nonjoinder of parties appearing upon the face of the complaint. Such was the legal effect of the whole pleadings by the appellant, and to hold otherwise would be putting form before substance. The complaint of the plaintiff was therefore fatally defective because it failed to make the original contractors parties to the suit, and the court erred in not so holding. But, if it be conceded that the complaint was not fatally defective on this ground, and that it alleged a cause of action, then the answer traversed the allegations of the complaint and raised an issue for determination before a jury. The appellant, in his answer, alleged as follows: "That he does not know and has no sufficient information upon which to base a belief, and therefore cannot say whether or not said indebtedness is past due and unpaid or in any way owing to said E. E. Mitchell; but, for further answer, denies that this

defendant owes said debt or that the plaintiff is entitled to recover therefor from him," that "he had paid off and discharged to John Patton, Jim Hanna and Jim Scanlan all and fully the contract price," etc.

These allegations were sufficient to raise the issue as to whether the indebtedness was past due and unpaid and as to whether or not there was such an indebtedness as would constitute the foundation for the creation and enforcement of a lien on appellant's property.

In *Dickerson* v. *Hamby,* 96 Ark. 163, we said: "In determining whether a pleading, complaint or answer makes sufficient allegations to constitute a cause of action or to state a defense, every fair and reasonable intendment must be indulged in to support such pleading. If the averments are incomplete, ambiguous or defective, the proper mode to obtain correction is by motion to make the allegations more definite and certain."

(3) Appellee contends that the appellant is not prejudiced by the ruling of the court in dismissing the answer and cross-complaint of the appellant and in proceeding to hear the cause on the complaint of the appellee, because, he says, the contractors appeared in court and testified that they bought the material sued for by appellee and that same was used in the erection of appellant's building and was correct, and also testified that appellant was still indebted to them for the erection of the aforesaid building in the sum of $575.00; all of which was denied by appellant. But, as we have seen, the complaint which the court treated as the basis for hearing this evidence was fatally defective, and the court erred in allowing the appellee to ground any right of action upon it.

Appellant was entitled to have the cause heard upon issues presented by a sufficient complaint. The cause could not progress to judgment without necessary parties, and appellant was necessarily prejudiced by a judgment based upon a complaint that did not state a cause of action.

For the error in not sustaining the demurrer to appellee's complaint the judgment is reversed and the cause remanded with directions to sustain the same.

HARRY v. WILLIAMS.

Opinion delivered January 31, 1916.

1. SET-OFF—JUDGMENTS—SAME TRANSACTION—EXCEPTIONS—EXTINGUISHMENT PRO TANTO.—Where appellant and appellee obtained judgments against each other growing out of the same transaction, the appellant has no right to claim his right of action against appellee, as exempt from appellee's claim against him; the two causes of action having grown out of the same transaction, one extinguishes the other *pro tanto*.
2. APPEAL AND ERROR—REVIEW OF ISSUES OF FACT—BILL OF EXCEPTIONS.—Where there was no motion for a new trial, the trial court's decision on issues of fact, can not be enquired into on appeal.
3. APPEAL AND ERROR—MOTION FOR NEW TRIAL.—A motion for a new trial is necessary where a case has been disposed of on an issue of fact after a verdict by a jury or a decision by the court. This rule is applicable to all trials at law.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little,* Judge; affirmed.

J. B. Karnopp and *J. E. London,* for appellant.

1. One holding a judgment against a debtor cannot have it set off against a judgment in his favor where such debtor shows that all his personalty, including such judgment is less than the amount allowed him by law as exempt. 7 N. D. 455; 66 Am. St. 670; Kirby's Digest, § 6238; 68 Ark. 497; 47 *Id.* 464; 63 *Id.* 83. Exemption laws are liberally construed; they are made to benefit the poor, and the power of the courts to offset one judgment against another can not be used to abrogate this rule where an offset would deprive one of his legal rights. 22 Am. & Eng. Enc. Law, 448 Note 3; 86 Ind. 172; 44 Am. Rep. 280; 13 Am. Dec. 729 to 731.

2. If the Williams judgment was rendered on items growing out of the *same transaction* for which he received

no credit in a former arbitration, the matter is *res judicata* and void.

3. No motion for a new trial was necessary. 47 Ark. 230; 93 *Id.* 382; 95 *Id.* 565; 103 *Id.* 1.

4. The schedule was filed as per § 3906 Kirby's Digest, and the judgment is exempt and not subject to set off. 23 Cyc. 1478.

A. A. McDonald, for appellee, filed no printed brief.

McCULLOCH, C. J. This controversy arose in the circuit court of Sebastian County, Fort Smith District, by motion of appellee filed in that court to set off, *pro tanto,* a judgment in his favor, for the recovery of money, against a judgment for a larger amount in favor of appellant. Both judgments were rendered in that court, and on hearing the motion the court allowed the set-off as prayed for in appellee's motion. When the motion came on to be heard, appellant filed a schedule of his exemptions, claiming as exempt from seizure under process the judgment against appellee. In the judgment entry, the court recited its reasons for the decision to be "that the said Cicero Harry is not entitled to claim as exempt against the judgment that said W. T. Williams holds against him, but that the said judgment be set off, they having each grown out of the same transaction and in the nature of a counter-claim, being debts and credits and the balance due being in favor of the said Cicero Harry, he is entitled only to the amount owing by W. T. Williams to him in excess of what he owes the said W. T. Williams."

It is contended on behalf of the appellant that the decision of the court was erroneous under the doctrine of this court in *Atkinson* v. *Pittman,* 47 Ark. 464, where it was held that a set-off could not be allowed where it prevented one of the judgment debtors from claiming his constitutional exemptions. The statute provides that judgments for the recovery of money "may be set-off against each other, having due regard to the legal and equitable rights of all persons interested in

both judgments." Kirby's Digest, § 6238. In the case cited above, Pittman recoverd a judgment against Atkinson & Co. and the latter subsequently purchased a judgment rendered against Pittman in favor of one Tomlinson and sought to set-off the judgment thus purchased against the judgment in Pittman's favor. This court decided that Pittman was entitled to claim as exempt his judgment against Atkinson & Co., and that the latter could not deprive him of his constitutional exemptions by the purchase of another judgment.

(1) The facts in the present case, as recited by the trial court in its judgment entry, are different from those in the case just cited, and do not call for the application of the rule there announced. Here the court found that appellee's judgment against appellant was based upon a liability which grew out of the same transaction which formed the basis of appellant's cause of action against appellee. That being true, appellant never had the right to claim his right of action against appellee as exempt from appellee's claim against him, for the simple reason that the two causes of action having grown out of the same transaction, one extinguished the other *pro tanto.* In other words, it reduced appellant's right to recover the amount of his debt due from appellee, and never formed a part of his constitutional exemptions.

(2-3) There was no motion for new trial filed in the case, and therefore we are not permitted to inquire into the correctness of the court's decision on the issues of fact. That is a necessary step before a case can be brought here for review. In *Douglass* v. *Flynn,* 43 Ark. 398, this court said: "Error of law in giving or refusing instructions to a jury is good ground for a motion for a new trial. So, also, any error of law announced by a judge in trying law and fact, which *bears upon the finding of the facts,* would be. But error of law announced as the basis of a judgment, or decree, upon given facts, found or admitted, would not be remedied by a new trial. Parties are not required in such cases to importune judges for a re-consideration. If the error appears in the record it is

sufficiently questioned by appeal." A motion for a new trial is necessary where a case has been disposed of on "an issue of fact after a verdict by a jury or a decision by the court." Kirby's Digest, § 6215. This applies to all trials at law. *School District* v. *School District,* 64 Ark. 483; *Hare* v. *Shaw,* 84 Ark. 32.

Judgment affirmed.

STATE *v.* GREENVILLE STONE & GRAVEL CO.

Opinion delivered January 31, 1916.

1. APPEALS—FINAL ORDER OF LOWER COURT.—An appeal to the Supreme Court may be taken only from a final judgment or order of the lower court.
2. APPEALS—FINAL ORDER—CONSTITUTIONAL QUESTION.—No appeal will lie, under Kirby's Digest, § 1188, sub-division 4, from a decision of the lower court on any motion, even though it involves the constitutionality of any law of this State, unless the decision is a final order or judgment of the court. The mere fact that the constitutionality of a law may be involved in the decision on a motion, would not of itself, render the decision on such motion a final order or judgment.
3. JUDGMENTS—FINALITY—CONSTITUTIONAL QUESTION.—The decision of a trial court, involving the question of the constitutionality of a law, where the court holds that the law is constitutional, will not determine the final merits of the law suit.
4. APPEALS—SUSTAINING DEMURRER—FINAL ORDER.—Where the trial court sustained a demurrer to the complaint, but did not enter any further order or judgment, the action of the court is not final, and no appeal will lie therefrom.

Appeal from Chicot Chancery Court; *Z. T. Wood,* Chancellor; appeal dismissed.

STATEMENT BY THE COURT.

This suit was instituted by the State, through the Attorney General and specially employed counsel, against the Greenville Stone & Gravel Company and the Greenville Sand & Gravel Company, hereinafter designated as the companies, to recover for sand and gravel alleged to have been taken by the companies from the bars and beds of the Mississippi River.

The complaint set up that the companies were foreign corporations, and were in fact but one corporation, being owned and controlled by the same persons under different names; that the State owned and was in possession of the lands, including sandbars and gravel beds along the west bank of the Mississippi River from which the companies had removed the sand and gravel; that since 1909 the companies had been dredging, taking and removing sand and gravel from beds and bars belonging to the State and had sold the same to their commercial customers, and had entered into another contract for the future sale and delivery of sand and gravel; that one million yards of sand and gravel had been sold to certain railroad companies, and that it was unknown how much sand and gravel was to be delivered under the new contract in the future. The State asked for a discovery from the books of the companies as to the amount of sand and gravel that had been taken between the years 1909 and 1915, inclusive.

The complaint covers a period for sand and gravel between the year 1909 to the 29th day of March, 1913, before the law was passed making it unlawful to take sand and gravel from the navigable streams in the State, and also a period from the latter date, when such law was passed, to the 11th day of March, 1915, during which time the act of March 29th, 1913, was in effect; and also covering a period from the 11th day of March, 1915, to the date of the institution of this suit, during which time Act 138, approved March 11th, 1915, relating to the taking of sand or gravel, etc., from the beds and bars of navigable streams in this State was in full force and effect. The complaint asked for an injunction, a discovery, and all proper relief.

The companies interposed demurrer No. 1, which was a general demurrer to the complaint as a whole; special demurrer No. 2 to that portion of the complaint which seeks to recover for sand and gravel taken prior to the act of March 29, 1913;* special demurrer No. 3 to that

*Act 265, p. 1088, Acts 1913. (Rep.)

portion of the complaint which seeks to recover for sand and gravel between March 29th, 1913, and March 11th, 1915; and demurrer No. 4 to that part of the complaint which seeks a discovery.

The court overruled the general demurrer, and also all of the special demurrers except No. 2. The court sustained demurrer No. 2. Each of the orders of court overruling the companies' several demurrers, except No. 2, recites as follows: "The court having heard the argument of counsel, and being advised in the premises, doth order and adjudge that said demurrer be and the same is hereby overruled, and defendants praying an appeal in open court and it appearing to the court that a constitutional question is involved in said demurrer, it is ordered that an appeal be and the same is hereby granted upon defendants entering into bond as required by law to be approved by this court."

The order of the court sustaining demurrer No. 2 recites as follows: "The court having heard the argument of counsel and being advised in the premises orders and adjudges that said demurrer be and the same is hereby sustained, and complainant praying an appeal from this order of the court, it is ordered and adjudged that said appeal be and the same is hereby granted."

Wallace Davis, Attorney General, *John P. Streepey,* Assistant Attorney General, and *R. W. Wilson,* Special counsel, for the State.

1. The orders overruling the demurrers of the Gravel Company to the complaint are not *final* orders from which an appeal will lie. Kirby's Digest, § 1188. 1 Crawford Dig. "Appeal & Error." 1 d. p 54; 52 Ark. 224. The appeals are premature.

2. Argue the cause on the merits citing 227 U. S. 229; 206 *Id.* 46; 220 *Id.* 53; 53 Ark. 320; 119 Ark. 377; 87 Ark. 531; 152 U. S. 1; 49 Ark. 172; 63 *Id.* 56, and many others.

Percy & Percy, of Tennessee, for the Stone & Gravel Co.

Argue the merits and contend that where the title to the soil is in the State, or public, every one has an equal right to take sand and gravel from the bed of a navigable river so far as it may be done without injury to the public interest. 43 L. R. A. 615; 67 *Id.* 773; 58 L. R. A. 93; *State* v. *So. Sand & Material Co.,* 122 Ark. 1; 38 U. S. (Law Ed.) 331; 81 Miss. 507; 62 L. R. A. 397; 113 U. S. 708, and many others.

WOOD, J. (after stating the facts.) The orders overruling the demurrers of the companies to the complaint of the State are not final orders from which an appeal will lie.

Section 1188 of Kirby's Digest provides: "The Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of all inferior courts of the State, in the following cases and no others:

"*First.* In a judgment in an action commenced in the inferior courts, and, upon the appeal from such judgment, to review any intermediate order involving the merits and necessarily affecting the judgment.

"*Second.* In an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action; and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part of an answer, or any pleading in an action; * * *

"*Third.* In a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from.

"*Fourth.* Whenever the decision of any motion involves the constitutionality of any law of this State, or where the decision of any such motion has been or shall be placed, in the opinion of the judge making such decis-

ion, upon the unconstitutionality of such law, then an appeal shall lie, and may be made from such decision or from the order entered upon such decision."

(1) This court, in numerous cases, has held that it is only from a final order or judgment of the lower court that an appeal can be taken to this court. See cases collated in 1 Crawford's Digest, "Appeal and Error," 1 d. p. 54. See also cases cited under section supra Kirby's Digest.

In *Davie* v. *Davie,* 52 Ark. 224, Chief Justice Cockrill, speaking for the court, said: "The right of appeal is limited in general to final judgments, and does not extend to interlocutory orders. The object of the limitation is to present the whole cause here for determination in a single appeal and thus prevent the unnecessary expense and delay of repeated appeals." And the court held in that case, concerning the first sub-division of the above section, that it "does not undertake to grant the right of appeal from an interlocutory order, but provides only what the law was without it, that such an order can be reviewed on appeal from the final judgment."

What was said by Judge Cockrill for the court in that case concerning the *first* sub-division is equally true also of the *fourth* sub-division, which the trial court, in the instant case, invoked and embodied in its orders overruling the companies' demurrers and granting an appeal.

(2-3) We have reached the conclusion that, under the fourth sub-division, no appeal will lie from a decision of the lower court on any motion, even though it involves the constitutionality of any law of this State, unless the decision is a final order or judgment of the court. The mere fact that the constitutionality of a law may be involved in the decision on a motion would not of itself render the decision on such motion a final order or judgment. Under the statute giving it appellate jurisdiction over final orders and judgments, and no others, this court would not acquire jurisdiction on the decision of a motion involving the constitutionality of a law unless such decision constituted a final order or judgment in the case.

To hold otherwise would lead to interminable confusion in our decisions and to innumerable appeals from interlocutory orders not decisive of the final rights of the parties, and would thus thwart the very purpose of the law, which, as stated in *Davie* v. *Davie, supra,* was "to prevent unnecessary expense and delay of repeated appeals." It can readily be seen that a decision involving the constitutionality of a law, especially where the court holds that the law is constitutional, would not determine the final merits of the lawsuit at all. On the contrary, the decision on such a motion upon a cause of action, grounded upon the statute, holding that the statute was valid, would, in fact, be but the beginning of the lawsuit.

II. While the court entered an order sustaining appellant's demurrer No. 2, to that portion of the complaint which seeks to recover for sand and gravel taken before the passage of the act of March 29th, 1913, there is no final order or judgment of the court dismissing this portion of the complaint. We therefore, on appeal from this, have no jurisdiction to pass upon the issue as to whether or not the State is entitled to recover on the allegations of this portion of the complaint, the appeal being premature.

(4) An order sustaining a demurrer to a complaint is in effect a holding that the complaint is of no avail and, it seems, is as near a final order as could be conceived, that is not so in fact; yet we have often, and in some very recent cases held that, "where the trial court sustained a demurrer to a complaint without entering any further order or judgment its action was not final and the order can not be appealed from." *Adams* v. *Primmer,* 102 Ark. 380; *Atkins* v. *Graham,* 99 Ark. 496; *Moody* v. *Jonesboro, L. C. & E. Ry. Co.,* 83 Ark. 371.

The appeals are premature, and are therefore dismissed.

Justices Hart and Kirby concur in the judgment only, and think the statute—4th div. of section—makes a judgment declaring a statute unconstitutional a final and appealable order.

SPENCE & DUDLEY *v.* CLAY COUNTY.

Opinion delivered January 31, 1916.

1. REVENUE—ATTORNEY'S FEES—ACTION BY COUNTY TO TEST VALIDITY OF AN ACT.—Kirby's Digest, § 7182, has no application to the right of an attorney employed by a county to represent the county in a suit to test the validity of an act of the Legislature detaching certain land from one county and attaching it to another.
2. COUNTIES—ACTION COVERING LAND IN SAME JUDICIAL DISTRICT—AUTHORITY TO EMPLOY COUNSEL.—By legislative enactment certain land was detached from Greene County and added to Clay County. *Held*, since both counties were in the same judicial district, that the prosecuting attorney could not represent one of them in *quo warranto* proceedings, brought by the Attorney General, to test the right of Clay County to collect taxes on the land in question, and that, therefore, the county court of Clay County was authorized to employ other counsel to represent the county.
3. COUNTY COURTS—EMPLOYMENT OF COUNSEL—FEES.—The county court may employ counsel to represent it in matters affecting land added to the county by legislative enactment, and may pay a reasonable fee for the service; what is a reasonable fee must be determined from all the facts surrounding the case.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney,* Judge; reversed.

Spence & Dudley and *G. B. Oliver,* the appellants, *pro sese.*

1. The findings of the court are not supported by the evidence.

2. It was error to hold that any additional claim for services in the *quo warranto* proceeding was barred by the allowance of $600 at the April term, 1911. The clerk simply made a misprision in writing the judgment.

3. The court erred in holding that the county court had no authority to employ counsel to defend the suit. Kirby's Digest, § 6393; 50 Ark. 566. The suit was not against the *county,* but against all the officers of the county and does not come within letter or spirit of the above section or decision.

The county has power to employ counsel to defend suits in which the county is interested, in the absence of a statute requiring some official to represent it. 11 Cyc.

471 (c); 7 Am. & Eng. Enc. Law 929 (3). 50 Ark. 566 rather favors appellants than appellee. The prosecuting attorney is not required to defend civil suits for the county. Kirby's Digest, § § 6393, 7182. $2,000 was a reasonable fee. See also 119 Ark. 567.

W. O. Irby, County Judge and *L. Hunter,* for appellee.

1. Appellants are barred by the former allowance.

2. There was no misprision of the clerk as shown by the record. The finding of facts is fully sustained by the evidence. 119 Ark. 567.

3. The law was properly declared by the court. Kirby's Digest, § 6393; 32 Ark. 676; 50 *Id.* 566; 119 Ark. 567; 11 Cyc. 471 (c). The statutes requires the prosecuting attorney to represent the county in such cases. Kirby's Digest, § § 6392-3. Appellants knew the limitations upon the county judge to bind the county. 44 Ark. 437; 61 *Id.* 74. The case of 119 Ark. 567 does not apply as the facts are entirely different.

HART, J. At the October, 1914, term of the county court of Clay County, Arkansas, appellants presented for allowance a claim for legal services performed for the county. The claim was duly authenticated and the amount claimed to be due was $1400. The county court refused to allow the claim and an appeal was taken to the circuit court. The material facts adduced in evidence in the record are as follows:

The Legislature of 1895 passed an act* detaching Blue Cane township from Greene County and attaching the same to Clay County. In June, 1909, the Attorney General filed in the Supreme Court *quo warranto* proceedings to test the right of the officers of Clay County to exercise jurisdiction over the territory which had been added to that county by act of the Legislature of 1895. All of the county officers were made parties defendant to the action. The county judge of Clay County employed G. B. Oliver and Spence & Dudley to represent the county

*Act 157, p. 244, Acts of 1895. Rep.

in the action. The attorneys accepted the employment and filed briefs and made an oral argument in the case. The court held that it had no jurisdiction and the application for the writ was denied. See *State of Arkansas* v. *Clay County,* 93 Ark. 228.

The opinion was delivered January 17, 1910. Immediately after that case was dismissed Huddleston & Taylor filed actions in the chancery courts of Greene and Clay counties to enjoin the officers of Clay County from levying and collecting taxes in the disputed territory. The case was finally disposed of in favor of Clay County in November, 1914.

At the April, 1911, term of the county court of Clay County appellants presented their claim against Clay County in the sum of $1000 for attorneys fees in the *quo warranto* case. The record shows that the court examined and allowed the claim in the sum of $600. This allowance was made after the suits in the chancery courts of Clay and Greene counties had been commenced. Appellants and the county judge who employed them testified that there was but one employment and that this was made by the county judge and that the same county judge was in office when the county court made the allowance of $600 at the April term in 1911. Appellants testified that the county judge employed them to represent Clay County in any litigation that might arise in regard to the jurisdiction of the county over Blue Cane township. One of them testified that when they presented their claim in 1911 the county judge asked them how it would suit them for the allowance of only $600 to be made then, as the litigation had not ended, and that they agreed to accept that amount in part payment of their fee.

They also testified that the county judge told them to go ahead and represent the county in the litigation in the chancery courts.

Appellants also introduced evidence tending to show that $2000 was a reasonable fee for the legal services performed by them in the whole matter.

The county judge testified that he told Oliver in the beginning that he thought $1000 would be a reasonable fee in the whole matter, that the county was not able to pay fees like an individual, and stated that Oliver said he could not tell at that time how much the services would be worth and that that matter could be settled after the litigation was ended.

The circuit court found that the present claim of appellants is founded upon the services rendered by them in the injunction proceeding against the collector and assessor of Clay County and the claim of appellants having been presented against the county and not against the collector and assessor of the county, the county judge had no authority as such to employ appellants to represent the collector and assessor, and that appellants had no valid claim against the county for the services performed by them in the injunction suit. The circuit court, therefore, adjudged that appellants take nothing by reason of their suit and that Clay County recover from them all its costs.

The case is here on appeal.

Section 7182 of Kirby's Digest provides in effect that whenever an action may be brought against the county assessor, collector of taxes or clerk of the county court for performing any duty authorized by any of the provisions of the revenue act or the laws of the State for the collection of public revenues, such officer shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending such action.

(1) We do not think this section of the statute has any application or bearing upon the present suit. This section is directed specifically to suits affecting the collection of the public revenue. It is true the public revenue was indirectly affected in the present action but this was merely an incident to the suit. The object and purpose of the suit was to test the validity of the act of the Legislature which detached Blue Cane township from Greene County and attached the same to Clay County.

In the recent case of *Leathem* v. *Jackson County,* 122 Ark. 114, we held that under the general powers granted to the county court under our Constitution and laws, such court became the representative of the county and was empowered to make contracts in behalf of the county in all cases where the local concerns of the county are involved. In that case we also held that where the county court is empowered to do an act purely administrative in its character, such as to make a contract, it may also ratify such act when done by the county judge in vacation and thereby bind the county as effectually as if the contract was made by the county court in the first instance.

(2) Section 6393 of Kirby's Digest provides that the prosecuting attorney shall defend all suits brought against the State or any county in his circuit. Notwithstanding this section of the statute, we held in the case of *Oglesby* v. *Fort Smith District of Sebastian County,* 119 Ark. 567, 179 S. W. 178, that the county court, under our Constitution and laws, was empowered to employ other counsel when in its judgment the interests of the county were of sufficient importance to demand it, or in cases where the prosecuting attorney neglects or refuses to perform the duties imposed upon him by the statute or where his other duties are of such a character that he does not have time to properly represent the county.

The present case is manifestly one where the prosecuting attorney could not represent the county and where the county court would be empowered to employ other counsel to represent the county and protect its interests. Greene and Clay counties are in the same judicial district and have the same prosecuting attorney; obviously the prosecuting attorney could not represent both counties and would not be required to make a choice of which county he would represent. Therefore the county court was authorized to employ other counsel to represent the county.

Many decisions from other States to the same effect are cited in 11 Cyc. 471.

In the case before us the undisputed evidence shows that the county judge employed appellants to represent Clay County in the litigation relating to the jurisdiction over Blue Cane township and appellants testify that the county judge employed them to represent the county in all the litigation which might arise, and agreed to pay them a reasonable fee therefor.

The evidence also shows that after the *quo warranto* proceeding had been decided, other suits were filed which had for their purpose to test the validity of the act of the Legislature detaching Blue Cane township from Greene County and attaching it to Clay County; that the county judge told appellants to represent the county in these suits; that while these suits were pending they presented their claim to the county court in the sum of $1000 for services which they had already performed in the *quo warranto* suit; that the county judge asked them if they would be satisfied with an allowance of $600 as a part payment of their services with the understanding that the balance should be allowed when the whole litigation should be ended and that they agreed to this and the county court granted them an allowance of $600 stating specifically in the order that it was for legal services in the *quo warranto* case styled *State of Arkansas* v. *Clay County.*

No appeal was taken from this order of allowance and appellants are concluded by it so far as their fees in the *quo warranto* case is concerned. The action of the county court in making this allowance was a ratification of the contract made by the county judge in the beginning. The same person was county judge at the time the original contract was made and at the time the order of allowance was made at the April term, 1911, of the county court. We think the order of allowance had the effect to ratify the contract made by the county judge as an entirety. The contract made by the county judge with appellants was to represent the county in all the litigation looking to testing the validity of the act of the Legislature detaching Blue Cane township from Greene

County and attaching it to Clay County. Appellants, after the *quo warranto* case had been decided and other suits brought in the chancery courts, continued to represent Clay County until these cases terminated favorably to the county in 1914. They are entitled to a reasonable compensation for their services.

(3) As we have already seen, the county court was the representative of the county and was acting in a fiduciary capacity. It was the duty of the court to employ counsel to represent the interests of the county and to pay them a reasonable compensation for their services. He could not, like a private litigant, agree to pay them any amount he might see fit; and in determining what is a reasonable compensation all facts and surrounding circumstances should be considered

From the views we have expressed it follows that the judgment must be reversed, and the cause will be remanded with directions to enter judgment in accordance with this opinion.

Kirby, J. dissents.

MONTAGUE v. ROBINSON.

Opinion delivered January 31, 1916.

1. CONTRACTS—REMOVAL OF STANDING TIMBER—MISTAKE—RESCISSION.—Appellant agreed to remove the timber from certain land within one year, or pay to appellee, the owner of the land, a certain sum, and executed a bond with a surety, conditioned upon his performance of the contract. In showing appellant the land, appellee made a mistake in a certain line. The appellant, with knowledge of the mistake, entered upon the work of clearing the land. *Held*, he could not thereafter complain of the mistake, nor was the surety on the bond relieved from his liability thereby.

2. CONTRACTS—STIPULATION FOR LIQUIDATED DAMAGES—PENALTY—CONSTRUCTION.—A contract will be construed as stipulating for liquidated damages, where, from a prospective view of the contract, it appears that the parties contemplated that damages would flow from a failure to perform the contract, and that such damages would be indeterminate or difficult of ascertainment, and the sum named bears some reasonable proportion to the damages which

the parties contemplated might flow from a failure to perform the contract.

3. CONTRACTS—STIPULATION FOR PENALTY—RULE.—A contract will be construed as stipulating for a penalty, when it is agreed that the same damages would be recoverable were the contract to be only substantially performed, or were there to be a total failure of consideration.

4. CONTRACTS—BREACH—STIPULATION FOR PENALTY.—A contract stipulated for the payment of a certain sum in the event of a breach of its terms, *held*, an instruction that if there was any breach of the contract, that the jury might find for the plaintiff in the full amount stipulated, was erronious.

Appeal from Mississippi Circuit Court, Chickasawba District; *J. F. Gautney*, Judge; reversed.

The appellants *pro sese*.

1. The court erred in refusing to require the plaintiff to elect upon which count of his complaint he would stand. Liquidated damages, in the proper sense, are a positive debt, excluding evidence of actual damages wherever a breach is proved to which they apply. 5 Sand. (N. Y.) 640; 22 Ark. 475; 31 Cyc. 652; 26 N. E. 348; 86 Pac. 624.

2. Plaintiff sued upon one contract and relied for a recovery upon another. Any material change in a contract made without the consent of the surety releases him. 65 Ark. 550; 74 *Id.* 601; 93 *Id.* 479; 113 *Id.* 429; 65 *Id.* 472.

3. The bond itself is clearly a penalty contract. Both provisions clearly contemplate the payment of compensatory damages in case of breach. The wording shows the parties intended a penalty and not liquidated damages. 52 N. H. 126; 2 Southerland on Damages, § 470 and 1 *Id.* § 284; 73 Ark. 437; 13 Cyc. 101; 55 Ark. 376; Southerland Dam. (3 ed.), vol. 1, p. 777. Instruction 3 was error.

A. G. Little, for appellee.

1. The counts of the complaint are not antagonistic nor inconsistent, but if so, the case was tried upon the first count. The instructions were only pertinent to the

first count. This was an election. 31 Cyc. 656; 88 Pac. 1064.

2. A contract induced by fraud or deceit is voidable only and may be affirmed. 6 Rul. Cas. Law. 933, 633, § 52; 67 L. R. A. 705.

3. The contract and bond must be construed together. It makes no difference whether the contract was for a penalty or liquidated damages. The judgment is right and there was no error.

KIRBY, J. Appellee was the plaintiff in the suit below, and alleged in his complaint that he made a contract with appellant Montague whereby, for the consideration of the merchantable timber down and standing upon a tract of land described as the north half of section 4, township 14, north, range 12 east, the said Montague agreed to cut all the timber upon said tract of land three inches in diameter and over, and to complete said contract within one year. Said contract further provided that in the event the said Montague failed to cut all of said timber within the time mentioned that he should pay appellee the sum of $600.00, and it was further provided that Montague should execute to Robinson a bond conditioned to indemnify Robinson against any loss by reason of Montague's failure to comply with said contract. The United States Fidelity & Guaranty Company became surety on this bond, which was conditioned that if the said Montague should hold the said Robinson harmless against all loss by reason of any failure on the part of Montague to comply with said contract, the bond should be void.

The complaint contained two counts, the first of which alleged that the contract and bond sued on provide for the payment to Robinson of the sum of $600.00 as liquidated damages in the event Montague failed to comply with the terms of his contract, while the second count alleged that the contract and bond sued on provide for the payment of such damages as Robinson might sustain by reason of Montague's failure to perform the contract.

There was a motion to require appellee to elect between the counts of his complaint, which appears never to have been passed upon.

The answer denied any liability for liquidated damages, but admitted liability for such damages as Robinson sustained by reason of Montague's failure to comply with his contract, but denied there was any such failure.

(1) Montague filed a cross-complaint in which he alleged that prior to the execution of said contract Robinson took him over the land and showed him the timber which he was to have in consideration of cutting down the timber on the lands and that some of the timber so shown him was not on the north half of section 4, but was on the south half of section 33, which lies immediately north of section 4. It is insisted that this error invalidated the contract and absolved the surety company. But it appears that before Montague entered upon the performance of his contract, Robinson told him that he had made a mistake in showing him the line between sections 4 and 33, and offered to release him from his contract, but Montague declined to be released. In going over the land Robinson showed Montague the four corners of the north half of section 4, but there was an error in the location of the line connecting the two north corners. Such being the case, and having entered upon the performance of his contract with knowledge of the mistake about the line, Montague is in no position to complain of the mistake Especially so, when the proof is that he did not regard the mistake made as of sufficient importance to ask a rescission of the contract or any change in the consideration therefor. Nor is there any change in the contract which the Surety Company undertook should be performed. The written contract called for the removal of the timber from the north half of section four and all parties agree that this is the land owned by Robinson and from which he wished the timber removed.

At the request of appellee, the court gave an instruction, numbered 3, which reads as follows: "If you find for the plaintiff you will find for him in the sum of $600.00, with interest thereon at the rate of six per cent. per annum from June 5, 1912, to the present time."

It is earnestly insisted that this was an erroneous instruction, and we agree with appellants in this contention. It is insisted that it appears from the language of the bond itself that it is a penalty contract. It is recited in the bond that the principal and surety are "held and firmly bound in the penal sum of $600.00." The use of this word "penal" is not controlling, yet it must be considered in determining the intention of the parties to that contract. *Tayloe* v. *Sandiford,* 7 Wheat. 13.

There are a great many cases which distinguish between penalties and provisions for liquidated damages, and several of these cases are found in our own reports. The rule is settled that in the interpretation of such contracts we must place ourselves in the position of the contracting parties and view the subject-matter of their contract prospectively and not retrospectively.

(2-3) There is an increasing tendency on the part of the courts to construe such contracts as stipulations for liquidated damages rather than as agreements for penalties. *Sun Printing & Pub. Association* v. *Moore,* 183 U. S. 642. And such contract should be so construed where, from a prospective view of the contract, it appears that it was contemplated that damages would flow from a failure to perform the contract, that such damages would be indeterminate or difficult of ascertainment, and that the sum named bears some reasonable proportion to the damages which the parties contemplated might flow from a failure to perform. Another test frequently applied in determining whether a contract should be construed as containing a penalty, or as providing for liquidated damages is this: Was it contemplated that the contract might be substantially performed, or that there might be a total failure to perform, and would the same sum be recoverable in either case? Where the contract's

provisions answer this question affirmatively, it is construed to be a penalty.

A case very similar on the facts, and one which announces the principle which controls here, is that of *Stillwell* v. *Paepcke-Leicht Lumber Co.*, 73 Ark. 432.

(4) Another instruction given by the court reads as follows: "Plaintiff sues to recover damages for an alleged breach of the written contract offered in evidence. The execution of the contract is admitted. That being true, the burden is on the plaintiff to show that there was a breach of the contract, and that he was damaged as a result thereof, before he can recover." The effect of the two instructions when read togther is to tell the jury that they need only find that there was some breach of the contract and some damage as a result thereof, in which event they should find for the plaintiff in the full amount of the bond. The bond so construed would permit a full recovery of the sum named for any failure to perform, however slight, within the time limited, and when so construed it becomes a penalty, for here the damages are not difficult of ascertainment, indeed appellee insists that the judgment should not be reversed, because they are proved, and are shown to exceed the judgment recovered.

The judgment will be reversed and remanded, and the instruction on the question of damages so modified, as to permit the recovery, only, of such damages as the proof shows appellee sustained by any failure to perform the contract.

PRESCOTT & NORTHWESTERN RAILWAY CO. *v.* HOPKINS, ADMINISTRATOR.

Opinion delivered January 31, 1916.

1. EVIDENCE—WRONGFUL DEATH—STATEMENTS OF DECEASED—ACTS AS TRESPASSER.—Deceased was killed in a railway accident. In an action for damages growing out of the same, the defense was set up that deceased, although an employee of defendant, was a trespasser on the train on which he was riding when the accident oc-

curred. *Held*, evidence of statements of deceased, showing his knowledge of the rules that he could not ride on the train, and that he said he intended to ride anyway, was admissible, as showing that he was a trespasser in riding on the same.

2. NEGLIGENCE—WRONGFUL DEATH—KNOWLEDGE OF RULE.—Deceased, while riding on defendant's train, in violation of the rules of the railway company, sustained injuries resulting in his death, *held*, under the evidence the deceased knew of the rule on the day in question, and of the effort of defendant, through its foreman, to enforce the rule.

3. NEGLIGENCE—RULES OF CORPORATION—REINSTATEMENT OF ABROGATED RULE—INJURY TO SERVANT.—Although a corporation may have acquiesced in the violation of its rules by certain persons, down to the day of deceased's injury, constituting an abrogation of the rules, the corporation has the right to reinstate the rules, and to insist on their enforcement whenever it sees fit.

4. NEGLIGENCE—VIOLATION OF RULES—TRESPASS.—One who takes passage on a work or logging train not purporting to carry passengers, in conscious violation of the rules of the company, and with the express purpose of riding, notwithstanding any efforts that might be put forth for the enforcement of the rules, is a trespasser.

5. NEGLIGENCE—WRONGFUL DEATH—BURDEN OF PROOF.—In an action by appellee to recover damages for the wrongful death of deceased, *held*, where the train upon which deceased was riding was a logging or work train, and deceased, not being a member of the crew operating the train, the burden was on appellee to show that deceased had a right to take passage upon the train. It is the duty of one who desires to take passage upon such train to inquire whether he may do so.

Appeal from Pike Circuit Court; *Jefferson T. Cowling,* Judge; reversed and dismissed.

STATEMENT BY THE COURT.

This suit was instituted by the appellee as the administrator of the estate of W. E. Sanders, deceased, against the appellants, Prescott & Northwestern Ry. Co., hereinafter called the Railway Company, and the Ozan Lumber Company, hereinafter called the Lumber Company, in which appellee sought to recover for the benefit of the widow and children of Sanders, damages which he alleged accrued by reason of the joint negligence of the appellants resulting in the death of Sanders.

Appellee alleged that the Lumber Company owned and operated a large saw mill at Prescott, in Nevada County, Arkansas, and had its principal place of business there, and that it maintained a branch office in Pike County, Arkansas; that the Railway Company was a subsidiary corporation to the Lumber Company and operated a line of railroad from Prescott into Pike County; that the principal business of the railway company was to transport logs for the lumber company; that the line of railroad ran into the interior of Pike County on the west side of the Little Missouri River, where it hauled off logs on a large tract of land belonging to the lumber company; that the lumber company, having cut out the timber there and wanting to move so as to log a tract of timber on the east side of the river, made a contract with the Memphis, Dallas & Gulf Railway Co., and the Dodson Construction Company whereby they were authorized to use the line of the Memphis, Dallas & Gulf Railway Co. to haul the logs from the east side of the river; that the trains in hauling these logs were jointly operated by the lumber company and the railway company; that on the 9th of February, 1914, it was the custom of the employees of the lumber company to ride on the log trains, which custom was known to and acquiesced in by the officers and managers of both appellants; that on that day Sanders was in the employ of the lumber company, cutting and hauling logs, and that it became necessary for him to go from the lumber company's camps to Murfreesboro and he took passage on appellant's log train with the assent of the crew in charge thereof; that the train consisted of a locomotive and a number of flat cars; that the engine was run with the tender in front; that the engineer in charge of the train was inexperienced and incompetent; that the track was in bad condition; that by reason of the negligence of the railway company in running the train, with the tender in front and at an excessive rate of speed, under the above conditions, the track slid off the dump and the engine turned over, catching Sanders and so injuring him that he died five days later. Ap-

pellee asked judgment on account of damages for pain and suffering endured by Sanders before his death in the sum of $10,000, and for pecuniary injuries on account of loss of contributions to his wife and children in the sum of $15,000.

The appellants answered jointly, in which they denied the material allegations of the complaint, and, among other things, set up the defenses that Sanders went upon the locomotive without right and in violation of the rules and regulations of the appellants, and that he knew he was violating the same when he got upon the locomotive; that he was on the locomotive at his own convenience and pleasure and not in the performance of any duty to the appellants; that he was a trespasser in thus going upon the train, and that he assumed the risk of doing so.

At the conclusion of the testimony the appellants prayed for instructions directing the jury to return a verdict in their favor, which the court refused. The jury returned a verdict in favor of the appellee in the sum of $8,000.

One of the grounds of the motion for a new trial was that the verdict was contrary to the evidence. Another ground was that the court erred in refusing appellant's prayer for a directed verdict. The motion for a new trial was overruled; judgment was rendered against appellants, and they have duly prosecuted this appeal.

J. C. Pinnix and *McRae & Tompkins,* for appellants.

Sanders was a trespasser upon the train and appellant owed him no duty and were not liable in damages for his injury. He violated the rules of the company knowingly and whatever the custom of the company had been in allowing employees to ride upon its trains, it had the right to reinstate the rule and insist on its enforcement whenever they saw fit. One who takes passage on a train not purporting to carry passengers, in conscious violation of the rules and with the express purpose of riding against any effort to enforce the rule, is a trespasser and can not recover. A verdict should

have been directed for defendant railway company. 114 Fed. 123-132; 76 Ark. 106; 3 Labatt Mast. & Serv. 3010; 48 Ark. 333, 348; 110 Mo. 387; 58 Ark. 206, etc.

Langley & Steel and *W. P. Feazel,* for appellee.

Liability in this case is predicated upon the theory that it had long been the custom of the company to permit employees to ride on their work trains; that this custom was acquiesced in by the roadmaster and general foreman and that deceased was not therefore a tresspasser. 96 Ark. 464; 112 *Id.* 446; 115 Ark. 473; 99 Ark. 490. A custom among employees to violate a rule of a railroad company known to and acquiesced in by said company, will be held to abrogate the rule. 172 S. W. 829. The custom was never abrogated by the company.

The statement of deceased were not competent testimony. Kirby's Digest, § 3094; 16 Cyc. 1028 B; 21 Ark. 79; 13 *Id.* 295.

SMITH, J. (after stating the facts.) A majority of the court has reached the conclusion that under the undisputed evidence Sanders, at the time of the injury resulting in his death, was a trespasser upon the train, and that therefore the appellants owed him no duty and were not liable in damages for his injury. The conclusion makes it unnecessary to discuss the other numerous questions presented on this appeal, and we will proceed to set out and discuss only the evidence relating to the issue as to whether or not Sanders, at the time of his injury, was a tresspasser.

Witness Lowe, on behalf of the appellee, testified on this issue substantially to the effect that, acting under instructions from one Fletcher Smith, who had the control and management of the appellant's business, especially the operation of their log and work trains, he was bringing the work train, consisting of two flat cars and the engine, from the log camp to Murfreesboro; that Sanders was there when they started; that there was five or six negroes on the cab and seven or eight on the cars. There were some negro women in the coal car. The negro

men who were on the cab and cars belonged to his crew. Neither witness nor anyone else made any objection to Sanders riding on the train. Ever since witness has been on the job it had been the custom for the employees of the company to ride on the work trains or log trains, and had been the custom for log cutters and loggers to ride on this train, and witness never heard any objection to it. The employees rode these trains when they were not going to and from their work. On one occasion a lot of camp hands were witnesses and they went back to the camp on the flat cars of the log train. Witness testified, over the objection of counsel for appellee, that after they had started he heard Sanders say as follows: "I may have to fight Fletcher Smith to ride this train, but I am going over there." There was no notice sticking up in the cab containing a warning that nobody could ride. The injury occurred on the morning of February 23, 1914. This train had been running over there since about the 24th of January. Witness stated, "If I am not mistaken it was the 24th of January when they brought the first steel on this side." Witness had never seen Fletcher Smith run working men off of the engine. He had never seen Fletcher Smith object to anyone riding these trains or the engine except one gambler and one hobo. Never heard Smith say it was against the rules to ride those trains and had never been advised by anybody connected with the compny that it was against the rules.

Witness General Smith testified that a number of times he had seen plenty of people riding on appellant's train, on this side of the river and the other side, when Fletcher Smith was on the train and he never heard him make any objections to anybody riding. He had seen other employees besides those who were operating the trains, and others, riding thereon. If there was a rule against anybody riding except the men connected with the train, witness knew nothing about it.

Witness Littlefield testified that he had worked for the appellant, driving a log team, off and on for about three years. During the time he was working he was

in the habit of riding the work train whenever he got ready—"just anywhere over the woods and down to the commissary and all around." No objection was ever urged to it. He rode the train when Fletcher Smith was on it and he never heard him object to it. Smith was the general boss out there. Things went according to his orders. Witness worked a month or a little better on the side of the river where the injury occurred, but was not at work when Sanders was injured.

One witness, a tie maker, testified that he never heard of it being against the rules for employees to ride the logging and work trains until after Sanders was killed.

Many other witnesses testified to the same effect, but the above states the evidence as strongly in favor of the appellee as the jury were warranted in finding, and it tends to show that there was a custom upon the part of appellants to permit their employees, who were not assisting in the operation of the train, to ride on these logging and work trains on business for the company and when they were not about the company's business; also to permit those who were not employees to ride on these trains. The jury might have found from this testimony that Fletcher Smith, who was the roadmaster of the railway and the general foreman of the lumber company, and who was charged with the enforcement of the rule, knew of this custom and acquiesced in it, even after the appellants had moved their logging operations to the east of the river, where the injury occurred.

On the other hand the appellants introduced witnesses whose testimony tended to prove that before appellants moved their logging operations to the east side of the river, where the injury occured, that it was the custom to carry passengers on their logging and work trains, but that after they moved their logging camps to the east side of the river the custom of permitting passengers to ride on their trains was abandoned, and that after appellants had moved to the east side of the river no person, whether employee or otherwise, was

permitted to ride on their logging and work trains except those employees who were handling the trains. The appellants were using the Memphis, Dallas & Gulf tracks, and the contract with that company provided that no persons whomsoever except the train crews should be permitted to ride on their logging and work trains, and that a failure to observe the provision on the part of the appellants would forfeit their right to use the track of the M. D. & G. Ry. Co.; that in pursuance of this contract warning notices were posted in all the engines and there was a warning notice in the engine on which Sanders was riding to the effect that no employee except members of the regular train crew would be permitted to ride on the locomotive or the car of that train, except in a car provided for that purpose; that on the pilot beam of the engine on which Sanders was riding, and at the back end of the tender there was posted a sign "Keep Off"; that appellants' trainmen were instructed by appellants' foreman and manager, Smith, not to let anyone ride their engines; that the employees were furnished a time card on which was printed a rule of the company to the effect that no one was permitted to ride on the trains except the employees having charge thereof; that the engineers and conductors were held responsible for violations of these rules.

John Karber, a witness on the part of the appellants, testified that he was an engineer on one of their log trains at the time Sanders was injured. Sanders told witness the day before the wreck that he was going over to Norvell and figured going on the work train. Sanders asked witness whether or not he could go over, and witness replied, "I don't know; that it was against the rule." This witness further testified that it was against the rules of the company for a man to ride on the work trains, and that this was generally known among the men and generally discussed among them.

Witness Thornton testified that he was an engineer in the employ of the Ozan Lumber Company; that in the week before Sanders was killed Sanders tried to ride on

witness' engine and witness told him that he could not carry him, that it was against the rules. Witness was asked this question: "Now what did he say about coming to Murfreesboro? Ans. "He said he was going to come up here and he expected he would have to have a fight with Fletch to ride. I told him I didn't think he could ride at all. There was no way for him to go, and he said he was going if he had to have a fuss."

Witness John Lyons testified that at the time of the injury to Sanders he was an engineer for the Ozan Lumber Company and saw Sanders the morning he was injured. Sanders asked witness to let him (Sanders) ride on the train, and witness states what took place as follows: "I told him it was against the company's rules; that I was not going to run the engine myself. He says, 'Who is going to run the engine?' He asked me if it was Mr. Thornton. I told him no, it was Mr. Smith; Mr. Smith was going to run the engine. Sanders said he just had to go; he said he was going to go; he would scrap Fletcher Smith all the way over there and back."

Witness Wm. Marlow testified that he was in the employee of the lumber company and saw Mr. Sanders on the morning he was killed. Witness relates what took place between Lowe and Sanders as follows: "He (Sanders) said that morning when he came down he wanted to go to Murfreesboro, and Mr. Lowe came to wake us up that morning. We were boarding at Mr. Lowe's. He said he was going over and Mr. Lowe was deviling him something about coming down. He told him he could not come down, and he told him he would fight it out with Fletch." Q. "You say you heard Mr. Sanders say he was coming down here and then fight it out with Fletch Smith?" Ans. "Yes, sir." Witness testified that he was a fireman on one of appellant's trains, and that at that time they had strict orders from Fletcher Smith, the foreman, to keep men off the trains.

Witness Russ Stephens testified that he was in the employ of the lumber company at the time Sanders was killed; saw him that morning before he left the camps.

He told witness that he was going to Norvell. Witness was asked, "What did he say with reference to riding on the train and knowing it was against the rule?" and answered, "He made a statement that he was going over on the engine if he could get on there, and wanted to know who was going to run the engine and some one of us made the remark that Mr. Smith was going to run it, and he said he would go down to the junction, that is, the set-out, and go down as far as Murfreesboro and have it out with Fletch from over there; something like that."

(1) Now the undisputed testimony shows that it was against the rules of the appellants for employees, not engaged in the work of operating their trains, to take passage on these trains. The only question about which there is a conflict in the testimony is as to whether or not the rule had been habitually violated within the knowledge of those employees of appellants whose duty it was to see that the rules were enforced.

The above testimony of witnesses on behalf of the appellants tends to show that those whose duty it was to enforce the rules informed Sanders that it was against the rules for him to ride on the train on which he received his injury, and it shows conclusively that Sanders declared his purpose to go on this train although he might have "to fight Fletcher Smith", the foreman and manager, who had given directions to the employees in charge of the train to enforce the rules. A majority of the court is of the opinion that this testimony as to the declarations of Sanders, and showing his knowledge of the rules and his purpose to violate the same notwithstanding any protest that might be made by the foreman and manager of appellants, constituted him a tresspasser. Although appellee objected to the testimony as to these declarations of Sanders, it was not hearsay and was competent, as the trial court held, to prove the affirmative fact that he made such declarations.

The testimony was competent because the acts and declarations of Sanders showed that he had knowledge of the rules of appellants and also of the duty and desire

of Fletcher Smith to enforce them. The knowledge of Sanders of the rules and the attitude of his mind towards them were material in determining the issue as to whether or not he was a trespasser. The testimony as to his declarations made just before and at the time of his riding the logging train was in explanation of his conduct in so doing and showed conclusively that such act upon his part constituted him a trespasser.

(2) The above testimony showed that whatever might have been the custom of appellants in regard to the enforcement of their rules against employees riding the trains prior to the day of the fatal injury to Sanders, that, at least, on that day he had knowledge of the rules forbidding him to ride, and was conscious of the fact that appellants were seeking to enforce the same through their foreman, Fletcher Smith.

(3-4) Although appellants may have acquiesced in the violation of their rules down to the very day of the injury to Sanders, constituting an abrogation of those rules to that time, nevertheless they had the right to reinstate the same and to insist on their enforcement whenever they saw fit. *Hobbs* v. *Texas & Pacific Ry. Co.*, 49 Ark. 358. One who takes passage upon a work or logging train not purporting to carry passengers, in conscious violation of the rules of the company, and with the express purpose of riding notwithstanding any efforts that might be put forth for the enforcement of the rules, is a trespasser. See *Kruse* v. *St. Louis, I. M. & S. Ry. Co.*, 97 Ark. 137-140; *Purple* v. *Union Pacific Rd. Co.*, 114 Fed. 123-132. See also *St. Louis, I. M. & S. Ry. Co.* v. *Reed*, 76 Ark. 106.

(5) The train upon which Sanders was riding being a logging or work train and Sanders not being a member of the crew operating such train, the burden was upon appellee to show that Sanders had a right to take passage upon such train. Hutchinson on Carriers, § §

1000-1001; *Eaton* v. *Delaware, L. & W. Rd. Co.*, 57 N. Y. 382, 15 Am. Rep. 513.

It is the duty of one who desires to take passage upon such train to inquire whether he may do so. See cases, *supra; St. Louis, I. M. & S. Ry. Co.* v. *Atchison,* 47 Ark. 74; *Railway Co.* v. *Rosenberry,* 45 Ark. 256-263; 3 Thompson on Negligence, § 2562; Elliott on Railroads, § 1576.

Witness Lowe, who was running the engine at the time Sanders was killed and who had charge of the work train testified that after they started Sanders said, "I may have to fight Fletcher Smith to ride on this train, but I am going over there." This testimony, and the testimony to the same effect by other witnesses, was, in the opinion of the majority, undisputed. There was nothing to justify the court or jury in arbitrarily disregarding this testimony. It conclusively shows that Sanders was a trespasser and that as such the appellants owed him no duty except—not to wilfully and wantonly injure him after discovering his peril, and they were therefore not liable in damages for injury resulting in his death.

The court erred in refusing to grant appellants' prayer for a peremptory instruction, and for this error the judgment is reversed, and as the cause seems to have been fully developed, the same is dismissed.

NATIONAL UNION FIRE INSURANCE COMPANY *v.* SCHOOL DISTRICT NO. 55.

Opinion delivered January 31, 1916.

1. INSURANCE—DELAY IN PASSING UPON APPLICATION—LIABILITY FOR LOSS.—Mere delay in passing upon an application for insurance can not be construed as an acceptance of such application, and consent by the insurance company to be bound for the insurance sought by the application, nor can a cause of action for negligence be grounded upon such delay.
2. INSURANCE—APPLICATION—LIABILITY BEFORE DELIVERY OF POLICY.—A soliciting agent for an insurance company, with authority only to

solicit business, can not bind the company by stating to an applicant for insurance, that the policy will be issued.

3. INSURANCE—APPLICATION—LIABILITY BEFORE DELIVERY.—An agent of an insurance company with authority only to solicit business, took an application for a policy of fire insurance from appellee, and the premium therefor, but did not transmit the application to the insurance company and the policy was never issued; shortly thereafter the building sought to be insured, was burned. The application provided that it was not to be construed as a contract of insurance against the company until the same was approved by the officers of the company, which approval shall be evidenced by the issue and delivery of the policy. *Held*, appellee had knowledge of the limitations upon the agent's authority, and that the policy never having been issued and delivered, that the insurance company was not liable for the amount of the loss.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney*, Judge; reversed and dismissed.

STATEMENT BY THE COURT.

On the 17th of February, 1913, R. H. McDermott, acting for the directors of School District No. 55 of Clay County, made a written application to the National Union Fire Insurance Company for a policy of insurance, covering the school building and its contents. The application, together with twenty dollars in payment of the premium, was delivered to T. A. Wynne, soliciting agent of the company. The policy of insurance applied for was never delivered, and on the 6th of January, 1914, the building and contents were totally destroyed by fire.

This suit was instituted on the 8th of October by the appellee against appellant to recover damages on account of the loss. The undisputed facts are as follows:

T. A. Wynne was a soliciting agent of the appellant, having authority to take applications, receive premiums, and to forward applications for policies to the company or its general agent for acceptance or rejection. On February 17, 1913, appellee made application to Wynne for a policy of insurance on its school building and contents, to take effect April 2, 1913. Wynne received the first premium, but did not transmit the application to the insurance company, and the policy was never issued. The insurance company was, at the time, writing insurance on

property of the character mentioned, and Wynne had taken applications and the company had accepted same, and issued policies on risks of the same character. The application which the appellee signed contains information concerning the ownership, the value of the property, its occupancy and such matters. It contained also this stipulation: "It is understood and agreed that this application shall not be construed as a contract of insurance against said company until the same shall be approved by the officers of said company, which approval shall be evidenced by the issue and delivery of its policy."

The court, in effect, told the jury in its instructions, over appellant's objection, that if Wynne was the agent of the appellant, and had authority as such to receive applications for insurance, and to forward same to the company, and receive the payment of premiums thereon that if he neglected for an unreasonable length of time to forward the application to the company, and if the company would have issued its policy if the application had been forwarded, and if they found that by reason of such neglect on the part of the appellant's agent, the appellee suffered the loss complained of, they should find in its favor.

The appellant asked the court to instruct the jury to return a verdict in its favor, which the court refused, to which ruling of the court the appellant duly excepted. The appellant also asked the court, in effect, to tell the jury that the taking of the application for the insurance and the receipt of the insurance premium would not constitute a contract of insurance between the school district and the company, that Wynne, being a mere soliciting agent, had no power to bind the company to the issuance of an insurance policy, and that it was the duty of the appellee to ascertain the scope of his authority before paying the premium, and if it failed to do so, the loss was at its peril.

The jury returned a verdict in favor of the appellee for the amount claimed, towit, $500. A judgment was entered against the appellant in favor of the appellee, and this appeal has been duly prosecuted.

Spence & Dudley, for appellant.

1. A verdict should have been directed for defendant. Mere delay by a soliciting agent in transmitting an application for insurance, or a delay by the company in accepting same does not make the company liable. Vance on Ins., 161. An acceptance is essential to the validity of the contract—mere delay or failure to notify the applicant is not an acceptance. 19 Cyc. 599. And an agent having only authority to receive and transmit applications does not bind the company. 19 Cyc. 600; 61 Ala. 163; 71 Iowa, 340; 32 N. W. 371; 28 Fed. 708. Mere delay in passing upon an application can not be construed into acceptance. 30 Fed. 545; 61 Ala. 163; 104 Ga. 67; 5 Okla. 598; 50 Pac. 165. There must be an actual acceptance. 2 Neb. 720; 89 N. W. 997; 90 U. S. 152, etc. Even if accepted, the company was not bound until the policy was issued. 98 Ark. 166.

The authority to solicit, receive and write applications, and to receive and deliver policies and collect premiums would not empower the agent to bind the company by saying a policy would be issued. 85 Ark. 337. Such an agent is not a general agent. 19 Cyc. 592; 22 *Id.* 1431. One dealing with an agent apparently having limited authority is bound to inquire as to, and take notice of, the limitations imposed by the company. 22 Cyc. 1434; 105 Ark. 111; 104 *Id.* 150. Wynne, the agent, is alone liable under the proof. 81 Ark. 202.

The appellee *pro se.*

Where an agent acts within the scope of his authority, and in the execution of his master's business, his principal is bound. Mechem, Agency, § 745; Story, Agency, § 308; 56 Ark. 247. The agents of the company were negligent in not forwarding the application within a reasonable time, and the company is liable. 86 Kans. 442; 121 Pac. 329; 40 L. R. A. (N. S.) 164; 51 Iowa, 679; 2 N. W. 583; note to 40 L. R. A. (N. S.) 164.

WOOD, J., (after stating the facts). The court correctly instructed the jury that "there was no contract of insurance in this case." The only issue presented by this

appeal is whether or not an insurance company is liable for the negligence of its agent in failing to send to the company an application for insurance, where the only authority of the agent is to solicit applications for insurance, to deliver policies when issued, and to receive and receipt for initial premiums.

When an agent acts within the scope of his authority, the principal is bound. *Railway* v. *Ryan,* 56 Ark. 247.

Now in the written application of appellee for a policy of insurance it is stated: "It is understood and agreed that this application shall not be construed as a contract of insurance against said company until same shall be approved by the officers of said company, which approval shall be evidenced by the issuance and delivery of its policy." Under the express terms of this proposal on the part of appellee for insurance it is stipulated that there shall be no contract of insurance until the company shall approve the application and evidence its approval by the issuance of a policy. Under this stipulation of appellee, even if the soliciting agent had promptly forwarded the application to the company, the latter was under no legal obligation to issue the policy to appellee. The authority of the soliciting agent to receive and forward the application if strictly followed did not impose upon the appellant any legal duty.

If the application had been promptly transmitted and received, appellant would not have been liable until the policy was actually issued. *Cooksey* v. *Mutual Life Ins. Co.,* 73 Ark. 117; *Peoples Mut. Life, Accident and Health Ins. Co.* v. *Powell,* 98 Ark. 166.

Negligence and liability therefor can not be predicated upon a state of facts that do not impose any legal duty.

The better reason and the decided weight of authority supports the doctrine that mere delay in passing upon an application for insurance can not be construed as accepting such application and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay. *Albania Gold L.*

Ins. Co. v. *Mayes,* 61 Ala. 163, and other cases cited in appellant's brief.

The soliciting agent with only the limited authority shown by the undisputed evidence, could not bind the company by stating that a policy would be issued. *American Ins. Co.* v. *Hornbarger,* 85 Ark. 337. Appellee could not assume or presume that the special agent with only limited authority, could bind his principal by any statements he made concerning his own authority. Appellee must be held, under the undisputed evidence to have known the extent and nature of the authority of appellant's special agent. *U. S. Bedding Co.* v. *Andre,* 105 Ark. 111.

It follows that appellee, under the undisputed evidence, had no cause of action, and the trial court erred in not so declaring.

The judgment is therefore reversed and the cause is dismissed.

CITY OF EL DORADO *v.* UNION COUNTY.

Opinion delivered January 31, 1916.

1. ROAD TAX—RIGHT OF MUNICIPAL CORPORATION.—Act 230, Acts 1913, providing for a division of the road funds paid by taxpayers within the corporate limits of a certain city, has reference to the road funds levied and collected under Amendment No. 5 to the Constitution of 1874, which authorizes the county court, when sitting as a levying court, to levy a road tax of not exceeding three mills on the dollar, when a majority of the qualified electors of the counties shall have voted therefor; said act has no reference to the optional road tax provided for by Kirby's Digest, § 7280.
2. REVENUE—TAXES FOR ROAD PURPOSES.—All taxes levied for general revenue purposes under article 16, section 9, of the Constitution, and the optional road tax as a part of such general revenue funds, levied and apportioned under the provisions of Kirby's Digest, § 7280, must be expended under the supervision of the county courts.
3. REVENUE—TAXES—JURISDICTION OF COUNTY COURT.—Article 7, section 28, of the Constitution vests the county courts with exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, etc.
4. REVENUE—EXPENDITURE OF TAXES—JURISDICTION OF COUNTY COURT.—The Legislature has no power to vest any tribunal, other than the county court, with jurisdiction over the expenditure of the funds raised under the general revenue clause of the Constitution (Art. 16, section 9, Const. 1874).

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

Geo. M. LeCroy, for appellant.

The appellant, city, is entitled to one-half of the optional road tax collected within its limits under section 1, Act No. 230, Acts 1913. The statute is plain and the term "one-half (½) of road funds of *every* kind, means what it says." 92 Ark. 98; Cooley, Const. Lim. (7 ed.) 126, 236, 242; Kirby's Dig., § § 2922, 3016; 7223-7358, 7280; Art. 16, § 9 Const. The Legislature has full control over highways, streets and roads. 76 Ark. 25; 103 *Id.* 532. Also over appropriations. 107 Ark. 292. The judgment is contrary to law. Cases *supra.*

R. G. Harper, for appellee.

The city is not entitled to one-half the optional road tax. Art. 16, § 9 Const.; Kirby's Dig., § 7280; Art. 7, § 28 Const.; Act 230, Acts 1913; 92 Ark. 98. The county court has exclusive jurisdiction and the Legislature can not deprive it of its constitutional jurisdiction. The cases cited by appellant involved different acts of the Legislature and do not apply. 103 Ark. 532; Act 351, Acts 1911. By amendment No. 5, Const., this tax is known as the county road tax, and the Act of 1899 refers to same as a public road tax. The act conflicts with Art. 7, § 28, if it attempts to give cities one-half of this optional road tax.

WOOD, J. Act No. 230 of the Acts of 1913 is entitled: "An Act to provide for a division of the road funds paid by tax-payers within the corporate limits of the city of El Dorado, in Union County." Section 1 of the act reads:

"That the county court of Union County, Arkansas, shall, at the term held at which the collector of Union County makes his annual settlement, apportion one-half of the road funds of every kind collected within the corporate limits of El Dorado, in Union County, Arkansas, to be used by its authorities on and in working and improving the streets, bridges and culverts of said city. This act shall apply to the road taxes collected for the year of 1912 and each year thereafter."

Section 2 provides that the collector shall pay into the city treasury of El Dorado the said funds so apportioned.

Section 3 repeals all laws in conflict.

The agreed statement of facts shows that at the October term, 1912, of the Union County court, the same being a regular meeting of the levying court of that county, there was duly and legally levied for county general purposes a tax of four and one-fourth mills and also three-fourths of a mill, an optional road tax, for the purpose of building and maintaining roads and bridges in Union County, under the provision of Section 7280 of Kirby's Digest. The levying court also levied the regular three mill road tax, which had been voted under Amendment No. 5 to the Constitution. The appellant petitioned for one-half of the three-fourths mill optional road tax, levied under the provisions of section 7280 of Kirby's Digest, *supra*. The lower court refused its petition, finding that, of the five mill tax levied for county general purposes, three-fourths of a mill was levied and appropriated by the levying court and expended for building and maintaining roads and bridges under proper orders of the county court; that the levy and appropriation was made prior to the passage of Act No. 230 of the Legislature; that the county court at the time of the levy and expenditure of the three-fourths of a mill optional road tax, acted within the terms and provisions of the law then in force and dismissed the petition, from which appellant has duly prosecuted this appeal.

Amendment No. 5 of the Constitution, adopted on January 13, 1899, authorized the county court, when sitting as a levying court, to levy a road tax of not exceeding three mills on the dollar when a majority of the qualified electors of the counties shall have voted therefor.

(1-4) Act 230 has reference to the road funds levied and collected under Amendment No. 5 of the Constitution. It has no reference whatever to the optional road tax provided for by section 7280 of Kirby's Digest, *supra,* which is levied and collected solely as a part of the general revenue under the authority of article 16, section 9 of the Con-

stitution. All taxes levied for general revenue purposes under article 16, section 9 of the Constitution, *supra,* and the optional road tax as a part of such general revenue funds, levied and appropriated under the provisions of section 7280 of Kirby's Digest, must be expended under the supervision of the county courts. Article 7, section 28 of the Constitution, vests the county courts with exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, etc. And under these provisions of the Constitution, the Legislature would have no power to vest any other tribunal with jurisdiction over the expenditure of the funds raised under (article 16, section 9, *supra*) the general revenue clause of the Constitution.

If the act under review, therefore, applied to the optional road tax which is levied and appropriated as a part of the general revenue, it would be in violation of the above section of the Constitution, giving to the county courts exclusive original jurisdiction over all matters relating to county taxes, roads, bridges, etc. For it will be observed that this act confers power upon the municipal authorities of the city of El Dorado to use the road funds mentioned therein "in working and improving the streets and culverts of said city." It also provides that the collector shall pay the fund apportioned by the county court, for the use of the city, into the city treasury of El Dorado. The whole act shows that it was the purpose of the Legislature to give to the authorities of the city exclusive control over the one-half of the road funds apportioned to the city. Construed as applying only to the road tax raised under the provisions of Amendment No. 5 to the Constitution, the act under consideration is a valid law. For in *Texarkana* v. *Edwards,* 76 Ark. 22-24, we said, speaking of Amendment No. 5 to the Constitution, "We see nothing in the amendment to the Constitution which authorizes the collection of a county road tax that prevents such an equitable distribution of the fund," and in *Sanderson* v. *Texarkana,* 103 Ark. 529-535, we said:

"The Amendment (No. 5) does not specify to what jurisdiction the road tax, when collected, shall be confided.

It simply provides that the tax when collected, shall be expended upon the roads and bridges in the county. The streets of the city are public roads, within the county, and the part of the road tax apportioned by the above act of the Legislature to the city of Texarkana was collected from property situated within the limits of that city, and, by that act, such portion of said tax apportioned to the city is directed to be expended upon its streets. The fund is, therefore, by the act directed to be expended for the very purpose named in said amendment to the Constitution. In the absence of any constitutional inhibition, the Legislature has full power, not only to apportion said road tax between the county and the municipality, as was directly held in the case of *Texarkana* v. *Edwards, supra,* but also, as therein suggested, it has the power to direct whether the municipal council or the county court shall be the agency which shall have the jurisdiction and the right to expend the portion of the fund apportioned to the city, when collected, upon the streets of such municipality."

The court, in *Sanderson* v. *Texarkana, supra,* had under review "an act to grant to the city of Texarkana, Miller County, for use on the streets of said city, three-fifths of the road tax collected on property within the corporate limits of said city and for other purposes." The road tax referred to in the act was raised under the authority of Amendment No. 5 to the Constitution and it was sought to enjoin the sheriff and collector of Miller County from paying into the county treasury three-fifths of the road tax collected for the year 1910 from the property situated within the corporate limits of the city of Texarkana and to compel him to pay same into the treasury of that city. One of the contentions of the collector was that the act was unconstitutional, because it took away the jurisdiction of the county court over the expenditure of the fund and was in conflict with article 7, section 28 of the Constitution; and we held that in the constitutional amendment, under which the tax was raised, no provision was made as to "what governmental agency shall receive or disburse the funds collected from such tax." And that

in the absence of the constitutional inhibition the Legislature might confer on any governmental agency it saw fit, the power of supervision and control of streets.

The appellant invokes the above decision as authority for its contention that it is entitled to one-half of the optional road tax, but as we have seen the optional road tax was raised under the general revenue clause of the Constitution (article 16, section 9), and not under Amendment No. 5, hence *Sanderson* v. *Texarkana* has no application further than to show that the act under consideration was a valid law.

It follows that the findings and judgment of the circuit court were correct and the judgment is affirmed.

KIRBY, J., dissenting.

STREUDLE *v.* LEROY.

Opinion delivered January 31, 1916.

1. COUNTER CLAIM—FAILURE TO REPLY—WAIVER.—Appellant will be held to have waived his objections to appellee's failure to answer his counter claim, when he took testimony and proceeded to trial, as if the issues had been made up by the pleadings.
2. DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS.—Where one party to a contract is prevented from performing the same by the fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made, had the other party carried out his contract.

Appeal from Crittenden Chancery Court; *Chas D. Frierson,* Chancellor; affirmed.

Wright, Miles, Waring & Walker, of Tennessee, for appellants.

1. The chancellor erred in overruling the defendants' motion for decree *pro confesso.* Decree in favor of defendants should be entered here on the pleadings. No reply was filed to the answer and counter-claim as required by section 6115, Kirby's Digest. A counter-claim is defined by Kirby's Dig., § 6099. The action of the chancellor is clearly violative of section 6192 *Id.;* 25 Ark. 20; 25 *Id.* 105; *Ib.* 86.

2. The court erred in not rendering judgment for appellants on their motion on June 11, 1914, for failure of appellees to answer their counter-claim. 69 Ark. 114; 71 *Id.* 364. Where a party filing a counter-claim moves for judgment for want of an answer and that motion is overruled and no answer is filed thereafter such party will not be considered to have waived the failure to reply and upon appeal will be entitled to decree. 33 Ark. 107; 47 *Id.* 496; 74 *Id.* 104; 80 *Id.* 228; 119 Ark. 133; Kirby's Dig., § 6137; 56 Ark. 73; 73 *Id.* 344; 88 *Id.* 406; 80 *Id.* 65; 9 *Id.* 535; 22 *Id.* 533.

3. Any finding against appellants is clearly against the preponderance of the evidence. The burden was on appellees. All expenses of manufacturing, caring for and loading were to be borne by appellees. 19 Atl. 1008; 14 So. 672; 16 *Id.* 627; 132 U. S. 491.

Brown & Anderson, of Tennessee, for appellees, filed no brief.

HART, J. On November 25, 1913, appellants and appellees entered into a written contract whereby the former agreed to furnish the latter with a saw mill and the latter agreed to supply its own hoop machine and appliances at Proctor, Arkansas. Appellants agreed to furnish appellees logs and strips of timber necessary for the manufacture of hoops and appellees agreed to manufacture hoops for appellants at a stipulated price. The contract provided that the transactions and moneys paid out or received under the agreement should be under the personal control and custody of John Reichert, one of appellants for which appellees should pay $3 per day. It was also agreed that L. B. Leroy, one of the appellees, should receive out of the pay roll $5 per day for his services as manager of the mill when in operation. The contract provided that all of the operating expenses and repairs should be at the expense of appellees; and also provided the basis on which appellants and appellees should share the profits and bear the losses of the enterprise.

Other provisions were incorporated into the contract which the views we shall hereinafter express render it

unnecessary for us to incorporate in the statement of facts.

Appellees filed a bill against appellants in which they sought an accounting. They alleged that there were 182 working days in the period covered by the contract; that the mill had a capacity to manufacture 40,000 hoops per day; that appellants failed to furnish them with material sufficient to enable them to run at full capacity; and that appellants and appellees became partners in the enterprise by the terms of the contract.

The complaint was filed on the 20th day of April, 1914; on the 26th day of April, 1914, appellants filed what they termed an answer and cross-complaint. They denied that they became partners with appellees under the terms of the contract; denied that they failed to carry out the contract on their part; denied that the mill had a capacity of 40,000 hoops per day; alleged that they furnished to appellees the logs and strips of timber called for by the contract; alleged that appellees failed to comply with the terms of the contract on their part; alleged that in order to keep the business going they furnished to appellees large sums of money which they were not required to furnish under the contract, and, by way of counter-claim, asked judgment for the amount found to be due them.

Appellees did not file an answer to the counter-claim of appellants.

On June 11, 1914, appellants filed a motion in which they asked for judgment against appellees in the sum of $3,119.04 because of the failure of appellees to answer their counter-claim. On the 27th day of January, 1915, the court heard the case upon the pleadings and the depositions on the part of appellees. The court found that the cross-complaint or counter-claim of appellants should be dismissed for want of prosecution and rendered judgment in favor of appellees.

On January 30, 1915, appellants filed a motion to vacate the decree entered of record January 27, 1915, and stated the grounds therefor in their motion.

On February 6, 1915, the court took under consideration the motion to vacate the decree until April 1, 1915, and time was given each party within which to take proof.

On the 26th day of April, 1915, the court entered a decree opening the decree of January 27, 1915, and after hearing the motion of appellants for a decree in their favor filed June 11, 1914, overruled the same. The case was heard on the depositions taken by both parties and a decree was entered in favor of appellees for the sum of $1,201.85, being a smaller amount than was awarded them by the former decree. The case is here on appeal.

(1) It is first contended by counsel for appellants that the court erred in not rendering judgment in their favor when they moved for judgment on June 11, 1914, for failure of appellees to answer their counter-claim They rely upon the case of *Young* v. *Gaut,* 69 Ark. 114, to sustain their contention.

It will be remembered that the court opened the decree rendered on January 27, 1915, and gave the parties leave to take proof in the case. A great volume of testimony was taken and the state of accounts between the parties was thoroughly gone into. There could be no mistake whatever as to the issues between the parties. The issues were thoroughly made up and both parties introduced testimony to support their claim. The motion for judgment for failure to answer their counter-claim was made by appellants in June, 1914. When the court opened the decree in 1915 and gave appellants leave to take testimony, they proceeded to take their testimony and the case went to trial as if the issues had been made up by the pleadings. Under these circumstances appellants will not be allowed any advantage from this defect in the pleadings, but are deemed to have waived it by going to trial on the merits of the case. This holding, we think, is in accord with the rule laid down in *Young* v. *Gaut, supra,* and other decisions of this court bearing on the question.

(2) This brings us to a consideration of the case on its merits. In the case of *Ford Hardwood Lumber Company* v. *Clement,* 97 Ark. 522, the court said that where plaintiff agreed to perform certain work for de-

fendant which he was prevented from doing by defendant's fault, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made had the defendant carried out his contract.

In the case of *Alf Bennett Lumber Company* v. *Walnut Lake Cypress Company,* 105 Ark. 421, the court held that where a party to a contract is prevented from performing same by fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made had the other party carried out his contract.

The court below was governed by these principles of law in its finding in favor of appellees.

The record contains about 675 pages of type-written matter. The whole state of accounts between the parties was gone into by the testimony of witnesses taken in the form of depositions and exhibits attached thereto. Nothing could be gained by a statement in detail of the evidence relating to these questions; nor would it serve any useful purpose to enter into a protracted discussion of them. We have carefully considered the evidence as disclosed by the record and are of the opinion that the finding of fact by the chancellor with reference to the state of accounts between the parties is not against the preponderance of the evidence. Therefore, under the settled rules of this court, the finding of the chancellor must be upheld and the decree will be affirmed.

GEISER MANUFACTURING CO. *v.* DAVIS.

Opinion delivered January 31, 1916.

SALES—RESERVATION OF TITLE—REPLEVIN BY PURCHASER.—Where goods are sold on credit, the seller retaining title, and where he retook the goods after the buyer's failure to pay any portion of the purchase price, the buyer can not thereafter maintain replevin for the same.

Appeal from Carroll Circuit Court, Eastern District; *J. S. Maples,* Judge; reversed.

STATEMENT BY THE COURT.

This appeal is prosecuted by the Geiser Manufacturing Company from a judgment in replevin against it for the possession of certain mill machinery.

It appears from the testimony that appellant sold to R. C. Davis a certain saw mill and machinery for a stipulated price and that Davis executed a mortgage upon the property to secure the payment of the notes in accordance with the terms of sale, and having failed to perform his contract of purchase, in consideration of an extension of time for the making of certain of the payments, which he failed to make, executed and delivered a bill of sale for the mill and machinery to the appellant company, and afterwards repurchased it under a written contract reserving the title in the seller, the Geiser Mfg. Co., until the purchase price was paid.

Upon his failure to pay the notes due in accordance with the terms of the last contract, the company took possession of the mill and machinery and he brought the action of replevin.

He admitted executing the contract of purchase or order for the property, but claimed that it was agreed to be sold to him for $150, to be paid in two $75 installments and that he had offered to pay to the company's agent in the county these payments when due, upon condition that they surrender to him his old notes under the first contract, which they refused to do claiming the contract had not been performed.

After appellant had taken possession of the mill and machinery, having torn it up and started away with it, the appellee offered to pay the balance of $150 that he claimed was all he owed upon the property. He testified that he signed the written order for the mill and machinery upon the repurchase thereof, but that it had been changed since he signed it, to include the payment of six $100 notes in addition to the $150 that he only in fact agreed to pay for it. He said it was sold to him for this price because of the prior payments made under the old contract. His letter of date two or three months before

the last sale offering to pay $750 for the mill, was introduced in evidence.

The court instructed the jury and it returned a verdict in favor of appellee for the property and damages in the sum of $160 and judgment was rendered thereon for appellee for the possession of the property and $10 as damages, said amount being the excess of the damages found by the jury over the $150, the amount admitted to be due by him to appellant on the purchase price of the machinery.

C. A. Fuller, for appellant.

The transaction was a conditional sale with a reservation of the legal title until the price was paid. None of the purchase price was ever paid. Oral evidence was not admissible to vary and contradict the terms of the written instrument. 24 Ark. 210; 25 *Id.* 339; 67 *Id.* 62; 80 *Id.* 507; 88 *Id.* 213; 94 *Id.* 130; 95 *Id.* 131. No alteration or change was made in the contract. The court erred in its charge to the jury. No tender was ever made. The verdict as amended was improper. The burden was on appellee and it is undisputed that he never paid a cent; and that the order for repurchase was never accepted nor altered. The judgment should be reversed with directions to enter judgment for appellant.

Festus O. Butt, for appellee.

1. No improper oral testimony was admitted.

2. There is no error in the instructions and no improper argument of counsel. The judgment should be affirmed because appellant fails in his abstract and brief to show that a motion for new trial was filed or overruled. 103 Ark. 430; 93 Ark. 85; 104 Ark. 517. The verdict and judgment are right.

KIRBY, J., (after stating the facts). The testimony is undisputed that the transaction was a conditional sale of the property by the manufacturing company to R. C. Davis, with a reservation of the title in said company until the purchase price was paid.

It is further undisputed that the purchaser had not paid any part of the amount even of the purchase price

he admitted he had agreed to pay, up to the time the suit was brought, nor had he ever offered to do so in such a way as amounted to a tender of the amount due. His statement that he offered to pay to the agent said two notes of $75 each of the purchase money, if the agent surrendered to him the old notes under the first contract did not amount to a tender that would relieve him from the payment of said notes nor divest the title of the property from the seller, the manufacturing company. Such offer was conditional and did not amount to a tender. *Fields* v. *Danenhower,* 65 Ark. 400.

The title remained in the seller until the purchase price was paid according to the terms of the sale and the uncontradicted testimony shows that the purchaser had failed to pay the notes that he even agreed were due as part of the purchase money and that the seller had resumed the possession of the property under his claim of ownership and the right thereto. Having the right to take possession of the property at any time before the money due for the purchase price thereof was paid and having actually resumed possession of it before the payment or tender of the purchase price, it could not thereafter be replevined by the seller who had failed to pay the purchase price and permitted the seller to retake the property. The title of the property and the possession thereof were thereafter rightfully in the manufacturing company, the owner, and the purchaser had forfeited his right and could not maintain replevin therefor. Tiffany on Sales, 138.

Upon the undisputed testimony the court should have directed a verdict for the appellant. The judgment is reversed and the cause remanded with directions to enter a judgment restoring the possession of the property to said appellant manufacturing company. It is so ordered.

STATE v. FOX.

Opinion delivered January 24, 1916.

1. INDICTMENTS—MOTION TO QUASH—INSUFFICIENCY OF THE EVIDENCE BEFORE THE GRAND JURY.—**An indictment will not be quashed on the ground that the evidence introduced before the grand jury was insufficient to sustain it.**
2. INDICTMENTS—MOTION TO QUASH—INSUFFICIENCY OF EVIDENCE BEFORE GRAND JURY.—**The grand jury is an inquisitorial body, the proceedings of which are intended to be kept secret and can not be examined and reviewed by a trial court upon a motion to set aside or quash the indictment, except for the causes set out in the statute. (Kirby's Digest, § 2279).**

Appeal from Prairie Circuit Court, Southern District; *Thos. C. Trimble,* Judge; reversed.

STATEMENT BY THE COURT.

These cases were briefed and tried together.

The grand jury of Prairie County returned indictments, one against the defendant W. L. Fox, charging him with embezzlement in January, 1913, of $5,000, in gold and silver, lawful money of the United States, from the Hazen Power & Light Company, of which he was secretary and treasurer; and one against W. H. Fox, charging him with the embezzlement and conversion to his own use in November, 1913, of two engines and boilers of the value of $2,000, the property of the Hazen Power & Light Company, of which he was president.

Defendants filed like motions in each case to quash the indictments, alleging as grounds therefor that said indictments were not based on any legal evidence, and that the only witness who appeared before the grand jury was E. K. Hathaway, who stated upon oath that he did not give any evidence that warranted the finding of said indictment and further that S. A. Robertson, a member of the grand jury, because of spite and feeling against the defendant and his connections, induced said grand jury to return said indictment without any legal evidence to support the finding of same. The affidavit of Hathaway was exhibited with the motion, in which he stated that he took charge of the books and accounts of the Hazen Power

& Light Co. as receiver on the 17th of February, 1914, and checked them all over and could not find from said accounts that W. L. or W. H. Fox had embezzled or unlawfully made away with any moneys or property belonging to the said company; that he was unable to find any evidence of where said Fox embezzled the sum of $5,000 in January, 1913, or at any other time. Affiant stated further that he was called before the grand jury and made the foregoing statement in substance and that the indictments could not have been returned on the evidence he gave before the grand jury. The minutes of the grand jury showing his testimony were read before the court and the court sustained the motion and quashed the indictments, and from said judgments the State appealed.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, *Jas. B. Reed,* Prosecuting Attorney for appellant. *Manning, Emerson & Morris,* of counsel.

1. It was error to sustain the motion to quash the indictment. Kirby's Digest, § § 2195, 2204, 2279, 2286; 96 Pac. 404-7; 73 N. Y. S. 535; 121 N. W. 1114; 107 Pac. 712; 19 *Id.* 145. An indictment can not be quashed for lack of competent or sufficient testimony. 36 Iowa, 272; 39 S. W. 365; 48 So. 819; 60 *Id.* 379; 60 S. E. 283; 88 Pac. 867; 84 Atl. 42; 148 S. W. 567; 23 So. 486, 505; 62 N. Y. S. 224; 22 Cyc. 422; 145 Fed. 745; 156 *Id.* 897; 186 *Id.* 1002-1018; 199 *Id.* 25, 831; 38 Am. Rep. 460; 82 Ark. 321; 83 N. Y. 418.

Trimble & Williams, for appellees.

The court had the power and discretion to quash the indictment on motion alleging that it was returned by the grand jury without any legal evidence; and there was no abuse of discretion by the court in sustaining the motion. 84 Ark. 290; 85 *Id.* 501; 22 Cyc. 501; Kirby's Dig., § 2203-5; 60 How. Pr. 17; 96 Pac. 404; 22 Cyc. 422; 186 Fed. 1002-18; 199 *Id.* 25; 1 Abb. Pr. 268; Leach, C. S. 184; 47 S. W. 896; 129 Fed. 49; 63 C. C. A. 491; 65 Howard, Rep. 177.

KIRBY, J., (after stating the facts). The State contends that the court erred in quashing the indictments,

being without authority to review the evidence upon which they were found and determine the sufficiency thereof.

The statutes provide that the grand jury can receive none but legal evidence and should find an indictment when all the evidence before them taken together, would in their judgment if unexplained, warrant a conviction by a trial jury. Sections 2203-4, Kirby's Digest.

(1) Upon the arraignment or upon the call of the indictment for trial, if there is no arraignment the defendant must either move to set aside the indictment or plead thereto, and section 2279 of Kirby's Digest provides "The motion to set aside the indictment can only be made upon the following grounds:

"First. A substantial error in the summoning or formation of the grand jury.

"Second. That some person other than the grand jurors was present before the grand jury when they finally acted upon the indictment.

"Third. That the indictment was not found and presented, as required by law."

Section 2286 of Kirby's Digest designates the grounds upon which a demurrer is a proper pleading to the indictment, none of which would warrant the action of the court herein, if the motion be considered a demurrer.

An indictment is merely an accusation against a defendant and does not even raise a presumption of guilt and any irregularity in the finding and return of it by the grand jury does not deprive the accused of any substantial right since the trial before a jury on a plea of not guilty affords an opportunity to establish his innocence or the truth of the charge. *Latourette* v. *State,* 91 Ark. 65; *Worthem* v. *State,* 82 Ark. 321.

The statute expressly provides that a motion to quash an indictment can only be made on the grounds specified in said section 2279 and this limitation excludes any right to make such motion for any other than one of the specified causes.

The motion to quash the indictment for want of legal and sufficient evidence adduced before the grand jury to

warrant the finding thereof, certainly does not come within the first and second subdivisions of said section and we do not think it can be said to be included within the third subdivision that the indictment was not found and presented as required by law.

(2) In the Latourette case, *supra,* a like question was raised, after conviction, but the court held that the failure of the grand jury to receive legal evidence was a mere irregularity and was waived by the plea of not guilty. It was never the purpose of the law, as clearly indicated by the statute designating the only grounds upon which a motion to quash, or set aside, an indictment can be made, that such motion could be made because of the introduction of illegal testimony or want of any testimony at all to support the return of an indictment and thus bring the testimony and proceedings before the grand jury for review by the trial court before a plea to the charge by the accused. The grand jury is an inquisitorial body, the proceedings of which are intended to be kept secret and can not be examined and reviewed by a trial court upon a motion to set aside or quash an indictment, except for causes specified in the statute. *Borello* v. *Superior Court,* 96 Pac. 404; *State* v. *Longstreth,* 121 N. W. 1114; *U. S.* v. *Cutler,* 19 Pac. 145; *State* v. *Britton,* 60 So. 379; *State* v. *Walsh,* 84 Atl. 42; *Lee* v. *State,* 148 S. W. 567; 22 Cyc. 422.

It follows that the court erred in sustaining said motion and quashing the indictments and its judgment is reversed and the cause remanded with directions to overrule same and for further proceedings, according to law.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* HOME OIL & MANUFACTURING COMPANY.

Opinion delivered February 7, 1916.

CARRIERS—CONNECTING CARRIERS—DAMAGE TO FREIGHT—PRESUMPTION.—Where goods are received by the initial carrier in good order, and are delivered by the terminal carrier in a damaged condition. in the

absence of other proof, the presumption arises that the shipment reached the terminal carrier in good condition, and the burden is cast upon the terminal carrier of meeting this presumption with evidence.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson,* Judge; affirmed.

Troy Pace and *W. G. Riddick,* for appellant.

1. A peremptory instruction to find for defendant should have been given. (1) The presumption prevails, when a shipment is handled by two carriers, that the damage occurred while the goods were in possession of the last carrier. 73 Ark. 112; 76 *Id.* 589; 93 *Id.* 439; 91 *Id.* 97. The burden was on plaintiff first to show that the loss occurred while in transit. 4 Rul. Case Law, § 383; 25 Am. St. 59. (2) The consignee refused to accept the seed on arrival, when it was its duty to accept and prevent further damage. 90 Ark. 524; 99 *Id.* 568; 90 *Id.* 37.

2 There was no proof of negligence. By statute the initial carrier is liable. There was no proof of delivery to the carrier of the seed in good condition, but there was proof that they were in bad condition when first delivered. Cases *supra.*

Harry M. Woods, for appellee.

1. This cause was properly submitted to the jury. Every question raised was submitted under proper instructions most favorable to defendant. There was ample evidence of the good condition of the seed when shipped; the bill of lading recites the seed "in good condition." 6 Cyc. 423.

2. The presumption that the last carrier was liable, is rebutted by the proof. 82 Ark 150; 74 *Id.* 597; 31 L. R. A. (N. S.) 107; 113 S. W. 233; 25 S. W. 1077. The damage having been shown to exist while on defendant's road and before delivered to the Transfer Co., the burden was on appellant to show that the damage did not occur on its line. 82 Ark. 353; 73 *Id.* 112; 72 *Id.* 502.

3. A verdict was warranted against either or both companies. 73 Ark. 116; 61 *Id.* 381. There is no question as to the amount of damages.

McCULLOCH, C. J. Appellee instituted this action to recover damages sustained by reason of negligent delay in transportation of a carload of cotton seed from Gregory, Arkansas, to Augusta, Arkansas. Appellee is a domestic corporation engaged in operating an oil mill at Augusta, and purchased the carload of cotton seed from a ginning concern at Gregory and caused the same to be consigned by railroad from Gregory to Augusta. The Chicago, Rock Island & Pacific Railway Company was the initial carrier which received the car at Gregory and transmitted it to Jelks, a point on the line of appellant's road, and it was thence carried by appellant to New Augusta and delivered to another carrier, the Augusta Tramway & Transfer Company, which carried it the short distance from New Augusta to destination. The car was received for shipment by the initial carrier on October 4, 1914, and was not delivered to the consignee at the point of destination until the forenoon of October 16. Each of the three carriers was made a party to this suit, and on a trial of the issues the jury returned a verdict in appellee's favor against appellant, the other two defendants being exonerated by the verdict.

The only contention here is that the evidence is not sufficient to sustain the verdict. We are of the opinion that the evidence is sufficient.

In the first place, it is said that the testimony does not show that the cotton seed were in good condition when delivered to the initial carrier. That contention is not tenable, we think, for the testimony of one of the witnesses tends to show that the seed were in good condition when delivered to the carrier for transportation. The witness had no express recollection about this particular car, but he said that he handled all the seed that were shipped from the gin at Gregory and that they were all in good condition when shipped out.

The next point made as to the insufficiency of the testimony is that it does not show that the delay which caused the damage—if indeed the damage was caused by delay in transportation—occurred while the car was in the hands of appellant. None of the defendants introduced

any testimony, nor was there any testimony introduced at all tending to show when the car was delivered by the initial carrier to appellant, nor what condition the cotton seed were in at the time of such delivery. It was, however, developed in the testimony that the cotton seed were delivered by appellant to the delivering or terminal carrier at New Augusta on October 13th, and that the seed at that time were in a bad condition—in fact, that the seed were spoiled and in the condition in which they were finally delivered to the consignee. There was unnecessary delay caused by the last carrier, but the jury were warranted in finding from the evidence that the damage to the seed was done before delivery to the last carrier; in other words, that the damage occurred while the shipment was being handled either by the initial carrier or by appellant, the intermediate carrier.

In an exhaustive note to the case of *Roy* v. *C. & O. Ry. Co.,* 31 L. R. A. (N. S.) 1, the prevailing rule with respect to presumptions, where goods pass through the hands of several carriers, is stated as follows: "When goods are received by the initial carrier in good order, and are delivered by the terminal carrier in a damaged condition, the courts well-nigh uniformly recognize that, nothing else appearing, a presumption arises, born, it is said, of convenience and necessity, that the shipment reached the terminal carrier in the same condition as when delivered to the initial carrier, which casts upon the terminal carrier the burden of meeting this presumption with evidence that the goods were not injured while in its transportation." Numerous cases are cited in support of the text, among others several decisions of this court, beginning with the case of *St. L., I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112.

The presumption may be rebutted by proof, and there was in this case enough testimony adduced to overcome that presumption and to show that the damage was caused by delay which occurred before the cotton seed were delivered to the last carrier. In that case the presumption, for the same reason, prevails against the next preceding carrier and places on it the burden of showing that the

damage was not caused while in its possession. *Ft. Worth & D. C. Ry. Co.* v. *Shanley,* 36 Texas Civil Appeals, 291, 81 S. W. 1014; *Connelly* v. *Illinois Cent. Ry. Co.* (Mo.) 113 S. W. 233. Applying this rule to the case in hand, it is found that the evidence is sufficient to make out a *prima facie* case against the appellant, which has not been overcome.

It is also contended that the evidence shows that appellee refused to accept the shipment and that the damage was caused or augmented by that delay. The point seems not to have been stressed in the testimony below, but there is at any rate enough testimony to justify a finding that all the damages were done to the cotton seed before they were tendered to the consignee and that the latter accepted the goods promptly after they were tendered. It is true that one of the employees of the delivering carrier stated that the delay of three days, while the seed were in the hands of that carrier, was caused by the refusal of the consignee to accept; but the testimony of Mr. Winfield, the manager of appellees' manufacturing plant and business, was sufficient to justify the conclusion that the refusal and the final acceptance all occurred on the same day, and that there was no time for the injury to occur between the time of the refusal and the final acceptance.

There is no assignment of error except the alleged insufficiency of the evidence, and since we find that there was enough to sustain the verdict, it follows that the judgment must be affirmed, and it is so ordered.

C. J. LINCOLN COMPANY *v.* STATE.

Opinion delivered February 7, 1916.

LIQUOR—STATE-WIDE PROHIBITION LAW—SALE OF PURE ALCOHOL.—Act No. 30, p. 98, Acts 1915, known as the State-Wide Prohibition Act, made it unlawful "to manufacture, sell or give away * * * any alcoholic, vinous, malt, spirituous or fermented liquors * * * within the State * * *." *Held,* the act did not repeal existing laws prohibiting the unrestricted sale of alcohol, and did not exclude the sale of that article from the prohibitive terms of the statutes.

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

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellant.

The Liquor Acts; Gantt's Dig., § 5052, Act 1878; Acts 1879, p. 33; Acts 1883, p. 192; Acts 1907, p. 1237; Acts 1911, p. 64; Kirby's Dig., § 5093; Acts 1913, p. 180, (Going Act); Acts 1915, p. 98 (State-wide prohibition). *Alcohol is not a liquor.* 34 Ark. 340. It is not within the purview of the laws. 39 *Id.* 216; 43 *Id.* 152; 9 Enc. Dig. Ark. Rep., p. 438, par. 68. The word "alcoholic liquors" is substituted for "alcohol." 56 Ark. 444; 77 *Id.* 443. Alcohol is an article of commerce and indispensable in the manufacture of medicines and in the arts and sciences. In its raw state it can not be used as a beverage. The demurrer should have been sustained.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, *M. E. Dunaway,* Prosecuting Attorney, for appellee; *W. R. James,* of counsel.

1. Alcohol is included in the prohibition against the sale of "any alcoholic * * * etc. liquors." 23 Cyc. 63; 98 N. C. 723; 76 Iowa, 245; 26 W. Va. 422; 149 Mass. 316; 104 Ga. 727; 159 Ala. 71; 24 S. W. 902; 75 *Id.* 536; 26 W. Va. 422; 25 Kans. 751; 21 N. E. 369; 1 Words & Phr. 295, etc.

2. Courts take judicial knowledge that alcohol is intoxicating. 2 Wharton, Cr. Law 1989; 23 Cyc. 63; 159 Ala. 71; Tex. Civ. App. 508; Joyce on Intox. Liq., § 9; 135 Ga. 662; 81 *Id.* 753; 7 S. E. 631; 12 Am. St. 350; 159 Ala. 71; Woolen & Thornton, Intox. Liquors, § 9; Kirby's Dig., § 7792; 36 Ark. 38. Individual hardships or inconveniences cut no figure, where the end is the preservation of society from evil, disease, poverty and crime. 36 Ark. 38. The case of 34 Ark. 340 is not binding on this court; it is *dictum* and *not* the law. Cases *supra;* 75 S. W. 536; 1 Woolen & Thornton, Int. Liq., p. 5; 48 L. R. A. (N. S.) 302.

3. The law does not favor repeals by implication. 10 Ark. 95-103. There must be repugnancy or express re-

peal. 23 Ark. 304; 28 *Id.* 317; 34 *Id.* 499; 45 *Id.* 90. An endeavor is always made to so construe two apparently inconsistent statutes so as to give effect to both. 50 Ark. 132; 76 *Id.* 443; 92 *Id.* 600 *Ib.* 266; 109 *Id.* 24; 72 *Id.* 125; 112 *Id.* 353. The object was to prevent the sale of alcohol *and* alcoholic liquors.

McCULLOCH, C. J. This is an action instituted by the prosecuting attorney of the Sixth Judicial Circuit in the Pulaski Chancery Court, pursuant to the Act of February 6, 1915, (Act No. 109, Acts 1915), to enjoin the appellant from selling alcohol and from using it in the manufacture of medicines, tinctures and varnishes for sale. Appellant admitted the truth of the allegations and the court decided that it is not unlawful to use alcohol in the manufacture of medicines, tinctures or varnishes, or to sell medicines, etc., when so manufactured, but that it does constitute a violation of the law to sell raw alcohol for any purpose. A decree was entered in accordance with that conclusion of the chancellor. The State has not appealed, and the question for decision on the present appeal is whether or not it is unlawful to sell alcohol.

The first act on the subject levied a tax on the business of selling, "either at wholesale or retail, any ardent or vinous liquors, it being an occupation of no real use to society (except the same is sold exclusively for medicinal purposes). Act of April 28, 1878 (Gantt's Digest, section 5052). This court, in the case of *State* v. *Martin,* 34 Ark. 340, affirmed a judgment of the circuit court sustaining a demurrer to an indictment which charged the defendant with selling "one quart of alcohol without paying the special tax by law levied." In the opinion it was said that "alcohol is not either ardent or vinous spirits, or liquor of any kind, and its sale is not in any manner restricted or attempted to be regulated."

The next statute on the subject declared it to be unlawful "for any person to sell any ardent, vinous, malt or fermented liquors in this State, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, in any quantity or for any purpose whatsoever, without first procuring a license," etc., except that

manufacturers of such liquors could sell in original packages of not less than five gallons. Act of March 8, 1879, page 33.

The Act of March 21, 1881, (Acts 1881, page 140), commonly known as "The Three Mile Law," made it unlawful to "vend or give away any spirituous or intoxicating liquors of any kind, or any compound or preparation thereof, commonly called tonics or bitters," within the radius of three miles of any church or school house, when so prohibited by an order of the county court. In *State* v. *Witt,* 39 Ark. 216, a count in the indictment charging the accused with having sold "one pint of alcohol" was quashed, and this court affirmed the decision.

The Legislature then passed the Act of March 26, 1883, (Acts of 1883, page 192), amending the Act of March 8, 1879, by inserting the word "alcohol" after the word "sell," and also by inserting the words "or intoxicating spirits of any character which are used and drunk as a beverage." That statute was passed to change the law so as to cure the omission pointed out in the cases just cited. *Chamberlain* v. *State,* 50 Ark. 132. The Act of March 16, 1911, (Acts of 1911, page 64), amended the Act of March 8, 1879, by striking out the exceptions which permitted the sale of liquor in original packages. The law stood in that condition until the General Assembly of 1913 passed what is commonly known as the "Going Law," (Acts of 1913, page 180) which provides that the license for the sale of liquor can be obtained from the county court only upon presenting a petition signed by a majority of the adult white inhabitants of the municipality where the business is to be conducted. The first section of that act reads as follows: "Section 1. It shall be unlawful for any court, town or city council, or any officer thereof, to issue a license or permit, or any other authority to any corporation, person or persons, to sell, barter, or give away, any alcoholic, malt, vinous, or spirituous liquors, or any compound or preparation thereof, commonly called tonics, bitters, or medicated liquors, within the State of Arkansas, except as provided in this act."

The last statute on the subject is the "State Wide Prohibition Law" of February 6, 1915, (Act No. 30, Acts of 1915, page 98), the first section of which makes it unlawful for any county judge, or the council of any municipal corporation, to issue license to anyone, "to manufacture, sell, barter, or give away any alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors," and the second section of which makes it unlawful for any person or corporation "to manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away" of any of the before enumerated liquors.

Now, the contention of appellant is, relying on the decisions in *State* v. *Martin, supra,* and *State* v. *Witt, supra,* that the "Going Law," of 1913, and the "State Wide Prohibition Law," of 1915, having omitted the noun "alcohol" and substituted the adjective "alcoholic" before the word "liquors" have changed the law so as to restore it to the state in which it was expounded by the decisions of the court in those cases. The contention is unsound, we think, for more than one reason. In the first place, the recent statutes are expressly declared to be cumulative to existing laws on the subject, and the lawmakers have not manifested any intention, in using the words "alcoholic liquors" instead of "alcohol," of changing the law with respect to the character of liquors, the sale or giving away of which is forbidden. Moreover, the words "alcoholic liquors" do not fall within the restrictive definition laid down in the cases above cited. Those words necessarily include raw alcohol, for if a compound or dilution thereof constitutes alcoholic liquors, the raw alcohol, which is the basis of a compound, is included in the meaning of that term.

It is scarcely necessary to further discuss the decisions just referred to. They are generally disapproved by the decisions in other states. But even if the court was correct then in saying that it did not judicially know that alcohol was intoxicating, or that it was in common use for the purposes of dissipation or even that it was ca-

pable of being applied to such a use, it may be that we can, in the light of further developments in the restrictions of the sale of intoxicants and the evasive substitutes which have come into use, take judicial cognizance of the fact, known to all, that alcohol is an intoxicant and is frequently used by certain classes "for purposes of dissipation." See cases cited on the brief of counsel for the State. This court has decided that the court should take cognizance of the fact that beer is intoxicating. Then why not alcohol, too? *Williams* v. *State,* 72 Ark. 19.

The language quoted from the *Martin case, supra,* was *dictum* because the reason for affirming the judgment had already been stated to be that "it was not charged that the defendant was a liquor dealer, and such special taxes were required only of liquor dealers by the statute in force when the indictment was found." In the statutes in force when that case was decided, as well as when the *Witt case, supra,* was decided, neither the word "alcohol" nor the words "alcoholic liquors" was used, so whatever else may be said about those cases it follows that neither of them is authority for upholding the contention of appellant in the present case.

At any rate, we are convinced beyond doubt, from the language of the last statutes on the subject, that the Legislature did not intend to repeal existing laws prohibiing the unrestricted sale of alcohol, and did not intend to exclude the sale of that article from the prohibitive terms of the new statutes.

The decree is therefore affirmed.

HART, J., (concurring). I fully concur in the decision of the court holding that under the prohibition act of 1915 the sale of raw alcohol by appellant was unlawful; that the sale of alcohol absolute, or raw alcohol, may be classed as either alcoholic or spirituous liquors within the meaning of the statute. I think it is unlawful to sell it or any compound or preparation thereof commonly called tonics, bitters, or medicated liquors which could be used as a beverage.

I can not, however, agree with my brother judges in holding that the issues raised by the appeal in this case

should be confined to the narrow limits placed upon them by the opinion of the court. The complaint filed by the prosecuting attorney alleges that the appellant is doing a wholesale drug business in the city of Little Rock and as such is engaged in the wholesale manufacture of medicines such as laudanum, paregoric, etc., and of tinctures and varnishes; that the appellant uses alcohol in the manufacture of said medicines, tinctures and varnishes and sells the compounds to retail druggists; that appellant keeps alcohol for the purpose of manufacturing and selling said articles and that the keeping thereof is a public nuisance under the provisions of Act 109 of the Acts of 1915 of our Legislature.

The appellant filed a demurrer to the complaint.

The chancellor held that it was not a violation of the laws of this State for appellant to have in its possession alcohol in its raw state to be used in the preparation of medicines, tinctures and varnishes specified in the complaint, and that it was not unlawful to sell said medicines, tinctures and varnishes to others when manufactured. The court held, however, that it is a violation of the law for the appellant to sell to others alcohol in its raw state. The court declined, therefore, to enter a decree prohibiting appellants from keeping alcohol to be used in the manufacture of medicines, tinctures and varnishes, but did enter a decree enjoining appellants from selling or giving away alcohol in its raw state.

I think that the question of whether appellant can use alcohol in making medicines, tinctures and varnishes is within the issues; for if appellant has not that right the keeping of alcohol by it for that purpose would be a nuisance and the decision of the court in not enjoining it from keeping same for the purpose was erroneous.

If it be said that the decision of the court in this respect was favorable to appellant and that it is in no attitude to complain, a sufficient answer is that this cause was advanced on the docket as a matter of grave public interest, and the view is at least opposed to the spirit of our former decisions on the question. See *McClure* v. *Topf & Wright,* 112 Ark. 342, and *Trammell* v. *Bradley, County*

Judge, 37 Ark. 374. In the first case, Topf & Wright had complied with the terms of the act, and claimed they had obtained the signatures of the required number to make for saloon license; and having done so, they could not turn back and attack the legality of the statute. It is well settled that the validity of a statute can not be questioned by one to whom it has no application, or who is not injured by it, or who has voluntarily complied with it. And the general rule is that courts refuse to pass on the constitutionality of a statute unless absolutely necessary to a decision of the case. The court in view of the grave public interests involved in the question waived those points and passed upon the validity of the statute. The same view was taken in the last mentioned case where the decision of the lower court was adverse to the applicant for saloon license.

Being of the opinion that the question of whether or not the appellant can keep alcohol for use in the manufacture of medicines, tinctures, etc., is within the issues raised by the appeal, it becomes necessary for me to express an opinion on whether the prohibition act passed by our Legislature in 1915 forbids the sale of such medicines, tinctures, etc.

In my opinion, it is not a reasonable construction of the statute to hold that it prohibits the sale of every medicine or article in the preparation of which alcohol is used. My views are well expressed in the opinion rendered in *In Re Intoxicating Liquor Cases,* 25 Kan. 751, 37 Am. Rep. 284. In that opinion Mr. Justice Brewer, afterwards a member of the Supreme Court of the United States, said:

"If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of alcohol does not necessarily bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating

liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients and ingredients of an independent and beneficial force in counteracting disease or strengthening the system."

I do not think medicines, tinctures, etc., containing alcohol, which can not be used as beverages, come within the prohibition of the statute. I think the views I have expressed are in accord with our previous decisions on the question.

LONGSTRETH v. HALTER.

Opinion delivered February 7, 1916.

ACCORD AND SATISFACTION—DISPUTED CLAIM—ACCEPTANCE OF DEBTOR'S CHECK.—When a claim is in dispute and a debtor sends to his creditor a check or other remittance which he clearly states is a full payment of the claim, and the creditor accepts the remittance or collects the amount of the check, without objection, this constitutes a good accord and satisfaction.

Appeal from Conway Chancery Court; *Jordan Sellers,* Chancellor; reversed.

STATEMENT BY THE COURT.

This suit was instituted by the appellees against the appellants to recover judgment against appellants on a certain note executed to the appellee F. U. Halter, and to foreclose a mortgage on 163 acres of land in Conway County, executed to secure the note. The defense of appellants was payment, accord and satisfaction. The facts are substantially as follows:

Appellants borrowed of the appellee F. U. Halter $600 on July 15, 1910, and executed their note for the same, and also a mortgage on certain land in Conway County. The undisputed evidence showed that there had been paid on this note the sum of $400. On May 6, 1913, O. D. Longstreth wrote a letter to Halter in which he says: "I am sending you statement as I promised." The statement enclosed was as follows:

"I must owe you:

Principal on note	$600.00
Interest to date	79.00
Office rent, west of depot	9.00
Cow pasture	12.00
	$700.00
Credit paid by checks	350.00
	$350.00

You owe me:

Halter v. Kinchloe *et al.;* Kinchloe v. Dunaway..$500.00

The letter continues as follows: "Since this was a big case and we did not have time to try it and because of the favors you have shown me heretofore I am willing to cut the amount to $300, if that will be satisfactory to you. $300 is 10 per cent on $3,000, the least amount you would have been entitled to had you preferred damages to getting the property. Since you got the property which you wanted rather than the damages I hope you will not regard the fee of 10 per cent as anything but reasonable. You were to pay $4,500.00 for one-half lot, Frauthenthal paid $1,666 2-3 for one-ninth lot value of lot $15,000.00. Your half was worth then $7,500.00. Your loss would then be $4,500.00 from $7,500.00, or $3,000.00 for which the judge would have instructed the jury as a minimum. Trusting that this will settle all amounts between F. U. Halter and O. D. Longstreth and Mayme Longstreth. I am enclosing herewih my check for $50.00, which balances the above account.

Very truly yours,

O. D. Longstreth."

F. U. Halter testified concerning this statement that he received it on the 6th of May; that he did not accept that statement as a final settlement. He was asked this question: "Why, if you did not consider Longstreth's indebtedness to you as paid in full, when you received the last payment made to you of $50.00 you didn't return the check to Longstreth?" and answered, "I held the check several weeks before cashing the same and only cashed

the same after I was instructed to do so and was told that it would not have any effect on the case."

It was the contention of the appellants that F. U. Halter had employed O. D. Longstreth as an attorney to represent him in bringing about the consummation of the purchase of certain real estate from the Kinchloe heirs, which he had made from one J. D. Dunaway, acting as the agent of such heirs, the real estate involved in the transaction being certain lots in the town of Conway. The testimony of the appellants concerning this tended to show that Halter had purchased these lots from one Dunaway, agent of the Kinchloe heirs for the sale of the property, the consideration for the purchase being the sum of $4,500.00; that after the contract for the purchase was made and the sum of $50 had been paid as earnest money to close the deal, the heirs had repudiated the transaction and had sold the property to Joe Frauenthal; that Halter employed attorney O. D. Longstreth as an attorney, to enforce the contract for the purchase, or to sue for damages for failure to carry out their contract; that he rendered services in this connection which were reasonably worth the sum of $500, for which the charge was made in the statement rendered appellee F. U. Halter. The testimony in regard to this transaction is somewhat voluminous and it is unnecessary, in the view we take of the case, to set out and discuss the same in detail.

The testimony on behalf of the appellees in this connection was to the effect that F. U. Halter did not employ Longstreth to represent him in the capacity claimed. The testimony of Halter however shows that he did consult with Longstreth as to the purchase of the real estate, but denies that he ever authorized him to bring suit. He stated that he discussed the matter, sometimes two or three times a day from about the middle of July until the middle of August, with Longstreth. He did not know whether Longstreth prepared a complaint to file against the Kinchloe heirs or not. Among other things he stated as follows: "About the last of May or first of June, 1913, I told Longstreth I wanted my money. He said he had an account against me; that he would look it up. Be-

fore receiving the statement I had no knowledge that he contemplated charging me anything for what he claims to have done. Longstreth said there would be no charge unless I instructed him to bring suit, which I never did." He denied specifically the testimony of Longstreth in regard to his employement, but did not deny that Longstreth did the work which Longstreth testified that he did do concerning the real estate transaction. Appellee testified that there was a balance due on the note in the sum of $200.

The court found generally "the issue of law and fact for the plaintiff upon his complaint, and against the defendants upon their answer setting up a plea of payment and accord and satisfaction," and that there was due and unpaid upon the note sued on the sum of $297.40, including principal and interest, and rendered a decree in favor of the appellees against the appellants for that sum, and foreclosing the mortgage on the lands therein described. The appellants have duly prosecuted this appeal.

John Clerget, O. D. Longstreth, A. C. Martin and *Geo. A. Longstreth,* for appellants.

1. The acceptance and collection of the check without remonstrance or explanation was an accord and satisfaction. 94 Ark. 162; 148 N. Y. 326; 161 Ill. 339; 188 Mo. 623; 1 Corpus Juris. 554; *Ib.* 556, par. 76; Branson Inst. to Juries, § 111, p. 112; 98 Ark. 269; 100 Ark. 251; 112 *Id.* 503; 1 Corp. Juris., § 12, p. 270, 528, § 14, 529, § 16.

2. Where an agreement is fully executed to discharge a debt by payment of a smaller sum and such discharge is evidenced by a written receipt in full satisfaction of the greater, there is a valid discharge of the whole debt. *Ib.* citing 75 Ark. 354; 69 L. R. A. 823; 44 Ark. 349. See also, 1 Corp. Jur., pp. 557-8, 562-5, 570, par. 95-105, etc.

3. *Implied contract.* Where a party avails himself of the benefit of the services of another, though without express authority or request, the law implies a promise to pay. 26 Ark. 360; 56 *Id.* 382; 75 *Id.* 192. As to the relation of attorney and client, see 4 Cyc. 897; 2 Rul. Case

Law, par. 26, p. 995; 18 S. W. 907, a ruling case; 4 Cyc. 927; 38 Ark. 149.

4. There was an account stated. 32 Ark. 470; 41 *Id.* 502; 55 *Id.* 376; 19 *Id.* 686; 80 *Id.* 439; 64 *Id.* 39; 1 Cyc. 370-1, 74-5; 53 Ark. 155.

5. Undisputed evidence can not be disregarded. 96 Ark. 500; 113 *Id.* 190.

E. M. Merriman, for appellee.

The plea of accord and satisfaction is not well founded. There was no dispute or controversy to settle, and appellee had a right to accept the check as a partial payment and not as a final settlement. The fee is exorbitant for services never rendered; never taken advantage of; nor of any benefit. The decree is right and should be affirmed.

WOOD, J., (after stating the facts). The issue as to whether or not appellee F. U. Halter employed Longstreth as attorney, and as to whether or not Longstreth rendered the services to Halter that were reasonably worth the amount claimed by Longstreth was purely one of fact. Without discussing the evidence in detail it suffices to say that the weight of the evidence on this issue, was in favor of the contention of the appellant Longstreth. The proof shows that he was employed by Halter and performed services for him in the capacity of an attorney which, taking into consideration the character and value of the services rendered and the benefit which Halter derived therefrom, were reasonably worth the sum of $500. While Halter denied that he employed Longstreth to represent him in the capacity claimed by the latter, yet it is not reasonable to conclude that Longstreth, under the circumstances, would have done the work which he testified he did do, and which is not denied by Halter, unless he had been employed and was expecting remuneration for his services.

Longstreth testifies concerning this that he had no stipulated fee with Halter, but that his understanding with Halter was that if he rendered him the services and got no results he would make no charge, but that if he

got what Halter wanted his fee would be as much as the best firm of lawyers would charge for the same work and results. He details fully the work that he did, and his own testimony and the testimony of reputable attorneys as to the amount and character of the work, as shown in the hypothetical case stated, tends to prove that the services rendered would be worth the sum of $500.

But, if we are mistaken in our conclusion on this issue, we are convinced that the chancellor erred in not holding that there was an accord and satisfaction.

The appellee Halter admits, in his testimony, that he received the statement contained in the letter of May 6, 1913, in which Longstreth set forth the account, as he understood it, between himself and Halter. He also admits this in this same letter he received a check for $50. This check was drawn on the Faulkner County Bank, in favor of Halter or order, and was signed by Longstreth, and stated on the margin that it was for "balance on loan," and was indorsed "Paid, July 11, 1913." The statement and letter accompanying this check show plainly that appellant Longstreth intended it as a payment of the balance which he conceived to be due appellee Halter. The statement contains an account not only of the amount due on the note, but also other items of indebtedness from Longstreth to Halter, together with a statement of credits, showing payments theretofore made, which, with the amount claimed for services, would leave a balance due the appellee Halter of $50. This letter and the statement and the check show conclusively that the $50 check was intended by Longstreth to balance the account between him and Halter and that Halter knew that it was so intended, and yet he made no reply to the letter denying the correctness of the statement, or the charge made by Longstreth for his services, and did not protest against receiving the check in payment of the account as same was stated by Longstreth, and did not return the check, but, on the contrary, presented the check for payment and received the money thereon.

The acceptance and collection of the check by appellee Halter without remonstrance or explanation, was, un-

der the circumstances, an accord and satisfaction, and brings this case within the doctrine of the cases set out in 1 R. C. L., p. 196, section 32, as follows: "When a claim is in dispute and a debtor sends to his creditor a check or other remittance which he clearly states is in full payment of the claim and the creditor accepts the remittance or collects the check, without objection, it is generally recognized that this will constitute a good accord and satisfaction." *Barham* v. *Bank of Delight,* 94 Ark. 158. See *Cunningham Com. Co.* v. *Rauch-Darragh Grain Co.,* 98 Ark. 269; *Barham* v. *Kizzia,* 100 Ark. 251.

It was the duty of appellee Halter, on the receipt of this letter containing the statement of account and check, if he did not intend to approve the statement and to accept the check in settlement according to such statement, within a reasonable time to notify appellant Longstreth of that fact and to return to him the check. 1 Corp. Jur., pp. 563-4, section 87. Halter was advised by this letter, statement and check that Longstreth was expecting that the value of the services which he claimed to have rendered Halter in the capacity of an attorney would be accepted by the latter and allowed as an off-set on the mortgage debt. Halter having cashed the check, must be held, under the circumstances, to have accepted Longstreth's version of the account and to have received the services rendered in payment *pro tanto* of the mortgage debt.

In *Lamberton* v. *Harris,* 112 Ark. 503, we said: "The performance of services by the debtor for the creditor which are received and accepted by the creditor in satisfaction of his debt, and which are of benefit to him, no matter how small the value may be, is a sufficient consideration to support an accord agreement."

The decree is therefore reversed and the cause remanded with directions to dismiss the complaint for want of equity.

AMERICAN NATIONAL INSURANCE COMPANY v. OTIS.

Opinion delivered February 7, 1916.

1. INSURANCE—LIFE INSURANCE—REINSTATEMENT OF FORFEITED POLICY—CONDITION AS TO LIABILITY.—Where a life insurance policy became suspended, a provision by the insurance company that the same would be reinstated upon the following terms, is enforcible: "That in case death occurs from any cause whatever within five weeks from the date of such reinstatement, the company shall not be liable to any extent whatever on account of such death," and such provision, being known to the insured, was not a forfeiture of the policy.

2. INSURANCE—ACTION ON POLICY.—In a suit to recover on a policy of insurance, the insured is bound by the terms of the contract of insurance.

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

STATEMENT BY THE COURT.

This suit was instituted by appellee against appellant to recover on a policy of life insurance issued by appellant on the life of one Alberta Rogers for the sum of $174 in favor of appellee as the beneficiary. The complaint set up the policy, alleged compliance with its terms on the part of the insured, the death of the latter, and prayed for the amount of the policy and the statutory penalty of 12 per cent and a reasonable attorney's fee.

Appellant answered, and alleged that it was not liable because the policy provides that: "In case death should occur from any cause whatever within five weeks from the date of reinstatement, the company shall not be liable to any extent whatever on account of such death;" that the insured, after being out of benefit for a certain time, was reinstated on the 4th day of January, 1915, and that the death of the insured occurred on the 19th day of January, 1915.

Appellee proved the contract of insurance, and the death of the insured on the 19th day of January, 1915; that she paid the premiums till the 23d day of February, 1914; that after that date no premiums were paid because, says the appellee, "the agent would not come out

to my house to collect, and I sent the money to the office several times but never found any one in." Appellee made application for reinstatement February 14, 1914. She signed the application for reinstatement that day, and gave the agent of appellant four dollars and took his receipt. The application contains the following provision: "I hereby declare my child who was formerly insured under the above named policy, to be in as good a state of health as when said policy was issued, and that, having allowed it to become lapsed, I wish to renew it, upon the understanding that it will not be in force (although I now pay the arrears), until the company shall have consented to revive the same."

The application for reinstatement was dated the 12th day of December, 1914. The receipt contains the following: "Under no circumstances will the company be liable under said policy in case of death, until the policy has been revived on the books of the company, and the money credited in the premium receipt book belonging to said policy." And on the margin of the receipt was the following notation: "If the company accepts the revival application amount paid will be credited in the premium receipt book belonging with the policy; otherwise the money will be returned."

The policy was returned to appellee and had on the back of it the following notation: "In consideration of lien on this policy to cover $4.20 arrears same is hereby revived subject to the conditions of policy, same to be deducted from first money due the assured."

On the 12th day of December, 1914, appellee paid appellant the further sum of forty cents and took appellant's receipt.

The superintendent of appellant, who conducted for it the negotiations with appellee for reinstatement, testified substantially as follows: The policy was turned over to him at the time or soon after the application for reinstatement. He attached the revival application to it and mailed it to the company on or after the 12th of December. The policy was due to be revived on January 4

following. Witness delivered the policy to appellee about January 10. It takes from two to four weeks to make an investigation on the policy revived, and after witness sends the policies to the company it takes some time—nearly a month—to act on them and return them. Witness delayed the policy for about thirty days for investigation. Witness accepted the $4 and also the forty cents as a deposit for revival. The death of the insured was fifteen days after the policy was revived and two months and five days after the application for revival had been made and all amounts in arrears had been paid.

The court instructed the jury to return a verdict for plaintiff in the sum of $174 and for a penalty of 12 per cent. Appellant excepted and duly prosecutes this appeal.

Skipwith W. Adams, for appellant.

According to the terms and conditions of the policy the insured can not recover where the death occurred within five weeks after reinstatement. 166 S. W. 17. The insurance company has the right to impose conditions for reinstatement not contrary to public policy. 112 Pac. 1106; 102 N. Y. Sup. 157. The revival was not complete until made on the books of the company. 65 N. Y. Sup. 1143; 107 Mich. 160; 64 S. E. 180.

Fink & Dinning, for appellee.

1. The provision in the policy on which appellant relies is void. "Revival" means to come to life again. 53 N. E. 950; 153 Ind. 160; 47 L. R. A. 489; 7 Words & Phr. 6212.

2. The provision was waived. 82 Ark. 150; 53 *Id.* 494. Forfeitures are not favored in law; and any agreement, declaration or course of action which leads one insured to believe honestly that by conforming thereto, a forfeiture will not be incurred by conformity thereto will estop the company. 65 Ark. 54; 94 *Id.* 227; 99 *Id.* 476. Fair dealing required the company to act promptly.

WOOD, J., (after stating the facts). (1) The undisputed evidence shows that when a policy holder in appel-

lant company had been suspended and had made application for reinstatement that it took the superintendent having charge of such applications from two to four weeks to make an investigation, and that it took sometimes nearly a month for the company to act on and return it. The agent took about a month for investigation, sending the application and the policy on December 12, 1914, and the policy was revived and the insured reinstated on January 4, 1915. The notation on the back recited that it was revived subject to the conditions of the policy, and the policy itself contained the reinstatement clause copied in the statement, which recites the conditions upon which the policy would be reinstated, among them being "that in case death occurs from any cause whatever within five weeks from the date of such reinstatement the company shall not be liable to any extent whatever on account of such death."

We know of no ground of public policy which forbids an insurance company from including the above as one of the conditions upon which its policy holders who are "out of benefit," *i. e.*, who have been suspended for nonpayment of premium, may be reinstated, nor is there any ground of public policy forbidding the policy holder from accepting the renewal of the policy and reinstatement upon these conditions. In the absence of some statute or some well recognized ground of public policy forbidding such conditions, the parties have a right to make them and are bound by them. See *Conway* v. *Minn. Mut. Life Ins. Co.*, 112 Pac. 106.

(2) The suit filed by appellee in this case is to recover on the policy and she is bound by the terms of the contract. It is not a suit in equity to reform the contract, nor a suit against the appellant for negligence in failing to revive the policy at an earlier date than January 4, 1915, the date when the insured was reinstated and the policy revived. Appellee, having grounded her right of action on the policy, under its plain provisions, is not entitled to recover.

This court has often held that the doctrine of waiver and estoppel applies to insurance contracts, and that these principles will be liberally applied when it is necessary to prevent injustice and fraud being perpetrated by insurance companies upon their policy holders, when the latter have been misled or imposed upon by the agents of such companies. Forfeitures of insurance policies are not favored in law, and insurance companies may be estopped from claiming such forfeitures by the acts of their agents towards the policy holders. This is familiar doctrine. See *German Ins. Co.* v. *Gibson,* 53 Ark. 494; *Phoenix Ins. Co.* v. *Flemming,* 65 Ark. 54; *Ark. Mut. Fire Ins. Co.* v. *Claiborne,* 82 Ark. 150; *Queen of Arkansas Ins. Co.* v. *Forlines,* 94 Ark. 227; *Lord* v. *Des Moines Fire Ins. Co.,* 99 Ark. 476. But these well established doctrines of waiver and estoppel, invoked by the learned counsel for the appellee, have no application to the undisputed facts of this record. There was nothing done or said by the superintendent of the appellant to lead the insured to believe that the insured would be reinstated and the policy revived upon any other conditions than those mentioned in the reinstatement clause of the policy. There was nothing to mislead the policy holder or to induce her to believe that her policy would be revived from the day that she made application therefor or at any earlier date than was usual in such cases. Having had the policy in her possession, she must be held to have been familiar with the reinstatement clause therein, which plainly declares that the company would not be liable for death occurring within five weeks from the date of the reinstatement, and when the policy was revived and returned to her with the date of reinstatement indorsed thereon she was fully advised.

So the case we have here is not one of waiver of forfeiture or estoppel by conduct, but it is the simple case of enforcing a contract that the parties made. As was said by Wheeler, J., speaking for the Supreme Court of New York, in *Greenwaldt* v. *United States Health & Accident Ins. Co.,* 102 N. Y. Sup. 157-8: "While the

courts have been reluctant to permit insurance corporations to void their policies through forfeiture clauses, I find no case in which they have made a new or different contract from that which was entered into between the parties. This is not the case of an insurance company voiding its policy; it is an effort to make it liable under conditions which it was agreed should not constitute a liability."

Inasmuch as the undisputed evidence shows that Alberta Rogers, the insured, died within five weeks from the date of the reinstatement of her policy, under the express terms of such policy the appellant is not liable, and the court therefore erred in directing a verdict in favor of appellee. For this error the judgment is reversed and the cause dismissed.

SHAWMUTT LUMBER COMPANY *v.* WAITES.

Opinion delivered February 7, 1916.

JUSTICE COURTS—JURISDICTION—PRAYER FOR JUDGMENT AND ATTACHMENT.—A. brought suit against B. in justice court, praying for judgment for a sum named, on account of labor performed, and for an order of attachment on certain lumber. *Held*, the justice had jurisdiction to render a personal judgment against B., and on appeal to the circuit court, where the case is tried *de novo*, the circuit court has the same jurisdiction as the justice court; an order of attachment, issued by the justice was subsidiary and incidental to the relief prayed, and a prayer for such order does not constitute the action a proceeding *in rem*.

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

STATEMENT BY THE COURT.

On the 25th of November, 1914, the appellee filed before a justice of the peace the following affidavit (omitting formal parts); "The plaintiff, W. F. Waites, states that the defendant, the Shawmutt Lbr. Co., is justly indebted to him in the sum of $133.49, for labor performed by plaintiff for the defendant for hauling saw logs to defendants saw mill, etc." Appellee prayed for

judgment and an order of attachment. Summons was issued and included therein was a writ of attachment, commanding the Shawmutt Lumber Company to appear on the 10th of December, 1914, to answer the claim of plaintiff for debt amounting to $133.49.

On the 12th of December, 1914, a trial was had before a jury which returned a verdict in favor of the appellee against appellant for the amount claimed, and also sustaining the attachment of the lumber described in the writ of attachment, and judgment was entered directing a sale of the lumber to satisfy the demand. The appellant, on the day the judgment was rendered, gave notice and prayed for an appeal to the circuit court, and on the 4th day of January, 1915, it filed an affidavit and appeal bond, which provided that if the appeal should be dismissed it would satisfy the judgment of the justice, or if judgment should be rendered against it on a trial anew in the circuit court it would satisfy that judgment. The justice refused to grant the appeal. Application was made to the circuit court for an order requiring the justice of the peace to grant the appellant an appeal, and for a restraining order against the appellee, the justice, and the sheriff from further proceedings under the justice's judgment, and the appellant tendered with the application his appeal bond. The circuit judge granted the prayer of the petition and granted the appeal. The appeal was perfected, and on the 16th of March a trial was had by a jury in the circuit court. Evidence was adduced and the court instructed the jury, to which no exceptions were saved, and the jury returned a verdict in favor of the appellee in the sum of $136.15. The appellant's motion for a new trial was overruled, judgment was entered against appellant and the sureties on its bond, and it duly prosecutes this appeal. Other facts stated in the opinion.

J. W. Bishop, for appellant.

1. Where the error is apparent from the face of the record no motion for new trial is necessary, 26 Ark. 536, 662; 46 *Id.* 21; 61 *Id.* 35.

On appeals from justice courts, the circuit court only acquires such jurisdiction as the J. P. had, and can render only such judgments as the justice should or could have rendered. 77 Ark. 234; 85 *Id.* 445; Kirby's Digest, § 4682; 48 Ark. 353; 44 Ark. 377; 61 *Id.* 33; 85 *Id.* 444. This case was *in rem* involving a lien on lumber. It was error to permit plaintiff to change to an action *in personam. Cases supra.*

C. E. Johnson, for appellee.

1. This court will not review the instructions. 41 Ark 535; 44 *Id.* 103; 59 *Id.* 215; 62 *Id.* 262.

2. There is legal evidence to support the verdict. 51 Ark. 457; 56 *Id.* 314; 46 *Id.* 142. The verdict is conclusive where there is a conflict of evidence. 70 Ark. 513; 67 *Id.* 399; 70 *Id.* 136. This court only considers errors in the ruling of the trial court. 85 Ark. 200.

3. The trial court has the witnesses before it and has opportunity to observe their manner of testifying and demeanor, and if it permits the jury's verdict to stand, it is conclusive unless wholly unsupported by legal evidence. 76 Ark. 373; 78 *Id.* 589; 76 *Id.* 615; 71 *Id.* 242; 112 Ark. 305; 74 Ark. 478.

4. There was no change in the action. A personal judgment was sought; the attachment was only an ancillary proceeding. Judgment was properly rendered against appellants and his sureties on the appeal bond. 97 Ark. 97.

WOOD, J., (after stating the facts). We treat as abandoned those grounds of the motion for a new trial that are not specifically argued in the brief. Therefore, the only question for our consideration on this appeal is whether or not the circuit court had jurisdiction to render the judgment against the appellant and the sureties on its appeal bond.

The appellant's counsel urges that the circuit court was without jurisdiction for the reason, as he states, that the cause was one *in rem,* involving the question as to whether or not the appellee was entitled to a lien on a certain pile of lumber owned by the appellant. The affi-

davit, to which we must look for the jurisdiction of the justice, prayed for judgment in the sum named and for an order of attachment. The justice therefore had jurisdiction to render personal judgment against the appellant, and on appeal to the circuit court the case was tried *de novo* and the circuit court had the same jurisdiction that the justice court had. The order of attachment was subsidiary and incidental to the relief prayed, and prayer for such order did not constitute the action a proceeding *in rem* as appellant contends. When judgment was rendered against the appellant in the justice court and it filed its appeal bond, under the provisions of that bond the appellant and its sureties were bound to satisfy any judgment that should be rendered against it.

By the express terms of the bond the appellant and its sureties became liable for any judgment rendered by the circuit court, and that court, therefore, did not err in entering judgment against the sureties on the bond as well as against the appellant. The judgment is therefore affirmed.

MOSLEY v. MOHAWK LUMBER COMPANY.

Opinion delivered February 7, 1916.

1. CHANGE OF VENUE—DISCRETION OF TRIAL COURT—REVIEW.—The law leaves the matter of granting a change of venue in civil actions to the discretion of the trial judge, and permits the opposite party to controvert and resist the petition therefor, and the court's decision denying such petition will not be reviewed unless it appears to have been arbitrarily made.
2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK—DISCOVERY OF DEFECT.—A servant does not assume the risks of the master's negligence, but assumes only the ordinary risks incident to his employment; the fact that a servant could, by the exercise of ordinary care, have discovered the defect which caused the injury, and avoided the danger, does not constitute an assumption of the risk where it arose by reason of the negligence of the master, even though such servant may have been guilty of contributory negligence which would bar his recovery.
3. MASTER AND SERVANT—ASSUMED RISK—ERRONEOUS INSTRUCTION—PREJUDICIAL ERROR.—In an action for damages resulting from an

accident which caused deceased's death, while deceased was acting as engineer on a logging road, an instruction that deceased assumed the risk of his employment unless he did not know, or by the exercise of ordinary care, could not have known of the defective condition of the track of defendant, which caused the injury, is prejudicial, and when given, constitutes reversible error.

4. EVIDENCE—OBJECTION TO COMPETENCY.—Any objection to particular evidence on the ground that it is incompetent, does not go to the competency of the witness, a specific objection being generally necessary to raise such questions of competency.

5. EVIDENCE—PARTY TO SUIT—RIGHT TO TESTIFY—STATUTORY INHIBITION—MANAGER OF CORPORATION.—In an action against a corporation by an administratrix for damages growing out of the death of an employee of the corporation, due to the corporation's negligence, the manager of the corporation is not a party to the suit within the inhibition of Kirby's Digest, § 3093, prohibiting a party to the suit from testifying in an action by or against an administrator.

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

STATEMENT BY THE COURT.

This is a suit for damages by the administratrix, for the benefit of the estate and next of kin, for personal injuries, resulting in the death of her intestate, alleged to have been caused by the negligence of the lumber company in the maintenance of its track and operation of its logging train, of which deceased was engineer.

There was a motion for a change of venue filed, appellant in her affidavit stating she verily believed that the plaintiff could not obtain a fair and impartial trial in the county in which the suit was pending "on account of the undue influence of the defendant in said county."

The supporting affidavits of two citizens were filed, stating they were in no manner related to the plaintiff and that they verily believed the facts set forth in the petition for a change of venue were true. Like affidavits from 8 other citizens made before J. S. Ragan, a justice of the peace, were also filed and of 12 others made before another justice of the peace, being affidavits of 22 in all, in support of the motion. The defendant filed a response to the motion for a change of venue, denying that it was necessary, in order to obtain a fair and impartial trial,

and the allegation that plaintiff could not obtain a fair and impartial trial on account of any undue influence of the defendant or any of its stockholders, and that any undue prejudice existed against the plaintiff in the county and submitted affidavits of 28 citizens of the county in support of its response. Each of said affidavits states the maker is a citizen, his avocation or business and the portion of the county in which he resides, that he is acquainted with a large per cent of the citizens of the county or township, as the case may be, and with the stockholders of the company, naming them and that neither the defendant nor any of the stockholders have any undue influence with the people of Columbia County, such as to prevent the plaintiff from obtaining a fair and impartial trial at the hands of the jury of said county. That there was no undue prejudice existing against the plaintiff or her cause of action, such as would prevent her from obtaining a fair and impartial trial before a jury in said county."

Four of the affiants were merchants, six of them residents of Magnolia, one of the six being the cashier of the bank, and the others were citizens of the different townships of the county, mostly engaged in farming.

The court denied the motion for a change of venue and plaintiff excepted to his ruling thereon.

C. C. Mosley was the engineer upon the train hauling logs from the woods over its tram or log road to the mill, and on the 23rd day of May, while pulling a train load of five loaded cars of logs, the engine left the track and turned over and imprisoned the engineer and he was scalded to death by the escaping steam and hot water.

It was alleged and the testimony tended to show on the part of the appellant, that the derailment of the train was caused by insufficient fastening of the ends of two rails of the track, together with a defective fish plate not securely bolted and fastened, permitting one of the rails to be pushed out by the flange of the engine causing

a lip in the joint and the flange of the wheel to mount the rail and run off.

The undisputed testimony shows that the defect, if any existed, and there was sharp conflict in the testimony on this point, was one that could not be discovered by ordinary observation in passing, but only by inspection. The testimony on the part of the defendant lumber company tended to show that the injury resulted from the negligence of the deceased in operating the train down grade at an unusual rate of speed and with an extra number of loaded cars, contrary to the instructions of the appellee.

The manager of the defendant corporation, over objection, testified that he had told the deceased upon several occasions that he should only haul three loaded cars of logs each trip to the mill and that three trips a day, which he had ample time to make, would be sufficient to supply the mill with logs. The engineer insisted that he could haul five or six cars of logs a trip and only make two trips a day and later told the manager that he had done so, and invited him to come out and see how it was done. The manager told him that it was not the thing to do, and that if he hauled more than three cars he should cut the load at the top of the first hill, coming down and near the bottom of which the wreck occurred, and carry the other cars on over to the top of the second hill, the one nearest the mill, and leave them there until he could go back and bring the remaining cars over, and not to try to bring more than three loaded cars from the first hill on over the second, as he would have to run too fast to make the second hill.

The evidence tended to show that the engine was coming off the first hill at an unusual rate of speed, gaining momentum with which to climb the second hill, with the five loaded cars, at the time of the wreck. An old engineer, who had formerly operated the engine, was on it at the time, and testified it was going so rapidly that he got scared and got down in the tender as they came down the hill, just before the train was derailed.

The court instructed the jury, giving over appellant's objections instructions numbered 4, as follows:

"No. 4. If you find from the evidence that defendant's railroad track was in the defective condition alleged, and further find that such defective condition was a direct and proximate cause of derailment, you are instructed that before the plaintiff will be entitled to recover, *she must further show by a preponderance of the proof that said defective condition of defendant's railroad track was not known to the deceased, or could not have been known by him in the exercise of ordinary care for his own safety,* and that said defective condition was known, or ought to have been known, to the defendant in the exercise of ordinary care."

From the verdict and judgment in favor of the defendant, plaintiff prosecutes this appeal.

H. S. Powell, for appellant.

1. The change of venue should have been granted. Kirby's Digest, § 7998; 74 Ark. 172.

2. There was error in the admission of the evidence of Wingfield. Kirby's Digest, § 3093; Schedule to Const., § 2; 60 S. W. 648; 27 N. E. 215; 61 Neb. 709.

3. The court erred in giving instruction No. 4 for defendant. 77 Ark. 374, 458; 89 *Id.* 424; 83 *Id.* 567; 86 *Id.* 507; 92 *Id.* 102; 95 *Id.* 291; 86 *Id.* 516; 87 *Id.* 396; 101 *Id.* 197; 107 *Id.* 512.

T. D. Wynne and *C. W. McKay,* for appellee.

1. It was not error to refuse to grant the petition for change of venue. 74 Ark. 172.

2. There was no error in admitting the testimony of Wingfield, the general manager of the corporation. Kirby's Dig., § 3093. He was not a party to the suit. 113 Ark. 299; 40 Cyc. 2238, 2395; 86 Ark. 138; 24 *Id.* 620; 58 *Id.* 353-373; 56 *Id.* 465; 69 *Id.* 313; 60 *Id.* 88; 58 *Id.* 373; 29 *Id.* 17; 18 *Id.* 392; 92 *Id.* 107; 53 *Id.* 117; 142 Ill. App. 392; 83 *Id.* 210; 46 *Id.* 378. The conversation did not relate to a transaction with deceased. 78 Ark. 209; 40 Cyc. 2290; 63 Ark. 556.

3. There was no error in giving instruction No. 4 for defendant. But if error, it was not prejudicial.

KIRBY, J., (after stating the facts). It is contended that the court erred in denying the motion for a change of venue, in giving said instruction No. 4, and in admitting the testimony of the manager of the defendant corporation, relative to his instructions to the deceased in a suit by his administratrix.

(1) The law leaves the matter of granting a change of venue in civil actions to the discretion of the trial judge, and permits the opposite party to controvert and resist the petition therefor, and the court's decision denying such petition will not be reviewed unless it appears to have been arbitrarily made. Act 249, Acts of 1909; *St. Louis, I. M. & S. Ry. Co.* v. *Reilly,* 110 Ark. 182.

From the controverting affidavits, in support of the response to the motion for a change of venue made by twenty-eight citizens residing in different portions of the county, the court could have found that there was no such undue influence of the defendant, or its stockholders in the county as would prevent plaintiff from obtaining a fair and impartial trial of the cause, and did not err in denying said motion.

(2) The assignment that the court erred in giving instruction No. 4, is well founded, and must be sustained. Appellant specifically objected to the portion of said instruction in italics, requiring the plaintiff to show by a preponderance of the testimony that the defective condition of the track was not known to the deceased or could not have been known by him in the exercise of ordinary care for his own safety in order to a recovery. The objection should have been sustained and that portion of the instruction stricken out.

The servant does not assume the risk of the master's negligence, but only the ordinary risks incident to his employment and the instruction was erroneous in telling the jury that she could not recover unless she showed by a preponderance of the testimony that the defective condition of the track was not known to the deceased or could

not have been ascertained by him in the exercise of ordinary care for his own safety. The fact that the servant could by the exercise of ordinary care have discovered the defect and avoided the danger does not constitute an assumption of the risk where it arose by reason of the negligence of the master, even though such servant may have been guilty of contributory negligence, which would bar his recovery. *C., O. & G. R. Co.* v. *Jones,* 77 Ark. 374; *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458; *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 424; *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102; *Clark Lumber Co.* v. *Northcutt,* 95 Ark. 291; *C., R. I. & P. Ry. Co.* v. *Smith,* 107 Ark. 512.

Counsel for appellee insists that notwithstanding this erroneous instruction, no prejudice could have resulted from its being given, claiming that the testimony is undisputed, that deceased had no knowledge of the alleged defective condition of the track, nor could have had by the exercise of ordinary care for his own safety.

(3) Although it is true that the testimony shows that the defect in the track, if any existed, and the testimony is contradictory on that point, was one that could not have been discovered except by inspection; that it would probably not have been discovered by deceased in passing over it in the engine, and that his duties did not require him to make an inspection for its discovery; the jury might still have been misled by the instruction requiring appellant to show, after they found the defective condition of the track was the proximate cause of the injury, by a preponderance of the testimony, the defective condition was not known to the deceased, or could not have been known to him in the exercise of ordinary care for his own safety.

It is likewise insisted that the uncontradicted testimony shows that deceased was guilty of contributory negligence, resulting in his death, which barred the right of recovery therefor, and while the evidence does tend strongly to show that he was operating the train at an unusual rate of speed at the time of the derailment, in

violation of instructions, attempting to pull five loaded cars over the track from one hill to the next, instead of three, and that the defective track, or lip in joint, where the trucks began to leave the track, would not probably have caused the wreck, but for the unusual speed of the over-loaded train, we can not say that the uncontradicted testimony shows such fact.

The next contention is that the court erred in admitting the testimony of the manager of appellee corporation, relative to the directions given by him to the deceased about the operation of the train, and the hauling of loaded cars, this being a suit by his administratrix.

It is doubtful if a sufficiently specific objection to this testimony was made, and whether the objection would reach to the incompetency of the witness, but it will be treated as effectual under the circumstances.

(4) Any objection to particular evidence, on the ground that it is incompetent, does not go to the competency of the witness, as a rule, but a specific objection is generally necessary to raise such questions of competency. *Hammel* v. *St. Louis, I. M. & S. Ry. Co.,* 113 Ark. 299; *Mahoney* v. *Roberts,* 86 Ark. 138; *Fakes* v. *State,* 112 Ark. 592; 40 Cyc. 2233, *et seq.*

(5) The statute provides that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transactions with, or statement of the testator, intestate or ward, unless called to testify thereto by the opposite party. Kirby's Digest, § 3093.

This statute was only intended to prevent a party to the suit from testifying, under the conditions named, and the manager of the corporation was not a party to the suit, within the meaning of the statute, which does not provide that persons interested in the result of the litigation shall be excluded from testifying.

The corporation, the Mohawk Lumber Company, was the defendant in the suit, and the party thereto, and not

Wingfield, its general manager. 40 Cyc. 2290; *Stanley* v. *Wilkerson,* 63 Ark. 556.

For the error in giving said instruction, numbered 4, the judgment is reversed and the cause remanded for a new trial.

NEVADA COUNTY BANK *v.* SULLIVAN.

Opinion delivered February 7, 1916.

DAMAGES—BREACH OF BUILDING CONTRACT—STIPULATION FOR LIQUIDATED DAMAGES—VALIDITY—REASONABLENESS.—By the terms of a building contract, the contractor agreed to complete the building by a certain date, and the contract provided for the payment of $10 per day to the owner, for every day past the time set for the completion of the building. The lower floor of the building was for the sole use of the owner in its banking business. The contractor failed to deliver the building until several months after the date set in the contract, and the evidence showed that plaintiff was put to considerable inconvenience, and suffered damages which could not be estimated upon the basis of the rental value of the building. *Held,* under these facts, the contract contained a stipulation for liquidated damages, which was enforcible, as the amount stipulated for appeared to bear a reasonable relation to the damages contemplated at the time the contract was entered into.

Appeal from Nevada Chancery Court; *J. D. Shaver,* Chancellor; reversed.

Horace E. Rouse, for appellant.

1. The delay was inexcusable and the damages were liquidated at $10 per day. Where parties by the terms of their agreement expressly provide whether the damages shall be liquidated or unliquidated, they will be so construed by the courts. 13 Cyc. 94, and note 35; 56 N. E. 892; 14 App. D. C. 180; 183 U. S. 662, 46 L. Ed. 378; 183 U. S. 661; 20 N. E. 504. The contract says liquidated damages and the intention of the parties govern; 30 S. W. 560.

2. Appellant was entitled to the cost of correcting defects in the cornice. 97 Ark. 278; 64 *Id.* 34. Also, to the saving in hardware and the cost of correcting the stone. 97 Ark. 278. There was no waiver of the full

amount of the liquidated damages. Money paid by mistake in ignorance of the facts may be recovered. 102 Ark. 159, 160. Appellant could have paid the entire contract price without waiving any rights, and then sued for damages for the delay. 114 N. Y. Supp. 1084.

3. The damages were liquidated; not a penalty. 14 Ark. 329; 56 *Id.* 384; 72 *Id.* 524; 14 *Id.* 315, 327-8; 1 Suth. on Dam. (3 ed.), § 291, p. 761; 38 N. E. 1061; 13 Cyc. 98, 99; 69 Ark. 118; 110 Va. 358; 66 S. E. 46; 54 Ark. 340. It was unnecessary to prove the actual damages. 57 Ark. 168; 46 L. Ed. 366; 121 Fed. 609; *Ib.* 617, 618. The word "sole" in 104 Ark. 16, means only or exclusively. 11 App. D. C. 358, 369, 373; 8 Words & Phr., 6343. The rule as to the rental value of the building being the measure of damages does not apply here. 104 Ark. 9-16. The decree is erroneous and should be reversed and judgment entered here for the proper amount.

McRae & Tompkins, for appellee.

1. The delay was excusable as appellee used due diligence in getting the stone specified. 25 S. W. 1122.

2. Nothing should be allowed for alleged defects of cornice; saving in hardware or stone setting, but appellee should be allowed for extras.

3. Liquidated damages may be defined to be a *fixed sum as compensation* stipulated by the parties as the amount of damages for a breach and in lieu of actual damages. A penalty is a sum to be paid or forfeited upon nonperformance of a contract, its purpose being to *insure* performance rather than compensation for the breach. Courts do not lay down any general *rule* which will decide each case as presented, each case standing upon its own facts. It is, however, the tendency of courts to regard stipulations for damages as of the nature of a penalty rather than as liquidated damages in doubtful cases, as by doing so compensatory damages may be allowed and justice sustained. 13 Cyc. 94; 183 U. S. 642; 20 N. E. 504; 104 Ark. 9-16; 73 *Id.* 432; 48 Pa. St. 450; 92 Ark. 545; 69 *Id.* 114; 14 *Id.* 329; 56 *Id.* 384; 72 *Id.* 524; 57 *Id.* 168; 112 *Id.* 133; 55 N. E. 398; 38 *Id.* 1061; 66 S. E. 46; 160 S. W.

311; 128 N. C. 69; 84 N. W. 490; 13 So. Dak. 530; 19 Atl. 274; 45 N. W. 472; 32 S. W. 24; 72 Mo. App. 673; 108 Am. St. 55; 29 Neb. 385, etc.; 72 Ark. 529; 73 Ark. 436; 106 Ark. 279.

SMITH, J. On May 1, 1912, appellee entered into a written contract with the building committee of the Nevada County Bank by which he agreed to tear down and clear away the debris of its old building and construct, according to plans and specifications therefor, a new two-story brick building for the sum of $10,000, payable on estimates of the architect every two weeks in such sum as would not exceed 90 per cent of the value of labor and material furnished since the last preceding estimate, except that the final estimate should be for the balance due under the contract.

The contract provided that the building should be completed on or before August 15, 1912, and contained the following provision:

"And the contractor agrees to pay to the owner the sum of $10 per day as liquidated damages for each and every day which shall elapse between the time of completion and the time of actual completion."

The building was not completed within contract time, the lower floor not being completed and accepted until December 15, 1912, and the upper floor was not entirely completed until about February 15, 1913.

During the progress of the building certain extra work was ordered and after the completion of the building, a controversy arose over the cornice of the building and damages were claimed against appellees for defective work alleged to have resulted from the failure to follow the plans and directions of the architect. The parties undertook to adjust their differences and each made the other a proposition for a settlement, but each proposition was rejected. Whereupon appellee commenced suit for the balance which he alleged was due him, and sought to enforce a lien on the building to secure this sum.

As has been said, only the first floor of the building was ready for occupancy by December 15, at which time appellee wrote the following letter:

"Prescott, Ark., December 14, 1912.

"Building Committee Nevada County Bank, Prescott, Ark.

"Gentlemen: You may occupy the first floor of the bank building being erected by me under contract with you, without such occupancy in any way being considered an acceptance of the job or a waiver of any of the terms and provisions of my contract with you.

"Yours truly,

"J. A. Sullivan."

Upon receipt of this letter, appellant occupied the lower floor of the building, but we do not understand the proof to show that appellant would have had tenants ready to move into and occupy the offices on the second floor. Upon the contrary, the proof appears to be that even now some of those rooms are unoccupied. There was conflicting evidence upon the question of responsibility for the delay in the completion of the building, but the chancellor found that issue in favor of appellant. And there was also conflicting evidence upon the question of extra work and defective work, and we think the chancellor's finding on those questions is not against the preponderance of the evidence.

The important question in the case is whether the provision for the payment of $10 for each day's delay was a stipulation for a penalty or an agreement for liquidated damages. The contract allowed about three and one-half months for the erection of the building, and a contractor of much experience testified that sixty days would ordinarily have been sufficient time for the erection of the building where reasonable diligence was used in pushing the work. It was shown on behalf of appellant that its old building was torn down and carted off, and that the bank moved into the general mercantile store of a Mr. Hamilton across the street, where a space of about 8x12 or 14 feet was furnished, and for which a charge of $10 per month was made. Mr. Hamilton permitted this use of his store only until the time when it had been represented the bank building would be completed, after which time he demanded for his own use this space, whereupon the officers

of the bank moved into a part of the building used by Mr. Hamilton as an office, and shared there with Hamilton a standing desk from which the bank's business was transacted. There was no provision for keeping cash except in a cash drawer, and the bulk of the money was kept in the vaults of a competitive bank, while a part of the books were kept in a warehouse, and others in the competitive bank, and the remainder in their own safe on the street, and that other things and valuable papers were kept in the vaults of the competitive bank, to which place they were required to go when any of them were needed. It was also shown that $8,000 had been borrowed from a bank in Little Rock to be used in paying for this building, and under the loan contract this money could be used for no other purpose, and was kept on deposit with the bank from which it had been borrowed, during all of which time interest was being paid on it at the rate of 6 per cent. per annum. It was shown that there was much expense in moving and removing from Hamilton's stores as well as inconvenience and annoyance, during which time appellee was being prodded to complete the building. The cashier of appellant bank testified that he had no facilities for transacting the bank's business, that he lost some of the records temporarily, and that there was constant annoyance in keeping up with the records because of the lack of proper places to put them, and that there was no way to measure the annoyance and trouble of having no facilities for the transaction of the bank's business, and that this condition spoiled his business and ruined his collections for that fall, and that $10 per day would not, and did not cover the actual loss sustained by the bank by reason of being kept out of their building. That the fall of the year is the season for general collections and the acquisition of new depositors, and that there were deposits which the bank failed to get because of its lack of facilities.

In answer to all of this, it is insisted that appellee is not responsible for appellant's failure to properly equip itself for business, and that if its loans were not paid, the

interest continued to run, and that the rental value of the building was the measure of the damages.

The court found that appellee complied with his contract except for the delay, and that he was entitled to credit for the extras claimed, but declared the stipulation herein set out to be a penalty and unenforceable, and that it was placed in the contract to insure performance, and not for compensation; that the damages are easy of ascertainment, and are measured by the rental value of the building, and fixed appellant's damages for the delay from August 15 to December 15 at $125 per month, and from December 15 to February 15, at $50 per month, which damages were deducted from the sum found due appellee, leaving a balance in his favor of $66.63, for which amount a judgment was rendered. It was decreed that appellant was entitled to nothing as liquidated damages nor for defects in the cornice, and that appellant had waived its claim, if any it had, to liquidated damages, and found adversely on appellant's counterclaim, except a small item which was allowed on the rents as set out above.

There was an appeal and a cross-appeal, and it is now insisted that appellant waived any claim for liquidated damages by reason of the fact that at the time when such damages were due, if they were due at all, appellant paid appellee certain money which did not leave still due appellee a sufficient sum to pay these damages. But it was shown that $500 was paid appellee under a mutual mistake, as a result of which mistake appellant did not know of this $500 payment at the time it made the payment said to constitute the waiver, and it was further shown that the money was advanced to pay the claims of certain materialmen.

There are an almost unlimited number of cases which discuss the principles of law which are to be applied in determining whether or not a provision like the one here contained is an agreement for liquidated damages or a stipulation for a penalty. A large number of the leading cases on this subject is cited in the case note to *Webster* v. *Bosanquet,* an English case reported in 24 Ann. Cases

1019, and in the cases of *Madler* v. *Silverthorne,* 34 L. R. A. (N. S.) 1, and *Evans* v. *Moseley,* 50 L. R. A. (N. S.) 889.

But we need not go beyond the reports of our own State for an abundance of authority upon this subject. See, *Williams* v. *Green,* 14 Ark. 329; *Young* v. *Gaut,* 69 Ark. 114; *Lincoln* v. *Little Rock Granite Co.,* 56 Ark. 405; *Nilson* v. *Jonesboro,* 57 Ark. 168; *Lawrence County* v. *Stewart,* 72 Ark. 525; *Nevada County* v. *Hicks,* 38 Ark. 557; *Haldeman* v. *Jennings,* 14 Ark. 329; *Blackwood* v. *Liebke,* 87 Ark. 545; *Chickasawba Railroad Co.* v. *Crigger,* 83 Ark. 364; *Westbay* v. *Terry,* 83 Ark. 144; *Tidwell* v. *Southern Engine & Boiler Works,* 87 Ark. 52; *Cox* v. *Smith,* 93 Ark. 371; *Wait* v. *Stanton,* 104 Ark. 16; *Dilley* v. *Thomas,* 106 Ark. 279; *Kimbro* v. *Wells,* 112 Ark. 133; *Glasscock* v. *Rosengrant,* 55 Ark. 376.

The principles which control in the decision of this question have been applied to an almost infinite variety of conditions, and an apparent contradiction in some of the cases grows out of this fact. But there appears to be no substantial difference in the declaration of the principles themselves. An early and the leading case on this subject is that of *Williams* v. *Green, supra,* which case is recognized as an authority everywhere, and has been widely cited and quoted from. Our last case on this subject is that of *Montague* v. *Robinson,* 122 Ark. 163.

The case upon which appellee chiefly relies, and the one said to be controlling here, is that of *Wait* v. *Stanton,* 104 Ark. 16. But the principles announced there are in harmony with numerous other declarations of the court on this subject, and when these controlling principles were applied to the facts of that case, the court was constrained to hold the provision of that contract for the payment of damages to be a penalty. Under the facts of that case, the damages were of easy ascertainment, and were measured by the rental value of the property, and the damages provided for were entirely disproportionate to any damages, which in the contemplation of the parties, could have been sustained by delay in the nonperformance of the contract.

The instant case is clearly distinguishable on the facts from the case of *Wait* v. *Stanton, supra.* The building here contracted for was primarily a bank building intended for use in connection with that business, and only the second floor of the building was intended for rental purposes. At the time of making this contract, the parties must necessarily have contemplated that damages would result from delay in the construction of the building and in the very nature of the case these damages would be indeterminate and difficult of ascertainment, and as we view this evidence, it is even now impossible to determine with that degree of certainty which should exist for a jury to assess damages, what these damages were. Who can know what damages appellant sustained from loss of business through the lack of facilities to transact business? It is obvious that these facilities were indispensable to the successful conduct of the banking business, and it is manifest from the very date fixed for the completion of this contract that it was appellant's desire to have its building ready for occupancy before the beginning of its busy season. The evidence is that these conditions were discussed before the contract was signed, but even though such was not the case, it must have been manifest at the time the contract was made that damages would result from delay in its performance, and that this damage would be indeterminate and difficult of ascertainment. Moreover, the sum named is shown to bear a fair proportion to the damage sustained, indeed, the cashier of the bank says that the damage exceeded that amount. But it is not necessary that we find the fact so to be. It is sufficient to support the finding that these liquidated damages for the sum named appear to bear some reasonable proportion to the damage contemplated, and such we find the facts to be.

It follows, therefore, that the court erred in not allowing appellant's claim for the liquidated damages provided by the contract. The decree will, therefore, be

modified to allow appellant $1,220 on that account and to disallow the $600 allowed it on account of the rent, and the cause will be remanded with directions to the court below to enter a decree accordingly.

ROYAL INSURANCE CO. OF LIVERPOOL *v.* MORGAN.

Opinion delivered January 24, 1916.

1. FIRE INSURANCE—INVENTORY—TIME OF TAKING—QUESTION FOR JURY.—The finding of a jury that an inventory, which the insured testified had been taken within thirty days after the issuance of a policy of fire insurance, had been taken within that time, held conclusive.
2. FIRE INSURANCE—INVENTORY—LUMBER—DIMENSIONS.—An inventory, required to be given by a policy of fire insurance on certain lumber, held sufficient, which gave the dimensions of the lumber in each of several piles, and stated the total number of feet in each pile, but did not give the dimensions of the piles.
3. FIRE INSURANCE—LUMBER—INVENTORY.—Where plaintiff alleged the loss of 522,000 feet of lumber by fire, his failure to correctly itemize a small portion thereof, in making an inventory of all the lumber, will not avoid the policy.
4. FIRE INSURANCE—SET OF BOOKS.—In an action on a policy of fire insurance for the loss of lumber, *held*, under the evidence that the jury was warranted in finding that the record of logs scaled, together with the invoices showing the amount of shipments, constituted a compliance with the clause of the policy requiring books to be kept presenting "a complete record of business transacted, including all purchases, sales and shipments for both cash and credit."
5. FIRE INSURANCE—INSPECTION OF BOOKS—FINDING OF JURY.—The verdict of the jury held conclusive on the question whether the insured failed to deliver his books and other papers to the insurance adjuster, for his inspection.
6. FIRE INSURANCE—LUMBER—CHATTEL MORTGAGE—FORFEITURE.—A policy of fire insurance on certain lumber held not to be forfeited by the placing of a chattel mortgage on the lumber, when the agent of the insurance company, knew of the transaction and promised to make an endorsement on the policy, to prevent a forfeiture.

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

H. S. Powell, for appellant, *J. W. Warren,* of counsel.

1. No inventory was taken within thirty days of issuance of policy. 52 L. R. A. 70; 85 Ark. 579; 82 *Id.* 476; 94 *Id.* 228; 65 *Id.* 240.

2. No books were kept as provided by the terms of the policy. 52 L. R. A. 70; 65 Ark. 336; 94 *Id.* 228.

3. Books, bills, invoices, etc., were not produced and delivered as provided. 65 Ark. 336.

4. The policy was forfeited by false statements in proof of loss. 62 Ark. 350.

5. Policy voided by execution of deed of trust.

6. Verbal testimony not admissible to establish extent of loss. There was error in the instructions. 65 Ark. 240.

Gaughan & Sifford, for appellee.

1. Only *substantial compliance* with the *fine print* terms of insurance policies is required and that question is one of fact for the jury. Sections 4375a and 4382, Kirby's Digest. 107 Ark. 170-1.

2. An inventory was taken August 25, 1913, and it complies with the policy. 82 Ark. 476; 94 *Id.* 228.

3. The books were properly kept. 94 Ark. 229; 79 *Id.* 164, 269.

4. The books etc., were presented to the adjuster.

5. There were no false and fraudulent representations in the proof of loss. "*Laborantur in moutes nas cetur rediculus mus.*" 94 Ark. 168. The knowledge and remark of the agent was a waiver of any forfeiture. 88 Ark. 506; 65 *Id.* 348; 87 *Id.* 72; 79 *Id.* 475; 82 *Id.* 150; 111 *Id.* 435.

6. Verbal testimony was admissible as to the appearance of the amount of lumber on the yard just before the fire. 82 Ark. 476; 85 *Id.* 37. The books were also evidence and intelligible to a lumberman. 85 Ark. 37.

7. There is no error in the instructions.

McCULLOCH, C. J. This is an action on a fire insurance policy issued by appellant insurance company to appellee on a stock of yellow pine lumber. The

amount of the policy is $4,500, and it is alleged that at the time the fire occurred the stock of lumber consisted of 350,000 feet, which was all destroyed.

The verdict in appellee's favor was for the sum of $4,000. Appellant defended on the ground that there were various forfeitures of the policy, which will be discussed in detail later, and also that there were only 65,000 feet of lumber destroyed. There is a sharp conflict in the testimony as to the amount of lumber on hand at the time the fire occurred, the appellant having adduced proof tending to show that it was only 65,000 feet, whereas the testimony of the appellee himself and the witnesses he introduced tends to show that there was more lumber on hand than that claimed in the complaint, or about that quantity. There being a conflict in the testimony on that issue, we must treat the verdict of the jury as having settled it in appellee's favor.

(1) The first contention is that there was a forfeiture by reason of the failure of the assured to make an inventory in accordance with the requirements of the policy, which provided that "unless an inventory has been taken within twelve calendar months prior to the date of the policy, the assured should take such inventory within thirty days of the issuance of the policy," otherwise the policy should be void. Appellee exhibited to the jury what purported to be an inventory of all the stock of lumber on hand, which said inventory appeared to have been taken on the 25th day of August, 1913, within the thirty days after the issuance of the policy, and he testified that he took that inventory on the date named. In other words, his testimony was sufficient to warrant a finding that the inventory exhibited was taken within thirty days, and while there are some indications about the date of the inventory which might have warranted the jury in finding that it was not in fact taken at that time, yet the jury has credited the testimony of appellee and found in his favor on that issue, so we must treat the issue as settled by the verdict.

(2) It is insisted that the inventory is not sufficient to constitute compliance with the terms of the pol-

icy, even though it was taken within thirty days. The inventory gives the dimensions of the lumber in each pile, and states the total number of feet in each pile, but it does not show in any way the dimensions of the piles, and it is contended that that is a material omission, for without that information the adjuster for the insurance company could not verify the accuracy of the items set forth. We think that it is a strained contention to say that the inventory is not sufficient on that account. Especially is that true in construing it in the light of our statute, which only requires substantial compliance with the terms of a policy.

(3) There is one item on the inventory, however, which is not specific, as stated above, and that is an item of 40,000 feet of lumber described as being on the tram. The inventory showed 522,000 feet of lumber on hand at that time, and that part which was not itemized was only a small portion of the whole. It was shown that it was lumber lying in bulk near the tramways, which could not be conveniently measured, and we are of the opinion that the failure to itemize that small portion of the total amount of lumber does not amount to a breach of the warranty with regard to taking inventory. We have said, it is true, that a mere summary does not constitute an inventory, (*Arkansas Mutual Fire Ins. Co.* v. *Woolverton,* 82 Ark. 476; *Arkansas Ins. Co.* v. *Luther,* 85 Ark. 579), but this is more than a summary, for it purports to give the items and the aggregate number of feet of each pile of lumber, except that portion which was lying on the trams.

(4) It is next contended that there was a breach of the policy on account of the failure of the assured to keep a set of books showing a complete record of the business transacted, "including all purchases, sales and shipments, both cash and credit, from date of inventory." Appellee exhibited books showing an itemized scale of the logs which were sawed into lumber and placed on the yards subsequent to the taking of the original inventory, but it is not contended that any record was kept of the lumber put out on the yard after the said inventory

was taken. The original invoices were kept in connection with those books showing the amount of lumber sold and shipped out. The testimony shows that the rule among saw mill men is that the lumber will run on an average about 20 per cent more than the logs scale. While there were no entries showing the amount of lumber, the books showing the log scale, when considered in the light of available information concerning the average amount of lumber which will be produced according to the standard scale of logs, affords sufficient means for ascertaining the amount of lumber on hand. It is, in other words, substantial compliance with the terms of the policy, and that is all that the statutes of this State require. It is not essential that the books be absolutely accurate, nor that the books themselves must show all the information available, sufficient to enable the adjuster to ascertain the precise amount of lumber on hand. We are therefore of the opinion that the jury were warranted in finding that the record of the logs scaled, together with the invoices showing the amount of shipments, constituted compliance with the clause of the policy requiring books to be kept presenting "a complete record of business transacted, including all purchases, sales and shipments for both cash and credit." *Queen of Arkansas Ins. Co.* v. *Forlines,* 94 Ark. 227.

(5) It is also urged as grounds for forfeiture that the assured failed and refused to deliver his books, invoices, etc., to the agent of the company for inspection, as provided by the policy. The testimony of the adjuster is to the effect that when he went to Stephens, Arkansas, to adjust the loss, he requested appellee to bring his books to the counting room of the bank at that place for his inspection, but that appellee declined to do that, and, on the contrary, invited him to go down to his (appellee's) home to inspect the books. He stated that appellee furnished him only an inventory which purported to have been taken on April 20, 1914. Appellee testified that the adjuster asked him if he kept books, and that he answered in the affirmative and told him that the

books were at his office; but that the adjuster didn't ask to see them. The jury passed on the question whether or not there was a failure to deliver the books and other papers to the adjuster for inspection and the verdict is conclusive of that issue.

The next contention is that there was a forfeiture because of false statements in the proof of loss with respect to an unrecorded chattel mortgage on the lumber, and also with respect to a considerable lot of lumber which it was claimed belonged to a Mr. Holt. It is sufficient to say in response to that, however, that there was evidence showing that the statement was not false, but was made in good faith under the belief that the lumber delivered by Holt belonged to appellee, and that the mortgage had been released. In fact, there is enough testimony to warrant a finding that all of the lumber belonged to appellee—that Holt had sold and delivered it to him—and that the chattel mortgage which appellee had executed on the property had been released.

(6) Another issue in the case was whether or not the policy was avoided by the execution of the chattel mortgage. During the life of the policy, and before the fire, appellee executed a chattel mortgage on the lumber to a bank to secure an indebtedness of $2,000. Appellant's agent who had authority to issue policies and make indorsements of consent thereon, and to collect premiums—the agent who issued this particular policy to appellee—was the cashier of the bank to which the chattel mortgage was given. The agent was present with the directors of the bank at the time the mortgage was executed, and the evidence shows that he was instructed to make the proper indorsements on the policy, and that the agent agreed to do so. There is some conflict in the testimony as to just what was said on that occasion, but the testimony warranted the inference that the language used on the occasion was understood by the agent to be a request that the proper indorsement be made on the policy to prevent a forfeiture, and that he agreed to do that. The evidence is undisputed, in fact, that the agent's conduct on that occasion amounted to a prom-

ise to make a proper indorsement on the policy to prevent a forfeiture, and it is therefore unnecessary to discuss the assignments of error with respect to the instructions on that issue. The agent, it is true, was also the agent of the bank, but that does not prevent his waiver from binding the insurance company. The loss payable clause was not in fact indorsed on the policy, and therefore there is no question in the case of the bank being entitled to recover anything. We have only to deal with the question of forfeiture on account of the mortgage being executed without consent of the company. It is not important whether there was a loss payable clause indorsed on it, but the question is whether the company through its agent manifested its consent. That being true, it is unimportant to consider whether or not the agent of the company was also the agent of the bank, for, as before stated, that did not lessen the binding force of his conduct as a representative of the insurance company. The subject of insurance agents acting in dual capacities is thoroughly discussed in the recent case of *Milwaukee-Mechanics Ins. Co.* v. *Fuquay,* 179 S. W. 497, 120 Ark. 330.

The only other assignment of error which we deem it necessary to mention is that which relates to testimony of witnesses adduced by appellee, giving an estimate of the amount of lumber on hand. Appellant introduced the same character of evidence tending to show that there was only a small amount of lumber on hand at the time the fire occurred, and this testimony was introduced by appellee, not only to show that appellant's estimate was not correct, but also for the purpose of corroborating appellee's claim as shown by his books and inventories of the amount of lumber on hand.

There are very numerous assignments of error with respect to the giving and refusing of instructions, but we are of the opinion that the disputed issues were sent to the jury on proper instructions, and that the verdict of the jury is supported by sufficient evidence.

Judgment affirmed.

WATERS v. MOORE.

Opinion delivered January 24, 1916.

1. LIBEL AND SLANDER—PLEADING AND PROOF—VARIANCE.—In an action for slander the complaint charged defendant with saying that "there was a shortage in his (plaintiff's) accounts with the county and his bondsmen had to make it good," *held*, the essence of the allegation is the charge of official dishonesty, and where the proof on the part of the plaintiff showed that defendant stated that plaintiff had been short in some public office, and that his official bondsmen had had to make this shortage good, did not constitute a variance between the pleading and proof.
2. LIBEL AND SLANDER—PLEADING AND PROOF—VARIANCE.—There is no variance between the complaint in an action for slander, which alleged that "He (plaintiff) was short in his accounts as treasurer of Garland County, and his bondsmen had to settle his shortage," and the proof, where the witness was not sure that the office stated was clerk or treasurer, but where he did say it was one office or the other, it appearing from all the proof that the plaintiff had never held any office but that of county treasurer, and that defendant had been surety on his bond as treasurer, and had not been surety on any other bond.

Appeal from Garland Circuit Court; *Jefferson T. Cowling,* Judge on Exchange; affirmed.

Gibson Witt, and *A. J. Murphy,* for appellant.

1. There is a fatal variance between the allegations of the complaint and the proof. In action for slander plaintiff must prove the use of substantially the same words as those alleged in the complaint, it not being sufficient to prove the use of different words, though of the same import. 98 Ark. 312; 77 *Id.* 64. The overwhelming preponderance of the evidence is that defendant used no language derogatory to the character of plaintiff.

2. Besides the language was privileged and the evidence shows no malice. 107 Ark. 74-86; Townsend on Slander, § 365; 12 Am. Dec. 245; 2 East 426; 36 Mo. 153; 27 Am. Dec. 764; 207 Fed. 222; 131 S. W. 721; 147 Ill. App. 162; 104 Pac. 458.

3. Therefore, the court erred in its instructions to the jury; the words used were *not* slanderous *per se.* The case has been fully developed and the judgment should be reversed and the cause dismissed.

T. P. Farmer, for appellee.

1. The authorities cited for appellant fairly cover this case. The evidence made a case of slander. There is no variance. The words used charge embezzlement, they were slanderous *per se;* they were not privileged and malice is shown. The words were used to injure appellee with the knowledge that they were false. There is no error in the declarations of law and the judgment should be affirmed.

SMITH, J. This is an action for slander instituted by appellee against appellant, and the complaint alleged that on or about the 6th day of April, 1913, the appellant unlawfully, falsely, and maliciously spoke and published of and concerning appellee the following false, malicious and defamatory words: "'He (meaning the plaintiff) was short in his accounts as treasurer of Garland County, and his bondsmen had to settle his shortage;' that the defendant by said language meant to charge the plaintiff with the crime of embezzlement, and that said language in its common acceptation amounted to charging the plaintiff with the crime of embezzlement." In a second count the complaint further alleged the use of the following defamatory words: "'There was a shortage in his accounts with the county and his bondsmen had to make it good,'" it being alleged that appellant used said language with reference to appellee, meaning thereby to charge that appellee did not pay to Garland County money which he had in his hands as treasurer of said county, and that he had embezzled funds of Garland County, and that his official bondsmen were required to settle his said shortage; that said language in its common acceptation amounted to charging appellee with the crime of embezzlement.

The answer contained a general denial of the material allegations of the complaint, and denied the use of the language set out in the complaint, and at the trial of the cause appellant denied having used the language quoted. He further testified that appellee had been treasurer of Garland County, and that he had been one of

the sureties on his bond, but he denied having said that he or any one else had been called upon to pay any shortage in appellee's accounts, or that there was any shortage in his accounts.

In behalf of appellee Mr. Leo McLaughlin testified that he was present at a caucus which appellant also attended, at which time the persons present were discussing the election of a city collector; that several members of the city council expressed their intention of voting for appellee for this office, whereupon appellant expressed surprise that the councilmen present favored appellee for this position for the reason that he had been short in his accounts. The following questions were asked this witness:

"Q. Do you knew whether he said when he was treasurer of Garland County?

A. Well, he was short in his accounts in some public office. I don't remember whether it was county clerk or county treasurer or what, but he said the account was made up and paid by the bondsmen, by Mr. Moore's bondsmen at the expiration of his term.

Q. Well, did you hear anything else said by Mr. Waters about Mr. Moore?

A. Let me think just a minute. No, I don't recall anything else. It has been so long ago that I hadn't given it much thought, but he just said that Mr. Moore was short in his accounts in some office; I don't remember what office it was, some political office, though, that he had held, and the shortage had to be made up at the expiration of his term by his bondsmen."

After detailing the purpose of the caucus which appellant attended, and after stating the names of the gentlemen who were there, T. J. Pettit testified on behalf of appellee as follows:

"Q. Now, if you remember, just state what Mr. Waters said about Mr. Moore.

A. Well, in sitting at the table, it was a large round table, there was each candidate, I think there were three, each had their friends. I was for Milt Moore and one or

two others at this meeting; there were two non-committal, wouldn't say who they were for, and there were others for Watkins. I forget the names of the other candidates; I think there were three. And in talking pro and con every fellow was expressing his opinion of the different candidates. Mr. Waters made some remark about Milt Moore and seemed surprised that some of us were with him. He said, 'You ain't going to vote for him, are you?' or something like that, and some of them said, 'Yes,' and then he made some remark, his exact words I can not place; it was some remark about Milt being short with the county and that he had to pay it at one time, and he looked in his pocket—

Q. Just tell it as near as you can, Mr. Pettit, what he did say in regard to his shortage.

A. I can not remember the exact words. I know he looked in his pocket for a piece of paper. He said, 'I have it right here,' looked in his pocket for his pocket book but he didn't find it. He said, 'I guess I left it at home,' or something like that.

Q. But he said he had been short with the county?

A. He didn't say short. He just said, 'I had to pay.' Or 'Had to pay for that fellow,' or something like that; made some remark as if he had to pay something for Mr. Moore to the county or make good for something; just what his words were I can not remember now."

Upon their cross-examination these witnesses stated that they were not positive that they had quoted the exact words used by appellant, but that they had given substantially his statements as they remembered them.

Appellant insists that there is a variance between the alleged slanderous words set out in the complaint and the proof offered in support of those allegations, and the correctness of this position is the only question of importance in the case.

A similar question was raised in the recent case of *Laster* v. *Bragg,* 107 Ark. 74. In the opinion in that case the rule in such cases as stated in Townsend on

Slander, was quoted, and previous cases of our own on the subject were cited, and the discussion of the subject was closed with the following statement:

"Hence, it will be seen that while the exact words charged in the complaint were not proved, the words proved are substantially proved as laid. Both the words charged and the words proved impute the crime of larceny. The meaning of the rule above announced seems to be that if the words charged to have been spoken are proved but with the omission or addition of words not at all varying or affecting their sense the variance will not be regarded as material. While it is not necessary under the rule to prove as laid, all the words which are alleged to have been spoken by the defendant, yet so much of them must be proved as is sufficient to sustain the cause of action. As we have already seen, the actionable word in the instant case is the word 'thief' because it imputes the crime of larceny. The words accompanying it were merely descriptive and in the application of the rule to the facts of this case we conclude that the slander proved substantially corresponded with the allegation of the complaint, and there was no variance." See also, *Miller* v. *Nuckolls,* 77 Ark. 64; *Townsley* v. *Yentsch,* 98 Ark. 312; *Morris* v. *State,* 109 Ark. 530.

Applying the rule thus stated to the allegations of this complaint, we think there was no substantial variance.

(1) The second count of the complaint alleged that " 'There was a shortage in his accounts with the county and his bondsmen had to make it good.' "

The charge of official dishonesty is the essence of this allegation, and the proof on the part of appellee is that appellant stated that appellee had been short in some public office, and that his official bondsmen had to make good this shortage.

(2) Nor do we think that there was any variance between the proof and the allegations of the first count of the complaint, which count alleged that appellant had accused appellee of being short in his accounts as treasurer of Garland County, and that his bondsmen had to

settle that shortage. It is true that the witness who undertook to name the office referred to by appellant was not positive whether the office stated was that of county clerk or county treasurer, but he did say that it was one office or the other, and the proof shows that appellee had held only the office of county treasurer, and had never held the office of county clerk, and that appellant had been a surety on appellee's bond as county treasurer and had not been surety on any other bond.

The judgment of the court below is, therefore, affirmed.

STEPHENS v. WILLIAMS.

Opinion delivered January 31, 1916.

1. APPEALS—TIME—LIMITATION BY LEGISLATURE.—It is beyond the power of the Legislature to pass a statute cutting off the right of appeal under existing laws, but the Legislature has power to shorten the time for taking appeals, where it did not attempt to cut off the right.
2. APPEALS—LIMITATION UPON TIME FOR TAKING AN APPEAL.—Under Act No. 62, p. 205, Acts 1915, the time for taking appeals to the Supreme Court was shortened to six months from the date of the rendition of the judgment or decree to be appealed from; the act became effective June 11, 1915. *Held*, under the act, appeals taken from judgments or decrees, must be perfected within six months after the act became effective, even in the cases of judgments and decrees rendered prior to that time.
3. APPEALS—TIME FOR TAKING.—Appellant sought to appeal from a judgment rendered on February 4, 1915, and presented a prayer for an appeal to the clerk of the Supreme Court on January 27, 1916. *Held*, that the clerk properly refused to grant the appeal.

Appeal from Mississippi Chancery Court, Chickasawba District; *Chas D. Frierson*, Chancellor; rule denied.

McCULLOCH, C. J. The decree sought to be appealed from was rendered on February 4, 1915, and a prayer for appeal was presented to the clerk of this court on January 27, 1916, more than six months after the date of rendition. The clerk refused to grant the appeal and a rule on him is asked to compel him to do so.

The General Assembly of 1915 enacted a statute shortening the time for appeals to the Supreme Court to six months from the date of the rendition of judgments or decrees, except in cases of infants or persons of unsound mind, when an appeal may be taken within six months after the removal of such disabilities, or death. The new statute* is in the exact words of section 1199 of Kirby's Digest except that the words "one year" were stricken out and the words "six months" substituted. The act does not contain an emergency clause and therefore did not go into effect until June 11, 1915, which was three months after the adjournment of the Legislature. Does that statute apply so as to prevent an appeal from being taken more than six months after the passage of the act? The statute originally prescribed three years as the limit within which appeals might be taken to this court, but there was an amendment by the Legislature in 1899 shortening the time to one year after rendition of the judgment or decree. The first section of the Act of 1899 has been brought forward into Kirby's Digest as section 1199, and was the section amended by the present statute. It contained, however, another section which read as follows:

"Section 2. The parties to all judgments, orders or decrees rendered within two years prior to the passage of this act shall have one year from the time it shall take effect within which to pray an apeal or sue out a writ of error. The time for taking an appeal or suing out a writ of error on all judgments, final orders and decrees rendered more than two years prior to the passage of this act shall be three years from the date of the judgment, order or decree."

In *Rankin* v. *Schofield,* 70 Ark. 83, this court held that the first section of the Act of 1899 had no application to judgments or decrees rendered prior to the passage of the statute. That was an attempt on the part of an infant to appeal more than six months and less than a year after coming of age, from a decree rendered more

*Act 62, p. 205, Acts 1915 (Rep.)

than three years before the passage of the statute. In analyzing and construing the statute, the court found that the last clause of the second section was an attempt to cut off the right of appeal in all cases where the judgment was rendered more than two years prior to the passage of the statute, and that for that reason it was unconstitutional and void.

The present statute is, however, different for the reason that it contains no express provision for time for appeals in cases where judgments or decrees have been rendered prior to the enactment, and the construction of the statute is unaided by any other section containing a provision of that sort, as was the case in the old Act of March 16, 1899. It was, of course, beyond the power of the Legislature to pass a statute cutting off the right of appeal under existing laws, but the Legislature had the right to shorten the time for taking appeals where it did not cut off that right. In other words, it was evidently the purpose of the Legislature to give only six months within which to take an appeal, and there is no reason to believe from the language used, that it was meant to give longer than that after the passage of the statute, even in cases of decrees that had been rendered prior to that time. *Wilson* v. *Kryger,* 26 N. D. 77, 51 L. R.A. (N. S.) 760; *Rogers* v. *Trumbull,* 32 Wash. 211, 73 Pac. 381; *Bailey* v. *Kincaid,* 57 Hun (N. Y.) 516; *Lewis* v. *Lindsay,* 33 Ala. 304; *Stephen* v. *Lewis,* 62 Md. 229; *Shelly* v. *Dampman,* 174 Pa. 495; *Beebe* v. *Birkett,* 108 Mich. 234. It being the purpose of the Legislature to shorten the time to six months, appellant is not deprived of any constitutional right by compelling him to take his appeal within the time specified by the new statute.

The decision in *State* v. *St. L. & S. F. Rd. Co.,* 92 Ark. 74, is not, when considered in the light of the facts of that case, in conflict with the conclusion now reached. The Act of May 6, 1909, reduced the time for granting writs of error in criminal cases to sixty days after judgment of conviction, and the writ of error in that case was granted on June 1, 1909, which was within the time al-

lowed by the old statute and also within sixty days after the new statute went into force. The effect of that decision was merely to establish the rule that the new statute did not apply to judgments previously rendered so as to shorten the time in such cases to less than the full period prescribed by the new statute.

It follows that the appeal in this case was prayed too late, and that the clerk was correct in refusing to accept and file the transcript. The rule on the clerk is denied.

HART, J., (dissenting). I dissent from the opinion of the court on the ground that it in effect overrules *Rankin* v. *Schofield,* 70 Ark. 83. In that case the court said, "The first section is prospective in its operation. It applies only to appeals from judgments, orders and decrees rendered after the act took effect. This is the general rule of construction." In order to strengthen the general rule the court said, "That it is the true rule to apply to this section is manifest when considered in connection with the second section."

Section 1 of the act, in that case is the same as the present act except the time for taking appeals is six months instead of one year.

The language first quoted was used by the court in construing section 1 of that act separate and apart from section 2. What follows was an additional reason by the court for the construction already placed upon section 1.

In 3 Corpus Juris., p. 329, the authors said, "Unless it is evident from the term of a statute, which gives, takes away, or modifies the remedy by appeal or other mode of review, that it was intended to have a retroactive effect, it applies only to cases pending and undetermined at the time when it goes into effect, and has no application to causes in which judgments have been entered prior to that time." The case of *Rankin* v. *Schofield, supra,* is cited to support the text.

In a case note to 51 L. R. A. (N. S.), p. 761, the author said, "It is a general rule of construction that statutes shortening the time within which appeals or pro-

ceedings in error can be taken do not, in the absence of language showing clearly a legislative intention to the contrary, apply to judgments, decrees, or orders rendered or entered before such statutes took effect."

Again the case of *Rankin* v. *Schofield* is the first case cited to sustain the text. Retrospective laws have always been regarded unfavorably and I do not think there is anything in the present act to show that the Legislature intended that it should have any different construction than that placed on the first section of the former act by the opinion of the court in the language quoted. The effect of that language is not taken away because the court gave an additional reason for its correctness.

Mr. Justice WOOD concurs in the dissent.

SCOTT *v.* CLEVELAND.

Opinion delivered January 31, 1916.

REAL ESTATE BROKERS—COMMISSIONS.—A. entered into a contract with B. to sell certain land, B. interested one D. in the property, but did not make the sale; thereafter A. employed one F. as agent, and F. effected a sale to D. In an action by B. against A. for commissions, *Held*, it was error to refuse to give instructions telling the jury that A. was not liable to B. under the facts set out.

Appeal from Clay Circuit Court, Western District; *J. F. Gautney,* Judge; reversed.

G. B. Oliver, for appellants.

1. Where the existence at one time of a certain condition or state of things of a continuing nature is shown the general presumption arises that such condition or state continues to exist until the contrary is shown by either circumstantial or direct evidence. 22 Am. & Eng. Enc. L. 1238-9, 4-b.; 29 Ark. 131; 34 *Id.* 707-711; 61 Ala. 19. John James' reputation was shown to be bad for truth and morality, and his reputation is still presumed to be bad, no testimony being offered that a change had taken place. Hence it was error to refuse

to give instruction 1 for defendant and to give par. 5 of No. 6 by the court.

2. It was error to refuse No. 2 and 3 asked by defendants. There was ample evidence to support them and no other instruction given covers the theory of the case that James was appellant's agent to sell the timber and that his contract terminated July 1, and that Day had abandoned the purchase; that after Fleetwood took the agency he again induced Day to buy the timber, etc.

3. The verdict is wholly without evidence to support it.

C. T. Bloodworth, for appellee.

1. The credibility of a witness, though impeached, is a question for the jury. 36 Ark. 653.

2. Any error in refusing No. 2 and 3 was cured by giving No. 5. 110 Ark. 9. A party having it in his power to prove a fact, his failure to do so is conclusive that it is against him. 29 S. E. 1006. 110 Ark. 9 is conclusive of this case; 119 Ark. 434. A general agent is a person whom one puts in his place to transact all his business of a particular kind. 55 Ark. 627; 48 *Id.* 138. The instruction Mrs. Scott claims she gave her husband, would not bind Cleveland unless he had knowledge of it, and there is no such evidence. 90 Ark. 301; 100 *Id.* 360; 31 Cyc. 1327. This controversy should be ended and an affirmance would end it.

McCULLOCH, C. J. This is an action instituted by appellee against appellants to recover the sum of $1,000 alleged to be due for commission on the sale of timber standing on the lands of appellants in Clay County. There was a judgment in favor of appellee for the full amount claimed. The case was here on a former appeal from a judgment in appellee's favor, and we reversed the cause on account of the error of the court in refusing to grant a continuance. 110 Ark. 9.

Appellants owned a tract of timber land in Clay County and were seeking a purchaser for the timber. It

was finally sold to Mr. T. E. Day, of Greensburg, Indiana, and the evidence, on the part of appellants, tends to show that the sale was brought about by the efforts of one Fleetwood, who had been employed by appellants to find a purchaser and make the sale. A commission on the sale was paid to Fleetwood. Appellee testified that appellants made a trade with him to find a purchaser at a stipulated price, and that he negotiated the sale to Day. It appears from his testimony that he began negotiations in January, 1911, and the undisputed testimony shows that the sale to Day was not consummated until December 6, 1911. Appellants' testimony tends to establish the fact that they made no contract with appellee except one to pay him a small sum to show the timber to Day when he came down to inspect it, and that the sale was finally made through the efforts of Fleetwood, to whom a commission was paid.

Appellants requested the court to give the following, among other instructions, which were refused:

"2. Even though you should find from the evidence that plaintiff, through Fleetwood, procured the man who finally purchased the timber, yet if you further find that the man procured refused to buy the timber at the price asked, but later, after the time of James had expired, was solicited by Fleetwood and that Fleetwood then had the agency to sell the timber at a lower price and consummated the trade through Fleetwood, then plaintiff would not be entitled to any commission, and you will find for the defendants."

"3. If you find from the evidence that Cleveland did not have a contract with the defendants and that Fleetwood procured Day to purchase said property, or that Cleveland failed to induce Day to purchase the property, that Day went away without purchasing the property; that later he took the matter of purchase up with Fleetwood, and that Fleetwood induced Day to purchase; that Fleetwood was the agent of defendants in making the sale and plaintiff was not such agent, then you will find for defendants."

There were no other instructions submitting that precise issue to the jury, and if those instructions were correct it was prejudicial error to refuse them. We are of the opinion that those instructions should have been given, for there was sufficient evidence to warrant a finding that notwithstanding the fact that appellants entered into a contract to pay him a commission for procuring a purchaser, appellee's efforts to make the sale to Day had failed and that the sale was finally made through Fleetwood, with whom appellants had also made a similar contract. It is not contended by appellee that he had an exclusive agency for the sale of the timber, and if, as contended by appellants, the sale was made through Fleetwood, the latter was entitled to the commission. *Murray* v. *Miller*, 112 Ark. 227.

It is insisted that the law of the case is settled by the former opinion, where it was held that the only error committed by the trial court was in refusing to grant a continuance. The instructions of the court were not discussed in the former opinion, nor does it appear that these two instructions were asked and refused on the former trial. It can not, therefore, be said that the law on this phase of the case had been settled by the former opinion, and the question is now presented for decision.

For the error in refusing to give the instructions set forth above the judgment is reversed and the cause remanded for a new trial.

BUSH, RECEIVER *v.* BARKSDALE.

Opinion delivered February 7, 1916.

1. APPEALS—RIGHT OF APPELLANT TO DISMISS APPEAL—PRACTICE.—An appeal in any case may be dismissed by the appellant as a matter of right, for the purpose of praying another appeal, or in any case other than an order granting a new trial, for the purpose of submitting to the judgment appealed from.
2. NEW TRIAL—FINALITY OF ORDER—WHEN APPEALABLE.—An order granting a new trial is a final and appealable judgment, if the appellant stipulates as required in Kirby's Digest, § 1188, that if the order be affirmed, judgment absolute shall be rendered against him.

3. NEW TRIAL—FINAL ORDER—APPEAL—STIPULATION BY APPELLANT—ELECTION.—Where appellant appealed from an order granting a new trial, the stipulation of appellant, filed under Kirby's Digest, § 1188, that if the order be affirmed, judgment absolute may be rendered against him, the stipulation constitutes an election not to submit to a new trial, and it is irrevocable; it deprives the trial court of jurisdiction to proceed with another trial except "for an assessment of damages or other proceedings to render the judgment effectual" in case the Supreme Court "shall determine that no error was committed in granting the new trial."

4. NEW TRIAL—APPEAL FROM ORDER GRANTING.—An order granting a new trial is necessarily self-executing and can not be superseded except by an appeal taken in the manner prescribed by the statute, and when the appeal is taken the force of the order can not be reinstated by an abandonment of the appeal.

5. NEW TRIAL—APPEAL FROM ORDER GRANTING—FAILURE TO PROSECUTE—AFFIRMANCE.—If an appeal from an order granting a new trial is not prosecuted, under Kirby's Digest, § 1195, the appellee may file a transcript of the record, and ask for an affirmance, which will operate as a final adjudication of the rights of the parties in the subject-matter of the litigation.

6. ELECTION OF REMEDIES—REVOCABILITY.—An election of remedies is irrevocable.

Appeal from Lonoke Circuit Court; *G. W. Emerson,* Special Judge; affirmed.

Troy Pace, for appellant.

Where no supersedeas bond is filed appellant has a right to dismiss his appeal under the statute. Kirby's Digest, § 1229; 14 Ark. 164; 36 *Id.* 511; 85 *Id.* 30.

F. W. Rawles, Trimble & Williams, Sam M. Wassell and *Harry M. Woods,* for appellee.

The order of the lower court should be affirmed with directions to render judgment absolute. 98 Ark. 304; Kirby's Dig., § 1195.

PER CURIAM. This is an appeal from an order of the circuit court granting appellee's motion for a new trial. Appellant filed a stipulation, in accordance with the terms of the statute, containing "an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant." Kirby's Digest, § 1188.

The transcript was not lodged in this court within ninety days, as required by statute, and appellee filed a motion to affirm the judgment in accordance with the rules of the court. The rules provide that an appellant may, at any time before such a motion is submitted to the court, prevent a judgment of affirmance by offering to prosecute the appeal or to dismiss the appeal, in which case the motion to affirm shall be overruled as a matter of course. In this case the appellant responded to the motion by a motion to dismiss the appeal. That motion is contested by appellee on the ground that appellant can not dismiss an appeal from an order granting a new trial. The contention of appellee is not sound, strictly speaking, for an appeal in any case may be dismissed by the appellant as a matter of right, for the purpose of praying another appeal or, in any case other than an order granting a new trial, for the purpose of submitting to the judgment appealed from. But appellant does not seek to dismiss the appeal for the purpose of prosecuting another appeal. It is candidly conceded that another appeal would be unavailing for the reason that there is no bill of exceptions in the case and that the judgment would be affirmed on that account. The purpose is to dismiss the appeal in order to submit to the order granting a new trial. The real question presented to us for decision is whether or not such an appeal can be abandoned so as to proceed with a new trial.

(1-2) The decision of that question calls for a construction of the statute on the subject. It provides, as before indicated, that no appeal from an order granting a new trial "shall be effectual for any purpose, unless the notice of appeal contains an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant." It is further provided by statute that on appeal from an order granting a new trial, " if the Supreme Court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assess-

ment of damages or other proceedings to render judgment effectual, may be then and there had in cases where such subsequent proceedings are requisite." Kirby's Digest, section 1238. The effect of the statute is to make the order granting a new trial a final and appealable judgment, if the appellant stipulates as above indicated; otherwise the order is not applicable. We have so treated such orders in many cases. *Osborn* v. *LeMaire,* 82 Ark. 490; *Hudleston* v. *St. Louis, I. M. & S. Ry. Co.,* 88 Ark. 454; *Taylor* v. *Grant Lumber Co.,* 94 Ark. 566; *Blackwood* v. *Eads,* 98 Ark. 304; *McDonnell* v. *St. Louis S. W. Ry. Co.,* 98 Ark. 334; *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 596. There is a discussion of other subdivisions of the same section of the statute in the case of *Davie* v. *Davie,* 52 Ark. 224, and in the recent case of *State, ex rel.* v. *Greenville Sand & Gravel Co.,* 122 Ark. 151, where it was held that interlocutory orders can not be appealed from.

(3-6) But, as before stated, an order granting a new trial is by the statute made final upon the filing of a stipulation that it may be so treated, as a decision either way as to the correctness of the order settles the rights of the parties. The stipulation constitutes an election not to submit to a new trial, and it is irrevocable. It deprives the trial court of jurisdiction to proceed with another trial except "for an assessment of damages or other proceedings to render the judgment effectual" in case this court "shall determine that no error was committed in granting the new trial." The order granting a new trial is necessarily self-executing and can not be superseded except by an appeal taken in the manner prescribed by the statute, and when the appeal is taken the force of the order can not be reinstated by an abandonment of the appeal. If the appeal be not prosecuted, the appellee has the right under the statute (Kirby's Digest, section 1195), to file a transcript of the record, and ask for an affirmance, which operates as a final adjudication of the rights of the parties in the subject-matter of the litigation. The principle that an election of remedies is irrevocable seems too plain for argument to the con-

trary, and its application to the proceeding now under discussion is obviously proper. 15 Cyclopedia of Law, 262.

The motion of appellant to dismiss the appeal is therefore overruled, and judgment absolute will be entered to the effect that appellee is entitled to recover in accordance with the prayer of his complaint, and the cause will be remanded for an assessment of damages and for other proceedings not inconsistent with this opinion. It is so ordered.

COOPER v. DEMBY.

Opinion delivered February 7, 1916.

1. ASSAULT—EVIDENCE—REPUTATION OF DEFENDANT FOT PEACE AND QUIETUDE.—In an action for damages for assault, testimony as to defendant's reputation for peace and quietude, is admissible, in order to determine who was the probable aggressor, and the state of mind under which defendant committed the assault.
2. DAMAGES—CIVIL ASSAULT—PUNITIVE DAMAGES—PROVOCATION—MITIGATION.—The extent to which punitive damages may be mitigated by provocation is a question of fact to be passed upon by the jury in each particular case, and depends upon the nature and character of the provocation; if the provocation was of such a character as to make the passion irresistible, and was solely responsible for the assault, then no punitive damages should be assessed, but such provocation would not affect the compensatory damages, which include such items as loss of time, bodily suffering, impaired physical and mental powers, mutilation, disfigurement, expense of attendance and the like.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed.

Appellant, *pro se*.

1. The court erred in refusing to permit witnesses to testify as to the reputation of appellee as to his generally known habits, and in refusing to give instructions 1, 2, 3, 5 and 6 and in giving the peremptory instruction. The rule if a person has reason to believe and does believe that he is about to suffer great bodily injury, he is justified in resorting to violence in self-defense, though not actually in danger, is applied in civil actions for damages for assault. 76 Ind. 317; 13 Ky. Law. Rep.

927; *Ib.* 703; 91 Ill. App. 671; 26 Ky. Law. Rep. 291; 80 S. W. 1165; 83 Minn. 141; 85 N. W. 946; 67 Ark. 594-603.

2. No exemplary damages should have been allowed. 41 Ark. 295. Immediate provocation may even mitigate actual damages in cases of assault. 9 Allen 67; 100 Mass. 258; 144 *Id.* 299; Sedwick on Damages (7 ed.), vol. 2, p. 521; 45 Conn. 243; 86 N. Y. 324; 23 Penn. St. 523; 24 Wisc. 183; 27 Mich. 241. There was no evidence of malice nor of deliberate cruelty.

3. Instruction No. 4, asked by defendant should have been given as it is taken from 41 Ark. 295. The verdict was excessive. The actual damages were shown to be $50. The jury awarded $800 clearly showing that they erroneously allowed exemplary damages.

A. J. Murphy, for appellee.

1. The trial court's ruling, excluding testimony as to character of appellee, and his reputation, and in refusing to give instruction 1, 2, 3, 5 and 6 asked was correct. Evidence of the general character, nor of particular facts not in issue, is not competent. There is a natural presumption of peaceableness in favor of a party, and that he is a law-abiding citizen. But his reputation is not in issue in ordinary civil actions either in contract or tort. R. C. L., vol. 2, p. 575, par. 56; 4 Chamberlayne, Mod. Law of Ev., § 3283.

2. Exemplary damages were properly allowed. 8 Rul. Case Law, p. 651, section 194. When the jury found actual damages, it was within their discretion to award punitive damages. 68 Me. 287; Ann. Cases, 1913. E. 517; 30 Ark. 165; 102 *Id.* 200; 108 *Id.* 578; 111 *Id.* 87. There is no error and the judgment should be affirmed.

SMITH, J. Appellee sued for and recovered damages, both compensatory and punitive, on account of an assault alleged to have been committed upon him by appellant.

According to the evidence of appellee and of the witnesses who testified in his behalf, the circumstances of the assault were such that damages, both compensatory and punitive, were properly assessed. According

to the evidence of appellant, however, and of his witnesses, the facts were that appellee grossly and wantonly insulted appellant while employed about his own business and at his own place of business, and appellant used only such force as appeared to him reasonably necessary to protect himself from a threatened assault and violence.

Appellant was not permitted to testify that appellee had the reputation of being a quarrelsome and dangerous man, and one who went armed and was known as a gun fighter, and the court refused to permit other witnesses to so testify, who were offered in appellant's behalf, and exceptions were duly saved to its ruling.

Instructions were given declaring the law applicable to appellee's right to recover compensatory damages, and no objections are now urged to these instructions.

On the question of punitive damages appellant requested an instruction numbered 4 as follows:

"You are instructed that, although you may believe the defendant was not acting in necessary self-defense, if, making due allowance for the infirmities of human temper, the defendant had a reasonable excuse arising from the provocation or fault of the plaintiff, but not sufficient to justify entirely the act done, then damages ought not to be assessed by way of punishment, and the circumstances of mitigation should be considered."

The court refused to give this instruction, but gave it in the following modified form, to which appellant duly excepted:

"If the defendant acting as a reasonable man had a reasonable excuse, arising from the provocation or fault of the plaintiff, at or immediately before the assault, then damages ought not to be assessed by way of punishment, and the circumstances of mitigation should be considered."

(1) We think the court should have permitted appellant to prove the general reputation of appellee for peace and quietude. Such evidence was competent in determining who was probably the aggressor, and the

state of mind under which appellant committed the assault.

We think, too, appellant's instruction numbered 4 should have been given in substantially the form in which it was asked. The law in regard to the mitigation of punitive damages by provocation is stated in 8 R. C. L., p. 551, as follows:

"Provocation may be shown in mitigation of punitive damages, even to the extent of entirely excluding such damages, and limiting recovery to compensatory damages only. But provocation does not necessarily defeat exemplary damages, the better rule being that the conduct of both parties should be passed upon by the jury. There is a conflict of authority as to whether provocation may be shown in mitigation of compensatory damages, the better rule and the weight of authority supporting the rule that actual or compensatory damages are not in any case subject to mitigation by proof of mere provocation or of malice. Where proof of provocation is admissible in mitigation, generally the provocation must have been immediate, or so recent as to constitute a part of the *res gestae.*"

In support of this text the case of *Ward* v. *Blackwood*, 41 Ark. 295, is cited, and that case appears to give full support to the text quoted.

The law of this question was discussed by Mr. Justice Riddick in the case of *LeLaurin* v. *Murray*, 75 Ark. 232, in which case it was said:

"Now, it is a well settled rule of law that mere words never justify an assault, though, when they are such as to naturally arouse the resentment of those to whom they are addressed, they may go in mitigation of damages resulting from an assault provoked by them; but to do this they must have been uttered at the time of the assault, or so recently before that the provocation and the assault may be considered as parts of the same transaction. If sufficient time has intervened for reflection, and for reason to regain control, words, however provocative, do not in law mitigate such damages, for only provocation that is so recent as not to allow cool-

ing time is competent to mitigate damages; and even then such mitigation extends only to exemplary damages. Damages for pecuniary losses actually sustained from a wrongful assault can never be mitigated below adequate compensation. *Ward* v. *Blackwood,* 41 Ark. 295; *Goldsmith* v. *Joy,* 61 Ver. 488;*Prentiss* v. *Shaw,* 56 Me. 427; *Millard* v. *Truax,* 84 Mich. 517; Hale on Torts, 262.

"Provocation, so recent and immediate as to induce a presumption that the violence done was committed under the immediate and continuing influence of the feelings and passions excited thereby, may be shown in mitigation of damages. *Mowry* v. *Smith,* 91 Mass. (9 Allen) 67; *Millard* v. *Traux,* 84 Mich. 517; 3 Cyc. 1096."

In the case of *St. Louis S. W. Ry. Co.* v. *Myzell,* 87 Ark. 123, punitive damages were recovered. The evidence there was that when the passenger got off the train the auditor grabbed him by the arm and told the town marshal that he wanted him to take charge of Mizell as being drunk and disorderly on the train. The marshal asked the auditor if he had a warrant and, when told that he did not have, the matter was ended. It was shown that Mizell was drunk and had been guilty of very irritating conduct, and in holding that he could not recover punitive damages under the circumstances stated it was there said:

"The auditor's conduct was the natural, although improper, result of Myzell's insulting and inebriate behavior, but fell short of containing those elements of wantonness or wilfulness from which malice is inferred which constitutes the basis of an action for exemplary damages."

The case of *Mahoning Valley Ry. Co.* v. *Pascale,* 1 A. & E. Ann. Cas. 896, contains an extended case note in which many cases are cited, the result of these cases being summed up in the following note:

"In civil actions for damages for assault, evidence that the injuries complained of were inflicted under provocation offered by the plaintiff is admissible upon the question of the defendant's motive and the presence

of malice. The effect of the evidence may be to show that conduct on the part of the defendant, which in the absence of provocation would seem malicious, was not malicious in view of the provocation under which he acted, and in this way to mitigate or to defeat altogether the recovery of exemplary damages."

(2) The extent to which punitive damages may be mitigated by provocation is a question of fact to be passed upon by the jury in each particular case, and depends upon the nature and character of the provocation. If the provocation was of such a character as to make the passion irresistible and to be solely responsible for the assault, then no punitive damages should be assessed, but under the rule as stated in the case of *LeLaurin* v. *Murray, supra,* such provocation would not affect the compensatory damages, which damages include such items as loss of time, bodily suffering, impaired physical and mental powers, mutilation, disfigurement, expense of attendance, and the like.

In the case of *Morely* v. *Dunbar,* 24 Wis. 183, it was said:

"Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If malice in the defendant is to be punished by the imposition of additional damages, or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct, and not to punish the other for the same thing; nor so unwise as not to make allowance for the infirmities of men, when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensation for damages

occasioned by himself—a result which would be contrary to every principle of reason and justice."

For the errors indicated the judgment will be reversed and the cause remanded.

PEKIN COOPERAGE COMPANY *v.* MIXON.

Opinion delivered February 14, 1916.

1. MASTER AND SERVANT—YOUTHFUL AND INEXPERIENCED SERVANT—DUTY TO INSTRUCT AND WARN.—A youthful servant assumes the risks of dangers ordinarily incident to his employment, notwithstanding the fact that he is inexperienced in the work, if he has been properly instructed and warned, and is made to appreciate the dangers of the service. It is only when the master fails to give such instruction and warning, which constitutes negligence, that there is no assumption of the risk by the inexperienced servant.
2. MASTER AND SERVANT—YOUTHFUL SERVANT—ASSUMPTION OF RISKS.—A youthful servant assumes the dangers of his employment, which he is made aware of, and fully appreciates.
3. INSTRUCTIONS—ERRONEOUS INSTRUCTION—PREJUDICIAL ERROR.—An instruction which is inherently wrong, can not be cured by the giving of an instruction which states the opposite doctrine.

Appeal from Greene Circuit Court; *N. F. Lamb,* Special Judge; reversed.

Block & Kirsch and *T. D. Wynne,* for appellant.

1. When an employer does discharge his duty by giving warning and instructions to his minor servant, he exonerates himself from liability for any injury that might result from the risks and dangers arising from the employment. 115 Ark. 380; 56 Ark. 237; 97 *Id.* 180; 1 Labatt on Master & Servant, Ch. 16, § 248, p. 562.

2. It was error to give instruction No. 3 for plaintiff. It is not the law. 104 Ark. 499; 1 Labatt on M. & S., par. 291 and p. 1020, § 388; 63 Mich. 478; 30 N. W. 109; 100 Mich. 276, 58 N. W. 999; 32 N. Y. Supp. 748; 139 N. Y. 458; 75 Md. 464; 81 N. W. 259; 87 *Id.* 729; 140 N. Y. 450; 117 *Id.* 658; 23 N. W. 624; 55 Fed. 943; 39 Ark. 17; 36 Am. Rep. 454; 6 L. R. A. 733. It conflicts with No. 10 given for defendant. 99 Ark. 385; 72 *Id.* 31; 74 *Id.* 437; 61 *Id.* 141.

W. W. Bandy, for appellee.

1. It is the duty of the master to give proper instructions and to warn the inexperienced servant of patent as well as latent dangers. 115 Ark. 380; 90 Ark. 417; 90 *Id.* 473; 97 *Id.* 180.

2. Instruction No. 3 given is not erroneous. It states the rule correctly. Labatt on Master & Servant, section 291. Taking this with No. 10 given for defendant together they express the respective theories of both parties. They are not inconsistent. 83 Ark. 61; 120 Ark. 350; 99 Ark. 377; 90 *Id.* 482.

McCULLOCH, C. J. The plaintiff, Roney Mixon, received personal injuries while working for the defendant, Pekin Cooperage Company, at the latter's mill. He received the injuries during the month of May, 1913, and he was seventeen years of age at that time. It was the duty of plaintiff to remove staves from a table after they came through the planing machine, and to put them upon a wheelbarrow and haul them away. While standing at the end of the table, and in the act of pulling a stave from the planer as it emerged therefrom, plaintiff lost his balance and fell towards the machine, and, throwing out his hand, inserted it into the boxing where the knives were set, and his hand was severely injured, requiring amputation.

In a former trial of the case the court instructed the jury to return a verdict in favor of the defendant, and the plaintiff prosecuted an appeal to this court. We held on that appeal that there was no evidence of negligence on the part of the defendant concerning the machinery and other appliances furnished, but that there was enough evidence to warrant a submission to the jury of the question whether or not the plaintiff was inexperienced in the duties that he was expected to discharge and was unadvised as to the dangers incident to the work, and that defendant was guilty of negligence in failing to give him proper instructions as to his duties and a warning of the danger. For that reason it was decided that the peremptory instruction in defend-

ant's favor was erroneous, and the cause was remanded with directions for a new trial. 115 Ark. 380, 170 S. W. 1163.

On the remand of the case there was another trial, which resulted in a verdict in favor of the plaintiff. The evidence in the case at the last trial was substantially the same as that adduced at the former trial, and the issue to be submitted was unchanged. There was no attempt to show that the defendant was guilty of negligence other than that of failing to properly instruct the plaintiff as to his duties and the dangers incident to the discharge thereof under the circumstances shown in the evidence. There was, according to the decision of the case on the former appeal, sufficient to warrant the submission of that issue to the jury.

There is only one assignment of error which we deem it necessary to discuss, and that relates to the giving of instruction No. 3, over the defendant's objections. The instruction reads as follows:

"3. It was the duty of defendant to exercise ordinary care to furnish to plaintiff a reasonably safe place in which to perform his duties. And while an adult person, upon entering the employ of another, assumes all of the risks and dangers ordinarily incident to such employment, yet this rule does not prevail as to youthful and inexperienced servants. They do not assume such dangers."

The court also gave the following instruction, at the request of the defendant. "10. You are instructed that the mere fact that the plaintiff was not of age at the time of the accident is not sufficient to enable him to recover damages in this case, if he was able to appreciate the dangers incident to his employment. So, if you believe from the evidence that he was aware of and appreciated the danger of coming in contact with the knives of the planing machine in question, and of working about said machine, then he assumed the risk of injury from such danger and can not recover damages."

(1) Instruction No. 3 was incorrect for the reason that it contains the unqualified statement that a youth-

ful and inexperienced servant does not assume the risk of dangers ordinarily incident to his employment. He does assume such risks unless the master has been guilty of negligence in failing to give instructions as to the discharge of the duties and warning of the dangers attending the performance thereof. In other words, a youthful servant assumes the risks of dangers ordinarily incident to his employment, notwithstanding the fact that he is inexperienced in the work, if he has been properly instructed and warned and is made to appreciate the dangers of the service. It is only where the master fails to give such instruction and warning, which constitutes negligence, that there is no assumption of the risk by the inexperienced servant.

(2-3) It is contended by counsel for the plaintiff, in defense of the court's action, that instruction No. 3 is qualified by instruction No. 10 given at the instance of the defendant, and that the two when read together present the law of the case as a harmonious whole. We do not think that the instructions can be read together so as to harmonize with each other. They are directly in conflict with each other, for instruction No. 10 properly told the jury that the plaintiff assumed the risk of dangers which he was made aware of and fully appreciated. Instruction No. 10 perhaps contains a stronger statement of the law than defendant was entitled to, in that it said nothing about instruction as to the method of doing the work; but, at any rate, it did not cure the conflicting statement of the law contained in instruction No. 3. In other words, instruction No. 3 was inherently wrong and could not be cured by another instruction which stated the opposite doctrine. *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 227; *Helena Hardwood Lumber Co. v. Maynard,* 99 Ark. 377. The case does not fall within that class where it has been found that the instructions which are inaccurate when read alone, may be found to be in harmony and present the whole law of the case when read together. *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61.

For the error in giving instruction No. 3, the judgment must be reversed and the cause remanded for a new trial.

JOHNSON v. JOHNSON.

Opinion delivered February 14, 1916.

1. DIVORCE—CORROBORATING TESTIMONY.—A divorce will not be granted because of desertion upon plaintiff's uncorroborated testimony, alone.
2. DIVORCE—EVIDENCE—AFFIDAVIT.—An affidavit is inadmissible in evidence to establish a ground for divorce.
3. DIVORCE—STATEMENTS IN COMPLAINT—FAILURE TO ANSWER.—The statements in a complaint for divorce are not taken as true because of the failure of the defendant to answer, nor as defendant's admission of their truth; such statements must be proved, and affidavits are inadmissible to establish the issues.

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

STATEMENT BY THE COURT.

This appeal comes from a decree denying appellant a divorce.

The complaint alleged as a ground therefor that appellee had deserted him wilfully and without cause in the State of North Carolina; refused longer to live with him and went to the home of her father where she still lived; that he came from North Carolina here on the 14th day of February, 1914, and asked his wife, before leaving, to come with him, which she refused to do. That he established a residence in Pulaski County, Arkansas, and thereafter insisted on her coming here to live with him as his wife, which she refused to do and that his cause of divorce existed in this State for more than a year and occurred within five years next before the commencement of the suit.

Constructive service was had and appellant testified to the marriage; that his wife deserted him and returned to the home of her parents without reasonable cause and refused to live longer with him, in North Caro-

lina; that she refused to come with him to the State of Arkansas and refused to come to this State and live with him after he had established his residence here. He attached to his deposition as an exhibit the affidavit of one J. T. Puckett, in which it was stated that the affiant at the request of appellant had gone with appellant's father to see his wife, Margaret Johnson, and asked her to return to and live with her husband and in reply to the question, "Leslie Johnson wants to know if you will go and live with him?" her answer was, "No, I will not go and live with him; I never intend to live with him again." That in her remaining conversation she expressed no desire to live with him nor did she ask any questions about him.

The court found that the desertion occurred in the State of North Carolina where desertion is not recognized as a ground for divorce, and therefore did not exist and could not continue to exist in this State within the meaning of our law authorizing the granting of a divorce, if the cause therefor existed in this State and dismissed the complaint for want of equity.

Rose, Hemingway, Cantrell, Loughborough & Miles, and *Coleman & Lewis,* for appellant.

Argue the merits of the cause and cite many authorities to show that the desertion *existed* in this State for the statutory period. Schouler, Dom. Rel., § 37; 29 Ark. 280; 65 *Id.* 254; 5 A. & E. Ann. Cas. 851 and note; 14 Cyc. 612; 72 Conn. 567; 91 Ky. 634; 34 N. H. 519; 10 Ind. 436; 17 Ill. 476; 38 Ala. 13; 48 Atl. 533, 62 N. J. Eq. 807; 53 Atl. 221; 71 *Id.* 687; 80 *Id.* 113; 38 N. W. 607; 10 Tex. 555; Kirby's Dig., § 2678.

No counsel for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the chancellor erred in construing the statute, (section 2678, Kirby's Digest), relative to the proof of a cause of divorce that occurred outside and existed in this State, but this court can not determine the question since the testimony is not sufficient to establish the facts of the alleged ground for divorce. "Divorces are not

granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds therefor." *Sisk* v. *Sisk,* 99 Ark. 94; *Shelton* v. *Shelton,* 102 Ark. 55; *Kientz* v. *Kientz,* 104 Ark. 381.

There is no evidence whatever in the record corroborating the testimony of appellant Leslie Johnson, relative to the wife's abandonment and desertion of him and the cause thereof. The affidavit attached to his deposition as an exhibit was but written hearsay testimony, was incompetent and without probative force. There is no warrant in our law for the introduction of an affidavit in evidence to establish a ground for divorce. The statements of the complaint for a divorce are not taken as true because of the failure of the defendant to answer, or his or her admission of their truth, and must be proved, and affidavits can not be admitted to establish the issues. *Smith* v. *Feltz,* 42 Ark. 355. It makes no difference that the chancellor refused to grant a divorce for a different reason since appellant was not entitled to a decree upon the case made.

Affirmed.

BIXLER v. TAYLOR.

Opinion delivered February 14, 1916.

1. APPEAL FROM JUSTICE COURT—JURISDICTION—EFFECT OF APPEAL—PARTIES.—Where a justice rendered judgment against defendant, although defendant was not properly before the court, if defendant then elected to appeal, and took the necessary action therefor, under the statute, he became a party to the proceeding, and an affidavit and prayer for appeal, filed with the justice, will constitute an entry of his appearance.

2. APPEALS FROM JUSTICE COURT—NECESSITY FOR BOND.—An appeal may be prosecuted from a judgment of a justice court without the giving of the bond named in Kirby's Digest, § 4666.

3. APPEALS FROM JUSTICE COURT—FILING TRANSCRIPT—DUTY OF JUSTICE—BOND.—When an appeal is taken to the circuit court from a justice court, by the filing of the necessary affidavit within the time fixed by the statute, the execution and filing of a bond by the party appealing is not necessary, and the justice is required to file the

transcript in the circuit court, upon the payment to him of the costs allowed by law.

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

Hinton & Rogers, for appellant.

1. A judgment by a court without jurisdiction is void. 105 Ark. 5. It can not be validated by revival nor by appeal. 23 Cyc. 698.

Certiorari is the proper remedy to quash. 73 Ark. 604; 52 *Id.* 213. An appeal not prosecuted does not bar the writ. 16 Tex. 590. Nor will an ineffectual appeal defeat the right. 2 Phila. 215; 25 Ark. 25; 3 Corpus, Juris. 352.

2. An appeal means the removal of a suit from an inferior to higher court. 72 Ark. 475. It is an entry of appearance. 31 Ark. 58; 20 *Id.* 12. The revival of a void judgment on *scire facias* gives it no validity, though defendant appears and pleads. 9 Ark. 336.

Sellers & Sellers, for appellees.

1. The making and filing of an affidavit for appeal in due form and time was an entry of appearance. Kirby's Dig., § 4672.

2. *Certiorari* is not a writ of right, and can not be used as a substitute for an appeal. 51 Ark. 281; 44 *Id.* 509; 61 *Id.* 605; 37 *Id.* 318; 89 *Id.* 604; 28 *Id.* 87.

3. The appeal was too late.

SMITH, J. This is a proceeding by *certiorari* to quash the judgment of a justice of the peace upon the ground that it was rendered without service having been previously had. Upon the trial in the court below there was evidence which tended to support the allegations of the petition for the writ, and there was likewise evidence to the effect that the defendant appeared by an attorney-in-fact at the justice trial and defended the suit there. There is also evidence to the effect that this attorney-in-fact had no authority to so appear.

It is undisputed, however, that after the rendition of the judgment by the justice of the peace an affidavit in proper form was prepared and filed within the time

limited by law for an appeal to the circuit court, but the justice did not file the transcript required by law for the reason, as stated by the justice of the peace, that no bond for appeal was made nor were the costs paid. This appeal was abandoned by appellant, who was the defendant below, and he now seeks by this proceeding to vacate the judgment against him.

Appellant had the right to prosecute an appeal from the judgment of the justice court, although he was not required to do so, if the allegations of his petition for the writ of *certiorari* are true. But when he elected to appeal and took the necessary action for that purpose, under the statute, he thereby became a party to that proceeding and the affidavit and prayer for an appeal, which he filed with the justice of the peace, was an entry of his appearance, and he should thereafter have prosecuted this appeal. Section 4666 of Kirby's Digest provides how any person aggrieved by any judgment rendered by a justice of the peace may take an appeal therefrom to the circuit court, and appellant, by his attorney, complied with the first two subdivisions of this section and, having done so, his right of appeal was perfected. It is true the third subdivision of section 4666 provides for the giving of a bond, upon the approval of which a supersedeas issues; but the appeal may be prosecuted without giving this bond, and the justice had no right to require the execution of this bond as a condition precedent to the filing of proper transcript with the clerk of the circuit court. When he made and filed, within the time limited by law, the necessary affidavit, appellant had done the jurisdictional things essential to an appeal and, if necessary, could have had a rule upon the justice to require the filing of a transcript, upon payment of the costs allowed by law. Having thus elected to appeal, he can not now be permitted to adopt this remedy as a substitute for the appeal he should have prosecuted.

The judgment of the court below denying the prayer that the judgment be quashed will be affirmed.

COMMONWEALTH FARM LOAN COMPANY *v.* WALL.

Opinion delivered February 14, 1916.

PRINCIPAL AND AGENT—AGENCY TO NEGOTIATE LOAN.—Appellee, whose property was subject to a mortgage, desired to procure a loan from appellant, which appellant agreed to make, it being agreed that the existing mortgage be paid off out of the proceeds of the mortgage to appellant. Appellant sent the money to its local correspondent at the place of appellee's residence, with instructions, but the local correspondent appropriated the money to his own use, without applying the money as directed. *Held*, in determining as between appellant and appellee as to whose agent the intermediary was, and upon whom the loss would fall, the controlling question is one of fact; for whom was the agent or intermediary acting in the particular transaction; and *held*, further in this particular case, that the intermediary was the agent of, and acting for appellant, that the duty to satisfy the existing mortgage was within the apparent, if not the actual scope of his authority, and that appellant, who held him out as his agent, must sustain the loss.

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

Mayo & Maddox, for appellant.

1. Leatherwood was the agent of the appellee, Wall in the matter of the payment of the prior liens on the lands, and he is bound by his acts. 31 Cyc., p. 1222. He acted for Wall after the draft was endorsed by him and delivered to Leatherwood as his agent for the purpose of discharging the liens. 31 Cyc. 1225, note; 67 Ark. 159; 53 S. W. 888.

2. One dealing with an agent is bound to ascertain the nature and extent of his authority, and has no right to trust to the mere presumption of authority, nor to the assumption thereof by the agent. 92 Ark. 315; 94 *Id.* 301; 126 S. W. 832. A principal is not bound by the acts or declarations of an agent beyond the scope of his authority. 92 Ark. 315; 122 S. W. 992; 100 Ark. 360; 8 *Id.* 227. Here there was no ratification by the loan company of the unauthorized act. 74 Ark. 557; 11 *Id.* 189; 64 *Id.* 217; 41 S. W. 852.

Lamb, Caraway & Wheatley, for appellee.

1. Leatherwood was the agent of the loan company and it must bear the loss. 31 Cyc. 1222, 1225; 54 Ark. 40; 58 N. W. 100; 53 N. W. 148; 62 *Id.* 753; 144 *Id.* 1077; 27 Pac. 807; 46 N. E. 589; 53 N. W. 179; 101 Fed. 490; 100 Ark. 360-363.

2. The principal is bound by the acts of the agent exercising such authority as a third person is justified in believing the agent to have. 103 Ark. 79, 85; 100 *Id.* 240.

SMITH, J. Appellant is engaged in the business of making farm loans and had as a local correspondent, or agent, at Marked Tree, Arkansas, one Paul Leatherwood. On February 20, 1913, appellee made application, through Leatherwood, for a loan of $1,200, and submitted an abstract of the title to his property, which showed the existence of two liens, one in favor of the Chapman & Dewey Land Company, and the other in favor of the Marked Tree Bank & Trust Company. Leatherwood had formerly been the cashier of this bank. Notes for the amount of the loan and the mortgage securing the same, were executed by appellee on March 7, and after the mortgage had been duly recorded it was sent, with the notes, to appellant. Leatherwood drew a common customer's draft on the appellant for the amount of the loan, made payable to himself, but the payment was refused by appellant on presentation. Thereafter a draft was drawn on one of the company's forms, executed by appellee and payable to his own order and endorsed by him and delivered to Leatherwood to pay off the prior liens. This draft was then endorsed by Leatherwood and was paid upon presentation, and the proceeds thereof placed to the credit of Leatherwood with the Marked Tree Bank. Leatherwood checked out the money for other purposes and the prior liens were never discharged.

Appellee instituted suit praying that the notes and mortgage in appellant's favor be cancelled on the ground that no consideration therefor had ever passed, or that he have judgment against appellant for the amount of said loan. There was an answer and cross-complaint in

which a foreclosure was asked on acount of appellee's failure to discharge the prior liens and to pay interest. Upon the trial a decree was rendered cancelling said mortgage and notes, and this appeal has been prosecuted from that decree.

The parties to this litigation agree that the controlling question in this case is the one of fact: Whose agent was Leatherwood in the matter of the payment of the prior liens on the land offered as security for the loan?

In the application for the loan Leatherwood was referred to as "your (appellant's) local agent," and he was referred to by appellant's officers, who testified, as their "local correspondent," but no attempt was made to differentiate between an agent and a correspondent.

The officers of the appellant company knew, of course, of the outstanding liens and that it was anticipated that the loan would be used in part in their satisfaction and that according to their contract these items were to be discharged before the loan was completed. Appellant company knew, when it paid the draft, that Leatherwood was the last endorser and in the usual course of business the money would pass through his hands. There is nothing about the transaction to indicate any purpose on appellant's part to pay appellee the entire amount of the loan and then trust to his honesty to properly apply the money. Leatherwood testified that he had procured numerous loans from appellant company and that his fees or commissions were always paid by it and never by the borrower, and that his instructions in all cases were to secure a release and satisfaction of all prior liens, and that in making these loans it was generally necessary to satisfy some prior lien, and that his custom was to deposit the draft in the local bank and to pay off the prior indebtedness by checks on the bank. He further testified that it was his duty to see that the papers were properly executed and that he was required to submit a report on the loan, in which he gave his opinion on the appellant's character and credit and also his opinion on the

desirability of the loan. The applicant knew nothing of this report and was not supposed to see it.

The evidence on appellant's behalf was to the effect that it had no local agents, but only local correspondents, and that the duty of these correspondents was confined to submitting applications for loans.

The cashier of the bank testified that Leatherwood had negotiated a number of loans and that his custom was to attach the mortgage to a draft drawn on appellant for the amount of the loan, and deposit the draft for collection to his credit, and out of the proceeds of the draft to pay off the prior liens and any balance to the borrower.

Appellant lays stress on the recital in the application that all liens will be discharged, and insists that in undertaking to do this Leatherwood was the agent of the borrower. But this is the very point in issue. The agreement was not that appellee would discharge the liens but that there are no liens which would not be removed before the loan was completed.

Discussing a similar question the Supreme Court of Iowa said:

"As to McLean's agreement to pay off the prior mortgage, it is clear from all of the facts and circumstances that that amounted to no more than a consent on McLean's part that so much of the money loaned as was needed for that purpose should be applied in satisfaction of the existing incumbrance upon his land. We do not deem that statement in the application as of controlling importance in determining the main question as to whether or not, in receiving the money, Coleman was acting for McLean." *MeLean* v. *Ficke,* 62 N. W. 753.

In 31 Cyc., p. 1222, in a discussion of the principle which must control the decision of this case, it was said:

"In the negotiation of loans it is often difficult to determine whether an intermediary is the agent of the borrower or of the lender. Each case must be decided upon its own particular circumstances. If a person desiring a loan makes known that desire to one who applies to a money lender and consummates the loan, the inter-

mediary is the agent of the borrower, not of the lender. So if the borrower in a written application or otherwise expressly makes the intermediary his agent, if he pays the agent's commission for negotiating the loan, or if he employs the intermediary to examine the title to the property offered as security or to discharge prior encumbrances thereon, these facts, taken collectively or in various lesser combinations, justify an inference that the intermediary is the agent of the borrower. On the other hand if a money lender employs the intermediary to negotiate loans, to examine the title to property offered as security, to see that the property is discharged from prior encumbrances, to prepare the papers and see to the execution thereof, to pay over the money to the borrower, or to perform other services in regard to the loan, these facts, taken collectively or in various lesser combinations, justify an inference that the intermediary is the agent of the lender. If the lender pays the intermediary's commission, it tends to establish an agency in the lender's behalf; and if the service is performed at the request and by the direction of the lender, presumptively the agent is his agent, even though the borrower is required to pay for the service. However, none of the foregoing facts is conclusive on the question of agency, and will not preclude the alleged principal from showing that the intermediary was actually acting as the agent of the other party, or as agent of each, but for different purposes. And the fact that the application for the loan recites that the intermediary is the agent of the borrower is not controlling, if the facts and circumstances are such as to create an agency in behalf of the lender as a matter of law."

To this text there is the following note:

"Whether a loan agent who retains part of the money loaned until prior encumbrances are discharged acts in so doing as agent of the lender or of the borrower is in dispute. Certainly he may be so employed by the borrower. But when the agent is directed to retain a portion of the loan until the prior encumbrance is discharged, it would seem that he does so for the lender, who alone is inter-

ested in having the discharge before he parts with his money. Otherwise the retention of the money seems without meaning, for if the agent acts for the borrower then his possession is the possession of his principal, and the latter may demand that the money be paid him without discharging prior claims against the property, and such is the holding of many cases. (Citing cases). But there are other cases that hold that the discharging of the prior encumbrance is the duty of the owner of the property, and hence in attending to such discharge the agent acts for him. (Citing cases)."

Numerous cases are cited in support of these conflicting views. We will not undertake to review these cases, but it is sufficient to say that all of them recognize that the controlling question is the one of fact: For whom was the agent acting in the particular transaction? When that test is applied here we are constrained to hold that Leatherwood was appellant's agent in the satisfaction of the prior liens.

It is finally insisted that the proof on appellant's part is to the effect that if it be said that Leatherwood was its agent, his agency was limited and that his act in undertaking to satisfy the prior liens was beyond the apparent scope of his authority insofar as his agency for appellant was concerned. But we can not accept this view. In the case of *American Sales Book Co.* v. *Whitaker,* 100 Ark. 360, it was said (to quote the syllabus):

"Where an agency is proved without showing its extent, the agent is presumed to have authority to do all acts necessary to carry out the particular employment in which he is engaged by the principal."

Leatherwood was unquestionably appellant's agent for some purposes, and the only question of fact here is the extent of that agency, and we are constrained to find that if Leatherwood's act in undertaking the satisfaction of the prior liens was not within the actual scope of his authority it was within the apparent scope, and that the principal who thus held him out must sustain the loss resulting from his infidelity to his trust. *Peoples Life Ins.*

Co. v. *Kohn,* 100 Ark. 240; *Oakleaf Mill Co.* v. *Cooper,* 103 Ark. 79.

The decree of the court below will, therefore, be affirmed.

COLUM *v.* THORNTON.

Opinion delivered February 14, 1916.

1. HOMESTEAD—WIDOW'S RIGHT—CONSTRUCTION OF STATUTES.—The Constitution gives the homestead to the widow for life without any restrictions. Laws pertaining to the homestead right of the widow and minor children, should be construed liberally in favor of the homestead claimants.
2. HOMESTEAD—RIGHT OF WIDOW AND CHILDREN.—The homestead goes to the widow and to the minor children until each of the children arrives at the age of twenty-one years.
3. HOMESTEAD—SECOND MARRIAGE OF WIDOW—RIGHTS OF CHILDREN.—The children of a woman by her first marriage have no rights in the homestead of her second husband, and the children of the second marriage have no rights in the homestead of their mother's first husband.
4. HOMESTEAD—EFFECT OF REMARRIAGE OF WIDOW—EFFECT OF REMOVAL.—Upon the death of her first husband, a life estate vests in the widow in his homestead, and she may lease it and receive the rents therefrom, subject to the rights of her minor children, to share the same with her until each of them arrives at the age of twenty-one years, and she does not forfeit her homestead by a second marriage, and removal to the homestead of her second husband.
5. HOMESTEAD—REMARRIAGE OF WIDOW—RIGHT TO SHARE HOMESTEAD OF SECOND HUSBAND.—The remarriage of a widow, and her removal to the homestead of her second husband, does not work a forfeiture of her previously existing right in the homestead of her former husband.

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

W. P. Strait, for appellant.

1. A homestead right is a privilege personal to the widow, which may be abandoned, and which carries to her no legal interest in the estate beyond this right or privilege, and is held upon condition of its being and remaining her home, whether in reality occupied or not. Const. Art. 9, § 6; 105 Ark. 652; 95 *Id.* 256; 79 *Id.* 412;

102 *Id.* 668; 79 *Id.* 410; 48 *Id.* 230; 65 *Id.* 68; 72 *Id.* 476; 65 *Id.* 68.

2. A widow can not have two homesteads. 71 Ark. 594; 107 *Id.* 284. The legal domicile of the wife follows that of the husband. When she remarried and moved to his home, she made it her's and thereby abandoned her homestead as the widow of Colum. Cases *supra.*

Sellers & Sellers, for appellees.

1. It is admitted that a homestead can be abandoned, and that leaves only for determination whether the widow has abandoned the Colum homestead in Argenta. A homestead is not subject to partition; the burden was on appellants to show that it is no longer a homestead and no affirmative proof is required of appellees to show any intention of returning to or asserting any rights whatever over the homestead. 31 Ark. 145; 47 Ark. 504. There is no proof of abandonment. Rosa Thornton has collected the rents, paid the taxes and kept up the repairs. Mere absence is not abandonment. 42 Ark. 503; 48 *Id.* 239. Her right did not cease on remarriage and removal. 100 Ark. 399. The Constitution vests a life estate in her without any restrictions. 21 Cyc. 569; Kirby's Dig., § 3882; 51 Ark. 335; 26 S. W. 628.

HART, J. This is a suit for partition brought by appellees against appellants in the chancery court to divide certain lands situated in Conway County, Arkansas, among the parties according to their respective interests.

Appellants answered alleging that the complaint did not contain all of the lands in which the parties were interested, describing lands in Pulaski County, Arkansas. The lands involved in the partition suit belonged to the estate of R. C. Colum, who died in Argenta, Arkansas, in 1906, leaving his widow, Rosa Colum now Rosa Thornton, and their children. At the time of his death he owned a homestead in Argenta. After he died, his widow, through fear of mob violence to her children, moved to Conway County and has since resided there. Subsequently she married a man named Thornton and now lives with him on his homestead in Conway County. She and her chil-

dren collected the rents on the Argenta homestead until the children became of age and since that time Rosa Thornton has collected them.

On the trial of the case the chancellor held that, the heirs now being over twenty-one years of age, Rosa Thornton was entitled to the possession of the Argenta homestead for and during her natural life; that she had not abandoned or attempted to alienate it; that being her homestead, it was not subject to partition.

The children and heirs at law of R. C. Colum, deceased, have appealed.

The finding of the chancellor that Rosa Thornton had not abandoned the Argenta homestead nor attempted to alienate it, is fully warranted by the evidence.

It is the contention of appellants that when Rosa Thornton, as the widow of Robert Colum, married J. C. Thornton and went to live with him at his homestead, she, as a matter of law, lost the homestead which she acquired from her first husband. Section 6, article 9, of the Constitution of 1874, which is repeated in section 3882 of Kirby's Digest, is as follows:

"If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

(1) Our Constitution gives the homestead to the widow for life without any restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children, shall be construed liberally in favor of the homestead claimants.

In the case of *Davis* v. *Neal,* 100 Ark. 399, we held that a right of homestead is not lost by a widow who remarries. This case arose under a former homestead law which preserved the homestead during the time it should be occupied by the widow or children of any deceased person. We held that the word "widow" as used in the act referred to the person and not to her state or condition—whether she remains a widow or marries again. We there said:

"The rule is that whenever a right by law is attached to a person by reason of her being a widow, such right remains, unless other words are used in the act, which limit it. If the Legislature had intended that her right of homestead should cease when she married again, it would doubtless have used words of that import, such as 'during her widowhood,' which would refer to her state or condition, and not to the person, or would have added the words 'until she marries again,' or 'so long as she remains unmarried.' "

(2-3-4) It will be noticed that under our homestead law the homestead goes to the widow and to the minor children until each of them arrives at the age of twenty-one years. So it will be seen that the homestead is for the benefit of both the widow and the children of the deceased. The Constitution vests in the widow an estate for her life and in the children during their minority. Under our Constitution the children could not have shared in the homestead of the second husband of Rosa Colum if she had married before they arrived at the age of twenty-one years. Neither could her children by her second husband share in the homestead acquired from her first husband. There is no language in the Constitution from which it could be inferred that the widow forfeits her homestead by a second marriage and removal to the home of the second husband. Upon the death of her first husband a life estate vests in her in his homestead, and she has the right to lease it and receive the rents from it, subject, of course, to the rights of her minor children to share same with her until each of them arrives at the age of twenty-one years; and we do not think she forfeits her

homestead by a second marriage and removal to the homestead of her second husband.

(5) In other words, we do not think the fact that a homestead had been acquired by her as a widow from the estate of her former husband estopped her from sharing a homestead with her second husband. Such is the effect of the decisions in *Higgins* v. *Higgins,* 46 Cal. 259; *West* v. *McMullen,* (Supreme Court of Missouri), 20 S. W. 628.

After a somewhat careful search of the authorities we have not been able to find other cases directly in point; but we believe that the decisions just cited, which are directly in point, are in accordance with the spirit of our Constitution and our former decisions bearing on the question. The general rule is that a remarriage by a widow will not operate to destroy the homestead character of a home left to her and her children by a former husband. Our Constitution does not require a widow to occupy the homestead. There is nothing in it to indicate that the framers intended that the marriage of a widow and her going to her second husband's homestead and occupying it with him, should work a forfeiture of her previously existing legal rights. In short, there is nothing in our Constitution to indicate that the right of homestead of a widow should terminate should she remarry and go to live with her husband on his homestead; and we do not think such an act on her part destroys the homestead character of a then existing homestead of herself and her children by her former husband.

The decree will be affirmed.

OLIVER v. WHITTAKER.

Opinion delivered February 14, 1916.

1. IMPROVEMENT DISTRICTS—POSTPONED PAYMENTS OF ASSESSMENTS—COLLECTION OF INTEREST.—The Legislature may authorize the collection of interest on postponed payments or assessments.
2. IMPROVEMENT DISTRICTS—POSTPONED PAYMENTS OF ASSESSMENTS—INTEREST.—Under Act 279, p. 829, Acts of 1909, as amended by Act 177, Acts of 1913, the postponement of the payment of assessments

in installments is entirely at the option of the property owner, and he is merely required to pay interest on the deferred payments, if he exercises the option to defer the payment, and the act does not impose anything beyond the estimate of the value of the improvements, and the interest on the deferred payments.

3. IMPROVEMENT DISTRICTS—POSTPONED PAYMENT OF ASSESSMENTS—INTEREST—REASONABLENESS OF TIME GIVEN.—When the statute, authorizing the formation of an improvement district, provided that the amount of the assessment might be paid within thirty days without interest, but that payments made after that time would bear interest, the time given held to be of a reasonable length.

4. IMPROVEMENT DISTRICTS — ASSESSMENTS—BONDS—INTEREST.—Section 10 of Act 177, Acts of 1913, which provides that, "the amount of interest which will accrue on bonds issued by such districts and sub-districts shall be included and added to the tax, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of (the cost of) construction in determining whether or not the expenses and costs of making said improvements are or are not equal to or in excess of the benefits assessed," *held*, to imply an intention to declare the interest on bonds not be a part of the cost of construction, and was intended as authority for allowing interest on the bonds to be met by interest on the deferred payments of assessments.

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

F. G. Taylor, for appellant.

The rule is that the expense of constructing a drain can not be assessed against particular lands to an amount in excess of the benefits received by such lands. 14 Cyc. 1061 and notes 41 and 42; *Ib.* 1062 and note 50; 10 A. & E. Enc. L. 232; 120 Ill. 482. The Act of 1913 says the interest on the bond shall be included and added to the tax, etc., but does not authorize the levy of a tax to pay such interest. The power to tax must be express; such grants are construed strictly and all doubts given to the taxpayer. 37 Cyc. 966-7 and notes. The judgment is excessive and void for the reason that it exceeds the amount of the benefits.

D. Hopson, for appellees.

The court's action was fully authorized by law. Act 177, § 10. The act is valid. 1 Ark. 513; 11 *Id.* 481; 82 *Id.* 587; 85 *Id.* 175; 99 *Id.* 14. Interest is properly allow-

able on installments not due. 1 Page & Jones on Taxation by Assessment, § 475; 164 Ill. 412; 45 N. E. 723; 42 N. J. L. 508; 43 *Id.* 169; 6 Wash. 368; 33 Pac. 961; 117 Iowa, 366; 90 N. W. 1006; 114 Cal. 137; 44 Pac. 1057; 41 La. Ann. 252; 5 So. 848; 82 S. W. 280; 26 Ohio St. 280; 20 Wash. 343, 55 Pac. 432; 52 *Id.* 1063; 47 Cal. 9; 41 Kans. 560, 21 Pac. 593; 119 N. Y. Supp. 585, 134 App. Div. 533; 126 N. Y. Supp. 241; 141 App. Div. 591.

McCULLOCH, C. J. Appellant is the owner of real property within the boundaries of Big Gum Drainage District in Clay and Greene counties, and instituted this action in the chancery court of Clay County to enjoin the commissioners of the Drainage District from issuing bonds. An attack was made in the pleadings on the validity of the organization of the district, but those attacks appear to have been abandoned, and the sole question presented here for determination is whether or not the proposed bond issue is valid.

The contention is that the interest on the bonds must be taken into account in determining the cost of the improvement, and that when so treated the said costs will exceed the assessed value of benefits to accrue to the property from the improvement. The value of the benefits as assessed by the board of assessors aggregates the sum of $186,942, and the series of bonds sought to be issued amounts, with interest to maturity, to the aggregate sum of $319,704. Assessments were levied, divided into twenty-two annual installments, apportioned in amount so as to aggregate the total amount of the value of benefits with interest at 6 per cent per annum up to the respective dates of payment, which said aggregate amount is equal to the amount of the bonds and the interest thereon and the sum estimated to be sufficient to defray current expenses of maintenance and emergencies. In other words, the record shows, as we understand it, that the aggregate value of the benefits is divided into annual assessments, bearing interest to maturity, and that the bond issue, with interest thereon to be computed, together with other anticipated expenses, does not exceed that aggregate.

(1) The contention of appellant is that the amount of the value of benefits as assessed, without interest, is the maximum liability of the property owners, and that there can be no assessments in excess of that amount for any purpose. Interest on bonds executed to obtain borrowed money for use in the construction of an improvement is necessarily a part of the cost of construction (*Fitzgerald* v. *Walker,* 55 Ark. 148), and that additional burden in excess of the value of benefits can not be cast upon the property owners unless it be held that interest can be imposed on postponed installments of the value of benefits. It is quite well settled by our decisions that special benefits to the property to be taxed form the basis of the right to impose the cost of local improvements upon such property, and that there can be no imposition of a tax in excess of the value of benefits. *Kirst* v. *Street Improvement District,* 86 Ark. 1; *Alexander* v. *Board of Directors Crawford County Levee Dist.,* 97 Ark. 322. But we have not decided that the Legislature can not authorize the collection of interest on postponed installments of assessments. On the contrary, it is more reasonable to say that while the estimate of benefits should be fixed at the value at the time they accrue to the property from the construction of the improvement, interest on the deferred installments also becomes a part as it accrues, of the benefits and payment thereof may be exacted. All the authorities which are brought to our attention seem to agree that the Legislature may authorize the collection of interest on postponed payments of assessments. 1 Page & Jones on Taxation by Assessment, section 475; *Watson* v. *City of Elizabeth,* 42 N. J. L. 508; *Johnson* v. *City of Trenton,* 43 N. J. L. 169; *Heath* v. *McCrea,* 20 Wash. 343, 55 Pac. 432; *The People* v. *Weber,* 164 Ill. 412, 45 N. E. 723; *E. & W. Construction Co.* v. *Jasper County,* 117 Ia. 366, 90 N. W. 1006; *Hellman* v. *Shoulters,* 114 Calf. 137; *Newman* v. *City of Emporia,* 41 Kans. 583, 21 Pac. 593.

(2) The remaining question in the case is whether or not the Legislature has authorized the collection of interest in addition to the amount of the assessed value of

benefits. The general statute (Act of May 27, 1909),* under which this district is organized, was amended by the General Assembly of 1913 (Act 177), which included the following section:

"Section 10. The amount of interest which will accrue on bonds issued by such districts and sub-districts shall be included and added to the tax, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of (the cost of) construction in determining whether or not the expenses and costs of making said improvements are or are not equal to or in excess of the benefits assessed.

"When assessments of benefits are made in drainage and other improvement districts, the land owners shall have the privilege of paying the same in full within thirty days after the assessment becomes final. But all such assessments shall be made payable in installments, so that not more than 25 per cent. shall be collectible in any one year against the wishes of the land owner, and in the event that any land owner avails himself of this indulgence, the deferred installments of the assessed benefits shall bear interest at the rate of 6 per cent. per annum, and shall be payable only in installments as levied.

"The levy of the assessment may be made by way of proportional amounts of the total assessed benefits, and interest need not be calculated until it is necessary to do so to avoid exceeding the total amount of benefits and interest."

The language of the new statute just quoted is not as clear as it might be but when fairly construed we think it means to confer authority merely to collect interest on deferred payments of assessments and to authorize the payment of interest on the bonds, which is to be included in the assessments against the property. It is our duty to construe the language of the statute so as to render it a valid exercise of legislative power if the language is fairly susceptible to such construction, and we are of the opinion that when an analysis of the statute is ap-

*Act 227, p. 829, Acts 1909. (Rep.)

proached in that spirit it can not be said that it was intended to authorize the imposition of any burden in excess of the actual value of benefits to the property, together with interest on deferred payments. Property owners are by the statute expressly given the privilege of paying the estimated value of benefits within thirty days after the assessment is made, so as to free their property of any further assessment for the cost of improvement. In other words, the postponement of the payment of assessments in installments is entirely at the option of the property owner, and he is merely required to pay interest on the deferred payments, if he exercise the option to defer the payment, but it was not intended to impose anything beyond the estimate of the value of the improvements and the interest on the deferred payments.

(3) It is not contended by counsel for appellant that the time (thirty days) given for payment of assessments free of interest is unreasonably short so as to render unconstitutional that part of the act which attempts to impose the payment of interest as being in effect, a taking of property without due process, but some of the judges maintain that the statute is unconstitutional for that reason, and we deem it proper to say that the majority do not share that view. The fixing of the time of payment of assessments was within the discretion and power of the lawmakers and the time is not so obviously oppressive as to justify the court in setting aside the legislative will.

(4) The last paragraph of the section seems to authorize just what was done in this case, namely to compute the interest on deferred payments of assessments and levy the whole amount, including the computed interest, in proportional assessments. The language of the first paragraph of the section, which if literally interpreted, seems to imply an intention to declare the interest on bonds not to be a part of the cost of construction, was evidently intended merely as before stated, as authority for allowing interest on the bonds to be met by interest on the deferred payments of assessments.

We are of the opinion that the statute, when so construed is a valid one, and that its terms have not been violated by the commissioners in the bond issue involved in this litigation. The decree is therefore affirmed.

HART and KIRBY, JJ., dissent.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. BURTON.

Opinion delivered February 7, 1916.

1. TRIAL—REMARKS OF COUNSEL—REMOVAL OF PREJUDICE.—In a personal injury action defendant sought to introduce in evidence, photographs of plaintiff at work some months after the alleged injury. In objecting to the introduction of the testimony counsel for plaintiff said that "it was a put up job." *Held*, the action of the trial court, in admonishing the jury not to consider these remarks, removed any prejudice which might have arisen.
2. APPEAL AND ERROR—INVITED ERROR.—Error can not be predicated upon the trial court's doing something agreed to by appellant's counsel.
3. MASTER AND SERVANT—DUTY OF SERVANT TO ACT QUICKLY—NEGLIGENCE A QUESTION FOR THE JURY.—Where the plaintiff was working on a motor car, hauling a push cart, loaded with ties, and where he was directed by the foreman to release the connection between the two cars, and he acted in obedience to a direct command from his foreman, and was required to act promptly, the service demanding his exclusive attention, he having no time for observation and deliberation, *held*, when the plaintiff was injured, the question of defendant's negligence, or plaintiff's contributory negligence, is properly a question for the jury.
4. DAMAGES—PERSONAL INJURIES—AMOUNT.—Plaintiff was injured by falling from a motor car hauling a push car along defendant's tracks. *Held*, under the evidence, that a verdict of $1,500 was not excessive.

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

STATEMENT BY THE COURT.

William A. Burton sued the Kansas City Southern Railway Company to recover damages for personal injuries alleged to have been sustained by him while in the employment of the company by reason of its negligence. The material facts are as follows:

In January, 1915, William A. Burton was employed as a section hand by the defendant railway company. He was injured while assisting in hauling ties on a push car with a motor car pulling it, the accident happening near Ravenna, in Miller County, Arkansas. The push car was loaded with about thirty ties. They were seasoned, were eight feet long and seven inches thick. The plaintiff, Elmer Sherman and W. M. Whitworth, the section foreman, were going out to unload ties at the time plaintiff was injured. Elmer Sherman was riding on the rear end of the push car and it was his duty to hold the ties on the push car. Whitworth was operating the motor car. Burton was sitting on the back end of the motor car about two feet from his foreman and was acting as brakeman.

The plaintiff himself testified substantially as follows: The push car was attached to a motor car in front of it and we were going north at the time I received my injuries. The foreman told me to disconnect the push car, which was connected by a chain to the motor car. The foreman had shut off his battery before I began to pull out the pin. When I reached over to pull out the pin the section foreman shoved his battery on. This caused the car to jump or jerk violently and I was thrown down between the push car and the motor car. I threw my hand against the ties in order to keep from getting down across the rails. I fell down between the tracks and the car of ties passed over my body and shoved me along for ten or fifteen feet right down the track. The car ran completely over me.

The plaintiff then detailed the character and extent of his injuries which will be stated later on in discussing the question of the alleged excessiveness of the verdict.

S. G. Hearn, a cousin of the plaintiff, testified: I saw the accident at the time the plaintiff was hurt and was about seventy yards away; Sherman was on the rear end of the push car with his back to the motor car; Whitworth was driving the engine to the motor car and was about two feet from Burton; the exhaust to the motor car stopped and in just a little bit started up again; then

I saw Burton lying on the track; the push car had passed over his body.

For the defendant W. M. Whitworth testified as follows: Burton was on the motor car with me, braking, at the time he was injured. Elmer Sherman was riding on the rear end of the push car and was holding the ties on it. When we got down to a point somewhere between sixty and one hundred yards of the place where I wanted to stop I shut the batteries off. Burton pulled the spike out of the chain that coupled the cars together. He then stood up with his feet towards the push car. He gave the push car a shove and this gave the motor car a start. He then jumped off the car in the opposite direction to which it was going and this caused him to fall down. The power was not on the motor car at the time he fell. It had been cut off and the car was just running along easy. I did not start up the motor car suddenly and did not turn on the power just before Burton got off. I had instructed Burton to stay on the car until we got to where we were going to unload ties. There was no jerk whatever to the car at the time plaintiff was injured.

Elmer Sherman testified: Whitworth told Burton when they got down there close to the station to pull the pin out. The foreman shut off the power so the chain would give slack and thus enable Burton to pull out the pin and uncouple the push car from the motor car. Burton uncoupled the push car and then got up and stood with his back the way the motor car was going. At the time he stepped off, the push car was a rail or more from the motor car. A rail is forty or fifty feet long. There was no power in the motor car when Burton stepped off of it. There was no jerking or jolting of it. I was looking right at him when he stepped off and could see him until the push car ran over him. I am a son-in-law of Whitworth.

Other evidence will be stated or referred to in the opinion. The jury returned a verdict for Burton in the sum of $1,500 and the defendant railroad company has appealed.

Read & McDonough, for appellant.

1. The verdict is excessive. 82 Ark. 61; 87 *Id.* 109; 89 *Id.* 9; 98 *Id.* 425.

2. The remarks of counsel were improper and prejudicial. 82 Ark. 562; 65 *Id.* 619; 75 *Id.* 577.

3. The court erred in admitting in evidence the written statement of plaintiff. Self-serving declarations, even though in writing can not be admitted. 92 Ark. 472; 168 S. W. 514.

4. A verdict should have been directed for defendant. There must be substantial evidence authorizing a recovery. 118 Ark. 349. Unless the section foreman knew plaintiff was in a place of danger at the time that the power was turned on, plaintiff can not recover. 113 Ark. 60; 112 *Id.* 446; 111 *Id.* 272, 486; 107 *Id.* 341; 78 *Id.* 505; 79 *Id.* 437. There must be knowledge of the dangerous position before the master is liable. 84 Ark. 377; 95 *Id.* 477.

5. The court erred in giving instruction No. 1 for plaintiff. 90 Ark. 439; 78 *Id.* 553; 82 *Id.* 562. Also in giving No. 2 and refusing No. 6 for defendant. 100 Ark. 467 and cases *supra* under subdivision 4.

William H. Arnold, for appellee.

1. The verdict is not excessive. Plaintiffs' injuries were permanent and he was subjected to much suffering mentally and physically. The testimony sustaining the plaintiffs recovery must be taken in its strongest and most favorable light. 86 Ark. 244; 91 *Id.* 337; 90 *Id.* 210; 93 *Id.* 191; 96 *Id.* 394; 97 *Id.* 486; 87 *Id.* 109; 97 *Id.* 438; 98 *Id.* 211; 90 *Id.* 233; 89 *Id.* 424.

2. The instructions as to mental suffering were proper. 95 Ark. 220; 96 *Id.* 32.

3. The photographs taken by plaintiff were admissible; those taken by defendant were not and the remarks of counsel were not improper. 102 Ark. 400; 100 *Id.* 437; 74 *Id.* 256. Juries are influenced by frivolous remarks. 109 Ark. 231; 103 *Id.* 307. But if improper it was invited error. 113 Ark. 82.

4. The Act of March 8, 1907, makes all corporations liable for injuries to servants resulting from carelessness, omission of duty or negligence regardless of the grade of service. 87 Ark. 587; 89 *Id.* 522; 92 *Id.* 502; 102 *Id.* 562. Evidence tending to prove that defendant's servant was guilty of negligence which caused plaintiff's injury was sufficient to sustain a charge of negligence. 102 Ark. 625; 109 *Id.* 393.

5. There is no error in the court's charge. It is not error to refuse instructions covered by others. 110 Ark. 209; 111 *Id.* 272; 111 *Id.* 538. Burton was not guilty of contributory negligence in obeying the foreman. 82 *Id.* 19; 79 *Id.* 53; 92 *Id.* 554.

HART, J., (after stating the facts). (1) Counsel for the defendant assigns as error the action of the court with relation to certain remarks of counsel for plaintiff. It appears that a short time before the trial the attorney for the plaintiff went to the scene of the accident and took certain photographs showing the motor car and the push car on the tracks as they were at the time of the accident. The plaintiff was injured on January 14, 1915. During the first part of June he was engaged in sawing down trees for a lumber company. An agent of the defendant made arrangements with the foreman of that company to cause plaintiff to go to work on a very large tree and to allow him to take photographs of the plaintiff while so engaged without the plaintiff being aware of his doing so. The photographs taken by defendant were introduced in evidence and the plaintiff's counsel proved by Burton that they were taken without his consent or knowledge of what they were to be used for. He testified that the foreman told him to get this big tree out of the way. Counsel for the defendant objected to this testimony. Counsel for the plaintiff stated that he wanted to show that it was a "put-up job." Counsel for the defendant objected to the remarks of counsel for the plaintiff and asked for a continuance of the cause. Counsel for the plaintiff explained what he meant by the remark, that is, that the defendant had taken snap shots of the plaintiff while at work in helping to cut down a

big tree without the knowledge or consent of the plaintiff and that these photographs were taken for the purpose of being used at the trial of the case. The court declined to grant a continuance but stated to the jury that he withdrew from their consideration the remarks of counsel for the plaintiff to the effect that it was a "put-up job," referring to the photographs. The court then permitted plaintiff to state that these photographs were taken without any knowledge or consent on his part that they were to be used in the trial of the present case. It is not contended that the photographs as taken by the defendant do not correctly represent the plaintiff as he was engaged in helping to cut down the tree and on this account it is contended that the remarks of counsel were prejudicial to the rights of the defendant. If it be conceded that the words "put-up job" as used by counsel for the plaintiff have a meaning of wrongful action on the part of the defendant and thus were calculated to create prejudice against the defendant in the minds of the jury, still the action of the court in excluding these remarks from the jury had the effect to remove this prejudice. The court told the jury not to consider these remarks and only permitted the plaintiff to testify that the photographs were taken without his knowledge or consent that they were to be used in the trial of the instant case.

(2) Counsel for the defendant also assign as error the action of the court in admitting in evidence a written statement of the plaintiff. After the plaintiff was injured he was carried to a hospital operated for the benefit of the employees of the defendant and was attended by Doctor Boyd. Doctor Boyd was a witness in the case and first testified that the plaintiff stated to him that he was pulled off the motor car by the chain which coupled the push car to it. He testified that the plaintiff had stated to him in substance that the chain dragged him off of the motor car. The doctor took a written statement of the plaintiff, made to him at the time he was brought to the hospital. The physician asked the plaintiff the following:

"State in your own way and for your own benefit just how this happened," and the plaintiff answered, "I was on the motor car with push car attached to motor car with chain and W. M. Whitworth told me to uncouple the push car from the motor car which I did, when Whitworth speeded up the motor car and jerked me off the car."

This written statement of plaintiff was desired to be put in evidence by his counsel. Counsel for the defendant objected to this unless the statement of Doctor Boyd which was attached to it was also read to the jury. Among other things, the doctor's statement contained the following: "Burton said when he got the push car loose Whitworth turned on speed and the chain dragged him off the motor car and ran over him."

After some controversy between counsel, the court admitted the written statement of the plaintiff and also the statement of Doctor Boyd just referred to. We think an examination of Doctor Boyd's testimony as a whole shows that the only statement ever made to him was the written one signed by the plaintiff, referred to above. And we think that when the whole record is considered, counsel for the defendant agreed that the written statement of the plaintiff might be read to the jury if at the same time the statement of Doctor Boyd was also read in connection with it. This the court required to be done. Therefore, no error could be predicated upon the court doing something agreed to by counsel for the defendant.

(3) It is next insisted that a verdict should have been directed for the defendant. According to the testimony of the defendant, the foreman did not direct plaintiff to pull the pin for the purpose of uncoupling the cars at the time he was injured and did not know that plaintiff was doing so. The foreman testified to such a state of facts and also said that he did not put on the power just before the plaintiff was injured. The foreman also stated that he had directed the plaintiff to stay on the motor car until they got to a place where they wanted to unload the ties but that the plaintiff had got off before that, contrary to his directions. Of course if this testimony was

true there was no liability on the part of the defendant; and if it had been undisputed the court should have directed a verdict for the defendant. But the testimony of the foreman is not even fully corroborated by Elmer Sherman, his son-in-law. He corroborated Whitworth to the extent that there was no jolting or jerking of the motor car and also said that the plaintiff stepped off of the motor car himself with his back to the way the motor car was running, and fell on his back. On the other hand, however, he testified that the foreman told Burton when they got near the place where they intended to unload the ties, to pull the pin out when he stopped the engine and for the plaintiff to get off and help him, Sherman, stop the push car.

In this last respect the testimony of Sherman is at variance with that of Whitworth. Whitworth's whole testimony is flatly contradicted by that of the plaintiff himself. According to the testimony of the plaintiff he stood within two feet of Whitworth and Whitworth, after shutting off the power, directed him to pull the pin before the cars had stopped; that, in compliance with the foreman's directions, he did so; that the foreman then, without any warning to him, suddenly turned on the power on the motor car causing it to start suddenly with a violent jerk; and that this caused him to be thrown backward and to fall between the cars.

According to this testimony, Whitworth, knowing the plaintiff was in a dangerous position, applied the batteries of the motor car and this caused it to jerk so violently that Burton fell off of the car.

The testimony of the plaintiff is corroborated to a considerable extent by the testimony of the witness Hearn. He was not near enough to hear Whitworth tell plaintiff to pull the pin, but he says he saw Burton sitting about two feet distant from Whitworth on the motor car. He also stated that after the power was shut off of the motor car it started again, almost at once, and that he then saw the push car run over the plaintiff. He contradicts the testimony of Sherman by saying that the lat-

ter had his back to the motor car when the accident happened.

Thus it will be seen, according to plaintiff's testimony, that he acted in obedience to a direct command from his foreman, was required to act promptly, and the service required of him was such as to demand his exclusive attention. He had no time for observation or deliberation. Under these circumstances the question of the negligence of the defendant or contributory negligence of the plaintiff were properly jury questions.

Counsel for the defendant also assigns as error the action of the court in giving and refusing certain instructions. We do not deem it necessary to set out these instructions or discuss them in detail. We have carefully read and considered them and are of the opinion that the respective theories of the parties to this law suit were fully and fairly submitted to the jury.

(4) We now come to a consideration of what we deem the most serious question in the case, and this is the alleged excessiveness of the verdict. The jury returned a verdict in plaintiff's favor for $1,500 and it must be conceded that according to the testimony introduced by the defendant that that amount is excessive. We need not set out the evidence on the part of the defendant for the reason that the excessiveness of the verdict must be tested by the evidence on the part of the plaintiff. At the time the plaintiff was injured he was a strong, able-bodied young man twenty-two years of age. When he started to fall from the car he says that he saw that his shoulders or neck were about to fall on the rail and that he threw his hands over on the ties to keep from so falling, knowing that the wheels of the car would sever his head from his body; that he fell on the track between the rails and that a cog wheel of the push car pressed down on his hip and dragged him along ten or fifteen feet down the track; and that he lay there about thirty minutes bleeding at the mouth and nose.

Another witness testified that blood was coming from his ears when he was picked up.

He was carried to a hospital and remained there only a few days but states that he went home because the physicians there did not seem to be treating him properly; that after he went home he was not able to do any work for two months; that he spat up blood for about three weeks and that his lungs hurt him; that he had to hold his head to one side and could not turn it or straighten it up; that he hurt all of the time and could not rest any for five weeks; and that he suffered a great deal of pain. He claimed that he was not able to work much but went to work because he did not have any means of support and felt that he had to do what work he could. At the trial of the case he testified that he still suffered pain from the injury; that he still suffers pain in the small of his back when he lays any object down or picks it up; and that he has at times particularly severe pains between his shoulders.

Giving to plaintiff's own testimony its strongest probative force and considering the character and extent of his injuries and the suffering endured by him, we can not say that the verdict of the jury is excessive.

It follows that the judgment must be affirmed.

OPINION ON REHEARING.

Hart, J. The chief contention of counsel for appellant was that the evidence did not warrant the verdict of the jury. In his brief on rehearing he challenges the statement of facts made by the court. In the statement of facts is the following: "When I reached over to pull out the pin the section foreman shoved his battery on; this caused the car to jump or jerk violently and I was thrown down between the push car and the motor car."

It is contended by counsel that there is nothing in the transcript to warrant this statement.

It is not practical in an opinion to set out in full the facts as they appear in the transcript. Such a course would unduly extend the length of every opinion.

Appellee was a witness in his own behalf and being recalled testified as follows:

"Q. You heard the testimony of Mr. Sherman that you stepped off of the car while you were facing the push car; is that a fact?

A. No, sir; it aint. I was sitting on the motor car, upon the seat on the west side of it, on the motor car, right on the corner of the seat, and reached over and pulled this pin out, and when I pulled the pin out he started the batteries on.

Q. Go ahead and tell whether you stepped off the car when you were facing the push car, or not?

A. I was sitting on this seat and reached to pull the pin out, and when I pulled the pin out and he shoved his batteries on I fell right on that side of the track and throwed that hand on the ties to keep from falling against the rail and the car of ties come right on over me.

Q. Who put on the batteries?

A. The section foreman.

Q. What was his name?

A. Whitworth,"

In addition to this, when appellee was carried to the hospital after he was injured Doctor Boyd, his attending physician asked him certain questions in behalf of the railroad company. Among them he asked the following:

"State in your own way and for your own benefit just how this happened," and appellee answered, "I was on the motor car with a push car attached to the motor car with a chain and W. M. Whitworth told me to uncouple the push car from the motor car, which I did. When Whitworth speeded up the motor car and jerked me off the car."

Doctor Boyd wrote this down and it was introduced in evidence as part of the testimony. When this is considered together with the evidence given by appellee on the witness stand, we think the court was fully warranted in abbreviating the testimony into the statement challenged in our statement of facts.

In any event, under the state of the record as set out in this motion for a rehearing, the jury was fully warranted in finding that when the foreman shoved his battery on and the plaintiff was thrown from his seat, the

car jerked violently; or else he would not have been thrown from his seat.

The plaintiff testified that the foreman shut off the battery before he pulled out the pin; that he was sitting on the side on the rear end of the car and reached over to pull out the pin; that the section foreman then shoved his battery on and he was thrown from the car.

We think the jury might infer from the fact that he was thrown from the car that it jerked violently when the foreman threw the battery on.

However, his statement made to the physician was a part of the testimony and in it states that the foreman speeded up the motor car and jerked him off of the car.

The motion for a rehearing will be denied.

PINE BLUFF HOTEL COMPANY v. MONK & RITCHIE.

Opinion delivered February 7, 1916.

1. BUILDING CONTRACTS—DELAY IN COMPLETION—STIPULATION FOR LIQUIDATED DAMAGES.—A building contract provided that the building should be completed by a certain date, and in the event of delay, that the contractor should pay a sum of $100 per day as "liquidated damages by reason of such delay." The contract also contained the following stipulation: "This is understood to be and is a provision for damages liquidated that will be sustained by the owner in the event of delay of completion of said work after Oct 1, 1912, and the same is not a provision for a penalty." *Held*, the stipulation in the contract was for liquidated damages and not for a penalty.
2. BUILDING CONTRACTS—DEFECTIVE CONSTRUCTION—CONSTRUCTION ACCORDING TO ARCHITECT'S PLANS.—When a building contractor performs his work strictly in conformity with plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications, and the contractor may recover under the contract, unless he has warranted that the plans and specifications are correct.

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

Bridges & Wooldridge, for appellant.

1. The intention of the parties govern and is usually conclusive as to whether a sum stipulated to be paid in

case of breach of a contract is liquidated damages or a penalty; the question is one for construction. 8 Ruling Case Law, 560; 56 Ark. 405, 413; 87 *Id.* 545, 553; 104 *Id.* 9-15; 73 *Id.* 432; 69 *Id.* 114; 104 *Id.* 9; 118 Ark. 492; 48 Pa. St. 450. It was error to refuse instruction No. 1 and in giving No. 8. 205 U. S. 105.

2. The hotel company was not liable to the contractors for building the wall the second time, but the contractors were liable to the hotel company in such sum as the proof showed to be the cost of constructing the wall the third time. See as to authority and powers of architects and superintendents, 100 Ark. 166; 87 *Id.* 56; 20 Minn. 494; 21 Manitoba L. Rep. 641; 98 S. W. 387; 149 Fed. 189-191, 104 S. W. 1061-6; 53 Pac. 637. A contractor is liable notwithstanding an honest mistake. 88 Ark. 213. Appellant was entitled to recover (1) liquidated damages and not the penalty, (2) for rebuilding the west wall and (3) $1,800 it paid its superintendent for services during the delay. Cases *supra.*

M. Danaher and Palmer Danaher, for appellee.

1. Provisions in a contract like this as to the time of completion may be waived. 6 Cyc. 65; 16 Abb. Pr. N. S. (N. Y.) 337; 20 Ohio 361; 2 Woodw. (Pa.) 332; 54 N. W. 743; 99 Ala. 620; 13 So. 118; 75 Atl. 25; 138 S. W. 1188-90. A large amount of the extra work was done by order of the owners, and the contractors did the work and furnished the materials under the honest belief that no damages would be claimed for delay. Cases *supra.*

2. The builder were bound to follow the plans and specifications. The west wall was built according to same and the builders were entitled to pay. 88 Ark. 213; 6 Cyc. 63; 81 Pac. 742; 131 *Id.* 642; 39 Atl. 795. If a building or wall falls from following defective plans, etc., before or after completion the builder is not liable. 142 Pac. 675; 41 N. W. 338; 39 Atl. 143. The defect was in the plans of the architect. There is no error in the instructions. Only *actual* damages were properly allowed. Cases *supra.*

McCULLOCH, C. J. The plaintiffs, Monk & Ritchie, entered into a contract with the defendant and counter-claimant, Pine Bluff Hotel Company, to construct a six-story hotel building for the latter in the City of Pine Bluff for the contract price of $170,000. The contract contains a stipulation that the building should be completed by October 1, 1912, and that in the event of delay in completion beyond that date the contractors should pay the sum of $100 per day "for each and every day the completion of the building is delayed beyond the time specified above, as liquidated damages by reason of such delay." That clause of the contract contains the further stipulation as follows: "This is understood to be, and is a provision for damages liquidated that will be sustained by the owner in the event of delay of completion of said work after October 1, 1912, and the same is not a provision for a penalty." There was a delay of nearly a year in the completion of the building, and the defendant filed a counter-claim asking for judgment for damages in the sum of $100 for each day of the delay.

According to the undisputed evidence, the plaintiffs performed extra work on the building, for which the price aggregated the sum of $8,863.07, making a total earned price, for work and material of $178,863.07. Defendant has paid thereon the sum of $165,919.80, leaving a balance due of $12,943.27. In addition to that, the plaintiffs claim the sum of $3,500, the price for rebuilding a retaining or area wall which fell down before the completion of the building and which plaintiffs rebuilt under the direction of the architect. The wall fell the second time, and the defendant in the counter-claim asserts the right to recover the price of rebuilding it on the ground that the fault was with the plaintiffs and that they should rebuild the wall again or pay the cost of rebuilding it. The disputed items are those concerning the rebuilding of the wall and the items of damages for delay in completing the building.

The court instructed the jury that the stipulation contained in the contract was for a penalty, and that the defendant should only recover actual damages sustained.

The jury by its verdict found for the plaintiffs for the undisputed sum of $12,943.27, and for the sum of $3,500 the price of rebuilding the wall, together with interest on those two items, and found in favor of the defendant in the sum of $16,027.20 for damages on account of the delay in completion of the work, leaving a balance due the plaintiffs of $1,978.20. The discussion here will be confined to the two points in the case, with reference to the stipulation for the payment of $100 per day for delay and the item for rebuilding the retaining wall.

The evidence shows that the defendant had an investment of from $350,000 to $375,000 in the building, which was constructed mainly for the purpose of operating a hotel. In addition to the hotel proper, there was a cigar stand which rented for $125 per month; banking room, which rented for $166.66 per month; a store room, which rented as a drug store for $50 per month; a barber shop, which rented for $50 per month; another store room, which rented for $75 per month; and a bar room, which was rented out part of the time after completion of the building. The hotel part was constructed to lease to some one operating a hotel and some of the other rooms were leased out before the contract of construction was let. Preparations were made to occupy the building before it was completed, and there was a large expenditure in anticipation of the operation of the hotel, the principal item being that of the salary of a superintendent, who was employed to superintend the operation of the hotel as soon as the building could be occupied for that purpose.

The court erred in instructing the jury that the stipulation was for a penalty, for it seems clear, under the law as established not only by the decisions of this court but of many other courts, that the stipulation constituted a valid contract for liquidated damages in the event of delay, and the contract is enforcible as such. The cases on this subject, which seems to settle the question in favor of defendant's contention that it was a stipulation for liquidated damages, may be cited as follows: *Lincoln* v. *Little Rock Granite Co.*, 56 Ark. 405; *Nilson* v. *Jones-*

boro, 57 Ark. 168; *Young* v. *Gaut,* 69 Ark. 114; *Blackwood* v. *Liebke,* 87 Ark. 545; *Kimbro* v. *Wells,* 112 Ark. 126. The courts are more and more disposed to follow the obvious intention of the parties as expressed in the contract, by upholding a stipulation of this sort as being one for liquidated damages unless it is clear that it was intended as a penalty in disguise. *Sun Printing & Pub. Co.* v. *Moore,* 183 U. S. 642; *United States* v. *Bethlehem Steel Co.,* 205 U. S. 105.

Moreover, it is not to be overlooked that the parties themselves in the contract expressly denominated the stipulation as being one for liquidated damages, and have written it into the contract that it shall not be treated as a penalty. Now, the language of such stipulation would be unavailing to control the meaning if it really was intended as a penalty, but when the terms of the contract leave a state of doubt as to what the parties intended, the surest test is to accept their own clear expression as to what was intended. In other words, the fact that the parties themselves have called it liquidated damages is forceful evidence of their real meaning and will control unless it otherwise appears that it was merely meant as a cover for a stipulation for penalty.

In *Wait* v. *Stanton,* 104 Ark. 9, we quoted with approval the following from Mr. Justice Agnew's opinion in *Streeper* v. *Williams,* 48 Pa. St. 450: "Upon the whole, the general observation we can make is that in each case we must look at the language of the contract, intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease and difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case."

(1) When that test is applied, it is easily seen that this contract was one for the payment of liquidated damages.

In *Blackwood* v. *Liebke, supra,* we said that "the question is not as to the status of the parties at the time when the contract terminated, but as to the status of the parties at the time they made the contract. It may be,

as the contract works out, that it would be easy to ascertain the damages for the breach of it, or to prove that there were none. But if the status of the parties at the time of the contract was such that it would be difficult or impossible to have anticipated the damage for a breach of it, and there was a positive element of damage, then under the authorities there is no reason why that may not be anticipated and contracted for in advance."

It is contended by counsel for the plaintiffs that this case should be controlled by our decision in *Wait* v. *Stanton, supra.* The facts of that case were, however, altogether different, as it was a contract merely for the construction of a building for no other purpose except to rent; the rental value, which was the true measure of the damages, was easily ascertainable and the stipulated amount to be paid was greatly out of proportion to damages which would probably result from delay. In the present case we have before us a contract for the construction of a very large building to be used for different purposes, where special damages might reasonably be expected to flow from delay in the occupancy. The proof shows, as a matter of fact, that considerable inconvenience, injury and perhaps loss of profits did result from the failure to complete the building according to the terms of the contract, and the stipulated damage was not out of proportion to the probable actual damage. When we place ourselves in the position of the parties when they made the contract, it is easy to see that they had damages in contemplation which were not easily ascertainable and that they elected to agree upon the damages in advance. This, they had a right to do and there is no reason why the court should disturb that agreement and arbitrarily say that the contract was one for a penalty. We are of the opinion, therefore, that the court erred in its instruction, and that for that reason the judgment must be reversed and the cause remanded for a new trial.

(2) It is further contended by the defendant, which is the appellant here, that the court erred in its instruction as to the item of $3,500, the price of rebuilding the wall. The testimony on the part of the plaintiffs concern-

ing that item tended to show that they constructed the area wall strictly in accordance with the plan and specifications and under the direction of the architect, and that the wall fell either by reason of defects in such plan and specifications or by reason of the fault of the defendant in turning water in behind the wall which caused it to crumble and fall. On the other hand, the testimony adduced by the defendant tends to show that the wall fell by reason of faulty construction. The court gave the following instruction on that subject:

"V. In order to entitle plaintiffs to recover the cost of rebuilding the retaining wall the burden is on them to prove by a fair preponderance of the evidence that they built the same in accordance with the plans and specifications of the architect and used such reasonable degree of care and skill and took such precautions as are ordinarily taken by contractors in doing work of this kind and that the failure and collapse of the wall was owing to the erroneous, defective and insufficient plan and specifications furnished by the architect and not to the manner of its construction. They must further show by a like preponderance of evidence that such errors, defects and insufficiencies in the plan and specifications for said wall as furnished by the architect were not such as to be readily discovered by the use or ordinary knowledge, skill and care on part of plaintiffs, and that plaintiffs, exercising such skill and care, could not reasonably have foreseen that the wall would prove insufficient for the purpose intended and would probably collapse or break down. If you find these facts so proven and that the wall was rebuilt by plaintiffs according to the original plan and specifications at the request of the superintendent of construction employed by defendant to supervise the erection of the building, then you should find for the plaintiffs for the cost of rebuilding the wall, as shown by the evidence."

"VI. If you find from the evidence that the plan and specifications for the wall furnished by the architect were proper and sufficient and that it gave away and fell because it was not built according to the plan and specifications so furnished, or because the plaintiffs failed to

use ordinary and reasonable care for its support and protection, or for both of these reasons, combined, and if you further find that the wall again fell because of or for the reasons above enumerated, then defendants are entitled to recover the reasonable cost of repairing or replacing said wall, as shown by the evidence."

It is insisted that those instructions were not correct, and counsel for defendant rely principally upon two Texas cases which hold, in effect, that one who enters into a contract to construct a building without requiring from the other party a guaranty of the sufficiency of the plan and specifications can not relieve himself of liability for failure to complete the work by reason of defects in such plan and specifications. In other words, that if the contractor follows the plan and specifications, which prove defective and cause the building or the improvement to fall before completion, the loss is upon the contractor and not upon the owner. *American Surety Co.* v. *San Antonio Loan & Trust Co.,* 98 S. W. 387; *Lonergan* v. *San Antonio Loan & Trust Co.,* 104 S. W. 1061. Those cases sustain the contention of counsel, but they do not appeal to us as being correct, and they are clearly against the weight of authority on that subject. The rule is, we think, clearly laid down as follows: "Where the builder performs his work strictly in conformity with plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications, and may recover under the contract, unless he has warranted that the plans and specifications are correct." 6 Cyc. 63; *MacKnight-Flintic Stone Co.* v. *The Mayor,* 160 N. Y. 72, 54 N. E. 661; *Bentley* v. *State,* 73 Wis. 416, 41 N. W. 338; *Huetter* v. *Warehouse & Realty Co.,* 81 Wash. 331, 142 Pac. 675.

The New York court, speaking through Mr. Justice Vann in the case cited above, said: "The fault of the defendant's plan would not prevent the plaintiff from recovering payment for good work done and good materials furnished precisely as the defendant required. The reasonable construction of the covenant under consideration is that the plaintiff should furnish the materials and do

the work according to the plan and specifications, and thus make the floors water-tight, so far as the plan and specifications would permit."

Our conclusion on this branch of the case is that the instructions given by the court were as favorable to defendant as it could ask. We refrain from expressing any opinion as to other instructions, for the reason that the plaintiffs have not appealed.

Reversed and remanded.

BANK OF CORNING v. NIMNICH.

Opinion delivered January 31, 1916.

1. BILLS AND NOTES—LIABILITY OF OFFICERS WHO SIGN AS SUCH, ON NOTE EXECUTED BY A CORPORATION.—Where the name of the corporation itself is signed to a promissory note, and is followed by the names of officers, giving their official title, indicating that they are signing in their official capacity for the purpose of attesting the signature of the corporation, the instrument constitutes the obligation of the corporation alone.
2. BILLS AND NOTES—NOTE OF CORPORATION—SIGNATURE OF DIRECTORS.—A promissory note was signed by a corporation and the signature was attested by the secretary of the corporation, thereafter appeared the names of certain persons, after whose names appeared the word "Director." *Held*, the persons so signing would be held to have signed in their individual capacity, and not as officials of the corporation.

Appeal from Clay Circuit Court, Western District; *W. J. Driver*, Judge, reversed and judgment here.

J. N. Moore, for appellant.

This was an instructed verdict. All the evidence offered by plaintiff must be considered in the light most favorable to it. 96 Ark. 394. Where there is any evidence tending to establish an issue it is error to direct a verdict or take the case from the jury. 95 Ark. 359. The note on its face establishes the liability of appellees; "*We* promise to pay," signed by two or more persons is the joint obligation of *all* of them. 4 Am. & Eng. Enc. Law, (2 ed.) 110-111. This phrase and "the makers severally waive, etc.," fix a *prima facie* liability on all

who sign *prima facie.* The evidence shows appellees signed as sureties, and they are jointly bound with the corporation. The word "Director" after their names is merely *descriptio personal,* 31 N. W. 947; 39 *Id.* 640; 42 *Id.* 635; 48 N. E. 262; 54 Pac. 273; 19 L. R. A. 676; 152 S. E. 208; 52 N. W. 208; 42 L. R. A. (N. S.) 1 and notes; 69 Ark. 406; 94 *Id.* 200; 42 Cal. 139; 4 Am. & Eng. Enc. L. (2 Ed.) 110; 62 Ark. 387. A written contract can not be varied or contradicted by oral testimony. 62 Ark. 387.

C. T. Bloodworth, for appellees.

There is no need of proof to show the real intention of the parties, for that is expressed in the signatures, and parol evidence to vary that written expression is not admissible. 50 Ark. 393. 10 Cyc. 918, 1026; Tideman on Com. Paper, § 123; 6 A. & E. Ann. Cases, 999, 1001 and notes; 93 S. W. 510. The only aim and intention of appellees was to bind the corporation and they were not personally liable. 69 Ark. 406 and cases *supra.*

J. N. Moore, in reply.

There is much confusion in the authorities as to the liability of a corporation and its officers both of whose names appear on a note where the corporate name is signed followed by names of persons who sign as officers. 39 N. W. 640 represents one view and 97 N. W. 612 represents the other view. Neither controls this case. See also 16 L. R. A. 143; 48 N. E. 262; 54 Pac. 273; 47 *Id.* 484.

McCULLOCH, C. J. Appellant sued appellees Joseph Nimnich and E. Hartwig for an amount alleged to be the balance due on a promissory note in the following form:

$5,000.00 Corning, Ark., Sept. 27th, 1911.

Six months after date for value received, we promise to pay to the order of the Bank of Corning, Corning, Ark., Five Thousand Dollars.

With interest at ten per cent per annum from date until paid. The makers and endorsers of this note hereby severally waive presentment and payment, notice of non-payment, protest, and consent that time of payment may be extended without notice thereof.

Payable at Bank of Corning, Corning, Ark.

Farmers Union Gin & W. H. Co.,
Per Henry Brown, Sec. & Treas.
Henry Brown, Director.
W. T. Griffith, Director.
Earnest Hartwig, Director.
Porter Larkins, Director.
G. A. Hoffman, Director.
J. T. Montgomery, Director.
H. D. Chappell, Director.
Joseph Nimnich, Director.

Appellees, Nimnich and Hartwig, answered separately, denying that they had executed the note individually or that they were personally liable thereon. In other words, the answer of appellees raised the question of whether the note was the joint and several obligation of the Farmers Gin & Warehouse Company and the individuals who signed the note, or whether it was the sole obligation of the corporation itself. Appellant introduced testimony showing the circumstances under which the note was executed, but appellees introduced no testimony and based their defense entirely on the face of the instrument sued on. The court gave a peremptory instruction in favor of appellees and judgment was accordingly rendered in their favor.

(1) There is much conflict in the authorities as to the question of liability on written obligations similar to the one now in suit, where the obligation is signed by officers of a corporation, but the rule is established by what appears to us to be the weight of authority that where the name of the corporation itself is signed and followed by the names of officers, giving their official title, indicating that they are signing in their official capacity for the purpose of attesting the signature of the corpora-

tion, the instrument constitutes the obligation of the corporation alone. *English and Scottish American Mortgage and Investment Co.* v. *Globe Loan & Trust Co.,* 70 Neb. 435, 6 Am. & Eng. Ann. Cas. 999; *Hitchcock* v. *Buchanan,* 105 U. S. 416; *Falk* v. *Moebs,* 127 U. S. 597; *Liebscher* v. *Kraus,* 74 Wis. 387, 5 L. R. A. 496; *Castle* v. *Belfast Foundry Co.,* 72 Me. 167; *Draper* v. *Massachusetts Steam Heating Co.,* 5 Allen (Mass.) 338; *Reeve* v. *First National Bank of Glassboro,* 54 N. J. L. 208, 16 L. R. A. 143; *Miller* v. *Roach,* 150 Mass. 140, 6 L. R. A. 71; *Bean* v. *Pioneer Mining Co.,* 66 Calif. 451.

(2) Instruments of that kind are held to be the promise of the corporation and the signatures of the officers to be official and not individual. The authorities are, as before stated, not harmonious on this subject, and appellant cites on its brief, cases which hold to the contrary. The real question in the present case is whether or not the established rule is applicable to the instrument involved in this controversy. An inspection of the instrument, as it appears in the records, shows that the name of the corporation was attested by Henry Brown, the secretary and treasurer. The additional signature of Henry Brown follows his signature as secretary and treasurer, and after it is written the word "director," and all of the other names are followed by the same word. We do not think that it can be said from the face of the instrument that those who signed as directors did so for the purpose of officially attesting the signature of the corporation, which had already been attested by the secretary and treasurer. The form of the signatures evidences an intention to add something more than a mere certification of the corporate name, and the addition of the word "director" is merely descriptive of the person who signed. Daniel on Negotiable Instruments, Sec. 415. There was no attempt to plead or establish any facts or circumstances which would warrant a reformation of the instrument so as to exclude personal liability on the part of the directors, as was done in the case of *Lawrence County Bank* v. *Arndt,* 69 Ark. 406.

It follows, therefore, that the court erred in directing a verdict in favor of appellees. The judgment of the circuit court is reversed and the cause is remanded for a new trial.

MYERS v. HINES.

Opinion delivered January 31, 1916.

1. CHATTEL MORTGAGES — PERFORMANCE — RIGHT OF MORTGAGEE.— The owner of a business, turned it over to another to manage, taking a mortgage on a certain wagon and team of horses to secure the manager's faithful performance of the contract. *Held*, when the business was insolvent when retaken by the owner, and the manager had withdrawn a sum as salary in excess of the contract agreement, the owner was entitled to the proceeds of the sale of the mortgaged property.
2. PRINCIPAL AND AGENT—CONTRACT TO MANAGE BUSINESS—RIGHTS OF PRINCIPAL.—The owner of a business turned it over to one A. to manage, the contract stipulating the manner in which advances were to be repaid, but not binding A. to pay the same; the business became insolvent. *Held*, after payment to the owner by the receiver of the amount received from a sale of the assets of the business, that the owner could not recover from A. the balance on the money advanced to him.
3. RECEIVERS—APPOINTMENT—COSTS.—A receiver was improperly asked by A., who had been employed by the owner of a business to manage the same, A's. compensation being dependent upon there being net profits derived from the business; after the owner resumed possession of the business, *held*, in a suit by A. to wind up the business, the cost of a master and the receiver in said suit, were assessable against A.

Appeal from Boone Chancery Court; *T. H. Humphreys*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellees brought this suit to wind up the affairs of an alleged partnership, doing business under the firm name of The Harrison Lumber Company, and for an accounting, and asked the appointment of a receiver, alleging the insolvency of the partnership, and that W. J. Myers, a member of the firm, had wrongfully taken possession of the assets and books of account of the concern.

A receiver was appointed on the application of E. C. Hines, appellee, and appellant moved to vacate the order of appointment. Appellant answering denied that any partnership existed, alleged that the business was his own and conducted for him by appellees, under the terms of a written contract, by which he was to furnish certain sums of money and to have interest at a stipulated rate thereon and appellees were to conduct the business and receive as their pay the net profits after certain deductions were made under the provisions of the contract, under the terms of which also a team and wagon was to be furnished by appellees and a lien was given thereon to secure the faithful performance of the contract on the part of E. C. Hines; that he had furnished $9,000.00 for the conduct of the business, and in January, 1912, declined to make any more advances and elected to terminate the contract, and possession of the business and assets was given by appellees; that "an invoice was made by agreement of plaintiff and defendant of all stock and material on hand and a statement of expenses, the values in said invoice being named by plaintiff, and that plaintiff refused to settle by such invoice after agreeing to do so. It was further alleged that plaintiff had failed to keep proper books and accounts of the business and had paid to himself without authority and incurred losses in the sum of $1,300.00; prayer that the complaint be dismissed and the receivership be dissolved, for costs, etc.

The plaintiff, E. C. Hines and the representatives of N. C. Hines, deceased, filed an amended complaint alleging the date of the commencing of the business, the death of N. C. Hines, that the business had been prosperous and that defendant was indebted to the plaintiffs in certain named amounts; that at the time the defendant took wrongful possession of the business it was of the value of more than $10,477.33; that under the terms of the contract there was due to plaintiff, E. C. Hines, more than $3,000.00, which defendant refused to pay or to make a settlement; and it was also alleged that the transactions of the business of the concern were of a complicated

nature and required the stating of an account by a master; prayed for an accounting and judgments in favor of the heirs of N. C. Hines for $1,500.00 and an additional judgment for $3,000.00 for E. C. Hines, and a continuance of the receivership, and a master to state an account.

The master and receiver were appointed and an account was stated, and the inventory taken by the receiver showed the total assets of the concern, which the court found from the receiver's report to be $10,477.97, and from the master's report the amount due W. J. Myers $9,093.66, for money advanced to the business with interest, and from the receiver's report outstanding accounts and claims against the concern amounting to $1,871.78, making a total of liabilities of $10,965.44, $487.87 more liabilities than assets, and that there could be no actual net profits except such amounts as were paid to plaintiffs for salary each month.

The court found also that the master's report was correct, "figured on basis of daily sales and estimated profits," but held it was necessary, in order to ascertain the net profits, to take into consideration the actual value of all assets on hand at the time the concern ceased to do business, and that there was no way to ascertain the net profits from the books kept.

That the business was conducted under the terms of a written contract from the 9th day of November, 1909, till the 15th day of February, 1912, when W. J. Myers took possession and executed a receipt to E. C. Hines for all the property of the concern, in which it was recited that the rights of both parties were reserved. He also found that under the terms of the contract E. C. and N. C. Hines were employees of the defendant, their compensation stipulated in the contract, that the business was not a partnership, and that said E. C. and N. C. Hines were to be paid for their services out of the net profits arising from the business; and that under said contract the net profits were to be ascertained by the sale of the property, out of the proceeds of which the money furnished by W. J. Myers should be returned to him; then all the ex-

penses and liabilities of the concern should be paid and that the balance should represent the net profits.

The written contract was introduced in evidence showing the terms under which the business was to be conducted. It provides: "It is agreed by and between both parties to this contract that said Myers shall employ and does hereby employ the said two parties of the second part to manage and run said business for him in his name, and as his agent," for a specified period; it then provides what books and accounts shall be kept by them, how the business shall be conducted and the reports made, and required them to furnish a wagon and team for use in the business, and "for their services * * * said parties of the second part shall have and receive from said party of the first part all the net profits arising from the business," after deducting certain specified amounts and interest, payments for insurance, rent and expenses incident to the business, which net profits were to be ascertained as found by the court and already set out above. The contract contained also a mortgage of the team and wagon to secure the faithful performance of its obligations by Hines, which provided that "they shall promptly pay, deliver and account for, to said party of the first part, all moneys, goods, wares and merchandise received by them under the contract." It was also shown that the inventory taken by the parties before the bringing of the suit showed the liabilities of the company amounted to $10,723.80 and the assets only $9,686.65.

The undisputed testimony shows that W. J. Myers had advanced for use in the business, $9,000.00, which was to be returned and had not been returned; that Hines drew out of the business, during its continuance, $3,938.44, and that the receiver realized from the sale of the assets about sixty per cent of the inventory price. The court allowed $300.00 for the services of the master and $500.00 for the receiver and his attorneys, and directed it to be paid out of the funds, and also held that the proceeds of the team and wagon sold should be paid to E. C. Hines. Myers prosecuted this appeal from the decree rendered.

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

1. It was error to allow plaintiff $315.00 for the wagon and team. They should have been charged with a lien for the amount plaintiffs owed.

2. The court erred in not rendering judgment for defendant for the balance of his advances.

3. It was error to make the costs chargeable to the fund in court, instead of against the plaintiff. 23 Am. & E. Enc. L. 1107; 86 Pac. 113; 75 Fed. 168; 12 N. Y. Supp. 120; 2 High on Receivers § 809 a; 35 Pac. 385; 18 Utah 279; 31 Iowa, 428; 2 Page Ch. 438; 168 Ill. 266; 183 *Id.* 467; 79 Pac. 698; 108 Am. St. 510; 45 Hun, 219.

E. G. Mitchell, W. N. Ivie and *Guy L. Trimble,* for appellees.

1. The case should be affirmed both because it is not properly before this court and because it is without merit. 59 Ark. 135; 72 *Id.* 185; 111 *Id.* 202; 86 *Id.* 608.

2. *On the merits* no cause for reversal is shown. The costs were properly ordered paid out of the fund. 95 Ark. 389; 86 *Id.* 608. Defendant turned plaintiff out and declined to account. At the sale defendant bought in the property. He was not entitled to any judgment whatever. Hines carried out his contract and fulfilled all his obligations. The decree is just and should be affirmed.

KIRBY, J. (after stating the facts). (1) Appellant contends that the court erred in failing to adjudge him entitled to the proceeds of the sale of the horses and wagon mortgaged to secure the faithful performance of the contract and the return of all moneys received by appellees, and also in refusing to render judgment in his favor against the defendant, E. C. Hines, for the balance of the money furnished to him under the terms of the contract for carrying on the business, over the amount realized from the assets of the business upon its being wound up, and in assessing against the fund, realized from the sale of the assets, the costs of the master and receiver.

Under the terms of the contract and mortgage the appellee was bound to the faithful performance of the contract, and the team and wagon was mortgaged to secure his faithful performance of it, and bound to the payment and accounting for all moneys received by Hines under the contract.

The business was insolvent when it was taken possession of by the appellant, Myers, as shown by the books kept by Hines, which also showed that he had withdrawn from the business, as salary, about $4,000, and the assets, valued as in his own inventory made at the time Myers took possession of the business, were more than $1,000 less than the liabilities.

The court found that it was impossible to ascertain the net profits of the business, before the failure of it, from the books kept by said appellee.

Under these circumstances we are of the opinion that the chancellor erred in holding that appellant was not entitled to the proceeds of the sale of the horses and wagon under the terms of his mortgage from appellee.

(2) Appellant's second contention, that the court erred in not rendering judgment against the appellee, Hines, for the balance of the amount of money shown to have been advanced him, after payment by the receiver of the amount realized from the assets of the business, is not well founded. The business was his own, as shown by the terms of the contract, and conducted by appellees as his agent, and the written contract provided the manner in which his advances should be repaid, and did not bind said Hines to the payment thereof except in that portion of it mortgaging the wagon and team as security for the return thereof.

(3) The third assignment, complaining of the assessment of the costs of the master and receivership against the fund realized from the sale of the assets of the business, must be sustained. The business was known to be insolvent and shown to be so by the books, as kept by appellee, Hines, who also knew that his compensation depended upon there being net profits, and consisted of

such net profits to be determined as provided by the written contract. The insolvent business had been taken charge of by appellant, the owner of it, who was financially responsible, and not alleged to be insolvent, and there was no necessity for the appointment of a receiver to take charge of said business and deprive the owner of his property and dissipate it in expense of a master and receiver at the instance of said appellee, who had no interest in it to be protected or preserved. The payment of the expense of the master and receiver, out of the funds, was improper and unwarranted, and said master and receiver having been appointed at the instance of appellee, the cost of their compensation should be assessed against said appellee, who improperly procured their appointment, and not against the receivership fund realized from the sale of appellant's property, and the court erred in holding otherwise. 23 Am. & Eng. Enc. L, 1107; High on Receivers, § 809a; 34 Cyc. 368; *Highley* v. *Deane*, 168 Ill. 266; *Hendrie & Bolthoff Mfg. Co.* v. *Parray*, 86 Pac. 113; *Couper* v. *Shirley*, 75 Fed. 168; *Willis* v. *Sharp*, 12 N. Y. Supp. 120; *Weston* v. *Watts*, 45 Hun. 219.

The decree is accordingly reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

MOORE *v.* PAVING IMPROVEMENT DISTRICT NO. 20, TEXARKANA, ARK.

Opinion delivered January 31, 1916.

1. LOCAL IMPROVEMENT—BASIS OF ASSESSMENT.—A paving improvement district included nearly all of the improved portion of a certain city. *Held*, the finding of the chancellor that the assessment of benefits was properly made, was sustained by the testimony, the assessors being successful business men, familiar with the property in the district, and it appearing that they had used their best judgment in arriving at the amount of the assessments.
2. WORDS AND PHRASES—DESCRIPTION OF LANDS—"SAID."—In the description of land, as "the said lot," the word "said" held to be a word of reference to what has been already spoken of or specified, and

when there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things.

3. BOUNDARIES—DESCRIPTION—CLERICAL ERROR—IMPROVEMENT DISTRICT.—In describing the boundaries of a proposed local improvement district, a certain boundary was given as being along *Block* 10, of a certain addition, continuing, the description: "thence east along * * * *said lot* 10." *Held*, that from the description and the use of the word "said" that "block" was meant and intended to be used instead of "lot," the mistake being a clerical misprison.

4. BOUNDARIES—IMPROVEMENT DISTRICT—DESCRIPTION—CLERICAL OMISSION.—The description of the boundaries of a proposed improvement district described a portion of the boundary as along a certain side of E. N. Maxwell's *Second* addition, and continued "* * * the east boundary line of lot 7, block one, of E. N. Maxwell's Addition," *Held*, although there were two additions, E. N. Maxwell's Second addition, and E. N. Maxwell's addition, that where the proof showed that E. N. Maxwell's addition was removed from the portion of the district then being described, that the omission of the word "second," in the description, would be held merely to be a clerical omission, and would not invalidate the formation of the district.

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

STATEMENT BY THE COURT.

This appeal is prosecuted from a decree establishing the validity of a paving improvement district in Texarkana, Arkansas. The district includes practically all the improved part or area of said city and its validity was challenged because of an insufficient description of the boundaries thereof and because of the manner of assessment of benefits, it being alleged that the assessments were arbitrarily made upon a front foot basis and without regard to the value of the property and to whether the benefit assessed would be derived from the improvement.

The territory was divided into zones or districts by the assessors in consideration of the amount of assessment to be levied as benefits against each individual tract or piece of land. The assessors were men of long residence in the city and district and successful in their business affairs, as well as property holders therein. They were thoroughly familiar with the conditions existing,

had maps and plats of the entire city before them and the tax books of the county showing the assessed valuation of the different lots and parcels of land. They concluded that in the zone north of 9th street, the lots of the same dimension would be benefited practically in the same amount, the streets therein being all fifty feet in width, and adopted as a basis $125 as benefit to each inside lot with $150 as benefit to the corner lots and estimated the benefits to accrue to the improvements on each lot at from $25 to $125, according to the size and valuation of the houses. An additional amount was added to each lot as a benefit for putting in curb, where there was none. The property being more valuable south of 9th street and the streets nearly twice as wide, the benefits were increased to more than double the amount assessed against lots in the zone to the north, the basis for estimating benefits being there $300 for inside lots and $350 for corner lots, with $25 to $700 for improvements on the different lots, according to the size and value thereof. In the business district on Broad street and State Line Ave. the system, or house and lot basis of assessment, was abandoned largely and the benefits estimated in a gross sum because of the much greater value of the property and its location and use. This was the general plan adopted as a basis: for example, the pencil memorandum of assessments shows the assessment against three Sanderson lots on the outside edge of the district north of 9th street as follows: "Benefit to three lots $325; benefits to the house on the lots, $100—total $425. Lots 2 and 3 are inside lots and upon a basis of $125 each, the benefits to the two would be $250. Lot One, the corner, if assessed at the general basis of $150 per lot would have made the total amount of benefit assessed against the lots $400, but said lot being on the edge of the district, and getting no benefit on the north side, and subject to be included in another district, the value of the benefit to it was reduced half, making $75, which added to $250 made the total assessment of $325.

Mr. A. H. Whitmarsh, one of the assessors, testified that he was a manufacturer, and dealer in lumber, had resided in the district for twenty years, and was familiar with the property therein. They had several meetings of the Board, and never failed to have a meeting when assessing benefits. That the board viewed part of the property together during the time of assessing. That before they began work, they were shown an estimate by an engineer of the total cost of the improvement, which showed the character of the pavement to be put down in the district. That they had a map of the city, with the boundaries marked thereon, while the assessment was being made, and at one or two meetings, before any figures were made, the Board discussed the general proposition, and the best method of making the assessment. "We were trying to get the assessment fixed up in some way, and we got it about as near right as a set of men could do it. The method used, in our belief, was an equitable basis. We tried to make the assessment as fair as could be made, all the conditions considered.

T. S. Mullins, another assessor, stated that he was in the wholesale grocery business, that his company owned lots in the down-town district fronting on Front street, one block south of Broad street, which was the retail center of the city. Its property was in the wholesale district, that his residence was in the district, ten blocks from the business district, and he had resided in the district for fifteen years and was reasonably familiar with the property. That the assessors had ideas of their own about the respective values of the property assessed, but were not real estate men, and did not attempt to fix any particular values, having the county assessors values before them. "We tried to assess each division of a block, or lot, according to the benefits it would receive. We considered the property, and that the value would be enhanced the amount we assessed against each and every piece of property in town."

E. W. Frost testified that he lived within two blocks of the district, and that the assessors spent three or four

days in working out the assessments. "We commenced on the plan that we had to provide enough money to do the work, which was estimated to cost so much. We made the difference in values because there was a difference. We thought some of the lots and property worth more than lots differently located. We started in to make the assessment an amount sufficient to pay the bonds and interest, and in doing so, tried to proportion it so it would be as nearly equal as was possible for us to make it. In making our assesments, we considered the question of benefits. We were trying to fix the assessments equal to the benefits to the particular piece of property. We understood the amount we fixed would be an assessment of benefits, and that was the basis we were working on." In answering the question whether he considered the improvement would enhance in value the particular property, or benefit it to the extent of the assessment, he said "I do not think I thought about enhancing the value of the property, it was just simply an improvement that was needed, and when it was done would be of that much benefit, if it was done properly and right. The property would be benefited by the improvement in the amount the owner had to pay."

There was other testimony tending to show a great disparity in the assessment of benefits made upon certain property in different zones of the district, market value of the particular property being considered, and also that the assessment of benefits against certain property could not be reasonably explained otherwise than that it was arbitrarily made upon a frontage or front foot basis.

M. E. Sanderson, for appellants.

1. The assessment was not of benefits as required by law but an arbitrary appointment of the cost of improvement, without respect to benefit or not. 86 Ark. 1; 55 N. Y. 604. The rule of uniformity was broken. Kirby's Digest, § 382; 84 Ark. 259; 84 *Id.* 259.

2. The assessment against the railroads was unequal, unfair, unjust, discrimatory and not uniform. 99 Ark. 522; 86 *Id.* 1.

3. The original petition was illegal. 103 Ark. 269; 108 *Id.* 141; 71 *Id.* 556; 105 *Id.* 392; 104 *Id.* 298, etc. The chancery court cannot change or alter the boundaries as described in the first petition. 108 Ark. 144.

Frank S. Quinn, for appellee.

1. Where there are material omissions from the transcript this court will affirm.

2. The benefits as returned by the assessors and settled by the council are not unequal nor discriminatory. 81 Ark. 1; 97 Ark. 334; 99 *Id.* 508; 113 *Id.* 493. There was no discrimination in favor of the Cotton Belt Railway and I. Mt. Ry. Co. nor any ulterior motive on the part of the assessors. Such an agreement was approved in 103 Ark. 127-135.

3. The boundaries of the district are easily distinguished. There is no uncertainty and no inaccuracies in description. 104 Ark. 289; 115 Ark. 163. The word "Said" means "aforesaid." 34 Cyc. 1825. It refers to what has already been specified or spoken of. 34 Cyc. 1825 and note; 5 Cyc. 867 as to boundary; 79 Ark. 442 as to sufficiency of description. The boundary is certain.

SMITH, J., (after stating the facts). It is contended that the assessment by the board of assessors was not an assessment of benefits to accrue to each lot and parcel of land by reason of the improvement, but only an arbitrary apportionment of the cost of the improvement upon the several lots in the district upon a frontage or front foot basis and without regard to the value of the land and to whether the making of the improvement would result in the amount of benefit assessed against it.

This objection is urged against the validity of the assessment as a whole, it being charged that the assessors acted arbitrarily, that the assessment made is

unfair, unjust, unequal, grossly inequitable and not uniform.

Each of the assessors testified delineating the purpose in mind at the time the assessment was levied and the methods pursued in reaching the result obtained. It is undisputed that each and all of them are successful business men of large experience, property owners in the district, two having resided therein from fifteen to twenty years and the other residing just outside the district near the northwest corner. They had before them during their deliberations, maps of the city, showing the boundaries of the district and the description of each lot and parcel of land therein, as well as a copy of the county assessment list showing the value for which the lands were assessed for taxes. They did not pretend to know the actual market value of each tract of land, but were personally acquainted with each lot, the improvements thereon and conditions surrounding it. Their testimony shows that they had in mind and considered in levying the assessment of benefits against the particular tracts, all the elements that can be considered in estimating the value of lots and improvements.

It is true they divided the district into zones, and in the residential portion north of 9th street, where the streets were narrow and the houses not so valuable and the lots virtually of the same dimensions, estimated the benefits to accrue upon the lots of like size and condition in the same amount; that they divided the improvements thereon with which they were familiar, into certain classes, considering, in assessing the benefit against the land that it would result in a certain amount from the improvement thereon, estimated by ranging from $25 to $125, according to the kind and value of such improvement. They likewise estimated an additional benefit to such lots of $6.00 for the cost of curbing, where none had already been put down.

In the zone south of 9th street, where the houses were much more valuable and the streets almost double the width of those to the north, a different basis of $300 to

$350 to the lots of like width and condition, with an estimate of from $125 to $700, in one instance, to accrue from the value of the improvements considered.

In the business district, a different system was adopted, the property being more valuable, likewise the improvements, and of an altogether different kind. Here they considered the location of the property, the use in which it was being employed and its value therefor and estimated the benefits in such manner as would in their opinion make it as nearly equitable, equal and uniform as could be arrived at in the judgment of business men of long experience and accurately and intimately acquainted with the property and conditions existing.

The assessment against the railroads, their lands and trackage, was made in a lump sum, it is true, but the assessors each testified that they were familiar with the lands south of Front and Broad streets, belonging to the railroad company, and the railroad tracks thereon and that in assessing the benefits they took into account the situation of the lands and tried to make the assessment equitable and equal, so far as the land was considered, to that on the opposite side of the street occupied by business houses.

They also took into consideration the value of the railroad tracks but not the franchise and they did not assess the benefits separately of the different railways occupying the lands with their tracks, having made an assessment of the entire benefit to accrue to all of it and the railroads having agreed to the justice of the assessment and to an apportionment thereof between themselves, which was considered desirable by the assessors, who did not definitely know what particular improvement belonged to each of said companies.

It is also complained that a contract was made by the commissioners of the district with the railroad companies for the paving of Front street upon which their tracks are located and adjoining which, on the south, much of their property is situated, agreeing to credit the entire amount of the assessed benefits upon the contract

price for the pavement and that this was considered by the assessors in the making of the assessment of benefits as well as the fact that a franchise was also to be granted by the city to the railroads, for operation of tracks along Front street in consideration thereof. The assessors denied having taken these matters into consideration in assessing the benefits against the property of the railroads, or that the benefits assessed were in any way affected thereby.

While the assessors did not know the market value of all the particular pieces of property in the district, they knew the value in a general way, and that property in certain localities was much more valuable than that in others and all the elements going to make up such valuation and difference. This is nowhere disputed.

(1) It can not be fairly said that the assessment of benefits was made arbitrarily and amounted to but an apportionment of the cost of the improvement made without regard to the value of the lands and the benefit to accrue from the improvement to be constructed. In *Kirst* v. *Street Improvement Dist.*, 86 Ark. 1, the court said: "The statute requires the board to assess the value of the benefits to accrue to each piece of property. * * * This means that the assessors shall, from their knowledge, experience, observation and judgment, make a fair and just estimate of the benefit which each particular piece of property will receive by reason of the improvement."

It is also well known and generally recognized that the assessment of future benefits is largely a matter of estimate and to some extent speculative, depending chiefly upon the opinions of men of sound judgment to determine what the future benefits will probably be, and it is recognized that it is impossible to find an exact standard for the measurement thereof in advance of the improvement constructed and the law does not require of the assessors the unattainable. *St. Louis & S. F. Rd. Co.* v. *Ft. Smith & Van Buren Bridge Dist.*, 113 Ark. 493.

The assessment made by the board may not have resulted in exact equality and fairness to every land

owner, but a great area with varying conditions and improvement was included in the district and as already said, it was not to be expected that some inequalities and injustice might not result which would be, and in many instances were in fact corrected, upon being called to the attention of the board and commissioners.

From the whole testimony considered in the light of the requirements of the law relating to the establishment of improvement districts, this court is not able to say that the findings of the chancellor are not sustained by the preponderance thereof.

(2-3) It was next alleged that the boundaries of the district were not sufficiently and definitely described and that it should have been adjudged void, because of such uncertainty. There is no claim made that the description of the district as petitioned for, organized, and as described in the publication of the ordinance establishing it varies in any way, the contention being only that its boundaries are not sufficiently defined in two particulars, as follows: After the description reaches the north boundary line of the northeast quarter of block 10, of Witherspoon's addition, it continues, "Thence south along the center of the alleys in block 9 and block 14 of Deutschman's third addition, and block 3 and block 6 of Kelley & Bramble's addition, to the north boundary line of the northeast quarter of block 10 of Witherspoon's addition to the city of Texarkana, Arkansas."

"Thence east along the north property line of the northeast quarter of said lot 10 of Witherspoon's addition and along the north property line of lot 12 in block 1 of H. A. Mann's addition to the center of the alley in said block 1 of H. A. Mann's addition."

"Thence south along the center of the alleys in block 1 and 2 of H. A. Mann's addition and through the alley in block 2 of Peek's addition to the center of Ninth street."

And further: "Thence south across Ninth street and through the alleys in block 16 and block 21 and block 37 and block 42 of the city of Texarkana, Arkansas, to

the center of the alley in block 1 of E. N. Maxwell's second addition to the said city of Texarkana, Arkansas;

"Thence east along the center of the alley in said E. N. Maxwell's second addition to a point opposite the east boundary line of lot 7, in block 1, of E. N. Maxwell's addition:

"Thence south along the said east boundary line of lot 7 in block 1, in E. N. Maxwell's second addition, and along the east boundary line of lot 2 in block 2 of said E. N. Maxwell's second addition to the center of the alley in said block 2 of E. N. Maxwell's second addition."

It will be observed that in the middle paragraph of the first description, the line continues east along the north property line of the northeast quarter of said "lot 10" of Witherspoon's addition, instead of block 10 as was the fact and as sufficiently shown by the description.

In the first paragraph reaching the northeast quarter of block 10, the description refers to said lot instead of block and is apparently a clerical error when the whole description is read together.

It was further shown by comparison with the city map, that there is or was no lot 10 in Witherspoon's addition and the word "said" before "lot 10" refers necessarily to something already mentioned. It means aforesaid: before mentioned. 34 Cyc. 1825. It has also been defined as "A word of reference to what has been already spoken of or specified, and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things. *Hinrichsen* v. *Hinrichsen,* 172 Ill. 462, 465, 50 N. E. 135."

It is obvious from the description and the use of the word "said" that "block" was meant and intended to be used instead of "lot," the mistake being a clerical misprision.

(4) In the middle paragraph of the second part of the description above set out, it appears that the word "second" is omitted in the last line designating the addition. The boundary line as shown by the first paragraph, after reaching the center of the alley of block 1 of E. N.

Maxwell's second addition to the city of Texarkana, Arkansas, continues thence along the center of the alley in said E. N. Maxwell's second addition to a point opposite to the east boundary line of lot 7 in block 1 of E. N. Maxwell's addition, thence along the said east boundary line to lot 7 in block 1 in E. N. Maxwell's second addition, etc. There was in fact an E. N. Maxwell's addition to the city, but as shown a line could not run east along the center of the alley of block 1 in E. N. Maxwell's second addition to a point opposite the east boundary line of lot 7 in block 1 of E. N. Maxwell's addition, and it is apparent from the expressions used both before and after, that the word "second" was omitted by inadvertence from before the words E. N. Maxwell's addition in said paragraph, it being clearly apparent from the conditions existing and the description before and after that it was a clerical omission.

The circumstances all show unmistakably the intention to locate the line through the center of the alley in block 1 of E. N. Maxwell's second addition to the east boundary line of lot 7 in said block 1 thereof and there was no such uncertainty about the description as to prevent the property intended to be included from being definitely and certainly ascertained. The description was sufficient to identify the lands included in the district and give notice to the owners of their assessments, and said owners could not have been mislead by it into concluding that their lands were not so included.

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

STATE v. BOARD OF DIRECTORS OF SCHOOL DISTRICT OF ASHDOWN.

Opinion delivered February 21, 1916.

1. MANDAMUS—NATURE OF WRIT.—Mandamus is not a writ or right, but is within the judicial discretion of courts to issue or to withhold, and a party, to be entitled to the writ must show that he has a clear legal right to the subject-matter, and that he has no other adequate remedy.

2. SCHOOL DISTRICTS—FUNDS—LOAN OF FUNDS BY BOARD—MANDAMUS.—Mandamus will not lie, in a suit brought by the Attorney General and certain tax payers in a special school district, to compel the county treasurer to demand and receive of the board of directors of the district, and to compel the board of directors, and a certain bank to pay over a certain sum, raised by the issuance of bonds in the district for the purpose of erecting a school house where a portion of such sum had been loaned to the said bank, and the remainder had been loaned to one of the school directors.
3. SCHOOL DISTRICTS—CUSTODIAN OF FUNDS.—The directors of school districts, whether common or special, are not the custodians of the funds of the districts. *Semble*, if the petition showed that the directors of a school district, were in possession of the funds of the district, which they, upon demand, had refused to pay over to the county treasurer as the legal custodian of such funds, then mandamus might lie to compel them to do so.
4. MANDAMUS—DEFINITION.—Mandamus is an order of a court of competent jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law.

Appeal from Little River Circuit Court; *W. H. Arnold,* Special Judge; affirmed.

Wallace Davis, Attorney General, and *A. D. Dulaney,* for appellant.

1. The petition, as amended, states a cause of action. Kirby's Dig., § § 1990-2-3; Ark. Law Rep., vol. 43, No. 9, p. 486.

2. There was no defect of parties. The State ex. rel., etc., was a proper party, plaintiff, for the public interest was affected. Kirby's Dig., § 5156; 25 Ark. 444; 31 *Id.* 264. The individual taxpayers were proper parties. Kirby's Dig., § 6008. The treasurer refused to join in the suit and refused to demand the money. 31 Ark. 175; 49 *Id.* 103; 30 Cyc. 78. There was no misjoinder of defendants.

James S. Steel and *Seth C. Reynolds,* for appellees.

1. The petition as amended, if the facts stated were true did not state a cause for mandamus. Kirby's Dig., § § 5156, 7686-7699; 3 Burr. 1265; 8 East, 219; 81 Am. Dec. 639; Angel & Ames on Corp., § 698; 1 Burr 402; 26 Ark. 482.

2. Mandamus only issues in cases of necessity to prevent injustice or greater injury. 26 Cyc. 146; 3 b.; 44 Ark. 284; 26 Cyc. 151 B; 27 Ark. 283; 26 *Id.* 510; 106 *Id.* 24 and 48.

3. There is a defect of parties plaintiff. Kirby's Dig., § 5999; 43 Ark. L. Rep. 486; 25 Ark. 444. Also a misjoinder of parties defendant. Kirby's Dig., § 5156.

WOOD, J. The questions presented by this appeal are whether or not mandamus will lie in a suit brought by the Attorney General and certain taxpayers of the Special School District of Ashdown to compel the county treasurer to demand and receive of the board of directors of such district, and to compel the board of directors and the bank to pay over, the sum of $30,000, money raised by the issuance of bonds in such district for the purpose of building a school house, $25,000 of which sum had been loaned to the First National Bank and $5,000 to H. G. Sanderson, a member of the board; and also whether or not an injunction should issue, on the facts above stated, restraining the directors and the bank from paying out the funds.

(1) As early as *Fitch* v. *McDiarmid,* 26 Ark. 482, this court held that mandamus, with us, is not a writ of right, but is one within the judicial discretion of courts to issue or to withhold, and that a party, to be entitled to the writ must show that he has a clear legal right to the subject-matter, and that he has no other adequate remedy.

Under this doctrine, and the facts stated, appellants have mistaken their remedy, and mandamus will not lie.

The allegations of the petition are somewhat inconsistent and contradictory, for in the first part of the petition they allege that the board unlawfully had placed the money in the First National Bank of Ashdown, indicating that the board had deposited the money as a board of directors in the bank, and further on in the petition they allege that the board "has unlawfully loaned to the First National Bank of Ashdown, Arkansas, the sum of $25,000" and has "loaned to a member of said board, H. G. Sanderson, the sum of $5,000."

(2) Now, it is manifest that if the board had the money on deposit in its name, then it had not loaned the same; and, on the other hand, if it had loaned the same to Sanderson and to the bank then the board did not have possession of the money, and could not be compelled by mandamus to pay over funds which it did not have in its possession.

(3) In the recent case of *Black* v. *Special School District No.* 2, 116 Ark. 472, we held that the directors of school districts, whether common or special, are not the custodians of the funds of their respective districts. Under this decision, if the petition, by proper allegations, had shown that the directors were in possession of the funds of the district, which they, upon demand, had refused to pay over to the county treasurer as the legal custodian of such funds, then mandamus might lie to compel them to do so. But, taking all of the allegations of the petition together, no such case is presented. On the contrary, the allegations of the petition show that the directors had loaned out the funds to the bank and to one of the members of the board of directors. It is clear, therefore, that appellants could not have compelled the directors to restore a fund that they had already loaned and over which they had no control.

(4) Mandamus, as defined by our statute, "is an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law," etc. Kirby's Dig., section 5156.

It is clear that if the money had been loaned to the bank and Sanderson, as stated in the petition, mandamus would not lie to compel them to pay the money into the county treasury. Even though the board had proceeded unlawfully to loan the money to the bank and Sanderson, mandamus would not lie to compel restitution on their part, and the writ could not be made effective as against the board of directors, because, as appears in the petition, they did not have possession of the funds.

In *Fitch* v. *McDiarmid, supra,* many authorities are cited, and among them the court quotes the following from *The People* v. *Thompson,* 25 Barb. 76: "The invariable test by which the right of a party, applying for a mandamus, is determined, is to inquire, first whether he has a clear legal right; and if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right; if there is, he can not have a mandamus. The writ only belongs to such as have legal rights to enforce and find themselves without an appropriate legal remedy."

Under the facts stated in the case at bar it suffices to say, if the money was unlawfully in the possession of Sanderson and the bank, under a contract of loan made with them by the board of directors, this money can be recovered, but mandamus is not the appropriate remedy and is certainly not the only remedy, and the court did not err in so holding, and did not abuse its discretion in refusing the writ and in dismissing appellant's petition. The petition did not state any cause of action for injunction. The judgment is therefore affirmed.

FOREMAN *v.* HOLLOWAY & SON.

Opinion delivered February 21, 1916.

1. DEEDS OF TRUST—TITLE PASSES FOR WHAT PURPOSE.—Although the naked legal title to lands included in a mortgage or deed of trust passes to the mortgagee, or to the trustee, for the purpose of making the security available in the payment of the debt, it passes for no other purpose, and the beneficiaries in such instruments do not acquire title absolute, except upon foreclosure, as the law requires.
2. MORTGAGES—MORTGAGOR IN POSSESSION—CUTTING TIMBER.—The mere fact that a mortgagor in possession cuts timber upon lands which he has mortgaged to another, would not alone constitute him a wilful trespaser in so doing; that would depend upon the facts and circmstances going to show whether his act in so doing was in good faith, and whether or not it results in injury to the mortgagee. *Semble,* when a grantor conveys land by absolute deed, the act of the grantor in cutting timber thereon, would constitute him a wilful trespasser.

3. MORTGAGES—REMOVAL OF TIMBER—LIABILITY.—Lands were mortgaged to appellant; the mortgagor sold some of the timber thereon, and it was cut and delivered to appellees; in an action by the appellant against appellee for the value of the timber, *held*, the removal of the timber impaired appellant's security to the extent of the value of the timber as it stood upon the land, and that will be the measure of the damages.

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

STATEMENT BY THE COURT.

One J. D. Tevis borrowed from George M. Foreman $2,600, executing his promissory note therefor and a deed of trust to secure the same on certain lands. Tevis having failed to pay the money when due, this suit was instituted on the note and to foreclose the deed of trust. Judgment was entered against Tevis, and it appearing that during the life of the mortgage G. D. Holloway & Son had purchased certain timber that had been cut by other parties from the land without the consent of the trustee or Foreman, the beneficiary, Holloway & Son and others were made defendants, and judgment was asked against them for the value of the timber so cut and removed.

The undisputed testimony showed that Tevis, the mortgagor, was in possession of the land and had authorized his agents, Pence & Adams, to sell the timber on the land. These agents sold the timber to one Peterson, who cut the same into saw logs and hauled the logs to the mill of appellees and sold the same to appellees at the rate of $6.25 per thousand for red oak and $7.50 per thousand for white oak. The court deducted $4.25 per thousand, this amount representing the cost of cutting and hauling the timber to the mill, and rendered judgment in favor of appellants for the sum of $160.93, that amount representing the value of the timber as it stood in the woods. Appellants duly prosecute this appeal.

Brundidge & Neelly, for appellant.

1. Plaintiffs were entitled to recover the value of the timber at the mill instead of the value of the timber standing and growing upon the land. 109 Ark. 223; 73 *Id.* 466.

J. N. Rachels and *John E. Miller,* for appellees.

1. The plaintiffs were properly allowed only the value of the timber as it stood upon the land. 65 Ark. 448; 93 *Id.* 360; 94 *Id.* 512. Defendants were not trespassers. See also 52 Atl. 422. There was no bad faith nor wilful trespass.

WOOD, J., (after stating the facts). Appellants contend that instead of $160.93, the value of the standing timber in the woods, judgment should have been rendered in their favor for the sum of $368.75, the latter sum being the value of the timber at the mill of appellees, which amount was made up of the value of the timber in the woods plus the cost of cutting and hauling the same to the mill.

To support this contention appellants rely upon the case of *Griffith* v. *Ayer-Lord Tie Co.,* 109 Ark. 223. In that case the appellee, the Ayer-Lord Tie Company, claimed under an instrument which the court construed to be a deed conveying to the tie company the absolute title to the timber, for which the company sued Griffith, setting up that the timber had been cut from the land and manufactured into crossties and sold to the defendant Griffith, and that all this was done without any right or authority and amounted to a conversion by the parties concerned, of the company's property. The suit as finally settled was at law for the value of the timber at the time Griffith purchased same. It was shown that Griffith bought the crossties, not knowing that the tie company had any interest therein. We said: "The correctness of the judgment turns upon the question of whether or not the instrument in evidence was a deed to appellee, creating an absolute title in it to the crossties in controversy, or whether or not it was intended as a deed to Leffler with a mortgage back to appellee creating a lien in its favor for the purchase money advanced to pay for the timber, and also the amounts advanced to Leffler to pay for the manufacturing of the same into crossties. Construing the whole instrument, we are of the opinion that it was a deed conveying the absolute title to the timber in contro-

versy to the appellee." And it was held that Griffith was liable for the value of the crossties, without deduction on account of the increase in value by the work and labor of the trespassers or wrongdoers who had first cut and removed the timber. The instrument under which the Ayer-Lord Tie Company claimed, gave it the absolute title in the timber, and the opinion in that case is grounded upon that fact. The judgment in favor of the tie company was correct because of that fact. On the other hand, if Leffler had had the absolute title and the instrument had been construed to be a mortgage by him to the tie company and the suit had been in equity to recover the value of the timber at the time it was sold, the case would have been entirely different and would have been like the case we now have under review.

(1) The fact that Leffler had no title to the timber at the time he sold the same to Wafford constituted him and Wafford wilful trespassers. Leffler having no title, of course he could convey none to Wafford. But, although the naked legal title to lands included in a mortgage or deed of trust passes to the mortgagee, or to the trustee for the purpose of making the security available in the payment of the debt, it passes for no other purpose, and the beneficiaries in such instrument do not acquire title absolute except upon foreclosure, as the law requires.

(2-3) The mere fact that a mortgagor in possession cuts timber upon lands which he has mortgaged to another, would not alone constitute him a wilful trespasser in so doing. That would depend upon the facts and circumstances going to show whether his act in so doing was in good faith, and whether or not it resulted in injury to the mortgagee. To be sure, where a grantor has by absolute deed, conveyed land to another, then the grantor would thereafter have no title whatever to the timber growing upon the lands conveyed, and his act in cutting the timber, and selling same without the consent of the owner, would constitute him a wilful trespasser. But, such is not this case. Tevis, the mortgagor, sold the timber in controversy herein, through his agents, to one

Peterson, who, in turn, sold it to the appellees, G. D. Holloway & Son. G. D. Holloway & Son set up in their answer that "they bought the timber and it was brought to their mill yards, and they had nothing to do with the cutting or removing of it from the land, and that said timber was bought in good faith, and that said Peterson was fully able financially to answer for the value of the logs and should be held responsible for them, and that the land was sufficient to meet all amounts due, and if it should not prove to be sufficient, then the plaintiff should be required to exhaust all remedies against the defendants Tevis and his agents, who are worth the amount."

There is no contention on the part of apellants, and no evidence to show that these facts as alleged by appellees Holloway & Son are not correct.

In *Stewart* v. *Scott,* 54 Ark. 187-191, Chief Justice Cockrill, speaking for the court, said: "The mortgagee is in common, entitled to the possession of the mortgaged land; but until he takes it legally, the possession of the mortgagor is not illegal, and his entry is not of itself a trespass."

Here appellants are seeking to foreclose their mortgage. They are not entitled to recover any greater damages than they have sustained. They are not the absolute owners of the timber, and were only entitled to the possession of the same after the mortgagor had failed to pay his debt, as security for the satisfaction thereof. The removal and sale of the timber impaired their security to the extent of the value of this timber as it stood upon the land. The decree of the court awarded them such value, and this was all that in equity and good conscience should be allowed them.

The decree is therefore affirmed.

DARROW v. DARROW.

Opinion delivered February 21, 1916.

1. DIVORCE—ILL TREATMENT—SINGLE ACT.—A wife will not be entitled to a decree of divorce upon proof of a single act of ill treatment on the part of her husband, the act consisting of grasping her by the arm, bruising it, and ordering her to go into the house, the husband having a knife in his hand.
2. DIVORCE—UNCORROBORATED TESTIMONY.—A decree of divorce will not be granted upon the uncorroborated testimony of one of the parties

Appeal from Franklin Chancery Court, Ozark District; *T. H. Humphreys,* Chancellor on exchange; reversed.

June R. Morrell, for appellant.

1. The court erred in rendering judgment against appellant for $200.00 since there was a valid settlement between the parties. 75 Ark. 127; 95 *Id.* 523. Contract between husband and wife when fairly entered into are binding. 67 Ark. 15 and cases *supra.*

2. The court erred in granting appellee a divorce. If appellant was guilty so was appellee. 104 Ark. 381; 53 *Id.* 484; 44 *Id.* 429; 76 *Id.* 28; 87 *Id.* 175.

Geo. W. Barham, for appellee.

1. If the court was correct in granting a divorce this settles the correctness of the judgment for $200.00. Kirby's Digest, § 2684. The doctrine of 87 Ark. 175 and 104 *Id.* 381 do not apply here, but 44 Ark. 229 does apply. The evidence fully sustains the finding of the chancellor. The appellant was more to blame and clearly at fault. 53 Ark. 384; 68 *Id.* 158.

2. The findings of the chancellor are sustained by the evidence. 120 Ark. 323; 67 Ark. 200; 73 *Id.* 489; 72 *Id.* 67; 68 *Id.* 134.

HART, J. This is an action for divorce instituted by the wife against the husband on the statutory grounds that the husband was guilty of such cruel and barbarous treatment as to endanger her life and offered such indignities to her person as to render her condition in-

tolerable. She also alleged that she had lent her husband $200.00 which he applied towards the payment of certain lands owned by him. She asked for a divorce and for alimony, and that she have judgment for the $200.00, and that same be declared a lien on her husband's land. The husband denied the allegations of the complaint.

The chancellor found the issues in favor of the wife and granted her a decree for divorce. The court also rendered judgment against the defendant for $200.00 and declared the same to be a lien on the land described in the complaint. It was also decreed that the wife have one third of the husband's personal property absolutely and one third interest in his lands for life. E. O. Darrow, the husband, has duly prosecuted an appeal to this court.

Martha E. Darrow was married to E. O. Darrow in October, 1911, and they lived together in Franklin County, Arkansas, a little over two years before they separated. Each had been formerly married and had children living and each owned a small farm in the same neighborhood. When they married, they went to live on the farm of Mrs. Darrow and lived there for one year. The husband cleared some of the land and made some improvements on it. The place was then sold and Mrs. Darrow received $450.00 for it. The purchaser stated that he thought that he got the place at a bargain, but that he would not have paid any more for it. Then they bought another tract of land. The wife paid part of the purchase money for it and she also lent her husband $200.00 and took his notes therefor.

The husband testified that it was agreed between him and his wife that the second piece of property they bought should be deeded to her and that this should be in full settlement of the $200.00 he owed her.

The wife testified that the $200.00 went to pay for the place which her husband owned at the time of their marriage. She admitted, on cross-examination, that she told her husband that if he would deed her the piece of land which they bought after their marriage, that this would be a settlement of the amount he owed her. In regard

to the divorce, she testified that they got along very well together until about the time they separated; that she heard that her husband was boasting that he would get everything she had and then drive her away; that one morning she heard her husband saying something to her son-in-law about selling the place. She went out there and asked him what he meant; that her husband caught hold of her arm and bruised the muscles of it; that he at the same time drew a knife on her and made her go back in the house; that she then left him and has not lived with him since.

Her son-in-law testified that she came out to where Mr. Darrow was talking to him about selling his place and asked Mr. Darrow what he meant; that the latter then took hold of her arm and jerked her around telling her to go back in the house; that Darrow at the time had a knife in his hand but that he did not know whether he drew it on her or not. On cross-examination he stated that Darrow was standing there whittling when his wife came out. Darrow testified that he had treated his wife well since their marriage and denied that he drew a knife on her or treated her roughly on the morning of their separation. He testified that his wife came out there that morning where he was talking to her son-in-law and began to abuse him and to call him vile names; that he took her by the arm and told her to go to the house; that he did not draw his knife on her or even think of striking her; that as soon as she began to jerk he turned her loose.

(1) His testimony was corroborated by his sixteen year old daughter, and a neighbor testified that he had been around their house very frequently and had observed no ill treatment on the part of the husband. The one act of ill treatment testified to by the wife was not sufficient to warrant the chancellor in granting her a decree of divorce. *Kientz* v. *Kientz,* 104 Ark. 381; *Malone* v. *Malone,* 76 Ark. 28; *Arnold* v. *Arnold,* 115 Ark. 32.

(2) Besides this the wife was not corroborated and it is well settled in this state that a decree of divorce

will not be granted upon the uncorroborated testimony of one of the parties. See authorities *supra.*

The husband testified in positive terms that a deed was made to his wife to the land they bought after their marriage in consideration of the $200.00 she lent him. It is true the wife testified that she lent him this money for the purpose of applying the balance due on the tract of land which he owned at the time of their marriage, but on cross-examination she admitted that she had received a deed to the land which they had purchased since their marriage, in settlement of the money she had loaned her husband. See *Hannford* v. *Dowdle,* 75 Ark. 127; *McDonald* v. *Smith,* 95 Ark. 523.

From the views we have expressed, it follows that the decree must be reversed, and the cause will be remanded with directions to the chancellor to enter a decree in accordance with this opinion.

BURTON *v.* CREEL.

Opinion delivered February 21, 1916.

1. APPEAL AND ERROR—CIRCUIT JUDGE SITTING AS JURY—FINDING OF FACT.—The finding of fact made by a circuit judge sitting as a jury, will be upheld on appeal, if there is any substantial evidence to support it.
2. APPEAL AND ERROR—FINDING OF CIRCUIT JUDGE—SUMMONS—SIGNATURE OF JUSTICE.—The finding by a circuit judge on appeal, that a summons served upon appellant out of a justice court, was signed by the justice, will not be disturbed on appeal.
3. SERVICE OF SUMMONS—NECESSITY FOR JURISDICTION.—In an action at law the defendant must be brought within the power of the court by service of summons, either actual or constructive, or by some other process issued in the suit, or by the voluntary appearance of the defendant in person, or by his attorney, in order to give the court jurisdiction.
4. SERVICE OF SUMMONS—FAILURE OF CONSTABLE TO SIGN RETURN.—Where, in an action in justice court, service of summons was actually had upon the defendant in the manner prescribed by the statute, the fact that the constable did not sign his return, will not subject a judgment of the justice to quashal upon *certiorari.*
5. JUDGMENTS—JUSTICE OF PEACE—ENDORSEMENT ON SUMMONS—JURISDICTION.—The failure of a justice of the peace, to endorse on a

summons issued by him, the amount of plaintiff's demand, together with the cost, etc., as required by the statute, will not deprive the justice of jurisdiction, and a default judgment rendered thereafter, may not be successfully assailed collaterally or quashed upon *certiorari.*

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

J. M. Carter.

1. The judgment should be quashed for three reasons, viz:

(1) The copy of the summons served on him by the constable was not signed by the justice of the peace who issued it.

(2) The justice did not endorse thereon any of the requirements of § 4650 Kirby's Digest. 89 Ark. 164, 95 Ark. 71; 42 *Id.* 166; 71 *Id.* 322; Kirby's Digest, § 6381.

(3) The constable, at the time of judgment by default, had not signed his name to the return showing service; (60 Ark. 185) this could not be amended by *nunc pro tunc* order. 92 Ark. 305; 42 Ark. Law Rep. 224; 5 Ark. 308. The judgment is void.

Pratt P. Bacon and *Webber & Webber,* for appellee.

1. The evidence as to whether the justice of the peace signed the summons or not is not abstracted and not in the bill of exceptions, hence this court will not disturb the findings.

2. A compliance with Kirby's Digest, § 4650 is not jurisdictional. 93 Ark. 502; 89 *Id.* 160. The latter case is not analogous.

3. The constable's return was amended to speak the truth. *Actual* notice is all that is required; this was shown. 64 Ark. 499; 71 *Id.* 286; 59 583; 7 *Id.* 9; 17 A. & E. Enc. L. (2 ed.) § 1069.

HART, J. E. L. Creel sued J. W. Burton before a justice of the peace on a note and verified account for the sum of $125.98. A summons was duly issued and served by the constable. On the return day of the summons the defendant made default and judgment was

rendered against him in the amount sued for. An execution was issued, and levied by the constable, upon the personal property of the defendant. After the time for appeal from the judgment had expired, the defendant petitioned the circuit court to quash the judgment upon certiorari. In his petition he recited the facts before set forth and alleged that the judgment by default had been rendered against him without his knowledge and further alleged that he did not owe the plaintiff anything. He did not give any reason why he did not file an affidavit for appeal within the time allowed by the statute. His petition was dismissed by the circuit court and the case is here on appeal.

Counsel for appellant insists that the judgment of the justice of the peace should be quashed because the copy of the summons served on him by the constable was not signed by J. J. Towery, the justice of the peace who issued it, and before whom the suit was pending. The case was tried before the circuit court sitting as a jury and the court found from the evidence that said summons was signed by the justice of the peace.

(1-2) There was evidence tending to show that the justice of the peace's name was signed to the summons at the time a copy of it was delivered to the defendant by the constable. It is true there was evidence to the contrary, but it is well settled in this State that the finding of facts made by a circuit court sitting as a jury, will be upheld on appeal, if there is any substantial evidence to support it. Therefore, it must be taken as established, that the summons was signed by the justice of the peace who issued it.

(3) It is next contended by counsel for appellant that the judgment should be quashed because the constable had not signed his name to his return on the summons at the time the justice of the peace rendered judgment by default against the defendant. In the case of *Webster* v. *Daniel & Straus,* 47 Ark. 131, the court said: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction.

"The defendant must be brought within the power of the court by service of summons, either actual or constructive, or of some other process issued in the suit, or by the voluntary appearance of the defendant in person or by his attorney, in order to give the court jurisdiction."

In that case the justice of the peace issued a warning order which supplied the place of a summons. It was published in the manner prescribed by the statute and this constituted a constructive notice to the defendant.

The court said: "The proof of publication filled the place of a return upon a summons. If the warning order was properly published the failure to make the proof of publication by the person and in the form prescribed by law, would be a mere irregularity, and would not defeat the jurisdiction of the justice, and could not be taken advantage of by a collateral proceeding, as shown by the authorities cited. The constructive notice, would, nevertheless have been given."

(4) In the case before us, service of summons was actually had upon the defendant in the manner prescribed by the statute. Therefore, under the authority just cited, the fact that the constable had not signed his return did not subject the judgment of the justice of the peace to quashal upon *certiorari.*

(5) Finally, it is insisted that the judgment should be quashed because the justice of the peace did not endorse on the summons the amount of the plaintiff's demand, together with the cost, etc., as required by section 4650 of Kirby's Digest. We have not set out the statute, but from a careful consideration of its terms we think it is evident that a compliance with it is not jurisdictional. The statute was passed for the purpose of regulating the payment of the claim sued for to the constable, and to protect the defendant in the payment thereof. The justice of the peace had jurisdiction of the cause of action and of the person of the defendant. Any irregular act on his part is no more than an erroneous exercise of jurisdic-

tion and does not make the judgment rendered liable to be successfully assailed collaterally or quashed upon *certiorari*. *Carolan* v. *Carolan*, 47 Ark. 511.

It follows that appellant's remedy to correct errors complained of was by appeal to the circuit court.

The judgment will be affirmed.

JOEST v. CLARENDON & ROSEDALE PACKET COMPANY.

Opinion delivered February 21, 1916.

1. CARRIERS—COMMON CARRIER.—One who operates for hire, an incline for the purpose of transferring freight from boats to cars, and who undertakes to handle the cargoes of all vessels applying, will be held to be a common carrier.
2. CARRIERS—CONNECTING CARRIERS—LOSS OF FREIGHT—RIGHTS INTER SE. —Where freight is lost through the negligence of a connecting carrier, the initial carrier, after paying the amount of the loss to the owner, may recover the amount of the damage from the connecting carrier.
3. CARRIERS—LOSS OF FREIGHT—LIABILITY.—In an action for damages against a carrier, for damages for loss of freight, due to defendant's negligence, *held*, under the evidence, that a verdict in plaintiff's favor would be sustained.

Appeal from Monroe Circuit Court; *Thomas C. Trimble*, Judge; affirmed.

STATEMENT BY THE COURT.

The Clarendon & Rosedale Packet Company sued P. H. Joest for the purpose of recovering the value of 136 sacks of rice alleged to be worth $408 and to have been lost by reason of the negligence of the defendant. The facts are as follows:

The Clarendon & Rosedale Packet Company is a corporation, and for some years had been engaged in operating a boat between Clarendon, Arkansas, and Rosedale, Mississippi. The packet company is a common carrier of freight, and on or about October 31, 1914, received a cargo of rice from W. H. Norsworthy & Co. of St. Charles, Arkansas, to be transported by it to Rosedale, Mississippi. The cargo of rice was consigned by Norsworthy

& Co. to a warehouseman in New Orleans, and the title to the rice remained in Norsworthy & Co. The rice was to be stored by the warehouseman in New Orleans and to be held subject to the orders of the consignors. The defendant, P. H. Joest, operated an incline in the town of Rosedale, Mississippi, and the incline was used for the purpose of transporting cargoes from boats and barges to the cars of the Yazoo & Mississippi Valley Railroad Company at Rosedale. The railroad company originally built the incline but it has been operated by the defendant for a number of years. The defendant transported the cargoes of all the boats to the cars of the railroad company. The incline was built for the accommodation and use of the public, and a uniform charge was made to all the vessels plying the river for the transportation of their cargoes to the cars of the railroad company. The incline contains two tracks and as the loaded car is pulled up the incline an empty car is carried down it on the other track that it may again be loaded. There is a piece of timber at the lower end of the track to prevent the cars from going into the river, and this is called a bumper. The cars are operated by a cable fastened to a drum at the top of the incline so that when one car is pulled up the other is allowed to go down the incline.

According to the testimony of the plaintiff it was the duty of the defendant to "spot" the cars, that is to say, under the contract made with him, it became his duty to pull the railroad cars along the sidetrack to a point where they could be unloaded from the tram or incline track. A cable was wound around the drum and in "spotting" a car this cable was attached to the car and it was pulled along the railroad track into position. In this instance, while placing the car in position the cable became released and this permitted the car on the incline to go down the incline and strike the bumper with such force that 136 sacks of rice were thrown into the river. The value of the rice was $408. The car at the bottom of the incline was against the bumper and stood there until the car at the top of the incline came down and knocked the bumper

off. This caused the cars loaded with rice to fall into the river.

According to the testimony of the plaintiff the cars were not overloaded; and the loading of the cars had nothing whatever to do with the cars knocking the bumper off of the incline and falling into the river. According to the testimony of the defendant, however, the cars were overloaded.

It was also shown by the defendant that it was not his duty to "spot" the cars and that he only did this as a matter of accommodation; and that the pulling of the pin which released the cable was done at the request of the agents of the plaintiff.

In short, according to the testimony of the defendant he was not in any way negligent in handling the rice on the incline.

After the rice was lost the plaintiff paid to the consignors its value and instituted this action against the defendant to recover the amount so paid.

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

Fink & Dinning, for appellant.

1. The testimony was legally insufficient to warrant a finding for the plaintiff. The rice was never in the possession of defendant, and never passed out of the possession of the packet company and the acts of negligence can not be attributed to appellant. The spotting of cars was merely an accommodation, and no part of appellant's duty. The accident was caused solely by the carelessness of the packet company.

2. No cause of action is shown against appellant. 5 Ark. 97; 10 *Id.* 304; 4 *Id.* 618; 12 *Id.* 126; 115 Ark. 221.

3. Appellant was not a common carrier. The proper person to sue is the consignee. Hutchison on Car., § 1315. When the shipper was paid the claim was satisfied.

Lee & Moore, for appellee.

1. None of the questions raised here were raised by appellant below. 105 Ark. 571.

2. The title of the packet company was sufficient to maintain this suit. 4 Rul. Case Law, par. 306; 72 Ark. 471.

3. The company issuing the bill of lading is liable for any loss or damage. Act No. 270, Acts 1907. And the initial carrier is entitled to recover from any connecting carrier or *tort feasor*. Joest was a common carrier. 104 Ark. 44.

HART, J., (after stating the facts). (1) It is first insisted by counsel for the defendant that he was not a common carrier. The evidence, however, shows that he was operating an incline for hire at the time the rice was lost and that he undertook to carry the cargoes of all vessels plying the river up the incline to the cars of the railroad company. This made him a common carrier. *Arkadelphia Milling Co.* v. *Smoker Merchandise Company,* 100 Ark. 44.

(2) The shipment in question was an interstate one. The packet company was the initial carrier. The undisputed evidence shows that the rice became worthless when it fell into the river and the initial carrier paid to the shipper the value of the rice. It had a right then to recover from the connecting carrier the amount of damage it had been required to pay the shipper by reason of the negligence of the connecting carrier. *K. C. & Mfs. Ry. Co.* v. *N. Y. Central & Hudson River Rd. Co.,* 110 Ark. 612; *Atlantic Coast Line Rd. Co.* v. *Riverside Mills,* 219 U. S. 186.

(3) It was the contention of the defendant that he gave his engineer instructions not to load more than fifty sacks of rice on one car at any one time and that in disregard of these instructions the plaintiff placed ninety-six sacks of rice on one of the incline cars and that the overloading of the car caused the loss. On this phase of the case the court instructed the jury that if the plaintiff placed ninety-six sacks of rice on one of the incline cars of the defendant and that if they further found that this was in violation of the instructions of the defendant, and that the overloading of the car was the cause or one of

the causes of the loss of the rice, that they should find for the defendant.

So, it will be seen that the contention of the defendant was submitted to the jury under as favorable instructions as he could ask. Besides, there is no evidence tending to show that the overloading of the car was the cause of the accident. The undisputed evidence shows that at the time of the accident one car was resting against the bumper at the foot of the incline and the other car was at the top of the incline. The accident was caused by the removal of a certain pin and clamp that released the cable and permitted one of the cars to roll down the incline, knocking the bumper loose and thus precipitating the other car into the water. It is the contention of the defendant that it was not his duty to "spot" the cars and that the pin was removed by one of the employees of the packet company for the purpose of "spotting" the car.

On the other hand, the testimony on the part of the plaintiff shows that the pin was removed by the engineer for the purpose of drawing the railroad car into position to be loaded from the incline car, and that it was the duty of the defendant to do this and that the removal of the pin was the cause of the accident. This phase of the case was submitted to the jury under proper instructions.

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

CONCORDIA FIRE INSURANCE COMPANY v. MITCHELL.

Opinion delivered February 21, 1916.

1. PRINCIPAL AND AGENT—PROOF OF AGENCY.—The existence of an agency can not be established by proof of the acts and declarations of the agent; but an agent may prove his own agency.

2. INSURANCE—WAIVER OF PROOF OF LOSS—AUTHORITY OF AGENT.—The local agent of defendant insurance company, with power to effect insurance, countersign policies, and collect premiums, *held*, to have authority, at least within its apparent scope, to waive proof of loss, and that such waiver was binding on the insurance company.

3. INSURANCE—REPRESENTATIONS OF AGENT—WAIVER OF PROOF OF LOSS—APPARENT SCOPE OF AUTHORITY.—When the right to waive proof of loss is within the apparent scope of the authority of the local agent of a fire insurance company, the company will be bound by the agent's act, where he introduced to the insured, a person who claimed to be defendant's adjuster, and when the insured relied upon his statement that a formal proof of loss would be unnecessary.

Appeal from Hempstead Circuit Court; *George R. Haynie,* Judge; affirmed.

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

1. There was no waiver of proof of loss. To bind appellants it is necessary that it be established that the person whose conduct is relied on to effect the waiver was, first, the agent of the companies, and, second, that he acted within the scope or the apparent scope of his authority. Foster had no power to adjust losses or waive proof of loss; nor any authority to bind the companies by introducing Casey as an adjuster. The *prima facie* case of Foster's authority was overcome by direct proof that he had no such authority. 100 Ark. 212; 60 *Id.* 532; 106 Iowa, 229. Foster's introduction of Casey is merely hearsay evidence.

2. It is incompetent to establish agency, or its extent by proof of declarations of the alleged agent or his conduct in assuming to act as such. 10 Enc. Ev., p. 15, 22; 1 Mechem, Ag. (2 ed.), § 285; Ostrander on F. Ins. (2 ed.), § 48, p. 174; 26 S. W. 381; 85 Ark. 252, 256; 93 *Id.* 603; 80 *Id.* 228; 46 *Id.* 222; 141 S. W. 205; 164 Ind. 77; 147 Ala. 646. No ratification nor acquiescence is shown. 164 Ind. 77; 32 S. E. 291; 75 N. W. 923; 70 Neb. 510; 99 N. Y. Sup. 234.

3. The agency of one whose authority is in issue can not be shown by the declarations, admissions or recognition of another agent unless it appears that the latter is one authorized to make such admissions, declarations and recognition. 91 Ga. 554; 106 Iowa, 229. The burden of proof was on the appellee. 11 Okla. 585; 69 Pac. 938; 123 Ala. 667; 120 Ga. 247; 121 Mass. 439; 90 Iowa, 457; 40 Neb. 700, 715; 16 Okla. 1.

Steve Carrigan, Jr., L. F. Monroe and *W. H. Etter*, for appellee.

1. If appellants' agent, Foster, was acting within the apparent scope of his authority and was consequently apparently authorized to act for appellants in regard to matters in which he undertook to act in dealing with appellee, then his acts are binding upon appellants. 115 S. W. 475-6; 97 Pac. 577; 52 Me. 389; 109 Minn. 440, 450; 124 N. W. 236; 12 Pac. 141; 86 S. W. 274; 108 *Id.* 355; 2 Corpus Juris, 572; 135 Fed. 636; 81 Vt. 420; 83 Ky. 246; 20 Okla. 576; 67 Am. St. 238; 60 Fla. 83; 103 Ark. 86; 111 *Id.* 237; 79 *Id.* 323; 94 *Id.* 227; 92 *Id.* 386; 97 *Id.* 564.

2. The acts and declarations of Foster and Casey were enough to satisfy the requirements of the policies as to proof of loss. A waiver is clearly shown. 108 Ark. 268.

3. The acts and admissions of an agent are available to charge the principal when they occur in the course of his employment, as part of the *res gestae.* 3 Wigmore on Evidence, § 1795; 1 Greenl. E., § 113; Jones on Ev., § 256; 165 S. W. 1154; 49 Ark. 215; 58 *Id.* 179; 63 *Id.* 93; 95 Pac. 218.

4. There is no error in the instructions. 96 U. S. 577; *Ib.* 234; 106 *Id.* 30; 53 Ark. 499; 24 Law Ed. U. S. 890; 42 Ark. 99.

SMITH, J. Appellee, who was doing business as the Rustic Novelty Company, brought suits against the appellant insurance companies on certain policies of insurance covering property which was destroyed by fire on July 11, 1914. There was prayer for the amounts of the policies and the statutory penalty and for attorney's fees. Separate suits were filed against each of the companies, but the same issue is involved in each case and the cases were consolidated and tried together.

No question is made as to the occurrence of the fire, or the extent of the loss. The policies sued on are standard form policies and each of them contained the usual requirement that the insured shall, in the event of loss

sustained by fire, make due proofs of loss to the insurer within sixty days thereafter, and provides that, in case this is not done, the policy shall become void.

Appellee does not claim to have made proofs of loss, and the question in the case is whether that requirement has been waived. Immediately after the fire appellee reported the loss to one C. B. Foster, who was engaged in the insurance business under the name of the Hempstead County Insurance Agency, which agency had written both policies. Some time thereafter Foster called upon appellee, in company with a stranger to appellee, but who was introduced by Foster as Mr. Casey, the adjuster for the insurance companies, who had come to adjust appellee's loss under said policies. Relying upon this representation of Foster, appellee took Casey to the scene of the fire and directed him to the night watchman, who was in charge of the insured property at the time of the fire, and then, upon Casey's further request, furnished and delivered to him an itemized list of the property lost in said fire and the value of each article lost. Thereupon Casey expressed himself as satisfied with the proof of loss and informed appellee that settlement would be made with him within the course of a short time. Appellee then inquired of Casey if anything additional was required and was advised that nothing else was necessary and that the showing made was sufficient. Resting on this assurance appellee made no other proof of loss, but on September 2d wrote a letter to one H. B. Hart, of Memphis, Tennessee, an adjuster of the appellant companies, requesting an early settlement of his loss, but Hart made no reply to this letter until September 15, which was after the expiration of the sixty days allowed for the proof of loss.

It was not denied that Foster was appellant's agent and that he wrote, signed and delivered the policies to appellee; nor is it denied that he introduced Casey as the adjuster, who was there for the purpose of adjusting appellee's loss. It is insisted, however, that the proof in regard to Foster's agency shows that the extent of his authority was to solicit insurance, issue policies, and col-

lect premiums, and that he had no authority to adjust losses and none to waive proof of loss, and that he had no power, therefore, to bind the companies by his act in presenting Casey to appellee as an adjuster, and that the evidence in regard to Foster's conduct is hearsay and that it was incompetent to establish the fact of agency, or the extent of the agency, by proof of the declarations of the alleged agent, or his conduct in assuming to act as such, and that error was committed in admitting proof of the acts and declarations of Casey.

Certain officers of the insurance company gave testimony which circumscribed Foster's authority to the matters above stated, but Foster himself testified that, in addition to his duties to receive applications for insurance, fix rates, countersign policies, deliver and renew policies of insurance, it was also a part of his duties under his agency to notify the companies of losses.

In the case of *Citizens' Fire Ins. Co.* v. *Lord,* 100 Ark. 212, it was said that a local agent who has power to effect insurance, countersign policies, and collect premiums, had also *prima facie* power to waive proof of loss. But appellants insist that no such presumption exists here for the reason that it now affirmatively appears that Foster, the agent, had no such authority; and it is further insisted that there is no competent evidence to show any waiver by Casey or any agency by him for any purpose.

(1-2) It is, of course, well settled that the existence of an agency can not be established by proof of the acts and declarations of the agent; but it is equally as well established that the agent himself may prove his agency. Foster proved his own agency; in fact, for some purposes it is admitted, and this agency having been shown and admitted, appellants became liable, not only for all of the acts which were within the actual scope of his authority, but for those also which were within the apparent scope of his authority. A similar question was involved in the recent case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Nunley,* 120 Ark. 268, 179 S. W. 369. There a loss was sustained by Nunley, of which it was necessary to

give notice within the time limited by a contract of shipment. Nunley was directed by an admitted agent to report the loss at the office of an agent who had authority to adjust such losses. Nunley repaired to this office, where he met a young man who was in charge of it, and entered into negotiations with him for the adjustment of his loss, and he and the young man examined the injured stock for that purpose. This young man admitted the liability of the railway company and promised a settlement. On behalf of the railway company it was shown that the young man was only the stenographer in the office of the adjusting agent and that he had no authority for his action. But we there said that, inasmuch as the young man had been left in charge of the office by the person whose duty it was to settle such claims, and had actually entered into negotiations looking to a settlement, that the jury were warranted in finding that he had such authority. So here Foster testified as to his own agency and as to its scope. Presumptively he had the power to waive the proof of loss. His agency having been established by competent evidence, the insurance companies became liable for his acts and declarations within both the scope and the apparent scope of his agency. It was, therefore, competent to prove Foster's introduction of Casey as an adjusting agent, and, consequently, also to prove Casey's statement that all the proof had been furnished which would be required.

(3) We think the jury were warranted in finding that appellee had the right to rely on Foster's statement as being, at least, within the apparent scope of his authority, and the proof of his acts within this scope was, therefore, admissible. 2 C. J. 570. And if Foster's acts were within the apparent scope of his authority, then it is immaterial whether Casey was an agent or not, or whether he had authority to waive proof of loss or not, provided appellee believed Foster's statements and relied upon them. If appellant's agent falsely represented that Casey was an adjuster, when he was not, then the principal must suffer the loss occasioned by his agent's false state-

ment, and not the person to whom the agent made the false statement, where the authority to make the statement was within the apparent scope of the agent's duties. It might be said, however, that the only proof which the appellants offered that Casey was not an adjuster was that of the adjuster, Hart, who testified that the adjustment of this loss was placed in his hands and that, to avoid conflict, a second adjuster is never appointed without notification of that fact to the first adjuster, and that no such notice was ever given him; but, on his cross-examination, Hart admitted that an adjuster named Casey had been at work on this loss, but he did not give the source of his information.

Instructions were asked by the parties to this litigation presenting their respective views, and exceptions were saved by appellants to the action of the court in refusing to give various instructions, and in giving others. But the instructions given conformed to the views here expressed.

Finding no error in the judgment, it is affirmed.

JOHNSON v. JOHNSON.

Opinion delivered February 28, 1916.

DIVORCE—DIVISION OF PROPERTY.—Plaintiff and defendant, acquired title to certain property, holding title as an estate by the entirety. Plaintiff (the wife) sued defendant for divorce, but defendant was granted a divorce on his cross-complaint; the defendant prayed that the title of plaintiff be divested out of plaintiff and vested in him, alleging that plaintiff, by fraud, induced defendant to purchase the property and place the title partly in her name. *Held*, Kirby's Digest, § 2684, did not apply, and that defendant would be denied relief, the evidence being insufficient to overcome the presumption that he had intended to make a gift of the property to his wife.

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

Martin, Wootton & Martin, for appellant.

1. The property involved was received by the appellee "in consideration and by reason of the marriage

annulled," and, under the statute, should be restored. Kirby's Dig., § 2684. The construction of this statute in *McNutt* v. *McNutt,* 78 Ark. 351; *Harbour* v. *Harbour,* 103 Ark. 273-283, was, in each case, upon facts differing from those presented in this case.

As held in the Harbour case, *supra,* the presumption that a gift from husband to wife is an advancement, is not conclusive, and may be rebutted. See, also, 71 Ark. 373.

In no case has the court held where a husband has caused land to be conveyed to himself and wife jointly that this was an advancement. Such a form of conveyance, and the creation of this peculiar estate, are potential evidence of an intention to more firmly cement the marriage tie, and must be taken as "in consideration and by reason thereof."

2. Appellee practiced such fraud upon appellant as entitles him to a cancellation of the deed to her. *Harbour* v. *Harbour, supra.*

Davies & Davies, for appellee.

1. If the conveyance was a gift, it does not fall in the class of property mentioned in the statute, Kirby's Dig., § 2684. We think this case is settled adversely to appellant by the case of *Wood* v. *Wood,* 116 Ark. 142.

2. There is no evidence at all of fraud on the part of appellee. The burden of proof was on the appellant. He did not meet it. 115 Ark. 416; 66 Ark. 305.

McCULLOCH, C. J. The parties to this appeal were husband and wife and resided in Garland County, Arkansas, where they acquired title to certain real estate there during their coverture. The conveyance of the property was to them jointly, which constituted an estate by the entirety. Appellee (the wife) commenced this suit for divorce in the Garland Chancery Court, and appellant filed a cross-complaint, praying for a divorce on alleged grounds of misconduct of appellee, and also prayed that the title to said property be divested out of appellee and vested in appellant. The court granted the divorce

on the prayer of appellant's cross-complaint, but denied any relief with respect to the property in controversy. Relief is sought under the statute of this State which provides that, "In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof." Kirby's Digest, § 2684.

In *McNutt* v. *McNutt,* 78 Ark. 346, we gave a construction to the statute following that given by the Court of Appeals of the State of Kentucky, whence our statute was borrowed, that the word "consideration" meant "the act of marriage, or some agreement or contract touching or relating to the act of marriage," and the words "by reason thereof" to relate to such property "as either party may have obtained from or through the other by operation of the laws regulating the property rights of husband and wife."

The statute thus interpreted does not apply to the facts of the present case, it being merely alleged that the wife by fraud induced the husband to purchase the property and place the title partly in her name.

The same construction was placed on the statute in the more recent case of *Harbour* v. *Harbour,* 103 Ark. 273, but relief was granted to the husband on the ground that there had been fraudulent conduct on the part of the wife whereby the husband was induced, in consideration of his affection for her, to convey certain property. Perpetration of fraud was the basis for the relief granted in that case, and it was held that the proof was sufficient to overcome the presumption that the conveyance was intended as a gift or an advancement to the wife.

Under the proof in the present case, as abstracted, we can not say that the chancellor was wrong in holding that it was insufficient to overcome the presumption.

The decree is therefore affirmed.

CLARK, TRUSTEE, *v.* SPANLEY, TRUSTEE.

Opinion delivered February 28, 1916.

1. TRUSTS—EQUITY JURISDICTION—KNOWLEDGE OF THE TERMS OF THE TRUST.—A court of equity can not render a judgment against a trustee, as to the trust property, without knowing what are the terms of the trust.
2. TRUSTS—TRUST PROPERTY—RIGHT TO FOLLOW.—Trust property, or property substituted for it, may be recovered from the trustee and all persons having notice of the trust.
3. TRUSTS—TRUST RROPERTY—EQUITY JURISDICTION.—So long as a trust fund can be distinctly traced, equity will follow it and fasten the purpose of the trust upon it, unless the rights of innocent third parties have intervened.
4. TRUSTS—NEGLECT OF TRUSTEE—LIABILITY.—If a trustee violate the rights of the beneficiary by neglect or misconduct, the beneficiary may hold the trustee liable for the damage caused.
5. TRUSTS—CONDUCT OF TRUSTEE—LIABILITY OF TRUSTEE'S PERSONAL PROPERTY.—The individual property of a trustee will not be liable to the beneficiary under a trust, unless the trustee has violated the rights of the beneficiary by neglect or misconduct.

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

J. I. Alley, for appellant.

The court should have given a peremptory instruction in favor of appellant. It is admitted that he is trustee for the estate of R. B. Clark, and there is nothing to show that he had authority as trustee to bind her estate in this matter. Moreover, the only way to obtain a judgment against the estate of a deceased person is to proceed against the administrator. Art. 7, § 34, Const. Ark.; 33 Ark. 575; 33 Ark. 727; 44 Ark. 423; 47 Ark. 222; *Id.* 317; *Id.* 460; 48 Ark. 544; 50 Ark. 34; 51 Ark. 361, 366; 45 Ark. 267; 49 Ark. 51.

W. Prickett, for appellee.

This is not a suit against the estate of a deceased person, but a suit against the trustee of an estate created by appellant and others interested in certain property, with a view to collecting the debts and paying off the claims against the property.

The proper person to sue for a claim against property held in trust is the trustee, not the donor or *cestui que trust.* The legal title is in the trustee. 113 Ark. 501; 30 Ark. 250; 1 L. R. A. 230, 231, note 1, and cases cited. The trust is not terminated by the death either of the donor or *cestui que trust.* 39 Cyc. 100, 104.

HART, J. Charles A. Spanley, trustee in bankruptcy of the Hanna-Breckenridge Company, instituted this action against T. W. Clark, as trustee of the estate of R. B. Clark, deceased, to recover judgment for the sum of $528.75, with accrued interest. The facts are as follows:

The Clark Lumber Company, a corporation organized under the laws of the State of Oklahoma, opened up business at Mena, Arkansas, pursuant to the laws of this State. T. W. Clark and R. B. Clark, his wife, became creditors of the corporation. R. B. Clark obtained a judgment against it for $5,000 and T. W. Clark for $1,500. There were other creditors of the corporation. Then a contract in writing was executed between the corporation and the Clarks. The contract was not introduced in evidence and all the information as to its contents, as disclosed by the record, is the testimony of T. W. Clark. He testified that the Clark Lumber Company could not pay its debts to the Clarks and other persons and sold to them its plant and other property; that under the contract the Clarks were either to operate the plant or sell it and get their money out of it and divide the residue with the stockholders. He further stated that this "trusteeship," as he called it, was created prior to his wife's death and was in writing. He was asked if he and his wife had not agreed to pay the indebtedness of the Clark Lumber Company in this contract, and an-

swered that they had done so conditionally. The conditions of the trust were not stated.

R. B. Clark died while she and her husband were in possession of the property of the Clark Lumber Company under the contract above referred to. She also owned individual property. After her death in August, 1913, T. W. Clark wrote the Hanna-Breckenridge Company as follows:

"I have your favor of the 19th inst. addressed to the Clark Lumber Company. The party who owned this plant is dead. I am authorized to wind up its affairs and pay off its debts. It is very solvent and there will be no loss. Your note for $450 was placed in the hands of Judge Prickett of this place some time past and will be paid to him. There could be no balance as stated by you. This note was subject to curtail and was contingent upon a contract, which is in my possession, and the note which you hold is void and no effect. I am advised that this note is in the hands of parties in Baltimore. I have notified them that it is to be taken care of in this $450 item and is void. This $450 item will be taken care of now very soon."

The claim of the Hanna-Breckenridge Company against the Clark Lumber Company was a balance alleged to be due upon a planer and matcher with the regular equipment belonging to the same which had been sold by it to the Clark Lumber Company. Four hundred and fifty dollars was the balance due and the Clark Lumber Company had given its note for that amount. The Hanna-Breckenridge Company became bankrupt and Charles A. Spanley was appointed trustee in bankruptcy.

T. W. Clark also testified that though the body of the machinery was shipped to the Clark Lumber Company, the equipment was never delivered.

The court sustained the request of the plaintiff for a peremptory instruction and rendered judgment in favor of the plaintiff against T. W. Clark, trustee of the estate of R. B. Clark, deceased, for $528.75. The case is here on appeal.

The subject of trusts falls strictly within the scope of equity and forms a large part of equity jurisprudence. Bispham on Equity Jurisprudence (4 ed.), § 49; Pomeroy's Equity Jurisprudence (3 ed.), vol. 1, § 151.

In *Boles* v. *Jessup,* 57 Ark. 469, the case was heard by the court without the intervention of a jury. The case should have been tried on the chancery side of the docket. The court there said that the result was the same as it should have been had it been tried in equity and that inasmuch as the same end had been reached as should have been reached had the case been tried in equity, the court would not reverse the judgment.

(1-2-3) The principle announced in that case and others of a similar character does not apply here for the reason that we are of the opinion that the court erred in the judgment rendered in the present case. The Clark Lumber Company, a corporation, under a contract in writing, delivered its property to T. W. Clark and R. B. Clark, his wife, in trust. Everything depended upon the contract creating the trust and that contract should have been introduced in evidence. The contract creating the trust is not in the record and we know nothing whatever of its terms except as testified to by T. W. Clark without objection. He testified that the contract contained a condition but does not state what the condition was. Therefore, we can not tell whether or not the plaintiff was entitled to judgment against defendant, as trustee, in a proper action. The contract created a trust and without knowledge of its terms a court of equity could not even enforce its provisions. It is well settled that trust property or property substituted for it may be recovered from the trustee and all persons having notice of the trust. So long as the fund can be distinctly traced the chancellor will follow it and fasten the purpose of the trust upon it unless the rights of innocent third parties have intervened. Second Perry on Trusts, (6th ed.), § 828; Modern American Law, Vol. VII, bottom of page 357.

(4) It is equally well settled that if the trustee violate the rights of the beneficiary by neglect or misconduct the beneficiary may hold the trustee liable for the damage caused.

(5) As we have already seen, Mrs. Clark had other property besides the trust property at the time she died. No administration had been had upon her estate. Under the rule just stated her individual property would not be liable to the beneficiary unless she had violated the rights of the beneficiary by neglect or misconduct. It is not alleged or proved that she did this. Therefore a court of equity would not even have power to render judgment under the facts in this case against her individual estate. The letter copied in the statement of facts shows that the trust under which the Clark's received the property contained a condition.

As indicated above, a court of equity could not render a judgment against the trustee as to the trust property without knowing what the terms of the trust were.

From the views we have expressed it follows that the court erred in rendering judgment against T. W. Clark, trustee of the estate of R. B. Clark, deceased, and for that error the judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

WILLIAMS v. WILLIAMS.

Opinion delivered February 28, 1916.

1. DIVORCE—INDIGNITIES TO PERSON.—Under the evidence, *held*, a wife was entitled to divorce on account of the indignities to her person, offered and committed by her husband, rendering her condition intolerable.

2. DIVORCE—PROPERTY OF WIFE.—When a wife is granted a divorce from her husband, property will be decreed to her, which she purchased out of her own means, and from her savings from her husband's earnings, which he turned over to her, for the support of the family.

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

J. S. Thomas, for appellant.

1. The testimony fails to show that defendant was an habitual drunkard for more than one year. Her testimony, except as to an occasional spree, is not supported. Neither is her testimony as to cruelty and indignities supported by any testimony except by a daughter nine years old. 76 Ark. 28.

2. The evidence is insufficient to sustain the decree. The finding of a chancellor is merely persuasive. 41 Ark. 292.

Glen H. Wimmer and *H. R. Whyte,* for appellee.

1. The grounds set up for divorce were proven and there is no error in the findings of the chancellor. Kirby's Digest, § 2672; 44 Ark. 429; 9 *Id.* 507; 103 Ark. 382.

HART, J. This is an action for divorce brought by Mary Williams against W. E. Williams on the statutory grounds that her husband had been addicted to habitual drunkenness for the space of one year and offered such indignities to her person as to render her condition intolerable. She also alleged that since their marriage she had purchased and paid for a home in the town of Des Arc, by her own earnings. She asked that her title to this be quieted.

The court entered a decree of divorce in her favor and also decreed that the title to the home in Des Arc be vested in her. The defendant has appealed.

One of the grounds for divorce alleged by the plaintiff was that her husband had been addicted to habitual drunkenness for the space of one year. We do not think the evidence supports this ground for divorce. It shows that the husband got on a protracted spree just before they separated and also that he had been drunk occasionally since their marriage.

This testimony was not sufficient to establish habitual drunkenness for a period of one year. *Chappell* v. *Chappell,* 83 Ark. 533; *O'Kane* v. *O'Kane,* 103 Ark. 382. The plaintiff also alleged that the defendant offered such indignities to her person as to render her condition intolerable. The chancellor found the issue generally in her favor on this ground. It is settled that the findings of favor of the plaintiff and this constitutes a finding in fact made by a chancellor will not be disturbed on appeal unless against the preponderance of the evidence.

Tested by this rule, we are of the opinion that the decree of the chancellor on the question of divorce should be affirmed.

The plaintiff, herself, testified that she and the defendant were married in 1905; that at the time she had two children by her former husband; that her husband would get drunk at intervals since their marriage and that they had been separated several times; that he would promise her that if she would take him back that he would do better; that he would keep his promise for a while and would then commence to abuse her and her children; that he would curse and abuse her children and threatened to kill them and that he wanted them to work instead of going to school; that he was quarrelsome and never treated her as if he had any affection for her; that he loafed around most of the time and that she had to make most of the living with the help of her children; that when he was drinking he would curse and abuse her; said that she had told lies and was lower down than a negro; that at the time she left him he had been on a protracted spree lasting for several weeks; that there were five empty gallon jugs on the place and some bottles which represented the amount of whiskey he had drunk on that spree.

One of her children and her half sister testified for her. They stated that defendant would often curse and abuse his wife and her children; that he cursed and abused her a great number of times in their presence during the last two years.

The boy stated that his step-father came home intoxicated on one occasion, and sat by the stove with his knife open and was cursing and using profane and vulgar language towards his mother; that his father would abuse his mother and threatened to slap her. He also corroborated his mother as to the occurrences during the protracted spree just before they separated.

The defendant testified in his own behalf and denied the testimony of his wife and denied the specific acts of ill treatment testified to by her and her boy. He admitted that he had been on a protracted spree at the time of their separation but said that he was sorry for it and tried to get his wife to return to him. He admitted that he drank whiskey occasionally but denied that he became addicted to the excessive use of intoxicating liquors. He introduced other witnesses who corroborated him in regard to his drinking. A cousin of his, who lived in the house with the parties prior to their separation, testified that the husband always treated her well until he got on the protracted spree which brought about their separation.

(1) As we have already stated, we think the finding of the chancellor on the question of divorce is not against the preponderance of the evidence. While the courts are not quick to interfere in domestic quarrels, the testimony of the plaintiff, her sister and her son, is sufficient to establish this ground of divorce. *Cate* v. *Cate*, 53 Ark. 484; *Haley* v. *Haley*, 44 Ark. 429; *Kurtz* v. *Kurtz*, 38 Ark. 119; *Kientz* v. *Kientz*, 104 Ark. 381.

(2) On the question of the home, we think the testimony fairly shows that it was paid for by the earnings of the wife. It is true the husband testified that he turned over his earnings to his wife. But is was his duty to support his family and the testimony does not show that he contributed very much towards the support of his family. The evidence shows that the wife kept boarders and earned most of the family's support and that she earned

the money which paid for the house they lived in. She testified to this effect and is corroborated by the agent of the person from whom the house was purchased. He stated that she paid all the money for the place and was the only person known in the transaction.

The decree will be affirmed.

BOYNTON LAND & LUMBER COMPANY *v.* HAWKINS.

Opinion delivered February 28, 1916.

COSTS—ACTION IN EJECTMENT.—Plaintiff sued defendant in ejectment to recover 160 acres of land, defendant answered, denying plaintiff's ownership. On the day of trial defendant acknowledged plaintiff's title to all but 5.72 acres, and judgment was rendered in plaintiff's favor for all the land except the 5.72 acres noted. *Held*, all the costs were assessable against the defendant.

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

Lamb & Rhodes and *Frank H. Sullivan*, for appellant.

This was an action at law and the liability for costs is controlled by statute. Kirby's Digest, § 965; 46 Ark. 552. A plaintiff in ejectment who recovers part only of the property sued for, is entitled to his costs. 35 Kans. 46; 116 N. C. 843; 117 *Id.* 13; 150 Pa. St. 516; 83 Tex. 355; 144 Cal. 430; 15 Ore. 484; 49 *Id.* 324; 210 Fed. 604; 131 *Id.* 989.

No brief filed for appellee.

HART, J. The Boynton Land and Lumber Company sued W. R. Hawkins in ejectment to recover 160 acres of land in Mississippi County, Arkansas. The defendant filed an answer in which he denied that the plaintiff was the owner of, or entitled to the possession of the land sued for, and denied the execution of any of the deeds mentioned in plaintiff's complaint. He also alleged that he had been in adverse possession of a small part of the lands for more than seven years prior to the institution of the action. On the day the case was called for trial

the defendant admitted in open court that the plaintiff had title to all of the lands sued for except the portion he claimed title to by adverse possession. The issue as to this land was submitted to the jury which returned a verdict in favor of the defendant for 5.72 acres. Thereupon judgment was rendered by the court in favor of the plaintiff for all the land sued for except 5.72 acres; and as to this tract judgment was rendered in favor of the defendant. The court also rendered judgment for costs against the plaintiff. The plaintiff filed a motion to retax costs and the court overruled it. The case is here on appeal.

The right to recover costs did not exist at common law but rests upon statute alone. In actions at law the costs generally go to the prevailing party, and, under such statutes the costs follow the judgment. It is well settled in this State that a plaintiff in ejectment must rely upon his own title and not upon the weakness of the title of his adversary. This proposition has been decided so frequently that no citation of authority to support it is necessary.

It will be observed that the plaintiff sued for 160 acres of land. If the defendant had disclaimed as to the interest in the land in which he was not entitled, he would, under our statutes, have been entitled to costs. See Kirby's Digest, § § 965, 966. The defendant, however, denied that the plaintiff was the owner of the land sued for or that he was entitled to the possession of it. He further alleged that he was entitled to a small part of the land by adverse possession, and the verdict of the jury was in his favor for the land claimed by him adversely. If he had disclaimed in the beginning as to all of the land in controversy except the 5.72 acres which was awarded him he would have been entitled to recover costs which accrued after that time. However, he did not enter a disclaimer as to the remainder of the land until the day of trial. The record shows that the case was tried

on the day it was called for trial. All of the costs had accrued at that time. Therefore the court should have adjudged costs against the defendant; and for the error in not doing so the judgment will be reversed and the cause remanded with directions to the court below to tax the costs against the defendant.

GUY v. STANFIELD.

Opinion delivered February 28, 1916.

1. TAX SALES—INVALID DESCRIPTION—REDEMPTION.—Where appellants lands were sold for the non-payment of State and county taxes under the following description: "Ex. 10 A. Sq. NE Cor. S½ SE 26-11-11," it will be held that the sale is invalid because of an improper description of the land, and that appellant may redeem from said sale.
2. TAX SALES—DESCRIPTION.—The description of lands to be sold for taxes must be intelligible, not only to the expert, but also to one who is only ordinarily versed in such matters.

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

A. D. Chavis and *Walter M. Purvis,* for appellant.

1. Counsel review the testimony as to the age of appellant and insist that the chancellor's finding is contrary to the weight of the evidence, and that since his findings of fact are merely persuasive, the decree ought not to be sustained. 75 Ark. 72; 77 Ark. 216.

2. Appellee is not entitled to a decree because she held no record title conveying even color of title. Wild and unoccupied land is in the constructive possession of the true owner. 74 Ark. 383. The record title being in the ancestor of appellant and the land being unimproved and uninclosed, there was no duty or necessity of resorting to legal or equitable remedies until some one threatened to destroy or impair the rights of the inheritor. 88 Ark. 395. Redemption statutes are liberally construed. 113 Ark. 501.

Geo. H. Holmes, for appellee.

1. The preponderance of the evidence supports the decree.

2. The liberal construction of redemption laws relied on by appellant, does not mean an indefinite time must be allowed in which to redeem. Appellant was allowed only two years after arriving at her majority in which to bring suit for recovery of the land. Kirby's Digest, § 5061; 53 Ark. 419; 57 Ark. 523; 59 Ark. 460; 60 Ark. 163.

SMITH, J. Appellant alleged her ownership of the south half of the southeast quarter of section 26, township 11 south, range 11 west, and brought this suit to have a cloud on the title to this land removed. This cloud consisted of a sale of a portion of said land for the State and county taxes due thereon under the following description: "Ex. 10 A. Sq. NE. Cor. S ½ SE 26-11-11 containing 70 acres."

Appellant asserted a right to redeem because of the disability of infancy existing at the time of the sale and the briefs in the case are devoted chiefly to a discussion of this question. The chancellor found against appellant on the question of her age and dismissed the suit because she had not applied to redeem the land, within the time limited by law after she had attained her majority.

We have concluded that the right of redemption should have been granted nothwithstanding that finding may not be against the preponderance of the evidence because of the invalidity of the tax sale upon which appellee's claim of title rests. We think the description set out above is not sufficiently definite and certain and that the sale was, therefore, void. In the case of *Cooper* v. *Lee,* 59 Ark. 460, the court, in discussing the necessity of a proper description of land to be sold for taxes, quoted from Cooley on Taxation (2 ed.) 405 the following reasons for a correct description:

"First, that the owner may have information of the claim made upon him or his property; second, that the

public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and, third, that the purchaser may be able to obtain a sufficient conveyance."

The case of *Cooper* v. *Lee, supra*, presented a question similar to the one now being considered except that the description there employed was not as indefinite as the one here used. In that case it was said:

"A description of the land by the abbreviations commonly used to designate government subdivisions sufficiently indentifies it; but the use of abbreviations in a tax assessment or notice must be confined to those commonly used and understood. Had the description of the land been 'N½ of N. E.' followed by section, township and range, we should have felt no doubt in saying that it correctly designated the land in controversy by abbreviations commonly used and understood, but the letters N. NE do not, to our minds, have such well defined and accepted meaning. For this reason we feel compelled to hold that the description of the land in controversy as the 'N. NE Sec. 3, Town. 15, Range 6, 87.19 acres' was not a description by abbreviations the knowledge and use of which is so general as to warrant the court in holding that they sufficiently identify the land to be sold. On the contrary, we hold that it was not a sufficient description, and that the sale of the land must be treated as a sale without notice, and therefore void."

The same case is authority for the proposition that the description must be intelligible, not only to the expert, but also to one who is only ordinarily versed in such matters.

We conclude, therefore, that appellant was entitled to the relief prayed for, and as it appears that a proper tender of taxes and interest was made, the decree of the court below will be reversed and the cause remanded with directions to enter a decree cancelling the tax deed as a

cloud on appellant's title. *Morris* v. *Eagle,* 94 Ark 180; *Beardsley* v. *Hill,* 85 Ark. 4; *Woodall* v. *Edwards,* 83 Ark. 334; *King* v. *Booth,* 94 Ark. 306; *Dickinson* v. *Ark. City Improvement Co.,* 77 Ark. 570; *Rhodes* v. *Covington,* 69 Ark. 357; *Chestnut* v. *Harris,* 64 Ark. 580; *Beck* v. *Anderson-Tully Co.,* 113 Ark. 316.

BRYAN *v.* CITY OF MALVERN.

Opinion delivered February 28, 1916.

1. MUNICIPAL CORPORATIONS—REGULATION OF BUSINESS—NUISANCES.—If a business is a nuisance *per se,* the city council may prevent it, if it is one which may become so by being improperly conducted, but which would not be so otherwise, then it may be so regulated as not to become a nuisance.
2. MUNICIPAL CORPORATIONS—POOL HALLS—REGULATION.—Pool halls may be regulated by a city council, so as to prevent their becoming public nuisances.
3. MUNICIPAL CORPORATIONS—POOL HALLS—REGULATION AND SUPPRESSION—INVALIDITY OF ORDINANCE—REVENUE MEASURE.—An ordinance passed by the council of a city of the second class provided that pool and billiard halls should pay an annual license of $600, and that the operators thereof should enter into a bond in the sum of $1,000, conditioned upon their observing certain regulations; *held,* the act was void, as being intended to suppress the business, or as a revenue measure.

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

H. B. Means, for appellant.

1. In the absence of a showing that a pool hall is a nuisance a city has no right to declare it one or suppress it or prohibit its maintenance, 116 Ark. 390.

2. The license fee is unreasonable and the ordinance is void. 52 Ark. 301; 112 *Id.* 28.

3. It is void also as a means of raising revenue. 83 Ark. 355. The provisions of the ordinance are discriminatory in requiring the hall closed at 9 P. M. 85 Ark. 513.

Henry Berger, for appellees.

1. Pool and billiard tables are proper subjects of police regulation. 74 Kans. 393; 177 S. W. 1036; 120 Mo. 1; 63 Tex. Cr. 627; 152 S. W. 1068, 1074.

2. The ordinance is not unreasonable nor the hour of closing discriminatory. 7 Col. App. 528; 94 Pac. 870. While a billard or pool hall is not immoral *per se,* it may become such by certain conditions. 8 Cal. App. 440; 97 Pac. 199; 100 Pac. 1134; 65 Ore. 442.

3. The license fee is not unreasonable. Friedman on Muni. Corp. § 123; 64 Ark. 154.

SMITH, J. Appellant was engaged in operating a billiard hall in the city of Malvern, and on the 13th of April, 1915, the council of that city passed an ordinance regulating such places. Said ordinance provided for an annual license fee of $600, and that the operator of such hall should enter into a bond in the sum of a thousand dollars binding himself not to operate the hall after 9 P. M. or to permit any person under the age of 18, or any person under the influence of intoxicating liquors, to enter such hall; and it further provided that the keeper of such hall should require each person who played at the game to register his name in a record book kept for that purpose, and a failure to comply with any of the provisions of such bond worked a forfeiture thereof.

This proceeding was brought to enjoin the marshal of said city from enforcing said ordinance on the ground that it is unjust and unreasonable and is a tax for the purpose of raising a revenue, and that its provisions are so arbitrary as to amount to a suppression of his business.

There was offered in evidence a resolution of the city council which recited that, inasmuch as the city had authorized the granting of licenses to operate billiard halls, the service of an additional officer would be required, and the marshal was authorized to employ a deputy at a salary of $50 per month.

There was proof both pro and con on the necessity for the employment of this officer on account of the opera-

tion of billiard halls in that city; but the chancellor found the fact to be that billiard halls in that city required supervision and regulation.

The case of *Town of Dardanelle* v. *Gillespie,* 116 Ark. 390, is relied upon as authority for the proposition that billiard tables are not the proper subject of regulation unless they are used for purposes of gaming.

We are not now called upon to decide that question, but we will say the point was not so decided in the case cited. There it appeared from the agreed statement of facts that the tables were not used for gaming, or other unlawful purposes, and no attempt was made to show that the tables were so conducted that the business became a nuisance. It was sufficient there to say that, in the absence of authority from the Legislature to prohibit the operation of billiard tables and pool rooms, the town council could not declare that to be a nuisance which was not one *per se.*

That case, however, involved a town ordinance, while the one now under consideration was enacted by the council of a city of the second class. Cities of the second class are given certain enlarged powers, and under section 5593 of Kirby's Digest the council of such a city is authorized to enact ordinances "to prevent or regulate the carrying on of any trade, business or vocation of a tendency dangerous to morals, health or safety, or calculated to promote dishonesty or crime."

(1) A council cannot license any act which is prohibited by the State law, for that law is supreme, but it may prevent or regulate a business of the kind stated; the power to prevent to be exercised in the event the business is *per se* of such nature that its tendency is dangerous to morals, health or safety, or calculated to promote dishonesty or crime, while the power to regulate is to be exercised where the business may or may not become of that nature according to the manner in which it is conducted. In other words if the business is a nuisance *per se* the city council may prevent it. If

it is one which may become so by being improperly conducted, but which would not be so otherwise, then it may be so regulated that it may not become a nuisance.

(2) We think the proof shows appellant's business to be of this last class and, therefore, the proper subject of regulation by the city council.

(3) But we are also of the opinion that, although this ordinance is passed under the guise of one to regulate, it is, in fact, intended to be one for the suppression of that business.

And we think, it also appears that, if the ordinance did not operate to accomplish the result of suppressing the pool room business in that city, the proof shows it would be a revenue measure, and it is void upon either theory.

The decree of the court below will, therefore, be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

PRICE v. MORRIS.

Opinion delivered February 7, 1916.

1. MALICIOUS PROSECUTION—MALICE AND PROBABLE CAUSE.—Want of probable cause, and malice combined, are essential, in order to maintain a suit for malicious prosecution.
2. MALICIOUS PROSECUTION—INFERENCE OF MALICE.—Malice, generally, may be inferred from the evidence of want of probable cause.
3. MALICIOUS PROSECUTION—PROBABLE CAUSE.—Absence of probable cause is absolutely essential to sustain an action for malicious prosecution; no matter how much or what kind of malice may actuate the prosecutor, if he has probable cause to believe the defendant guilty, he is justified in taking the matter before the court.
4. MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL.—Proof that defendant acted upon the advice of counsel learned in the law, or upon the advice of the public prosecutor, given after a full and fair statement of all the known facts, will be a complete defense to an action for malicious prosecution, because it is conclusive evidence of the existence of probable cause.
5. MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF DISTRICT ATTORNEY.—Where defendants laid before the district attorney all the

material facts in their possession, and a prosecution of plaintiff for a violation of the postal laws, was instituted upon the district attorney's advice given in good faith, this is conclusive evidence of the existence of probable cause and is a complete defense to an action for malicious prosecution.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action for malicious prosecution brought by Emmett Morris against M. G. Price and F. B. Bumgardner. The action is based upon the following facts: The defendant F. B. Bumgardner became postmaster of the city of Fort Smith, Arkansas, on March 12, 1910. His commission expired on March 12, 1914, but he held over until July 15, 1914. When he became postmaster the plaintiff was a clerk in the office but after four months Bumgardner made him foreman of the work room. In 1912 plaintiff was appointed superintendent of mails and occupied that position at the time the matters involved in this suit occured. Bumgardner claimed that plaintiff was inattentive to his duties and in the latter part of 1913 made complaint to the department with the view of having him removed. The defendant Price, who was post office inspector, was sent to Fort Smith to investigate the charges made against Morris. In making the investigation Price discovered that Morris procured two of his subordinates to sign promissory notes for him, and he procured the affidavits of these men to that fact. One of them, R. C. Medlin, in his affidavit states that he was clerk in the post office under Morris and that some time in September, 1912, he signed a note with Morris to the Day and Night Bank for $300 and later signed a renewal for $200, that Morris offered him no inducement to sign the notes except to say that he had often favored affiant; that he did not propose to give him any favors as far as his promotion was concerned; that he made no promise to favor affiant in an official way and that affiant did not think Morris was in a position to promote him and that he did not think he could very well afford

not to sign the note; that he and Morris had been close friends for about twelve years.

John P. Kennedy made an affidavit in which he stated that he was a clerk in the postoffice at Fort Smith and that in December, 1912, Morris came to him to get him to sign a note for $300 and said that Mr. Medlin would sign it with him; that Morris had signed a note for him for $30, and that he signed the note for Morris because Morris asked him to and because they were friends; that he would have signed it whether or not they had been associated in the office, and that Morris did not offer him any inducements to get him to sign the note.

Price told Bumgardner that the facts stated in these affidavits constituted a violation of section 168 of the postal laws and regulations of the revised statutes of the United States. Bumgardner knew that Kennedy and Medlin had signed the notes for Morris in 1913 but had no idea that such acts constituted a violation of the postal laws. Price showed these affidavits to J. V. Bourland, United States district attorney, and also showed him the clause of the postal laws above referred to. Bourland, after reading over the affidavits and the postal regulations above referred to, gave it as his opinion that Morris was guilty. He then filed an information before the United States Commissioner at Fort Smith charging Morris with a violation of the postal laws. At the examination the Commissioner found that Morris was not guilty of any offense against the postal laws under the facts stated in the two affidavits above referred to.

The district attorney testified that the defendants showed him the affidavits of Kennedy and Medlin and that he acted upon the information contained therein in instituting the prosecution against Morris. He testified that he was still of the opinion that the facts warranted the prosecution and that Morris was guilty, under the facts stated in the affidavits. He further stated that the attorney general of the United States had directed him to defend Price in this action upon the request of the post office department.

Price and Bumgardner also stated that their information was obtained from the affidavits of Kennedy and Medlin; that they showed these affidavits to the district attorney and told him that was all the information they had on the subject. On the part of the plaintiff it was shown that when Bumgardner first became postmaster a warm friendship existed between him and Morris; that their friendship gradually waned until Bumgardner had a positive dislike, if not direct hatred for Morris; that while the district attorney was writing out the information to procure the arrest of Morris, Bumgardner was present and his countenance expressed great satisfaction. In short, there was testimony from which the jury might have inferred that the defendants were actuated by ill will and a spirit of revenge towards plaintiff in procuring plaintiff's prosecution, as above stated, but the conclusion we have reached renders it unnecessary to state this evidence in detail.

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

J. V. Bourland, U. S. Dist. Atty., and *H. C. Mechem,* for appellants.

1. The court erred in admitting the testimony of Rowe that Bumgardner exhibited strong dislike for Morris. The question was whether Bumgardner had malice against Morris when the prosecution complained of took place, not at some other time.

2. The court erred in denying Bumgardner's request for a direct verdict. (1) There was no evidence that he had anything to do with the prosecution or conspired with Price to cause it. The evidence must be clear, full and satisfactory to establish a fraudulent conspiracy in a civil suit for damages. 1 Pears, (Penn.) 510; 70 Atl. 546; 65 So. 793; 44 Fed. 896; 23 N. W. 325; 94 *Id.* 4; 26 N. C. (Iredell) 61; 75 Me. 184; 82 Ark. 259. (2) Because Price and Bumgardner were protected by the advice of the district attorney, who was of the opinion that § 168 Postal Laws had been violated and filed the

complaint himself. 82 Ark. 259; 71 *Id.* 518; 19 A. & E. Enc. Law, (2 ed.) 685; 100 Ark. 318; 142 U. S. 16; 152 N. W. 42; 90 Pac. 637.

3. The second clause of the 5th instruction should not have been given. This was a charge upon the facts. 100 Ark. 318. Besides the evidence disclosed probable cause.

3. The court erred in the concluding paragraph of the 6th instruction. There was no evidence to warrant it and the 13th is open to the same objection. There was also error in refusing Bumgardner's second request and in amending it and giving it as amended. Also in refusing his 3d request, also in refusing his 5th and 8th requests. It is error to refuse specific instructions when not covered by others given. 69 Ark. 134; 98 *Id.* 17.

5. The verdict should have been set aside because in finding more actual damages against Bumgardner than Price it appears the jury did not properly comprehend the facts and law, or were moved by some improper motive, such as prejudice or passion. 1 Sumner 481; Fed. cases No. 17, 671; 4 Fed. cases No. 2284; 4 *Id.* 128. The verdict is not sustained by the evidence and is contrary to law. Freeman on Judgments, § 241; 86 Atl. 555. In case of suit against several to recover for joint tort or trespass the verdict, if against all or more than one must be against the defendants found guilty for *one sum,* viz. the damages suffered. 48 Conn. 520; 86 Atl. 555; 42 Conn. 270; 93 Atl. 531; 62 S. E. 580; 98 Pac. 878; 105 S. W. 867; 134 *Id.* 116; 172 U. S. 554; 4 Mass. 419; 54 Cal. 491; 45 S. W. 682; 146 N. W. 830; 83 Ind. 489; 13 N. J. L. 294; 5 Burr. 2790; 7 Ill. App. (7 Bradwell) 644.

Ira D. Oglesby and *Ira D. Oglesby, Jr.,* for appellee.

1. There was no error in admitting Rowe's testimony. The objection is not well taken because not directed to any specific part, but to the entire deposition. Statements made before of a conspiracy are admissible. Admissions after prosecution are also admissible. 72

Ark. 316; 53 Atl. 800; 61 N. W. 390. When hostility is shown at a specific time, the existence at another time is generally admissible. Wigmore on Ev. § 396; 29 Cyc. 99 and cases cited.

2. The verdict is abundantly sustained by the evidence and no error of law was committed.

3. There is no error in the part of the 5th instruction as to malice and probable cause. It is essentially different from the one condemned in 100 Ark. 316.

4. Nor is there error in the 6th instruction as to the advice of counsel; nor the 2nd; nor in refusing those asked, reviewing them and cite 107 Ark. 190; 94 Fed. 343; 61 N. W. 390; 44 Fed. 896; 5 Rul. Case Law, 1088.

5. The jury had the right to apportion the damages. 1 Bay 11; 39 Am. Dec. 122; 159 S. W. 792; 178 *Id.* 1043; Central Law Journal, Oct. 15, 1915, p. 282 and Nov. 5, 1915, p. 327; 26 Mass. 555; 11 N. Y. 128; 13 Ark. 225; 9 Pick. 555; 4 Bibb 208; 3 Atl. 645; 63 *Id.* 60.

HART, J. (after stating the facts.) (1) As we have already stated, there was not only testimony from which the jury might have inferred legal malice but even express malice. Want of probable cause and malice, combined, are essential in order to maintain a suit for malicious prosecution. If either of these is wanting the action must fail.

(2-3) Malice generally may be inferred from the evidence of want of probable cause; but the converse of the proposition can not be sustained. Absence of probable cause is absolutely essential to sustain an action for malicious prosecution. No matter how much or what kind of malice may actuate the prosecutor, if he has probable cause to believe the defendant guilty, he is justified in taking the matter before the court. Mod. Am. Law, Vol. II, p. 297; *Wheeler* v. *Nesbitt,* 24 How. (U. S.) 544; *Thompson* v. *Beacon Valley Rubber Co.,* 56 Conn. 493; *Hamilton* v. *Smith,* 39 Mich. 222.

In the case last cited the court said: "Malice may be proved by direct evidence or it may be inferred from

circumstances; and, generally, it may be inferred from the want of probable cause, though the latter can never be presumed or inferred from the most express malice."

In the first mentioned case the Supreme Court of the United States, in discussing the question, said:

"Malice, alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may, nevertheless, prefer a well founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation, and though the averment is a negative one in its form and character, it is, nevertheless, a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. *Morris* v. *Corson,* 7 Cow. 281. Either of these allegations may be proved by circumstances, and it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description. Accordingly it was held in *Foshay* v. *Ferguson,* 4 Den. 619, that even proof of express malice was not enough without showing, also, the want of probable cause; and the court go on to say, that however innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. Similar views were also expressed in *Stone* v. *Crocker,* 24 Pick. 83. There are two things, say the court in that case, which are not indispensable to the support of the action, but lie at the foundation of it. The plaintiff must show that the defendant acted from malicious motives in prosecuting him, and that he had no sufficient reason

to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities from a very early period to the present time. *Golding* v. *Crowle,* Sayer 1; *Farmer* v. *Darling,* 4 Burr. 1, 974; 1 Hilliard on Torts, 460.

"It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi,* as well remarked in the case last referred to, is upon the plaintiff to prove affirmatively by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. *Purcell* v. *McNamara,* 9 East 361; *Willians* v. *Taylor,* 6 Bing. 184; *Johnstone* v. *Sutton,* 1 Term. 544; *Turner* v *Ambler,* 10 Q. B. 257."

(4) We have held that proof that defendant acted upon the advice of counsel learned in the law or upon the advice of the public prosecutor given after a full and fair statement of all the known facts, will be a complete defense to an action for malicious prosecution, because it is conclusive evidence of the existence of probable cause. *Laster* v. *Bragg,* 107 Ark. 74, and cases cited; *St. L., I. M. & S. Ry. Co.* v. *Wallin,* 71 Ark. 422.

It is not necessary to determine whether the facts stated in the affidavits of Medlin and Kennedy constitute a crime under the postal laws of the United States, or whether the opinion expressed by the district attorney was erroneous; for the advice of counsel, honestly given after a full disclosure of the facts, is a complete defense. *Kansas and Texas Coal Co.* v. *Galloway,* 71 Ark. 351, and authorities cited above.

It is earnestly insisted by counsel for the defendants that the statements to the attorneys were truthful, full and complete, giving all the material facts and circumstances within the knowledge or information of defendants; and that the existence of probable cause became a

question of law for the court which should not have been submitted to the jury. They contend, therefore, that the court erred in not directing a verdict for them. In this contention we think they are correct. As we have already seen probable cause is a complete defense to the action.

(5) The district attorney stated that he advised the institution of the prosecution against Morris upon the facts contained in the affidavit of Medlin and Kennedy. It was proved that the facts contained in these affidavits were true. The district attorney testified that he believed at the time that the appellant was guilty under the facts stated to him and that he still held to that opinion. There is nothing whatever in the record to impeach or contradict him in this respect. The undisputed evidence showed that he acted upon the information given him by the facts contained in the affidavits above referred to, and that he acted in good faith in instigating the prosecution, believing the facts stated to him constituted a violation of the postal laws. As we have already seen, in an action for a malicious prosecution if probable cause is found to exist, no amount of malice will entitle a plaintiff to a verdict. The undisputed evidence shows that the defendants laid before the district attorney all the material facts in their possession and that the prosecution was instituted upon the district attorney's advice, given in good faith. Under our decisions, this is conclusive evidence of the existence of probable cause and is a complete defense to an action for malicious prosecution.

The record shows that the case has been fully developed and no useful purpose could be served by remanding the cause for a new trial. Therefore, for the error in not directing a verdict for the defendants, the judgment must be reversed and the cause of action dismissed.

BRIDGER *v.* STATE.

Opinion delivered February 7, 1916.

1. RAPE—ASSAULT WITH INTENT—SUFFICIENCY OF EVIDENCE.—In a prosecution for an assault with intent to commit rape, the evidence held sufficient to warrant a conviction.
2. EVIDENCE—CRIMINAL PROSECUTION—CORROBORATING TESTIMONY.—In a prosecution for an assault with intent to commit rape, the testimony of certain girls, schoolmates of the prosecutrix, as to her behavior some time after the alleged assault, is inadmissible.
3. APPEAL AND ERROR—INTERLINEATIONS IN TRANSCRIPT—REVIEW.—Unexplained and unauthenticated interlineations made with a pencil, will not, on appeal, be regarded as a part of the transcript.
4. CRIMINAL LAW—NAME OF DEFENDANT—VARIANCE.—In an indictment, defendant's name was charged as Bridgen, and the proof showed his name to be Bridger. *Held*, there was no variance where the proof showed that the defendant was the person intended to be charged with the commission of the crime. Kirby's Digest, § 2232.
5. WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS—DISCRETION OF TRIAL COURT.—Trial judges being vested with discretion in the matter of the examination of witnesses, it will not be held error, when the trial court refused to permit a witness to be recalled, when the appellant wished to examine him as to matters he had already testified to, tending to impeach the veracity of another witness.
6. APPEAL AND ERROR—INTRODUCTION OF EVIDENCE—DISCRETION.—Trial judges are vested with much discretion in the order of the introduction of evidence, and judgments will be reversed only when it affirmatively appears that this discretion was abused.

Appeal from Arkansas Circuit Court, Southern District; *Thomas C. Trimble,* Judge; affirmed.

C. L. O'Daniel, R. D. Rasco and *Manning, Emerson & Morris,* for appellant.

1. There is a fatal variance between the indictment and proof. 6 Ark. 165; 6 *Id.* 540.

2. The remarks of the court were prejudicial. 51 Ark. 147; 17 Cal. 146; 73 Ark. 568-573.

3. There were errors in admitting evidence and allowing leading questions. Kirby's Digest, § 3136. One crime cannot be proven by allowing evidence of another.

39 Ark. 278; 37 *Id.* 261; 73 *Id.* 262; 68 *Id.* 577; 111 *Id.* 457; 100 *Id.* 321; 91 *Id.* 555; 38 *Id.* 221.

4. There was error in the court's charge to the jury. 83 Ark. 192, 195; 67 *Id.* 416.

5. It was error to permit part of the jurors to deliberate upon their verdict while the others were on the street unaccompanied by an officer. Kirby's Digest, § 2393; 44 Ark. 115; 57 *Id.* 1; 95 *Id.* 430; 102 *Id.* 356. A fair and impartial trial was not granted appellant. The court's remarks were prejudicial.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant, for appellee.

1. The variance was not fatal. 6 Ark. 540; *Id.* 165; Kirby's Digest, § 2332; 35 Ark. 385; 101 *Id.* 59; 105 *Id.* 84.

2. The remarks of the court were not prejudicial. 73 Ark. 573; 72 S. W. 918; 83 *Id.* 384; 71 *Id.* 70; 83 Pac. 490.

3. There was no error in the admission of evidence. Kirby's Digest, § 3136. Lead pencil interlineations upon a transcript which are unexplained and unauthenticated will not be regarded as part of the transcript. 84 Ark. 95; 86 *Id.* 360; 85 Ark 496. It is within the discretion of the court to allow a party to ask his own witness leading questions. 83 Ark. 100; 85 *Id.* 496; 63 *Id.* 120; 75 *Id.* 144; Wigmore on Ev. § 770.

4. There is no error in the instructions. The charge states the law correctly. 91 Ark. 562; 82 *Id.* 540; 38 *Id.* 304; 66 *Id.* 494; 34 *Id.* 649; 35 *Id.* 585; 58 *Id.* 472; 41 Ga. 217; 90 Pac. 259; 18 Ga. 13; 99 Ark. 561.

5. There were no irregularities in the trial. 95 Ark. 321; 107 *Id.* 38; 109 *Id.* 479. Appellant had a fair and impartial trial. None of the so-called irregularities were prejudicial.

SMITH, J. Appellant was convicted upon a charge of assault with intent to commit rape, and has appealed from the judgment of the court sentencing him to a term of three years in the state penitentiary.

(1) At the trial a great many instructions were given, to a number of which exceptions were saved, and a large number of instructions were asked by the appellant, many of which were given, while exceptions were duly saved to the refusal of the court to give others which were requested. Upon a consideration of all the instructions given we are of the opinion that the law of this case was fairly and fully presented to the jury.

The evidence of the girl alleged to have been assaulted is sufficient to sustain the conviction, while according to the evidence offered in behalf of appellant the charge was wholly unfounded, and with the exception of a few, somewhat incriminating circumstances, the State's case rests entirely upon the evidence of the girl. The girl's name was Cleon Eason and, according to the State's evidence, she was a child only 13 years of age, while according to the evidence offered by appellant she was a girl 15 years of age. She is an orphan and had been taken to live at the home of appellant, who is a married man, and according to her evidence she had been importuned by appellant to yield to him and upon her continued refusal, had finally been assaulted. Shortly after the time of the commission of the alleged assault Cleon left appellant's home and was placed in school, and three of her girl school mates were permitted to testify in regard to her conduct at school and, according to the evidence of these school mates, Cleon appeared morose and was frequently seen crying, and remarked that she wished she was dead and that she was sorry she was living, and in this connection stated to one of her school mates that appellant had attempted to hug and kiss her, and to another that he had been mean to her. The purpose and effect of all this evidence was to corroborate the girl, and all of this evidence was offered over the objection of appellant. Three practicing physicians examined the girl shortly after the time of the alleged assault and one of these doctors testified that he found evidence of laceration and a partial rupture of the hymen, while the other two doctors testified that they found no bruises or

other evidence of attempted intercourse and at the trial one of these doctors was used to impeach the doctor who testified for the State. This witness, Doctor Kelly, was twice called as a witness for the prosecution, and was cross-examined at length, and he was also called as a witness by appellant. Doctor Rasco, who testified for the appellant, stated that Dr. Kelly, after he had examined the girl, told him that no man had had anything to do with her, and after the examination of both of these witnesses appellant offered to prove by Dr. Rasco that Dr. Kelly told him that the girl's parts were not lacerated at all, but the court refused to let the witness be called for this purpose and exceptions were duly saved.

Appellant was indicted under the name of R. C. Bridgen, but the undisputed evidence shows that his name was Bridger, and appellant objected to the testimony tending to show his guilt of the crime charged, upon the ground that there was a variance between the indictment and the proof.

Exceptions were also saved to the remarks of the court in passing upon the admissibility of certain evidence tending to show that this prosecution was instituted in aid of an action for damages which had been brought against appellant. The remark of the court was argumentative and, therefore, improper, but we do not agree with counsel that the language used by the court could have been construed by the jury as expressing an opinion upon the issue involved and we will not therefore, reverse the judgment on that account.

(2) We think the court should not have admitted the evidence of Cleon Eason's school mates. The incidents testified to by them occurred some days after the alleged assault, and while its purpose, of course, was to corroborate the girl in her statement that she had been assaulted, the evidence was not admissible for that purpose. Several of our cases define the conditions under which proof of outcry can be made, but those cases have no application to the facts of this case, and we are not advised of any theory upon which this evidence could

be held competent. *Threet* v. *State,* 110 Ark. 152; *Sexton* v. *State,* 91 Ark. 589; *Skaggs* v. *State,* 88 Ark. 62; *Williams* v. *State,* 66 Ark. 264; *Pleasant* v. *State,* 15 Ark. 624.

(3) Certain of the questions which elicited this evidence were objected to as leading, but that objection did not call the court's attention to their real vice, and no other objection was made. There does appear in the transcript certain interlineations made with a lead pencil, but the interlineations are unexplained and unauthenticated and we can not therefore regard them as part of the transcript. *Johnson* v. *State,* 84 Ark. 95; *Hobbs* v. *State,* 86 Ark. 360.

(4) We do not reverse this judgment because of the error contained in the indictment in spelling appellant's name, as all of the proof shows that he was the person intended to be charged. *Joiner* v. *State,* 113 Ark. 112. The statute provides that if it shall be made to appear that an error was made in the name in the indictment, that this fact shall not vititate the indictment, or the proceedings thereon, but that upon the discovery of the true name of the person charged, an entry shall be made upon the minutes of the court of his true name, referring to the fact of his having been indicted by the name mentioned in the indictment, and thereafter all subsequent proceedings shall be in the true name, and a form to be used in such cases is also provided by the statute. Section 2232 Kirby's Digest.

(5-6) It was, of course, competent and proper for the appellant to impeach the evidence of Doctor Kelly by the proof of contradictory statements, if it was possible to do so, but under the circumstances we can not say that error was committed in refusing to permit Doctor Kelly to be further examined for the purpose of impeachment. He had already been upon the stand three times and had been examined and cross-examined at length on each appearance on the stand, and Doctor Rasco had been permitted to testify about a statement made to him by

Doctor Kelly, the effect of which was to show that there were no physical evidences of any attempt to have sexual intercourse with Cleon Eason, and we can not say that the court erred in refusing permission to further emphasize this contradiction in a slightly different manner. Trial judges are necessarily vested with much discretion in the order of the introduction of evidence, and judgments will be reversed only when it affirmatively appears that this discretion was abused, and we think it does not so appear here.

Other questions are discussed in the brief, but we think they do not call for a discussion.

Finding no prejudicial error the judgment is affirmed.

ST. PAUL FIRE & MARINE INSURANCE COMPANY v. WOMACK.

Opinion delivered February 14, 1916.

1. FIRE INSURANCE—PROOF OF LOSS—REJECTION OF PROOF.—A fire insurance company can not arbitrarily reject proof of loss for the purpose of postponing the date of payment.
2. FIRE INSURANCE—LOSS—NECESSARY PROOF—TIME OF PAYMENT—PREMATURE ACTION.—Plaintiff held a policy of fire insurance in appellant company. A fire occurred on August 17, and plaintiff made out a statement of the loss, which appellant received on September 4; this, under the terms of the policy, was not a sufficient proof of loss, and further proof was made out, in accordance with appellant's request, and received by appellant on October 8. Plaintiff then, on October 29, brought suit for the amount of the policy, and for the statutory penalty and attorney's fees; the policy provided that appellant have sixty days, after receipt of proof of loss in which to make payment. *Held*, that appellant was entitled to have the proof of loss made out as provided in the policy, and was then entitled to sixty days in which to make payment, that plaintiff's action was prematurely brought, and that he could not recover the statutory penalty and attorney's fees.
3. FIRE INSURANCE—ACTION FOR PENALTY AND ATTORNEY'S FEES—COSTS.—Plaintiff prematurely brought an action on a policy of fire insurance, after a loss had been sustained, for the amount of the loss, and for the statutory penalty and attorney's fees. Defendant tendered into court the amount of the policy and interest thereon, *held*, the defendant may have judgment for costs expended in both the appellate and trial courts.

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

D. D. Terry, for appellant.

1. The suit was prematurely brought and penalty and attorney's fees should not have been allowed. The judgment should have been for defendant on the grounds that the suit was prematurely brought. 92 Ark. 387; 59 S. W. 61; 130 *Id.* 769; 131 *Id.* 406; 98 Ark. 137; 104 *Id.* 129.

2. The preliminary proof of loss was not a compliance with the provision of the policy. 79 Ark. 481; 77 *Id.* 27; 79 *Id.* 475, 484; 75 Atl. 1037.

3. The suit should have been abated as premature. 42 Ark. 163; 40 *Id.* 545; 21 *Id.* 306; 92 *Id.* 460. The provisions of the policy as to notice of loss, etc., have often been held reasonable and valid. 72 Ark. 484; 88 *Id.* 120; 87 *Id.* 171.

D. M. Cloud, for appellee.

1. Appellee furnished proof of loss substantially in compliance with the policy and Kirby's Digest, § 4375. 72 Ark. 368; 75 *Id.* 409.

2. Delivery to the agent was delivery to the company. Kirby's Digest, § 6271; 82 Ark. 178; Act No. 324, Acts 1905.

3. The insured demanded his money before filing suit, hence the amount of the policy became a liquidated demand upon the total destruction of the house by fire. The suit was not premature.

McCULLOCH, C. J. The plaintiff's dwelling house in Benton, Arkansas, was insured under a policy issued by the defendant, St. Paul Fire & Marine Insurance Company, in the sum of $2,000, against loss or damage by fire, and the building was totally destroyed by fire on August 17, 1914, which was during the existence of the policy. On the day the fire occurred, plaintiff conferred with the company's local agent, W. M. Steed, and the latter forwarded notice of the loss to the company, which was promptly received at the home office of the company in the city of St. Paul. On August 24, 1914, the plaintiff

made out proof of loss, or, at least, what he intended as proof of loss, and delivered the same on that day to the local agent at Benton. Said proof was made in the following form:

"Benton, Ark., August 24, 1914.

"St. Paul Fire & Marine Insurance Company, St. Paul, Minn.:

"Gentlemen: I wish to submit proof of loss in accordance with the terms of policy No. 81918 issued to C. H. Womack, of Benton, Ark., insuring him against loss from November 13, 1911, until noon, November 13, 1914, upon the building situated on lot No. six (6), block No. sixty-two (62), in the city of Benton, Ark.

"The amount of insurance being two thousand dollars.

"I desire to state that said building was totally destroyed by fire on the 17th day of August, 1914.

"The said building belonged to me, and that my loss because of destruction of same by fire was $2,869.11, as per attached statement made by Contractor G. A. Zinn to rebuild said building.

(Signed) "S. H. Womack."

This was sworn to before a notary public. Plaintiff also delivered with said proof, an estimate made out by a carpenter of the cost of replacing the building. The local agent mailed those papers to the home office on September 2, 1914, and the same were received at the office of the company in St. Paul two days later. The company then referred the matter to an adjuster, who went to Benton on September 16, 1914, to investigate the loss. The adjusted did not see the plaintiff on that occasion, but a few days later forwarded to the local agent at Benton a printed blank form for proof of loss which would be satisfactory to the company. The local agent communicated the request to plaintiff and delivered the blank to him. After some hesitation, and after consultation with his attorney, the plaintiff decided to make out the new proof of loss, which he did on September 28, 1914, and delivered the same to the local agent who forwarded it to the adjuster, and the latter in turn forwarded the same to the

home office in St. Paul, where it was received on October 8, 1914. On or about October 24, 1914, plaintiff made inquiry of the local agent as to when payment of the policy might be expected, and renewed the inquiry on October 28. Not getting a satisfactory reply, he instituted this action on October 29 to recover the amount of the policy and the statutory penalty and attorney's fees.

There is no question raised as to the liability of the company for the amount of the policy, but the only controversy is as to the liability for attorney's fees and penalty. The contention on the part of the defendant is that the suit was prematurely instituted, because it was before the expiration of the sixty days after the delivery of satisfactory proof of loss, as stipulated in the policy. The policy contains a stipulation making the right to recover on the policy depend upon the furnishing of a proof of loss. The stipulation is couched in the following language:

"If the fire occur, the insured * * * within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire, and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes the insured has

honestly sustained loss to the amount that such magistrate or notary public shall certify."

(1-2) The stipulation concerning payment under the policy is that "the sum for which the company is liable, pursuant to this policy, shall be payable within sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by this company, in accordance with the terms of the policy." The proof of loss first made out by the plaintiff failed in several particulars to comply with the terms of the policy. It appears to be more a notice of the loss than proof of loss, but was doubtless sufficient to constitute proof of loss if no objection thereto had been made. The policy called for proof of loss satisfactory to the company, and gave sixty days after the receipt of such proof within which to make payment. Of course, an insurance company can not arbitrarily reject proof of loss for the purpose of postponing the date of payment, but it does not appear in this case that the failure to accept the proof was at all arbitrary, for the same did not come up strictly to the requirements of the policy. The adjuster had the right to call for more satisfactory proofs, and especially a certificate from the nearest justice of the peace or notary public. The first proof of loss was not, according to the undisputed evidence, received at the home office until September 4, and even if those proofs had been satisfactory, the company had sixty days from that date within which to make payment. The stipulation for a satisfactory proof of loss shows that the time is to run from the date that the proof is received at the home office, for it is there only that it can be determined whether or not the proof is satisfactory. We are therefore of the opinion that plaintiff's claim under the policy could not have been, in any event, mature until the expiration of sixty days from September 4, 1914.

But even if that were not true, the subsequent transactions between the parties with respect to the additional proof of loss postponed the date of payment even to a later date than that. The company, it appears, proceeded with reasonable diligence to adjust the loss, and within a reasonable time made the request for a more satisfactory

proof of loss, including a certificate from the nearest magistrate or notary public, and it is evident from the language of the policy that it was intended to provide for payment only within sixty days after the satisfactory proof of loss was furnished, that is to say, the proof of loss furnished in compliance with the last demands which the company had the right to make. Of course, the company could not, as before stated, postpone the date of payment by making an unreasonable demand, but here the demand was reasonable, inasmuch as the first proof of loss was insufficient.

The suit being premature, it is obvious that there can be no recovery of the statutory penalty and attorney's fees. The company, through its attorneys, tendered in court the amount of the policy and interest thereon, and when the tender was refused, the money was paid over to the clerk of the court, and the judgment in the case directs the clerk to pay it over to the plaintiff. Thus all question as to liability for the amount of the policy is eliminated from the case, and since there is no right to recover anything more, the right of action is ended on account of said payment.

(3) The judgment is therefore reversed and the cause is dismissed insofar as there is an attempt to recover a statutory penalty and attorney's fees. The defendant is, of course, entitled to recover judgment for costs expended in both courts. It is so ordered.

CENTRAL COAL & COKE COMPANY v. CHARLES.

Opinion delivered February 14, 1916.

1. MASTER AND SERVANT—SAFE PLACE TO WORK—INGRESS AND EGRESS TO AND FROM A MINE.—A mine owner owes to its employees in the mine, the duty to furnish a safe place to work, to keep the place in a safe condition, and to furnish a safe mode of ingress and egress, to the servant while on the premises of the master.

2. MASTER AND SERVANT—INJURY TO SERVANT—MINE—CONTRIBUTORY NEGLIGENCE.—Plaintiff, an employee in defendant's mine, was injured while entering the mine; *held*, under the evidence that defendant's

other servants knew of his whereabouts, and that as plaintiff was walking on the customary and only place where he could walk, that he was not guilty of contributory negligence.

3. NEGLIGENCE—PERSONAL INJURY ACTION—SPECIFIC ACTS OF NEGLIGENCE.—In an action for damages for personal injuries by a servant against his employer, it is reversible error for the court to give instructions as to the defendant's negligence in general, when the evidence shows only the particular act of negligence which resulted in the injury complained of.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee sued appellant to recover damages for personal injuries alleged to have been sustained while employed in appellant's coal mine.

Appellee testified as follows: I have been working in coal mines since 1887, and have been working in appellant's mine for seven or eight years before I was injured. On the morning of the accident, my room was full of coal, and I did not go to work as usual. I met the pit boss, he told me that I had better work in the entry until they got a couple of cars of coal loaded out of my room. I went home, got breakfast and came back to the mine between 8 and 9 o'clock. I saw Fred Woodson, rope rider at the mouth of the slope, and asked him which way that trip was going. Woodson replied that he did not know. I asked him how long the trip was going to stand there. Woodson answered he did not know, maybe a half-hour, or maybe longer. I then told him if it was going to stop there that long, I was going down the slope. I went down the slope about 700 yards, going past the engine which pulled the cars up the slope. I was going down the main track, and saw a rope rider on the front end of the car with his lamp on his head. I turned off on an empty track and had taken five steps when the empty trip cars struck me in the back. When I fell I struck a big piece of timber, about thirty inches thick, near the track. The timber was so close to the rail, the car, in dragging me along, pinioned my leg between the cars and the timber. My leg was broken. At the place where I was walking when hit, there

was thirty inches between the track and rib or walls of the passage. This big piece of timber was between the track and the rib. There were dog or refuge holes along the side of the wall there thirty or forty feet apart. It is customary for the workmen to go backward and forward in the mine all during the day. Sometimes they ride trip cars, and sometimes they walk. There is no other place to walk except down the track. There was not sufficient room for a man to walk between the tracks and the walls of the passage. The dog holes are placed in the side of the wall for the men to go in while the trip cars pass on the track. There were two dog holes near the place where I was injured, and they were both filled up with timber and debris. Another workman was in another refuge hole near by. I did not hear the trip cars coming because the engine was making so much fuss. The trip cars hit me just about the time I saw them.

It was shown by other witnesses that it was about 2,000 feet from the mouth of the slope from where the accident happened, and that it was the custom of the miners to walk in the center of the track down the slope in going to and from their work; that the rope riders have a light on their caps and generally sit on their cars; that it is a dangerous place at the switch near where appellee was injured, because the empty cars and loaded cars pass each other.

One of the witnesses for the defendant testified that there was sufficient space between the track and the ribs for a person to step out of the way of passing cars. Another one said, that he usually asked the engineer where the trip was, and waited until it got by if it was not all right.

The engineer, himself, testified, that he gave signals for moving the cars, but does not remember on that particular day to have signaled this trip; that he saw some one pass along just before the accident, but did not know who it was; that the engine makes considerable noise; that sometimes you can hear a trip coming, and sometimes you can not hear it; that it is wider from track to

wall in some places than others; that it averaged about two and one-half feet.

A rope rider testified that he remembered appellee going along on the morning of the accident, and asking him if he was going down in the mine right then. He stated that he told him that he could not tell, but would not go until he got a signal to do so; that the engineer has charge of handling the cars; that the loaded cars are brought up the slope to the tipple, and after being unloaded, are kept there generally from a few minutes to a half-hour before they are returned.

Other evidence was adduced by appellant which tended to show that appellee was guilty of negligence at the time he received his injuries. The jury returned a verdict for appellee in the sum of $990, and the case is here on appeal.

Ira D. Oglesby, for appellant.

1. There was no testimony that defendant failed to furnish competent and careful servants to handle its machinery, or failed to provide a system of signals to warrant safety to those who must travel on its gangways or slopes, or that it negligently permitted said gangway or slope to become filled with coal, or debris, or permitted its cars to run at excessive speed, etc. In fact, no negligence whatever is shown, and defendant's instructions 3, 4, 6 and 7 should have been given. 74 Ark. 19; 78 *Id.* 553; 88 *Id.* 26; 77 *Id.* 448; 70 *Id.* 441.

2. There was no negligence on the part of the company, and plaintiff assumed the risk by the grossest contributory negligence. 106 Ark. 206; 226 Fed. 495.

3. The instructions for plaintiff are erroneous. Cases *supra.*

Appellee *pro se.*

The court properly refused the requests for instructions 3, 4, 6 and 7, by defendant. The questions of proximate cause and assumed risk are for the jury. This case falls squarely within the rule of 77 Ark. 557. Here the danger was not of the kind ordinarily incident to the

work, but the conditions of the service were altered, and the servant suddenly brought face to face with danger arising from the master's own negligence. One can not assume a risk he does not know of, or one made by, a servant as in this case. 118 Ark. 128. A servant has a right to rely upon the master's judgment; that he will not negligently or carelessly run over him. This case is fully covered by the court's charge. Kirby's Digest, § § 5343-4; 120 Ark. 394; 89 Ark. 522.

HART, J., (after stating the facts). It is earnestly insisted by counsel for appellant that there is not sufficient evidence to support the verdict and this we regard as a very close question. Appellee was a coal miner and was going to his place of work at the time he was injured. It was the custom of all the servants to walk down the track as they went to and from their work. There was a passage down into the mine which contained two tracks, one for the loaded cars to be hauled up, and the other for the empty cars to pass down.

(1) It is the general rule that it is the master's duty to use ordinary care to furnish his servant a safe place to work and to exercise the same degree of care to keep his working place in safe condition. Under the circumstances in this case this duty carried with it the further duty to furnish the servant a safe mode of ingress and egress while on the premises of the master. *St. Louis, I. M. & S. Ry. Co.* v. *Duckworth,* 119 Ark. 246, 177 S. W. 1148.

(2) This seems to be conceded by counsel for appellant but he contends that under the facts in this case appellee was guilty of contributory negligence and bases that contention on the following facts: that appellee was an experienced miner and had worked for appellant seven or eight years; that he was familiar with the methods of work and knew that when the mine was being worked cars were likely to be on the loaded track and empty track; that the empty trip would move whenever the engineer gave the signal; and that loaded and empty cars passed

at the "parting," a place on the track near where appellee was injured.

On the part of appellee, however, it was shown that he had told the rope-rider that he was going down the track and the rope-rider saw him do so; that he was at a place where he had a right to be; that no other way was provided by appellant for its servants to go to and from their work rooms; that there was not sufficient room between the track and the walls for a person to walk; that the servants were accustomed to walk along the middle of the track and, indeed, that it was the only place for them to walk.

As we have already seen appellee notified the rope rider on the empty trip cars that he was going down the slope to his working place; the engineer also saw some one pass just before he gave the signal for the cars to move.

Appellee was in full possession of his senses and from his testimony and the attendant circumstances, the jury might have found that he was keeping a sharp lookout for the cars and that he did not hear any signal given for them to move.

Under this state of facts we think the negligence of appellant and the contributory negligence of appellee were properly questions for the jury.

(3) Counsel for appellant also contends that the court erred in refusing to give certain instructions to the jury and in this contention we think counsel is correct. Appellee in his complaint alleged that the defendant failed to furnish competent and careful servants to handle its machinery and perform the duties required of them in operating the mine, and that appellant failed to establish a system of signals in operating the mine as required by statute. There was no testimony whatever tending to support these charges of negligence. The only contention made by appellee at the trial was that the particular servants engaged in the work at the time he received his injury were negligent. There was not a particle of testimony to show that they were incompetent or careless servants in

general. The testimony only went to show a particular act of negligence at the time appellee was injured. So, in regard to the allegation of negligence of appellant in failing to provide a system of signals to warn those who were traveling its slopes; there was no testimony to establish this allegation of negligence. The testimony only went to the extent of showing negligence on the part of the engineer in failing to give signal or warning at the time appellee was injured.

Counsel for appellant by a specific instruction asked the court to state to the jury that there was no evidence to establish the particular allegations of negligence just referred to and the court committed prejudicial error in not giving the instruction. *Harris Lumber Co.* v. *Morris,* 80 Ark. 260; *Arkansas Central Rd. Co.* v. *Workman,* 87 Ark. 471; *Huddleston* v. *St. Louis, I. M. & S. Ry. Co.*, 88 Ark. 454.

We would not reverse the case for the refusal of the court to give these particular instructions, if in the instructions given, it had limited the right of appellee to recover to the specific acts of negligence proved at the trial; but the court did not so limit appellee's right to recover but, on the other hand, gave general instructions on the question of appellant's negligence.

For the error in refusing these instructions as indicated in the opinion, the judgment must be reversed, and the cause will be remanded for a new trial.

MASON v. BOWEN.

Opinion delivered February 14, 1916.

1. WILLS—HOLOGRAPHIC WILL—PROOF.—An instrument, to be valid as an holographic will, both the entire body of the will and the signature thereto, must be in the handwriting of the testator, and this must be established by unimpeachable evidence of at least three disinterested witnesses.
2. WILLS—HOLOGRAPHIC WILL—SUFFICIENCY OF PROOF.—A will, offered for probate, held to be valid as an holographic will.
3. WILLS—EXECUTION—SUFFICIENCY OF EVIDENCE.—The evidence held sufficient to warrant the jury in finding that an instrument offered

for probate as a will, was properly executed and the testator's signature properly attested, as required by the statute.

4. WILLS—UNDUE INFLUENCE—STATEMENTS OF TESTATOR.—The statements and declarations of a testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, but are admissible to show the mental condition of the testator at the time of making the will.

5. APPEAL AND ERROR—CUMULATIVE EVIDENCE OF AN UNDISPUTED FACT.—It is not prejudicial error for the trial court to refuse to allow cumulative evidence of an undisputed fact.

6. WILLS—CAPACITY OF TESTATOR—ACTS AND DECLARATIONS.—Where the testator's mental condition is in issue, evidence of his acts and declarations, are admissible, when made a reasonable time before or after the execution of the instrument.

7. WILLS—INTENTION OF TESTATOR—EVIDENCE OF DECLARATIONS.—In a contest of a will, evidence of statements made by the deceased, two years before his death, as to what disposition he wished to make of his property, is inadmissible.

8. WILLS—DECLARATIONS OF TESTATOR—TIME WHEN MADE—MENTAL CAPACITY.—Declarations of a testator made prior to the execution of a will, will be entitled to probative force according to the nearness or remoteness of the time at which they are made. The admission of such declarations is much within the discretion of the trial judge; when made at a remote period, they lose their probative force, and are entitled to no value whatever as proof of the mental capacity of the testator.

9. WILLS—CONTEST—MENTAL INCAPACITY.—Where deceased removed from where he was living, and went to live with other parties, evidence of his declarations made three and a half years before his death, and before he moved, are inadmissible to show his mental incapacity at the time he executed his will.

10. WILLS—VALIDITY—FINDING OF JURY.—When the evidence is conflicting as to deceased's capacity to make a will, the verdict of a jury, upholding the will, will not be disturbed on appeal, when there is any substantial evidence to support it.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; affirmed.

Bradshaw, Rhoton & Helm, for appellants; *Gardner K. Oliphant*, of counsel.

1. The case should have been dismissed on appellants' motion upon the testimony of appellee. A will that is made in such form and manner as to require the statutory attesting witnesses, is not valid unless at the time the testator subscribed it or acknowledged it that he uncon-

ditionally, unqualifiedly and without any express mental reservation declared to and in the presence of such witnesses and in the presence of each other that it was his last will and that he did so at a time when he possessed testamentary capacity. 13 Ark. 474; *McDaniel* v. *Crosby,* 19 *Id.* 553. A holographic will must be established by the unimpeachable evidence of at least three disinterested witnesses. Kirby's Dig., § 8012; 80 Ark. 204; 12 Mich. 495.

2. The court erred in refusing to permit the witness Ben Mason to testify as to undue influence. 29 Ark. 151; 14 Enc. of Ev., p. 281; 12 Mich. 490; 10 Ark. 446. The statements made by deceased were competent and relevant. 74 Ark. 212; 5 *Id.* 70; 29 *Id.* 151; 25 *Id.* 384; Greenl. Ev., § 510; 42 Ark. 544; 87 Ark. 243.

3. It was error also to refuse to permit witness J. S. Hoffman to testify as to declarations made by deceased, prior to the execution of the will as to how he intended to dispose of his property. 29 Ark. 154; 74 *Id.* 216; 60 *Id.* 301; 180 U. S. 552, 571 and note; 1 Redfield on Wills, 557, 559; Schouler on Wills, § § 242-3; Gardner on Wills, 137; 28 N. J. L. 282. It was certainly competent to show the mental capacity of the testator. 106 Ark. 213; 13 S. W. 1098; 35 L. R. A. 102, 21 So. 41; Hughes on Ev., § 10, p. 128; 14 Enc. of Ev. 281; 115 Tenn. 73, 5 A. & E. Ann. Cas. 601; 3 L. R. A. (N. S.) 749 and note; 74 Ark. 212; 119 Ala. 641, 6 So. 459; 14 Ga. 286; 62 Minn. 482; 35 Col. 578; 6 L. R. A. (N. S.) 575; 35 N. W. 726; 157 Mass. 180; Wigmore's Select Cases on Ev., p. 677.

3. There was error in the instructions. 57 Ark. 512; 62 *Id.* 286, 312; 29 *Id.* 152; 77 *Id.* 261; 87 *Id.* 275; 119 Ala. 641; 107 Pac. 598; 77 Ark. 129; *Ib.* 201, 437; 57 *Id.* 203. The nonproduction of evidence within the power of a party, is a strong presumption that, if produced it would be against him. 1 Greenl., Ev., § 37; 32 Ark. 346, 337. The verdict is contrary to the evidence.

Botts & O'Daniel and *H. C. Locklar,* for appellee.

1. The will was properly admitted to probate as a statutory will. Kirby's Dig., § 8012; 13 Ark. 474, 487; 19 *Id.* 553; 31 *Id.* 180; 80 Ark. 204; 93 *Id.* 76.

2. The testator was shown to be capacitated to make the will. 87 Ark. 243.

3. The undue influence required to avoid a will must be directly connected with its execution. 49 Ark. 371; 19 *Id.* 552; 15 *Id.* 602. There is no evidence of undue influence. The burden was on the contestants. 94 Ark. 476; 103 *Id.* 203; 93 *Id.* 66; 87 *Id.* 148. The questions of testamentary capacity and of undue influence were of fact and were correctly submitted to the jury on proper instructions and there was abundant evidence to support the verdict. 107 Ark. 158; 103 *Id.* 263; 97 *Id.* 91.

4. The testimony of Ben and Mrs. Mason and Hoffman were properly excluded. 89 Ark. 483; 100 *Id.* 76; 96 *Id.* 78; 87 *Id.* 243. It was all incompetent. 60 Am. Dec. 323; 112 Ark. 507; 112 *Id.* 507.

5. The instructions, taken as a whole are correct. 49 Ark. 372; 87 *Id.* 243, 275.

HART, J. This was a contest over the will of L. W. Mason. The will was contested by the heirs of the testator on the ground of mental incapacity on the part of the testator and that the execution of the will was procured by undue influence on the part of the contestee. The probate court refused to admit the will to probate and the contestee appealed to the circuit court. There the issues were submitted to a jury and a verdict returned in favor of contestee. Thereupon the court rendered judgment establishing the will and ordering it admitted to probate. The contestants have duly prosecuted an appeal to this court.

L. W. Mason resided in Pulaski County, Arkansas, all his life and was nearly sixty years of age at the time of his death. He died of consumption and had been ill for many years suffering with that disease and with kidney trouble. He came to Little Rock in November, 1911, to reside with J. B. R. Bowen, the contestee, and lived with him until the time of his death on June 8, 1913.

(1) The will in question was executed on October 30, 1912. At the time of the execution of the will Mason owned property to the amount of $6,000 or $7,000, most of which he had inherited from his father. By the terms

of the will most of this property went to the contestee. After the will was executed the testator gave to his relatives certain specified amounts of money. For about three years prior to the time he came to Little Rock the testator resided with the widow of a deceased brother and she says she did not charge him any board. It was claimed by the contestee that the body of the will and the signature thereto were in the handwriting of the testator. The will was also attested by two witnesses as required by the statute. At the request of counsel for the contestants the court instructed the jury that to be valid as a holographic will both the entire body of the will and the signature thereto must be in the handwriting of the testator and that this must be established by unimpeachable evidence of at least three disinterested witnesses. See *Arendt* v. *Arendt,* 80 Ark. 204.

One of the attesting witnesses to the will testified that he had known L. W. Mason nearly all his life and was familiar with his handwriting and that the body of the will and the signature thereto were in the handwriting of L. W. Mason.

Two other witnesses testified that they had known L. W. Mason for a long time and were familiar with his handwriting. They said that they thought the body of the will and the signature thereto were in the handwriting of L. W. Mason.

Another witness testified that he was familiar with the handwriting of L. W. Mason and that the only reason he could not say that it was L. W. Mason's handwriting was because he did not see him write it.

(2) All these witnesses were disinterested persons and there is nothing in their evidence or in the entire record reflecting on their character or in any way tending to impeach their testimony. Therefore the jury was warranted in finding in favor of contestee on the question of a holographic will.

The court at the request of counsel for the contestants also instructed the jury on the question of attesting a will in the manner required by the statute. As we have already stated, one of the witnesses who attested the will

testified that the entire body of the will and the signature thereto were in the handwriting of L. W. Mason. He further stated that he came to the house where Mason lived on the day the will was executed at the request of Mason for the purpose of attesting his will; that the other attesting witness and a justice of the peace went with him; that Mason first acknowledged the will before the justice of the peace and had the justice sign the acknowledgment and that he and the other attesting witness signed their names at the end of the will at the request of the testator; that before they signed it the testator had signed the will in their presence and told them that this was his fourth will and hoped it would be his last one.

The other attesting witness said that he went there for the purpose of attesting the will of the testator and did attest it. He stated that the word "will" was never mentioned while he was there but that he was called there by the testator for the purpose of witnessing his signature to a will. He answered questions propounded to him in an evasive manner and said that the justice of the peace was there too and wrote out the acknowledgment of the testator to the will and signed that and that the justice of the peace then asked the testator if this was his last one and that the testator replied that he did not know whether or not it was; that it might be and that it might not. The witness said that he supposed it was the will of the testator but that the testator never in fact called it by that name.

(3) We think the evidence clearly shows that the testator, the justice of the peace and the two attesting witnesses were all present at the time the will was signed by each of them; that the said testator sent for these persons to witness his will and that they attested it in the manner required by the statute; at least, we think the jury was warranted in finding these to be the facts. See *Payne* v. *Payne*, 54 Ark. 415.

(4) Counsel for contestants offered to prove by Ben Mason, a brother of L. W. Mason, that L. W. Mason, before he went to board with J. B. R. Bowen, stated that Bowen was indebted to him and that the only reason he

was going to board and live with Bowen was for the purpose of collecting his debt. The court refused the admission of this testimony before the jury and counsel for the contestants assigns this as error. They say the testimony should have been admitted upon the question of undue influence.

It seems to be well settled, both by text writers and the decisions of courts of the various states, that the statements and declarations of a testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, but are admissible to show the mental condition of the testator at the time of making the will. When the condition of the testator's mind is the point of contention, statements or declarations of the testator are received as external manifestations of his mental condition and not as evidence of the truth of the things he states. If offered to prove an external fact, such as undue influence or fraud, such statements or declarations are merely hearsay and are liable to all the objections to which mere declarations of third parties are subject.

In a valuable and well considered case in which the authorities are thoroughly reviewed, the Supreme Court of Tennessee held that in a will contest declarations made by the testator prior to the execution of the will are admissible in evidence for the purpose of showing the mental capacity of the testator but are not admissible for the purpose of establishing the substantive fact of undue influence. *Hobson* v. *Moorman,* 115 Tenn. 73, 5 Am. & Eng. Ann. Cas. 601. Many cases are cited in the note to support the reported case.

The same case is also reported in 3 L. R. A. (N. S.) 749 and an extensive case note also appears there.

(5) In addition to this the justice of the peace, who was also present when the will in question was executed, testified that at one time in a conversation with the testator the latter told him that Bowen was indebted to him and that he had gone there for the purpose of collecting his debt. This statement of the justice of the peace was not attempted to be contradicted by counsel for the con-

testee and it is well settled in this State that it is not prejudicial error to refuse to allow cumulative evidence of an undisputed fact.

(6-7) Counsel for contestants also offered to prove by J. L. Hoffman that L. W. Mason had told him that he intended at his death that all his property should go to his relatives, that whatever he had, he had obtained by inheritance from his father and that at his death he desired and intended that what he had left should go to his relatives. The court refused to admit this testimony to go before the jury and its action is assigned as error.

In the case of *Flowers* v. *Flowers*, 74 Ark. 212, the court said that the authorities are uniform in holding that the declarations of a testator made before the execution of a will are admissible to show his mental capacity when that issue is raised. See, also authorities *supra*.

In *Coghill* v. *Kennedy*, 119 Ala. 641, 24 So. 459, the court said on this subject, through Bricknell, C. J.:

"Inasmuch as the mental condition of a person can be determined only by his acts and declarations, these are admissible, whether made a reasonable time before or after the execution of the will, to establish everything pertaining to the testator himself—his memory, intentions, idiosyncracies, prejudices, affections, relations with, and feelings towards, the beneficiaries and all those who, if he had died intestate, would have been entitled to share in the distribution of his estate, and towards those charged with the exercise of undue influence."

Tested by this rule, we do not think the court erred in refusing the testimony. Hoffman stated that he had the conversation in question with Mason about two years before Mason went to live with contestee and that he thought the testator lived with the contestee about two years before his death.

Mrs. Mason, a sister-in-law of the testator testified that the testator lived with her for three years prior to going to the home of the contestee; that he left her house just after Thanksgiving, in November, 1911, and went to the home of contestee; that he lived there until his death which occurred June 8, 1913.

(8) Declarations of a testator made prior to the execution of a will would necessarily be entitled to probative force according to the nearness or remoteness of the time at which they were made. As the time became more remote they would necessarily lose much of their probative force and there would be a period of time at which such statements would be entitled to no probative force whatever. Such, we think, was the case here. The declarations were made at a period of time before the declarant went to live with Bowen and amounted to no more than a declaration that at that time he intended his property to go to his relatives at his death. The declaration was made three and one-half years before the testator's death. The period of time to be covered by the declarations of the testator must necessarily be left to a great extent to the sound discretion of the trial court under all the circumstances of each particular case. The reason for this is that the declarations lose value as the time at which they were made grows remote, and when too remote, such declarations lose their probative force, and are entitled to no value whatever as proof of the mental capacity of the testator. Schouler on Wills, Executors and Administrators, 15th Ed., vol. 1, section 193.

It is contended that this ruling is contrary to the ruling announced in *Tobin* v. *Jenkins*, 29 Ark. 151, but we do not think so. In that case a will which was made in 1868 was contested on the ground of the mental incapacity of the testator. The court admitted in evidence a former will executed in 1862 which was executed at a time when there was no question as to the capacity of the testator to make a will. The first will, with regard to the disposition of the testator's property to his son to the exclusion of the children of his daughter, was essentially the same as the contested will. Under the circumstances the court held that it was competent evidence to be considered in connection with the other evidence to show whether the testator's mind was rational at the time the will of 1868 was executed.

(9) As we have already seen, while the will under consideration in the present case made a disposition of the

testator's property entirely different from the disposition he had intended to make of it, his declarations on the subject were at a period of time before he went to live with the contestee and the period of time was so remote that we do not think his declarations are entitled to any probative force whatever as tending to show whether or not he was mentally competent at the time he executed the will in question.

In the case of *McCulloch* v. *Campbell,* 49 Ark. 371, upon the question of undue influence requisite to avoid a will, the court said:

"As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties."

What was there said by the court has been uniformly and repeatedly followed since that decision. In the case of *Taylor* v. *McClintock,* 87 Ark. 243, the court, in discussing the question of testamentary capacity said:

"The test of testamentary capacity as declared by this court is that the testator shall have capacity to retain in memory without prompting, the extent and condition of his property, and comprehend to whom he was giving it; and to be capable of appreciating the deserts and relation to him of others whom he excluded from participation in the estate."

Objections are made to certain instructions given by the court. We do not deem it necessary however to set these instructions out or discuss them in detail. It is sufficient to say that the court gave full and complete instructions on the questions of undue influence and testamentary capacity in accordance with the rules of law laid down in the opinions just cited.

(10) Finally, it is contended by counsel for the contestants that the verdict of the jury was not warranted by the evidence. It is true the justice of the peace who was present at the time the will was executed and who took the testator's acknowledgment thereto, said that the testator at that time was not mentally capable of transacting business of any kind; and that his testimony is corroborated by other witnesses for the contestants. It appears from their testimony that the testator had been an invalid for most of his life, suffering with kidney trouble and later with consumption. In order to alleviate his pain his physician prescribed morphine for him and during the last years of his life he became addicted to the use of that drug. It appears from the testimony of the contestants that his mind had become so weakened by his ill health and his constant use of morphine that he was not capable of making his will at the time it was executed. But we can not balance the evidence and determine where the preponderance lies, for it is a well settled rule of law in this State that the verdict of the jury must be upheld on appeal if there is any substantial evidence to support it.

In the case before us one of the attesting witnesses to the will said that he had known the testator nearly all of his life and that his mind was perfectly clear at the time he executed the will and that he knew what he was doing. A physician who attended him in the fall that he executed the will testified that his mind was clear at that time and that he was mentally capable of executing the will. Another physician who attended him in the spring and at a period of time about a month before he died, stated that although addicted to the use of morphine the testator's mind was clear and that he was capable of attending to business of any kind. Other witnesses testified that although the testator's body was weakened by disease, his mind remained clear up until the time he died and some of them regarded him as a man of unusual business ability.

On the subject of undue influence, but little need be said. There is little, if anything, to show undue influence

except the fact that the testator made a will in favor of the man with whom he lived during the last year and a half of his life. There was abundant testimony to warrant the jury in finding that the will was not procured by undue influence exercised on the testator and there was sufficient evidence to uphold the verdict of the jury on the question of the testamentary capacity of the testator.

It follows that the judgment will be affirmed.

RURAL SPECIAL SCHOOL DISTRICT NO. 6 *v.* BLAYLOCK.

Opinion delivered February 14, 1916.

1. SCHOOL DISTRICTS—SPECIAL ELECTION—SUFFICIENCY OF NOTICE.—The notice for an election to organize a rural special school district, must be given by the county judge, and is not within the control of the election officers or voters, and any irregularity in the giving of it, should not render the election void, unless the statute expressly makes it so.
2. SCHOOL DISTRICTS—SPECIAL RURAL SCHOOL DISTRICT—SUFFICIENCY OF NOTICE—ELECTION.—The notice for an election to organize a special rural school district, which omitted the month, and name of the county judge ordering the same, *held*, not to be insufficient, when a general school election was held at the same time, and all but three of the electors present voted in the special election.

Appeal from Yell Circuit Court, Danville District; *M. L. Davis*, Judge; reversed.

STATEMENT BY THE COURT.

This appeal comes from a judgment of the circuit court declaring invalid Rural Special School District No. 6 of Yell County. Twenty-two electors residing within the territory sought to be created into a rural special school district filed a petition therefor with the county judge, praying for an order calling an election to ascertain whether it should be so established, accompanied by a map showing the territory proposed to be included. The county court granted the petition and ordered an election to be held on the 16th of May, 1914, at Waveland, the school house in the common school district and in the

affected territory. Five notices were posted as required by law. The special school election was held on the 16th day of May pursuant to the order. The returns were certified up and the county court found that the election had been duly held; that twenty-seven votes were cast for the rural school district and one against, and that three electors attended this special school election who did not vote for or against the establishment of the school district, making in all thirty-one electors present at the election, and declared the district duly established. Common School Districts Nos. 75 and 85 of Yell County filed remonstrances with the county court, asking that the order creating the school district be set aside, which remonstrances were denied and from which order the remonstrants appealed to the circuit court where the case was tried upon an agreed statement of facts and the district adjudged to be invalid on account of the failure to give notice of the election as required by law. Copies of the notice recite that the election was ordered on the 8th of May. The court order fixed the date for the election on May 16, 1914, but the notice leaves out the month, May, and recites: "on the 16th day 1914," and further:

"Given under my hand as such County Judge this 8th day of May, 1914.

. . . . . .

County Judge Yell County, Arkansas."

but did not contain the name of the judge on the blank for signature. The 16th day of May was the date for the regular annual school election in the district and it was held on one side of the school room, while the election for the establishment of the territory into a rural special school district was held on the other side of the room. Twenty-seven of the electors present voted for the establishment of the district, one voted against it and three did not vote at all. The territory embraced in the proposed special school district included a portion of each of common school districts Nos. 75 and 85, upon which no electors or pupils lived, and the agreed statement of facts shows that there were ninety-three qualified

electors in common school district No. 6, all of which was included in the special school district at the time the election was held.

Priddy & Chambers, for appellant.

1. The notice was not void. The particular form and manner pointed out by the statute is not essential. Actual notice is all that is required. 50 Ark. 277; 92 *Id.* 70; 74 Ill. 277; 18 A. & E. Ann. Cas. 1138.

The appellee, *pro sese.*

1. The notice required by law was not given and there was a variance between the petition and the plat filed. This is fatal. Kirby's Dig., § 7669; Castle's Dig., § § 7695a and 7695b; 1 Words & Phr. 1204, (2 ed.); 112 Pac. 482; 33 Ark. 716; 43 *Id.* 425; 100 *Id.* 494; 17 How. Pr. 192; 77 S. W. 678; 87 *Id.* 580; 50 Ark. 256.

KIRBY, J., (after stating the facts). It is insisted that the court erred in holding the notice given of the time and place of holding the election for determining whether the territory proposed should be established into a special school district or not, insufficient.

The law requires that the county judge shall fix a day, not less than seven nor more than fifteen days distant from the date of the presentation of the petition, for holding an election, and cause notice thereof to be given by posting notices in at least five public places within the territory to be affected. Each elector within the territory proposed to be included in the district had the right to vote upon the question in the election, and the purpose of requiring notice is to give such information of the time and place of election as will enable the voters to exercise such right and express their choice upon the question.

(1) The time fixed by the court's order was the 16th day of May, the date of the general school election, and the place, the school house in the district where the electors congregated upon that day. All who attended to vote at the annual school election knew certainly, of the special election for the establishment of the rural school district, and twenty-eight of the thirty-one electors present participated therein. The election was necessarily a

special one, of the holding of which the voters would not be expected to know, and, therefore, the notice is required.

In *Wheat* v. *Smith,* 50 Ark. 277, the court, speaking of a special election ordered to fill a vacancy in office, stated:

"There is no presumption that the voters know the date fixed by the writ of election, and they must be informed of it, but the established rule is that the particular form and manner pointed out by the statute for giving notice is not essential. Actual notice to the great body of electors is sufficient. The question in such cases is, whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise, to change the result of the election."

And further: "The voice of the people is not to be rejected for a defect or want of notice if they have, in truth, been called upon and have spoken."

The matter of giving the notice was not within the control of the election officers nor the voters, being required to be done by the county judge, and an irregularity in the giving of it should not render the election void unless the statute expressly makes it so which is not done in this instance. *Hogins* v. *Bullock,* 92 Ark. 70.

(2) The notice purported to be given by the authority of the county judge notwithstanding there was no name signed to it. The statute does not expressly provide the form of notice to be given, and the failure to insert the month "May" could not have been misleading since it did recite that the election was ordered on May 8 and the law provides that it must be held not less than seven nor more than fifteen days from the presentation of the petition. Any elector not being certain of the time fixed from reading the notice, could easily have ascertained the correct date from the court's order and it appears that all who attended the general school election on the day fixed by law for the purpose, participated in the election on this question, but three, who knew of it and refused to vote, and it can not be said that the voters of the dis-

trict did not have sufficient notice to make the election valid.

The law providing for the establishing of rural special school districts requires only that a majority of those voting at the election therefor shall vote in favor of the proposition, and the testimony here shows that of all present one only voted against it, and three not voting would have been, at most, but four of all the electors against it, there being but thirty-one present. Act 321 of Acts 1909, section 7670, Kirby's Digest.

It is true the opinions in *Common School District* v. *Oak Grove Special School District,* 102 Ark. 416, and *Bonner* v. *Snipes,* 103 Ark. 304, contain the statement that "The district is established under the law if a majority of the qualified electors within the territory named in the petition before the county judge, shall vote for the establishment of such district," which was evidently inadvertently made, the court intending only to say the district is established when a majority of the ballots cast at the election are in favor thereof. The question was not raised nor a determination of it requisite to a decision in either of said cases.

The judgment of the circuit court reversing the judgment of the county court upholding the validity of the district is reversed and the cause remanded with directions to enter a judgment declaring same established and dismissing the petitions of appellees.

HOWARD v. STATE.

Opinion delivered February 21, 1916.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE—MANSLAUGHTER.—In a prosecution for homicide, the evidence held sufficient to warrant a verdict of manslaughter.
2. HOMICIDE—ASSAULT—PROVOCATION—WORDS.—Mere words, however abusive and insulting, do not justify an assault, but when sufficiently aggravating to invite combat with the person to whom they are addressed, and when a difficulty is thus brought on, the one who first invites it, must endeavor to retire and decline to further contest, if he can do so with safety, before he is justified, on the ground of self-defense, in slaying his adversary.

3. HOMICIDE — BEHAVIOR OF DEFENDANT — SELF-DEFENSE.— Defendants, father and son, were engaged in an altercation with deceased, threats having passed between the parties; the father, in the midst of the argument, left the scene, returning shortly armed with a stick and in a threatening attitude. *Held*, this conduct amounted to an invitation to further combat, and would preclude the defendants from pleading self-defense.

4. CRIMINAL LAW—ERRONEOUS INSTRUCTION AS TO EXTENT OF PUNISHMENT—HARMLESS ERROR.—In a criminal prosecution, the giving of an erroneous instruction fixing the extent of punishment, will be held harmless, when the jury disregarded it, and fixed the punishment at less than the amount named in the instruction.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; affirmed.

Paul G. Matlock and *T. D. Crawford*, for appellant.

1. There was error in giving the State's instructions Nos. 10, 11, 13 and 20. They were not applicable to the facts and calculated to mislead the jury. 36 Ark. 127.

2. There is also error in Nos. 17 and 18. It is not true, as a matter of law that one who fights and returns and fights, is guilty of a felony; that depends upon circumstances and does not preclude the plea of self-defense.

3. The 19th and 22d are also error. The former is abstract and the latter cuts off a finding by the jury of involuntary manslaughter. 21 A. & E. Enc. L. 190; 22 Ark. 539.

4. The verdict is not supported by the evidence. Brashears was the aggressor; Howard never was. He was constantly endeavoring to elude Brashear's pursuit.

Wallace Davis, Attorney General, *Hamilton Moses*, Assistant, for appellee.

1. 36 Ark. 127 cited for appellants sheds no light on this case. Here there could be no prejudicial error in instructions relating to any higher degree of homicide than manslaughter, the crime of which appellants were convicted. 60 Ark. 76; 76 *Id.* 84; 73 *Id.* 280; 99 *Id.* 591; 54 *Id.* 4; 58 *Id.* 513; 102 *Id.* 199.

2. Instruction No. 19 is not error. The assault by Brashears had ceased. This instruction was approved in 83 Ark. 81.

3. Involuntary manslaughter can not be here pleaded. There can be no involuntary manslaughter where there is an intent to kill. Where there is no evidence of a lower degree of homicide the court should refuse to instruct in reference to involuntary manslaughter. 74 Ark. 265; 80 *Id.* 226; 95 *Id.* 100; 102 *Id.* 266; 88 *Id.* 447. Furthermore no such instruction was asked by defendants and they can not complain. 114 Ark. 399; 74 *Id.* 265; 95 *Id.* 409; 102 *Id.* 186; 109 *Id.* 510; 109 *Id.* 523; 74 *Id.* 444.

4. The evidence is legally sufficient to sustain the verdict. 104 Ark. 142; 101 *Id.* 570; 109 *Id.* 130; *Ib.* 138.

McCULLOCH, C. J. This is an appeal from a judgment of conviction of the defendants, W. A. Howard and Lucien Howard, of the crime of voluntary manslaughter, committed by striking with sticks and killing one John Brashears. One of the contentions is that the testimony is not sufficient to sustain the verdict, and it becomes necessary, therefore, to notice briefly the testimony, as presented in the light most favorable to the contention of the State.

The two defendants are father and son, W. A. Howard, the elder, being about fifty-four years old, and his son, Lucien, a grown man. They lived in the town of Leola, Grant County, Arkansas, where the killing occurred, as did deceased, John Brashears. Leslie Howard, another son of the defendant W. A. Howard, had rented a house and garden from one Carver, deceased's brother-in-law, and had recently vacated the premises, but Carver had permitted him to retain possession of the garden, or at least to gather from time to time the vegetables then growing in the garden. Deceased occupied the adjoining premises and permitted his calf to get into the garden. On the day of the killing, Carver and his wife spent the day with deceased, and the elder Howard came over to see about the calf being in the garden. While deceased and Carver and their families were at dinner, the two defendants came to the house of deceased and called Carver out into the yard. W. A. Howard asked about the calf in the garden, and, upon being told that it was deceased's

said: "You tell Brashears to take that calf out of there or there'll be trouble." He asked further about what authority Brashears had for putting the calf in the garden. The defendants left and went back to the house of Lucien, and after dinner deceased and Carver started out to the garden to see what damage was being done by the calf, and soon afterwards they observed the elder Howard going in at the garden gate, and they (deceased and Carver) turned and went over in that direction. As they went into the gate, deceased picked up a stick four or five feet long, and an inch and a quarter by one inch in size, and, as he walked up towards the elder Howard, said, "Here, old man, you're too fast; that's my calf." Howard replied: "Yes, and this is Leslie's garden." Carver interposed and said "No; the garden isn't Leslie's, but the vegetables are." Deceased then said to Howard, "Quit chunking my calf." Some words then passed between them, "cuss words," as stated by witness Carver, and deceased said to Howard: "I'll beat the devil out of you if you don't quit chunking my calf." And Howard replied, "You damned son-of-a-bitch, I'm not afraid of you." Deceased then struck Howard over the head with a stick, and the latter ran and climbed over the fence and called out to his son Lucien to help him, that Brashears was killing him. As Howard ran away, the deceased went over towards the garden gate and passed out of it, and the two met near the gate, when Howard picked up a short piece of plank and threw it at deceased, striking him on the head and knocking his hat off. After throwing at deceased, the elder Howard ran off a short distance, about nintey-four feet the witness states, and then defendant Lucien Howard appeared on the scene. He stepped out in front of deceased, who was advancing in the direction of the elder Howard, and both the men had drawn sticks in their hands—deceased still having the stick with which he had struck the elder Howard while they were in the garden. They stood facing each other for a short time, each urging the other to put down the stick. Howard said "Put down your stick, and don't hurt Pap, and I won't hurt you and won't let Pap hurt you." And de-

deceased replied: "You put down your stick first and I will put down mine." They repeated this, or words to that effect, several times. While this was going on, the elder Howard ran a distance of about forty feet, where he secured another stick, and came back to the place where his son and deceased were facing each other with drawn sticks. The testimony of the witnesses for the State shows that Brashears then began to give ground, and that the two Howards followed him up a distance of more than twenty feet, with drawn sticks, and both struck him over the head and knocked him down. This ended the fight and deceased was carried home in a wheelbarrow and sent to the hospital where he died a day or two later. It was found on examination that his skull was fractured, and there is no doubt that his death resulted from the blows inflicted by one or both of the defendants. The defendants deny that deceased retreated after W. A. Howard came back to the place where deceased and Lucien were facing each other. They testified that deceased had his stick drawn at that time, and that, as the elder Howard came up, he advanced upon him a few feet with the stick and was in the act of striking him, when they both struck him with their sticks.

(1) The evidence is sufficient to establish all the elements of the crime of manslaughter. It shows that the two defendants attacked the deceased with sticks and struck him over the head, thus inflicting blows that produced death. Defendants were not acting in self-defense and were not justifiable on that ground. We are of the opinion, therefore, that the evidence was sufficient to sustain the verdict.

(2) The giving of the following instruction, over the objection of the defendants, is assigned as error: "11. You are instructed that if you believe from the evidence in this case beyond a reasonable doubt that the defendants brought on the difficulty that before they or either of them would be justifiable in striking a fatal blow, that they must show that they in good faith endeavored to decline any further contest before striking the mortal blow."

The basis of the objection to the instruction is that there is no evidence that either of the defendants brought on the difficulty, and that for that reason it was erroneous and prejudicial to submit that question to the jury. There is, we think, evidence sufficient to justify the submission of that issue. It is true that according to the undisputed testimony deceased struck the first blow, but it was provoked by the insulting epithet which the elder Howard used towards deceased in addressing him. Mere words, however abusive and insulting, do not justify an assault, but they may be sufficiently aggravating to invite a combat with the person to whom they are addressed, and when a difficulty is thus brought on, the one who first invites it must endeavor to retire and decline to further contest, if he can do so with safety, before he is justified, on the ground of self-defense, in slaying his adversary. Any other view of the law would permit a person to provoke a difficulty by the use of insulting words, and, when assaulted in consequence of his own wrongful conduct, to slay his adversary with impunity. This is not the law. So it is evident that the instruction was not wholly without evidence to support it.

(3) Besides, the testimony of the defendants themselves shows that they were not justified in striking the deceased. The elder Howard stated in his testimony that he ran on a distance of thirty or forty feet, after his son had intercepted deceased, and after picking up a stick he returned to the place where his son and deceased were standing, or near thereto. He states, it is true, that he did not strike until deceased made another effort to strike him, and that he did not advance on the deceased; but he does state that he armed himself with a stick and returned to the place where the combat was renewed and put himself in a position to meet the attack of the deceased. Now, Lucien Howard states in his testimony that with a stick in his hand he intercepted the deceased and begged him to refrain from striking his father, but he says that his father ran on a short distance further and he did not look back to see what his father was doing, but

knew from the expression on the face of the deceased, and the latter's movements, that his father was returning to the scene. He states that he did not strike the blow until deceased tried to pass him and strike his father. It is evident, however, from the testimony of both of the defendants, that the cause of the fresh encounter was the unnecessary and voluntary return of the elder Howard to the scene. They both knew that deceased was making no effort to strike Lucien Howard, and that there was no probability of the difficulty being renewed unless the elder Howard returned to the scene; and when the latter returned in a threatening attitude, it amounted to an invitation to further combat and precluded the defendants from claiming self-defense.

There were other instructions along the same line, to which the defendants objected, but to those objections the same answer may be made as above.

There is another instruction objected to, which erroneously fixed the extent of the punishment, but as the jury disregarded it and fixed the punishment at less than the amount named in the instruction, it can not be said that there was any prejudice.

(4) We do not find any prejudicial error in the record. The killing was a very deplorable affair and resulted from a very trivial incident. The men were neighbors, and grew angry at each other about the calf of deceased running in the garden. Doubtless neither of them expected anything more to result from the combat than mere bruises or slight wounds. But death has in fact resulted, and under circumstances which show that the two defendants were not justified, and which warrant a finding of guilt of the crime of manslaughter.

Judgment affirmed.

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

Opinion delivered February 21, 1916.

1. CARRIERS—INJURY TO PASSENGER—THREAT OF ARREST—JUMPING FROM MOVING TRAIN.—The operatives on defendant's train threatened to arrest plaintiff for an alleged violation of the law, when the train reached a certain city, the defendant will not be liable for injuries received by plaintiff, where he jumped from the same while the same was going so fast that an ordinarily prudent person would not attempt to alight therefrom.
2. CARRIERS—ALIGHTING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.—Unless the danger of alighting from a moving train is obvious, a passenger will be justified in relying upon the direction of those in charge of the train to alight, to the extent that he will not be guilty of contributory negligence as a matter of law.
3. CARRIERS—THREAT—ALIGHTING FROM MOVING TRAIN.—Some force or threat of bodily harm, or effort to eject a passenger must have been used before a passenger is justified in attempting to alight from a rapidly moving train.
4. CARRIERS—INJURY TO PASSENGER LEAVING A MOVING TRAIN—THREAT OF ARREST.—A mere threat by train officials, not accompanied by force, or by a threat of immediate bodily harm, to have plaintiff, a passenger, arrested upon reaching a certain city, will not justify plaintiff in jumping from a rapidly moving train.
5. CARRIERS—INJURY TO PASSENGER—LEAVING MOVING TRAIN—THREATS OF OFFICIALS OF DEFENDANT.—In order to justify a passenger in attempting to leave a rapidly moving train, on account of threats made by officials of defendant railway, there must be some show of force, threat of bodily harm, threat to eject him, or some overbearing intimidation.

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

STATEMENT BY THE COURT.

Thomas Duffey sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages sustained by him while a passenger on one of defendant's passenger trains, alleging that his injuries were caused by the negligence of the defendant and its servants. The plaintiff was a witness for himself and testified substantially as follows:

I am thirty-one years of age and have lived in Hempstead County, about thirteen miles from the town of Ful-

ton, all of my life. On the morning I was injured, Wade Cheatham and I came to Fulton and boarded the fast mail train of the defendant for the purpose of going to Texarkana. The train did not stop between Fulton and Texarkana. We were going to Texarkana to look for some cattle which had been stolen from me. I had a pistol in my pocket and had been told by the constable of my township that I had a right to carry it under the circumstances. Wade Cheatham had a bottle of whiskey in his pocket. When we got on the train we went into the toilet. Wade Cheatham then put his bottle of whiskey down on the floor but we had not drunk any of it after getting on the train. The auditor came into the toilet and demanded our tickets. He saw the bottle of whiskey and demanded that also. Wade Cheatham gave him the bottle of whiskey and he started out with it and threatened to have us arrested if we did not get off the train. He asked us if we did not know that it was a violation of the law to drink whiskey on the train. We told him that we had not been drinking it and he replied that it did not make any difference and that he would have us arrested in Texarkana, if we did not get off the train. Later on the auditor came into the coach where we were sitting. He had a pistol. The conductor and train porter were also there. They passed the pistol around among themselves and looked at us in a significant manner. Both Wade Cheatham and I went to different ones of the trainmen and told them our business at Texarkana, and tried to persuade them not to have us arrested. They insisted, however, that they would have us arrested if we did not get off the train before it arrived at Texarkana. They said they would slow the train down so we could get off. Finally the train porter came and notified us that the train had slowed down and that it was time for us to get off. The train was just getting into Texarkana. I was frightened and followed the porter out of the coach and got down on the steps of the car. The vestibule door had been opened before I got out there. I stood a few minutes on the second step and looked out. The train was running too fast for me to get off. I thought I would go back into

the car but the man who took up our tickets came out there and placed his foot in my way. I was afraid to pass him and stood there on the step. I looked out to see a street car which was approaching and that is the last thing I remember. I believe I was knocked or pushed off the car. I did not recover my senses until about a week afterwards.

The plaintiff was severely injured and described the character and extent of his injuries. His testimony, in all essential respects, was corroborated by that of Wade Cheatham.

The train auditor admitted that he took the whiskey away from the negroes and threatened to have them arrested when the train arrived at Texarkana. He gave the bottle of whiskey to the conductor and he threw it out of the train.

The conductor and auditor were both old employees of the railroad company and denied that they had any altercation whatever with the plaintiff. They denied that they exhibited a pistol in his presence or that they even had a pistol. They said that they did not in any way intimidate him or try to force him to leave the train, and that they did not know that he was injured until after the train had arrived at Texarkana and they had left the station. They said they opened the vestibule doors as they approached Texarkana in accordance with their custom in order to enable passengers to alight as soon as the train stopped.

The train porter corroborated the testimony of the conductor and auditor. He denied that he told the plaintiff to leave the train and denied that he had any knowledge that he had done so until after he was injured.

Other witnesses who lived along the right-of-way in Texarkana testified for the railroad company and said that they saw the plaintiff standing on the lower step of the coach as if he were preparing to jump off the train. They testified that the vestibule doors were open on both sides and that they could not see anyone else on the step or near it.

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

E. B. Kinsworthy and *R. E. Wiley,* for appellant.

1. It was error to refuse defendant's requests for instructions Nos. 11, 12 and 13. A mere threat to have a passenger arrested for alleged misdemeanor would not justify a passenger in exposing himself to obvious danger. The threat is not the proximate cause. 80 S. W. 121; 8 Am. St. 497; 57 Mo. App. 147; 14 L. R. A. 613; 30 S. W. 170; 55 Ark. 248; 57 Am. Rep. 114. It was negligence *per se* to alight from a train running from twelve to eighteen miles per hour. 58 Ark. 397; 45 *Id.* 256; 11 S. W. 212; 99 *Id.* 248; 83 Fed. 58; 37 L. R. A. (N. S.) 43 and note. There must be well grounded or reasonable apprehension of immediate impending danger. 55 Ark. 248-255; 14 L. R. A. 613; 37 L. R. A. (N. S.) 758, note; 80 S. W. 121; 67 Ark. 209; 1 Stark (Ky.) 493; 13 Pet. 181; 1 S. W. 493.

Plaintiff's instruction No. 1 was error. 80 S. W. 121, 123. There was no evidence of violence on part of the auditor.

3. No negligence was shown on part of defendant. 11 S. W. 212. Plaintiff was guilty of the only negligence. 20 L. R. A. (N .S.) 1123; 30 S. W. 170; 1 S. W. 493; 100 Pac. 641; 62 Am. Dec. 325. A verdict should have been directed for defendant.

4. There was reversible error in the argument of counsel. 87 Mo. 74; 71 Ark. 427; 65 *Id.* 619-626; 70 *Id.* 305.

J. M. Carter, for appellee.

1. There was nothing appellant was entitled to have said to the jury in the requests asked that was not given in the instructions for appellee, or in other instructions for appellant.

2. There is no error in instruction 1 for appellee and the testimony fully supports the verdict. 118 Ark. 39.

3. No prejudice resulted from the remarks of counsel. But if the remark was prejudicial it was invited

error. Besides the emphatic rebuke by the court and the withdrawal of the statement cured any prejudice.

HART, J., (after stating the facts). (1) Counsel for the defendant assigns as error the action of the court in refusing to give instruction No. 13. The instruction is as follows:

"If you believe plaintiff jumped from the moving train because defendant's train operatives threatened to have him arrested when he got to Texarkana, and further believe that the train was at the time he jumped off, going too fast for an ordinary prudent person to alight therefrom, in safety, your verdict should be for the defendant."

(2) We think the court should have given the instruction. Unless the danger of alighting from a moving train is obvious, a passenger will be justified in relying upon the direction of those in charge of the train to do so, to the extent that he will not be guilty of contributory negligence as a matter of law.

(3) It is equally well settled that some force or threat of bodily harm or effort to eject a passenger must have been used before a passenger is justified in attempting to alight from a rapidly moving train. In the case of *Little Rock & Ft. Smith Ry. Co.* v. *Atkins,* 46 Ark. 423, the court said:

"Whether it was culpable or excusable, depends on the rapidity of the motion, the fact whether it is day or night, the distance from the car to the ground or other surface upon which the passenger proposes to alight, the age and vigor of the party, and whether he takes the risk by the command or encouragement of the company's agents in charge of the train, or to escape a greater peril."

In the case of *Sibley, Receiver, et al.* v. *Smith,* 46 Ark. 275, the plaintiff claimed that he had been compelled by threats and intimidation on the part of the conductor to jump off a moving train. The principal question was as to the right to compel a personal examination of the plaintiff as to his personal injuries. The court reversed the

judgment because the injuries were of a permanent nature and the lower court refused to compel the plaintiff to submit to a medical examination. On the question now under consideration, the court said:

"It was not disputed that the plaintiff leaped from the train while it was in rapid motion. The court referred it to the jury, under appropriate instructions, to say whether he acted voluntarily, or from a fear, generated by the conduct of the conductor, that worse consequence might befall him if he attempted to remain in the car."

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Rosenberry,* 45 Ark. 256, the plaintiff claimed that he was induced to jump from the train by the threats of the conductor to eject him, accompanied by a show of force. There the court said: "To be forcibly ejected from a moving train would, obviously, be attended with more danger than to leap from it, and if the appellee had been justified in the belief that he would be ejected if he did not go voluntarily or without force, no blame could be attached to his conduct. In such case the railroad, being the author of the original peril, would be answerable for the consequences."

(4) It follows from the principles announced in these opinions that the mere threat on the part of the train officials to have the plaintiff arrested when the train arrived at Texarkana was not enough to justify plaintiff in leaving the rapidly moving train. The mere threat to have him arrested, not accompanied by force or by a threat of immediate bodily harm, was not enough. The dictates of ordinary prudence are not to be disregarded and a mere threat of arrest, by whomsoever uttered, did not justify the plaintiff in incurring an obvious risk. The refusal of the court to give the instruction touching this phase of the case was prejudicial error.

The plaintiff testified that the train auditor threatened to have him and his companion arrested as soon as he discovered that they had a bottle of whiskey. The train auditor admitted this fact. It was also shown that the plaintiff had a pistol in his pocket, and it was the

theory of the railroad company that he was afraid he would be arrested for carrying a pistol and for that reason jumped off the train while it was moving rapidly. We think the railroad company had a right to have its contention presented to the jury in a concrete form. This is especially true when we consider that the instructions given at the request of the plaintiff were of a general character. The instruction given at the request of the plaintiff upon which he predicated his right to recover is as follows:

"If you find from a preponderance of the evidence that plaintiff was a passenger on one of defendant's trains, and that by reason of threats or any intimidation whatever the servants or any servant of the defendants engaged in the operation of the train so alarmed or terrified plaintiff as to induce him to put himself in a place of danger while the train was in rapid motion, and while in such place he was pushed or knocked off the train by any of said servants or while so there in the exercise of ordinary care for his own safety, he was jolted off by the movements of the train and injured, then you will find for the plaintiff."

(5) It will be observed that the instruction is of a very general character and allows the plaintiff to recover if he put himself in a place of danger while the train was in rapid motion by reason of threats or any intimidation whatever. The plaintiff would not be justified in leaving a rapidly moving train by reason of a threat to have him arrested or even by the mere command of those in charge of the train. There must be some show of force, threat of bodily harm, threat to eject him, or some overbearing intimidation in order to make the company liable where the danger is evident.

Of course, as we have already seen, a passenger will be justified in relying upon the direction or command of those in charge of the train to alight from a slowly moving train while it is in motion, unless the danger of doing so is obvious. The reason for this is that the passenger has a right to rely upon the superior knowledge of the trainmen.

It is also earnestly insisted that there was no evidence to support the verdict. We are of the opinion, however, that the evidence of the plaintiff, if believed by the jury, was sufficient evidence to warrant the verdict.

For the error in refusing instruction No. 13, as requested by the defendant, the judgment must be reversed and the cause remanded for a new trial.

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

Opinion delivered February 28, 1916.

RAILROADS—ARREST OF INTOXICATED PASSENGER.—Where a railway conductor, or other trainman, acting in good faith, and without negligence, under the *bona fide* belief that a passenger is intoxicated, calls a policeman and has the passenger arrested, the railway company will not be liable in damages, although the passenger was not in fact intoxicated.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; reversed.

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

It was error to give the 5th instruction for the plaintiff. It is directly opposed to the law as declared by this court. 95 Ark. 506; 105 *Id.* 623. This error was not cured by giving instruction No. 4, for defendant which correctly states the law. These instructions are conflicting and this court can not say which the jury followed in arriving at their verdict.

Robt. L. Rogers, for appellee.

The two instructions do not conflict in any sense, but taken separately or together give the jury the opportunity of judging whether defendant's agents and servants acted with ordinary care in removing or endeavoring to ascertain whether plaintiff was under the influence of intoxicating liquors. 97 Ark. 28; 95 *Id.* 510; 99 *Id.* 233; 119 Ark. 28.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Louis Vaughan, against the St. Louis, Iron

Mountain & Southern Railway Company to recover damages alleged to have been sustained by reason of the misconduct of servants of the defendant in wrongfully causing the plaintiff to be arrested by a policeman and ejected from a train at Little Rock.

The plaintiff had been working at Argenta and boarded one of defendant's passenger trains at the Union Station in Little Rock about 11:30 o'clock one night, with the intention of going to Jacksonville, a station north of Little Rock. He purchased a ticket from Little Rock to Jacksonville, and, in company with another man with whom he had been associated for several hours, boarded the train, which was delayed about an hour and a half in leaving the station on account of waiting for a theatrical troupe to take passage. Plaintiff took a seat in one of the coaches, and, being tired and sleepy on account of having worked during the two nights previous, he went to sleep in the seat. His companion, who sat a short distance away, was to some extent intoxicated and vomited on the heating pipes. When the auditor came through the coach to take up the tickets, before the train was ready to start, he found the plaintiff asleep in his seat with his head hanging out of the window, and also noticed the fact that Peeler, the other man, had been vomiting. He aroused the plaintiff and took up his ticket and punched it. He reported the circumstance to the other trainmen and a policeman was called to arrest the plaintiff and take him from the train. The policeman who patrolled the Union Station was called and went into the coach, arrested the plaintiff, and took him off the train. About the time, or just before the policeman came, Peeler left the coach and was not arrested. Plaintiff was asleep in his seat when the policeman came up, and he testified that he was roughly handled by the policeman and that some of the trainmen spoke roughly to him at the time, thus giving encouragement to the policeman. When plaintiff was aroused and was about to be taken from the train, he demanded his ticket from the auditor, who gave it up to him, but as it had been punched the

ticket agent in the office refused to cash it when plaintiff was carried to the ticket window by the policeman for that purpose.

The policeman testified that plaintiff had the appearance at first of being intoxicated, but after he carried him out to the ticket window and into a better light he discovered that plaintiff was not in fact intoxicated, and he carried him back to the platform and told the conductor that the plaintiff was not drunk and that they had better take him and carry him to his destination. Plaintiff was then allowed to board the train and without further interference to travel to his destination.

The plaintiff testified that he was not in any degree toxicated, but that he had drunk two "thin beers" during the evening.

Testimony was introduced by the defendant to show that the plaintiff had taken more intoxicants than he stated he had in his testimony, and that he had told a companion that evening that he had been on a "booze" all day, meaning that he had been drunk. That testimony tended to show that the plaintiff while on the train at the time he was arrested had the appearance of being intoxicated, and there was enough to justify the jury in finding that the trainmen acted in good faith in causing plaintiff's arrest. The jury returned a verdict in plaintiff's favor and an appeal has been prosecuted to this court by the defendant.

The principal ground urged for a reversal is that the court erred in giving the following instruction:

"5. No one has the right to deprive another of his personal liberty without just or legal cause, and if the defendant's agents or employees arrested, or caused to be arrested, the plaintiff, and detained him, while he was a passenger on its train, unless the plaintiff was committing or had committed, some act that under the law would authorize his arrest, the defendant would be liable for said false arrest and imprisonment, regardless of the time said plaintiff was detained by said arrest and imprisonment."

It is plain that this instruction is in conflict with the law applicable to the case as heretofore announced by this court. In *St. Louis, I. M. & S. Ry. Co.* v. *Hudson,* 95 Ark. 506, we held that under the statute which authorizes conductors to act in the capacity of peace officers on their train, and to arrest all persons found on the train to be in an intoxicated condition, that where a person is arrested by a conductor on a railway train it may be shown that the conductor acted in good faith and honestly believed, "after the exercise of ordinary care under the circumstances of the arrest, that the person arrested was drunk." It was said further in the opinion that "the company would not be liable for the arrest where the person arrested was sober, if the conductor, exercising ordinary care, honestly believed, under all the facts and circumstances, that the party arrested was drunk, and made the arrest and the ejection without any unnecessary force."

The same rule was announced in the later case of *St. Louis, I. M. & S. Ry. Co.* v. *Waters,* 105 Ark. 619. In each of those cases the arrest was made by a conductor under the statute which constituted him an officer for that purpose, but there is no reason for holding the law to be otherwise in a case where the conductor or other trainmen calls a policeman to make the arrest. After all it is a question of good faith and freedom from negligence which tests the question of the company's liability. Instruction No. 5 is wrong because it omits that question from the consideration and tells the jury in unmistakable language that the arrest was unlawful, "unless the plaintiff was commiting or had committed some act that under the law would authorize his arrest," and that the company would be liable for such arrest. A specific objection was made to the instruction on this ground and the court should have amended the instruction so as to cure the defect.

The court gave a correct instruction on the subject, at the instance of the defendant, which reads as follows:

4. "You are instructed that in removing from their trains persons believed by them to be under the influence of liquor, the defendant's servants are only required to use ordinary care in determining whether or not persons so removed are under the influence of intoxicating liquor, and if in the exercise of such care, defendant's servants reasonably believed that the person removed is intoxicated, or under the influence of intoxicating liquors, and use no more force than is reasonably necessary under the circumstances in removing such persons from the train, then the defendant can not be held liable to such person for his removal, even though he was sober."

It is insisted that the two instructions can be read together in harmony, and that the one cures the apparent defect or omission of the other. Instruction No. 5 is inherently wrong, we think, and it is not cured by the other instruction. The two instructions are conflicting and were calculated to mislead the jury as to the law applicable to the case. That being true, we are unable to say which one of the instructions the jury followed in arriving at their verdict.

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

NOLLEY v. NOLLEY.

Opinion delivered February 28, 1916.

1. CONFLICT OF LAWS—DIVORCE—DOMICILE OF HUSBAND.—The presumption that a married man's domicile is with his wife and family is not conclusive, and may be overcome by evidence showing the facts to be otherwise.
2. DIVORCE—CONDUCT AFTER ACTION BROUGHT.—Evidence of the conduct of the defendant, after the bringing of an action for divorce, is competent in corroboration of testimony relating to defendant's conduct, which occurred prior to the commencement of the action.
3. DIVORCE—GROUNDS—SUFFICIENCY.—In an action for divorce, the evidence held sufficient to warrant the granting the decree upon the ground that defendant's conduct rendered the plaintiff's condition intolerable.

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

S. A. Miller, for appellant.

The burden of proving his legal residence in Arkansas was on the appellee, and this burden he has failed to discharge. Having built for himself and wife a home at Paris, Ill., refusing to sell it because he wanted it for his home, his domicil was there. "The presumption is that a married man's domicil is with his wife and family." 10 Am. & Eng. Enc. of L. 23; 111 Mass. 382; 25 Kan. 103; 29 Ark. 280; 54 Ark. 172.

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

Appellant herself testifies that she lived with appellee in Hot Springs, Arkansas, nine or ten years, and, with no evidence to the contrary the presumption is that Arkansas continues to be his residence. 4 Ark. 456; 48 Ark. 551.

The presumption that a married man's domicil is with his wife and family "is one of fact, and not of law, and may be overcome by evidence showing the fact to be otherwise." 10 Am. & Eng. Enc. of L (2d ed.) 24; *id.* 33, note 1; 44 Ia. 191; 20 La. Ann. 312.

McCULLOCH, C. J. The plaintiff, S. B. Nolley, and the defendant, Emma C. Nolley, intermarried at Arkadelphia, Arkansas, in the year 1894, and on October 15, 1912, the plaintiff instituted the present action, in the chancery court of Jefferson County, Arkansas, against his wife for a divorce, and alleged in the complaint that he was a resident of that county and had been a resident of the State of Arkansas for more than one year. The complaint sets up the statutory grounds for divorce that defendant had offered such indignities to the person of the plaintiff as to make his condition intolerable. An affidavit was filed showing that the defendant was a nonresident of the State, and warning order was issued and duly published and an attorney was appointed by the court to make defense for the defendant. The case was heard by the court and a decree for divorce was rendered in November, 1912.

The defendant then resided at Paris, Illinois, and on April 11, 1914, she filed in the chancery court of Jeffer-

son County a complaint in the nature of a bill of review to set aside the decree for divorce, alleging that the decree had been obtained upon insufficient testimony, and that the plaintiff had perpetrated a fraud upon the court by failing to inform the court as to the place of residence of defendant so that she could be notified and have an opportunity to make defense. It was alleged in this complaint that the plaintiff in the original complaint, was not a resident of the State of Arkansas, but, on the contrary, resided in the State of Illinois, and that no grounds for divorce existed as set forth in the original complaint. An answer was filed by the plaintiff, and thereafter the defendant took proof tending to show that the plaintiff resided at Paris, Illinois, with the defendant up to a month or two before he commenced this suit in Jefferson County, Arkansas, and that the defendant had not been guilty of any misconduct which would justify the decree for divorce. The court thereupon rendered a decree setting aside the former decree and made an order giving the defendant time within which to file an answer to the original complaint. Both parties then took further testimony and the cause was finally heard as if there had been no former decree in the case, and upon the whole testimony the court found in favor of the plaintiff and rendered a decree granting a divorce. Defendant has prosecuted an appeal from that decree.

It is contended here that the decree is erroneous on account of insufficiency of the proof in two particulars, namely, that it does not show that the plaintiff was a resident of the State one year before the commencement of the action, or that the defendant was guilty of any misconduct which constituted grounds for divorce. The proof adduced by the plaintiff tends to show that he and defendant intermarried at Arkadelphia, in 1894 and that he has continuously resided in Arkansas since that time. It shows that the plaintiff lived at Hot Springs nearly all the time after the marriage, but that he frequently spent his summers in the North. He was engaged in the hotel business at Hot Springs, and during the summer

months he was engaged as purser on a steamer on the Northern Lakes. The evidence tends to show that plaintiff and defendant separated, on account of her misconduct, several years before the divorce was granted, and that her conduct was such as justified a divorce on the grounds named in the complaint.

There is, however, a conflict in the testimony, and that adduced by the defendant tends to support her contention that she was without fault and that the plaintiff did not in fact reside in Arkansas. The defendant herself testified that she and plaintiff purchased a lot at Paris, Illinois, and built a home thereon about five years before the divorce was granted, and that it constituted their home all the time until the plaintiff deserted her. She introduced other testimony which tended to support her in that contention, particularly the testimony of a gentleman engaged in the lumber business at Paris who testified to a conversation which occured at his office between the plaintiff and defendant on September 23, 1911, which warranted the conclusion that the plaintiff was then living at Paris and considered it his home. That testimony was contradicted by that of a hotel clerk in Milwaukee, who showed that the plaintiff was not in Paris on that date or for several days before or after that date.

(1) Counsel for defendant relies mainly upon the presumption "that a married man's domicile is with his wife and family." 10 Am. & Eng. Enc. of L. (2d ed.) 23; *Keith* v. *Stetter,* 25 Kan. 103. But that presumption, if the testimony is sufficient to raise it, may be overcome by evidence showing the facts to be otherwise. In other words, it constitutes a rebuttal presumption and not a conclusive one. Even if it be true that plaintiff was a resident of Paris, Illinois, up to September 23, 1911, as shown by the witness referred to above, yet it is possible for him to have come to Arkansas and established his residence one year before the institution of this action. But we are of the opinion that, taking the testimony as a whole, it cannot be said that it prepon-

derates against the finding of the chancellor that the plaintiff always lived in Arkansas and that he did not take up a residence at all with his wife at Paris, Illinois. His contention is that they had separated before that time, and that he was only with her occasionally, and that during all this time he maintained his residence in Arkansas.

(2-3) The proof taken by both parties, after the original decree was set aside, covered the conduct of each after the commencement of the action and down to the present time. Some of the strongest testimony concerning the misconduct of the defendant relates to that which occurred after the suit was commenced and even after the decree for divorce was granted, but it is competent in corroboration of the testimony relating to misconduct which is said to have occurred prior to the commencement of this action. Even if that testimony be discarded altogether, there is enough to make a preponderance of the evidence in favor of the chancellor's finding. The testimony shows that during the year 1912, and prior to the commencement of the suit, the defendant was guilty of repeated misconduct which justified the chancellor in reaching the conclusion that it was sufficient to render plaintiff's condition intolerable and to justify the divorce. She made unfounded charges against him concerning his relations with other women, and followed him to Hot Springs and had him arrested on a groundless charge. After the first decree of divorce was rendered, she came to Hot Springs and was guilty of the grossest kind of misconduct in keeping with her former treatment of plaintiff. She followed him up and abused him and abused his attorney, and followed them along the street throwing rocks at them. She had the plaintiff arrested in Chicago in the summer of 1912 on a charge of desertion and caused him to be taken into custody by an officer and carried back to Paris. She informed the officer who was to make the arrest that plaintiff was a dangerous man and warned him he must take every precaution after making the arrest, even advising the officer to shoot the plaintiff in the

arm or leg so as to prevent him from making his escape. Pursuant to that information and advice, the officer handcuffed the plaintiff and kept him handcuffed on the journey from Chicago to Paris, where he put the plaintiff in jail. Letters written by the defendant to the plaintiff accused him of misconduct with other women, and there is no testimony whatever in the record to show that there were any grounds for those charges.

Upon the whole we are of the opinion that the chancellor's finding is not against the preponderance of the testimony. The chancellor gave the defendant the utmost opportunities for having the cause completely heard, after the original decree had been set aside, and there is nothing presented here for our determination except the question of fact. And, as before stated, we are of the opinion that the chancellor reached the correct conclusion.

Decree affirmed.

THE HENRY WRAPE COMPANY v. COX.

Opinion deliver February 28, 1916.

1. DEEDS—QUIT-CLAIM DEED—INNOCENT PURCHASER.—A quit-claim deed is a substantive form of conveyance, and a party holding under such a deed may be entitled to protection as an innocent purchaser.
2. TITLE—LIS PENDENS—ACTION AFFECTING TITLE.—A suit affecting the title or any lien on real estate is not *lis pendens*, until a notice of pendency of the action is filed in accordance with the statute.
3. TITLE—BONA FIDE PURCHASER—QUIT-CLAIM DEED.—Where no notice of the pendency of a suit affecting the title to land was filed, as required by the *lis pendens* statute, and the purchaser took a quit-claim deed from its immediate grantor without notice of an outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would have led to knowledge of an outstanding conveyance or equity, then the purchaser is entitled to protection as a *bona fide* purchaser upon showing that the consideration stipulated had been paid, and that such consideration was a fair price for the claim or interest designated.
4. APPEAL AND ERROR—EVIDENCE—NECESSITY FOR SUBSTANTIAL EVIDENCE.—There must be some evidence of a substantial character to uphold a verdict of the jury, or the finding of fact made by a court sitting without a jury.

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

STATEMENT BY THE COURT.

Henry Wrape Company instituted this action in ejectment against Sarah I. Cox and F. E. Cox to recover forty acres of land in White County, Arkansas. The plaintiff acquired title to the land by mesne conveyances from the State of Arkansas. The immediate grantor of the plaintiff was the Stecher Cooperage Works, a corporation. That corporation conveyed the land to the plaintiff by a quit claim deed executed on May 18, 1910. The consideration stated in the deed was $1 but the actual consideration paid was $8.50 per acre, which was an adequate price for the land.

Frank Wrape, one of the stockholders and the treasurer of the plaintiff company, testified that he was on the land just after his corporation bought it, that at that time there were no improvements on it, and that no one was in possession of it. He testified that at the time plaintiff purchased the land it was not known that the defendant Sarah I. Cox had any litigation with the Stecher Cooperage Works; that the Stecher Cooperage Works sold and conveyed to plaintiff a number of tracts of land at the time the land in controversy was conveyed, and that a warranty deed was executed for all of these lands except the forty acres in controversy and another forty acre tract; that the reason the quitclaim deed was executed to the forty acre tract in controversy was that a man named Hibbard had obtained a judgment awarding him possession of the land; that the plaintiff company did not know that the defendant claimed any interest whatever in the land; that in the early part of 1911 plaintiff sold the timber on said land to one McHale; and that in December, 1911, the witness in company with McHale had a conversation with the defendant F. E. Cox, at a hotel in Bald Knob, Arkansas, and that in the course of the conversation Cox informed him that his wife claimed title to the land.

McHale testified that he bought the timber on the land in controversy in the early part of 1911; that the timber on it was worth about $50; that he was on the land soon after he purchased it and that the land was wild and unimproved and that no one was in possession of it; that he was present at a hotel in Bald Knob in December, 1911, when Frank Wrape had a conversation with F. E. Cox concerning the title to the land in controversy and that Cox at that time said his wife claimed title to the land.

On the part of the defendant it was shown that the Stecher Cooperage Woorks filed a petition in the chancery court to confirm its title to certain lands in White County, the land in controversy being embraced in the suit, and that in December, 1908, Sarah I. Cox, defendant, filed an intervention in which she claimed title to the forty acres in controversy. In December, 1911, the court found that Sarah I. Cox had been in adverse possession of said lands for more than seven years and it was decreed that the petition of the Stecher Cooperage Works as to said land be dismissed and the title of Sarah I. Cox in the same be quieted as against all claims of the Stecher Cooperage Works.

Other facts will be referred to in the opinion.

The court, sitting without a jury, found for the defendants and dismissed the complaint of the plaintiff. It awarded defendants damages in the sum of $50.

The plaintiff appealed.

Brundidge & Neely, for appellant.

Plaintiff was an innocent purchaser of the land. No notice of *lis pendens* was filed as required by Kirby's Digest, § 5149. Nor had plaintiff any actual notice, nor was any one in possession when it was purchased. 118 Ark. 139; 98 Ark. 109; 87 *Id.* 64; 75 *Id.* 228; 36 Law. Ed. U. S. 527; 25 Cyc. 1465.

J. N. Rachels and *John E. Miller,* for appellees.

1. The evidence shows conclusively that appellant was not a *bona fide* purchaser. 95 Ark. 586. If it pur-

chased with actual knowledge of the pendency of litigation it cannot complain that no *lis pendens* notice was filed. 94 Ark. 141; 98 *Id.* 109. The burden of proving it was an innocent purchaser devolves upon it. 75 Ark. 228; 80 *Id.* 86; 103 *Id.* 425. The trial court has found against it on this question of fact and this court will not reverse. 92 Ark. 41; 90 *Id.* 494, 512; 82 *Id.* 188, 260.

2. Appellant can not claim to be an innocent purchaser as it held under a quitclaim deed, which charges notice. 50 Ark. 322; 103 *Id.* 429; 23 *Id.* 735; 145 U. S. 492; 29 L. R. A. 34; 63 S. E. 180; 162 Mich. 585; 139 S. W. 384; 145 *Id.* 1041; 69 Wash. 386.

HART, J. (after stating the facts.) (1) In this state a quitclaim deed is a substantive form of conveyance and a party holding under such deed may be entitled to protection as an innocent purchaser. *Brown* v. *Nelms,* 86 Ark. 368, and cases cited. See also *McDonald* v. *Belding,* 145 U. S. 492.

(2) The common law and equity rule of *lis pendens* has been abrogated in this state by statute. Since the passage of the statute a suit affecting the title or any lien on real estate is not *lis pendens* until a notice of the pendency of the action is filed in accordance with the statute. *Steele* v. *Robertson,* 75 Ark. 228; *Hudgins* v. *Schultice,* 118 Ark. 139.

(3) In the case before us there was no notice of the pendency of the suit filed as required by section 5149 of Kirby's Digest. Therefore, under the authorities above referred to, if the plaintiff took the quitclaim deed from its immediate grantor without notice of an outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would have led to knowledge of such outstanding conveyance or equity, it was entitled to protection as a *bona fide* purchaser upon showing that the consideration stipulated had been paid, and that such consideration was a fair price for the claim or interest designated. See also, *Marchbanks* v. *Banks,* 44 Ark. 48; 25 Cyc. 1452.

As we have already seen, the plaintiff paid an adequate price for the property. The record shows that the defendant Sarah I. Cox, filed an intervention in the suit of the Stecher Cooperage Works to confirm its title to certain lands including the land in controversy. The question, then, is, did the plaintiff have notice of her claim or did it have notice of facts which, if followed up, would lead to knowledge of her claim at the time the conveyance was made to it by the Stecher Cooperage Works?

Frank Wrape, who was the treasurer and also a stockholder in the plaintiff corporation, testified that the plaintiff was not in possession of such knowledge. The plaintiff bought a number of tracts of land from the Stecher Cooperage Works at the time and took a warranty deed to all of them except the forty acres in controversy and another forty-acre tract. The reason the Stecher Cooperage Works did not execute a warranty deed to the land in controversy was that a man named Hibbard had obtained judgment awarding him possession of that tract of land. The claim of the defendants Cox to the land was not considered because it was not then known that the defendants claimed any interest whatever in the land.

Frank Wrape further testified that he was on the land after the plaintiff bought it, that the land was then unimproved with no one in possession of it; and that he did not learn that the defendants claimed any interest in the land until December, 1911, several months after the land was purchased by the plaintiff.

In the main he is corroborated by the testimony of McHale to whom the plaintiff sold the timber on the land in the early part of 1911. McHale testified that he went on the land soon after he bought the timber; that no one was in possession of it at that time, and that it was then unimproved. He also testified that the first notice he had that defendants claimed any interest in the land was in December, 1911, at the time Frank Wrape had the conversation with F. E. Cox at the hotel in Bald Knob.

The testimony on the part of the plaintiff is reasonable and consistent in itself; and we do not think it is contradicted by any substantial testimony whatever. An attempt was made by F. E. Cox to contradict the testimony of the plaintiff but when his testimony is fully analyzed we do not think it tends in any manner whatever to contradict that of the plaintiff. He testified at first that there had been a house on the land but further on in his testimony stated that this house had been burned down several years before the plaintiff purchased the land. Again, he stated that he thought the conversation with the plaintiff in regard to his wife's claim to the land occured before the plaintiff had completed its purchase of the land, but when asked how he knew this, could not give any reason whatever for thinking so; and upon being further questioned, it is evident that he meant he thought the conversation occurred before the plaintiff had sold the timber on the land to McHale.

We have not attempted to set out in full the testimony of F. E. Cox, but when it is carefully considered we do not think there is anything in it from which it may be inferred that the plaintiff had any knowledge of the claim of Mrs. Cox at the time it purchased the land. In short, we think the undisputed evidence shows that the plaintiff was an innocent purchaser for value of the land.

(4) We have never adopted the scintilla rule in this State but have uniformly held that there must be some evidence of a substantial character to uphold a verdict of the jury, or the finding of fact made by a court sitting without a jury. Our opinion is that there was no testimony of a substantial character to support the finding of the circuit court in favor of the defendants.

The court, therefore, erred in finding for them and for this error the judgment will be reversed and the cause remanded for a new trial.

WAXAHACHIE MEDICINE COMPANY v. DALY.

Opinion delivered February 28, 1916.

FOREIGN CORPORATIONS—NON-COMPLIANCE WITH STATE LAWS—VALIDITY OF CONTRACTS.—A contract made by a foreign corporation before complying with the laws of this State, is not made void by Act 313, page 744, Acts of 1907, and when the laws are complied with before suit is brought, such contracts are enforcible.

Appeal from Nevada Circuit Court; *Geo. R. Haynie,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant Medicine Company, a foreign corporation, of the State of Texas, made a contract August 16, 1912, with appellee and his sureties, for the sale of certain medicines to be supplied by it at a certain price delivered to appellee Daly, to be sold by him in Nevada County, and the proceeds accounted for according to the stipulations contained in the contract. Under this contract it delivered to Daly, medicines to the amount of $428.38. It had not complied with the requirements of our State laws for admission of foreign corporations to do business, at the time of the execution of said contract, but did comply therewith on the 9th day of August, 1913, and was issued a permit to do business in the State, and on the 15th day of August, 1913, it made another contract in the terms of the first with Daly, with the same sureties, for the sale of its medicines in Nevada County, to December 31, 1913.

Before the making of the second contract, appellee had only paid $90.50 on the goods delivered to him under the first contract, but had sold a large amount of said goods and the appellant credited him with the amount of money sent in on its charge for goods under the first contract in the sum of $277.48, which left a balance it claimed of $157.90, due under said contract.

It alleged that it sold him under the second contract $439.27 worth of goods and was only paid of said amount $20.07, leaving a balance due on both contracts of $570.10, the amount sued for.

A copy of the contract was exhibited with the complaint.

Appellee Daly admitted the execution of both contracts; denied that the amount of goods alleged to be, had been delivered to him and that appellant had not been paid more than the amount with which he was credited. Alleged that the goods had been shipped to and received by him under the contract as the agent of the medicine company and distributed among its customers by him in accordance with said company's instructions at the price fixed by it and that at the time the first contract was entered into the plaintiff was a foreign corporation, without right to do business in this State, not having complied with the requirements of its laws for entry for that purpose and was not entitled to enforce the contract.

He denied that the amount of goods charged for had been delivered to him on the second contract and that he had paid only $20.07 thereon. Alleged that at the termination of the contract he had on hand $57.41 worth of medicine, which he was entitled to return and receive credit for and which he offered to return, but plaintiff refused to receive same, that he had on hand outstanding and uncollectible, accounts to the amount of $671.15 which he returned to plaintiff at the termination of the contract and upon which he was entitled to a credit under the terms of the contract of 25 cents on the dollar.

He alleged that all credits made on the first contract should be credited upon his account on the second contract, the first being void.

The sureties on his bond filed separate answers, alleging that appellee Daly had failed to comply with his part of the contract with the medicine company, in the way of making reports and payments and that it agreed with said Daly at the begining of the contract that it should not be complied with; conspired with him and agreed to the violation thereof, all of which was unknown to them and of which they had no knowledge until after the suit was instituted and alleged that the loss, if any,

sustained by the plaintiff was due to its own negligence and connivance with the appellee to defraud the defendants.

It appears from the testimony that the medicine company shipped to appellee Daly $428.38 worth of goods under the first contract, upon which he only paid $90.50 to the time of executing the second contract on April 15, 1913. That under the second contract it delivered goods to Daly to the amount of $439.27, and was paid on the account only $96.46. Daly rendered a statement at the expiration of the last contract Jan. 1, 1914, showing medicine on hand of the value of $156.10, and it rendered him a statement claiming a balance due of $570.10, which its secretary testified was correct; and that the bondsmen were liable for the full sum less $76.88.

Daly admitted that all the goods charged to him by said company had been received except one consignment of $48.50. He also stated that he had on hand at the end of the term of the contract of uncollectible accounts $671.15, and medicine of the value of $57.41. Said he had received goods under the first contract amounting to $428.38 and under the second of the value of $346.75; that he had paid the company under the first contract, and $122.41 under the second, and claimed he was entitled to a credit of twenty five cents on the dollar on the amount of uncollectible accounts, $167.78.

The court instructed the jury, giving among others, over appellant's objection, instruction numbered one, as follows:

"If the jury find from the evidence in this case that the first contract, which was entered into on the 16th day of August, 1912, was substituted and taken up by the plaintiff by the execution of the second contract, and that it was not considered by the parties hereto of any more force and effect, then the plaintiff can not recover under the first contract, because it had no authority under the laws of Arkansas to do business in this State."

The jury returned a verdict in favor of the defendants and from the judgment thereon this appeal is prosecuted.

U. A. Gentry and *McMillan & McMillan,* for appellant.

1. The court erred in refusing to direct a verdict for the plaintiff. When the facts are undisputed, and when different minds cannot draw different conclusions therefrom, it becomes the courts duty to direct a verdict. 57 Ark. 461; 97 *Id.* 442; 104 *Id.* 267. Appellee is not entitled to the credits claimed for medicine on hand and uncollectible accounts under the contract and evidence. It is certainly undisputed that Daly still owed $335.03, it is shown by his own testimony.

2. The first contract was not void but enforceable. 61 Ark. 1; 70 *Id.* 525; 72 *Id.* 327; 77 *Id.* 203; 25 Am. St. 925; Beale on For. Corp. § 213. A foreign corporation can comply with the law even after suit is brought. 77 Ark. 203; (Fed.) 7 Ann. Cas. 222.

3. Penal statutes are strictly construed. 79 Ark. 517; 66 *Id.* 472; 64 *Id.* 284; 59 *Id.* 355; 56 *Id.* 45 and 224.

4. A penalty does not change the rule. 61 Ark. 1. The court's instruction on its own motion is misleading.

No brief filed for appelee.

KIRBY, J. (after stating the facts.) It is contended that the court erred in giving said instruction numbered one because there was no testimony upon which to base it so far as the substitution of the second contract for the first is concerned, nor any showing that the parties regarded it of no further force and effect and that it was in effect a direction to the jury to find against appellant because it had not complied with the requirements of the laws of the State for foreign corporations entering to do business before its execution.

It is undisputed that the medicine company in April, 1913, complied with our laws and was issued a certificate authorizing it to do business in the State and also that the appellee continued selling medicines supplied

to him under the first contract until the second was entered into, the 15th day of April, 1913.

Our court has held that the failure of a foreign corporation to comply with the requirements of the statutes prescribing conditions upon which foreign corporations may enter and do business within the State did not render its contracts void, but only prevented the enforcement of same by such corporation until compliance with the terms of the statute. *State Mutual Fire Ins. Assn.* v. *Brinkley Stave Co.*, 61 Ark. 1; *Buffalo Zinc etc. Co.* v. *Crump,* 70 Ark. 525; *Sutherland-Innes Co.* v. *Chaney,* 72 Ark. 327; *Woolfort* v. *Dixie Cotton Oil Co.,* 77 Ark. 203.

In *Buffalo Zinc etc. Co.* v. *Crump, supra,* the court said. "The penalties of the Act in question are, doubtless, intended to compel an observance of its terms. When that is done, its purpose is accomplished; the condition upon which the right to maintain an action depends is performed, and the plaintiff can in the future prosecute it to final judgment."

In *Woolfort* v. *Dixie Cotton Oil Co., supra,* the court held that the foreign corporation could comply with the law after institution of suit upon a contract made before compliance therewith, and in answer to the contention that the statute rendered the contract absolutely void and unenforceable said: "The statute does plainly prohibit the maintenance of a suit until its terms are complied with, and in the absence of a provision expressly declaring the contract to be void, we do not feel at liberty to say that the Legislature intended to fix the latter penalty. If it had been intended to declare the contract absolutely void and of no effect, the further provision that no suit should be maintained thereon, was superfluous."

It is true the terms of the statute now in force are different from those construed in said opinions. The present statute* after prescribing a penalty of a fine of not less than $1,000 for failure to comply with its provisions provides: "As an additional penalty any foreign corporation which shall fail or refuse to file

*Note—Act 313, page 744, Acts 1907.—(Rep.)

its articles of corporation or certificate as aforesaid, can not make any contract in this State which can be enforced by it either in law or in equity and the complying with the provisions of this act after suit is instituted shall in no way validate said contract."

This provision does not expressly declare the contract void although it does say it shall be unenforceable either in law or in equity by the delinquent corporation, and that a compliance with it after suit is instituted shall in no way validate the contract. The use of this language as to the validation of the contract was made doubtless because of the court's decision holding in the construction of the other statute that a compliance with the terms of the law by the foreign corporation after suit brought would enable it to prosecute the suit, but if the Legislature had intended that compliance with the terms of this act by a delinquent foreign corporation, after the entry into a contract and before suit brought, on its part, would not enable it to enforce such contract, then there was no use to add anything after the words "which can be enforced by it either in law or equity."

Since the statute does not expressly declare the contracts void, we do not think in view of the language used that the lawmakers intended to fix such additional penalty for the failure to comply with the terms of the statute.

Appellee does not contend that the contracts were not fairly entered into upon his part nor faithfully performed on the part of the medicine company and admits that he

Received goods to the amount of.....		$775.13
Paid under the first contract.....	$ 92.50	
Paid under the second contract.....	122.41	
Should be credited with medicine on hand in the sum of	57.41	
And with 25 per cent of $671.15 of uncollectible accounts	167.78	
Which makes total of credits claimed of..		440.10
And leaves an undisputed balance due of		$335.03"

The court erred in the giving of said instruction, and the verdict of the jury was contrary to the testimony. The court also erred in refusing appellant's requested instruction for a verdict directed in its favor and the judgment is reversed, and the testimony being undisputed as to said amount due under the terms of the contracts, a judgment will be entered here in appellant's favor for said sum, except that Kennedy, surety, is not liable for any amount under the first contract, not having signed same as surety.

It is so ordered.

WORD v. COLE.

Opinion delivered February 28, 1916.

1. MORTGAGES—FUTURE CROPS—VALIDITY.—While a mortgage of a future crop is valid, it is valid only against crops to be planted within twelve months after the execution of the mortgage.
2. MORTGAGES—FUTURE ADVANCES.—A mortgage given to secure future advances, even at the time of the foreclosure of the instrument, is valid, but if such purchase is intended to be accomplished, that fact must clearly appear from the instrument, and such purpose will not be presumed where the instrument does not contain a general description of the indebtedness secured, so as to put one who examines it on notice that this was its purpose, in order that such person may pursue the inquiry which such knowledge would suggest.
3. MORTGAGES—FUTURE ADVANCES.—The test of whether items will be included in a mortgage covering future advances is not when the charge was entered on the books but when the liability for any particular item did accrue.

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

Moore, Vineyard & Satterfield, for appellant.

1. It was error to direct a verdict. There was some evidence to prove the issue for plaintiffs. 33 Ark. 350; 39 *Id.* 491; 89 *Id.* 368. The uncontradicted evidence and indebtedness of $1,148.56 secured by the deed of trust.

2. The cases 66 Ark. 393 and 50 *Id.* 256 do not apply here. A mortgage to secure future advances is valid,

(111 Ark. 367) if it contains a general description sufficient to embrace the liability intended to be secured. * * * Here the debt secured was never paid. All the indebtedness was *incurred* prior to Nov. 15 although not all *charged* in the books. The mortgage secured all indebtedness, note and advances.

Fink & Dinning, for appellees.

1. The terms of the mortgage are so comprehensive as to become too indefinite to determine the intent of the parties. The date within which an indebtedness may be incurred must be fixed. 55 Ark. 569. The deed of trust is void for uncertainty.

2. The indebtedness secured by the deed of trust had all been paid. The appropriation of payments must be to the older items of the account. 50 Ark. 256; 47 *Id.* 111. All indebtedness prior to Nov. 15 had been paid. 66 Ark. 393; 111 Ark. 362.

3. The landlord's lien is not transferable and an assignee takes no lien by transfer. 31 Ark. 597; 37 *Id.* 43; 39 *Id.* 344; 61 *Id.* 266; 55 *Id.* 569. Amounts expended by appellants after Nov. 15, 1914 were not advances contemplated by or included in the deed of trust.

SMITH, J. This action was brought to recover possession of certain personal property conveyed to appellant as trustee for N. Straub Sons Mercantile Company by appellee. The following recital is contained in the deed of trust:

"Witnesseth; That whereas the party of the first part is indebted to the third party in the sum evidenced by his promissory note of even date herewith for $2,500 due and payable November 15, 1914, bearing interest at the rate of 10 per cent from date until paid, and whereas, the first party desires to secure the payment of said sum and all other sums that are now due or that may hereafter become due to said party of the third part, whether evidenced by note or book account."

And, after describing the property conveyed, it is provided that the conveyance shall be "in trust, however, and upon the following conditions, viz: That if the said

party of the first part shall on or before the 15th day of November, 1914, pay what may be due the said party of the third part upon said promissory note or book account hereinbefore described, or indebtedness hereafter contraced, and costs incurred on account of this indenture, then this conveyance shall be void."

It was further provided: "And it is expressly agreed and understood by and between the parties hereto that the said party of the third part shall have the exclusive right to apply the net proceeds of sale of all crops and all payments of money paid to him to the payment of any indebtedness which may be due now or which may hereafter become due to him by the said party of the first part upon open account, or to the debt secured and intended to be secured by this indenture according to his views of the exigency of the case—that such application may be made at any time and in such manner as he may elect, and that no application of such proceeds of sale or money to the payment of any debt in open account, which at any time may be due to the said party of the third part by the said party of the first part, shall impair, lessen or prejudice the debt secured and intended to be secured by this indenture, or the security herein and hereby provided for."

At the trial a statement of the account claimed was introduced, from which it appeared that on November 14, 1914, the date of the maturity of the note mentioned in the deed of trust, the sum of $3,425.88 was then due, and the last item charged on the account was under the date of February 2d, 1915, at which time the items of the account aggregated $7,972.99. Towards the satisfaction of this account there were credits amounting to $6,424.36, which was $2,998.48 in excess of the amount due on the date of the maturity of the note. It was shown, however, that certain items were due at that time which were not charged on the account until a subsequent date.

Upon the conclusion of appellant's evidence the court directed a verdict in appellee's favor upon the theory that the indebtedness secured by the deed of trust had been paid and that there was no lien on the property described for the balance due.

According to appellant, there was due under the deed of trust a balance of $1,548.63, and the issue in the case is whether or not this indebtedness is secured by the deed of trust.

Our decisions on this subject were reviewed in the recent case of *Howell* v. *Walker,* 111 Ark. 362. That case announced the rule as being universal that a mortgage securing future advances is valid, but it also recognized the rule that such instruments were to be considered as a whole in determining the intention of the parties.

In additon to the clauses set out, the deed of trust covered all crops of cotton and corn grown on 285 acres of land so long as appellee was indebted to the mercantile company, and it is no doubt true that the making of this crop and the handling of the cotton constituted the real consideration for the instrument.

(1) While a mortgage of a future crop is valid, it is valid only against crops to be planted within twelve months after the execution of the mortgage. Section 5406 of Kirby's Digest. It is not to be presumed, therefore, that the parties were contracting beyond the year 1912.

(2) The effect of our cases is that a mortgage to secure future advances, even to the time of the foreclosure of the instrument, is valid, but if such purpose is intended to be accomplished, that fact must clearly appear from the instrument, and such purpose will not be presumed where the instrument does not contain a general description of the indebtedness secured, so as to put one who examines it on notice that this was its purpose, in order that such person may pursue the inquiry which such knowledge would suggest. *Curtis* v. *Flinn,* 46 Ark. 70.

We think the proper interpretation of the language of the preamble is that it was contemplated that there might be an indebtedness evidenced both by note and by book accounts, and that both should become due and payable at the same time. And we think too, that the language which declares the purpose of the trust contemplated that there would, or might, be an indebtedness thereafter contracted which would be evidenced by book accounts, and that such indebtedness so incurred before November 15th, should be secured by the mortgage as well as the note itself.

Appellee contends that the undisputed proof shows that nothing was due on November 15th, and that the instrument thereupon became void and the advances constituting the balance sued for were made after that date. Numerous items constitute this balance, and appellant contends that, although they were not charged to the account until after November 15th, yet the liability accrued before that date.

(3) The test of course, is not when the charge was entered on the books, but when the liability for any particular item accrued. The proof on these items is undisputed. For instance, the proof is that the mercantile company bought the interests of the tenants in the crop for appellee, and the accounts of the tenants were given credit for the amount of their interests in the crop. These accounts were charged to appellee, as he stood for all of them, and he was consequently credited with the proceeds of the crops. But these credits could not be entered until the cotton was sold, and while the necessary entries to evidence the items were made after November 15th, the liability for the items accrued prior to that time. The same thing may be said of the items of rent and balance due on tenants' accounts. The items of interest and recording fees were not charged until after November 15th, but the recording fees, of course, were due when the instrument was recorded, and it was proper to charge the interest at any time, as the liability for it continues until the indebtedness is paid.

Of all the items charged there appears to be only $107.85 for supplies furnished after November 15th, but the case has been developed on only one side.

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

HOLLAND v. STATE.

Opinion delivered March 6, 1916.

EVIDENCE — ABSENT WITNESS — TESTIMONY AT EXAMINING TRIAL.— Where a witness is absent from the State, his testimony, given at an examining trial, before a justice of the peace, is competent in a trial of the cause in the circuit court.

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

Thaddeus B. Vance, for appellant.

The evidence is insufficient to sustain the verdict. Jim Allen's testimony should have been excluded. He was not shown to have been beyond the jurisdiction of the court. No proper foundation was laid. 84 Ark. 178; 73 *Id.* 406; 63 *Id.* 130; 68 *Id.* 441; 66 *Id.* 545. The testimony taken before the examining magistrate was not identified.

Wallace Davis, Attorney General, and *Hamilton Moses,* Assistant Attorney General, for appellee.

1. Jim Allen's testimony was properly admitted. He was shown to be beyond the jurisdiction of the court. 1 Gr. Ev. § 163; 2 Wigmore on Ev. § 1404. It was at least, within the court's discretion to admit it and no abuse is shown. 57 Ark. 402; 58 *Id.* 371; 29 *Id.* 17; 33 *Id.* 339; 40 *Id.* 454; 47 *Id.* 180; 60 *Id.* 400; 68 *Id.* 441; 90 *Id.* 515; 95 *Id.* 176. A sufficient foundation was shown. 108 Ark. 321; 112 *Id.* 42.

2. The objection to the testimony was general. 29 Ark. 17; 32 *Id.* 319; 58 *Id.* 353. A specific objection is necessary to raise questions of competency. 112 Ark. 592; 86 *Id.* 138; *Mosely* v. *Mohawk Lbr. Co.,* 122 Ark. 227; 113 Ark. 300.

3. The preponderance of the evidence sustains a verdict of guilty. 92 Ark. 120; 50 *Id.* 511; 47 *Id.* 196.

McCULLOCH, C. J. Appellant, Walter Holland, was convicted of the crimes of burglary and of larceny, alleged to have been committed by breaking into the smoke-house of E. L. Butler in Miller County, Arkansas, with intent to commit the crime of grand larceny and by stealing from said house fifty pounds of meat and sixty pounds of lard.

The testimony of Butler and his wife shows that the smoke-house in question was burglarized and that the quantity of meat and lard mentioned in the indictment was stolen and taken therefrom. The lard was in a three-gallon stone jar and in three buckets, and the stone jar taken from the house was shortly afterwards found in the house of one Lelia Wiley. The jar was greasy as if it had been filled with lard and was identified by Butler and his wife as being the particular jar that was stolen from their smoke-house. The proof also shows that appellant carried the jar to the house of Lelia Wiley and gave it to her. She testified that appellant brought the jar to her house, and claimed that he had found it, but that it had no lard in it at the time.

Appellant, according to the testimony of the officer who was making the investigation, denied at first that he had had anything to do with the jar, but afterwards admitted that he had found it in a brush pile and had given it to Lelia Wiley. The State also introduced in evidence the testimony of one Jim Allen given at the examining trial of appellant before the justice of the peace, and Allen's testimony was to the effect that appellant told him that he (appellant) had stolen two sides of bacon and a jar and three buckets of lard and had given to Lelia Wiley some of the bacon and the jar of lard. The statement was admitted in evidence after the testimony had been adduced tending to show that the witness Jim Allen was out of the jurisdiction of the court.

The evidence was sufficient to warrant the conviction of both offenses, but the principal ground urged for reversal is that the foundation for the introduction of the testimony of Jim Allen was not properly laid, in that it was not shown that the witness was outside of the jurisdiction of the court. The sheriff and his deputy, who had charge of the investigation of this case, testified that they had made inquiry for Jim Allen and could not find him, but received information that he was in Kansas City. The testimony was, we think, sufficient to establish the absence of the witness from the jurisdiction of the court, and it was competent under those circumstances to introduce the testimony adduced at the examining trial.

It is urged here, also, that the court erred in allowing the State to read the statement of the witness from the record kept by the examining magistrate, without further identification or further proof showing that it was in fact the testimony of the witness. No such objection was made below, however, and it is too late to raise it here for the first time. The objection made below to the introduction of the testimony was based on the ground that the witness was not shown to be outside of the jurisdiction of the court, and that is the only objection that we can consider here.

Judgment affirmed.

GARDNER v. FIRST NATIONAL BANK OF DEQUEEN.

Opinion delivered March 6, 1916.

1. LIENS—ARTISAN'S LIENS—HOW CREATED.—Artisan's liens are a creation of the common law and are not dependent upon statute for their existence.

2. LIENS—ARTISAN'S LIEN—MORTGAGED CHATTELS.—A, the owner of certain horses and wagons, mortgaged the same to B., B. allowing the property to remain in A.'s possession, the same being used by A. in his sawmill. A. procured certain repairs to be made on the wagon by one C., a blacksmith and wheelwright, and also procured C. to shoe the horses. *Held*, C.'s lien for labor performed was superior to the lien of B., the mortgagee.

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

STATEMENT BY THE COURT.

T. J. Harvill, the owner of a saw mill was indebted to A. B. Gardner a blacksmith and millwright and horseshoer in the sum of $50.85 for repair work on a wagon and shoeing horses.

Plaintiff filed an itemized account of his work done, with the circuit clerk within the time required by the statute. Then he instituted this action before a justice of the peace to enforce his lien against the property.

The First National Bank of DeQueen filed an intervention claiming the ownership of the property by virtue of a mortgage executed to it by T. J. Harvill before the work was done by the plaintiff.

The plaintiff recovered judgment before the justice of the peace and the case was appealed to the circuit court. The facts briefly stated are as follows:

T. J. Harvill owned and operated a saw mill. In connection with it he used some log wagons and some horses and mules. The First National Bank of DeQueen had a mortgage on the wagons and horses and mules but allowed Harvill to use them in the operation of his saw mill. The mortgage was duly recorded. After this the plaintiff Gardner who was a blacksmith and wheelwright made certain repairs on the wagons and shod some of the horses and mules which were engaged in pulling the wagons. The mortgagee did not know that the mortgagor had had the repair work done and did not give its specific consent to its being done.

The circuit court held that the bank had a lien prior in point of time to that of Gardner and that its lien was superior to Gardner's lien. Judgment was thereon rendered in favor of the bank and the plaintiff Gardner has appealed.

Garrison & Steele and *B. E. Isbell,* for appellant.

1. The lien of the blacksmith is superior. Act 324, Acts 1911; Kirby's Digest, § 5013; 62 Ark. 438; Kirby's Digest, § 4995; 75 Ark. 115; 80 *Id.* 516.

No brief filed for appellee.

HART, J. (after stating the facts). Section 1 of Act 324 of the General Acts of 1911 provides that blacksmiths, wheelwrights and horseshoers, who perform work or labor for any person, if unpaid for the same, shall have an absolute lien on the product of their labor and upon all wagons, carriages, implements and other articles repaired, or horses or other animals shod by them, for all sums of money due for such work or labor, and for any materials furnished by them and used in such product, repairs or shoeing. See General Acts of 1911, page 298.

(1) Artisan's liens are a creation of the common law and are not dependent upon statute for their existence. In the case before us, the mortgagor operated a saw mill and the personal property in the controversy in this suit which was embraced in the mortgage to the bank was used by him in the operation of the mill. He used them as a means of earning the money to pay off the mortgage debt.

(2) The mortgagee allowed the mortgagor to keep and use the property for that purpose. It was necessary that the wagons be repaired and that the horses be shod in order to be used by the mortgagor for the purpose for which they were allowed to remain in his possession. In short, the record discloses that the mortgagee allowed the mortgagor to keep the property to use in running his saw mill and it may be fairly implied that such use of the property was contemplated when the mortgage was executed. Under such circumstances necessary repairs are superior to the lien of the mortgage as the mortgagee had impliedly authorized them.

The rule is well stated in *Hammond* v. *Danielson,* 126 Mass. 294, which was a case of a lien for repairs on a hack left in the possession of the mortgagor to be used in his business. In that case Gray, C. J. said,

"A lien on personal property cannot indeed be created without authority of the owner. *Hollingsworth v. Dow*, 19 Pick. 228; *Globe Works* v. *Wright,* 106 Mass. 207. But in the present case such an authority must be implied from the facts agreed. The subject of the mortgage is a hack, that is to say, a carriage let for hire; described in the mortgage as 'now in use' at certain stables; and which, as the parties have agreed in the case stated, the mortgagor retained possession of and used agreeably to the terms of the mortgage. It was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt. The case is analogous to those in which courts of common law, as well as of admiralty, have held, upon general principles, independently of any provision of statute, that liens for repairs made by mechanics upon vessels in their possession take precedence of prior mortgages." To the same effect see *Smith* v. *Stevens* (Minn.) 31 N. W. 55; *Meyer* v. *Berlandi* (Minn.) 40 N. W. 513; *Tucker* v. *Werner,* 21 N. Y. Sup. 264; *Ruppert* v. *Zang,* 73 N. J. L. 216, 62 Atl. 998; *Garr* v. *Clements* (N. D.) 62 N. W. 640; *Watts* v. *Sweeney* (Ind.) 26 N. E. 680.

There is nothing in our decisions in regard to the priority of mortgages over mechanics liens which conflicts with the rule we have here announced.

In the case of the mortgage of realty there can be no implied authority from a mortgagee that the mortgagor go on and create a lien for erecting new buildings or improving existing ones that shall take precedence of the mortgage. The buildings are attached to the soil and as soon as erected become a part of the realty. Buildings which are repaired are a part of the realty before the repairs are made. No facts exist in the nature

of the transaction from which authority on the part of the mortgagor to build or to repair houses can be implied.

The doctrine of agency implied from circumstances upon which the decision is based was recognized by this court in *Sheeks-Stephens Store Co.* v. *Richardson,* 76 Ark. 282. There the court held that the lien of the laborer who produced the crop is superior to that of the mortgagee who furnished supplies necessary to raise the crop. As part of the reason for holding as it did the court said, that one who takes a mortgage on a crop to be thereafter produced must know that it requires labor to produce it and, under the statute, laborers have liens for their work. So under the circumstances of this case it was contemplated between the parties that the mortgagor should use the property in his business and this raised by implication the right of the mortgagor to repair the property and thus render it fit for the intended use, as such action on his part was for the benefit of all concerned.

From the views we have expressed it follows that the judgment must be reversed and the cause remanded for a new trial.

CARLAND v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION.

Opinion delivered March 6, 1916.

INSURANCE—ACCIDENT AND ILLNESS.—A policy of insurance, agreed to pay the insured a certain sum per month in the event of illness resulting in total disability, if the disability occurred "by reason of illness that is contracted and begins after this policy has been maintained in continuous force for sixty days." *Held,* the insured or his estate could not recover under the policy, when the illness was contracted within sixty days after the issuance of the same, although the illness continued until after the expiration of the sixty-day period.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was brought by the administratrix of the estate of J. W. Carland, deceased, to recover $192, the benefit provided in the policy of health and accident insurance issued to her intestate.

It was alleged in the complaint that J. W. Carland, entered into a contract with appellee company on the 1st day of May, 1914, whereby it agreed and undertook to insure him against accident and illness in the sum of $60 per month, for a period not exceeding 24 consecutive months of total disability resulting from either illness or accident. That he became totally disabled on the 17th day of May 1914 by illness and so continued from that day to the day of his death, August 24, 1914. That he had fully complied with the terms of his contract of insurance and that the company was notified of his illness and disability on July 1, 1914, and a report of his attending physician was furnished and it denied liability thereupon on August 10th. A copy of the policy was exhibited with the complaint.

The answer denied any liability on the policy; alleged that its liability for indemnity for sickness was limited by Paragraph "E" of the policy, which provision it pleaded in defense of the suit, as follows: "Or at the rate of $60 per month for the sum of consecutive days, after the first week, that the assured is necessarily, totally and continuously confined within the house, and therein regularly visited by a legally qualified physician by reason of illness that is contracted and begins after this policy has been maintained in continuous force for sixty days."

The policy was introduced in evidence with the receipts for premiums and the undisputed testimony shows that the deceased was taken sick on the 17th day of May, 1914, after the issuance of the policy on May 1st, and died from the illness on August 24th, thereafter.

The premiums were due on the first of each month and all paid, including the one due on August 1st, 1914.

Mrs. Norman, the daughter of the deceased, testified that when she paid the July premium, she asked the col-

lector when they could collect the indemnity and she answered not until the expiration of the illness. She explained that they needed the money and would like to have part of it, but the agent said it never had been done and further: Q. Well was that before or after you paid the premium? A. It was after, after I paid it. I told her that father was sick and had been for some time and we did not think he would get well. Q. Did you tell her the day on which he took sick, A. I don't think so, but she gave me an application blank and I knew it would show in that so I did not make any mention of the date. Q. Was there anything said about whether you would pay the premium if you had not thought you would get it? A. No, sir; there was nothing said about us getting it or not getting it." She said she would not have paid the last nor the other premium on the policy if they had not been expecting to get the indemnity under it. She exhibited the notice of August 10th from the company, denying liability because the sickness causing the disability commenced prior to the expiration of sixty days after the date of the issuance of the policy.

The court instructed a verdict for the defendant, and from the judgment this appeal is prosecuted.

Carmichael, Brooks, Powers & Rector and *Verne McMillen,* for appellant.

1. The agent who collected the premiums had authority to, and did, waive the provision in the policy. 83 Ark. 583; 10 L. R. A. (N. S.) 1064; 140 N. W. 851; 68 N. W. 300; 52 N. Y. Supp. 759.

2. The company is liable at least for the time that the deceased was sick, after the expiration of the sixty days, although the sickness commenced within sixty days. This question should at least have been submitted to the jury. If the company did not expect to be liable for the sixty days at $60.00 per month, or so much per day, it should not have accepted and retained the premiums. In any event the company was liable for $60.00 for July and at the same ratio for twenty-four days in August.

Richard M. Mann and *Price Shofner,* for appellee.

1. The transcript does not contain all the evidence. The instructions are supposed to be correct. 89 Ark. 570; 101 *Id.* 555.

2. There was no waiver in this case. 40 Enc. Law & Pr. 254. And there was no intention to waive. 40 Cyc. 261-2. There was nothing to be submitted to a jury. There was no liability whatever.

KIRBY, J. (after stating the facts.) The testimony is undisputed that the policy was issued on the first day of May, 1914, insuring the deceased, J. W. Carland, against disability due either to accident or illness under classification "E," which provides for the payment of the specified sum per month for total disability "by reason of illness that is contracted and begins after this policy has been maintained in continuous force for 60 days."

Neither is there any dispute of the fact that the deceased was taken with the illness on the 14th of May, which was continuous and from which he died. This was the contract made by the parties and the provision is plain and unambiguous, and the company incurred no liability to pay indemnity for any loss resulting to the beneficiary from illness contracted before the policy had been in force for 60 days from its date of May 1st. *American National Ins. Co.* v. *Otis,* 122 Ark. 219.

The insurance company is not claiming a forfeiture under its contract, but only contending as it has the right to do, that it was not bound to the payment of any indemnity resulting from the illness, under the express terms of the contract of insurance, and neither can it be required to pay indemnity for the total disability because of the illness continuing after 60 days from the date of the policy as claimed by appellee, since the company was only bound to pay for disability from an illness which was contracted and began after the policy had been in continuous force for 60 days. In other words, it cannot be compelled under the terms of its policy, to pay for an illness which was contracted before the policy had been in force 60

days, notwithstanding such illness continued beyond the term of 60 days from the issuance of the policy.

There was no testimony tending to show a waiver of this provision of the policy nor any conduct on the part of the insurer that would estop it from relying upon the provisions of the contract made by the parties. *American Insurance Co.* v. *Otis, supra.*

The testimony being undisputed, the court properly directed the verdict. The judgment is affirmed.

PAGE v. COCKRUM.

Opinion delivered March 6, 1916

1. REDEMPTION—TIME.—A. loaned money to B., a mortgage being taken in C.'s name, C. being A.'s husband. C. brought a foreclosure proceeding, and the parties agreed that B. deed the mortgaged property to A., but that if B. should pay the debt within a year that A. would redeed the property to him. During the year certain creditors of C. brought garnishment proceedings against B. *Held,* B. had the right to have the garnishment proceedings disposed of before paying for the property under the agreement, and that his right of redemption, under the agreement, was not limited to the year named in the agreement.

2. MORTGAGES—CONSIDERATION—WIFE'S PROPERTY.—Where money was loaned to B., the note and mortgage being in the name of appellant's husband, *held,* under the evidence that appellant was the real owner of the consideration, and of the note and mortgage taken to secure the same.

Appeal from Baxter Chancery Court; *Geo. T. Humphries,* Chancellor; reversed in part, affirmed in part.

Allyn Smith, for appellant.

1. It is clear the money loaned was Mrs. Page's. It was error to hold that the contract of February 12, was a mortgage and that Cockrum had the right to redeem. A full breach of the original mortgage had been made. The mortgage and note had been merged in the chancery decree. The deed vested in Mrs. Page the fee simple title. Time was of the essence of the contract.

On failure to pay, the deed became absolute. 67 Kans. 758; 74 Pac. 249; 88 Ark. 299.

S. W. Woods, for appellees.

1. The right of appeal is barred. 80 Ark. 513; Kirby's Digest, § 1199.

2. If there was a debt existing the conveyance, whatever its form, is a mortgage. 40 Ark. 146; 75 *Id.* 551; 88 *Id.* 299; 106 *Id.* 583. Cockrum had the right to redeem.

3. Transfers by a man, to his wife, in a failing condition are looked upon with suspicion. 50 Ark. 42; 55 *Id.* 59; 73 *Id.* 174. The testimony shows that the money was the husband's. 84 Ark. 355; 74 *Id.* 161; 105 *Id.* 90; 50 *Id.* 2.

SMITH, J. Appellant alleged in the complaint which she filed that she loaned appellee Cockrum in July, 1903, the sum of $500, which was evidenced by a note for that amount and secured by a mortgage on the land in controversy. That this note was extended from time to time by the payment of the interest until an action was commenced to foreclose the mortgage. The note was made payable to the order of L. J. Page, who is appellant's husband; but it is explained that a Mr. Eatman prepared the papers and that when Mr. Page brought them to appellant to get a check for the amount of the loan she called attention to the error in the papers, but her husband explained to her that this would make no difference as the papers would be delivered into her possession and, assuming this was correct, she drew her check on the Farmers Bank at Siloam Springs for $500.00.

The foreclosure suit was brought in 1910 in the name of L. J. Page, and a decree was rendered ordering the property sold; but before the sale it was agreed between Cockrum and Mrs. Page that Cockrum and his wife should deed the land to Mrs. Page, and that she should execute a bond for a deed under which she agreed to deed the property back to Cockrum in case he paid the balance then due, with the interest thereon, within one year from the date.

About the time of this settlement a fire destroyed Mr. Page's store, as a result of which he became insolvent, and various creditors of the firm of which he was a member recovered judgments against him, and garnishments were run against Cockrum for the money alleged to be due to Page.

On the part of appellees it was denied that Mrs. Page owned the original indebtedness, and it is insisted that the warranty deed to her was a mere change in the form of the security and that the deed is, in fact, a mortgage.

Appellant contends that the deed is what it purported to be; that time was made of the essence of the contract to reconvey; that the title to the land was in her, and not in her husband; and she tendered back certain payments which had been made during the year under the bond for title.

The court found that, notwithstanding the expiration of the year, Cockrum still had the right to redeem the land, and that Mrs. Page was not entitled to a strict foreclosure as against him, and that the money originally loaned was the property of L. J. Page, and not that of his wife, and that the judgment creditors were entitled to apply the balance due by Cockrum upon its being paid into court to the satisfaction of their judgments against Mr. Page.

We think that the proof shows that the $500 was the individual money of Mrs. Page which she derived from the estate of her father, and that her husband acted as her agent and advisor in making the loan, as he was shown to have done in other loans which were made of her money, and that they were both solvent at that time, and regarded it as immaterial that the note was made payable to Mr. Page, instead of Mrs. Page, as the papers were delivered to her and retained in her possession, and the suit to foreclose was brought in her husband's name because the note was so made payable, but when the compromise and settlement was made the deed was taken in

her name because the transaction had been made for her benefit.

Appellant appears to have sold a farm which she inherited from her father for $3,100 cash just before she removed to this State. There was exhibited with her deposition a statement of her account with the bank, which showed it was kept in the name of both herself and her husband, and the account was similarly kept when it was transferred to a bank in the Indian Territory. Mrs. Page drew checks against this account and the check for the $500 which constituted the original loan, although it was drawn in the name of her husband. During this time Mrs. Page was shown to have made other loans, all of which were taken in her own name, and this particular loan was not so taken, according to the evidence in her behalf, because of the lack of specific directions to Mr. Eatman in the preparation of the papers. Mr. Page is an invalid, yet about the time of the original loan he transacted most of Mrs. Page's business for her, and Cockrum testified that in negotiating this loan he supposed he was borrowing the money from Mr. Page, as nothing was said to the contrary. Cockrum further testified that he was garnished by Mr. Page's creditors and that he thereafter made no further payments upon his loan evidenced by the deed and the bond for title, although Mrs. Page's attorney advised him to ignore the garnishments upon the ground that the money due by him was due to Mrs. Page; but he offered at the trial to pay the balance due by him to be applied under the direction of the court.

(1) We think the court was warranted in holding that Cockrum still had the right of redemption, and this is true even though the deed to Mrs. Page was not, in fact, a mortgage, because the garnishment arrested the payments. Cockrum had the right to require that the garnishment against him be dismissed, or disposed of before he could be required to continue his payments, and this is especially true when it is remembered that he had dealt with Mr. Page without knowledge of the existence

of his agency for his wife, and when he had reason to believe, and did believe, that the sum due by him was payable to Mr. Page. It is also shown that Cockrum offered to pay the balance due by him to Mrs. Page's attorney if they would protect him in the event the garnishment should be sustained against him, but they declined to accept his proposition and filed this suit.

So much of the decree as gave Cockrum the right to pay the balance due will be affirmed.

(2) We do not agree, however, with the court below in the application of the money so to be paid. We think the proof reasonably clear that the money did, in fact, originally belong to Mrs. Page, although her explanation of how and where she kept it is not entirely clear and satisfactory, yet at the time of the original loan she and her husband were both solvent. Nor do we think this is a case where the wife has permitted her husband to take charge of her property, to assume control over it, and use it as a basis of credit. It is not contended that any creditor of Mr. Page had knowledge of this transaction. It is true that the mortgage was recorded, but none of the payments made on it were endorsed on the margin of the record where the instrument was recorded, and it was apparently barred by the statute of limitations, so far as the contrary was disclosed by the records, before the credit was extended which formed the basis of the judgments upon which the garnishments issued.

The portion of the decree which directs the application of the balance due by Cockrum to the satisfaction of the judgments against Mr. Page will be reversed and the same is now ordered paid to Mrs. Page.

This appeal was perfected on October 16th, 1915, and it is insisted that, under the Act* of February 17th, 1915, amending section 1199 of Kirby's Digest, it was not taken in time. But we have held to the contrary in the recent case of *Shapard* v. *Mixon,* 122 Ark. 530.

*Act 62, p. 205-6 Acts 1915 (Rep.)

LOUISIANA & ARKANSAS RAILWAY COMPANY v. MASON.

Opinion delivered March 6, 1916.

1. CARRIERS—CARRYING PASSENGER PAST STATION.—Plaintiff, a passenger on defendant's train, was carried past her station, the train conductor having failed to lift her ticket and discover her destination. *Held*, under the evidence the jury was warranted in finding that the conductor should have known of plaintiff's presence and destination, and should have stopped the train for her at her destination.
2. CARRIERS—CARRYING PASSENGER PAST STATION.—DAMAGES.—A verdict of fifty dollars is excessive, when plaintiff, a passenger on defendant's train, was carried past her station, where it appeared that the railway officials were courteous to her, and provided free transportation back to the point of her destination, plaintiff being at the time *enceinte*.

Appeal from Lafayette Circuit Court; *Geo. R. Haynie*, Judge; modified and affirmed.

Henry Moore and Henry Moore, Jr., for appellant.

1 Under the whole of the evidence given in this case appellant was entitled to a peremptory instruction in its favor. Appellee had ample time to have notified the auditor or conductor that she had a ticket for a flag station. 84 Ark. 436; 64 S. W. 905; 18 *Id.* 866; 106 Ga. 826.

2. There was no evidence of any physical injury and no damages should have been allowed for mental anguish. 67 Ark. 123; 88 *Id.* 454. No damages at all were proven; no value of time lost or expense was shown on account of the delay. 67 Ark. 124-130. The judgment is excessive and contrary to the evidence.

D. L. King, for appellee.

There was no error in the refusal to give the instructions asked. This is a different case from 84 Ark. 436. The train was not crowded and the conductor had only two tickets to take up. Appellee was confined to her bed for two weeks and suffered pain as the result of being carried by her station. 64 S. W. 905 is not applicable here. Physical injury was proven; also inconvenience, doctor's bill, medicine, etc., besides mental suffering. The damages are not excessive. 118 Ark. 569.

Smith, J. On December 6th, 1914, appellee purchased a ticket from Stamps, Arkansas, a regular station on appellant's railway to Hafton, a flag station about six miles north of Stamps, and on that day boarded one of appellant's trains at Stamps at about 1:50 p. m. The train failed to stop at Hafton, and on appellee calling the attention of appellant's employees thereto they refused to run the train back to Hafton, but said they would put her off at Patmos, a station 10 or 12 miles north of Stamps, and that she could return on the next train, but they advised her to remain on the train and go to Hope, another station, and there take the train and return to Hafton. This she decided to do, and when her train reached Hope she was escorted to and placed upon the returning train, which left Hope about 25 minutes after her arrival there, and she reached Hafton after a delay of about an hour and three-quarters. Appellee was enceinte at the time and was accompanied by two of her children, one four and one nine years old, and she had at home another child six years old. She stated that she was very much disturbed when the train passed Hafton without stopping, as she had no money with which to pay her return passage, or to telephone her husband, and that she "was worried about her child," meaning the one at home. She testified that she became ill after reaching Hafton and that her illness was in connection with her condition and on account of the coming of the baby, and that she was attended by a physician. She admits, however, that she was very courteously treated by the officials of the train, and that she was assured by the conductor that it would not cost her anything to go to Hope and return. A Doctor Baker was a passenger on the train with appellee from Stamps to Hope, and returned on the next train with her, and he heard the conversation between her and the conductor. He testified that appellee had been his patient on several occasions and that he had also visited members of her family in a professional capacity, and that he did not observe any evidence of fright or terror or mental anguish, and that his attention

would have been attracted had there been such manifestations. He stated that, her condition considered, she would be more easily frightened and excited than she would otherwise, but that she did not exhibit any evidence of mental disturbance.

(1) Notwithstanding the fact that the railway company offered to confess judgment for $5.00, it denied that it is liable in any sum. It insists that a large crowd got on with appellee who were traveling on a party ticket, and that she sat near, or with, the members of this party, and the conductor supposed she was a member of this party, and that the train had passed Hafton before appellee made known her presence on the train and her desire to debark there.

The jury returned a verdict for appellee for the sum of $50, and this appeal has been duly prosecuted.

It is urged that, under the rule announced in *R. I, Ark. & La. Rd. Co.* v. *Stevens,* 84 Ark. 436, appellee is not entitled to recover. But this case is distinguishable from that one on the facts. Appellee did not embark at the point of origin of the train, and the tickets of the passengers on the train had been taken up before she boarded the train. Moreover, the train was a short one, consisting only of two coaches, and there were only two tickets for the conductor to take up, one a party ticket and the other appellee's ticket. And we think the jury was warranted in finding that the conductor should have known of appellee's presence and destination and, consequently, should have stopped the train at Hafton.

(2) It is also insisted that the judgment must be reversed because the proof does not show that appellee sustained any damages as the result of being carried by her station. While we do not agree with counsel in this contention, we do think the damages allowed are excessive. It is not shown that there was any causal connection between appellee's illness and the fact that she was carried by her station. She admits she was courteously treated, and the time which she lost is not shown to have had any money value. She did suffer certain inconven-

ience and annoyance, but we think a judgment for $10 on that account would be a reasonable compensation, and the judgment is, therefore, reduced to that amount and, as thus reduced, is affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. HEWITT.

Opinion delivered March 6, 1916.

FRATERNAL INSURANCE—PROOF OF INJURY—STIPULATION AS TO METHOD OF PROOF.—In a policy of accident insurance in a fraternal order, it was provided that "in the event of fracture * * * satisfactory proof in such case shall be taken to mean an x-ray photograph made" in a certain manner. *Held*, under the policy that the x-ray photograph was not intended as a substitute for evidence of loss to be adduced at the trial, in an action to recover on the policy, and that the insured may resort to other proof at the trial, and the failure of the x-ray photograph to reveal a fracture, will not preclude a recovery on the policy.

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

Wm. A. Roane (of Atlanta, Ga.) and *W. C. Rodgers*, for appellant

The policy sued on provides that, "This covenant is executed in consideration of the compliance on the part of this Guest with the constitution and by-laws of this fraternity now existing or hereafter legally amended, all of which are a part of this covenant." The by-laws thus mentioned became by operation of law a part of the insurance contract. 52 Ark. 202, 206; 55 Ark. 210, 212; 80 Ark. 419, 21; 81 Ark. 512, 514; 105 Ark. 140; 24 Fed. 97; 110 Ia. 642; 89 Mo. App. 621; 34 Mont. 357; 33 Fed. 11.

It is not necessary that the by-laws be referred to in order that they may become binding. 118 Cal. 6.

The assured must come within the requirements of future as well as existing by-laws. 118 Cal. 613.

The constitution of the order reserves the right "From time to time to amend its constitution and by-laws."

One who becomes a member of a mutual insurance company thereby assents to all its by-laws. 123 Ind. 128; 101 Mich. 161. And such a person is conclusively presumed in law to have made himself familiar with the constitution and by-laws. 1 Bac. Ben. Soc., § 157.

And whether they do so or not, the law imposes knowledge thereof on all members. They must take notice of these laws of the order at their peril. 102 Ind. 462; 1 Bac. Ben. Soc. § 81; 7 W. & S. (Pa.) 348, 351; 18 Ia. 425, 531; 46 Vt. 362, 371; 51 Pa. St. 402.

By joining the order the member is deemed to have assented to the by-laws and to have contracted with reference thereto. 46 Vt. 362, 371; 71 Ala. 436.

Even though the member be utterly ignorant of the by-laws, he is nevertheless bound thereby. 123 Ind. 128; 90 Ia. 685; 24 Hun, 149.

Where the right of amendment is reserved in the contract a member can not complain of an amendment even though it may affect him injuriously. 117 Cal. 370; 99 Cal. 392.

A member can not claim the benefit of his contract with the order and in the same breath repudiate the constitution and by-laws by which it is governed and to which it owes its existence. 29 Pa. Sup. Co. 492.

The policy provides that the assured in event of injury shall furnish satisfactory proof thereof, and to make this meaning clear, further provides that "satisfactory proof shall be taken to mean an x-ray photograph made and certified by a physician selected by the eminent director." Thus the assured is definitely directed what kind of proof shall be made. It is conceded that this requirement was not complied with.

The assured recognized his duty of conforming to this method of proof, but the examination did not show a fracture and he repudiated it and resorted to other testimony not authorized by the constitution and by-laws. When the law provides that something must be done in

a certain manner this necessarily precludes any other manner of performance. *Expressio unius est exclusio alterius.* 10 N. Y. S. 436, 437; 28 N. J. L. 491, 497; *Ex parte Jordan,* 94 U. S. 248.

The requirement that the proof shall be made in the manner stipulated necessarily implies that it may not be made in any other. 66 U. S. 55; 103 U. S. 770; 38 Ark. 205, 206; 45 Ark. 524, 527.

If the assured is not required to comply with this by-law, the order should not be required to comply with any other. If the by-law can be ignored by the assured, a member of the order is more powerful than its by-laws. We can see no good reason for such a construction.

D. B. Sain and *T. D. Crawford,* for appellee.

1. It is conceded that the by-laws of a fraternal order become part of the contract, and that the assured is bound by subsequent amendments where the right is reserved in the contract or charter. Vance on Ins. 193; 83 Am. St. 714. But the mere fact that a member agrees to comply with all the laws of the order subsequently enacted in no manner alters the rule that such laws should be given a prospective operation in the absence of a clear intent that they should act retrospectively. 112 Ga. 545; 1 Bacon Ben. Soc., § 187; Niblack, Acc. Ins. and Ben. Soc., p. 62; 104 Fed. 638; 59 Wis. 162; 4 Hun, 339; 22 Ore. 271; 164 Ill. 344; 45 N. E. 543.

2. If the by-laws intended to make plaintiff's right to recover depend upon procuring an x-ray photograph and a physician selected by his "eminence," the "medical director," such a by-law is *unreasonable* and void. 1 Bacon on Ben. Soc., § 85; 54 L. R. A. 602, 605; 55 *Id.* 465; 76 S. W. 259; 78 Minn. 448; 160 N. Y. 549; 172 N. Y. 515.

3. Facts peculiarly within a defendant's knowledge need not be proven by plaintiff. 2 Bacon on Ben. Soc., § 469; 39 Ark. 209; 2 Chamb. on Ev., § 978; 56 Ark. 127. No specific objections were made to the instructions. They should be construed together. The burden was on

appellant to show nonliability. 173 S. W. 838; 80 Ark. 190; 87 *Id.* 115; 108 *Id.* 130; 111 *Id.* 554; 29 Cyc. 232-3.

McCULLOCH, C. J. Appellant is sued on a life and accident insurance policy issued to appellee, as one of its members, the right of action in the case being based on an accidental injury alleged to have been sustained by appellee, resulting in a fracture of one of his arms. There was a trial of the issue before a jury and a verdict in favor of appellee for the full amount mentioned in the policy for that character of injury.

The policy was issued to appellee in the year 1908, and the accidental injury is alleged to have occurred in February, 1915. Appellee adduced the testimony of himself and two or three physicians who treated him, to the effect that his arm was fractured. The affidavits of the physicians were sent in to appellant with the proof of injury, and at the request of appellant the appellee submitted to an x-ray examination by a physician designated by appellant, and furnished the x-ray photograph as a part of the proof of loss, but the photograph did not show that there had been a fracture. The physician who made the x-ray examination testified that there was no evidence disclosed by the examination that there had been a fracture.

Appellant defends on the ground that there is no liability unless the fracture be disclosed by an x-ray examination by a physician of its own selection. It relies, for this defense, upon an amendment to the by-laws enacted subsequent to the date of the issuance of the policy to appellee. The benefit certificate or policy recited that it was executed in consideration of the warranties made by the assured in the application, and his compliance with the constitution and by-laws of the fraternity "now existing or hereafter legally amended, all of which * * * are a part of this covenant." The original by-laws in force at the time of the issuance of the policy to appellee provided that if the beneficiary suffer a fracture of the arm he should be paid the sum of $200, and the policy contains a covenant to that effect.

At the annual meeting of the fraternity in December, 1914, the by-laws were amended by the enactment of another section in the following language: "Section 8, article 11. In the event of fracture as provided in this section, satisfactory proof thereof shall be furnished the society, and satisfactory proof in such case shall be taken to mean an x-ray photograph made and certified to by a physician selected by the eminent medical director, the expense incurred in connection with such proof to be paid by the society."

The constitution and by-laws, as set forth in the record in this case, contain no further reference to a requirement for a proof of loss, and the question of liability turns upon the construction of the amendment quoted above. Much effort is devoted by counsel to discussion of the question whether or not the amendment can be given a retroactive effect so as to apply to a contract with appellee entered into prior to the enactment of the amendment. The view we take of the case in construing the amendment renders it unnecessary for us to enter into a discussion as to how far a fraternal order can go in applying amendments of the by-laws to antecedent contracts of insurance made with its members. The authorities on that subject are not in entire accord. It seems to be very generally settled that where either the policy itself or the by-laws and constitution in existence at the time of the issuance of the policy contain a stipulation for future changes, they may be made, and when made apply to pre-existing contracts. But some of the cases limit the exercise of such power to such changes as do not materially affect the original contract. 29 Cyc. of Law, 72, *et seq.; Fraternal Union of America* v. *Zeigler,* 145 Ala. 287; *Reynolds* v. *Royal Arcanum,* 192 Mass. 150.

But we assume, for the purposes of this decision, that the change in the by-laws was authorized and that it applied to the contract with appellee, and we proceed to determine whether or not the proper construction thereof defeats appellee's right of recovery. The contention of learned counsel for appellant is that furnishing an x-ray

photograph showing a fracture of the arm is a condition precedent to the right of recovery. We do not so interpret the language of the contract, according to the amended by-laws. The provision undoubtedly constitutes a requirement that satisfactory proof of the injury be furnished, and it undertakes to define what satisfactory proof is. According to its language an x-ray photograph is defined to be satisfactory proof, but it does not state that the x-ray examination and the photograph thereof must show the fracture. This is an important distinction, for if it had been intended to make the right to recover depend upon the fact that an x-ray photograph revealed the existence of a fracture, then it could have been expressed in more appropriate language. The original by-law, and the policy issued pursuant thereto, contained an unconditional provision that in case of a fracture of the arm of the beneficiary he should be entitled to the payment of $200. The language of that section stands unamended by the subsequent enactment, but the effect of the new provision brought about by the amendment is that an x-ray photograph made and certified by a physician selected by the fraternity must be furnished as a part of the proof of loss. The language used does not justify us in holding that the proof by an x-ray photograph was intended to be exclusive evidence of the fracture on the merit of the case. Especially is this true in the face of the original provision that a certain stipulated sum should be paid in the event of a fracture.

We think the proper construction is that the undertaking on the part of the insurer was to pay the sum named in case of an accidental fracture, but that the assured must submit to an examination by a physician selected by the fraternity, and an x-ray photograph furnished with the proof of loss. This does not exclude any other proof of the existence of the fracture, but was intended as a requirement to give the officers of the fraternity an opportunity to make the fullest investigation. The assured is not concluded by the fact that the x-ray photograph does not reveal the fracture, but is entitled to prove

that fact by any other competent evidence. It can not be said that because the x-ray photograph is required as the satisfactory proof of loss that the assured must necessarily be bound by it. The contract as to the form of proof of loss under a policy is not intended as a substitute for evidence of loss to be adduced at the trial of an action to recover the amount thereon. Unless the contract itself expressly makes the right of recovery depend upon the existence of the loss as disclosed in the proof furnished, the assured has the right to resort to other proof in the trial of his suit.

Our conclusion, therefore, is that the fact that the x-ray photograph fails to reveal the existence of the fracture does not preclude recovery on the policy, where the assured complied with the terms by submitting to the examination and furnishing the photograph, and has proved his injury by other competent evidence. The issue was submitted to the jury upon instructions in conformity with this view of the law, and we find no error in the record.

The judgment is therefore affirmed.

BANK OF ALMYRA v. LAUR.

Opinion delivered March 6, 1916.

1. EXECUTION SALES—PERSONAL PROPERTY—WHERE MADE.—A sale of personal property sold on execution under a judgment when held in front of the door of the house in which the property is situated, is not invalid because it was not held in the presence of the property to be sold, where it could be seen and examined by prospective purchasers.

2. OFFICERS—TERMS OF OFFICE—VALIDITY OF ACTS.—All public officers shall continue in office after the expiration of their terms until their successors are elected and qualified.

3. APPEAL AND ERROR—ERRONEOUS INSTRUCTION—OWNERSHIP OF PROPERTY—HUSBAND AND WIFE.—Where the ownership of certain personal property as between a husband and wife is in issue, and the evidence would warrant a finding that the property belonged to the husband, it is reversible error not to submit the issue of ownership to the jury.

Appeal from Arkansas Circuit Court, Northern District; *Thos. C. Trimble,* Judge; reversed.

W. D. Rasco and *Lee & Moore,* for appellant.

1. The judgment does not follow and conform to the verdict. 23 Cyc. 825; 47 Ark. 126.

2. The verdict is excessive. The bank was merely a judgment creditor and asked for an execution on the judgment; it did not direct what property should be levied upon. 17 Cyc. 1572; 66 Ark. 562.

3. There was no competent proof as to the profits of the business. 17 Cyc. 1578; 86 Ark. 486.

4. Boswell was, at least, a *de facto* officer. 38 Ark. 150; 25 *Id.* 344. The instructions to the jury were prejudicial. 38 Cyc. 1632.

W. N. Carpenter, for appellee.

1. The property was never levied upon; it was not present at the place of sale; it was not legally advertised, and there was no notice of sale served on either Ida V. or L. Laur.

2. The instructions were fair to both parties and are a correct expression of the law. By not objecting to the instructions given and remaining silent appellant admits the court was right in its charge. 29 Ark. 270; 31 *Id.* 648; 8 *Id.* 388-395; 34 *Id.* 421; 42 *Id.* 236.

3. The verdict and judgment are right and not excessive. The whole question was left to the jury under proper instructions and their verdict is conclusive.

McCULLOCH, C. J. Appellant brought suit before a justice of the peace in Arkansas County against one L. Laur to recover the amount of a promissory note executed by him to appellant, and recovered judgment. An execution was sued out on the judgment and placed in the hands of Sam P. Boswell, as constable, who levied the same on one soda fountain and bar, tank, glassware, chairs and tables, and sold the same under said writ. After sale, the said property was delivered into the possession of the appellant at its banking house and was there stored.

Appellee, Ida V. Laur, is the wife of said L. Laur, and she instituted this action against appellant, and against said Boswell, as constable, and certain other parties who removed the property under the latter's direction, alleging that she was the owner of said property sold under execution, and that the same was wrongfully sold by said constable under the direction of appellant, and that the conversion of the property was wrongful. Appellant and the other defendants answered, setting forth facts in justification of the sale of the property under the execution against L. Laur. It is alleged that the said property was really the property of L. Laur, the defendant in the execution, and that appellee's assertion of title thereto was a mere fraudulent scheme to defraud the creditors of L. Laur. The case was tried before a jury, and a verdict was rendered in favor of appellee, assessing damages at the sum of $1,000 to the property sold, and the sum of $250 for loss of business, and $50 for trespass, making the total sum of $1,300, for which sum judgment was rendered in favor of appellee against appellant.

Appellant was engaged in the banking business at the town of Almyra, and appellee and her husband, L. Laur, were operating in the same town a small business consisting of a soda fountain outfit and a lunch, candy and cigar stand. The business was started in April or May, 1913, and both of said parties assisted in the operation of the business. The proof introduced by appellee, principally her own testimony, tends to show that the business was started on her money and that she leased the house under a written contract executed by her husband and certain other heirs of an estate. The soda fountain outfit was purchased from the American Fountain Fixtures Company under written contract dated April 29, 1913, between L. Laur and said vendor, and the title was reserved in the vendor until the purchase price should be paid. Appellee testified that she sent her husband to Memphis to make the purchase of the soda fountain and that the initial payment was made out of her own

funds, and that she was the real owner of the business and that it was conducted in her own name. Appellee exhibited with her testimony a bill of sale alleged to have been executed to her by her husband, dated September 27, 1913, conveying to her the soda fountain and cold drink outfit—in fact, all of the articles that were sold under the execution.

The cashier of appellant bank testified that at the time of the purchase of the soda fountain he, as cashier, made a loan to L. Laur in the sum of $200 and took his note therefor, and that the first payment on the soda fountain was made by L. Laur out of money deposited to his credit from that loan, and that the balance of the money thus loaned was used in payments on the soda fountain. The judgment obtained by the bank against L. Laur was upon a renewal of that original note. It was also shown by the testimony of the same witness that the deposits of the proceeds of the business were made in the bank at frequent intervals by L. Laur, and that he held himself out to the bank and to the public as being the owner of the business. Numerous other witnesses testified that the business was generally understood in the community to be that of L. Laur and the place of business was known generally as "Luck Laur's" place. The constable, after levying the execution on the soda fountain and cold drink outfit, left the property in the house until date of sale, and the sale was made on the day advertised by an auctioneer standing out in front of the door. Appellee was present and protested against the sale, claiming the property as her own. As soon as the sale was over, the constable summoned several men as help and took the property out of the house, over appellee's protest, and carried it over to the premises of appellant.

The trial court, over appellant's objection, gave an instruction to the jury, stating that the property in controversy was never in fact levied on, and that the sale made by the constable under said execution was illegal and void, and that the jury should not take into consideration the fact that a sale of the property had been made

under execution. This instruction amounted to a peremptory one to find a verdict in favor of the appellee, for there was no other issue in the case except the right to subject the property to sale under the execution. The appellant asked the court to give instructions submitting to the jury the issue whether or not the execution of the bill of sale of the property by L. Laur to his wife, the appellee, was for the fraudulent purpose of hindering or defrauding creditors, but the court refused to give that instruction or any other instruction on the subject.

(1) It was error to give a peremptory instruction to the effect that the sale under the execution was void. The only ground upon which counsel for appellee attempts to defend that instruction is that the sale under the execution was not conducted in the presence of the property, and he cites decisions of this court in support of the rule that the sale of personal property under execution, or under power in a mortgage, must be made in the presence of the property where it can be seen and examined by the prospective purchasers. The testimony concerning this sale is to the effect that it was conducted out in front of the door of the house in which the property was situated, and that appellee was present and protested against the sale. We are of the opinion that the sale was made in such proximity to the property as to satisfy all the requirements of the law in that respect, and that the sale was not invalid on that account.

(2) There is also a suggestion in the brief casting a doubt upon the authority of Boswell to act as constable, but he was at least a *de facto* officer, and the sale was not void for that reason, if for no other. But, in addition to that, there is proof in the record that Boswell had been elected and duly qualified as constable for the preceding term, and that he was holding over without a new induction into office. It does not appear that any successor had been elected and the Constitution (article 19, section 5) provides that all officers shall continue in office after the expiration of their terms until their successors are elected and qualified.

(3) The real question in the case was whether or not appellee was the owner of the property and entitled to hold it against the creditors of her husband, or whether her claim was fictitious and colorable. Appellant introduced evidence which would have warranted a finding in its favor that appellee was not the owner of the property, and that her claim thereto was fictitious. That evidence tends to show that her husband, L. Laur, was operating the business in his own name, and that he bought the soda fountain and made the initial payment by money which he borrowed from the appellant, and that he made all the other payments on it. It would have warranted a finding that her claim was not a *bona fide* one or that she permitted her husband to hold the property out to creditors as his own. Upon that finding of the facts, the jury should have been told that she could not claim the property against the creditors of her husband who extended credit on the faith of her husband's ownership, and that such creditors had the right to enforce their claims by execution. *Mitchell* v. *State,* 86 Ark. 486.

Other assignments need not be discussed, for the reason that what we have already said is sufficient to dispose of this appeal.

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

MORGAN ENGINEERING COMPANY *v.* CACHE RIVER DRAINAGE DISTRICT.

Opinion delivered March 6, 1916.

1. DRAINAGE DISTRICTS—BOUNDARIES—INCOMPLETE DESCRIPTION—INVALIDITY.—An act creating a drainage district will be held void for uncertainty where the description used in the act does not enclose the property attempted to be described, and where, from the language of the act, there is no way of closing the boundaries without doing violence to the plain and unequivocal words used in the statute.
2. APPEAL AND ERROR—REVERSAL AND REMAND OF CAUSE "FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE OPINION."—When on an appeal or writ of error, a cause is reversed and remanded for new

trial, the case stands as if no action had been taken by the lower court; if the facts developed on the second trial remain the same as they were on the first trial, the lower court must be governed in applying the law to the facts by the principles announced by this court in that case which are controlling; if the facts are different, then the lower court may apply a different rule of law.

3. STATUTES—VOID STATUTE—VALIDATING ACT—EFFECT—IMPROVEMENT DISTRICTS.—An act attempting to create an improvement district, which was void *ab initio*, because of uncertainty in the description of the boundaries of the proposed district, will not be rendered valid by the subsequent passage of another act, repealing the former in express terms and providing for the payment of the district's obligations.

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

STATEMENT BY THE COURT.

The Legislature of 1911 passed an act creating the Cache River Drainage District (Act No. 457, Special Acts of 1911, page 1245). Section 1 of which provides: "A drainage and levee district is hereby created and established in the counties of Craighead, Jackson and Lawrence to consist of and contain all that territory in said counties including and bounded by the following lines:

"Commencing at the north boundary line of Craighead County at a point where section line between sections 3 and 4 intersects the said boundary lines; thence south on said section line between sections 3, 4 and 9, and 10, 16 and 15, 21 and 22, 28 and 27, 33 and 34, township 15 north, range 3 east, to where it intersects the south boundary line; thence west on said township line to the northeast corner of section 1, township 14 north, range 2 east; thence south on range line to south line of section 18, township 14 north, range 3 east; thence east one mile to the southeast corner of section 18; thence south on section line between sections 19 and 20, 29 and 30, 31 and 32, to the south township line; thence west on said township line to St. Louis Southwestern Railroad Company; thence in a southwesterly direction along said railroad to the southeast corner of section 12, township 13 north, range 2 east; thence west on south section line of said

section 12, and on section lines between sections 11 and 14, 10 and 15, 9 and 16, 8 and 17 and 18 to where it intersects range line between ranges 1 and 2; thence south on said range line to south boundary line of Craighead County; thence west on south boundary line of Craighead County to the southwest corner of said county; thence west on the south boundary line of township 13 to range line between ranges 2 and 3, Jackson County; thence north on said range line intersecting the boundary line between Lawrence and Jackson county, to the St. Louis, Iron Mountain & Southern Railway Company; thence in a northeasterly direction with the railroad to where it intersects township line between townships 15 and 16 north, range 1 east, in Lawrence County; thence east on said township line to the northwest corner of Craighead County; thence east on the north boundary line of said Craighead County to the point of beginning."

The board of directors of the district entered into a contract with the appellant to do the engineering work for the district. The appellant entered upon the work under this employment and continued as the engineer of the district until the General Assembly of 1913 repealed the act of 1911, referred to above (see Acts 1913, page 512). The appellant held warrants for its services, issued by the board of directors on the treasurer of the district for the sum of $15,652, which it presented to the county court of Craighead County, pursuant to the provisions made by the repealing act of 1913. It set up its contract, alleged that it performed the work, which had been liquidated by the issuance to it of the warrants covering the sum above claimed, and asked that these warrants be allowed and paid.

Certain land owners intervened and contested appellant's claim on the ground that the amount claimed under the contract was excessive and that under the repealing act appellant could only recover upon *quantum meruit*. The county court reduced appellant's claim and it appealed to the circuit court. The case was there tried before a jury, and from a judgment rendered in the cir-

cuit court both parties appealed to this court. So this is the second appeal. *Morgan Engineering Co.* v. *Cache River Drainage District,* 172 S. W. 1020, 115 Ark. 437.

On the former appeal we stated the issues between the respective parties as follows:

"It is the contention of the drainage district that under the terms of the repealing act the engineering company could recover only such compensation as the jury might find reasonable; on the other hand, the engineering company contends that its compensation should be measured by the terms of the contract, and that having done all the preliminary work required under the act it was entitled to recover from the drainage district 2 per cent. of the estimated cost of construction of the whole work."

We held on the former appeal that the compensation of the appellant should be measured by the terms of the contract, and not upon *quantum meruit.* The court reversed and remanded the cause for errors in the trial court's instructions which resulted in an erroneous verdict. In the opinion we prescribed the correct rule for ascertaining the amount due appellant and remanded the cause for "further proceedings in accordance with" the opinion.

On retrial the interveners, by leave of the court, filed additional exceptions to the claim of appellant, setting up that the original act creating the drainage district was void for uncertainty, in that the metes and bounds set forth in the act did not describe any particular territory; and the interveners alleged that the board of directors therefore had no authority to enter into a contract with the engineering company, and that consequently there was no lien existing on the lands of the interveners, and that the Legislature had no power to fix a lien on the same.

Substantially the same testimony was adduced at the last trial as in the first, and in addition Morgan, an expert engineer, testified in part as follows:

"The description of the boundaries of the Cache River Drainage District as given in Act No. 457 of the Special Acts of 1911, contains a typographical error in this way: The act states, 'Thence west on the south boundary line of Craighead County to the southwest corner of said county; thence west on the south boundary line of township 13 to range line between ranges 2 and 3, Jackson County.' Now that figure '3'—if the figure '3' were read a figure '1' the entire description would be made intelligible, because the act reads further: 'Thence north on said range line intersecting the boundary line between Lawrence and Jackson Counties,' which call would be properly carried out by changing the figure "3" to a figure '1,' but it is not properly carried out by leaving the figure '3,' because in the latter case the line is carried to a point that does not touch Lawrence County." He was asked, "What county would it touch," and answered, "Independence County."

The appellant presented the following requests for declarations of law:

"1st. That all matters and questions which were made or might have been made on the former trial can not be properly made here, but that this proceeding must relate solely to matters left open by the opinion of the Supreme Court.

"2nd. That the act of 1913, repealing the act creating the Cache River Drainage District is more than a curative act, and is in fact a legislative levy against the lands included in the assessment, and that such a levy is valid regardless of any imperfection or infirmity in the description in the original act.

The court refused these requests, and, over the objection of appellant, made, among others, the following findings of fact:

"3rd. The act of 1911 is void for uncertainty.

"4th. There is nothing in the repealing act which in any manner attempts to cure any defect in the original act," and declared the law to be that the act creating the Cache River Drainage District "is void for failure to

define the boundaries of the district with certainty, and that the act of 1913, repealing the above mentioned act, does not cure the uncertainty of said original act," and rendered a judgment in favor of the appellees, from which appellant has duly prosecuted this appeal.

Allen Hughes, for appellant.

1. This is an action upon a contract. The decision of this court upon the former appeal is that appellant was entitled to recover. It is conclusive. The former decision is conclusive where the facts are not different. Black on Jud. Prec. p. 283; 79 Ark. 185; 14 *Id.* 427, 621; 85 *Id.* 158; 92 *Id.* 554; 97 *Id.* 147; 104 Ark. 459; 108 U. S. 101 and many others, etc.; 152 Wisc. 589; 124 Fed. 171; 211 Ill. 183; 132 N. C. 86; 97 Ark. 147; 116 U. S. 567.

2. The description of the district is sufficient. 93 Ark. 168. But, if defective, the Legislature had power to authorize the assessment of the lands benefited. 107 Ark. 285; 113 *Id.* 363; 119 Ark. 188. If the creating act was invalid the provision in the repealing act for compensation would nevertheless be good. 83 Ark. 344; 170 U. S. 45; 98 *Id.* 113.

3. It is too late to raise the point of misdescription That is settled. No new evidence was offered on the trial. The act is a public act and the court takes judicial cognizance of such. 4 Wigmore on Ev. § 2572; 19 Ark. 630; 23 *Id.* 387.

4. The description is sufficient. There is a perfect identification of the lands subject to assessment. 107 Ark. 285; 113 *Id.* 363; 119 Ark. 188. The act amounts to a legislative levy and is a valid exercise of legislative power. 83 Ark. 344; 98 *Id.* 113.

Hawthorne & Hawthorne and *D. K. Hawthorne,* for appellees.

1. The act is void for uncertainty. 105 Ark. 308; 118 Ark. 119. The question of jurisdiction may be raised at any time. Here there was a void district, a void contract and there can be no recovery. 90 Ark. 195; 88 *Id.* 1; 70 *Id.* 346; 48 *Id.* 151.

2. The act of 1913, repealing the act of 1911 is also void in that it attempts to place an undue burden upon the property, by exempting property of railroads, public roads, tram roads and town lots within the original district. 48 Ark. 370; 96 *Id.* 419.

3. Interveners are not estopped. 52 Ark. 473; 79 *Id.* 475. On a reversal the case stands as if no action had been taken by the lower court. 29 Ark. 85; 73 *Id.* 513; 119 Ark. 188.

WOOD, J. (after stating the facts). (1) In its opinion the learned trial court states as follows: "The act of 1911 is void for want of a definite description of the boundary of said district. An examination of the public maps and surveys of the State will show that there is no possible certain way of closing the boundaries of said district without doing violence to the plain and unequivocal words used in the statute. It is doubtful whether it was intended by the statute to use as a boundary the range line between 2 and 3 in Jackson County, 2 and 1 in Jackson County, or 1 east and 1 west, between Jackson and Craighead Counties. It is certain that if the range line between 2 and 3 in Jackson County is followed north that no point on the Iron Mountain Railway can be reached. It follows that the attempted description of the drainage district is void for uncertainty. Therefore, no act or contract of the directors would have any validity. The repealing act, treated as a curative act, does not attempt to make certain the boundaries of the district, and as a curative act, can not do more than cure irregularities. The Legislature would be without power to create a drainage district having no boundaries; therefore, the repealing act would not cure the void act referred to."

These conclusions of the learned trial judge are correct and we hereby adopt and aprove them as our own.

In *Ferrell* v. *Keel,* 105 Ark. 380-392, this court had under review an act creating a certain levee district, in which the boundaries of the district were not any more accurately defined than they are in the present case. In that

case we said: "We understand the law to be that, when the Legislature creates a levee or other improvement district, it must define its boundaries with certainty, or provide for the same being done by some other agency. The Legislature undertook to define the limits of this district. We have carefully considered the act, and hold that it fails to define the limits of the district with sufficient certainty to determine what lands are included therein." Then, after setting out the defects, the court continues: "There are other defects in the description, but we do not discuss them, as those already mentioned are sufficient to defeat the act for uncertainty in the description of the territory proposed to be embraced therein. We hold the act invalid for this reason." So here.

Counsel for appellant says: "The act calls for the range line between 2 and 3 running to south line of Lawrence County. That line does not run to the monument named. No range line between 3 and any other township whatever, and no range line between 2 and any other township whatever except 1 would reach the south line of Lawrence County. No other range line in the district would do so. We can not make the call mean anything without making it mean the range line between 1 and 2, and so construed it harmonizes with the remainder of the description."

To make such a radical change in the language of an act of the Legislature as is here pointed out in order to make certain the description of the boundaries of an improvement district is purely a legislative, and not a judicial function. There is nothing to indicate that the defective description was a mere clerical misprision, and we find no authority in any of the canons of construction that would justify us in substituting entirely different words and figures for those actually used by the Legislature in order to effectuate what we might conceive to be the legislative purpose. To do so would be to ignore the language actually employed by the Legislature and to substitute therefor our own. The inten-

tion must be gathered, mainly, from the language of the act itself. *State* v. *Lancashire Ins. Co.,* 66 Ark. 466-72.

(2) In reversing the case on the former appeal we said: "The court should have taken proof of the value of the services under the contract which had been performed by the engineering company at the time the repealing act was passed, and should have found for the engineering company for that amount."

Counsel for apellant contends that the circuit court was foreclosed, on the last trial, by the above language, from inquiring into the validity of the contract, because such language was an adjudication of the binding effect of the contract, and that appellees are bound by the above language under the doctrine that such language, whether right or wrong, was the "law of the case." And he cites numerous authorities upon which he relies, among others, the following: *Scott* v. *Fowler,* 14 Ark. 427; *Yell* v. *Outlaw,* 14 Ark. 621; *Hollingsworth* v. *McAndrew,* 79 Ark. 185; *National Surety Co.* v. *Long,* 85 Ark. 158; *St. Louis, I. M. & S. Ry. Co.* v. *York,* 92 Ark. 554; *Lewis* v. *Jones,* 97 Ark. 147.

These decisions but announce and adhere to the rule that where an issue has been raised in the court below and has been finally adjudicated on appeal to the Supreme Court, the same issue cannot be re-opened on another trial in the circuit court, and that where a cause, on the former appeal, is reversed and remanded for a new trial, if there was not any material change in the second trial from the testimony and facts established in the first trial, the principle of law announced as applicable to those facts in the first trial must also prevail in the second, even though this court should conclude on the second appeal that the principles of law announced on the first appeal were erroneous. *Lewis* v. *Jones, supra; Westerfeld* v. *New York Life Ins. Co.,* 107 Pac. 699.

But this doctrine can have no application here for the reason that on the former appeal the judgment was reversed because the court erred in its instructions to the jury, and the case was remanded with directions,

not "to render judgment in accordance with the opinion," but, for "further proceedings in accordance with the opinion." There is a marked distinction between the two. "Further proceedings" contemplated that there was to be a new trial on the issues that might be presented, and that proof might be introduced on these issues. The order was in effect a remand for a new trial in general. Of course, all further proceedings that were to be had were to be in accord with the opinion, and if the issues on the second trial and the testimony remained substantially the same, then the appellant would have been entitled to a judgment for the value of its services under the terms of the alleged contract under which it claimed, computed in the manner directed by this court in its opinion on the former appeal. But, as was said in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *York, supra,* "The finding of the facts upon the former appeal can not be binding as the finding of facts in this second trial, because the testimony on the second trial might be different from or additional to that given on the first trial. But the principles of law determined and announced upon the former appeal are binding, and must stand as the law of this case; and if the testimony upon this second trial is substantially the same as on the first trial, then the former decision of this court upon all questions of law involved in this case must be followed on this appeal."

In the case of *Hollingsworth* v. *McAndrews, supra,* relied on by appellant, "the case was not reversed and remanded for a new trial," or for further proceedings, but with instructions to the lower court "to render judgment in accordance with the opinion."

The rule of law which controls here is as follows: "When, on an appeal or writ of error, a cause is reversed and remanded for new trial, the case stands as if no action had been taken by the lower court. If the facts developed on second trial remain the same as they were on the first trial, the lower court must be governed in applying the law to the facts, by the principles an-

nounced by this court in that case as controlling. If the facts are different, then the lower court may apply a different rule of law." *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475.

Now, on the first trial the appellees, interveners, did not challenge the validity of the drainage district, and they introduced no evidence to show that the district was invalid. Their contention was that under the act abolishing the district the appellant should be allowed to recover only such conpensation as the jury might find reasonable. They did not directly call in issue appellant's contract, but only claimed that it was not entitled to recover under it. On the last trial the issues were entirely changed. By permission of the court the appellees were permitted to put forth an entirely new defense to appellant's claim, and to set up that, the district being void for uncertainty, the directors had no authority to enter into a contract with appellant, and that therefore such contract was void, and that appellants were not liable at all, and they introduced evidence to sustain their contention. Thus the issues and the facts on the last trial were entirely different from what they were on the former appeal, and hence what was said by us in the former opinion as to the contract and its binding effect would not be law applicable to the changed issues and facts as discovered by this record.

(3) Counsel for appellant contends that, although all the prior proceedings were invalid, yet the general assembly had power to pass the act of 1913 abolishing the district and directing a levy upon the lands intended to be benefited for the preliminary expenses incurred under the alleged contract with the appellant, and that the act levying the assessment for this purpose adopted the description of the lands as assessed, and that therefore this latter act was not void for uncertainty. Citing, *Board of Dir. Crawford Co. Levee Dist.* v. *Dunbar,* 107 Ark. 285; *Fellows* v. *McHaney,* 113 Ark. 363, 371; *Thibault* v. *McHaney,* 119 Ark. 188, 177 S. W. 877. We can not agree with this contention of counsel, for the act

of 1911, purporting to create the Cache River Drainage District, as we have seen, was void *ab initio* because of the uncertainty in the description of the boundaries of such district. In the cases cited by appellant to support its contention the acts creating the districts were valid acts, and the districts were therefore legally brought into existence, and there was authority for incurring the preliminary expenses in forwarding and promoting the improvement contemplated. But such was not the case here.

The act of 1913 did not purport to and could not cure the defects of description in the act of 1911 that rendered the so-called Cache River Drainage District void for uncertainty; and it was not within the power of the Legislature of 1913 to validate contracts made with those acting in the capacity of directors of a district that never had in fact any existence and to make the preliminary expenses incurred under these void contracts liabilities against the land included in the proposed district. To do this would be taking property of the appellees and other land owners without due process of law and without compensation.

It follows that the court did not err in refusing appellant's request for declarations of law, and did not err in the findings of fact and declarations of law made by it, and its judgment in favor of the appellees is correct and must therefore be affirmed.

SALLEE v. BANK OF CORNING.

Opinion delivered March 6, 1916.

1. IMPROVEMENT DISTRICTS—CUSTODY OF FUNDS—RIGHT OF TREASURER TO SUE.—The duly elected treasurer of a drainage district organized by Special Act No. 197, Acts of 1911, page 544, is made by the act, the custodian of the funds of the district, and he has a right to maintain an action against any person or corporation improperly withholding the money of the district from him.
2. APPEAL AND ERROR—DEMURRER—TEST.—In determining whether or not a demurrer to a complaint should be sustained, every allegation made therein, together with every inference reasonably deducible therefrom must be considered.

3. IMPROVEMENT DISTRICTS—FUNDS—ACTION OF TREASURER.—In an action by the treasurer of a drainage district for the recovery of funds belonging to the district, the complaint *held* to allege that appellees were in possession of the same and were withholding the funds from the treasurer, and that a demurrer thereto should be overruled.

4. SERVICE OF SUMMONS—SEVERAL DEFENDANTS—RESIDENTS.—The treasurer of a drainage district may bring an action against three defendants in the county of the residence of two of them, and service upon the third in the county of the latter's residence will be valid.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant sued appellee to recover the sum of $26,775.81 with the accrued interest, the amount alleged to be due him as treasurer of Running Lake Drainage District, by appellees.

Appellant, in his complaint, alleged: That J. O. Sallee is treasurer of Running Lake Drainage District in Randolph County, Arkansas; that he succeeded Ferd Spinnenweber as treasurer of said district; that said district was duly organized under act number 197 of the acts of the General Assembly of the State of Arkansas, approved April 20th, 1911; that Ferd Spinnenweber was on the 13th day of May, 1913, elected treasurer of said district, and that the United States Fidelity & Guaranty Company for a valuable consideration became surety upon a bond which said Spinnenweber executed to the president of said Drainage District as such treasurer; that said bond was conditioned for the safe keeping and faithful accounting of all the funds of the district that came in the hands of said Spinnenweber as treasurer. A copy of the bond is made exhibit A to the complaint.

The plaintiff further alleges that the term of office of said Spinnenweber as treasurer expired on the 7th day of June, 1915, and that on said date, J. O. Sallee was duly elected and qualified as treasurer of said district; that he filed his bond as required by law and became

entitled to the possession of all the funds belonging to said district; that the sum of $26,775.81 was in the hands of Spinnenweber as such treasurer; that said funds at a prior date had been deposited in the Bank of Corning, a corporation doing business in Clay County, Arkansas; that said Spinnenweber executed and delivered to said Sallee a check upon the Bank of Corning for said sum of $26,775.81; that said check was duly presented to the Bank of Corning and payment thereof was refused by said bank; that said Bank of Corning is wrongfully withholding said sum of money to which Sallee is entitled as treasurer of said Drainage District; that demand was made upon said Bank of Corning and said Spinnenweber for the payment of said money on June 7th, 1915, but that same was then and at all times since then, has been refused.

Appellees, Ferd Spinnenweber and United States Fidelity & Guaranty Company demurred to the complaint on the following grounds:

1. That said complaint shows on its face that Sallee had no authority to maintain the action.

2. That said complaint does not state a cause of action against them.

3. That the bond sued on and made a part of plaintiff's complaint is made to the president of the Drainage District and Sallee had no authority or right to bring an action thereon; that the check described in the complaint and made an exhibit thereto, shows on its face that it is not properly executed in that it is not signed by the president and board of directors as required by sections 17 and 22 of the act creating the Drainage District.

The demurrer was sustained by the court and appellant, electing to stand on his complaint and refusing to plead further, his cause of action was by the court dismissed at his cost.

Thereupon appellee Bank of Corning filed its motion to quash the service of summons on it for the reason that it is a corporation organized under the laws of the State

of Arkansas and engaged in the banking business in Clay County and that summons was served on its president in Clay County. The motion was by the court sustained and service of summons on said bank was by the court quashed.

From the judgment rendered appellant has duly prosecuted an appeal to this court.

Campbell, Pope & Spikes, for appellant.

1. The appellant as treasurer of the District had the right to demand the amount and bring suit. Act No. 197, Acts 1911; Kirby's Digest § 5999, 6002; 39 Ark. 172; 30 *Id.* 69; 145 Ind. 496; 42 N. E. 753.

2. The court erred in quashing the service of summons upon the Bank of Corning. But service on both the other defendants gave the court jurisdiction. Kirby's Digest, § 6072.

C. H. Henderson and *G. B. Oliver,* for appellees.

1. The treasurer could not maintain this suit. Act 197, Acts 1911, § § 2, 4, 41; 85 Ark. 223.

2. The demurrer was properly sustained. The bond was executed to the president of the district. Only the president or the district could sue. 39 Ark. 172 and 30 *Id.* 69 are not applicable to this case. In those cases *they were public officers,* while here Sallee was not a public officer; furthermore the act contemplates that all suits shall be brought in the name of the district.

HART, J. (after stating the facts). We think the treasurer of the district was the real party in interest and had authority to sue for the money belonging to the district. In the case of *Haynes* v. *Butler,* 30 Ark. 69, the court held: That the county treasurer has capacity to sue or collect on his official bond for a failure to pay over money to him at a delinquent tax sale in excess of tax penalty and costs. The court said, that, as a general rule, all public officers, though not expressly authorized by statute, have a capacity to sue, commensurate with their public trusts and duties. In *Hunnicutt* v. *Kirkpatrick, Treasurer,* 39 Ark. 172, the court held, that either the State, the obligee

in the bond as trustee of an express trust, or the county treasurer, may maintain an action on his predecessor's bond for the amount of school funds found, upon settlement with the county court, to be due from him.

Running Lake Drainage District was created by Special Act of the Legislature of 1911. See Special Acts of 1911, page 544. Section 4 of the act provides for the officers to be elected biennially. One of the officers is a treasurer. Section 11, makes it the duty of the treasurer to collect assessments for the district. Section 17 also provides that the treasurer shall collect the annual taxes and assessments upon the property within the district. It also provides that he shall give a bond with approved security payable to the president, conditioned upon his honest and faithful accounting for funds. It further provides that he shall be the financial agent of the Drainage District and shall give a receipt for the funds due the district and pay out the same only upon the warrant of the secretary endorsed by the president. It also provides that he shall take charge of the funds arising from the sale of the bonds issued by the district. Section 22 also provides that the money arising from the sale of bonds shall be paid into the treasury of the Levee and Drainage Board. Section 24 also provides that moneys borrowed or arising from the sale of bonds shall be paid into the treasury of the Levee and Drainage Board.

(1) Thus it will be seen that the treasurer is made the custodian of the funds of the district. Among his duties is, that of disbursing the moneys of the district to the proper persons. It is true money could only be paid out by him on the warrant of the secretary countersigned by the president, but he alone, had authority to pay out money for the district or handle any funds belonging to the district. He was entitled to the possession of the money of the district that he might properly perform his duties as treasurer, and in order that he might properly disburse it as provided for in the act creating the district. Therefore he had a right to maintain an action against any person or corporation improperly

withholding the money from him in order that he might execute his trust.

It is true, as contended by counsel for appellees that the bond was made payable to the president of the board and under the authorities referred to, the president of the board, as obligee of the bond, might have brought an action on it against the treasurer when improperly withholding the funds from his successor in office, but in case of recovery the court should have ordered the money deposited in the treasury of the district as provided for by the act.

The president of the board did not have any authority to handle the funds of the district. As we have already seen, the treasurer alone was entitled to the funds, and as the real party in interest, had the right to maintain this action.

Again it is contended by counsel for appellees that the check was the foundation of the action and for that reason controlled the allegations of the complaint and that the check was not signed by Spinnenweber as treasurer of the district; nor made to Sallee as treasurer; that it follows that Sallee as treasurer could not maintain an action on the check against the Bank of Corning or against Spinnenweber, because the check had never been assigned to him as treasurer.

In answer to this contention we need only say that the foundation of the suit is not the check given by Spinnenweber to Sallee. The complaint alleges that Sallee was duly elected treasurer of the district and qualified as such and was entitled to the funds of the district; that Spinnenweber had in his possession certain funds belonging to the district when his term of office expired, and refused to turn over the funds on hand to his successor in office. His refusal to pay over the funds of the district to his successor in office was the basis of the action. His giving the check only amounted to an admission that the amount named in the check was the amount of funds in his hands belonging to the district.

It is also contended by counsel for appellee that the judgment should be upheld because there is no allegation in the complaint that Spinnenweber as treasurer deposited the funds in the Bank of Corning and no allegation that the funds were not still on deposit in the Bank of Corning to the credit of the Drainage District.

(2) In determining whether or not a demurrer to a complaint should be sustained, every allegation made therein, together with every inference reasonably deducible therefrom must be considered. *Gus Blass Dry Goods Co.* v. *Reinman,* 102 Ark. 287; *McLaughlin* v. *The City of Hope,* 107 Ark. 442, and cases cited; *Arkansas Life Ins. Co.* v. *American National Ins. Co.,* 110 Ark. 130.

(3) Tested by this rule, we think the complaint alleges that Spinnenweber deposited the funds of the district in the Bank of Corning and that the funds are now in the bank and are wrongfully withheld by it from the custody of the present treasurer.

The complaint alleges in express terms, that prior to the time the present treasurer was elected and qualified, that Spinnenweber deposited the funds in the Bank of Corning; that demand was made on the bank and payment thereof was refused.

Again the complaint alleges that the Bank of Corning is wrongfully withholding said sum of money belonging to said district to which the plaintiff is entitled as its treasurer. Again the plaintiff alleges that demand was made upon the Bank of Corning and Spinnenweber for the payment to plaintiff of said money on June 7, 1915, but that same was then, and at all times since then has been refused. Therefore we think the allegations of the complaint were sufficient to entitle the plaintiff to maintain the action, and that the court erred in sustaining the demurrer thereto.

(4) The court also quashed the service of summons upon the Bank of Corning. The suit was commenced in Randolph County and service of summons against Spinnenweber and the United States Fidelity & Guaranty Co., was had in that county. The Bank of Corning

had its place of business in Clay County and service of summons was had upon its president in that county. This was sufficient.

Under section 6072 of Kirby's Digest, an action like the present one may be brought in any county in which one of several defendants resides or is summoned. If the suit had been against the Bank of Corning alone, it should have been brought in Clay County where the bank was situated and did business. See section 6067 of Kirby's Digest. However, as we have already seen, the suit was brought against the Bank of Corning and other defendants and service was had upon the other defendants in Randolph County. They were proper parties to the suit and judgment against the Bank of Corning could be upheld under section 6072 of Kirby's Digest. See *Beal-Doyle Dry Goods Co.* v. *Odd Fellows Building Co.*, 109 Ark. 77.

From the views we have expressed it follows that the court erred in sustaining the demurrer to the complaint and for that error the judgment must be reversed and the cause will be remanded for further proceedings according to law.

ROSE v. STATE.

Opinion delivered March 6, 1916.

1. CARNAL ABUSE—CONVICTION—INDICTMENT FOR RAPE.—An indictment for rape of a female under the age of sixteen years will sustain a conviction of carnal abuse.
2. CARNAL ABUSE—SUFFICIENCY OF THE EVIDENCE.—The evidence held sufficient to sustain a verdict of carnal abuse.
3. TRIAL—IMPROPER ARGUMENT—INVITED ERROR.—Improper argument can not be complained of if it is necessitated by what was said in the argument of an adversary, the error being invited.

Appeal from Conway Circuit Court; *M. L. Davis*, Judge; affirmed.

Edward Gordon and *Sellers & Sellers,* for appellant.

1. The evidence is insufficient to support the verdict. The testimony of the prosecutrix is supported by no evidence whatever. 6 Cal. 221; 65 Am. Dec. 506.

2. The motion in arrest should have been sustained. Defendant was charged with rape, he could not be convicted of carnal abuse. 54 Ark. 664; 50 *Id.* 330; 44 *Id.* 265; 93 *Id.* 168; 83 *Id.* 379; 75 *Id.* 574.

3. The cause should be reversed because of the improper arguments of counsel for the State. 12 Cyc. 571; 20 Pac. 719; 62 *Id.* 1035; 32 N. E. 305; 87 Mo. 574; 18 S. W. 1003; 15 Neb. 20; 62 N. H. 675; 64 Vt. 432; 34 So. 1025; 39 *Id.* 370; 66 N. E. 207; 62 N. W. 709; 88 S. W. 339; 100 Ark. 100; 74 *Id.* 259. There is no way of keeping counsel within bounds except by setting aside the verdict. 66 Ark. 126; 61 *Id.* 130; 62 *Id.* 516; 71 *Id.* 415; 70 *Id.* 306; 80 *Id.* 23; 81 *Id.* 231 and 23 other cases from the Arkansas Reports.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant Attorney General, for appellee.

1. The motion in arrest was properly refused. Kirby's Digest, § 2005, 2008, 2413, 96 Ky. 73, 75 Ky. L. Rep. 55; 97 Mass. 61; 82 Ky. 549; 75 Ark. 267; 50 *Id.* 236; 103 *Id.* 119.

2. There was no prejudicial error in the remarks of the prosecuting attorney. 109 Ark. 137; 84 *Id.* 128; 91 *Id.* 43; 74 *Id.* 256; 95 *Id.* 326; 69 Wisc. 32; 100 Minn. 396; Thompson on Trials, § 964; 13 Col. 69; 77 S. W. 216; 38 Cyc. 1501; 185 Ill. 546; 93 Ark. 66; 75 *Id.* 350; 77 *Id.* 1; 112 *Id.* 267.

3. The testimony supports the verdict and there is no error in the court's instructions. 109 Ark. 449; 104 *Id.* 142; 101 *Id.* 570; 109 *Id.* 130, 138; 92 *Id.* 120; 50 *Id.* 511.

HART, J. Appellant was indicted for the offense of rape upon a female under the age of sixteen years and convicted of the offense of carnally knowing her, under section 2008 of Kirby's Digest.

From a judgment of conviction he has duly prosecuted an appeal to this court.

It is insisted by counsel for appellant that the offense of which he was found guilty, is not in a degree of or included by the one for which he was indicted as provided by section 2413 of Kirby's Digest.

(1) We have decided that an indictment for rape of a female under the age of sixteen years will sustain a conviction of carnal abuse. The difference between the two offenses being that in order to convict him of the greater, it was necessary to charge and prove that he had carnal knowledge of the female mentioned, forcibly and against her will and consent, whereas the lesser offense was made out by proof of carnal knowledge of her, though had by her consent. See *Coates* v *State,* 50 Ark. 336; *Henson* v. *State,* 76 Ark. 267; *Peters* v. *State* 103 Ark. 119.

The facts are as follows: The mother of Maggie Moreland, the prosecuting witness was dead, and she was placed in the Orphan's Home at Morrilton, Arkansas. On the 15th day of June, she went to the home of Gilbert Rose to live as a member of his family, and stayed there about two weeks when she was carried back to the Orphan's Home because she had stated that the defendant, Richard Rose, a brother of Gilbert Rose, had ravished her. She detailed the circumstances attending the commission of the crime as follows:

Q. Did this Richard Rose that is being tried for abusing you, did he ever mistreat you?

A. Yes.

Q. Where was it that he did that?

A. In the garden.

Q. Where was Mrs. Rose?

A. She was at Gilbert's daddy's, George Rose.

Q. Where was Gilbert?

A. He was there, too.

Q. What time in the day was it?

A. About twelve o'clock, somewhere along there.

Q. What were you doing in the garden?

A. Hoeing tomatoes.
Q. Were you by yourself?
A. Yes.
Q. What did he do to you?
A. He grabbed me and threw me down.
Q. Did he get between your legs?
A. Yes.
Q. Did you see it?
A. Yes, I did.
Q. Did he place his privates in you?
A. He tried to.
Q. Did he do that?
A. I don't know.
Q. Did he get that into you?
A. I don't know.
Q. Did he hurt you?
A. A little bit.
Q. How long did he stay on you?
A. I don't know.
Q. Was it a good little bit?
A. Yes.
Q. What were you doing; did you cry out or anything?
A. Yes.
Q. Did you try to get him to quit?
A. Yes.
Q. Did you know he was doing wrong?
A. Yes.
Q. Did he hold you?
A. Yes.
Q. Were you hurting when you got up?
A. Yes, a little.
Q. Did he say anything to you?
A. No.
Q. Told Mrs. Rose about it?
A. Yes.
Q. At the time this occurred in the garden it was between 12 and 1 o'clock?
A. Yes.

Q. Was it before dinner?
A. No.
Q. Who eat dinner with you?
A. The home folks eat with me.
Q. Who were they?
A. Gilbert and his wife.
Q. How far is it from there to his father's?
A. A quarter I guess.
Q. How long you say it was after you eat until this occurred in the garden.
A. Well, sir; I can't tell.
Q. How far was it from the garden to the house?
A. Right in front of the house.

When the prosecuting witness was carried back to the Orphan's Home, the superintendent had her examined by two physicians. They testified that they found the hymen gone which indicated that she had had sexual intercourse. That the hymen was hanging in shreds. That copulation would cause this; but that it might be destroyed by other objects penetrating it. That if the intercourse had been had against her will it was possible that she could have gotten up and gone to work at once, but that it was highly improbable.

On cross-examination, the prosecuting witness admitted that she had testified that she was only twelve years old when the offense was committed. There was other evidence to show that she was fourteen years old.

Other physicians testified that under the circumstances detailed by the prosecuting witness it was highly improbable that she could have gotten up at once and gone to work. There was also evidence that Richard Rose got out a license to marry the prosecuting witness and in his application stated his own age at eighteen years and her age at fifteen years.

The defendant, Richard Rose, denied that he assaulted Maggie Moreland and denied that he had sexual intercourse with her. He admitted that he became engaged to marry her while at his brother's house, and that they became engaged the first time he talked to

her there. Evidence was also adduced by the defendant tending to show that the prosecuting witness had had sexual intercourse with another man. That Mrs. Gilbert Rose was sick on the day of the alleged assault and that defendant did not have intercourse with the prosecuting witness while she was at the home of Gilbert Rose. The prosecuting witness denied that she had had sexual intercourse with any other man.

(2) It is earnestly insisted that the evidence does not support the verdict. Counsel for the defendant point out that leading questions were asked the prosecuting witness. That it was highly improbable that the prosecuting witness could have gone to work at once if the intercourse had been under the circumstances testified to by her. It is true all the physicians testified to this fact. Counsel also point to the fact that the prosecuting witness first testified that the intercourse was had on a certain day and that several witnesses testified that Mrs. Rose was at home sick on that day, and that it was not possible that the intercourse could have been had and outcry made by the prosecuting witness without Mrs. Rose having heard her. That the prosecuting witness then wavered in her testimony and said she did not remember on what day the intercourse was had with her. All these matters, however, only went to the credibility of the witness. The jury was the sole judge of the credibility of the witnesses and the weight to be given to their testimony. They were not required to accept or reject in toto the testimony of the witness. It was their duty to accept that portion of the testimony of any witness they believed to be true and reject that part they believed to be false. Therefore the jury might have believed, and by its verdict shows that it did believe, that the prosecuting witness yielded to the defendant, and that he was only guilty of carnal abuse. The undisputed evidence shows that she was under sixteen years. The physicians say that the hymen was ruptured and that sexual intercourse caused this. True they said it could be caused by other means but here again it was the province of the

jury to weigh the evidence. The defendant admitted that he procured license to marry the prosecuting witness and that this was done after the alleged assault. He said that he became engaged to her within an hour after he first met her. The jury might have believed that he intended to marry her to avoid this prosecution. But it is not within our province to say where the weight of the evidence was. That was peculiarly within the province of the jury. The evidence was sufficient to support the verdict; and the contention of counsel for defendant on this point must be denied.

(3) The next inquiry is whether or not the judgment should be reversed on account of certain remarks made by the prosecuting attorney.

The record declares that in his closing arguments the prosecuting attorney stated, "That the State had authority to prove by introducing letters from parties who lived near the Roses, where the manager of the Orphan's Home got his information, why Maggie Moreland was recalled from the Roses and who informed the manager of the Orphan's Home about how she had been mistreated by the Roses, what caused him to have her examined by physicians after she had denied that she had been mistreated, but that the defendant objected to said evidence and by objecting to said evidence closed the mouth of the State and prevented it from proving these facts."

This argument of the prosecuting attorney was made in reply to a statement in the argument of the attorneys for appellant as follows:

"That there was not any evidence in the record to show how the manager of the Orphan's Home learned that Maggie Moreland had been mistreated by the Roses, or why he sent for her or where he received the information that she had been mistreated by the Roses and had her examined by the physicians, and no one stated where it was obtained."

The argument of the prosecuting attorney was provoked by the remarks made by counsel for appellant.

Improper arguments can not be complained of if it is necessitated by what was said by the argument of an adversary. In such cases the error complained of is invited and it is well settled in this State that a judgment will not be reversed for invited error.

In the case of *Ferguson & Wheeler* v. *Good,* 112 Ark. 267, we said, "Argument of counsel for plaintiff explaining why certain witnesses were not called is not prejudicial when made in answer to argument of defendant's counsel, making charges as to why said witness had not been called." See, also, *St. L., I. M. & S. Ry. Co.* v. *Leflar,* 104 Ark. 528.

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

MEMPHIS, DALLAS & GULF RAILROAD COMPANY *v.* TRUSSELL.

Opinion delivered March 6, 1916.

1. CARRIERS—DRUNKEN PASSENGER—DUTY OF CONDUCTOR.—A railway conductor may and should arrest a drunken passenger when, in the exercise of ordinary care, he honestly believes, under all the facts and circumstances, that the passenger is drunk.
2. CARRIERS—DUTY TO PROTECT PASSENGERS—INJURY AND ANNOYANCE.—A carrier of passengers is under a duty to protect its passengers from injury and annoyance from other passengers.
3. CARRIERS—ANNOYANCE TO PASSENGER—DAMAGES.—Plaintiff, a passenger on defendant's train was assaulted and insulted and otherwise annoyed by a drunken fellow-passenger. *Held,* an instruction on the question of damages, was not improper, as follows: "If you find for the plaintiff you will assess her damages at such sum as would fairly and reasonably compensate her for any injury she may have sustained by reason of the assaults and insults, if any, she received from the fellow-passenger on the train."

Appeal from Garland Circuit Court; *Jefferson T. Cowling,* Judge on exchange; affirmed.

J. W. Bishop and *J. G. Sain,* for appellant.

1. There is no sufficient proof of the fact that Hall was intoxicated, or that the conductor or brakeman knew it or discovered it, before the assault, and the instructions

given for plaintiff go too far in defining the duty of the conductor to act before there was evidenced some of the outward signs of drunkenness. Conductors can not act arbitrarily and without due care. 95 Ark. 624; *Ib.* 506; 105 *Id.* 624.

2. The damages were too remote and the alleged injury or assault not the proximate cause of any omission of duty owing to the plaintiff by defendant. 14 Am. Rep. 190. The company is not responsible for the results of a sudden, unlooked for and violent attack committed by a fellow passenger. 14 Am. Rep. 190; 8 Am. & Eng. Ann. cases, 590; 59 L. R. A. 104.

3. There was no physical injury and no recovery can be had for mental suffering and humiliation, where there was no willful, wanton or malicious wrong done. 70 Ark. 136; 91 Am. St. 79; 89 Ark. 187; 84 *Id.* 42; *C., R. I. & P. Ry.* v. *Mizzell,* 118 Ark. 153.

4. The verdict was by lot. 35 Ark. 113; 66 *Id.* 264; 91 *Id.* 502. It is excessive.

M. S. Cobb, for appellee.

1. The jury was properly instructed. It was the duty of the servants of the company to use reasonable care in protecting appellee from insults, annoyances, abuse and insults by a drunken fellow passenger, and to use reasonable care in preventing drunken passengers from boarding its train. Act No. 44 Acts 1909; 3 Thompson on Negl. § 3085-7; 63 L. R. A. 635; 91 Am. Dec. 224; 93 *Id.* 99; 99 Ark. 346. The instructions really were not as strong as should have been given.

2. Appellee was assaulted and appellants servants could have prevented it by the exercise of reasonable care. There was physical injury. 97 Ark. 24; *C., R. I. & P. Ry. Co.* v. *Allison,* 120 Ark. 54; 84 Ark. 42. The weight of the finger laid on in anger, or any frivolous assault will let in damages for mental anguish. The verdict is not excessive; but really too small.

SMITH, J. This is an action for damages for alleged "annoyance, fright, humiliation, and nervous shock

suffered at the hands of one Barney Hall, a fellow passenger," of appellee aboard one of appellant's trains.

Appellee was a passenger en route from Hot Springs to Pearcy and, according to the evidence offered in her behalf, was insulted and annoyed by a fellow passenger. One, Barney Hall, was permitted to board the train at Hot Springs in a drunken condition, after so deporting himself at the station as to make it apparent that he was drunk. Appellee was a school teacher and was returning to her home unattended, and a short distance out of Hot Springs the said Hall came into the coach where she was riding and sat down on the arm of the seat just across the aisle from where she was sitting. He placed his feet upon the arm of the seat occupied by appellee and, being unable by this means to attract her attention, he leaned across the aisle, placed his hands upon the arm of the seat occupied by appellee and struck the arm of the seat several times in a further attempt to attract her attention. Failing in this except to cause appellee to change her position in the seat he arose and, leaning across the seat, grabbed appellee by the arm in a rude and insulting manner. The proof further is that Hall came staggering into the coach in which appellee was riding; that his shirt tail was out; that he was in his shirt sleeves, and had in the bosom of his shirt a quart bottle of whisky. Hall was unacquainted with appellee and, when he touched her on the arm, she proceeded to strike him over the head with her umbrella and broke it with the third blow, after which appellee left the car. The conductor came into the car and asked appellee if anyone had annoyed her, and was told of the incident which had just occurred, whereupon the conductor advised her to get off the train at Hemp Wallace—one of the stations on appellant's road, and have Hall arrested. When the conductor left the car Hall came to the front door of the car and winked and blinked and laughed and patted on the door and kissed the door facing and blew kisses at appellee. Thereafter Hall came back into the coach a second time, when the brakeman came in and

took him out, but he came in again and stood down in the front of the coach, when the conductor came in again and took him out. Appellee testified that Hall came to the door twice and went through his winking maneuvers. Other witnesses testified that Hall was visibly drunk, and that this fact was apparent before he got on the train. When Hall's station was reached he was assisted off the train, and when released, fell to the ground.

Hall testified as a witness in appellant's behalf and admitted that he had been drinking, but denied that he was drunk. He remembered that appellee had struck him with her umbrella, but did not know why she had done so, as he did not remember having done anything to provoke the assault on him.

In behalf of the appellant the conductor testified that he saw Hall and took up his ticket, but did not observe that he was drunk, and that when he heard of the trouble which had occurred on the train he went into appellee's coach, but did not see anyone who appeared to be drunk; when he asked appellee if she had had any trouble and, upon receiving an affirmative reply he asked her what she wanted done about it, and she replied, "He will be all right, I think; I jammed his head." And the conductor further testified that he thereupon put a man in charge of Hall to see that he did not cause any further trouble. The conductor and other employees in charge of the train denied knowing that Hall was drunk before he entered the train.

There was a verdict and judgment in appellee's favor for $250, from which this appeal has been duly prosecuted.

Instructions given at the request of appellee told the jury that it was appellant's duty to arrest any person found in an intoxicated condition on the train, and also to use reasonable care to prevent intoxicated persons from boarding its trains, and, further, that, if appellant's servants in charge of the train knew or, in the exercise of reasonable care, should have known that Hall was drunk, and liable to insult or annoy other passengers

on the train, he should not have been permitted to board the train, and that if they became aware of his condition after he had become a passenger, it was their duty to exercise reasonable care to prevent him from annoying appellee and other passengers.

This idea was embraced and enlarged upon in several instructions given at appellee's request, to all of which exceptions were duly saved.

It is urged that there was no sufficient proof of the fact that Hall was in the condition defined prior to the time of the alleged assault, and that the instructions go too far in requiring the conductor to act before there are outward signs manifesting the intoxication, and that the instructions imposed an unreasonable burden on the servants of the carrier engaged in the operation of its trains.

Act No. 44 of the Acts of 1909, page 99, constitutes all conductors on trains running in this State peace officers on their respective trains for the purpose of arresting any person found to be drunk, and charges them with the duty of delivering such drunken person to the nearest peace officer with the names of two witnesses who are not railroad employees.

(1) In the recent case of *St., L. I. M. & S. Ry. Co.* v. *Vaughan,* 122 Ark. 436, the cases on this subject are reviewed, and it was there stated that the conductor might arrest, and should arrest, a drunken passenger when, in the exercise of ordinary care, he honestly believed, under all the facts and circumstances, that the passenger was drunk.

It is conceded that this act gave the conductor authority to arrest Hall and that he should have done so, if he had known of his drunken condition; but it is insisted that, under the proof, the conductor was under no duty to make the arrest, and that the instructions referred to were erroneous in imposing upon him a higher duty than the law exacts.

(2) The duty of the carrier to protect its passengers from annoyance and injury is discussed in an almost

infinite number of cases and, among these, is our own case of *Mayfield* v. *St. L., I. M. & S. Ry. Co.,* 97 Ark. 24, also reported in 32 L. R. A. (N. S.) 529. A late case on the subject is that of *C., R. I. & Pac. Ry.* v. *Brown,* 111 Ark. 288. A number of the leading cases on the subject are collected in the case notes to sections 606-608 of 4 R. C. L.

We do not think the instructions complained of imposed a higher duty or degree of care than the law requires, and we think the jury was warranted, under the evidence, in finding that appellant failed in the performance of its duty to appellee, and that if appellant's servants in charge of the train did not know, they should have known, that Hall was drunk, and that, if he was not arrested and put off the train as provided by the act above cited, he would require special observation if he was allowed to remain on the train.

(3) Over the objection and exception of appellant the court instructed the jury as follows:

"If you find for the plaintiff you will assess her damages at such sum as would fairly and reasonably compensate her for any injury she may have sustained by reason of the assaults and insults, if any, she received from the fellow passenger on the train."

It is insisted that as a result of giving this instruction the jury awarded excessive damages, inasmuch as there is no proof of physical injury. But we think the instruction was not an improper one, and we are unable to say that the damages are excessive. Appellee was assaulted and flagrantly insulted, and there was an exasperating renewal of the incident, from which she necessarily suffered humiliation and mental anguish. This suffering resulted from a breach of the carrier's duty to carry her safely and to afford the protection which was due her.

Finding no prejudicial error the judgment is affirmed.

SOUTHWESTERN SURETY INSURANCE COMPANY v. TERRY.

Opinion delivered February 21, 1916.

PRINCIPAL AND SURETY—BUILDING CONTRACTOR'S BOND—EXTRAS—RELEASE OF SURETY.—The contract of a surety on a building contractor's bond provided that alterations and additions made in the plans could be made without notice to the surety up to $15,000. Extras were allowed by the architect and owners in the sum of $14,257.97, and in addition thereto the front windows of the building were changed from straight show windows to the arcade type at a cost of $4,000 additional, and a change was made in the basement, where a cement floor was changed to a wooden one. *Held,* although these changes and additions were done at the direction and cost of the owners' lessee, that the owners consented thereto, and that these constituted alterations within the meaning of the bond, which with other extras allowed raised the extra cost in excess of the sum of $15,000, and released the surety from liability.

Appeal from Pulaski Circuit Court; *Guy Fulk,* Judge; reversed.

STATEMENT BY THE COURT.

This appeal is from a judgment against it as surety upon a contractor's bond for the erection of a six story building for appellees, the owners, upon the northwest corner of Main and Fourth streets, in the city of Little Rock.

On the 7th day of December, 1911, Adolphine Fletcher Terry and Mary Fletcher Drennan, the owners of the property, entered into a contract with the Oklahoma City Construction Company to construct a modern six story fire-proof mercantile building in two sections or units thereon.

The portion of the building to be first constructed was known as the north three bays, being about sixty feet front on Main street, which was required to be completed within 200 working days from the delivery of the premises to the contractor. The second portion, the south two bays being about forty feet front on Main street and adjoining the first portion, was to be completed within 120 days. The owners had previously entered into a contract of lease, with the Gus Blass Dry Goods Company,

and let to them for a period of years, the building they then occupied, which was on the site where the new building was to be erected and agreeing to erect a modern department store building on it and the adjacent forty feet to the south. At the time possession could not be obtained of the south forty feet occupied by the Pfeifer Clothing Company, necessitating the erection of the new building in two units, the first unit— the north sixty feet being required completed without regard to whether possession could be obtained of the ground for the building of the second.

The Oklahoma City Construction Company on the 18th day of December, 1911, executed a bond to the owners in the sum of $95,000 for the faithful performance of its contract with the appellant, the Southwestern Surety Insurance Company, as surety thereon, the condition of the bond being as follows: "Whereas, the said, The Oklahoma City Construction Company, has on the day of the date of these presents, executed and entered into a certain contract for the erection of certain buildings in said contract described, which contract is hereto annexed;

"Now, if the said The Oklahoma City Construction Company shall well and truly perform and fulfill all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled and any alterations and additions to said contract, provided such alterations and additions, if any such be made, shall not exceed in extra cost the sum of $15,000, we, the said surety, hereby expressly waiving all rights to be notified of, or by any further act to give our assent to, such alterations and additions, and acknowledging ourselves to be bound unconditionally for the faithful performance of said contract and of such alterations and additions within the limit of said contract price and of such extra cost aforesaid, and shall keep the said Adolphine Fletcher Terry and Mary Fletcher harmless and indemnified from and against all and every claim, etc. * * * then this obligation shall be void, otherwise the same shall remain in full force and virtue."

After the contractor began work making the foundation for the north sixty feet of the building, he had to suspend because of litigation with the Pfeifer Clothing Company about possession of the site. The name of the contractor was changed to D. H. Shenk Construction Co.

The first unit or north sixty feet of the building was completed in January, 1913, and full settlement made with the contractor therefor, and for all extra work done during the month of March, 1913. Meanwhile possession had been obtained of the remainder of the site and work begun upon the construction of the second unit. In the early part of July, 1913, D. H. Shenk, the president of the construction company, contractor, was injured while engaged upon another building in the city and died on July 21. About that time the construction company suspended work on the building, being unable financially to proceed with it and the bond company was notified and requested to take charge and complete the work, which it declined to do and the owners thereupon completed same.

This suit is brought by the owners against the construction company and the bond company to recover the damages alleged to have been caused the owners by the contractor's abandonment of the work and failure to complete the contract and pay off and discharge the claims for liens asserted against the building. The contractor did not answer, but the bond company answered denying that the contractor had abandoned the work before completion; that the owners made demand upon it to complete the building and that it had refused to do so and alleged it was discharged from liability as surety because the parties had changed the contract without notice to it from the construction of a six story building as contracted for and erected a seven story building instead; second, that substantial alterations were made in the work, changing the original contract in a material manner without a written order of the architect; third, because the Gus Blass Dry Goods Company without the surety's knowledge or assent was made a party to the

contract; fourth, because the owners had paid the contractor more than 85 per cent of the value of the work as it progressed and did not retain the 15 per cent as required by the terms of the contract until the final completion of the work and; fifth, because the alterations and additions had been made to the original contract which were largely in excess in extra cost of the sum of $15,000 and the same were made without notice to the surety and without its consent.

It was not disputed that the contractor abandoned the work before the completion of the building, that the owners made demand upon the bond company to finish the building which it refused to do and thereupon the owners took possession and completed it and it was virtually undisputed that the contractor was not financially able to proceed with the work at the time of its abandonment. A vast amount of evidence was taken as to the kind, character, amount and value of extra work performed by the contractor and whether such work amounted to alterations and additions to the principal contract or was independent and additional thereto, and not contemplated by its terms, also as to whether certain work was solely for the benefit and convenience of the Gus Blass Dry Goods Co., the lessee and not included within alterations and additions to the building contract.

The bond company contended that all items of extra work were such in character as under the terms of the building contract and its bond, amounted to alterations and additions to the contract.

The owners contended that less than $15,000 of the extra work was of such character.

The evidence as to the correct classification of the extra work done by the contractor was conflicting as to many items. The original contract price of the building was $136,355 and the owners had paid the contractor to the time of Mr. Shenk's death and the abandonment of the work, $148,552.73, and had retained under the terms of the contract $6,705.30, making a total for the building

of $155,258.03, showing a balance of $18,903.03, paid the construction company over and above the original contract price.

The testimony also shows that the Gus Blass Dry Goods Co., lessee of the building, took possession before it was completed, directed a number of changes to be made by the contractor, independent of the owners, but with their assent, that other changes were made in the original plans under an agreement with the owners, whereby the Blass Company and the owners were to pay jointly the expense of the change; the Blass Company was charged with about $9,000 for extra work.

It is admitted that the architect allowed certain items of the account of the contractor for extras as being alterations and additions to the building contract amounting to the sum of $14,257.97, which included the raise of the height of the attic on the sixth floor to a seventh story. He allowed also of the extras claimed against the owners, certain other items in the sum of $5,046.87, classed as additional or separate contracts with the owners and allowance to compensate the contractor for time lost, etc., that did not involve any alterations or change in the building contract. He allowed the claim of the contractor for certain other extras against the Gus Blass Dry Goods Co. in the amount of $8,635.30.

Testimony was taken upon each item of the claim for extras.

In the construction of the building on the first floor, a change was made from plate glass show windows upon the property line on the front or Main street side to an arcade or tiled floor passage, with plate glass walls across the front, making in effect a double or box show window with plate glass on the street side and plate glass on the side next to the passage way and plate glass show windows on the other side of the passage way, the front of the store rooms, at an additional cost of more than $4,000.

The contract required and the specifications provided for a cement basement floor of one inch thickness of Portland Cement and sand in proportion, on top of a five

inch thickness of composition of Portland Cement, coarse sand and crushed stone, which was changed to pine lumber on a three inch base of composition in the construction, at an extra cost of more than $2,000. These changes were made with the assent of the owners at the suggestion of the lessee, Gus Blass Dry Gooods Company, which agreed to pay therefor.

Other facts will be stated in the opinion.

Jno T. Suggs and *J. W. & J. W. House, Jr.,* for appellant.

The material alterations and changes in the contract, without the surety's consent (in excess of the $15,000 permitted) absolutely discharged the surety in this case. The alterations were not independent and additional contracts within the meaning of the rule in 112 Ark. 207. 65 Ark. 552; 66 *Id.* 288; 71 *Id.* 200; 74 *Id.* 601; 2 Brandt, Suretyship, § § 278, 288; 24 A. & E. Enc. Law, 837; 37 Mo. App. 466; 22 Ind. 388; 36 Minn. 439; 10 Ga. 235; 46 N. W. 1018; 52 *Id.* 1104; 99 Fed. 237; 54 S. W. 303; 13 Ind. 286; 99 Pac. 857; 85 Ark. 451; 27 A. & E. Enc. L. 499; 99 Ark. 112; 101 *Id* 22; 104 *Id.* 573; 106 Mass. 532; 27 N. J. L. 131; 125 N. Y. Sup. 867; 100 N. W. 780; 111 Ark. 373; 67 Pac. 989.

W. L. & D. D. Terry and *Moore, Smith, Moore & Trieber,* for appellees.

None of the changes were alterations within the meaning of the contract, but were in effect independent and additional contracts and were not a change of the terms of the contract so as to release the surety. The cost of the extra work should not be counted so as to increase the cost above $15,000, as provided for in the original contract. 22 S. W. 622; 77 S. W. 329; 89 Mo. App. 204; 65 Tex. 259; 24 Atl. 1068; 174 S. W. 206; 112 Ark. 207; 33 N. E. 550.

Both sides argue other questions not decided by the court.

KIRBY, J., (after stating the facts). In *Snodgrass* v. *Shader,* 113 Ark. 429, the law relating to the discharge of

a surety on account of material alterations in the terms of the contract made without his consent, was declared as follows: "The courts have long held that any material alteration in the terms of a contract, whereby a surety is bound, discharges the surety as he has not consented to the change, and this is so, even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they can not bind the surety thereto, without his consent, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. *O'Neal* v. *Kelley,* 65 Ark. 550; *Singer Mfg. Co.* v. *Boyette,* 74 Ark. 601; 1 Brandt on Suretyship, section 427; *Hubbard* v. *Reilly,* 98 N. E. 886; *Warren* v. *Lyons,* 9 L. R. A. 353; *Stern* v. *Sawyer,* 61 Atl. 36; *Miller* v. *Stewart,* 9 Wheaton, 702; *Penn* v. *Collins,* 5 Rob. (La.) 213.

In *Berman* v. *Shelby,* 93 Ark. 479, the court said: "For a surety will be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered."

The bond of the surety herein permitted any alterations and additions to the contract not exceeding in extra cost the sum of $15,000, and, of course, the surety would be bound to the performance of it so long as the alterations and changes made did not exceed said sum, having consented in advance thereto.

It is conceded that alterations and changes within the meaning of the contract were made in the said sum of $14,257.97, allowed by the architect and owners for extras. It is contended by appellant that the construction of the arcade in the front of the first floor of the building instead of the straight show windows and of the wooden floor in the basement instead of the cement, as provided in the contract, were alterations within the meaning of the surety's bond and increased the extra cost of alterations beyond the said sum of $15,000 consented to and released it from

liability thereon. Unquestionably the arcade and the wooden basement floor were not provided for, nor contemplated in the making of the contract and undeniably were both constructed by the contractor in the erection of the building at the extra cost specified, and although the change was made at the instance of the lessee, who agreed to pay the extra cost thereof, it was done with the assent of the owner, and if it was an alteration within the meaning of the bond, which, with the others, raised the extra cost in excess of the said sum of $15,000, released the surety.

The appellees insist that neither constituted an alteration within the meaning of the contract, but in effect that both were constructed under independent and additional contracts within the doctrine announced by many cases of other jurisdictions cited, and our own case of *Hinton* v. *Stanton,* 112 Ark. 207. In this case, the court said: "The test of materiality of the change is this, 'Could the owner have made a separate contract for the *porte cochere* and could that contract have been performed without changing the contract which Norris had made, and upon which appellee was surety? If this could have been done, then the contract for the *porte cochere* is an additional contract and not a change in the original contract.' "

In *Fullerton Lumber Co.* v. *Gates,* 89 Mo. Appeals 204, the court said: "Without pretending to submit a rule applicable to all cases, we will say that where the different matter does not consist of a change of that provided for or contemplated by the contract, but is something additional, and not included in the contract, then it is an independent transaction."

The undisputed testimony shows that the arcade could not be constructed independently by another contractor during the progress of the work of construction of the building, nor the building completed without the construction either of the straight show windows specified or the substituted arcade consented to, and also that the putting in of the wood or plank floor instead of cement, in the basement, was a change or alteration of the

floor construction required by the contract, and although it was shown the wooden floor could have been constructed by another contractor after the cement floor was finished in accordance with the specifications, it could not have been done without tearing up and reconstructing the floor, and the contract called for a floor constructed in the basement by the contractor, and could not have been performed without the construction of the floor required by the specifications or one of some other kind agreed upon. The change from cement to wood was necessarily, therefore, an alteration within the meaning of the contract permitting alterations not to exceed in cost the sum of $15,000, as was likewise the building of the show windows in arcade style rather than with straight front effect. *Neuwirth* v. *Moydell*, 174 S. W. (Mo. Ap.) 207.

In the court's view of the case as already expressed, it becomes unnecessary to determine the several other questions raised. Said material alterations not having been consented to by the surety, discharged it, and the judgment is accordingly reversed and the cause dismissed.

SHAPARD v. MIXON.

Opinion delivered February 28, 1916.

1. APPEALS — CROSS-APPEALS — SEPARATE CONTROVERSIES. — Plaintiffs brought an action against one M. and M. filed a cross-complaint, bringing in other parties, viz, A. and B. A decree was rendered against M. in favor of the plaintiffs and in favor of M. against A. and B. B. was granted an appeal, and the original plaintiffs cross-appealed. *Held*, plaintiff's cross-appeal was ineffective to bring up their branch of the case, under Kirby's Digest, § 1225; plaintiffs not being appellees on the appeal of B. An appeal from the portion of the decree which related to one of the controversies did not bring up the other.
2. APPEALS—TIME FOR TAKING.—Act No. 62, page 205, Acts of 1915, affecting the time for taking appeals to the Supreme Court, fixed six months after the passage of the statute as the full limit of time for appeals in all cases, and where a decree was rendered on March 18, 1915, an appeal will be held to have been taken in apt time, where it is taken, more than six months after its rendition, but within six months after the above act became effective, and within one year after the rendition of the decree.

3. LIMITATION OF ACTIONS—INFANTS—LOSS OF RIGHT.—An action by a female heir to recover the rental value of certain land is barred by limitations, where her action is commenced more than three years after she attained the age of eighteen.

4. HOMESTEAD—CONVEYANCE OF INTEREST.—A female person, over the age of eighteen and under the age of twenty-one years, has power to convey her interest in the homestead derived from a deceased parent, so long as the rights of the other children of the owner of the homestead are not interfered with.

5. HOMESTEAD—CONVEYANCE OF ONE INTEREST—ABANDONMENT.—Where the children of the deceased owner of a homestead are not actually in possession of the same, the sale of her interest, by one of the children, does not interfere with the possession of the other children, and each of the children has the right to deal separately with his or her share of the rents.

6 HOMESTEAD—CONVEYANCE OF INTEREST—RIGHTS OF OTHER CHILDREN—ABANDONMENT—LIMITATIONS.—Where certain children undertook to convey their interest in their homestead, which was then subject to a lease, and in their conveyances they recognized the existence of the lease, they will not be held to have abandoned the lease, so as to confer upon a younger child the right to recover all the rents of the premises, and this is true even though the rights of the grantors of their interests are barred by limitations from asserting any right under the lease.

7. HOMESTEAD—ESTATES HELD BY MINOR CHILD.—A minor child who inherits the homestead has two separate and distinct estates in the homestead existing at the same time and incapable of merger, namely, homestead and inheritance, one of which may be alienated and the other reserved.

8. MERGER—EQUITABLE MORTGAGE—EQUITY JURISDICTION—MORTGAGE AND LEASE—INTERVENING EQUITIES.—M. held a mortgage on certain land, but released the same upon receiving a lease for a specified time, thereto, from one B. It appearing that B. was without authority to execute the lease, and that the rights of minors arose superior to the lease, *held*, that there was a failure of consideration for the satisfaction of the mortgage, and that equity will interfere to prevent an injustice to M. raising an equitable mortgage in M.'s favor, and that the estates held by M. as mortgagee and lessee were not merged.

9. LIMITATION OF ACTIONS—EQUITABLE MORTGAGE.—The statute of limitations as to mortgages, *held* not to apply to a mortgage of the kind recited in the preceding syllabus.

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

Moore, Vineyard & Satterfield, for appellant.

1. The testimony shows that appellant paid a valuable consideration for the interests of Vessie, Inez and Birdie. There was no testimony that he *did not* pay W. C. Bobbitt also a valuable consideration for his interest. In the absence of proof to the contrary, the quitclaim deed is sufficient to vest Shapard with all the interest and title of said W. C. Bobbitt. 44 Ark. 153; 86 *Id.* 368.

2. The deed of trust by W. C. Bobbitt to Mixon could not affect Shapard's title. It was void. 79 Ark. 45.

3. Courts of equity will not relieve against mistakes of law where the rights of third parties have intervened. Bobbitt leased to Mixon in good faith to pay his indebtedness. Subsequently he sold to Shapard in good faith and equity will not now interfere.

4. Shapard had the right to plead the statute of limitations. Kirby's Dig., § 5069.

E. H. McCulloch and *H. F. Roleson,* for R. L. Mixon.

1. Shapard paid no consideration for Bobbitt's life estate, and he bought from the heirs with full knowledge and information that such purchase was subject to Mixon's rights. Kirby's Dig., § 734; 51 Ark. 390.

In dealing with the heirs he recognized and took into account the Mixon lease, and so did the heirs. Shapard should have known the provisions of § 734, Kirby's Digest.

2. The cross-appeal was not taken within six months after the decree; it is too late.

3. Mrs. Douglas was barred, and so was Inez. After Inez conveyed to Shapard she no longer had any rights in the rents.

4. The conveyances by Birdie and Inez did not have the effect of vesting in Vera, the other minor child, all the rents of the homestead. The chancellor's finding is correct. If the heirs desired to dispute the lease, they should have done so as soon as each became eighteen years of age.

Daggett & Daggett, for appellees and cross-appellants.

The right to recover the rents is undisputed unless barred by limitation or lost by abandonment. 54 Ark. 9; 56 *Id.* 139. They are not barred (92 Ark. 625), and there was no abandonment. 53 Ark. 400. The deeds to Shapard only conveyed their *estate of inheritance* in the land, and not their homestead rights. 101 Ark. 510. Under this authority, Birdie only waived her right to the rents for 1911, 1912 and 1913, and Inez only for the year 1913 by their conveyances.

2. The fact that the account of Bobbitt was for supplies and necessaries is no defense to this action, as the heirs were never legally bound for, or purchased any of them.

3. They are not estopped. 51 Ark. 61; 55 *Id.* 423. They were minors. 87 Ark. 206; 86 *Id.* 556. Minors can not waive their homestead rights. 29 Ark. 633; 37 *Id.* 316; 47 *Id.* 445.

4. Kirby's Digest, 1225, does not affect these appellees' right to appeal; they are co-appellees, and the cross-appeal is effective to confer jurisdiction as to judgment against Mixon. Besides, they prayed an appeal, and it was granted by the clerk of this court, and the appeal was taken in time. Acts 1915, p. 206.

McCULLOCH, C. J. Harriet E. Bobbitt owned a farm in Lee County, containing forty acres, which constituted her homestead, and she died in February, 1898, leaving surviving her husband, W. C. Bobbitt, and four minor children—one son, V. A. Bobbitt, and three daughters, Birdie, Inez and Vera. The land was occupied as a homestead several years thereafter by the father and the four children, but they finally removed therefrom, and the farm was occupied by tenants. In the year 1906, W. C. Bobbitt mortgaged his interest in the land to Mixon-McClintock Company, a mercantile corporation doing business at Marianna, Arkansas, the debt secured being for supplies furnished and to be furnished thereafter. The mortgage specified that it was to secure a note from W. C.

Bobbitt to the Mixon-McClintock Company for $500, and such further advances of merchandise, etc., as should thereafter be made. The mortgagee furnished supplies to Bobbitt during the years 1906, 1907, and also to some extent in the year 1908, and the account thereof fell within the terms of the mortgage. At the end of the year 1908, Bobbitt owed the Mixon-McClintock Company the sum of $531.23 balance, which was secured by the mortgage, and on January 19, 1909, he executed to R. L. Mixon, acting for the mortgagee, a contract whereby he leased the premises to Mixon for the period of five years, ending on December 31, 1913, the contract reciting on its face that the consideration was the sum of $531.23, the amount of the mortgage debt. Mixon was the agent of the mortgagee in the transaction and the lease was accepted for the latter's benefit.

The evidence in the case establishes the fact beyond dispute that the lease was executed by Bobbitt and accepted by the Mixon-McClintock Company in satisfaction of the debt due under the mortgage. The original note for $500 was surrendered to Bobbitt by the mortgagee, and the latter also gave Bobbitt an instrument stating that the live stock and wagon also embraced in the mortgage were released. There was, however, no endorsement of the satisfaction of the mortgage, made upon the record. The son, V. A. Bobbitt, joined in the lease contract. That contract contained an express covenant on the part of the lessors that they had a good and lawful right to make and enforce the contract, and that they would, "for the consideration aforesaid, and the payment of taxes as hereinbefore mentioned, warrant, defend and protect said lessee in the quiet enjoyment of the use of said land for the period of time, together with the uses, rents and profits thereof inuring to him under and by virtue of this lease." Neither Bobbitt nor his children were living on the premises at that time, but the same had been rented out for several years prior thereto. Mixon held the premises for the full period of the lease and rented it out to different parties, receiving the gross rental of $145 a year

for each year during the lease. At the time the lease contract was executed, each of the three girls, Birdie, Inez, and Vera, was under the age of eighteen years. Subsequently, three of the children, V. A. Bobbitt, Birdie Douglas (*nee* Bobbitt), and Inez Bobbitt, severally conveyed their interests in the land to T. L. Shapard. V. A. Bobbitt conveyed in August, 1910; Mrs. Douglas conveyed in November, 1910; and Inez Bobbitt conveyed in November, 1912. The proof shows that the conveyance of each of the children made to Shapard was in subordination to the rights of Mixon, and that a discount in the price was made on account of the outstanding lease. W. C. Bobbitt also conveyed his interest in the land to Shapard by quitclaim deed dated November 22, 1910, which was the same date as the deed of Mrs. Douglas to Shapard, and the deed recites a consideration of one dollar paid.

On January 16, 1914, the three daughters of Mrs. Bobbitt, deceased, namely, Birdie Douglas, Inez Bobbitt and Vera Bobbitt, instituted the present action against Mixon to recover of him the rental value of said premises during the period of said lease, and they alleged in their complaint that they were infants under the age of eighteen years at the time the lease was executed; that the premises constituted their homestead which they derived from their mother; and that the lease was for that reason void. Mixon answered, setting up the foregoing facts with reference to the execution of the lease and the consideration therefor, and pleaded in defense that the consideration of the original debt was supplies furnished to W. C. Bobbitt for the benefit of his minor children, and he also pleaded the statute of limitations.

A cross-complaint was filed against W. C. Bobbitt and T. L. Shapard, setting forth the fact that the conveyance from Bobbitt to Shapard was executed without valuable considerable, and that Shapard, at the time he received the conveyance, did so with full knowledge of the rights of Mixon, and there was a prayer that in the event the plaintiffs recovered anything from Mixon, that the original security be reinstated and enforced against the

estate for Bobbitt's life, held by Shapard under the deed. It was alleged in the cross-complaint that the lease from Bobbitt was accepted upon the faith that the lessee would be allowed to retain the premises for the period of the lease, and enjoy all the rents thereof, and that if the Bobbitt heirs were permitted to recover it would constitute a failure of consideration of the lease.

The suit was, without objection, transferred to equity and proceeded to a final hearing. The chancellor found that plaintiff Birdie Douglas was barred by the statute of limitations by reason of the fact that the suit was not instituted within three years after she reached the age of eighteen years; that plaintiff Inez Bobbitt was entitled to recover of Mixon her proportionate part of the rent for each year during the lease, except the year 1913, which was after she had conveyed to Shapard in recognition of the outstanding lease; and that the plaintiff Vera Bobbitt, who was still under twenty-one years of age, recover her proportionate part of the rents for each year during the lease. A decree was rendered in favor of Inez Bobbitt against Mixon for the sum of $172, and in favor of Vera Bobbitt in the sum of $228.80, which included interest at the rate of 6 per cent per annum from the expiration of each year of the lease as the rents accrued. The net rental value of the land during each year of the lease was found by the chancellor to be $106. The chancellor decided that Mixon was entitled to have the lease extended from November 28, 1917, which is the date Vera Bobbitt will come twenty-one years of age, for such length of time as the rents and profits will be sufficient to repay him the amount adjudged against him in favor of the two heirs, not extending, however, beyond the lifetime of W. C. Bobbitt.

Shapard was immediately granted an appeal to this court, and since the transcript was lodged here the original plaintiffs cross-appealed. A motion was filed by the appellees, Mixon and others, to dismiss the cross-appeal, whereupon the three plaintiffs abandoned their cross-ap-

peal and obtained a direct appeal from the clerk of this court.

(1) The first question for discussion relates to the status here of the original plaintiffs—whether or not they have brought their case here in the proper time for review. It is evident that the cross-appeal was not effectual for the purpose of bringing up the plaintiffs' branch of the case. The statute provides that an appellee may at any time before trial "pray and obtain a cross-appeal against the appellant or any co-appellee." Kirby's Digest, section 1225. The plaintiffs are not appellees on the appeal of Shapard. The respective controversies between plaintiffs and Mixon, and between Mixon and Shapard, are entirely separate, and an appeal from the portion of the decree which related to one of the controversies did not bring up the other.

(2) The question whether or not the direct appeal of the plaintiffs was taken in time is a more difficult one. The final decree of the chancery court was rendered March 18, 1915, and the appeal of the plaintiffs was prayed more than six months after the rendition of the decree, but less than one year after such rendition and less than six months after the new statute shortening the time for appeals went into effect. The statute*, it will be remembered, shortened the time for appeals from twelve months to six months after the rendition of the decree or judgment appealed from.

We held recently, in the case of *Stephens* v. *Williams*, 122 Ark. 255, that the new statute applied to judgments and decrees rendered prior to the time the statute went into effect, so as to shorten the time to six months after the statute went into effect. The authorities cited in the opinion in that case all tend to sustain the view that the new statute does not apply to judgments rendered prior to the time it went into effect, where the unexpired period of time allowed under the old statute does not equal the full time allowed under the new. One of the cases cited in the opinion is *Wilson* v. *Kryger*, 26 N. D. 77, 51 L. R.

*Act No. 62, page 205, Acts 1915.—(Rep.).

A. (N. S.) 760, where the court was passing upon a statute similar to the one in this case, which had reduced the time of appeal from twelve months to six months. In disposing of the matter, the court said: "In order to give effect to the evident legislative intent we are required to hold that the new act applies only to those judgments the time for appealing from which under the old statute would extend more than six months after the taking effect of the new statute. In other words, the new statute is prospective in its operation, but applies to all judgments, whether entered prior or subsequent to July 1, which, but for such act, the period in which appeals might have been prosecuted therefrom would exceed six months from such date. As to other judgments, the period for appealing is governed by the old statute, and the new does not apply, for otherwise, the new act would have the effect of enlarging rather than shortening the period for appealing therefrom, or else it would cut off all right to appeal on the date of the taking effect of such act, neither of which results was intended."

Another case which we cited with approval was *Rogers* v. *Trumbull,* 32 Wash. 211, 73 Pac. 381, dealing with a statute which shortened the time of appeals from six months to thirty days, and concerning its effect, the court said: "There is no indication in the act of 1903 that it applied to judgments rendered prior to the time the act took effect, so that judgments rendered more than thirty days prior thereto were barred of the right of appeal. It, therefore, under the rule above announced, applied only to judgments rendered subsequently, or to those where the right of appeal under the old law extended more than thirty days from the time the act took effect."

Our present conclusion finds support in the opinion in *State* v. *St. L. & S. F. Rd. Co.,* 92 Ark. 74, where the rule appears to be laid down broadly that the new statute, shortening the time for appeals and writs of error in criminal cases, has no application at all to appeals from judgments rendered prior to the passage of the statute; but, as a matter of fact, the appeal in that case was taken

within the period prescribed by the new statute, so the decision directly supports the conclusion we now reach with respect to the statute now under consideration. We think it is consistent with reason and the manifest intention of the Legislature to say, in the construction of the language of the new statute, that it was intended to fix six months after the passage of the statute as the full limit of time for appeals in all cases, but that it was not intended to restrict the time to less than six months. Under this view of the statute, the appeal of the plaintiffs was taken in apt time, and the decree of the chancery court on their branch of the case is now before us for review.

(3) The decree against Birdie Douglas, on the ground that her right of action against Mixon for the recovery of rents was barred by the statute of limitations, was correct. The action was commenced more than three years after Mrs. Douglas attained the age of eighteen years, and she was barred, either under the exemption in the seven-year statute of limitation (Kirby's Digest, section 5056), or, under the general exemption (Kirby's Digest, section 5075), in favor of infants and other persons under disabilities. *Brake* v. *Sides,* 95 Ark. 74.

The next contention is, on the part of the plaintiffs, that if they had the power at all to convey the homestead before they reached twenty-one years of age, the conveyance of the three older children to Shapard constituted an abandonment of the homestead right and gave the other child the right to recover all the rent. In other words, it is contended that the conveyance of Mrs. Douglas to Shapard, in November, 1910, gave the other two children, Inez and Vera, the right of action against Mixon for the whole of the rent for succeeding years, and that the conveyance of Inez Bobbitt to Shapard, in November, 1912, gave the youngest child, Vera, the right to recover the whole of the rent for the years 1913, which was the last year of the lease.

(4) There can be no doubt of the power of a girl over the age of eighteen, and under twenty-one, to convey her interest in the homestead derived from a deceased

parent. That point was expressly decided in the case of *Hargett* v. *Hill, Fontaine & Co.*, 101 Ark. 510. In that case we said: "The homestead is a privilege which she may relinquish or abandon after arriving at that age, so long as the rights of other children are not affected thereby. Of course, if there were other minor children, under the Constitution if she attempted to convey or relinquish her homestead right after becoming eighteen years old, she could not do so, for the rights of other children would be affected by her attempted relinquishment."

(5-6) It does not follow that a conveyance under all circumstances constitutes an abandonment so as to give the remaining minor children the exclusive right to the rent. The homestead is intended for the joint occupancy and enjoyment of all the children of the deceased homestead owner, until they become twenty-one years of age, and neither of them has the right to use the property so as to interfere with the enjoyment of it by the others. Neither has one of the children a right to force an outsider upon the others in the joint occupancy of the premises. For instance, where all the children are enjoying the occupancy of a home, one of them can not force into the family circle a stranger by a conveyance of the homestead right. But the Constitution expressly provides that the minor children shall enjoy the use of the premises, whether they remain in possession or not, and where they are not actually in possession, a conveyance of the separate interest in the fee to the homestead would not necessarily amount to an abandonment of the right to enjoy the premises so far as concerns the other children. That is particularly true in a case like this, where the children are not in actual occupancy of the homestead or using it as a home, but where it is leased out and only the payment of rent is demanded. In such a case the sale of the homestead by one of the children does not interfere with the possession of the other children, and each of the children has the right to deal separately with his or her share of the rents. Here the children who sold to Shapard did so

in express recognition of Mixon's rights under the lease, and there was evidently no intention to abandon the lease so as to confer upon the younger child the right to recover all the rents of the premises. If the older children saw fit to recognize the validity of the lease to Mixon, that fact did not enlarge the rights of the youngest child so as to give her a right of action against Mixon for the whole of the rent; nor does the fact that the former are barred by limitations from maintaining a suit against Mixon confer any greater rights on the youngest child. *Stubbs* v. *Pitts,* 84 Ark. 160.

(7) Cases may be cited where it has been held that an attempt of the widow to alienate her interest in the homestead operates as an abandonment, but those cases do not present an analogous question to that involved concerning the effect of a conveyance by one of the children. A minor child who inherits the homestead has "two separate and distinct estates in the homestead existing at the same time and incapable of merger, namely homestead and inheritance." *Kessinger* v. *Wilson,* 53 Ark. 400. Having thus two separate and distinct estates, one may be alienated and at the same time the other reserved, unlike the conveyance of a widow, who has only one interest which is inalienable. The conveyance by the minors, therefore, of their fee, in recognition of the rights of Mixon, constituted a ratification of the lease, and not an abandonment, and it did not confer upon the other chil- the right to recover all the rents. *Stubbs* v. *Pitts, supra.*

We are of the opinion, therefore, that the chancellor did not err in refusing to render a decree in favor of Inez and Vera Bobbitt for the full amount of the rental value of the premises after the conveyance made by their sister, nor in refusing to decree in favor of Vera for the full amount after the date of the conveyance by Inez.

It is also urged that the conclusion of the chancellor was contrary to the evidence as to the amount of the rental value, but when we consider that the plaintiffs repudiated the lease, and are entitled to recover, not the amount Mixon agreed to pay, not what he received, but only the

net rental value of the premises, we can not say that the chancellor erred in reaching the conclusion he did as to the amount, so the decree as to each of the plaintiffs is affirmed.

(8) This brings us to the discussion of the controversy between Shapard and Mixon. In the complaint there was a prayer for a foreclosure of the mortgage, but the relief granted was an extension of the original lease so as to make it begin on the date of the expiration of the homestead right of the youngest child. That feature of the decree is defended on the ground that the lessor, W. C. Bobbitt, had no right to execute the lease at the time, but, that his right to do so will be complete when the youngest child becomes of age, and that Mixon's right to hold under the lease will inure to him at that time, pursuant to a statute which provides as follows: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." Kirby's Digest, section 734.

The difficulty of applying this statute in the way attempted in the decree is that the effect of the decree was not to confer an estate acquired subsequent to the execution of the deed of conveyance, but was to make a new contract of lease for the parties. The parties themselves contracted for a term of lease extending from one definite date to another, and for the court to attempt to fix another time would be to make an entirely new contract for the parties, and not merely to carry out the old contract. We are of the opinion that the decree in that respect was erroneous, but if it be found that appellees were entitled to a foreclosure of the original mortgage on the estate for the life of Bobbitt, then there is no error committed in extending the lease, for the effect of the decree was to

give the appellees less than what was asked. The decree was, in other words, in Shapard's favor to that extent, and he does not complain, but insists that appellees are not entitled to any relief at all against him. That is the real inquiry involved in this branch of the case.

Now, the testimony is undisputed that Shapard purchased this interest, as well as the interests of the plaintiffs, with full knowledge of Mixon's rights under the lease and in distinct recognition thereof. The testimony does not show that he was a purchaser for value from Bobbitt, for his deed is a quitclaim and recites a consideration of one dollar, and there is no other proof in the record tending to show that he paid anything. He was not only not a purchaser for value, but he was actually put upon notice as to all of the rights of the appellees in this case. He stands merely in Bobbitt's shoes, and if the appellees are entitled, as against Bobbitt, to have their rights re-established and enforced under the original mortgage, then Shapard's purchase does not prevent the enforcement of those rights. The parties intended by the execution and acceptance of the lease to extinguish the mortgage debt, but the consideration failed to the extent that the children are permitted to recover the rents for the years covered by the contract. The partial failure of consideration for the execution of the contract is the same as a total failure, so far as affects the rights of the injured party to relief. *Webster* v. *Carter,* 99 Ark. 458.

Bobbitt is insolvent; and unless appellees have a remedy under the original mortgage lien, then there is no remedy for them at all. Will a court of equity provide a remedy? In the case of *Driver* v. *Jenkins,* 30 Ark. 120, this court said: "Here there is a right without an adequate remedy at law. It is a maxim in equity that equity will not suffer a right to be without a remedy. This maxim is the foundation of equitable jurisdiction; because that jurisdiction had its rise in the inability of the common law courts to meet the requirements of justice."

The effect of the acceptance by Mixon of the lease, if it served as an extinguishment of the mortgage lien, was to merge the equitable estate of the mortgagee into the legal estate for the time being under the lease. If there was no merger then there was no extinguishment of the original lien. The principles involved in the disposition of this branch of the case are not new. Mr. Jones, in his work on mortgages, volume II, section 873, said: "Where a conveyance of mortgaged premises is made to the mortgagee in satisfaction of the mortgage debt, he taking the same in ignorance of a subsequent judgment lien thereon and canceling the mortgage of record, equity will not treat the conveyance as a merger of the mortgage lien in the absolute estate but will revive such lien as against a purchaser on execution sale. It may, therefore, be deduced from the authorities as a general rule that, when the mortgagee acquires the equity of redemption in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance. The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend." Many cases are cited in support of the text.

In *Stantons* v. *Thompson,* 49 N. H. 272, the court (quoting from the syllabus) held: "Where, by a release of the right of redemption, the two estates are united in the mortgage, the mortgage will be upheld as a subsisting source of title, whenever it is required by the justice of the case, or the intention of the parties."

In *Woodhurst* v. *Cramer,* 29 Wash. 40, it was held: "Where a conveyance of mortgaged premises was made to the mortgagee in satisfaction of the mortgage debt, who took same in ignorance of a subsequent judgment lien thereon and cancelled the mortgage of record, equity will not treat the conveyance as a merger of the mortgage lien in the absolute estate, but will revive such lien as against a purchaser on execution sale."

The following cases are precisely in point on that question: *Lyon* v. *McIlvaine,* 24 Ia. 9; *Snyder* v. *Snyder,*

6 Mich. 470; *Lowman* v. *Lowman,* 118 Ill. 582; *Mallory* v. *Hitchcock,* 29 Conn. 127.

The subject has been treated in decisions of this court and we have reached the same conclusion concerning the doctrine of merger. The rule laid down by this court is that "the doctrine of merger never applies where there are any equities which will be thereby defeated." *Bemis* v. *First National Bank,* 63 Ark. 625; *Neff* v. *Elder,* 84 Ark. 277; *Beauchamp* v. *Bertig,* 90 Ark. 351.

The application of the principle is not averted by the fact that there was no intervening incumbrance between the execution of the mortgage and the execution and delivery of the lease. Its application to this case rests upon the fact that Bobbitt obtained a satisfaction of the mortgage by granting a lease which the lessee was unable to enjoy because of the fact that the lessor had no right to execute it, and there was therefore a failure of the consideration for the satisfaction of the mortgage. The facts present a proper case, we think, for the interposition of a court of equity in order to prevent an injustice. Bobbitt is in no position to complain because his own warranty of title was broken and the consideration for the valuable things he received, *i. e.* the satisfaction of his mortgage debt, failed. We have already shown that Shapard is in no better condition, because he paid nothing more than a nominal consideration for the conveyance he obtained from Bobbitt, and he was in possession of full information concerning the rights of the appellees.

(9) But it is contended on behalf of Shapard that the remedy of appellees under the original mortgage is barred by limitations under the statute which provides that in suits to foreclose mortgages "it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given." Kirby's Digest, section 5399. The revival of the original mortgage lien makes it a creature of equity, and such liens are not subject to the terms of the statute concerning

registration of mortgages and the period of limitations for the enforcement of mortgages. *Martin* v. *Schichtl,* 60 Ark. 595; *Ft. Smith Milling Co.* v. *Mikles,* 61 Ark. 123; *Sturdivant* v. *McCorley,* 83 Ark. 278; *Neff* v. *Elder, supra; Weaver-Dowdy Co* v. *Martin,* 94 Ark. 503.

In *Sturdivant* v. *McCorley, supra,* Judge Riddick, speaking for the court, said: "The statute of limitations as to mortgages does not apply to equitable mortgages of this kind evidenced by absolute deeds without any written defeasance."

In *Neff* v. *Elder, supra,* we held (quoting from the syllabus) that: "A purchaser of a defective title to land who was entitled to subrogation by reason of having discharged a valid mortgage lien which was not barred at the time of such discharge may bring his action to enforce his right to subrogation within a reasonable time after discovery of the defect in his title."

We held that the statute of limitations with respect to the time within which foreclosure suits might be brought had no application to a suit of that kind.

The remedy was therefore not barred, and there being no prejudicial error in the decree against Shapard the same is affirmed.

Hart and Kirby, JJ., dissent.

McCULLOCH, C. J., (on rehearing). It is insisted by counsel for the plaintiffs that we reached an erroneous conclusion with respect to the amount of rents for which Mixon is liable to them. They contend that according to the undisputed evidence Mixon received annually the sum of $145 as rent of the lands and that he is liable to the plaintiffs on that basis. The chancellor found the rental value to be the sum of $106. The complaint contains no allegation as to the rental value of the lands and there was no proof directed to that issue. It is merely alleged in the complaint that Mixon received $145 each year, and that allegation is sustained by the evidence. The only testimony on that subject comes from Mixon himself. He testified that he accepted the lease in satisfaction of the Mixon-McClintock Company debt of $531.23 and that he

sub-rented the land each year for the gross sum of $145. He also testified that he paid for certain repairs and paid the taxes on the land, but did not state the cost and amount thereof and was not asked to do so.

The plaintiffs repudiated the lease made by their father and can not treat Mixon as a mortgagee in possession, but are confined in their recovery to the fair rental value of the lands. That is not necessarily determined by ascertaining the gross amount of rents received, but the amount so received affords some evidence of the rental value of the land, though not conclusive. The burden being on the plaintiffs, they should have offered proof of the net rents received, after deducting taxes and the reasonable cost of necessary repairs, or of the rental value regardless of the amounts actually received. They are not entitled to recover the full rental price received in face of the positive testimony that it was necessary to expend sums for repairs and taxes. Mixon testified that he agreed to pay $531.23 by way of credit on the mortgage debt and to pay the taxes and repair bills, and the chancellor accepted that as the best evidence brought before him of the true rental value of the land. We can not say that his conclusion was unwarranted. So the plaintiffs' petition for rehearing is overruled.

Shapard asks for a rehearing on each of the points decided against him, but he offers no reasons except those urged in the original briefs, and as we are satisfied with the conclusions reached the petition is overruled.

He asks, also, that the judgment of affirmance be modified so as to remand the cause with directions to enter a decree foreclosing the Mixon-McClintock Company mortgage on the estate of the life of W. C. Bobbitt for the amount decreed against Mixon in favor of the plaintiffs. Appellees join in that request, and for that reason the modification will be made. It is so ordered.

MOORE v. MOYE.

Opinion delivered March 13, 1916.

1. DEEDS—DELIVERY TO THIRD PARTY—WRONGFUL DELIVERY TO GRANTEE.—Where a deed is delivered to a third party, not in escrow, but to be held subject to the further order of the grantor, a delivery of the deed to the grantee named, without the order of the grantor, is wrongful, and the grantor is entitled to have the deed cancelled as a cloud on his title.

2. DEEDS—DELIVERY IN ESCROW.—The deposit of a deed with a third party for delivery, must be irrevocable in order to constitute it an escrow, and if it is subject to the order of the party its delivery has no binding effect.

Appeal from Hot Spring Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

McRae & Tompkins, for appellants.

1. The gist of this case is that these parties were to exchange lands if their title was good and each was to be given a reasonable opportunity to show that the title was good. Appellants made and furnished an abstract showing a merchantable title according to contract. Where a deed has been delivered in escrow, subject to a condition that has been performed, equity will compel the delivery thereof to the person entitled to its possession. 97 Ark. 480. Appellants were entitled to a reasonable time to perfect their title. But the abstract showed a good title at the time the decree was rendered. This was sufficient. 61 S . W. 899; 37 Mo. 388; 1 Paige 244; 5 *Id.* 235; 36 Cyc. 627; 2 Johnson, 594-613; 76 Atl. 1020.

2. Appellees never complied with their contract. A party seeking relief in equity must show a substantial compliance with his contract. 36 Cyc. 697; 23 Ark. 704; Pomeroy on Spec. Per., § 404; 73 Ark. 491-494. Time is often granted in equity for the vendor to perfect his title. 76 Atl. 1020; 120 Ark. 69; 61 *Id.* 889; 103 Ark. 212-218; 9 S. E. 252. The court below was wrong on both the facts and the law.

W. Morton Carden, for appellees.

1. McDonald was only authorized to deliver the deed upon the performance of the condition, even if the deed

was left in escrow. L. R. 20 Eq. 262; 18 L. R. A. 337, and note. There must be an assent by the grantor to deliver the deed and an assent by the grantee to accept it. 98 Ark. 466; 100 *Id.* 427; 97 *Id.* 284; 77 *Id.* 89.

2. An agreement to furnish a good abstract means one showing a good merchantable title. This was not done. Under the evidence there never was a delivery of the deed, which is essential to its validity. 77 Ark. 89; 96 *Id.* 589; 100 *Id.* 427; 74 *Id.* 104; 97 *Id.* 283; 98 *Id.* 466; 179 S. W. 334.

3. No consideration passed between the parties. No specific time was fixed or agreed upon. The law, therefore, fixes a reasonable time. 25 Ark. 138; 99 *Id.* 340; 65 *Id.* 51; 77 *Id.* 116; *Ib.* 150.

4. Defendants breached their contract and plaintiffs were released. 65 Ark. 320; 97 *Id.* 522; 78 *Id.* 336. The conditions were never complied with. The title was not marketable. 179 Ark. 334; 178 *Id.* 431; 63 Ark. 531.

5. The deed was not an escrow. It was deposited with a custodian, a mere depositary subject to the orders of the grantor. 1 Devlin on Deeds, par. 313, 273; 89 Ark. 193; 66 *Id.* 433; 98 *Id.* 466.

McCULLOCH, C. J. Appellants owned lands in Dallas County, Arkansas, and entered into an oral agreement for the exchange of those lands with appellees for certain lots in Malvern, Arkansas. Each of the respective owners executed their deeds of conveyance pursuant to said agreement and delivered the same to H. L. McDonald, the cashier of one of the banks in Malvern, to await the completion of abstracts of title. Appellants furnished an abstract of title and subsequently applied to McDonald for delivery of the deed executed by appellees, and pursuant to said request McDonald delivered the deed to appellants and the same was placed on record.

This is an action instituted by appellees against appellants in the chancery court of Hot Spring County to cancel said deed as a cloud on the title, it being alleged in the complaint that the deed was delivered without the consent of appellees and upon the false representation

made by appellants to McDonald to the effect that appellees had consented to deliver the deed. Appellants answered, alleging that the deeds had been delivered in escrow to McDonald for delivery to the respective grantees as soon as abstracts were furnished showing merchantable title to the land, which abstract had been furnished by appellants, and that the deed had been delivered to them by McDonald pursuant to the agreement with appellees. On trial of the issue the chancellor found in favor of the appellees and entered a decree cancelling the deed.

There is a substantial controversy between the parties as to the effect of the delivery of the deeds to McDonald. The contention of appellants is that the deeds were delivered in escrow, conditioned only on the furnishing of an abstract showing a merchantable title. On the other hand, it is the contention of appellees that the deeds were placed in the hands of Mr. McDonald merely to await the furnishing of a satisfactory abstract, but that each party was to have the privilege of determining whether the abstracts were satisfactory, and that the deeds were not to be delivered except upon the consent of each party. The chancellor determined this issue in favor of appellees, and we are unable to say that the testimony preponderates against that finding.

Each one of the appellees testified as to the terms of the trade, stating positively that McDonald was not to deliver the deeds to appellants until they consented thereto. In this statement they are corroborated by the testimony of others. Mr. McDonald was introduced as a witness, but his recollection does not seem to be entirely clear as to the details of the transaction, though his testimony rather tends to support the contention of appellees that he was not to deliver the deed until appellees gave him directions to do so. He stated that he held the deed until it was represented to him that appellees had consented. Mr. Moore, one of the appellants who applied to McDonald to deliver the deed, stated that he did so after having a telephone conversation in which he un-

derstood that W. H. Moye, one of the appellees, had consented to the delivery. The fact that he found it necessary to obtain the consent of appellees before applying for delivery of the deed tends in some degree to support the view that he was conscious of the necessity of obtaining such permission, and that that was in accordance with the terms of the trade. Mr. Moore testified positively that the deeds were delivered to McDonald solely on condition that there was to be a delivery to the respective parties when abstracts of title were passed, showing merchantable title, but the preponderance of the testimony seems to be against him on that issue. At any rate, we are not able to say that the finding of the chancellor on that issue was against the preponderance of the testimony.

Now, if the deed was not in fact delivered in escrow, but was to be held by McDonald subject to the further direction of the appellees, which was never obtained, and delivery was made without such consent, then it was wrongful and appellees were entitled to have the deed cancelled as a cloud on the title. The contract rested entirely in parol, and unless there was a delivery of the deed in escrow, there was nothing to bind the parties and they could not be bound by a wrongful delivery of the deed. The deposit of a deed with a third party for delivery must be irrevocable in order to constitute it an escrow, and if it is subject to the order of the party it has no binding effect. *Masters* v. *Clark,* 89 Ark. 191.

In that case, Judge Battle, speaking for the court, said: "In this case the instruments were not deposited to be delivered on the happening of a certain event or the performance of a condition, but to be delivered on the joint order of the grantor and grantee. They were still within their power to cancel or modify; they had not received any permanent force, but were still within the control of the parties. They were not escrows."

It follows, therefore, that appellees were not bound by the delivery of the deed without their consent, and that they are entitled to have it cancelled as a cloud on their title.

Decree affirmed.

SHELDON HANDLE *Co.* v. WILLIAMS.

Opinion delivered March 13, 1916.

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMED RISK.—Plaintiff, an employee in defendant's factory, undertook to lace a machine belt, using strips cut from a piece of leather that defendant provided for the purpose, but which broke, by reason of the fact that the piece used was the thin part of the leather and an injury resulted to the plaintiff. It appeared that defendant had provided another piece of leather for lacing heavy belts, but that plaintiff, instead of waiting until he could get the heavier, used the lighter piece. *Held*, the leather which plaintiff did use, not being defective in any way, that he assumed the risk, and that the defendant was not responsible for the resulting injury.
2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK—SAFE PLACE TO WORK.—Where the duty is delegated to a servant to make his own working place and appliances safe, or to determine the sufficiency of the appliances or material which he has to use, then he assumes the risk of any danger arising from the use of such working place, appliance or material.

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

M. S. Cobb and *Wilson & Armstrong*, for appellants.

1. A verdict should have been directed for defendant. This is a clear case of assumed risk. Where the duty is delegated to the servant himself of making his own working place and appliances safe, or to determine the sufficiency of the appliances or material which he has to use, then he assumes the risk of any danger arising from the use of such working place, appliances or material. There was no negligence on the part of the master; the material furnished was good and the choice of using it was left entirely to the servant. 26 Cyc. 1182, 1186; 100 Ark. 462; 95 *Id.* 560; 81 *Id.* 343; 93 *Id.* 140; 100 *Id.*

156; 101 *Id.* 197, 283; 108 *Id.* 377. The judgment should be reversed and the cause dismissed. 4 Thompson on Negl., § 4616.

2. The lacing was bought from a reputable and reliable dealer; it had been used by plaintiff since the factory was opened and had been tested by constant use. 65 Fed. 482; 163 Mass. 364; 132 N. Y. 273; 127 Fed. 92; 72 S. W. 113; 53 Atl. 665.

H. B. Means and *J. C. Ross,* for appellee.

It is conceded that, under our decisions as cited by appellants that where an employee is charged with the duty of making his own working place safe and fails to do so, etc., and injury results, his action for damages will fail either on the ground of assumed risk or contributory negligence, or both. But we do not concede that appellee here had that duty or assumed it. His only duty was to use the material furnished him for the purpose with ordinary care. The injury was caused by the inherent defect in the material furnished and there was no assumption of risk. He was not an expert and had only a few months experience and used the only lacing he could get in an emergency. The rule of simple appliances does not apply here. There was no error in the court's instructions. The law of this case is well settled as to the master's duty and responsibility in such cases.

McCULLOCH, C. J. Sheldon Handle Company is the name of a partnership composed of Mason Sheldon, M. O. Sheldon and Z. L. Sheldon, who are operating a wooden handle factory at Malvern, Arkansas. The factory was constructed in the autumn of 1913, and was actually put into operation in January or February, 1914. The plaintiff, Claude Williams, began working for the defendants at the factory before the actual operation was begun. In other words, he was employed in November, 1913, to do general work about the plant, and when the operations began he was put to work at a lathe and continued to work there until he received the injury, on August 31, 1914, for which he seeks to recover compensation in this

case. While he was at work at his lathe early in the forenoon of that day, a belt came loose from above him and fell down and struck his elbow and threw his hand into the knives of the machine, and serious injury to the limb resulted.

The cause of the giving way of the belt was that the lacing broke. There was no defect in the belt itself, and the plaintiff testified that he noticed when he went to work that morning that the lacing seemed to be in good condition. It was a seven inch belt, and, according to the testimony of one of the witnesses, carried ten or fifteen horse-power. The mill had been shut down nine days—from Saturday, August 22, to Monday, August 31, the day plaintiff was injured. It was a part of plaintiff's duty to see that the things about his machine, including the belt, were in proper order. Two or three days before the mill was shut down, plaintiff put new lacing in the belt. It is not explained in the testimony, so far as we have observed, whether the lacing broke or came loose or merely was thought to be worn out; but, at any rate, plaintiff undertook to lace it, as was his duty. Lace leather was kept in the plant to use in lacing the belt. A side of lace leather had been purchased by Mr. Sheldon, the manager, when the mill began operation and was kept in a certain cupboard or locker. At this time the side of leather had been used down to a strip about six inches wide and about three feet long, which included the thin or flanky part of the side. When the plaintiff got ready to lace the belt he went to the locker and got the piece of leather, but after looking at it decided that he would rather cut the lacing from a new side of leather which Mr. Sheldon had recently procured, but which it does not appear had been put in use. He talked with one of the men, Mr. Burch, who was also a witness in the case, and decided that he would rather cut strips from the new side of leather because he could get longer strips, and also because he thought that the thicker part of the hide would be better. He went off to find Mr. Sheldon, but the latter was away from the plant

at that moment and the office was locked, so without seeking further, the plaintiff went back and got the old piece of lace leather, and, with the help of Burch and another employee named Hicks, proceeded to cut the strips and lace the belt. The testimony shows that he cut the strips the full width allowed by the holes in the belt and that the lacing was properly performed.

The plaintiff and the other witnesses testified that the leather appeared to be and was in good condition, except that it was the thin and flanky part of the hide which was not so strong as the thicker part of the hide. There is some conflict in the testimony as to what is the best part of a side of lace leather, and there seems to be a difference of opinion as to the relative strength of the different parts, but it is undisputed that all parts of the hide are used, according to the size of the belt to be laced —that the larger the belt the stronger the lacing required, which is obviously true. Many of the witnesses say that the thin side of the hide is strong enough for anything below a seven or eight inch belt, and other witnesses say it is strong enough for any size belt.

(1) One of the contentions of counsel for defendant is that the plaintiff assumed the risk of the danger from using that particular piece of leather for lacing the belt, and we are of the opinion that the contention is sound and that the plaintiff has not made out a case for the recovery of damages. This is not a case of furnishing defective, rotten or worn-out material. It is uncontradicted that the side of leather purchased by the defendants and placed there for use was of the best material obtainable, and the only contention with respect to its unfitness for use is that it had been used down to the thin or flanky part of the hide, which it was claimed was not strong enough to be used in lacing a belt of that size. Now, it was a part of the plaintiff's duty to lace the belt, and it necessarily followed that he was to determine whether the material placed there was fit for that particular use. It would be different if the material purchased had been defective in any other way so that the master

might have discovered its unfitness by reasonable inspection, but such is not the case here, for the material was as before stated, fit for use, and the only question was whether the unused part was fit for the particular use that plaintiff wanted to put it to. If he discovered that it had been used down to the place where it was unfit for use in lacing a belt of that size, then he could not use it without assuming the risk of the danger. It was obvious from his own testimony that he did fully appreciate the fact that it was not altogether suited for that purpose, but he decided to go ahead and use it without waiting for the return of the superintendent so that he could get the new side of leather. He did proceed to use it of his own volition, and the belt remained in that condition throughout the period of nine days during which the mill was idle.

(2) The case falls, we think, within the principle announced by decisions of this and other courts to the effect that where the duty is delegated to the servant himself of making his own working place and appliances safe, or to determine the sufficiency of the appliances or material which he has to use, then he assumes the risk of any danger arising from the use of such working place, appliances or material. *Southern Anthracite Coal Co. v. Bowen,* 93 Ark. 140; *Fordyce Lumber Co.* v. *Lynn,* 108 Ark. 377; 4 Thompson on Negligence, section 4003.

The case of *Eligh* v. *Goldie,* 143 Mich. 596, 107 N. W. 316, which is cited on the brief of counsel for defendant, is quite similar to the facts of the present case. There the employee, whose duty it was to repair a belt, went to the foreman to get lace leather which he preferred to use rather than rivets, but upon the suggestion of the foreman he went back and used the rivets and an injury resulted from the breaking of the belt. The court held that the servant assumed the risk, and in disposing of that branch of the case said: "There is nothing in his testimony that indicates a lack of knowledge with reference to the manner in which the belt was fastened, nor that any representations were made to him to lead him to

suppose that the belt would be fastened in any other way than it was. As to this feature of the case he must be deemed to have assumed the risk."

To sum up the situation presented in this case, it is seen that there was no negligence on the part of the master in failing to exercise care to discover defects nor in furnishing material that was wholly unfit for use; but, on the contrary, the material which finally proved unfit for this particular use was in fact good material for other uses about the plant, and the choice of using it for this particular work was left entirely to the plaintiff. We think, therefore, that it presents a clear case of assumption of risk and that plaintiff has no right to recover. That being true, it is unnecessary to notice other assignments of error, and, the case having been fully developed, no useful purpose would be served in remanding it for a new trial.

The judgment is therefore reversed and the cause dismissed.

HART, J., dissenting.

IZARD COUNTY v. VINCENNES BRIDGE CO.

Opinion delivered March 13, 1916.

1. COUNTY COURTS—ALLOWANCE OF CLAIMS—REVIEW OF FORMER JUDGMENT.—A county court is not authorized to review its former judgments for mere errors in the allowance of claims, and it is only authorized to reject claims which have been illegally issued, or whose issuance has been procured by fraud.
2. COUNTY COURTS—ISSUANCE OF WARRANTS—RIGHT OF COUNTY TO REJECT—BRIDGE.—Where an appropriation was made for the building of a bridge, and commissioners appointed to construct the same, and where the bridge was constructed for an amount within the appropriation, and was accepted and used by the county, the county court was not without jurisdiction, in the first instance, to issue warrants for the claim, although the contract was not let at public auction as required by statute, and the claim of the contractor will not be defeated thereby, in the absence of any showing of fraud or collusion.

Appeal from Izard Circuit Court; *Z. M. Horton*, Special Judge; affirmed.

Bradshaw, Rhoton & Helm, for appellant.

1. County courts are empowered to review all allowances made at previous terms, and if illegally made to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued. Kirby's Digest, § § 1175, 1179; 99 Ark. 173; 83 *Id.* 229; 33 *Id.* 740; 37 *Id.* 649, 532; 25 *Id.* 261; 33 *Id.* 788. This was a claim to be verified and submitted to the county court. Kirby's Digest, § 988.

2. The contract for building the bridge was not let according to law and was void. Const. Art. 19, § 16; Kirby's Dig., § 555; 103 Ark. 288; 11 Cyc. 480-1; 54 Ark. 645; 13 L. R. A. 353.

3. The court below held that an allowance once made can be reopened only by appeal. This is directly in conflict with our decisions. 98 Ark. 299; 87 *Id.* 406; 99 *Id.* 173. The county court is expressly authorized to call in and reject any warrants founded on claims illegally or fraudulently allowed. Cases *supra;* 4 Dillon, 209; 107 S. W. 536.

McCaleb & Reeder, for appellee.

1. The county court can not cancel or reject warrants issued under an allowance at a previous term of court merely from an examination of the warrant itself. This examination would only disclose errors in issuing or forgeries. There must be some evidence before the court of illegality or fraud. Kirby's Dig., § 1179; 52 Ark. 502.

2. The county court had authority to build the bridge by contract. The law was complied with; the bridge accepted and warrants issued in payment. There was no objection and no appeal. Mere irregularities or errors do not render the judgment void. 73 Ark. 523; 93 *Id.* 11; 102 *Id.* 277; 96 *Id.* 427; 38 *Id.* 557; 72 *Id.* 331. The allowance and judgment of the court was final. 38 Ark. 557; 72 *Id.* 331; 107 U. S. 356.

HART, J. This is an appeal from the judgment of the circuit court denying the right of the county court to can-

cel certain warrants issued to appellee in payment for a bridge built by it across Piney Creek in Izard County.

The county court of Izard County at its January term, 1915, made an order calling in county warrants for redemption, cancellation, reissuance and classification. The warrants were ordered to be presented on the 19th day of April, 1915. On that date appellee presented warrants of the aggregate value of $720 for approval and reissuance. Accompanying the same was appellee's affidavit to the effect that the warrants presented were issued by order of the county court of Izard County in payment of the fulfillment of a *bona fide* contract made and entered into between said county and appellee on the 20th of March, 1913, for the construction of a bridge across Piney Creek in said county. The said contract was not on file in the office of the county clerk in Izard County.

The county court entered an order reciting that it had thoroughly examined the warrants and found that none of them was a just and legal evidence of indebtedness against Izard County. From the order rejecting them, appellee prosecuted an appeal to the circuit court. There Izard County filed an answer in which it admitted that the levying court of said county at its October term, 1912, made an appropriation of the sum of $1,000 for the purpose of building a bridge across Piney Creek and appointed commissioners to erect said bridge. It further admitted that the county court records show that the plans of said bridge were submitted to and adopted by the court but avers that no specifications of said bridge was submitted to and approved by the county court. It further alleged that the contract to build the bridge was not let at public outcry by the county court as required by the statute.

The circuit court found that the warrants attempted to be cancelled were issued on orders of the county court on matters of which it had jurisdiction and that no appeal was taken therefrom; that neither the county court nor the circuit court on appeal had any right or authority to

cancel said warrants. Whereupon an order was entered reversing and setting aside the judgment of the county court, cancelling the said warrants and ordering the county court to reissue said warrants as required by the statute. Izard County has appealed to this court.

In the case of *Monroe County* v. *Brown,* 118 Ark. 524, this court held that a proceeding under Kirby's Digest, section 1175, authorizing the county court to call in outstanding warrants to redeem, cancel, or reclassify them, is a direct and not a collateral attack on the judgment. The court further held that only those warrants may be rejected, which could not have been valid claims against the county or where the judgment of allowance was obtained by fraud. In discussing the question, the court said, "The statute is not construed to mean that the county court is authorized to review former judgments of the court for mere errors in allowance of claims, but they are authorized to reject claims which have been illegally or fraudulently issued. In other words, where the claim against the county was one which, under any evidence which might have been adduced, could not have been a valid claim against the county, or where the judgment of allowance was obtained by fraud practiced, it may be set aside and warrants issued pursuant thereto, cancelled. However, to carry the review beyond that and to permit investigations for mere errors of the court, would make it purely a collateral attack on the judgment, which is not authorized by the statute. This distinction is illustrated by our two decisions in *State* v. *Perkins,* 101 Ark. 358, and *Fuller* v. *State, for use of Craighead County,* 112 Ark. 91. In the former case we held that there could be no review of a judgment of the county court adjusting the settlement of a collector merely because there had been an error discovered in the amount of commissions allowed; but in the last cited case we held that there could be a review where the court allowed commissions which were wholly unauthorized by the statute, as such an allowance constituted fraud in law.

The record shows that an appropriation was made for the building of the bridge and commissioners appointed to construct the same. The bridge was constructed for an amount within the appropriation and was accepted and used by the county. This is conceded by counsel for the county, but they contended that the warrants should be cancelled because the contract for the construction of a bridge was not let at public auction as required by statute.

Under this state of the record we do not think that the county court in the first instance was without jurisdiction to issue warrants for the claim. As we have already seen, the county court is not authorized to review its former judgments for mere errors in the allowance of claims, but it is only authorized to reject claims which have been illegally issued, or whose issuance has been procured by fraud.

An appropriation was made by the levying court for building the bridge. The county court let the contract and had the bridge built. After it was constructed it accepted the bridge and allowed the public to use it and it could not thus get the benefit of the work and labor of appellee and still defeat the claim for compensation upon the ground that the contract to construct the bridge was not let at public auction. See *Howard County* v. *Lambright,* 72 Ark. 330; *Watkins* v. *Stough,* 103 Ark. 468. In any event it could not be considered that the action of the county court in issuing the warrants under the circumstances related was illegal and without jurisdiction. There is no allegation that there was any fraud or collusion between the county judge and the appellee in regard to the contract for the construction of the bridge.

It follows that the judgment must be affirmed.

BUCHANAN v. FARMER.

Opinion delivered March 13, 1916.

1. COUNTIES—EMPLOYMENT OF SPECIAL COUNSEL.—In a case where the prosecuting attorney is unable to attend to the business of the county, or in a case where the interests of the county in some particular suit are of such magnitude and importance as to demand of the county court the exercise of such foresight and care as prudent business men bestow upon important matters, the county court may employ additional counsel.
2. COUNTIES—EMPLOYMENT OF SPECIAL COUNSEL—PRESUMPTION—REVIEW.—It will be presumed that the county court will not put the county to the expense of extra counsel, unless such service is needed, but the action of the county court in this regard is a matter in which its judgment and discretion is open to review by the appellate courts.
3. COUNTIES—COUNSEL—FEES.—When the county court employed counsel to represent it in the collection of a certain sum of money, without calling on the prosecuting attorney to do so, and where it appeared that the matter was such that the employment of extra counsel was unnecessary, a judgment allowing an attorney's fee will be reversed.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed and dismissed.

Gibson Witt, for appellant.

If there is a liability at all in this case, it could be created only by express contract. No recovery could be had on a *quantum meruit*. An appropriation to pay for legal expenses was necessary; none was made. It was the duty of the prosecuting attorney to bring the suit for the county and it was an abuse of the discretion of the county court to employ an attorney and pay him. There was really no liability by the county. Kirby's Digest, § 1499, as amended by Acts 1909; 34 Ark. 369; 26 *Id.* 37; 7 Am. & Eng. Enc. Law, (2 ed.) 941, 945-6; Kirby's Digest, § § 6392-3-5; 47 N. E. 829.

Chas. Jacobson, for appellee.

The county court has the authority to employ counsel where the interests of the county demand it. No previous appropriation was necessary. The contract was made in good faith; the services were rendered and

the contract does not contravene section 9, Acts of 1875. 73 Ark. 523; 63 *Id.* 399; 93 *Id.* 11; 119 Ark. 567; 53 S. W. 476. No abuse of discretion is shown.

HART, J. This appeal involves the right of the county court to make an allowance to T. P. Farmer for legal services rendered by him in behalf of Garland County. The facts are as follows:

The General Assembly at its 1911 session passed an act creating the eighteenth judicial circuit, composed of the counties of Garland and Montgomery. The act provided that two-thirds of the salaries of the judge and prosecuting attorney should be paid by Garland County, by order of the county court, and the remaining one-third of the salaries should be paid in the same manner as salaries of other judges and prosecuting attorneys.

This court held that under our Constitution the salaries of circuit judges must be paid by the State, and the act creating the eighteenth judicial circuit, insofar as it imposed the payment of two-thirds of the salary upon one county in the circuit was invalid. See *Cotham* v. *Coffman,* 111 Ark. 108. That opinion was delivered January 19, 1914. At that time Cotham had served as circuit judge under said act for twenty-nine months and had been paid $4,866.46 by orders of the county court of Garland County.

On January 15, 1915, the county court of Garland County entered into a written contract with T. P. Farmer, an attorney of Hot Springs, in which he was employed to recover back the amount paid to Judge Cotham, and it was agreed to pay him 25 per cent. of the amount. On February 27, 1915, the claim of T. P. Farmer, based on said contract, was allowed in the sum of $1,216.61, and county warrants were issued to him for that amount. S. A. Buchanan, a citizen and tax payer of Garland County, was allowed to become a party to the action and appealed to the circuit court from the order of allowance. The circuit court set aside the order of allowance and remanded the cause to the county court without prejudice to Farmer filing his claim upon a *quantum meruit.* There-

after the county court allowed his claim in the sum of $750 and Buchanan again appealed to the circuit court. The circuit court allowed the claim in the sum of $500, and from the judgment rendered Buchanan prosecuted an appeal to this court.

The testimony of several witnesses was taken upon the question of whether or not the amount allowed Farmer was a reasonable compensation for the legal services rendered by him, but the views we shall hereinafter express renders it unnecessary for us to abstract the testimony on this point.

After his contract of employment with the county court, Farmer went to see Judge Cotham about the matter. Judge Cotham stated to him that if the State would make an appropriation for the salary already earned by him, that he would pay back the amount received from Garland County, otherwise that he would not do so without suit.

An appropriation bill was introduced and passed by the Legislature, appropriating the sum of $4,866.46 to the payment of the salary of Judge Cotham in lieu of what had been paid him by Garland County.

Farmer testified that he procured the passage of this bill, or as he expressed it, lobbied it through the Legislature at a cost of $125 to himself. He said that the amount expended by him was for legitimate expenses. After Judge Cotham received the money from the State he paid back to Garland County the amount he had received from it as before stated.

The prosecuting attorney resided in the city of Hot Springs but was not asked to represent the county in the matter and did not do so. He was not asked to represent the county in the matter but said, that in his opinion, no suit against Judge Cotham was necessary. It may be fairly inferred from the record that the prosecuting attorney had time to have brought the suit had he been requested by the county court to do so.

Section 6392 of Kirby's Digest provides that each prosecuting attorney shall commence and prosecute ac-

tions both civilly and criminally in which the State or any county in his circuit may be concerned.

(1-2) Notwithstanding this statute makes it the duty of the prosecuting attorney to represent the county, we have recognized that there are circumstances under which the interest of the county might be neglected or even sacrificed unless the county court has authority to employ other counsel than the prosecuting attorney. The prosecuting attorney might neglect or refuse to perform the duties required of him by the statute, or the press of other duties might prevent him from representing the county. In case where he is unable to attend to the business of the county, or in case where the interest of the county in some particular suit is of such magnitude and importance as to demand of the county court, in the exercise of such foresight and care as prudent business men bestow upon important matters, we have recognized the power of the county court to employ additional counsel. *Oglesby* v. *Ft. Smith Dist. of Sebastian County,* 119 Ark. 567, 179 S. W. 178; *Spence & Dudley* v. *Clay County,* 122 Ark. 157. The presumption is that the county court will not put the county to the expense of extra counsel, unless such service is needed, but the action of the court in this regard, is a matter in which its judgment and discretion is open to review of the appellate courts.

(3) In the case before us it was not shown that the prosecuting attorney was unable or refused to attend to the litigation in question. On the other hand, it was shown that he lived in the same town in which the county court was held and was not asked to represent the county or even consulted about it. He gave it as his opinion that no suit was necessary about the matter.

The suit was not one of such magnitude and importance as to require the service of extra counsel. Any one competent to perform the ordinary duties of a prosecuting attorney could have attended to the matter. It does not appear that there was any necessity whatever for the employment of extra counsel. There is no reason why, in

the judgment of prudent men, additional counsel should have been employed, and we think, under the particular circumstances of this case, the county court abused its discretion in entering into the contract in question, and no allowance should have been made in payment. In reaching this conclusion we have not overlooked the fact that Mr. Farmer said he spent $125 in procuring the passage of a bill carrying an appropriation for the salary of Judge Cotham already paid by Garland County. Such action contravenes public policy and was void.

In *Harris* v. *Roof's Excrs.*, 10 Barb. (N. Y.) 489, the court held that no action will lie for services as a lobby agent in attending to a claim against the State before the Legislature, and that agreements in respect to such services are against public policy, and are prejudicial to sound legislation. To the same effect are *Trist* v. *Child*, 21 Wall. (U. S.) 441; *Rose* v. *Truax*, 21 Barb. (N. Y.) 361; *Clippenger* v. *Hepbaugh*, 5 Watts & Sergeant (Pa.) 315, 40 Am. Dec. 519.

From the views we have expressed, it follows that the judgment must be reversed, and inasmuch as the case seems to have been fully developed, the claim of appellee against the county will be dismissed here.

TOMLINSON CHAIR MANUFACTURING CO. *v.* JOP-PA MATTRESS CO.

Opinion delivered March 13, 1916.

1. PARTIES—DEFECT—WAIVER.—Where the defendant failed to raise the question of the defect of parties in the lower court, he will be held to have waived the same.
2. FACTORS AND BROKERS—RELATIONSHIP OF BROKER.—When one P. was not employed to make sales for it by appellant, but where he did negotiate sales between appellant and merchants receiving a compensation by way of a commission, P. will be treated as a broker and not a salesman.

Appeal from Pulaski Circuit Court; *Guy Fulk*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant instituted this action against appellee before a justice of the peace to recover the sum of $30, the purchase price of a shipment of furniture ordered by the latter from the former.

Appellee admitted the indebtedness but pleaded a set-off of $28.45, being an amount alleged to be due it as commissions by appellant on account of goods sold for appellant. Appellee stated that it had tendered appellant $1.55, the difference between the two claims.

The justice of the peace found the issues in favor of appellee and appellant filed an affidavit and bond for appeal to the circuit court. There the case was tried before a jury on the following facts:

Appellant is a corporation engaged in the manufacture and sale of chairs by wholesale in the State of North Carolina. Appellee is a corporation engaged in business in the city of Little Rock, Ark.

Q. L. Porter was the president and manager of appellee. He also did a brokerage business in the sale of furniture; that is to say, he purchased furniture in job lots from various wholesale houses, and sold it to merchants. It was understood between him and appellee that his brokerage commission should go to the latter. Porter had been dealing with appellant in this way for several years. He testified that during all this time he had sub-agents under him and that he paid them 5 per cent. for making sales; that appellant knew of this fact and also paid him a regular commission of 6 per cent.

The managing officers of appellant testified that they did not know that Porter had been employing sub-agents and that he was paying them 5 per cent. They stated that he had no authority whatever to do this.

Madden, an agent of Porter, reported to him that he could secure an order for chairs for the Little Rock Storage & Sales Company. When a car load of chairs was purchased from appellant a discount of 10 per cent. was allowed.

Porter testified that he ordered from appellant a car load of chairs to be shipped to the Little Rock Storage & Sales Company and that the discount marked on the order was 5 per cent.; that it was understood between him and the Little Rock Storage & Sales Company, that appellee should take part of the chairs. He stated that it had been his custom to send in orders that way and that 5 per cent. discount was allowed to the customer to whom the goods were sent and that the remaining 5 per cent. was paid to him.

The managing officers of appellant testified that no such custom existed and that they billed out the order as it came to it. That the order as it came in showed that the regular 10 per cent. discount was to be allowed to the customer to whom the goods were shipped. They denied that the order was changed after they received it and claimed that Porter was not entitled to the 5 per cent. discount either by express contract with them or by any custom of trade existing between him and appellant.

Other facts will be referred to in the opinion.

The jury returned a verdict for appellant in the sum of $1.55 and the case is here on appeal.

R. M. Mann and *Price Shofner,* for appellant.

1. If appellee had any claim it was by assignment from Porter. An assignee can not bring suit on an open account without making the assignor a party. 80 Ark. 167; 79 *Id.* 414.

2. Instructions excluding and ignoring all other issues except the changing of the order and loss of commission are improper. 93 Ark. 564; 95 *Id.* 108.

3. There is no evidence to support the verdict.

J. H. Carmichael and *John F. Clifford,* for appellee.

1. No assignment of the claim was necessary. The proof shows that all commissions earned by Porter belonged to appellee.

2. The appellant accepted the order tendered it on terms of similar previous orders and is bound thereby. 24 Ark. 371; 19 *Id.* 270, 277.

3. Porter was a salesman for appellant but a broker. 11 S. W. 694.

4. The evidence though conflicting supports the verdict. 90 Ark. 100; 76 *Id.* 88; 102 *Id.* 103; 82 *Id.* 381.

HART, J., (after stating the facts). Counsel for appellant asked the court to instruct the jury that appellee was not entitled to recover because its claim against appellant was not assignable under our statutes and Porter the assignor had not been made a party to the action.

The case originated before a justice of the peace and no objection was made in that court that Porter had not been made a party to the action. When the case reached the circuit court no objection was made that he was not a party until the court began to instruct the jury.

Section 6093 of Kirby's Digest provides that the defendant may demur to the complaint where it appears on its face that there is a defect of parties.

Section 6096 provides that when any of the matters enumerated in 6093 do not appear upon the face of the complaint, the objection may be taken by answer. It further provides that if no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same.

(1) Appellant failed to raise the objection of the defect of parties in the language pointed out by these statutes and has therefore waived the same. *Jordan* v. *Muse,* 88 Ark. 587; *Spear Mining Co.* v. *Shinn,* 93 Ark. 346; *Less* v. *English,* 75 Ark. 288; *St. L. S. W. Ry. Co.* v. *Vanderberg,* 91 Ark. 252. It follows the court did not err in refusing to instruct the jury as requested by counsel for appellant.

According to the testimony of Porter, he was not an employee of appellant. He negotiated sales between appellant and merchants and received a compensation by way of commission. He dealt with several wholesale firms in this way and gave his orders to the one he deemed proper. Therefore under his testimony he was a broker and not a salesman of appellant. It could make no differ-

ence whether or not he employed sub-agents to solicit business for him.

According to the testimony of the witnesses for appellant when it shipped out a car load of furniture, the consignee was entitled to a discount of 10 per cent. The witness stated that the order in question when received by appellant called for a discount of 10 per cent. to the consignee. The Little Rock Storage & Sales Company was the consignee and the goods were billed to it at 10 per cent. discount.

Porter testified that it had been the custom of appellant to allow him 5 per cent. discount when he sent the order in that way; that it had been the custom to ship the goods out as directed by him. He testified that he sent in the order for 5 per cent. discount to the Little Rock Storage & Sales Company and that according to custom, appellant knew that he was to receive the remaining 5 per cent.

This disputed question of fact was submitted to the jury under proper instructions. As we have already seen, it is undisputed that appellee owed appellant $30 for a bill of goods and that 5 per cent. discount on the sale in question amounted to $28.45.

The jury returned a verdict for appellant for $1.55. It follows from what we have said that there was sufficient testimony to support the verdict and the judgment will be affirmed.

BROWN & CO. v. BENNETT.

Opinion delivered March 13, 1916.

1. NEGLIGENCE—INJURY TO PLAINTIFF'S HORSES—KNOWLEDGE OF STABLE-KEEPER—INFECTIOUS DISEASE.—A stable-keeper will not be liable for damages suffered by plaintiff's horses catching a disease while in defendant's stable, unless he had notice of such facts as would make him chargeable with knowledge that his own mules were infected with a disease, and liable to communicate it to other animals in the same barn.
2. PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT—LIABILITY OF PRINCIPAL.—A stable-keeper will be liable for damages, when a disease

was communicated from infected mules belonging to him, to horses kept in defendants' stable, and belonging to plaintiff, when defendants' agent, charged with looking after the animals, knew of their condition.

Appeal from Logan Circuit Court; *Jas. Cochran*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellants for damages resulting to his horses from an infectious disease negligently communicated to them. The complaint alleges that a pair of mules kept by defendants and driven by their agent, Parker, employed in the service of the firm in driving a poultry wagon, were allowed to be kept in his barn at the request of defendants; that they were kept in the barn while they were infected and diseased with a contagious disease, distemper, and known to be so diseased; that his horses were kept in the barn at the time and immediately after defendants took away their mules and before same was disinfected and that the disease was communicated to his horses. It further alleged damage to the horses, two of them dying therefrom and prayed judgment in the sum of $505.

The answer admitted that the mules were kept in the barn, alleged that they were free from any disease or any form of distemper and that other animals were kept in the barn besides theirs and if the disease was communicated to plaintiff's stock it was from other infected animals being stabled therein, and alleged specifically that a horse, the property of D. E. Johnson infected with distemper was stabled in the barn some time prior to plaintiff keeping his horses there.

It appears from the testimony that the appellants were the owners of the mules used in the poultry wagon sent out in the country by them in charge of the driver, Parker; that the mules were infected with distemper at the time they were being stabled in the barn of appellee when they were in town between trips; that appellee's horses after they were put in the barn where the mules had been kept, took the distemper and one mare and colt died

from the disease and the other mare recovered but was considerably damaged thereby and less valuable thereafter.

Several witnesses testified as to the character of the disease and its indications, some stating positively that the mules were infected with it and known to be so by the driver, Parker, who had them in charge and whose business it was to drive the wagon about through the country and take care of the team. One witness testified that a member of the firm told him he knew that the mules had distemper and intended to tell the appellee about it, but forgot to do so.

Several witnesses testified about the value of the animals and the cost of medicine and care for them during the time they had the disease.

The court instructed the jury, giving over appellants' objection number 5, as follows: "I charge you that while defendants before they could be held liable for damages for the injury complained of must have known these mules were infected with a contagious and infectious disease yet if you find from a preponderance of the testimony that the defendants' agent who had said mules in charge knew that said mules were so infected with a contagious and infectious disease known as distemper, then the defendants are held in law to have known this fact, as knowledge of the agent is in law knowledge of the principal."

From the judgment on the verdict against them, appellants prosecute this appeal.

Sam R. Chew, for appellants.

1. The *onus* was on appellee to prove by a preponderance of the evidence that appellants' mules were in fact infected with distemper and that appellants knew this and that the mules were liable to communicate this disease to appellee's stock. 58 Ark. 401; 57 *Id.* 402. There is no proof that the mules had distemper, or that appellant knew it.

2. The so-called expert testimony was not competent. 87 Ark. 243; 100 *Id.* 518; 103 *Id.* 196.

3. The court erred in its instructions. Nowhere can it be found that appellants or their agent knew the mules were infected with a contagious and infectious disease. They were abstract, misleading and prejudicial. 26 Ark. 513; 29 *Id.* 151; 36 *Id.* 641. Instructions should be hypothetical and only embody the law as applicable to the facts, but not assume facts to be proved. 14 Ark. 286; 76 *Id.* 468; 45 *Id.* 256; 71 *Id.* 38.

The court also erred in its instructions as to the amount of damages. 105 Ark. 205; 87 *Id.* 123. The instructions asked by appellant should have been given; they state the law correctly. 69 Ark. 134; 82 *Id.* 499; 96 *Id.* 206.

D. E. Johnson for appellee; *R J. White,* of counsel.

1. All the allegations of the complaint were sustained by substantial proof. 58 Ark. 401.

2. Knowledge of the agent is knowledge of the principal. 79 Ark. 283; 86 *Id.* 538. Distemper is contagious and appellants knew it.

3. The testimony was competent. The value of the animals was proven. 89 Ark. 111. The instructions as a whole are correct. 93 Ark. 141; 83 *Id.* 61; 96 *Id.* 339; 2 Cyc. 332.

4. A clear liability was proven. 83 Ill. 111; 2 Rob. (N. Y.) 326. The instructions were not misleading nor assume facts to be proven. 89 Ark. 111. All the instructions substantially comply with the rule in 58 Ark. 401. There is no error.

KIRBY, J., (after stating the facts). (1) The court properly instructed the jury that the plaintiff would not be entitled to recover unless they found from a preponderance of the testimony that defendants knew or had notice of such facts as would make them chargeable with knowledge that their mules were infected with the disease while they were kept in the plaintiff's barn and liable to communicate it to other stock. *Railway Company* v. *Goolsby,* 58 Ark. 401; *Railway Company* v. *Henderson,* 57 Ark. 402.

(2) We do not think the court erred in giving instruction numbered 5 complained of, since Parker the driver of appellants' mules, engaged in their service, was charged with the duty of looking after and taking care of them and being their agent his knowledge of the condition of the mules was their own.

There was testimony sufficient to show that the mules were infected with distemper at the time they were kept in the barn and that it was an infectious disease, known to be so and liable to be communicated to other stock and that the horses of appellee took distemper after being stabled in the barn where the mules were kept without having been informed by appellants of the fact that their mules had been infected with the disease while kept therein.

From the testimony relative to the value of the animals, and the damage thereto, the jury could have found for a larger amount than they did, and the testimony of an offer from a particular individual of a certain price for one of the animals that died, if it was incompetent as contended by appellant was not prejudicial, since the jury fixed the value at a much less amount in rendering their verdict.

We do not think any of the instructions are open to the objections that they assumed facts not proved, or permitted the jury to find the value of and damage to the animals without regard to the testimony. The case appears to have been submitted to the jury upon instructions properly defining the issues and the testimony is sufficient to support the verdict.

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

STATE v. WALKER.

Opinion delivered March 13, 1916.

CRIMINAL LAW—APPEALS BY STATE—FELONIES—ORDER OF LOWER COURT.—The State can not appeal from a judgment granting a defendant a new trial in a prosecution for a felony.

Appeal from Prairie Circuit Court; *Thos. C. Trimble,* Judge; appeal dismissed.

STATEMENT BY THE COURT.

This appeal is prosecuted by the State from a judgment of the lower court granting appellee a new trial. He was cashier of the Bank of Hazen and indicted and convicted of making false entries on its books of account with the felonious intent to defraud the bank. He moved for a new trial setting up various alleged errors committed in the trial as grounds therefor, including the one that Claud Grant, one of the jurors, was a member of the grand jury which indicted him for embezzlement of $4,000 of the funds of the Bank of Hazen, at the March 1914, term of the circuit court.

Affidavits were submitted in support of the motion, and the court in rendering its opinion indicating its consideration of the testimony and its effect, appeared to think it was a close question of whether the evidence was sufficient to submit to the jury and concluded saying "any preconceived opinion as to the defendant's guilt on the part of a juryman, especially an opinion officially expressed must be taken as having been the cause of the doubtful verdict" and granted the motion for a new trial.

It appears from the affidavits that Claud Grant, one of the jurors, was a member of the grand jury of the March term, 1914, which returned indictments against appellee Walker for embezzlement of certain sums of money from the Bank of Hazen. Some of the witnesses stated the substance of the testimony that was before the grand jury, including statements relative to false entries in the bank books made by the cashier, at the time of such indictments and that W. D. White one of the grand jurors, requested, at the time Walker was indicted for embezzlement, that he should not be indicted for making false entries in the books as it might affect the interest of the bank, saying he could later be indicted therefor.

Albert Youngman stated he was a member of the petit jury which convicted the defendant and that Claud Grant was a member of said jury and "showed by his acts, conduct and words that he was very much prejudiced against defendant; that one of the jurors suggested that they should have further instructions from the court as to the meaning of the false intent and that Grant objected to asking such instructions."

Certain other affiants stated that they testified before the grand jury when the indictment for embezzlement was found and made no statement whatever about false entries in the books and that same were not detected until after the indictment for embezzlement had been returned.

Other affiants, members of the petit jury, stated that Claud Grant did not do or say anything in the consideration of the case to indicate that he was prejudiced in any way against the defendant and denied that he had objected to the jury asking further instructions of the court. Grant himself testified that he had no recollection whatever of any testimony before the grand jury of which he was a member in March, 1914, that indicted Walker for embezzlement, relating to any false entries in the books of the bank, that it did not occur to him when he qualified as a juror in this case that he had been on any grand jury which indicted the defendant "nor did it occur to me after the evidence was all in that I had ever heard any testimony which in any way pertained to false entries in the books of the Bank of Hazen, by Walker," that when selected as a juror he had no acquaintance with Walker, had never seen him until that term of the court, had no prejudice against him or feeling of any kind in the matter; had never formed or expressed an opinion and could not see how his conduct on the jury would indicate he was prejudiced. "I did and said nothing that could have been prejudicial." He remembered the discussion upon the suggestion that the jury ask the court for further instructions, but took no part in it, and said that the juror who made the suggestion, when an-

other juror explained what the court meant, seemed satisfied.

The judgment granting a new trial does not indicate upon which ground the motion was sustained.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant; *J. B. Reed,* Prosecuting Attorney, for appellant; *Manning, Emerson & Morris,* of counsel.

1. Argue the merits of the cause which are not passed upon in the opinion rendered by the court. Also contend that it is too late, after verdict, to except to the qualifications of a juror. 23 Ark. 51; 40 *Id.* 511, 515; 51 *Id.* 126; 104 *Id.* 606; 35 *Id.* 109-13; Kirby's Dig., § 4494; 56 Ark. 515-20, etc.; 12 Cyc. 714.

2. The question of Grant's competency as a juror, was a question of law and not of fact, about which the court could exercise its discretion in the matter of granting a new trial. 12 Cyc. 702-3.

3. The State can appeal from any decision of a trial court in a felony case, and certainly from the decision on a motion for a new trial. Kirby's Digest, § § 1188, 2584, 1238; 55 Ark. 439; Kirby's Digest, § 2603; 34 Ark. 632, 636.

Trimble & Williams and *Blackwood & Newman,* for appellee.

1. The question whether the new trial was properly granted can not be considered by this court. No appeal can be taken by the State from an order granting a defendant a new trial in a felony case. Kirby's Digest, § § 2603, 2607, 6215, 2584, 2422, 2424; 94 Ark. 368; 34 *Id.* 637; 47 *Id.* 562, 567; 98 *Id.* 304; 98 *Id.* 336, 304; 100 *Id.* 596; 84 S. W. 319; 89 Ky. 305; 12 S. W. 550; 34 Ark. 376. This last case has been followed without question until questioned by this appeal.

2. The motion for new trial was properly sustained and had Grant's incompetency been the only ground upon which the order was made it was sufficient. Kirby's Dig., § 2363; 115 Ark. 305.

3. Argue the merits of the cause which the court does not decide.

KIRBY, J., (after stating the facts). It is contended that the State is without authority to appeal from a judgment granting a motion for a new trial in a felony case.

The Constitution provides: "The Supreme Court, except in cases otherwise provided by this Constitution shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law," etc. Art. 7, section 4, Constitution 1874.

"An appeal shall only be taken on a final judgment, except on behalf of the State." Section 2584, Kirby's Digest.

When the State desires an appeal, the prosecuting attorney prays it and a transcript of the record is made and transmitted to the Attorney General, and, "If the Attorney General, on inspecting the record, is satisfied that error has been committed to the prejudice of the State, and upon which it is important, to the correct and uniform administration of the criminal law, that the Supreme Court should decide, he may, by lodging the transcript in the clerk's office of the Supreme Court within sixty days after the decision, take the appeal." Section 2603, Kirby's Digest.

In *State* v. *Flynn,* 31 Ark. 35, where the State appealed from an order granting defendant a change of venue from Garland to Pulaski County, the court said: "Whilst we would not encourage or suppose that the Legislature intended to provide for appeals by the State, in felonies, from every interlocutory decision of the court, yet it was well enough for the Attorney General to allow the appeal in this case, before final judgment, for if the court had proceeded to try the prisoner, the verdict and judgment would have been invalid if it turned out on appeal that the court had no jurisdiction of the cause."

In *State* v. *Ross,* 34 Ark. 376, the State appealed from an order granting the defendant a new trial upon the ground that there was no authority under the law for

holding the term of the circuit court of Pike County at which the defendant was convicted and although this court held that the trial court was in error in its rulings, declined to remand the cause with instructions to sentence the defendant and dismissed the appeal as not authorized by law.

The case of *State* v. *Robinson,* 55 Ark. 439, is not an authority, as contended by appellant, in favor of the proposition that the State can appeal from a judgment granting the defendant a new trial in a felony case. It questioned only the court's ruling on the sufficiency of the indictment to charge a public offense and belongs in the classification of appeals allowed as necessary for the correction of errors in order to the correct and uniform administration of the criminal law.

It was evidently the purpose in excepting the State from the terms of the statute providing an appeal shall only be taken on a final judgment in prosecutions for felonies, to permit appeals from such interlocutory rulings and decisions as might affect the jurisdiction of the cause or as would be necessary for the correction of errors in order to the correct and uniform administration of the criminal law, and from the statutes and authorities quoted, it is apparent that it was not intended to permit appeals by the State from judgments granting new trials to defendants to review such decisions or control the discretion of the circuit court in the granting of new trials in prosecutions for felonies.

The appeal not being from a final judgment nor one from which the State can take an appeal, it must be dismissed and the trial court will proceed with the cause. It is so ordered.

EDWARDS v. THAYER.

Opinion delivered March 13, 1916.

EXEMPT PROPERTY—SALE TO SATISFY FEE BILL—LIABILITY OF OFFICER MAKING SALE.—Plaintiff obtained a judgment against defendant foreclosing a lien upon certain real estate; before trial plaintiff sued

out a writ of attachment against defendant which was levied upon certain personal property; defendant filed a schedule of exemptions, which was allowed and supersedeas issued. The land foreclosed upon failed to sell for a sum sufficient to pay the judgment and costs. A fee bill for costs was issued in the name of the officers of the court and levied upon the property named in the schedule of exemptions. *Held,* the personal property was wrongfully sold, and that the sheriff was liable to the defendant for its value.

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

B. E. Isbell, for appellant.

1. The right to a judgment for costs is conferred by statute and is based not upon contract but upon the right given by statute. 84 Ark. 187; 95 *Id.* 85. The Constitution exempts certain personal property from *execution* for debt arising upon contract. Const. Art. 9, § § 1 and 2. A judgment for costs is not a debt upon contract. Kirby's Digest, § 965; 84 Ark. 187. A statutory liability is superior to any right or obligation by contract. 62 Ark. 435; 84 Ark. 188.

2. The judgment for costs is not for the benefit of the litigant unless he has paid them, but belongs to the officers of court, witnesses, etc. 56 Ark. 116; 97 *Id.* 492; Kirby's Digest, § § 965-6, 972-3 and 3528, 1893; 92 Ark. 91.

Steel, Lake & Head, for appellee.

1. Where a successful litigant has paid the costs he may have judgment and execution therefor. 97 Ark. 492; 56 *Id.* 116.

2. Fee bill may issue for the officers costs, witness fees, etc. Kirby's Digest, § § 3491, 3505, 3528-9, etc. A fee bill is different from an execution. 11 Ark. 322; 6 *Id.* 280.

3. Costs are incident to and partake of the nature of the judgment itself. 33 Ark. 688; 29 N. E. 362; 84 Ark. 187; 16 Ind. 200; 5 N. E. 414; 100 Ind. 439; 12 A. & E. Enc. L., p. 173; 8 So. 379. Exemptions are allowed against fee bills the same as against executions. 166 S. W. 656; 33 Ark. 688.

SMITH, J. This cause was heard by the court below on the following agreed statement of facts:

"It is agreed by the parties hereto that the facts of this case are as follows: That E. M. Nix instituted suit in the chancery court of Sevier County against Gertrude Thayer to foreclose a lien upon real estate, and won the suit, obtaining judgment for the debt and cost of suit; that during the progress of the suit and before trial, plaintiff sued out a writ of attachment against defendant which was levied upon certain articles of personal property; that said Thayer filed her schedule for exemptions before the clerk of this court and the schedule as filed was allowed and supersedeas issued; that the land in the foreclosure proceedings did not sell for a sufficient sum to pay the judgment and cost; and, that after the sale, a fee bill for the cost of suit in the name of the officers of the court was issued against Thayer, and levied upon the following described articles, as stated below (with value of each):

"One Majestic Range Cooking Stove.....$.....
"One Dining Table.....$.....
"One Bed with Springs.....$.....

"Total.....$36.00

"And the said articles so levied upon and sold under the fee bill by the defendant in this action were included in the schedule of exemptions and supersedeas hereinbefore mentioned, and within less than twelve months after such supersedeas was issued."

The court rendered judgment against the sheriff for the agreed value of the property, and this appeal questions the correctness of that decision.

It is argued on behalf of appellant that the cause is controlled by the case of *Buckley* v. *Williams,* 84 Ark. 187, and that under the authority of that case the claim of exemptions should not have been allowed. This case is distinguishable on the facts from that case, however. The present case is founded upon a fee bill issued upon

the authority of section 3528 of Kirby's Digest. In the case of *Buckley* v. *Williams, supra,* it was said:

"This is not a suit based upon section 3528 of Kirby's Digest allowing officers to issue feebills for costs against the party at whose instance the services were rendered, and we express no opinion on that question."

So it appears that the question now presented was there expressly reserved.

In the *Buckley* v. *Williams* case the court followed and approved the decision of the Supreme Court of Indiana in the case of *Donaldson* v. *Banta,* 29 N. E. 362. In stating the issues involved in that case the learned judge who wrote the opinion said:

"The controlling question in this case is, does the right of exemption exist against an execution issued upon a judgment for costs in favor of the defendant against an unsuccessful plaintiff in an action founded upon or growing out of contract?"

The facts there were that the plaintiff sued for a debt alleged to be due upon contract, but recovered nothing. Thereupon under the law the defendant recovered judgment for his costs, hence the judgment for the costs which was rendered in the case was not incident to and did not grow out of any contract. It was there said:

"Where a suitor obtains a judgment for damages in an action for tort, or a money recovery in an action upon contract, and is awarded costs, the judgment is an entirety and must be collected according to the laws for the collection of the judgment for damages, or the money recovery upon contract. In other words, the judgment for costs is an incident to and must be controlled in its collection by the principal judgment. This is so even where the principal judgment is only for a nominal amount."

In that opinion the court reviewed its previous decisions on the subject, and its reasoning is that, where plaintiff sues upon a contract, and fails to recover, the judgment which is rendered in favor of the defendant is not incident to the contract, and therefore, can not and

does not partake of the nature of the contract. The defendant incurs his costs in his effort to disprove the plaintiff's claim, and when he has successfully done so the statute awards him a judgment against his adversary for the costs of the litigation. The liability thus fixed is statutory, and not contractual. Where, however, the plaintiff prevails and recovers judgment, he is permitted, as an incident to his recovery, to have judgment also for his costs, and it is said that the costs partake of the nature of the judgment.

In the case of *Martindale* v. *Tibbetts,* 16 Ind. 200, it was said:

"The judgment for the debt and costs is an entirety, the costs following as an incident to the judgment for the debt and to be collected in the same manner."

The case of *Massie* v. *Enyart,* 33 Ark. 688, is to the same effect. The syllabus in that case is as follows:

"The exemption of personal property is in cases of debt by contract only, and a judgment or decree for tort or fraud is not a debt by contract, nor are the costs, which are but an incident of the judgment."

It is argued that the process in this case is not an execution, but is a fee bill, and that, therefore, the fact that a supersedeas has issued within twelve months thereof is not controlling. Kirby's Digest, section 3906.

The court made a finding of fact that the fee bill had issued for all the costs in the case and that it was therefore, of the nature of an execution and it was intended thereby to subject to the satisfaction of the plaintiff's judgment property which had been previously held to be exempt from his demand.

We think the same rule should be applied here as would be applied if the process was an execution, instead of a fee bill, and that the court properly held that the property was wrongfully sold and that the sheriff was liable for its value.

The judgment of the court below is, therefore, affirmed.

ST LOUIS IRON MOUNTAIN & SOUTHERN RAILWAY CO. v. NEEDHAM.

Opinion delivered March 13, 1916.

1. CARRIERS—RAILROADS—CHANGE OF CARS—DUTY TO NOTIFY PASSENGER OF TIME TO MAKE CHANGE.—Where a passenger purchases a railway ticket which requires him to make a change of cars in order to reach his destination, the railway company is required to make suitable regulations for the convenience of passengers in making the change, and that reasonable steps be taken to bring those regulations to the attention of the passenger, no further individual notice being required.
2. CARRIERS—RAILROADS—JUNCTION POINT—CHANGE OF CARS—NOTICE TO PASSENGER.—Where a passenger, in order to reach his destination, to which he had purchased a ticket, is required to change cars at a junction point, a duty rests on the railway company to notify the passenger, when the junction point is reached, and that it is the junction point applicable to the passenger's route, and when an announcement to that effect has been made, the passenger can not recover damages where he fails to disembark from the train, and is carried past the junction point.
3. CARRIERS—CHANGE OF CARS—NOTICE TO PASSENGERS—DUE CARE—When the announcement by the employees of a carrier of the necessity for a change of cars, in order for the plaintiff to reach her destination, is made in accordance with a reasonable regulation of the carrier, it is error to leave to the jury the question of whether the carrier exercised ordinary care in making the announcement.

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

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

1. A verdict should have been directed for defendant. Plaintiff was carried by her station, Kensett, through her own negligence; and the evidence shows no negligence whatever of any of defendants' servants. It is the duty of a passenger to ascertain the station of his destination; whether the train stops there; and to notify the officers of the train where she desired to stop. She made no inquiry at the ticket office nor of the train officers and is not entitled to recover, because of her own negligence. 82 Ark. 598; 84 *Id.* 436; 47 *Id.* 74; 4 R. C. S., § 516; 39 L. R. A. (N. S.) 663; 28 *Id.* 611; 33 S. W. 285; 32 *Id.* 42; 54 *Id.* 1090; 66 *Id.* 862; etc.

2. There was error in the instructions to the jury. The tenth instruction for plaintiff is not the law of this case as to ordinary care. 28 L. R. A. (N. S.) 611 and cases cited *supra.*

Geo. F. Jones, for appellee.

1. It was the duty of appellant to have apprised appellee that it was necessary to change cars at Kensett to reach her destination. 67 Ark. 123; 67 *Id.* 142; 94 *Id.* 324; 100 Miss. 132; 55 So. 42; 6 Cyc. 584. The cases cited by appellant are not applicable to this case. The facts are different. The law is correctly stated in 159 Ala. 154; 48 So. 981; See also 54 Minn. 169; 55 N. W. 1117; 84 Ark. 436-441; Hutchinson on Carriers, § 1129; 5 R. C. L., § § 517, 532. Negligence in the officers of the train was shown.

2. In instruction No. 10, the court defined ordinary care, not elaborately, but certainly sufficiently, and there is no error in the other instructions. 75 Ark. 125; Hutchinson on Car., § 805. The information in a ticket is not binding on a passenger, if he had no actual knowledge of the condition and information conveyed in it.

McCULLOCH, C. J. The plaintiff, Mrs. Needham, became a passenger on one of the defendant's trains enroute to Heber Springs, a station on the Missouri & North Arkansas Railway, and was carried beyond the junction where she should have changed cars. This is an action to recover damages alleged to have been sustained by reason of negligent failure on the part of defendant's servants to notify plaintiff of the necessity for changing cars at Kensett, the junction of the two roads. The case was tried before a jury and the result was a verdict against the defendant, and from the judgment rendered thereon the defendant has prosecuted this appeal.

Plaintiff resided in Little Rock and bought a round-trip ticket to Heber Springs, the ticket reading over defendant's line from Little Rock to Kensett, and thence over the Missouri & North Arkansas Railroad to point of destination. Plaintiff boarded a train at the Union

Station, Little Rock, at 2:45 p. m. The conductor came through the train shortly after leaving Little Rock and detached the coupon covering the fare for passage to Kensett and returned the balance of the ticket to plaintiff. Plaintiff testified that she did not know where Heber Springs was, but supposed that it was on the line of defendant's road and that she would not have to change cars. The conductor says that when he took up the ticket he informed plaintiff of the necessity of changing cars at Kensett, but this the plaintiff denies in her testimony. The train stopped at Kensett a sufficient length of time for passengers to debark, and the name of the station was announced by one of the trainmen in the coach in which the plaintiff was riding, but there is a conflict in the testimony as to the extent of the announcement. Plaintiff said that the brakeman or other employee merely called the name of the station, but the flagman testified that he called the name of the station and gave the announcement to "change cars for Searcy and Eureka Springs." At any rate, plaintiff failed to debark at the station, and she says that she did not learn that a mistake had been made in not changing cars until she reached Crawfordsville, a station on the road seventeen miles west of Memphis. She states that the conductor then admitted that she had been carried by on account of his mistake, and stopped the train at Crawfordsville so that she could get off. She was furnished transportation from Crawfordsville back to Wynne, and thence back to Kensett, but in returning she was kept up all night, either at the station at Wynne or continuing the journey back to Kensett.

(1) It is contended by counsel for defendant that the judgment should be reversed and the cause remanded for the reason that according to the undisputed testimony the stop at Kensett was announced, and that that was all that the servants of the company were required to do, the plaintiff being guilty of negligence in failing to ascertain that that was the point for changing cars. It is clear that if there was an announcement made, as

claimed by the flagman, giving notice of the necessity for a change of cars to points north on the Missouri & North Arkansas Railroad, the plaintiff was bound to take notice of her route and make the necessary change. She was an adult, apparently of ordinary intelligence, and in full possession of her senses, therefore the carrier was not required to give her special notice of the necessity for a change of cars. All that the law required was that a suitable regulation be made for the convenience of passengers, and that reasonable steps be taken to bring those regulations to the attention of the passenger, no further individual notice being required. *St. Louis, I. M. & S. Ry. Co.* v. *Atchison,* 47 Ark. 74; *Jewell* v. *St. Louis, I. M. & S. Ry. Co.* 82 Ark. 598; *Rock Island, A. & L. Rd. Co.* v. *Stevens,* 84 Ark. 436; *Lilly* v. *St Louis, & S. F. Ry. Co.* (Okla.) 39 L. R. A. (N. S.) 663; *Central of Georgia Ry. Co.* v. *Ashley,* 159 Ala. 145.

In the Alabama case above cited, the rule is, we think, correctly stated as follows: "A primary duty rests on the carrier of passengers to give publicity to its regulations, whether of schedule, including places whereat its train will stop for the discharge or reception of passengers, or of routing on its roadway, embracing points of change to another line of its roadway or that of another company, to the end that the ordinarily prudent and intelligent traveler may be informed of the facts essentially necessary for him to accomplish his journey. The reason for such duty inheres in the nature of the service afforded by such agencies, in connection with the power possessed by carriers to formulate and enforce such reasonable regulations as the conduct of the business requires. * * * Having this power, it would be wholly irrational to say that no duty, commensurate with the power, rests on the carrier to advise the traveling public, by reasonable means, of regulation so necessary to any journey by rail; for such a pronouncement would essentially, cast upon the passenger the obligation, not simply to exercise reasonable prudence and diligence to ascertain the regulations, with respect to where, when,

and how his journey may be made under regulations existing and published, but to seek out unpublished regulations the operation of which affect his journey. The result would be, naturally, that no carrier of passengers would make any effort to give publicity to its regulations touching matters associated with the employment of its transportative agencies."

(2) We think the above statement of the law is correct, as applicable to the facts of this case, and that while the defendant had the right to assume that the plaintiff had informed herself as to the route to her destination, yet the obligation rested upon the carrier to give some notice of the arrival at the junction point, and of the fact that it was the junction point applicable to the route plaintiff was traveling. The undisputed evidence shows that there was such a regulation, which consisted of an announcement of the fact that it was the junction, and that it was necessary to change for points to the north on the line of the connecting carrier. If that announcement, in accordance with the regulation, was in fact made, then there can be no recovery in this case, but there is a dispute on that point. It is argued that inasmuch as the plaintiff confesses that she did not know that Heber Springs was on another line of railway, the announcement, even if it had been made, would have been ineffectual so far as she is concerned, and would have meant nothing to her. It is true, the plaintiff says that she did not know that she had to change cars at all, but we can not say that an announcement of the change at Kensett would not have attracted the plaintiff's attention to the extent that she would have pursued further inquiry to ascertain whether or not that change applied to her route. The jury might have drawn the inference from the circumstances that the announcement, if made, would have put the plaintiff upon an inquiry which she would have pursued by asking information of the conductor. We are of the opinion, therefore, that there was enough to go to the jury on that issue, about which there was a sharp conflict in the testimony.

(3) That issue was not, however, correctly submitted to the jury, and for that reason the judgment must be reversed for a new trial. The court gave the following instruction, over the objection of the defendant: "X. You are instructed that it was the duty of the defendant to use ordinary care to apprise plaintiff of the place she was to leave its train and catch a train on another road to continue her journey under the ticket defendant had sold her. By ordinary care is meant that care an ordinarily prudent person would exercise under the circumstances. If you find that her having been carried by Kensett was the result of want of ordinary care on the part of the employees of the defendant, then you will find for the plaintiff; if you find she suffered any damages of which such failure to exercise ordinary care was the proximate cause. By proximate cause is meant the natural and probable result of an act, and that that should have been foreseen under the circumstances."

The instruction is erroneous in leaving it to the jury to determine what would constitute ordinary care. The regulation of the company for the junction station to be announced, and the announcement of the necessity for changing cars for points on the intersecting line, was reasonable and constituted the full measure of the carrier's duty to the passengers. It was not proper to leave it to the jury to say whether or not, if that regulation had been complied with, it constituted ordinary care. The flagman testified that he made the announcement of the necessity for change of cars, and the jury may have accepted his statement as true and yet found that ordinary care required a special notice to the plaintiff that she must change cars in order to go to Heber Springs. The instruction ignores the real point at issue in the case, as to whether or not the announcement was made as testified by the flagman, and erroneously leaves it to the jury to determine whether or not the trainmen had exercised ordinary care "to apprise plaintiff of the place

she was to leave its train and catch a train on another road."

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

CHAMBERS v. CUNNINGHAM.

Opinion delivered March 13, 1916.

1. USURY—FINDING OF CHANCELLOR.—The finding of the chancellor that certain notes did not bear a usurious rate of interest, held to be sustained by the proof.
2. ADMINISTRATION—APPOINTMENT OF ADMINISTRATOR—NECESSITY.—The appointment of an administrator by the probate court is conclusive of the necessity for administration.
3. ADMINISTRATION—ASSIGNMENT TO ADMINISTRATOR.—A. was indebted to B. at the time of B.'s death. Thereafter A. executed a renewal note to B.'s widow and son. The latter then assigned the same to B.'s administrator. *Held*, A. could not question the administrator's authority to accept the assignment, and would be protected from further suit by a decree in an action by the administrator against him.

Appeal from Conway Chancery Court; *J. M. Martin*, Special Chancellor; affirmed.

The Appellants, *pro sese*.

1. The demurrer should have been sustained as appellees' pleading and proof both show that the suit was not prosecuted in the name of the real parties in interest. Kirby's Digest, § 5999; 51 Ark. 293. The property was never the property of the deceased. The mortgage and notes were payable to M. J. and G. L. Cunningham, Jr. and were never in the hands of the deceased, nor assets of his estate. 18 Cyc. 191, p. 1014.

2. The assignment was a subterfuge to get the protection of the constitution barring testimony as against administrators. 35 Ark. 274; 37 *Id.* 200. It was a fraud. 33 *Id.* 468; 16 Cyc. 722, 785; 68 Ark. 495. Before the assignment appellants had the right to show usury. 37 Ark. 195. The administration is only a scheme and device to hide the usury. 62 Ark. 97; 39 Cyc. 957, 918.

3. Usury was proven. Kirby's Digest, § 5389, 5390; 62 Ark. 97. The renewal of a usurious contract is itself usurious. 39 Cyc. 1003, 1005; 62 Ark. 376; 111 *Id.* 597.

4. Letters of administration were improperly issued; there were no debts to be paid. 35 Ark. 274; 37 *Id.*, 200; 34 *Id.* 394; 41 *Id.* 92.

5. There was no consideration except the old usurious debt. 53 Ark. 457; 39 Cyc. 997, 918.

Sellers & Sellers, for appellee.

1. The demurrer was properly overruled. 83 Ark. 495. There were some debts to be paid. The probate court is the sole judge of the necessity of administration. 7 Ark. 48; 46 *Id.* 373; 23 *Id.* 78. No scheme nor device was proven. A proper assignment was alleged and proven, and that the administrator was the owner and holder of the mortgage and notes.

2. Almost the entire testimony for appellants was inadmissible. Kirby's Digest, § 3093; 83 Ark. 210; 80 *Id.* 277; 79 *Id.* 69; 13 Enc. of Ev. 400. No usury was shown by any competent evidence.

3. The decree is correct on the merits. No fraud was shown and no usury proven. The appellants' rights are protected by the decree and it is amply supported by the testimony. His findings are, at least, not against the preponderance of the competent testimony.

McCULLOCH, C. J. This is an action instituted in the chancery court of Conway County by G. L. Cunningham, Jr., as administrator of the estate of G. L. Cunningham, deceased, against the defendants, J. B. Chambers and others, to foreclose a mortgage on real estate. The mortgage was executed on March 3, 1911, by J. B. Chambers and his wife, to G. L. Cunningham, Jr., (individually) and his mother, M. J. Cunningham, to secure a debt of $2,738.90 evidenced by five promissory notes, each for the sum of $547.78, bearing interest at the rate of 6 per cent per annum from date until paid. Subsequent to that date letters of administration on the estate of G. L. Cunningham, Sr., were issued to G. L. Cunningham, Jr.,

and said notes were by the payees transferred to said administrator.

M. J. Cunningham and G. L. Cunningham, Jr., are respectively the widow and only heir of G. L. Cunningham, deceased, and it is undisputed that said notes were executed to them by J. B. Chambers in renewal of certain notes which Chambers had previously executed to the senior Cunningham. There had been no administration on the estate of said decedent at the time of the execution of said notes, but, as before stated, letters of administration were issued to the plaintiff subsequent to that date and prior to the commencement of this suit. The evidence shows that there was no indebtedness of the estate of Cunningham, deceased, except a small amount of household expenses which had been paid.

The defendants challenge the authority of the administrator to sue on the notes, but the principal defense offered is that the original debt to Cunningham, Senior, was usurious, and that these notes, being executed in renewal thereof, are likewise void on account of usury. It is alleged in the answer, and the testimony of J. B. Chambers tends to prove, that the original indebtedness to G. L. Cunningham, Sr., was evidenced by notes bearing 10 per cent. interest from date until paid, and that in addition thereto there was no oral agreement between the parties that the maker of the notes was to pay interest at the rate of 25 per cent. per annum. The testimony of Chambers, if accepted as true, also shows that the notes were in fact paid. He testified that he began dealing with G. L. Cunningham, Sr., in the early part of the year 1901, and executed two notes, payable in the fall, one of which was for $50 and the other for $682.89; also that he executed a new note on January 14, 1902, for $876.65, and another note on March 17, 1904, for $767.70, and another on January 17, 1905, for $587.36. He claims that the last two notes were executed for accumulated usurious interest, and that he had paid, from time to time, more than enough to satisfy the original debt and lawful interest.

It appears from the testimony that some time prior to the year 1911 G. L. Cunningham, Sr., died, leaving his widow and the plaintiff as his sole heir at law. The plaintiff is a young man and knew nothing at all about the affairs of his father, but in going through the papers found the notes executed by defendant Chambers, aggregating, with accumulated interest, the amount of the notes in suit. The old notes were secured by a mortgage on land and on a gin outfit. He testified that he conferred with Chambers several times about the payment of the debt, and that Chambers asked for time and promised to make payments in the following fall, but failed to do so. Another creditor of Chambers sued out an attachment and levied it on the gin property, and, according to the testimony of plaintiff, this circumstance was reported to him by Chambers who stated that the property belonged to the Cunningham estate by reason of the mortgage, and that it was their duty to protect it. In February, 1911, Chambers executed to young Cunningham and his mother a bill of sale for the gin outfit at an estimated price of $1,500, to be credited on the old indebtedness, but on March 3, 1911, the gin property was reconveyed by Mrs. Cunningham and her son to Chambers, who then executed the new notes now in controversy for the amount of the original debt and accumulated interest. The old notes were not introduced in evidence, and the only testimony given on that subject is that of the plaintiff who testified in general terms that the amount of the new notes was the aggregate of the old notes and accumulated interest. He denies that anything was said between him and Chambers about the notes being usurious until after the commencement of this suit.

Chambers testified that young Cunningham came to see him about the notes and figured up the amount to be $4,238.90; that he informed Cunningham of the usurious character of the transactions with the latter's father and insisted that he had paid all that was justly due, and asked Cunningham to accept the new notes for one-half of the amount of the old ones with accumulated interest,

which offer he said was declined, and that he then executed the bill of sale for the gin, and subsequently the mortgage in controversy. There is an important inconsistency in the testimony of Chambers, for he claims that Cunningham figured up the notes to be $4,238.90, and insisted upon payment of the whole sum, expressly refusing to accept any less, and yet the fact is undisputed that the new notes were executed for amounts aggregating only $2,738.90. The consideration of $1,500 for the bill of sale of the gin outfit would, if deducted from the amount which Chambers says was asserted against him, leave the amount of the notes, but the proof is that the gin outfit was reconveyed to Chambers, so that credit does not stand on the amount of the indebtedness. The statement of Chambers to the effect that he informed young Cunningham of the usurious character of the old indebtedness is corroborated by the testimony of his wife and his daughter-in-law, but it is contradicted by the testimony of another witness, who, so far as the record shows, has no interest in this controversy. There is also in the record the testimony of two or three witnesses who say that the senior Cunningham during his lifetime told them that he was charging Chambers 25 per cent. interest.

(1) We pretermit any discussion of the question whether or not the testimony of Chambers was rendered incompetent because of the fact that it related to transactions with the decedent, inasmuch as a ruling on the motion to strike it out was not pressed before the lower court. Treating the testimony as competent, we think it can not be said that the finding of the chancellor was against the preponderance of the evidence. Proof of the fact that usury was actually charged depends wholly on the testimony of Chambers himself and upon the additional testimony of two or three parties to the effect that Cunningham told them that he was charging Chambers 25 per cent. interest, which, under the circumstances which the witnesses say these statements were made by the elder Cunningham, is so unreasonable as to be entitled to very

little, if any, credit. Now, the fact that Chambers waited until after the death of the elder Cunningham, and in the meantime executed new notes for the debt without saying anything about the usurious character of the indebtedness, is a strong circumstance against crediting his testimony, especially when he claims that he had in fact paid a sufficient amount to the elder Cunningham to discharge the indebtedness. The chancellor had the right, after having reached the conclusion that Chambers had kept silent so long a time and in the meantime executed new notes without saying anything about the defenses which he now asserts against the old indebtedness, to take those circumstances to the discredit of Chambers in weighing his testimony; nor can it be said that the chancellor erred in reaching the conclusion that Chambers had not, as he claims, said anything about the usurious character of the indebtedness to young Cunningham when he executed the new notes. Upon the whole, we are not convinced that the plea of usury is established by the preponderance of the testimony, and it therefore becomes our duty to leave the finding of the chancellor on that issue undisturbed.

(2-3) In answer to the contention that plaintiff has no right to sue for the reason, in the first place, that there being no indebtedness of the estate there was not authority for the issuance of letters of administration, and next that the administrator had no authority to accept an assignment of the notes, it may be said that the appointment of the administrator by the probate court was conclusive of the necessity for administration, (*Stewart* v. *Smiley, Administrator,* 46 Ark. 373); and that the defendants are not in a position to question the authority of the administrator to accept an assignment of the notes. The notes and the mortgage were in fact executed by Chambers and wife to Mrs. Cunningham and her son, and they assigned them to the administrator, and the decree protects the defendant from any further suit on the debt.

It appearing that the finding of the chancellor is not against the preponderance of the evidence as to the only real issue in the case, it follows that the decree must be affirmed, and it is so ordered.

IZARD COUNTY *v.* WILLIAMSON.

Opinion delivered March 13, 1916.

COUNTIES—PUBLIC BUILDING—COMMISSIONERS—COMPENSATION.—An order of a county court appointing an assistant commissioner of public buildings, where a commissioner has already been appointed, and an order making the former an allowance for his services, are *ultra vires* and void. More than one commissioner might have been appointed, but the compensation allowed can be a reasonable one for only one person. Kirby's Digest, § 1012 and § 1024.

Appeal from Izard Circuit Court; *Z. M. Horton,* Special Judge; reversed.

Bradshaw, Rhoton & Helm, for appellant.

1. The county court had authority to call in and cancel the warrants. See authorities cited in *Izard Co.* v. *Vincennes Bridge Co.,* 122 Ark. 122 Ark. 557.

2. Only one building commissioner is allowed by law; and certainly compensation could not be allowed to two separately. The allowance to Williamson is void for want of authority either in the county or circuit court. Kirby's Digest, § § 1012, 1024; 68 Ark. 347; 116 Ark. 65. Only one compensation to a commissioner can be paid for his services. 68 Ark. 347.

McCaleb & Reeder, for appellee.

1. The county court had jurisdiction to provide for the erection of a court house; to appoint commissioners, etc., and to provide compensation for same. Kirby's Digest, § § 1009, 1012, 1024. The orders and judgment thereon were valid and final unless set aside on appeal. No allowance should have been made to Wilson. Kirby's Dig., § 1024. More than one commissioner is allowed. 68 Ark. 340, 347.

2. If the compensation was excessive the only remedy is by appeal. The orders were not void. The county court may revoke the appointment of a commissioner at a subsequent term. 107 Ark. 298; 73 *Id.* 523. Mere irregularities or errors do not render the allowance void. *Ib.* The remedy is only by appeal. 93 Ark. 11; 102 *Id.* 277. The order was final. 96 *Id.* 427.

3. As to the power of the court to call in and cancel the warrants see Kirby's Dig., § 1179; 52 Ark. 502, and authorities cited in *Izard Co.* v. *Vincennes Bridge Co.*, 122 Ark. 557.

HART J. This is an appeal from the judgment of the circuit court denying the authority of the county court of Izard County to cancel certain warrants.

The county court of Izard County made an order calling in the county warrants of that county pursuant to section 1175 of Kirby's Digest for the purpose of cancellation and reissuance.

J. W. Williamson, appellee, presented to the county court five warrants in the sum of $200 each, issued on the 30th day of October, 1914. The county court entered an order cancelling the said warrants and stated that each of said warrants had been thoroughly examined by the court and found that none of the warrants was a just and legal evidence of indebtedness against said county. Williamson appealed to the circuit court.

The facts are that the county court made an order providing for the erection of a new court house. W. A. Wilson was appointed building commissioner. At a subsequent date, but prior to the erection of the building, the county court entered an order appointing J. W. Williamson as associate commissioner. The county court made an allowance to W. A. Wilson in the sum of $1,100 for his services. A separate order of allowance was made in favor of J. W. Williamson in the sum of $1,000.

The circuit court found that the warrants attempted to be cancelled were issued on orders of the county court on matters over which it had jurisdiction and that said orders had never been appealed from. The court held

that neither the county court nor the circuit court on appeal had any right or authority to cancel said warrants. From the judgment rendered, Izard County has duly prosecuted an appeal to this court.

Section 1011 of Kirby's Digest provides under what circumstances a county court may make an order for the erection of a court house.

Section 1012 provides that when such court shall have made an order for the erection of public buildings, it shall appoint some suitable person as commissioner of public buildings, who shall superintend the erection of the same.

Section 1024 provides that the commissioner of public buildings shall receive reasonable compensation for his services. It is the contention of counsel for Izard County that the county court had no authority to allow an associate commissioner compensation for services performed in superintending the erection of the building, and rely upon the case of *Hilliard* v. *Bunker,* 68 Ark. 340. Counsel for appellee rely on the same case and contend that under it the court might appoint two or more commissioners but that it might only allow a reasonable compensation for their services. They further contend that any error made by the court in the allowance of compensation should have been corrected by appeal and can not be inquired into in this proceeding.

In the case of *Monroe County* v. *Brown,* 118 Ark. 524, the court held that "the mere fact that the county court has erroneously allowed a claim for an excessive amount, does not call for reinvestigation and review in subsequent proceedings under the statute, but if fraud has been practiced in the allowance itself, the claim is an illegal one and the judgment may be inquired into and set aside."

The reasoning of the court for so holding was quoted in the opinion of *Izard County* v. *Vincennes Bridge Co.,* 122 Ark. 557, this day rendered, and need not be repeated here. As we have already seen, section 1012 Kirby's Digest, provides for the appointment of a commis-

sioner of public buildings when the county court has determined upon the expediency of erecting a new court house. It is true W. A. Wilson was not called by that precise title, and the order denominated him as building commissioner. It is evident, however, that he was appointed commissioner of public buildings under the statute and performed the services required of him by statute.

Williamson was denominated associate commissioner in the order appointing him. It is contended by his counsel that the name means nothing and that the court had a right to appoint more than one commissioner of public buildings.

In the case of *Hilliard* v. *Bunker,* 68 Ark. 340, the court said, "The objection that the county court appointed three (only two were appointed), instead of one, is abstractly correct, but it only goes to the compensation to be allowed the commissioners for services."

Under the authority of that case, the court might employ more than one commissioner but only one compensation could be allowed. In the case before us, compensation was allowed Wilson and Williamson separately. This the court had no authority to do. Wilson was first appointed as commissioner of public buildings. The Legislature provided for the appointment of such commissioner and imposed upon him certain duties. Such regulation of the Legislature was binding upon the county court and is exclusive of all other methods to be pursued by it. The making of the allowance to Williamson was *ultra vires* and the contract is void, and to pay him separately at an agreed price or upon a *quantum meruit* out of the public funds was beyond the authority of the county court. Under the statute the county court had authority to appoint a commissioner of public buildings and to allow him a reasonable compensation therefor. The court has construed the statute to mean that more than one commissioner may be appointed by the county court, but that the compensation allowed could be only a reasonable one for one person. The reason is that it is the spirit

of our laws to collect from the people only such an amount of money by taxation as may be allowed by law.

If the county court had allowed Williamson and Wilson compensation in one order and they had accepted it, the court could not be concerned about how they divided it, provided only a reasonable compensation for one person had been allowed. In the case before us a separate compensation was allowed to Williamson, and this the court had no authority to do, for it had already appointed a commisioner to superintend the erection of the court house and a fee was allowed him for that purpose.

It follows that the action of the court in making the allowance to Williamson was without its jurisdiction, and the county court was right in cancelling the warrants. Therefore, the judgment must be reversed and the cause will be remanded for further proceedings according to law, and not inconsistent with this opinion.

SMITH, J., dissents.

FISHER v. THE RICE GROWERS BANK.

Opinion delivered March 13, 1916.

1. BILLS AND NOTES—ACCOMMODATION—BURDEN OF PROOF.—As between the original parties to a note, the maker may set up as a defense that he signed the note for accommodation merely, and the burden of proving such defense rests upon him.
2. APPEAL AND ERROR—FINDING OF CHANCELLOR.—The findings of fact made by a chancellor, will not be disturbed on appeal, unless they are against the preponderance of the evidence.
3. BILLS AND NOTES—ACCOMMODATION.—The cashier of a bank had permitted overdrafts in favor of himself and certain others, and plaintiffs executed notes which were used in taking care of the overdrafts. *Held*, under the evidence that plaintiffs would be treated as having executed the notes to help their friend, the cashier, out of a difficulty, and not merely for accommodation.

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

Blackwood & Newman, for appellants.

1. There was no consideration for the notes; they were given as accommodation paper at the request of the president of the bank to cover certain overdrafts permitted by the cashier of the bank. These overdrafts when paid or secured were to be credited on the notes as paid. The evidence shows that the notes have been paid and should be cancelled. Smith's testimony can not be reconciled with the undisputed facts, and the promises of Smith, on behalf the bank, constituted the only consideration. The failure of the president to fulfill these promises can be pleaded against the bank. 177 S. W. 14. Or, upon proof that his fulfilling them would cause the liability to be terminated, equity will cancel the notes.

2. The evidence shows that all overdrafts which the notes secured have been paid. The facts corroborate the testimony of both the appellants and makes the finding of the chancellor clearly against the preponderance of the evidence. 120 Ark. 313.

Mann, Bussey & Mann, for appellee.

1. This being a suit to cancel written instruments the testimony must be clear, unequivocal and conclusive. 93 Ark. 295. However, the weight of the testimony is clearly in favor of the appellee and this court will not disturb the findings of the chancellor on matters of fact, All the evidence points to the fact that appellants signed to help their friend Bratcher out of trouble—to cover the overdrafts permitted by him as cashier against orders.

HART, J. William Fisher and E. N. Harrod filed separate suits in the chancery court against the Rice Growers Bank to cancel a note and mortgage. Each plaintiff alleged that he signed a note payable to the Rice Growers Bank in the sum of $2,500; that the note was delivered to the bank to be used by it as collateral security for the purpose of securing money to meet certain overdrafts; that the note was executed at the solicitation of the president of the bank and solely for the accommodation of the bank; that there was no consideration whatever for the execution of the note.

The bank filed an answer in each case in which it denied that the notes had been executed for accomodation merely but stated the facts to be, that its cashier had an overdraft under his own name and had permitted customers of the bank to have overdrafts, against the rules of the bank; that plaintiffs signed these notes as friends of the cashier to cover these overdrafts.

Judgment was asked in each case for the amount of the note sued on, and for foreclosure of the mortgage given to secure it. The same testimony was used in each case and the cases are consolidated here for the purpose of trial.

The chancellor found the issues for the bank and judgment was rendered against each plaintiff for the amount of the note and the foreclosure of the mortgage ordered in each case. The cases are here on appeal.

(1) In the case of *Boqua* v. *Brady,* 90 Ark. 512, the court held that as between the original parties to a note, the maker may set up as a defense that he signed the note for accommodation merely. So it devolved upon the plaintiffs to show by preponderance of the evidence that they signed the notes for the purpose of accommodating the bank, and that there was no consideration for their execution.

E. N. Harrod testified substantially as follows:

I signed the note in question, in August, 1913, at Wheatley, Arkansas. I had been engaged in the mercantile business there for several years and the Rice Growers Bank was also in business there. H. K. Smith was president and A. C. Bratcher the cashier of the bank. One morning Smith called me in the office of the bank and told me that Bratcher was in bad; that Bratcher had an overdraft of $3,300 and had permitted Charles Flemming a customer of the bank to overdraw his account to the sum of about $4,700, C. S. Hemenway & Sons to overdraw in the sum of $470.26. Smith stated the bank might have to close its doors if something was not done and I agreed to sign a note of $2,500 to enable the bank to procure money to meet the overdrafts. William Fisher

was at that time in Missouri, but he was called back and it was finally agreed that Fisher and I should each make a note to the bank for $2,500 to be used in paying the overdrafts of Fleming and Hemenway. Smith said that he himself would take care of the overdrafts of Bratcher. The notes were signed as accommodation merely to the bank and Smith agreed that we should never have to pay anything on them; that as soon as the overdrafts were taken care of by the parties, our notes would be returned to us.

William Fisher was in Missouri at the time the president first discovered the amount of the overdrafts and came to Wheatley at the request of Bratcher. He corroborated Harrod as to what occurred after he returned and states that the notes were executed at the request of Smith as accommodation to the bank. Bratcher also testified that the notes were signed by the plaintiffs to cover the Fleming and Hemenway overdrafts which amounted to about $5,000 and stated that these overdrafts had since been paid. He said there was nothing said about the plaintiffs taking care of his overdrafts and said that Smith agreed to take care of it.

On behalf of the bank Smith testified that the plaintiffs were friends of Bratcher and had executed the notes solely for his accommodation. He denied in positive terms that he asked the plaintiff to sign the notes as accommodation to the bank but stated that the overdrafts were wholly caused by the action of Bratcher and that he did not know anything about them and that it was against the rules of the bank for Bratcher to suffer customers to overdraw to that extent without consulting the directors and that he had no right to overdraw himself; that the Bank of Forrest City was placed in the hands of a receiver; that it had a large block of stock in the defendant bank; that he told Bratcher that an auditor would doubtless be sent to go over the affairs of the bank; that he asked for a statement from Bratcher; that Bratcher gave him a statement purporting to show all overdrafts; that none of the overdrafts mentioned

above were contained in the statement; that Bratcher upon being pressed admitted that he had done wrong and then acknowledged to his own overdraft, and then to those of Hemenway and Fleming; that Bratcher procured plaintiffs to sign the notes because they were his friends.

Russell Johnson, the bookkeeper of the bank, testified that he was a nephew of the president of the bank; that when his uncle asked Bratcher about the overdrafts that Bratcher first stated that the list was correct and then admitted that it was not. He then told of his own overdraft and of the Hemenway and Fleming overdrafts, He stated that he knew he had ruined the bank and asked that he be given time to get some one to help him.

In other respects the witness corroborated the testimony of the president of the bank to the effect that the notes were signed by the plaintiffs as accommodation to Bratcher.

When the notes were executed and money was procured by using them as collateral, the overdraft of Bratcher was first paid off with the proceeds and then the overdraft of Hemenway was taken up and the balance credited on the overdraft of Fleming. Bratcher knew that this was done and made no objection thereto.

There was a meeting of the directors to discuss the matter of the shortage of the cashier and of the overdrafts permitted by him. Two of the directors resided at Marianna and came to Wheatley to attend the meeting. They testified that they knew nothing about the overdrafts until that time and had not authorized them; that Bratcher had no authority to permit overdrafts to that amount without the direction of the board of directors; that they understood that Bratcher's overdraft was to be taken care of by the plaintiffs; that Bratcher was present and seemed to understand it that way.

(2) We have only attempted to set out the substance of the testimony. The witnesses were examined and cross-examined at great length. It is the settled rule in this State that the findings of fact made by a chancellor

will not be disturbed on appeal unless they are against the preponderance of the evidence. Tested by this well known rule, we think the decree should be affirmed.

(3) It is true that both the plaintiffs and Bratcher testified that the notes were signed to accommodate the bank merely, but their testimony is not only contradicted by the president of the bank and its bookkeeper, but also by the attendant circumstances. The bank records show that the notes executed were issued as collateral to borrow money and that the proceeds were first applied to the overdraft of Bratcher and the remainder to the overdrafts of Fleming and Hemenway. Bratcher knew this record was being made and this record was inconsistent with the testimony to the effect that Smith was to take care of Bratcher's overdraft. It was Bratcher who telegraphed Fisher to return and solicited him to sign the note.

The absent directors testified that they understood that the plaintiffs had signed the overdrafts to help Bratcher and not as accommodation for the bank; that Bratcher was present and seemed to so understand it; that he seemed well pleased that he had gotten out of his trouble.

As all of the evidence shows that Bratcher was wholly without authority to make an overdraft himself or to allow customers to do so in the amounts allowed to Hemenway and Fleming. The evidence shows that plaintiffs renewed their notes to the bank after Fleming and Hemenway had paid their overdrafts to the bank, and this fact, we consider a strong circumstance against the contention of the plaintiffs. In short, we think all the circumstances point to the fact that plaintiffs signed the notes in order to help their friend out of a difficulty and not as accommodation merely to the bank.

The decree will therefore be affirmed.

SHUFFLIN v. STATE.

Opinion delivered March 13, 1916.

1. CONFESSIONS—ADMISSIBILITY—INSTRUCTION.—It is proper for the court to admit evidence of a confession by defendant in a criminal prosecution, when the court in instructing the jury, properly charges the jury upon what terms they may consider the confession and upon what terms they must reject it, the court having previously passed upon the admissibility of the confession.
2. CONFESSIONS—ACCUSED IN CUSTODY—ADMISSIBILITY.—The mere fact alone that the accused was at the time a prisoner, and made the alleged confession to the officers who had him in custody, does not render the confession inadmissible, although such fact may be considered by the jury in determining whether the confession was voluntarily made.
3. CONFESSIONS—LOCALITY OF STOLEN PROPERTY.—When the confession of a prisoner, as to the locality of stolen property is verified by finding the property where he said it would be found, the confession is admissible in evidence, although induced by threats; but the confession that he stole the property is inadmissible.

Appeal from Miller Circut Court; *Geo R. Haynie,* Judge; affirmed.

J. M. Carter, for appellant.

1. Outside of the confessions of defendant there is no evidence whatever to sustain a conviction. The evidence as to the confession was not competent. The so called confession was not free and voluntary. Kirby's Digest, § 2385; 77 Ark. 581.

2. The instructions are erroneous. To warrant a conviction upon an extra judicial confession there must be independent evidence of the crime. 107 Ark. 581. Confessions of guilt to be admissible must be free from the taint of official inducement proceeding from either flattery of hope or the torture of fear. 50 Ark. 501; 74 *Id.* 397; 50 *Id.* 305.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant, for appellee .

1. Appellant's confession was properly admitted. No promise or threat was made nor any inducement of any kind made to elicit the confession. It was properly

submitted to the jury. The discretion of the trial judge in admitting extra judicial confessions will not be disturbed unless clearly abused. Although subject to review, the findings are generally conclusive. 43 S. W. 418; 82 N. C. 631; 74 Miss. 515; 124 Ala. 76; 162 U. S. 613; 28 Ark. 121, 531; 50 *Id.* 308; 74 *Id.* 399. If freely and voluntarily made they are admissible. 73 Ark. 497; 73 *Id.* 407; 94 *Id.* 343; 109 *Id.* 366; 93 *Id.* 156; 121 Ga. 344; 77 Mass. 201; 41 La. Ann. 543; 69 Ala. 159; 85 Mo. 145; 80 N. Y. 484; 14 Ark. 555, 107 *Id.* 568.

2. The confession was authenticated by finding the stolen property. 47 Ark. 174.

3. There is no error in the instructions. 74 Ark. 397; 111 Ark. 463; 72 *Id.* 371; 104 *Id.* 255.

4. The *corpus delicti* was sufficiently established. 84 Ark. 92; 99 *Id.* 455; 73 *Id.* 410; 94 *Id.* 344. The confession was corroborated by sufficient other evidence. *Ib;* 109 Ark. 370; 107 *Id.* 568.

5. The evidence supports the verdict. 109 Ark. 449 and cases cited.

SMITH, J. Appellant was convicted under an indictment charging him with the larceny of a cow and calf, the property of one Charlie Miller, and by this appeal questions chiefly the admissibility of his alleged confession, and the sufficiency of the evidence to sustain the conviction.

(1) The confession was testified to by the sheriff, the jailer, the deputy prosecuting attorney and a constable. These officers testified that the confession was entirely free and voluntary and so, no doubt, they regarded it, yet the circumstances detailed by them are such that the record presents a close question as to its admissibility. It is admitted that appellant was frequently questioned in jail about his connection with this and other larcenies of which he and one John Orr were accused, and that appellant at first denied any knowledge of or complicity in these crimes, or any of them; and it was admitted by these officers that they did finally tell appellant

that it would be better if he "came clean with the truth" and told what he knew; and it is not denied that the deputy prosecuting attorney stated that he would make a recommendation to his principal of clemency if appellant told all he knew. But is was also testified by these officers that appellant had previously told of his own connection with the crime here charged and that, among other things, he had told where the cow and calf could be found, and that the constable went to the place named and found the animals there. It was the theory of these officers that there was an organized band of cattle thieves, and the officers were attempting to induce appellant and the said Orr to divulge all they knew about the operations of the alleged gang of thieves, and their guilt of other crimes than the one charged, of which they were suspected. It appears, however, that these efforts were unavailing and that no additional disclosures were made. At least the jury might have so found the fact to be, and the court submitted to the jury the question whether the confession was voluntary or not. This instruction was as follows:

"There has been some testimony which the court has permitted to go to the jury with reference to an alleged confession by this defendant of the stealing by him of the cow and calf as charged in this indictment. The court has permitted that testimony to go to the jury as the court has already stated to the jury, and you may consider it in the trial of this case for whatever you think it is worth, provided the State has shown, and the burden is on the State to show, these confessions, if any were made by this defendant, were free and voluntary on his part; that is to say, that there were no intimidations made or inducements held out to him by those to whom he is alleged to have made the confession, in the way of promises of reward or immunity from the prosecution or punishment, and that there was no intimidation or threats of any kind made to him to induce him or compel him to make these confessions. If you 'find' that there were any threats or intimidations used, or any

promise made to him of immunity from prosecution, or reduction of punishment, and that these confessions, if any were made, were made by the defendant in view of these promises or these threats, as the case may be, then you can not consider the testimony. Otherwise, you can consider it along for whatever you think it is worth, together with the other evidence in the case."

Appellant complains of the action of the court in submitting this question to the jury, and says the alleged confession should have been excluded from the jury upon the ground that it was not voluntarily made.

(2) We think the instruction was not an improper one, but that, on the contrary, it was entirely proper to give it. As a preliminary matter the court passed upon the admissibility of the confession, and the jury was permitted to hear the evidence in regard to the circumstances under which the confession was made, and was told to disregard it entirely if they found it was not voluntarily made. The mere fact alone that appellant was at the time a prisoner and made the statement to the officers who had him in custody does not render the confession inadmissible. *Greenwood* v. *State,* 107 Ark. 568. Of course, that was a circumstance which the jury might very properly have considered in determining whether the confession was voluntarily made or not, and one which was, no doubt, called to the attention of the jury by learned counsel. But the record presents this question of fact, and we think the instruction fairly and properly submitted that issue.

It is urged, however, that the instruction should have been so modified as to tell the jury not merely to disregard the confession but to acquit the defendant if it was found that the confession was not voluntarily made. It is said that this is true because there is not sufficient evidence to sustain the conviction aside from the confession.

The evidence may be summarized as follows: Fowler, the constable, who was one of the witnesses to the confession, testified that appellant said the animals would

be found in the possession of one Enoch Green, about sixteen miles from Texarkana, and that they were found in Green's possession. The owner of the property identified the animals so found as being the ones described in the indictment, and that they disappeared about August 1. Green testified that he swapped appellant a horse for the cow and calf, which were delivered to him at his home by appellant about the 1st of August. We think this evidence sufficient corroboration of the confession. Section 2385 of Kirby's Digest; *Ivy* v. *State,* 109 Ark. 449.

(3) Moreover, we are of the opinion that the material part of this confession and the evidence which was most damaging was admissible in any event. This is the evidence which related to the place where the stolen property would be found and the fact that it was found there. The rule as to such evidence is stated in the syllabus to the case of *Yates* v. *State,* 47 Ark. 172, as follows:

"The confession of a prisoner of the locality of stolen property, though induced by threats, is admissible when verified by finding the property where he locates it; and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but his confession that he stole it is not admissible."

Finding no prejudicial error the judgment is affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Riggs *v.* Jones; appeal from Garland Circuit Court; Jefferson T. Cowling, Judge on exchange; affirmed January 31, 1916, *per* Kirby, J.

Fort Smith & Western Railroad Company *v.* Pence; appeal from Sebastian Circuit Court, Fort Smith District; Paul Little, Judge; affirmed January 31, 1916, *per* Smith, J.

Reynolds *v.* Polk; appeal from Randolph Chancery Court; G. T. Humphreys, Chancellor; affirmed January 31, 1916, *per* Smith, J.

Lindsey *v.* Ritchey; appeal from Sharp Chancery Court; G. T. Humphreys, Chancellor; affirmed January 31, 1916, *per* Hart, J.

Waldstein *v.* Brooks; appeal from Jefferson Chancery Court; John M. Elliott, Chancellor; affirmed February 7, 1916, *per* Hart, J.

Commercial Bank of Alma *v.* Yoes; appeal from Crawford Circuit Court; James Cochran, Judge; reversed February 7, 1916, *per* McCulloch, C. J.

The Deming Investment Co. *v.* Echols; appeal from Crawford Chancery Court; W. A. Falconer, Chancellor; affirmed February 7, 1916, *per* Kirby, J.

Watkins *v.* Special School District of Lepanto; appeal from Poinsett Circuit Court; J. F. Gautney, Judge; reversed February 7, 1916, *per* Kirby, J.

Olson *v.* Swift & Co.; appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed February 7, 1916, *per* Kirby, J.

Jones *v.* Hoyt; appeal from Arkansas Chancery Court; John M. Elliott, Chancellor; affirmed February 14, 1916, *per* Hart, J.

Lewis *v.* Fakes; appeal from Woodruff Chancery Court; Edward D. Robertson, Chancellor; affirmed February 21, 1916, *per* Smith, J.

Robertson *v.* The C. H. Sharp Contracting Co.; appeal from Hot Spring Chancery Court; J. P. Henderson, Chancellor; affirmed February 21, 1916, *per* Smith, J.

Polk *v.* Maynard; appeal from Clay Circuit Court, Western District; J. F. Gautney, Judge; affirmed February 28, 1916, *per* Kirby, J.

Woods *v.* Williams; appeal from Baxter Chancery Court; Geo. T. Humphreys, Chancellor; affirmed February 28, 1916, *per* Kirby, J.

Brown *v.* The Sanitary Grocery Co., appeal from Lonoke Circuit Court; Thos. C. Trimble, Judge; affirmed February 28, 1916, *per* McCulloch, C. J.

Schmelzel *v.* Bradford; appeal from Garland Circuit Court; Jefferson T. Cowling, Judge on exchange; affirmed March 6. 1916, *per* Kirby, J.

Morris *v.* Friend; appeal from Mississippi Circuit Court; W. J. Driver, Judge; affirmed March 13, 1916, *per* Kirby, J.

Weatherly *v.* Stane; appeal from Randolph Circuit Court; J. B. Baker, Judge; reversed March 13, 1916, *per* Smith, J.

Union State Bank of Shawnee, Okla., *v.* First National Bank of Huntsville, Ark.; appeal from Madison Chancery Court; T. H. Humphreys, Chancellor; reversed and judgment here for appellant March 20, 1916, *per* McCulloch, C. J.

Hicks *v.* Hicks; appeal from Pulaski Chancery Court; J. E. Martineau, Chancellor; affirmed March 20, 1916, *per* Smith, J.

Bowman *v.* Sims; appeal from Prairie Chancery Court; John M. Elliott, Chancellor; affirmed March 27, 1916, *per* Wood, J.

II.

CASES DISPOSED OF ON MOTION.

Jesse Edwards and W. E. West *v.* Equitable Powder Manufacturing Company; Sebastian Circuit Court, Fort Smith District; Paul Little, Judge; affirmed under rule 7, January 31, 1916; *per curiam.*

D. Ohlendorf *v.* L. D. Turner; Mississippi Chancery Court; Chas. D. Frierson, Chancellor; submission set aside, and appeal dismissed on appellant's motion, February 7, 1916; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Road Improvement District No. 1 of Pope County; Pope Circuit Court; M. L. Davis, Judge; appeal dismissed on appellant's motion February 7, 1916; *per curiam.*

Little Rock Ice Company *v.* John Olsen; Pulaski Circuit Court, Second Division; Guy Fulk, Judge; appeal dismissed for non-compliance with rule 9 February 7, 1916; *per curiam.*

Josephine McGill *et al.* *v.* Graysonia-McLeod Lumber Company *et al.*; Clark Chancery Court; James D. Shaver, Chancellor; appeal dismissed for non-compliance with rule 9 February 7, 1916; *per curiam.*

R. E. Bryant and Thos. B. Steele *v.* A. Butterfield; Garland Circuit Court; J. T. Cowling, Judge on exchange; affirmed February 14, 1916, on appellee's motion, for non-compliance by appellant with rule 9; *per curiam.*

W. H. Duncan *et al.* *v.* White Sewing Machine Company; Poinsett Circuit Court; W. J. Driver, Judge; appeal dismissed February 21, 1916, on appellee's motion, because same was not perfected within the time required by statute; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *et al.* *v.* Jacks Bayou Drainage District; Lonoke Circuit Court; G. W. Emerson, Special Judge; appeal dismissed February 28, 1916, on appellee's motion, because same was not perfected within the time required by statute; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* W. H. Oliver; White Circuit Court; J. M. Jackson, Judge; appeal dismissed

February 28, 1916, on appellee's motion, because same was not perfected within the time required by statute; *per curiam.*

Mrs. M. B. Curtis and Albert Curtis *v.* J. D. Benson; Franklin Circuit Court, Ozark District; James Cochran, Judge; appeal dismissed on appellant's motion March 6, 1916; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* W. C. Hobbs; Yell Circuit Court, Danville District; M. L. Davis, Judge; settled and appeal dismissed on appellant's motion March 6, 1916; *per curiam.*

Keck Furniture Company *v.* Gus Seawel, Special Judge; prohibition to Boone Circuit Court; dismissed on motion of the petitioner March 6, 1916; *per curiam.*

W. L. Gage *v.* W. J. Wood; Greene Circuit Court; W. J. Driver, Judge; appeal dismissed on appellant's motion March 13, 1916; *per curiam.*

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