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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* TEATER.

Opinion delivered May 1, 1916.

CARRIERS—INJURY TO MINOR PASSENGER—PASSING ON PLATFORM—NEGLIGENCE.—Plaintiff, a minor passenger, was injured while passing from one car to another. *Held*, it was a question for the jury, whether, under the circumstances, the minor was guilty of such negligence as would bar a recovery.

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

James B. McDonough, for appellant.

1. A verdict should have been directed for defendant. The finding of the jury is in the very teeth of the physical facts. It was impossible for plaintiff's foot to have been caught between the bumpers. The evidence shows that he was sitting on the step with his leg hanging down and his foot caught in a cattle guard. All the evidence must be considered together. 96 Ark. 500; 114 *Id.* 112. No negligence on the part of the company is shown. 221 Fed. 907; 84 Ark. 555; 108 *Id.* 578. The credibility of a witness is an issue of fact for the jury, but the sufficiency of the evidence is a question of law for the court. 107 Ark. 158.

2. There was error in giving and in refusing instructions. Instructions should submit to the jury the issues in the case. 76 Ark. 333; 63 *Id.* 177; 70 *Id.* 441. The evidence does not show that the injury was caused

"by the running of the train." 121 Ark. 295. The emphasizing of instructions is error. 43 Ark. 184; 59 *Id.* 143. It is not negligence to fail to furnish a seat to a passenger when cars are crowded. If there was even standing room inside the car it was plaintiff's duty to remain inside, if he went outside without reasonable cause and was injured he can not recover. 96 Ark. 206; 87 *Id.* 243; 95 *Id.* 108; 99 *Id.* 415; 96 N. E. 665; 113 N. Y. S. 636. Plaintiff was duly warned of the danger of riding outside, and was injured—he can not recover. 76 Ark. 69; 71 *Id.* 55; Elliott of Railroads, § § 1154, 1162, 1069, 1628n; Hutchinson on Carriers, § § 898, 959. It was error to refuse defendant's instructions.

Chas. A. Zweng and *Elmer J. Lundy,* for appellee.

1. Review the instructions given and refused and contend that there is no error. 121 Ark. 295; 181 S. W. 135; 224 Fed. 896; 224 *Id.* 908.

2. This case is governed by 93 Ark. 240; 102 *Id.* 532; 107 *Id.* 158; 224 Fed. 896. The instructions correctly state the law and the evidence sustained the verdict.

MCCULLOCH, C. J. The plaintiff, Jewel Teater, is a boy about fourteen years of age and instituted this action by his next friend against the Kansas City Southern Railroad Company to recover compensation for personal injuries alleged to have been sustained by reason of negligence of the company's servant while he was a passenger on one of its trains. The plaintiff was a little over thirteen years of age when the injury occurred and he was a passenger on an excursion train going from Mena to Cove, in Polk County, Arkansas.

The plaintiff alleged in his complaint, and undertook to prove, that the train was overcrowded and that he could not obtain a seat in the coach to which he was assigned, and was told to go to another coach, and while passing over the platform between the two coaches his foot was caught between the two bumpers of the coupling and his leg was broken. The particular charge of negligence upon which the case was tried is that "the de-

fendant was negligent in that it did not have protection over said couplings or bumpers to prevent an open space between said cars when being operated." The plaintiff testified that when he boarded the train and went into the coach there was no unoccupied seat and that he started to go into another car where some of his companions had gone; that when he got across the platform to the door of the other coach he met the other boys, who told him that there was no place for them in the coach, and that he turned to go back into the car from which he had come, and that as he started across the platform his foot was caught between the bumpers. Another witness testified that there was sufficient space between the couplings on the two connecting coaches for the boy's foot or leg to drop through. The evidence showed that there was a double compound fracture of the bones in the leg.

The defendant denied the charge of negligence and alleged, on the contrary, that the plaintiff was injured by reason of his own negligence in getting down on the lower step of the coach and hanging his feet down so that one of them caught in a cattle guard over which the train was passing and caused a fracture of his leg. The evidence adduced by the defendant tends very strongly to establish the fact that it was impossible for the plaintiff to have been injured in the manner which he described, and that he was injured, in fact, by getting down on the lower step of the car and letting his feet drag so that one of them struck the cattle guard. Defendant's testimony tends to establish the fact that there was no exposed opening between the ends of the two bumpers, but that the connection was covered with an iron plate so that it would be impossible for there to exist an exposed opening. It appears to us that the testimony preponderates considerably in defendant's favor, yet it can not be said that there was no evidence to support the plaintiff's contention. It was legally sufficient to warrant a submission of the issue to the jury.

The court submitted the case to the jury on instruc-

tions on its own motion, stating the law generally on the subject of negligence and contributory negligence, and also gave three instructions requested by plaintiff and the following two instructions requested by the defendant:

"IV. If the plaintiff got down on the steps of the coach, and there swung his legs out in a position where they were likely to be hit by a cattle guard, and if he was in that manner hit by a cattle guard, and injured, he can not recover."

"V. The defendant is not required to use force to keep a passenger like the plaintiff in the coach or in his seat. If the train men repeatedly warned the plaintiff to remain inside, and if the plaintiff wantonly disregarded that warning, and was thereby injured, either by the bumpers or the cattle guard, then he can not recover."

There were objections to each of the instructions given by the court of its own motion and on request of the plaintiff, but we do not think there was any error committed by giving either of those instructions, nor that the assignments are of sufficient importance to call for a discussion.

There were five of defendant's requests for instructions refused, and error in each of the rulings is assigned. Instruction No. II, which was refused, reads as follows:

"The defendant is not required to furnish a seat to each passenger regardless of the circumstances. It is not negligence, necessarily, for it to fail to furnish a seat to each passenger and if the jury find that there were insufficient seats for all the passengers, that would not authorize or justify the plaintiff remaining in a place about the coaches known to be dangerous. Even if there were insufficient seats for all the passengers, such fact would not authorize or justify the plaintiff seeking and remaining in the most dangerous place about the coaches or coach if he did so. If there was standing room in the inside of the coach, it was plaintiff's duty to remain inside rather than stand on the outside of the coaches. If the plaintiff could have remained inside in safety, and failed to do so, and if he went outside, when he could have

remained inside, and that without reasonable cause, he can not recover."

This and other refused instructions were erroneous in that they ignored the age and inexperience of the plaintiff and created an arbitrary standard of care which was not applicable to a child thirteen years of age. The instruction told the jury that if the plaintiff "could have remained inside in safety, and failed to do so, and if he went outside, when he could have remained inside, and that without reasonable cause, he can not recover." That may have been a correct test of negligence as applied to an adult, but it was not proper to apply to an infant, for it was a question for the jury to determine whether or not the boy was, under the circumstances, guilty of negligence in attempting to pass and repass over the platform while the train was in motion.

There are decisions of this court which hold that it is not negligence *per se* under all circumstances for even an adult passenger to temporarily occupy the platform of a train. *Pasley* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 22; *St. Louis, I. M. & S. Ry. Co.* v. *Hartung,* 95 Ark. 220. But even in cases where the circumstances are such that an adult would be said as a matter of law to have been guilty of negligence it makes a question for the jury in the case of an infant.

In *Garrison* v. *St. Louis, I. M. & S. Ry. Co.,* 92 Ark. 437, we said: "The standard for judging the conduct of a minor is not the care and prudence that would be exercised by an adult, but only that of one of his age, intelligence and discretion; and it can not be said as a matter of law that a minor is guilty of contributory negligence under circumstances that would declare an adult to be guilty of such negligence." In *St. Louis, I. M. & S. Ry. Co.* v. *Sparks,* 81 Ark. 187, it was said that "a child is not required to exercise the same capacity for self-preservation and the same prudence that an adult should exercise under like circumstances.

The other refused instructions are open to the same objection and the court properly refused to give them.

If defendant had asked a correct instruction submitting to the jury the question whether, under the circumstances, and considering the age and intelligence of the plaintiff, he was guilty of negligence, it ought to have been given; but no such instructions were asked, and inasmuch as those that were asked are found to be incorrect statements of the law as applicable to this particular case, there was no error in refusing to give them.

There are several assignments of error with respect to improper argument of counsel for the plaintiff, but we are of the opinion that there was no prejudicial error in that regard.

Judgment affirmed.

TALLMAN v. LEWIS.

Opinion delivered May 1, 1916.

1. CONTRACTS—STATUTORY PROHIBITION—PUBLIC CONTRACT—RIGHT OF TAXPAYER.—Where a contract is expressly prohibited by law, and the statute in terms declares the contract to be null and void, no recovery can be had under it, and a taxpayer may maintain an action to recover back money illegally paid when its officers neglect or refuse to perform their duty in that respect.
2. CONTRACTS—BOARD OF IMPROVEMENT—CONTRACT WITH COMMISSIONER.—A contract made between the board of improvement of a drainage district, and one of the commissioners, under Act 279, p. 829, Acts of 1909, is void.
3. CONTRACTS—STATUTORY PROHIBITION—VALIDITY.—The courts will not enforce the provisions of a contract where the consideration therefor was based upon, or the contract was against an express prohibition of the law.
4. CONTRACTS—STATUTORY PROHIBITION—VALIDITY.—All agreements or contracts in contravention of the policy of a legislative act, or in contravention of statutes, are illegal and void.
5. IMPROVEMENT DISTRICTS—CONTRACT WITH COMMISSIONER.—A commissioner of an improvement district can not recover for any service performed by him outside of his duty as commissioner.

6. IMPROVEMENT DISTRICTS—ILLEGAL PAYMENT OF MONEY OF—RECOVERY—SUIT BY TAXPAYER.—Where the officers of a drainage district neglect to perform their duty in bringing suit to recover money illegally paid out by the district, a taxpayer may maintain such an action.

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

Eugene Lankford, for appellant.

1. The chancery court had no jurisdiction without a showing of fraud upon the county court. 44 Ark. 225; 47 *Id.* 80; 103 *Id.* 16; 105 *Id.* 212; 96 *Id.* 264; 48 *Id.* 544; 110 *Id.* 34; 113 *Id.* 442; 112 *Id.* 91; 170 S. W. 40.

2. No fraud was shown.

3. Act 279, Acts 1909, can not be literally or strictly construed. 106 Ark. 518. If the law is properly construed defendants followed the law. 106 Ark. 39. Tallman was not a *contractor* with the board. He performed the services and was entitled to pay. Kirby's Digest, § 3534; 50 Ark. 83. Also to his necessary expenses.

4. Tallman was entitled to pay for his work regardless of construction of the Act of 1909. It was work outside his duty as commissioner. Thompson on Corporations, § § 1200, 1736, 1747; 96 Ark. 301; 86 *Id.* 613; 60 *Id.* 99; 23 A. & E. Enc. L. (2 ed.) 392, 908.

5. The suit should be dismissed for want of equity. 55 Ark. 633; 92 *Id.* 63; 97 *Id.* 217; 11 *Id.* 378; 65 *Id.* 392; 52 *Id.* 150; 74 *Id.* 252; 8 *Id.* 259.

Geo. C. Lewis, for appellee.

1. The compensation was fixed by the act. A commissioner can not be interested in a contract with the district. 110 Ark. 421.

2. The court had jurisdiction. 114 Ark. 299; 33 *Id.* 704; 85 *Id.* 89.

3. Tallman's charges were unlawful, unauthorized and void. 110 Ark. 421. The decree is right.

HART, J. Geo. C. Lewis, a land owner in Big Island Drainage District No. 8 of Arkansas County, instituted this action in the chancery court against Elliott Tallman,

Louis Buerkle and J. W. Underwood, the commissioners of said drainage district. The object of the suit was to recover from them certain amounts of taxes collected from the land owners in the district which were alleged to have been illegally held by said commissioners and converted to their own use. The material facts are as follows:

The drainage district was duly organized in the fall of 1911, and the commissioners, after being appointed and qualifying as required by the statutes, proceeded upon the work of constructing the improvement provided for. The board let a contract at public bidding for the construction of the drainage ditch. The drainage district was organized under Act 279 of the Acts of 1909. It is conceded that the provisions of the act were complied with in the organization of the district.

Section 4 of the act provides that the board shall prepare plans for the improvement and shall procure estimates from competent engineers as to the cost thereof. It also provides that the board may employ such engineers and other agents as may be needful. No engineer was employed by the commissioners to supervise the construction of the drainage ditch. After the construction of the drainage ditch had been begun, it was deemed advisable by the board that some one should be employed to supervise the construction of it. In January, 1912, the board passed a resolution that E. Tallman, one of the commissioners, be constituted agent to see that all matters pertaining to and connected with the engineering work, construction, up-keep of the ditch, and such other matters connected with the ditch that he may deem would be of benefit to the same. The resolution further provided that he should be allowed $5.00 per day for each day spent at the work, together with all his expenses. Warrants were drawn in favor of Tallman in the sum of $2,014. These warrants were signed by himself as president of the board and by Louis Buerkle as secretary. The warrants were paid out of funds belonging to the district in the hands of the commissioners. $460 was paid him

for attending meetings of the board. About $500 was paid him for the hire of a horse and buggy, at the rate of $3.00 per day. The balance was paid him for services in superintending the work of construction and up-keep of the ditch, at the rate of $5.00 per day.

Tallman testified that, while he furnished his own horse and buggy, he charged less therefor per day than he would have had to pay at a livery stable. He admitted that he was not an engineer, but stated that he understood how to measure the yardage of earth taken from the ditch and that his services were reasonably worth the sum of $5 per day to the district. Buerkle drew $938 for services and expenses. All of this was for attending meetings of the board except the sum of about $250. Underwood was only paid for services in attending the meetings of the board. The chancellor was of the opinion that the board had no authority under the statutes creating the drainage district to make a contract with one of its members. He was also of the opinion that a contract by implication could not arise between parties who are prohibited by law from entering into an express contract. It was agreed that the cause of action as to Buerkle be dismissed without prejudice. The court further found that the defendant Underwood had not drawn any funds from the district to which he was not entitled and the cause as to him was dismissed. The court found that the defendant Tallman had, without authority, drawn from the funds of the district and converted to his own use, the sum of $1,554.00.

A decree was therefore entered in accordance with the opinion and findings of the chancellor. The defendant Tallman alone has appealed, and for that reason we are only concerned with the correctness of the decision of the chancellor as to the issue involved in the suit against him. To reverse the decree in this case reliance is placed upon the decisions in *Smith* v. *Dandridge*, 98 Ark. 38; *Spearman* v. *Texarkana,* 58 Ark. 348; *Frick* v. *Brinkley,* 61 Ark. 397.

In the Dandridge and Spearman cases, there was no statute or ordinance prohibiting the execution of the contract and the rule announced permitted a recovery on the *quantum meruit* where the services contracted for and later performed were proper and necessary, and no unfairness was used or undue advantage taken, in obtaining the contract. In the Spearman case a physician was a member of the board of health and was employed by the board to render services on behalf of the city, which were outside his duties as a member of the board. It was held that while the physician could not enforce any contract made by him with the board of which he was a member, he was entitled to recover compensation for what his services were reasonably worth.

Dandridge was a member of the board of directors of a special school district. The district had entered into a contract for the erection of a school house and the other members of the board thought it necessary to employ some one to supervise the erection of the building. Dandridge was employed to do the work and performed it. The services which he performed were outside of the duties of his office as a director and he was not allowed to recover on the contract made. He was allowed to recover on a *quantum meruit,* it being shown that the amount allowed him for services was no more than his services were fairly and reasonably worth.

In the Frick case, a member of a town council was permitted to recover for the value of certain materials furnished the town, which were used by it. In that case the court called attention to a statute which provided that a member of the council could not be interested, directly or indirectly, in the profits of any contract or job for work or services to be performed for the corporation. The member of the council furnished certain drain tiles, which were used by the town. The court said that it was not necessarily or even reasonably to be considered that the furnishing of the drain tile was a contract for work or services to be performed, such as was contemplated by the statute. The decision in the case was based upon

the rule that where no statute exists on the subject, a contract in which a municipal officer is interested, though against public policy, may be enforced as to the benefits already received by the city.

In each of those cases the contract was considered upon the ground of public policy alone. In such cases the contract, before it is performed, may be avoided by one of the parties because the other party at the time of its execution acted in a fiduciary capacity. When, however, it has been executed without objection and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by allowing compensation on the *quantum meruit* or the *quantum valebat* for the reasonable value of the benefits received under it. There is a distinction to be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the contract is invalid upon the grounds of public policy alone. The general rule is that when a contract is expressly prohibited by law no court of justice will entertain an action upon it or upon any asserted rights growing out of it. The reason given is that to permit this would be for the law to aid in its own undoing. *Berka* v. *Woodward, Treas,* 125 Cal. 119. The drainage district in question was organized under Act 279 of the Acts of 1909. See Acts of 1909, p. 829. Section 4 of the act provides that each of the commissioners shall take the oath of office required of public officers in this State and shall also, swear that he will not, directly or indirectly, be interested in any contract made by the board. The language used is very broad and comprehensive and its evident purpose was to expressly prohibit a member of the board from entering into a contract made by the board of which he was a member. The statute makes it unlawful for a member of the board to become interested, directly or indirectly, in any contract authorized by the board.

(1) The general rule is that where a contract is expressly prohibited by law, and the statute in terms declares the contract to be null and void, no recovery can be had under it and that a taxpayer has a right to maintain an action to recover back money illegally paid when its officers neglect or refuse to perform their duty in that respect. *Capron* v. *Hitchcock,* 98 Cal. 427; *West* v. *Berry,* 98 Ga. 402; *Dwight* v. *Palmer,* 74 Ill. 295; *Winchester* v. *Frazer* (Ky.), 43 S. W. 453; *O'Neil* v. *Flannagan,* 98 Me. 426; *Stone* v. *Bevans,* 88 Minn. 127; *Milford* v. *Milford Water Co.,* 124 Pa. St. 610.

(2) All the cases just cited were based upon statutes which in express terms declare the contracts to be null and void. While the statute under consideration does not in express terms declare that the contract shall be null and void, it does require the commissioner to make oath that he will not directly or indirectly be interested in any contract made by the board. So under the statute, a commissioner would violate his oath of office by becoming interested in a contract made by the board of which he was a member. This amounted to an express prohibition to him and to permit a recovery upon rights growing out of such a contract would in effect abrogate the statute. The principle is well expressed by the Supreme Court of the United States in *Bank of United States* v. *Owens,* 2 Pet. 527, as follows: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

Again, the same court in *Coppell* v. *Hall,* 7 Wall. 542, said: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same rea-

sons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

(3) The rule is clearly and tersely expressed in the case of *Berka* v. *Woodward,* 125 Cal. 119, as follows: "Where contracts of public officials, with their counties or municipalities, have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat.* (*Spearman* v. *Texarkana,* 58 Ark. 348, and other cases cited). But in no one of these cases, nor indeed, in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration was base, or the contract was against the express prohibition of the law."

(4-5) In *Brooks* v. *Cooper,* 50 N. J. Eq. 761, 35 Am. St. Rep. 793, the court said that the general rule is, that all agreements or contracts whether sealed or otherwise, in contravention of statutes, are void and all contracts in contravention of the policy of an act of the Legislature are illegal and void. The court further stated that contracts having for their object the violation, defeat, or evasion of a statute are illegal and void. Tested by this rule and the principles of law announced above, the commissioner was not entitled to recover for any service performed by him outside of his duties as commissioner. The court allowed him the compensation provided by statute for his services as commissioner and properly held that he was not entitled to compensation for services performed by him outside of his duties as commissioner.

(6) It is contended that the plaintiff had no legal capacity to sue. The plaintiff was a taxpayer in the district. The suit was brought against the commissioners of the district. So it is evident that the officers of the

district refused or at least neglected to perform their duty in bringing the suit, and in such cases the general rule is that a taxpayer has a right to maintain an action to recover back money illegally paid on behalf of the district. The right of the taxpayer to maintain the action is recognized in the cases above cited. The right of the taxpayer to maintain the action necessarily results from the principles decided in *School District No.* 36 v. *Gladish*, 111 Ark. 329, and *Grooms v. Bartlett,* 123 Ark. 255.

Therefore, the decree will be affirmed.

BUCKEYE COTTON OIL COMPANY *v.* HARRIS.

Opinion delivered May 8, 1916.

EVIDENCE—INJURY TO EMPLOYEE—WAGES—CUSTOM.—Plaintiff, an employee of defendant, was injured in the course of his employment, and brought an action for his usual wages while he was injured, based upon an alleged contract to pay the same. Under a denial of the existence of such contract, it was error for the trial court to refuse to permit defendant to prove its custom of paying injured employees until they were able to return to work.

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

Cockrill & Armistead, for appellant.

1. The court erred in refusing to permit appellant to prove by Wilson that it was the custom to retain injured employees on the pay roll until their could return to work, etc. The court erred in its instructions.

Frank Terry and *Manning, Emerson & Morris,* for appellee.

1. The contract was fully established and was reasonable and based upon a good and valuable consideration, the compromise of a good right of action. L. R. 5 Q. B. 449; 31 Ark. 631; 44 *Id.* 556; 43 *Id.* 172; 21 *Id.* 69.

2. The contract was not within the statute of frauds. 93 Ark. 1.

3. Wilson had authority to make the contract. 49 Ark. 320.

4. There were errors in the rulings on the evidence.

KIRBY, J. Appellee sued appellant upon an alleged contract for the payment of his usual wages, during the time he was unable to work, by reason of an injury received while in its employ in the oil mill, and its agreement to permanently thereafter employ him at the same wages.

His hip had been broken by the fall of a stack of sacks of meal upon him and his contention was that the contract was entered into in settlement of his claim for compensation for the injury received, while the appellant company denied ever having made such contract and plead a full release executed by him in bar of any right to recover.

The testimony on the part of appellee tended to show that such a contract was made by the oil mill company as alleged, and he further testified that in accordance with the terms of the contract they had paid him his usual wages for five or six months thereafter, at which time the agent of the company offered to pay him but $4.50 a week instead of the $9.00 he contended he had contracted for, and upon his declining to receive it, refused to pay anything further at all.

The appellant company admitted that the plaintiff was injured, denied having made any such contract as the one alleged, but admitted having paid the usual wages of the injured employee for several months, claiming it declined to pay any further wages because he was able to return to work and refused to do so.

Its cashier, Mr. Wilson, upon being questioned about the payment of appellee's wages after the injury and while he was not at work, was asked in explanation of such payment, if it was not the custom of the appellant to retain all injured employees on the pay roll until they could return to work, when they were given such work as they could do. This question was objected to, whereupon appellant offered to show that in all cases of injury the practice of the company was to retain the employees in cases of common laborers on the pay roll until they could

return to work, when they were given such work as they could do; that in this instance Mr. Wilson got authority to pay appellee his wages until he could return to work; that he continued to pay the wages until after the injured employee came back and refused to sew cotton seed sacks, its counsel stating, "I offer that in explanation of this testimony, since it was brought out that he did continue paying the injured man until October."

The court sustained the objection and refused to allow or permit the introduction of the testimony and erred in doing so, in the opinion of a majority of this court.

The appellee and his witnesses had testified that the contract was made with him to continue the payment of his wages, so long as he was unable to work and in proof of such contract stated that the oil mill company carried it out for a certain time by the payment of the wages in accordance with the terms of the contract.

The appellant company admitted having made the payments to the injured employee of the usual wages, while he was not able to work, and had the right to explain why such payments were made and its not being permitted to do so was prejudicial to its rights, since it had admitted making the payments, which appellee insisted were made in accordance with the terms of a contract, the making and existence of which were denied by the oil mill company.

It is true the court allowed the witness, Wilson, to state that he had received authority to continue appellee on the pay roll as long as he thought it necessary to do so, but this statement could in no wise relieve against the prejudice resulting from the court's refusal to permit the witness to state the custom of the oil mill company to pay all its injured employees their regular wages until they were able to return to work, in explanation of the payments made to appellee.

For this error in the rejection of the testimony, the judgment is reversed and the cause remanded for a new trial.

MULLINS v. WILCOX.

Opinion delivered May 8, 1916.

MORTGAGES—LIMITATIONS—WRITTEN AGREEMENT FOR EXTENSION—ENDORSEMENT ON RECORD.—The failure to make endorsements of payments upon a mortgage upon the margin of the record, under Kirby's Digest, § 5399, does not operate to defeat the mortgage, where it has been kept alive by a subsequent written agreement. (*Austin* v. *Steele*, 68 Ark. 348.)

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

Rice & Dickson, for appellants.

1. The Chrane mortgage is a first and prior lien. Appellees' lien is barred by Kirby's Digest, § 5399. 68 Ark. 348. An unrecorded extension agreement could not keep appellee's mortgage lien alive against strangers. 45 S. W. 980; 64 Ark. 317; 42 S. W. 408.

The appellees *pro sese*.

1. The statute of limitations did not bar appellees' mortgage lien because (1) the note was kept alive by written extension to June 1, 1912, and (2) all the transfers were made subject to appellees' mortgage. Kirby's Digest, § 5399; 68 Ark. 348; 92 *Id.* 522; 123 S. W. 646.

2. The renewal agreement was sufficient to keep the mortgage alive. 2 Pingrey on Mortgages, 1418, § 1570; 108 U. S. 146; Kirby's Digest, § 146; 92 Ark. 522; 68 *Id.* 348.

SMITH, J. Appellant purchased a tract of land on April 29, 1912, without actual knowledge of a mortgage thereon which had been executed by her grantor. This mortgage was executed May 1, 1902, to secure the payment of a note due May 1, 1907. This mortgage had been duly recorded, but no payments of any kind were noted on the margin of the record, nor were there other marginal endorsements to indicate that any agreement had been made extending the time of payment of the debt there secured. An agreement in writing was made, however, between the mortgagor and mortgagee whereby the

time of payment was extended for five years or to May 1, 1912, but, as has been said, there was no marginal notation to indicate the existence of such agreement.

Appellant says, therefore, that the lien of this mortgage is barred under the provisions of Section 5399 of Kirby's Digest. A similar contention was made in the case of *Austin* v. *Steele,* 68 Ark. 348, and (we quote the syllabus) it was there said:

"The statute providing that payments on a mortgage debt shall not operate to revive the debt, so far as the rights of third parties are affected, unless the mortgagee 'shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded' (Sand. & H. Dig., § 5094, Kirby's Digest, § 5399) does not apply where the mortgage debt is kept alive by subsequent written agreement."

Appellants were not, therefore, entitled to have the mortgage canceled as prayed in their complaint, which was filed August 23, 1913, and the decree denying that relief is, therefore, affirmed.

HICKEY v. STATE.

Opinion delivered May 15, 1916.

PROSECUTING ATTORNEY—FEES.—Where an injunction is obtained, preventing defendant from conducting a nuisance, under the terms of Act 109, Acts of 1915, no provision is made for the assessment of an attorney's fee as authorized by Kirby's Digest, § 2620.

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

Holland & Holland, for appellant.

I. S. Simmons, prosecuting attorney, *pro se.*

Per Curiam: This was an action to enjoin the appellant, under Act No. 109 of the General Assembly of 1915, from operating a place which constituted a nuisance

under the terms of that act, and we affirmed the judgment of the lower court. *Hickey* v. *State,* 123 Ark. 180, 184 S. W. 459.

The prosecuting attorney who instituted the proceedings on behalf of the State now files a petition asking that a fee in the sum of $20.00 be taxed in his favor. He bases his claim upon section 10 of the Act of 1915, which reads as follows:

"Section 10. In all cases wherein the bill or petition hereunder is filed upon the relation of a prosecuting attorney of this state, and a permanent injunction is granted therein, said officer shall receive such fees as are now provided by law for convictions for the illegal sale of intoxicating liquors, said fees to be paid by defendant as part of the cost of the case."

It will be observed that the language of the statute is that the prosecuting attorney shall receive "such fees as are now provided by law for convictions for the illegal sale of intoxicating liquors." The general statutes of the State fixing fees of prosecuting attorneys in misdemeanor cases, including sales of intoxicating liquors, provide that there shall be a fee of $10.00 paid to the prosecuting attorney "for each conviction on indictment, presentment or information for misdemeanor or breach of the peace." Kirby's Digest, § 3488. The prosecuting attorney is, in the present case, undoubtedly entitled to the fee for the conviction, and that was taxed in the court below. There is another statute (Kirby's Digest, § 2620) which provides that upon the affirmance by the Supreme Court of a judgment of conviction in a misdemeanor case, "an attorney's fee of twenty dollars, to be paid to the prosecuting attorney, shall be taxed as part of the costs of the appeal." It is under this section of the statute, in connection with the other section quoted from the Act of 1915, that the prosecuting attorney bases his claim.

We do not think that the officer is entitled to the fee which he claims in the present case. The Act of 1915 gives him the same fees in this class of cases as the statute

gives him "for convictions for the illegal sale of intoxicating liquors." Now, the only fee which falls within that definition is the fee fixed by statute for convictions in criminal cases. The fee authorized to be taxed upon an affirmance of a judgment of conviction by this court does not fall within that designation. Costs are peculiarly the creature of the statute and can not be enforced except when expressly authorized by the statute. The prosecuting attorney is not required to perform any service in cases pending in the Supreme Court, and the statute which we have quoted, giving an affirmance fee, is imposed merely as a part of the penalty on a defendant who has been convicted, and it is not given as compensation to the prosecuting attorney for any services performed in that case in the Supreme Court.

The Act of 1915, like other penal statutes, must be strictly construed, and when it is viewed in that light it can not be stretched so as to embrace the affirmance fee authorized by Kirby's Digest, § 2620.

The motion to tax the fee is, therefore, overruled.

PAYNE v. STATE, USE CITY OF BOONEVILLE.

Opinion delivered May 15, 1916.

1. CRIMINAL PROCEDURE—BOND FOR COSTS—DISMISSAL.—Under Kirby's Digest, § 2476, where a motion to dismiss a prosecution is made before any affirmative steps have been taken in the trial, the defendant is entitled to have the cause dismissed, unless the prosecutor, or some one for him, shall enter into a bond for costs.
2. ABATEMENT—ISSUE RAISED WHEN.—Matters in abatement must be raised *in limine*, or before any affirmative steps are taken by the defendant in the cause.
3. LIQUOR—PURCHASE FOR ANOTHER.—By Act 191, Acts of 1899 (Kirby's Digest, § 5135), the Legislature made criminal that which was not so before the passage of the act, viz., to directly or indirectly procure or purchase for another any alcohol, etc., in any territory where the sale of liquors is prohibited.
4. STATUTES—INTERPRETATION.—Where there is any ambiguity in the language of a statute, the court, to ascertain the meaning thereof,

will look, not only to the language of the act, but to the title of the act also.

5. LIQUOR—PURCHASE FOR ANOTHER.—The proviso in section 2, Act 191, Acts 1899, that "this act shall not prohibit one person from buying for another from a licensed dealer," *held* to be surplusage and not to render the act void.

6. LIQUOR—PROCUREMENT FOR ANOTHER.—Kirby's Digest, § 5135, denouncing the crime of purchasing or procuring liquor for another in prohibition territory, *held* valid.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; reversed.

J. H. Evans, for appellant.

1. No bond for costs was filed and no affidavit for a warrant. Booneville is a city of the second class. Kirby's Digest, § § 2488, 2490, 2476; 37 Ark. 405; 39 *Id.* 175; 111 *Id.* 51; 94 *Id.* 175.

2. Kirby's Digest, § 5135, is not a valid law. 45 Ark. 361; 105 *Id.* 462; 90 *Id.* 579, 589; 72 *Id.* 14; Act 191 Acts 1899. Prior to the passage of the act and since, the mere purchasing or procuring for another, intoxicating liquor where the seller sells unlawfully is not a violation of the law. Black on Interpretation of Laws, § § 40, 65, 113, 114, etc; 50 So. 396; 156 Ala. 396; 47 So. 245; 149 N. C. 537.

3. But if section 5133, Kirby's Digest, is a valid criminal statute there is no proof in this case that defendant was guilty. Kirby's Digest, § 2385; 51 Ark. 550. The court erred in its instructions to the jury. Instructions upon the weight of the evidence or assumed facts which are for the consideration of the jury are erroneous. 43 Ark. 289; 45 Ark. 165, 292; 49 *Id.* 165.

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

1. Appellant waived the right to dismiss for want of a bond for costs. Such a motion is in abatement and must be *in limine.* 111 Ark. 51; 37 *Id.* 407; etc. No bond for costs was necessary. Kirby's Digest, § § 5463, 6388, 5590; 68 Ark. 248.

2. Kirby's Digest, § 5135, is a valid law. 72 Ark. 14; 105 *Id.* 462; 90 *Id.* 579, 589; 90 *Id.* 591; 24 L. R. A. (N. S.) 268, note; 149 N. C. 537; 50 So. 396; 156 Ala. 140; 47 So. 245; 114 Ark. 391, 392, 393; 93 Ark. 32; 99 *Id.* 149; 104 *Id.* 261.

3. The trial court committed no error and the verdict was responsive to the evidence. 43 Ark. 367. There is no error in the instructions. 64 Ark. 247; 21 *Id.* 357; 58 *Id.* 353; 109 *Id.* 130; *Ib.* 138.

WOOD, J. Appellant was convicted before the mayor of Booneville of the offense of procuring alcohol for another in violation of section 5135 of Kirby's Digest. The city had no ordinance upon the subject, and the appellant was convicted under the above statute.

The bill of exceptions shows that "it was admitted by the attorney for the city that in the trial of the case below before the trial the defendant moved the court to dismiss the action for want of a bond for costs; * * * that no bond for costs was given, and that the motion of the defendant made in the mayor's court to dismiss the case for lack of a bond for costs was overruled; that the defendant thereupon renewed his motion in the circuit court to dismiss this prosecution for want of a bond for costs. The court overruled defendant's motion, and the defendant at the time saved his exceptions.

First. The ground of the motion for a new trial is, that the court erred in overruling defendant's motion to dismiss the cause for want of a bond for costs, and this is likewise the first assignment of error urged for reversal of the judgment. The statute provides that, "In all prosecutions in cases less than felonies in courts of justices of the peace and in other inferior courts, the prosecutor, or some person for him, shall enter into bond, with good and sufficient security, for the payment of all the costs which may accrue in said prosecution." Kirby's Digest § 2476.

(1) Under this statute if the defendant moves to dismiss the case because no bond for costs has been filed,

and makes this motion before the trial, that is, before any affirmative steps have been taken to ascertain whether he is guilty or innocent of the crime charged, he will be entitled to have the case dismissed or the action against him abated unless the prosecutor, or some one for him, shall enter into bond for the payment of costs as the statute provides. This is a mandatory provision of the statute, and unless the defendant waives it by pleading not guilty or taking some other affirmative steps in the case before making the motion, then he is entitled to it, and if the motion is thus made in apt time it is the duty of the court before whom the prosecution is pending to require the bond to be executed. In case of a failure to execute the bond, under such conditions, the court should dismiss the cause. But where the bond is not executed and defendant fails to move to dismiss on that account *in limine,* or before he takes any other affirmative steps in the case, then he has waived his right under the statute and he can not at any time in the progress of the case avail himself of it. Such is the effect of our decisions. See *Mann* v. *State,* 37 Ark. 405; *State* v. *Parker,* 39 Ark. 174; *Laur* v. *State,* 94 Ark. 178; *Jones* v. *State,* 111 Ark. 51.

(2) Here the record shows that the defendant, "before the trial moved to dismiss the action for want of a bond for costs." It thus appears that the first affirmative step taken by the defendant in the case was his motion to dismiss. This meets the requirement of the law, as held in *Jones* v. *State, supra,* and other cases, that matters in abatement must be raised *in limine,* or before any other affirmative steps are taken by the defendant in the cause.

The court therefore erred in overruling appellant's motion to dismiss, and in not requiring the bond as the statute provides.

Second. Appellant was convicted under an act entitled, "An Act to aid in the suppression of the illegal sale of intoxicating liquors," which provides: "It shall be unlawful for any person to either directly or indirectly procure or purchase for another any alcohol,

etc. * * * in any district or territory where the same is prohibited by law. Provided, this act shall not prohibit one person from buying for another from a licensed dealer." Section 2 of the act prescribes the penalty. Act 191, Acts of 1899, Kirby's Digest, § 5135.

(3) It was the intention of the Legislature to make criminal that which was not so before the passage of the act; that is to directly or indirectly procure or purchase for another any alcohol, etc., in any territory where the sale of liquors is prohibited.

(4-5) Where there is any ambiguity in the language of a statute, in order to ascertain the meaning of the Legislature the court will not only look to the language of the act itself, but may also look to the title of the act. Here the meaning of the Legislature is plain when all the language is considered, and the act is viewed as a whole in connection with the title. By expressly prohibiting any one from procuring or purchasing for another the liquors named, the Legislature intended to aid in the suppression of the illegal sale. The proviso was merely surplusage, and was obviously added to emphasize the idea that the act applied only to territory where the sale of the liquors named was prohibited and therefore illegal. The proviso did not render the act void. For it is clear that the Legislature would have enacted the statute, and that it would have been a complete act, with the proviso eliminated.

This court has ruled that a defendant indicted under statutes making it unlawful to sell liquors, can not be convicted where the proof showed that he only purchased or aided the purchaser. *Woods* v. *State,* 114 Ark. 391; *Dale* v. *State,* 90 Ark. 579; *Fenix* v. *State,* 90 Ark. 589; *Whitmore* v. *State,* 72 Ark. 14; *Foster* v. *State,* 45 Ark. 361.

In such cases there would be a fatal variance between the charge and the proof. Even if there were a statute prohibiting one from purchasing liquor for himself a defendant could not be convicted under such statute, if the charge and the proof was that he sold, but did not pur-

chase. But we have no statute making it unlawful for one to purchase whiskey.

In *Whitmore* v. *State,* 72 Ark 14, Judge Riddick, speaking for the court, said:

"The license is required of those who sell, not of those who buy and one may purchase, either for himself or another, all the whiskey in the State, and under our statute he commits no crime by making the purchase." But this language was used in a case where the defendant was indicted for the illegal sale of liquor, and where the proof was that the defendant bought liquor for others, from a licensed dealer in St. Louis. The language of the learned justice must be taken in connection with the facts. The court in this case and in all the cases cited and relied on by appellant did not have under review and was not called upon by the facts presented in those cases to pass upon the question as to whether the statute under consideration was a valid law. The court's attention was not directed to it, and if the language used in any of the decisions indicates that the statute now under consideration was not in existence and that it was not a valid statute, such language was obiter.

(6) This court has never decided that Section 5135 of Kirby's Digest is not a valid enactment. But we hold now that it is. See also *Woods* v. *State, supra.*

Third. The evidence was sufficient to sustain the verdict.

Fourth. The instructions of the court as a whole contain no prejudicial error. However, the court in its fifth instruction should not have used this language, "notwithstanding you may not approve of and may condemn the conduct and actions of witnesses Holt and McNutt." The instruction was complete without this language, and this is not correct language in an instruction on the credibility of witnesses.

For the error in overruling appellant's motion to dismiss, the judgment is reversed and the cause is remanded with directions to sustain this motion unless the bond is executed.

KIRBY, J., dissents.

REDMAN v. HUDSON.

Opinion delivered May 15, 1916.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—INNOCENCE OF ACCUSED.—Appellee was charged with the crime of perjury before a justice, upon the affidavit of appellant. *Held*, the discharge of the appellee by the justice constituted a *prima facie* showing that he was not guilty of the crime of perjury as set out in the affidavit.
2. MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE.—To recover damages in an action for malicious prosecution it is necessary that both malice and want of probable cause be shown.
3. APPEAL AND ERROR—WORDING OF AN INSTRUCTION—SPECIFIC OBJECTION.—Where an instruction is faulty only in its verbiage, the error should be reached by specific objection.
4. APPEAL AND ERROR—INSTRUCTIONS—HARMONIOUS WHOLE.—A cause will not be reversed if the charge as a whole is free from error.
5. MALICIOUS PROSECUTION—ADVICE OF COUNSEL.—Where one lays all the facts in his possession before an attorney learned in the law, and acts upon the advice of such attorney in instituting the prosecution, that is conclusive of the existence of probable cause, and is a complete defense to an action for malicious prosecution.
6. MALICIOUS PROSECUTION—DISPUTED AND UNDISPUTED FACTS—PROBABLE CAUSE.—In an action for malicious prosecution, where there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is, and whether the circumstances relied on as a charge of justification, are sufficiently established; but when the facts are undisputed, whether they are sufficient to constitute probable cause is a question exclusively for the court.
7. MALICIOUS PROSECUTION—VERDICT—NEW TRIAL.—Where the jury returned a verdict against the defendant in an action for malicious prosecution, it was error for the court to refuse to set the same aside and grant a new trial, when it appeared that the defendant had acted upon probable cause.
8. MALICIOUS PROSECUTION—ADVICE OF COUNSEL—JUSTICE OF THE PEACE—PROBABLE CAUSE.—Where it does not appear that a certain justice of the peace was a lawyer, he can not be classed as one learned in the law, and capable of giving advice upon which appellant would be justified in instituting a prosecution against the appellee for the commission of a crime.
9. MALICIOUS PROSECUTION—DAMAGES.—Evidence of the treatment that appellee received while under arrest, caused by the appellant, is incompetent in an action for damages for malicious prosecution.
10. MALICIOUS PROSECUTION—HUMILIATION—DAMAGES.—In an action for malicious prosecution, testimony in regard to the humiliation that appellee was subjected to by reference being made to the fact of his prosecution and imprisonment by his neighbors, is competent.

11. APPEAL AND ERROR—INCOMPETENT TESTIMONY—MOTION TO EXCLUDE.—The court properly refused to exclude certain testimony as a whole where portions of the same were competent.

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

T. J. Wear, for appellant.

1. Instruction No. 2, given by the court, was erroneous for two reasons. The court undertook to tell the jury that a certain state of facts had been proven. Those facts were controverted by the pleadings and were contested in the trial. The court must not instruct the jury on matters of fact. The court also told the jury that those facts constituted a *prima facie* case showing that plaintiff was not guilty of perjury. 76 Ark. 43.

2. Instruction No. 4, given by the court, does not state the law correctly. It is ambiguous and mixed up. 32 Ark. 771; 101 *Id.* 43; 96 *Id.* 325, 330; 100 *Id.* 433; 96 *Id.* 311.

3. Instruction No. 1, asked by defendant, should have beeen given in order to show the jury that want of probable cause and malice both must concur and that the lack of either would prevent the plaintiff from recovery. 32 Ark. 176; 33 *Id.* 316; 71 *Id.* 356; 101 *Id.* 43.

4. Instruction No. 3, asked by defendant, is the law and should have been given. It was not covered in any instruction given. 33 Ark. 316; 96 *Id.* 325.

5. Instruction No. 11, asked by defendant, should have been given. It is the law. 82 Ark. 256; 71 *Id.* 362.

6. Instruction No. 4, asked, should have been given. The testimony shows that a full, fair and complete statement was made to an attorney learned in the law, and that appellant acted upon his advice. 26 Cyc. 102, 103, and notes.

No brief for appellee.

WOOD, J. Appellee sued appellant for malicious prosecution, alleging that appellant maliciously and without probable cause made an affidavit before a justice of the peace charging appellee with the crime of perjury

committed in a certain cause before a justice of the peace wherein appellant was plaintiff and appellee was defendant; that upon the affidavit of the appellant appellee was arrested and brought before the justice and committed to jail, where he remained for a long time before he was able to give bail for his appearance; that upon a trial before the justice for the crime charged against him in the affidavit he was acquitted. Plaintiff laid his actual damages at $1,500 and punitive damages at $1,500.

The appellant answered, denying specifically the allegations of the complaint and setting up that he did not make any affidavit as alleged, charging the appellee with perjury, but that he signed a statement which charged appellee with committing perjury, as alleged in appellee's complaint. Appellant further set up that he believed appellee had committed perjury and submitted all the facts to a reputable attorney, one learned in the law, and that such attorney advised appellant that appellee was guilty of perjury, and that, acting upon such advice, appellant signed the statement charging appellee with perjury, but that he did not swear to the statement. Appellant alleged that he set forth the facts in a statement, which he believed constituted perjury, and that this statement was signed by the prosecuting attorney and not by appellant; that the appellee was tried upon this signed statement by the deputy prosecuting attorney and not upon any statement that was signed by appellant accusing appellee of perjury.

It could serve no useful purpose to set out in detail and comment upon the evidence that was adduced at the trial. Such of it as may be necessary to comment on will be referred to in the opinion.

Appellant urges reversal for alleged errors in the rulings of the court in giving certain instructions on its own motion and in refusing certain prayers for instructions requested by appellant, and in the admission of certain testimony.

In the second instruction, given on its own motion, the court told the jury that the appellee was prosecuted

upon an affidavit made by the appellant and that such prosecution terminated in the discharge of the appellee by the justice before whom the prosecution was pending, and that such discharge constituted a *prima facie* showing that the appellee was not guilty of the crime of perjury as charged by appellant.

The justice of the peace testified that the appellant made an affidavit before him charging the appellee with the crime of perjury; that on such affidavit he issued a warrant, and his recollection also was that he issued a commitment; that appellee was arrested on the warrant and was afterwards brought into his court and the charge of perjury against the appellee was investigated and he was acquitted of this charge. He further testified that the affidavit was amended at the beginning of the trial, and the prosecuting attorney was present at the time.

Witness Lighter, for the appellee, testified that he had been a practicing attorney for eight years and making a specialty of criminal law; that he wrote the affidavit that the appellant signed, but that appellant did not swear to it. Witness wrote out the affidavit at the request of the justice. Appellant told the justice that he (appellant) wanted to make an affidavit, and the justice asked witness to write it out; that appellant signed the affidavit, and that the amendment was made on the original affidavit over appellant's signature, and appellant was present when the amendment was made and raised no objections to it.

Witness Watrous testified that he was deputy prosecuting attorney and did not think that he signed the affidavit after it was amended, but did not remember.

The appellant testified that at the time he signed the statement accusing appellee of perjury he believed he was guilty of perjury and still believed that he was. His testimony as abstracted does not show that he denied making the affidavit as testified to by the justice.

It thus appears that the uncontroverted testimony shows that appellant made an affidavit before a justice of the peace upon which the prosecution for perjury was

based, and that the justice, after investigating the charge, acquitted the appellee.

(1) The court, therefore, did not err in giving instruction No. 2, as the facts upon which this instruction was predicated were undisputed, and such being the case the court correctly told the jury as a matter of law that the discharge of the appellee by the justice constituted a *prima facie* showing that he was not guilty of the crime of perjury as set out in the affidavit. The instruction, in the form given, was the same in effect as if the court had told the jury that the facts as stated constituted a *prima facie* showing that there was no probable cause for the prosecution instigated by appellant against the appellee for the crime of perjury.

It will be observed that the instruction does not tell the jury that the facts stated therein show that the appellee was not guilty of perjury, but only declared that the facts as stated constituted a *prima facie* showing of his innocence. The instruction was correct. See *Wells* v. *Parker,* 76 Ark. 41-43.

Instruction No. 4 is as follows: "If you find from the evidence that the defendant did prosecute or cause to procure the prosecution of the plaintiff as alleged in this complaint, and that it was without probable cause, you will find for the defendant, unless it was shown by the evidence that such prosecution was malicious."

(2) This instruction was inaptly drawn and, to say the least, was ambiguous. Counsel for appellant contends that the instruction told the jury that they must find for the appellee if the prosecution of him by the appellant for perjury was malicious. But when the instruction is carefully analyzed it will be seen that such is not its meaning. On the contrary, the effect of the instruction was to tell the jury that before the plaintiff could recover it was necessary for him to prove both a want of probable cause for the prosecution and also that the prosecution was malicious, for the first part of the instruction told the jury that the verdict should be for the defendant if the prosecution was without probable cause,

unless it was also shown to have been malicious, which was equivalent to saying that if the plaintiff only proved a want of probable cause for the prosecution he could not recover against the defendant, but that he must also show that the prosecution was malicious.

(3) The objection urged by counsel relates purely to the verbiage of the instruction and not to its substance, and therefore counsel should have made a specific objection to the instruction.

The court, in its first instruction, told the jury: "that in order for the plaintiff to recover against the defendant he must prove by a preponderance of the evidence: (A) that he was prosecuted in a criminal action substantially alleged; (B) that the prosecution was instigated or procured by the defendant; (C) that the prosecution terminated in the acquittal or discharge of the plaintiff; (D) that it was without probable cause; and, (E) that it was malicious."

This instruction clearly told the jury that before there could be any recovery the plaintiff must show that the prosecution against him was without probable cause and that it was malicious. In other words, that it required proof of both to warrant a recovery of damages for malicious prosecution. The fourth instruction was manifestly intended to emphasize this idea, and when it is read in connection with the first, the jury could not have been misled thereby.

(4) Instructions must be considered as a whole, and if, when so considered, they present a harmonious charge and correctly declare the law, independent portions of the charge will not be condemned because they contain, when standing alone, some inapt expressions or ambiguous statements. A cause will not be reversed if the charge as a whole is free from error. *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564; *St. Louis, I. M. & S. Ry. Co.* v. *Carter*, 93 Ark. 589; *St. Louis. I. M. & S. Ry. Co.* v. *Lamb,* 95 Ark. 209; *Slim and Shorty* v. *State*, 123 Ark. 583. See also cases collated in Vol. V. Crawford's Dig., 848 G, *et seq.*

Appellant's prayers for instructions which the court refused were fully covered in the instructions which the court gave. The instructions of the court correctly declared the law, and to have given appellant's prayer would have been but a repetition of the same principles in different words.

Among other instructions given by the court was the following: Number 8. "If the defendant caused or procured the prosecution of the plaintiff, and you believe from the evidence before doing so he used reasonable diligence to ascertain the truth, and fairly and fully communicated to counsel, J. D. Lighter, all the facts within his knowledge, and that in instigating and causing the prosecution of plaintiff, if the evidence shows that he did so, and that he acted in good faith upon the advice of counsel, you will find for the defendant."

The appellant testified that he went to see Lighter and made a full, fair and complete statement of all the facts in regard to what Mr. Hudson had sworn and all the facts brought out in court at the trial of the civil suit, and that Mr. Brackett was also with him at the time and that Mr. Lighter told him that under his statement Hudson was guilty of perjury; that at the time he signed the statement accusing Hudson of perjury he believed that he was guilty of perjury and still believed that he was; that he told Lighter all he knew about the case.

Brackett testified that he went to Mr. Lighter's house with Mr. Redman, and while there told Mr. Lighter that he did not owe Hudson anything and that he did not stand good for groceries to Redman for Hudson, and that Mr. Lighter advised Redman, in witness' presence, that in his (Lighter's) opinion, Hudson had committed perjury. But Lighter did not advise Redman to prosecute Hudson at all.

Lighter testified that after the civil suit was disposed of, Redman came to his house with Brackett, and while there they explained all the facts connected with that suit and the controversy, and after they had explained all the facts witness, as an attorney, advised Red-

man that Hudson had committed perjury; that he did not advise Mr. Redman to file the affidavit or to start a prosecution; but only advised him that from all the facts in the case Mr. Hudson had committed perjury in the suit wherein Mr. Redman had sued Mr. Hudson.

Appellee permitted these witnesses to testify without objection that they explained all the facts connected with the civil suit to Mr. Lighter, the attorney; that appellant made a full, fair, free and complete statement in regard to what Hudson had sworn to and all the facts brought out in the civil suit. As appellee did not object to the testimony in this form, and did not demand that the witnesses state what facts they told Lighter, this was tantamount to an acquiescence on his part that appellant had made in good faith a full statement of the facts to the attorney. It must be taken, therefore, as the testimony is presented in the record, that appellant stated to Lighter what the testimony of Hudson was on the trial of the civil suit and what his own testimony was, and that Redman made a full, fair, free and complete statement of all the facts in regard to what Mr. Hudson had sworn to and all the facts brought out in court at the trial of the civil suit.

It must be held, therefore, that there is no conflict in the evidence on the issue as to whether or not the appellant made a full and complete statement of all the facts as they were brought out both by the appellant and by the appellee on the trial of the civil action, to the attorney, Lighter, before instituting the prosecution against the appellee for perjury, and the evidence is undisputed that Lighter advised the appellant, after hearing the statement of these facts, that appellee had committed perjury.

(5-6) The general rule is that where there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is, and whether the circumstances relied on as a charge or justification, are sufficiently established. But, where the facts are undisputed, whether they are sufficient to constitute a probable cause

is a question exclusively for the court. 26 Cyc. 106-7-8. It is the well settled doctrine of this court that where one lays all the facts in his possession before an attorney learned in the law, and acts upon the advice of such attorney in instituting the prosecution, this is conclusive of the existence of probable cause, and is a complete defense in an action for malicious prosecution. *Price Merc. Co.* v. *Cuilla,* 100 Ark. 318; *Kansas & Texas Coal Co.* v. *Galloway,* 71 Ark. 351. See also, *St. Louis, I. M. & S. Ry. Co.* v. *Wallin,* 71 Ark. 422; *Price* v. *Morris,* 122 Ark. 382; 183 S. W. 180; *Laster* v. *Bragg,* 107 Ark. 74.

(7) The testimony of appellant was to the effect that he believed at the time he instituted the prosecution against the appellee for perjury that he was guilty of perjury. Whether the appellee was in fact guilty of perjury or not, if the appellant believed that he was, and so believing, made a full and complete statement of all the facts to the attorney, Lighter, and acted upon the latter's opinion in instituting the prosecution, then appellant would have probable cause and a complete defense. There is nothing in this record to warrant a finding that appellant did not make a full and complete statement of the facts to the attorney and that the attorney did not advise him that appellee was guilty of perjury and that he did not act in good faith upon such advice. The testimony on this issue, as to whether or not appellant had probable cause, being undisputed, the court could have so instructed the jury as matter of law. However, as the court submitted this issue to the jury, their verdict on the issue was contrary to the undisputed evidence.

One ground of the motion for a new trial was that the verdict of the jury was contrary to the evidence. The court, therefore, erred in not setting aside the verdict and granting a new trial on this ground.

(8) The court refused to permit appellant to testify that he consulted with a justice of the peace and told him all about the facts which constituted the prosecution against the appellee for perjury. It is not shown that the justice of the peace was a lawyer and he therefore

could not be classed as one learned in the law and capable of giving appellant advice upon which he could be justified in instituting the prosecution against the appellee for perjury.

Appellee testified to the effect that after he was arrested on the warrant charging him with perjury he was put in jail and that the inmates made fun of him and greatly humiliated him; that it was the first time he was ever in jail; that his wife was sick at the time and he had no way to communicate to her and did not have any way to get out and make bond; that he suffered great mental pain and anguish while in jail; that he was greatly humiliated after he was released from custody by his neighbors and friends and his neighbor's children referring to the fact that he had been in jail.

The appellant moved to exclude all this testimony, which the court refused and to which ruling the appellant excepted, and makes this ruling one of his grounds for a new trial.

(9) The insults that were offered to appellee while in jail were not competent to enhance his measure of damages. The appellant had no control over the jailer and it was the jailer's duty to see that the prisoners in his custody received proper treatment. That appellee was not treated with proper consideration by the inmates of the jail was the fault of the jailer and testimony to the effect that appellee was humiliated on account of the treatment he received by the inmates of the jail is too remote to be considered as an element of damages. See 26 Cyc., pp. 102-3, note 78; *John Zebley, Jr.*, v. *John W. Story*, 117 Pa. St. 478.

(10) The testimony in regard to the humiliation that appellee was subjected to by reference being made to the fact of his prosecution and imprisonment, by his neighbors was competent as these were but the natural and probable consequences to be anticipated from such prosecution. See 26 Cyc. 102, and cases cited in note 76.

(11) Motion was made to exclude the testimony as a whole. The court did not err, therefore, in overruling

the motion. To have had the benefit of a ruling appellant should have moved the court specifically to exclude that part of the testimony which was incompetent. See *Kansas City So. Ry. Co.* v. *Leslie,* 112 Ark. 305. Moreover, the only effect this testimony could have had would have been to enhance the damages, and inasmuch as the appellant does not claim that the verdict was excessive either for actual or punitive damages, and did not make excessiveness of the verdict one of the grounds in his motion for a new trial, no reversible error could be predicated upon the ruling of the court in admitting the above testimony.

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

McCULLOCH, C. J. (dissenting). It is conceded that the court gave the jury correct instructions on the subject of what constitutes probable cause for a prosecution. The point of the controversy between the parties with respect to which Hudson is alleged to have sworn falsely, in the prosecution instituted against him by Redman, is whether or not Hudson had purchased a certain bill of goods from Redman. Redman sued Hudson before a justice of the peace for the price of the bill of goods, and in the trial which resulted there was a conflict in the testimony on the point at issue, Redman's testimony being to the effect that he had sold the goods directly to Hudson, and the latter testifying that he did not buy the bill of goods from Redman, but that the goods were purchased from Redman by one Brackett, who was a partner of Hudson's. This disputed fact was one within the personal knowledge of the two parties, and one or the other of them has misstated the facts in the trial below of the present case, for there was a sharp conflict in their testimony on that point. The jury have, however, settled that conflict by returning a verdict in Hudson's favor. The jury necessarily found by their verdict that Hudson told the truth about it and

that Redman did not state the facts correctly when he testified that he sold the bill of goods directly to Hudson.

In the trial below, Redman, after relating his version of the facts concerning the original controversy, stated that before instituting the prosecution he stated those facts to his attorney, who gave him an opinion to the effect that upon that state of the case Hudson was guilty of perjury, and that a prosecution against him could be maintained. The attorney also testified that Redman related those facts to him and that upon the latter's statement he advised that Hudson was guilty of perjury. It is true there is no controversy over the fact that Redman did state his side of the case to his attorney, and also stated what had occurred at the trial, but the jury have found by their verdict that Hudson misstated the facts about the original controversy; and that he obtained the advice of his counsel upon a misstatement of the facts.

It is difficult for me to see how the majority comes to the conclusion, therefore, that the facts of the case which tended to establish probable cause are undisputed, when we find that there was a direct conflict between the testimony of the two parties themselves as to what the facts were. "All authorities agree that all facts of which defendant had knowledge must be stated," in order to constitute probable cause for a prosecution alleged to have been malicious. 26 Cyc. 34. If, therefore, Redman told his attorney that Hudson had purchased the bill of goods from him, it constituted, according to the conflicting testimony of Hudson, a misstatement of the facts, and therefore could not have afforded probable cause for the prosecution. If any court has ever decided that a man can make probable cause for a prosecution by a misstatement of the facts to his attorney, the case has never been brought to my attention, but that is, however, the necessary effect of the decision of the majority in the present case, for they entirely ignore the conflict between the testimony of the two parties to this controversy, and hold that Redman is exonerated from a wrongful prose-

cution merely because he went to an attorney and obtained his opinion, upon his own misstatement of what the real facts of the controversy were.

The position of the majority is not aided at all by the fact that it may be treated as undisputed that Redman gave his attorney both sides of the controversy, for his own testimony here shows that he told his attorney what he claims to be the truth now, that Hudson had in fact purchased the goods from him, and the testimony of Hudson tended to show that that is not true and the jury have sustained Hudson on that point. It is entirely beside the question to refer to the general statement of Hudson concerning what he had said to his attorney in procuring the opinion, for even if it be conceded that Hudson waived the requirement for Redman to detail more accurately the particular statements that he made to his attorney, it does not follow that that makes the testimony of Redman and his attorney, bearing on the question of probable cause, undisputed. The sharp conflict in the testimony concerning the material facts, whether or not Hudson bought the bill of goods from Redman, can not be eliminated by any process of reasoning such as is adopted in the opinion of the majority.

It seems to me that in all malicious prosecution cases hereafter, all that will be necessary for a defendant in a case of that sort to do is to show that he had made his own statement of the facts to his attorney and procured an opinion, and that necessarily will constitute probable cause, whether he stated the facts correctly or not.

Mr. JUSTICE SMITH concurs in the dissent.

BEAVERS v. STATE.

Opinion delivered May 15, 1916.

1. PERJURY—PROOF.—A. and B. were charged with the crime of gaming. C. was called as a witness and testified that A. and B. were not gaming. Thereafter A. and B. plead guilty. *Held*, a conviction of C. for perjury would be sustained.

2. PERJURY—MATERIALITY OF FALSE STATEMENT.—Where there is no dispute about the fact sworn to, the question whether the testimony on which perjury was assigned was material, was a question of law for the court.

3. PERJURY—INDICTMENT—An indictment charging perjury is sufficient, if the substance of the offense is charged, by what court the oath was administered, averring that the court had authority to administer the oath, with proper averments to falsify the matter wherein the perjury is charged.

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

E. H. Vance, Jr., and *Albert W. Jernigan,* for appellant.

1. The court did not inform appellant of his rights; that he did not have to testify against himself. 171 S. W. 862; 115 Ark. 390.

2. It was error to permit the justice to testify contradicting his record. 159 S. W. 542; 89 S. W. 829.

3. The indictment is fatal because it fails to allege that there was a game of dice played for money, or any other game, by Eason and Bryant. 91 Ark. 205; 1 Mich. N. P. 141.

4. The materiality of the matter assigned as perjury is for the determination of the court, and it is error if it be left to be ascertained by the jury. 32 Ark. 192; 88 *Id.* 115; 99 *Id.* 629; 3 S. W. 662; 59 *Id.* 75; 102 *Id.* 480; 115 *Id.* 1126 . There is no criminality in this case.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, for appellee, *D. D. Glover,* Prosecuting Attorney, of counsel.

1. The testimony shows wilful perjury. The five instructions given for the State state the law correctly.

2. It is only in cases where there is no dispute about the facts that it becomes the duty of the court to say whether the testimony is material or not. 88 Ark. 115; 91 *Id.* 505; 99 *Id.* 629. Here there was a dispute and it was proper to submit it to the jury.

3. It is not necessary that the false testimony offered influence the decision of the court or jury, so long

as it is on a material point in issue. 3 Mich. 556; 69 Ill. 148; 2 Bishop New Cr. Law, § 1028; 3 Leon. 230; Kirby's Digest, § 1968; 32 Ark. 117. When the testimony is material, when it is knowingly and intentionally false, then the crime is proved. 87 Ark. 564; 78 *Id.* 567; 91 *Id.* 200.

HART, J. Joe Beavers prosecutes this appeal to reverse a judgment of conviction against him for the crime of perjury. The material facts are as follows:

On the 21st day of May, 1915, Arthur Bryant and Mansco Eason were seen by a constable gambling in the back of the ball park in the city of Malvern, Hot Spring County, Arkansas.

The constable testified that they were shooting dice for money and that Geo. Wheeler, Bud Posey and Joe Beavers were sitting down by them watching the game. The constable arrested Arthur Bryant and Mansco Eason and brought them to the office of D. M. Noble, a justice of the peace, to be dealt with according to law. The other three, including the defendant, were told to come to the justice's office, as witnesses for the State. They went along with the constable. When Eason and Bryant were brought to the justice's office, the prosecuting attorney was notified and he filed information against them, charging them with gaming. They announced ready for trial and entered a plea of not guilty. The other three, the defendant included, were sworn as witnesses for the State and the rule being asked, were placed in a separate room.

The constable testified that he saw Eason and Bryant gaming with dice and saw them pass several pieces of money between them. Joe Beavers testified that Eason and Bryant were not gaming at all; that he was sitting there by them and that no money passed between them; that they had no dice, but were playing mumble-peg with a knife. After he had given his testimony, Arthur Bryant, after consulting with his brother-in-law, asked permission of the court to withdraw his plea of not guilty

and enter a plea of guilty. Eason, the other defendant, who was being jointly tried with Bryant, made the same request. The justice of the peace granted their request and entered separate judgments against each of them on his plea of guilty.

The above facts were proved on the trial of the present case.

Arthur Bryant and Mansco Eason both testified that they were playing a game of craps on the day in question and betting on the game, and both stated that the defendant was present. Bryant also testified that he heard Joe Beavers testify at their trial before the justice of the peace that they were playing mumble-peg.

The constable and justice of the peace both testified that they heard Joe Beavers testify in the trial before the justice of the peace, that he stated there, that Eason and Bryant did not shoot dice for money, but that they were playing mumble-peg with a knife. The testimony was sufficient to warrant the jury in returning a verdict of guilty.

It is insisted by counsel for the defendant that the judgment should be reversed because the justice of the peace did not inform Beavers that he could not be compelled to testify in the trial of the case against Eason and Bryant. Counsel rely on the case of *Claborn* v. *State,* 115 Ark. 387. The facts in that case are essentially different from those in the present case. There the charge by the State against Claborn was pending before the grand jury and the charge of perjury was based upon what Claborn testified before the grand jury in the investigation of the charge against himself. The court held that an indictment for perjury based upon alleged false swearing in a criminal proceeding pending before a grand jury against the person himself giving the alleged false testimony, is fatally defective unless it alleges that the accused voluntarily appeared before the grand jury to give testimony upon which the indictment for perjury is predicated. Here Beavers was called to testify as to a charge of gaming against Bryant and Eason. Even if

he had been in the same game he could have been called to testify. *State* v. *Quarles,* 13 Ark. 307. The records show that after Beavers had given his testimony before the justice of the peace, that Eason and Bryant, who were being jointly tried, withdrew their plea of not guilty to the charge of gaming. Counsel for the defendant contends that because Eason and Bryant finally entered a plea of guilty, that perjury could not be predicated upon what Beavers testified before the justice of the peace.

(1) In the case of *Scott* v. *State,* 77 Ark. 455, the court held that where perjury has been committed as to a material matter, it does not lie with the perjurer to say that if he had sworn the truth, the case for other reasons would have failed. Applying that principle here it may be said that the testimony of Beavers upon which the perjury is based, related to a fact which was material in the gaming case against Bryant and Eason. So if he swore falsely in respect to any material fact in that case he is guilty of perjury, although a judgment of conviction could have been entered upon the plea of guilty afterwards made by Eason and Bryant.

(2) Counsel next contends that the question of materiality of the testimony was for the court and not for the jury. It is true the general rule is that on a trial for perjury, the court determines the materiality of the alleged false testimony and that an instruction leaving that question to the jury is erroneous. *Saucier* v. *State,* (Miss.) 21 A. & E. Ann. Cases, 1155. Here, however, there was no dispute about the fact sworn to, and the question whether the testimony on which perjury was assigned was material was a question of law to be decided by the court and not of fact to be passed upon by the jury. *Grissom* v. *State,* 88 Ark. 115; *Barre* v. *State,* 99 Ark. 629.

(3) Finally it is insisted that the indictment was too general and indefinite to support a charge of perjury. The indictment for perjury under our statute does not require the same strictness in the details and recitals as the law required for indictments for the same offense at

common law. If the substance of the offense is charged (by what court the oath is administered, averring that the court had authority to administer the oath, with proper averments to falsify the matter wherein the perjury is charged), it is sufficient. The object is that all indictments preferred against violators of law should be sufficiently clear and explicit, to enable the person charged with an offense to know with certainty what he is called upon to answer. *Loudermilk* v. *State,* 110 Ark. 549; *State* v. *Green,* 24 Ark. 591. In the instant case the indictment charges in what court the oath alleged to be false was taken and that the court before which the oath was taken had proper authority to administer it. The indictment also after stating the criminal charge in which the alleged false oath was taken states that Joe Beavers "feloniously, falsely, knowingly and corruptly testified, that the said Mansco Eason and Arthur Bryant were not gaming or unlawfully betting money on a game of hazard or skill, but that they were playing mumble-peg with a knife, when in truth and in fact they were gaming and betting money on a game of hazard or skill," etc. While this averment does not state the particular testimony, it does set forth the substance of it with proper allegation of the falsity of the matter on which the perjury is assigned. In our opinion all the requirements of the law are satisfied in the indictment. We find no prejudicial error in the record and the judgment will be affirmed.

SLAGLE v. BOX.

Opinion delivered May 15, 1916.

1. LIMITATIONS—PROOF OF PAYMENTS—BURDEN.—Where payments are relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence, in addition to the endorsement, that the payment was in fact made.
2. LIMITATIONS—DATE OF PAYMENTS.—The date of the payment, and not the endorsement, or entry of it, marks the time of the inter-

ruption of the statute, unless a future date is agreed upon by the parties.

3. LIMITATIONS—OBLIGATION OF CO-DEBTORS—PAYMENT BY ONE DEBTOR.—The partial payment of a debt by one of the joint and several debtors after the same is barred by the statute of limitations, does not revive the debt as to the co-debtor.

Appeal from Benton Chancery Court; *Wm. A. Falconer,* Chancellor; affirmed.

A. L. Smith, for appellant.

1. Whether appellee be treated as a surety or as a co-maker, his liability is the same. A surety is bound absolutely, unless he relieves himself in the mode pointed out in the statute. 113 Ark. 198. It is conceded that a payment by a co-maker after the statute has run will not revive a debt against the other party and if at any time the action was barred as to appellee, it could not be maintained against him unless he did some act which revived it against him.

2. The action was never barred by limitation, payments having been made regularly, which revived the debt. Appellee acquiesced in the payments. Black's Law Dict., p. 19; 60 Ark. 492; 65 *Id.* 222; 69 *Id.* 399; Wood on Limitation, par. 110; 38 Ark. 295; 32 *Id.* 645.

3. If appellee consented to the payments appellant had the right to apply it as a credit in the absence of a direction from the debtor. Cases *supra.* The last payment was within five years. The finding that the note was barred is clearly against the preponderance of the evidence.

Rice & Dickson, for appellee.

1. None of the payments or credits were directed or consented to by appellee. The burden was on appellant to show by evidence other than the endorsement, the fact that payment was made. Kirby's Digest, § 5091; 70 Ark. 598. None of the payments were authorized by appellee. The payments by Sam Box after the statute bar attached does not revive the debt against his co-debtor. 10 Ark. 108; 12 *Id.* 762; 14 *Id.* 199; 20 *Id.* 293.

2. It is the date of the actual payment which stops the statute and not the endorsing of the credit. 9 Ark. 455, 460; 20 *Id.* 293; 25 Cyc. 1375. The creditor must prove the date of payment. 14 Ark. 85, 213; 25 Cyc. 1368, note 76; 7 Port. (Ala.) 537.

3. A part payment does not *proprio vigore* start anew the statute of limitations, but it is a fact from which a new promise may be inferred. 25 Cyc. 1371-2. No affirmative act was shown by appellee.

4. Appellee settled in full and was discharged by the settlement.

KIRBY, J. Appellant brought suit on June 16, 1914, against P. Box, appellee, upon a promissory note for $1,148, dated May 16, 1891, and due one day after date and bearing interest at the rate of 10 per cent. per annum until paid. This note was signed "Sam Box, Principal," and "P. Box."

The complaint alleged that four payments had been made upon the note and endorsed thereon as follows: "May 16, 1896, $10; May 7, 1901, $1,369.93; Nov. 25, 1905, $33.50; Sept. 22, 1910, $2.00."

The execution of the note was admitted and it was alleged that defendant had compromised and settled and paid the plaintiff the amount of his liability on the note, which was accepted in full discharge and satisfaction of all liability; set up laches of the plaintiff in not proceeding to compel the payment by Sam Box, the principal debtor, and the granting of extension of time for payment to said Sam Box without defendant's consent, and also plead the statute of limitations. Later he filed a further equitable defense and moved to transfer to equity, which was done.

Upon the trial, the chancellor found for the defendant, that the note sued on was barred by the statute of limitations and entered a decree, from which this appeal is prosecuted.

Appellant testified that the first credit endorsed as of date May 16, '96, was the amount of a store account that

he owed to Box Bros., who were in business at Hico, when the debt was contracted. Sam Box stated that Box Bros. quit business in 1888 and that Slagle did not owe a store account and that they had been out of business a number of years on the date of the endorsement of said credit. He also said he did not request the endorsement, nor agree to such credit, that it was an imaginary credit and Slagle had said to him that the note was out of date and suggested an imaginary credit.

Defendant stated that Box Bros. had gone entirely out of business three or four years before the note sued on was executed and that if Slagle owed a store account it was contracted three or four years before the note sued on was given. The next payment was made by Sam Box, and appellant stated it consisted of the price of a small tract of land conveyed to him by Sam Box. The deed executed by Box and wife to appellant was dated November 24, 1896, and he stated that the amount was to be credited on the note on the date of the deed and appellant stated that the making of the deed was the final consummation of the trade for the five acres of land, of which he took possession immediately thereafter. Nothing else entered into this credit and no part of it was paid by appellee.

Appellant stated that the $33.50 credit was for part of the value of an iron safe which he had bought from Box Bros., that he had the safe at his house and it was there when he moved in; that Sam Box had lived in the house before he did. He could not remember the year the iron safe was turned over to him, but it had been in the house ever since he had moved in.

Appellee stated that Slagle asked him about the safe and he told him he had nothing to do with it and had never bought any safe or opened it, to see Sam about it; that he made no agreement with him about the price of the safe nor any credit therefor, that he had no interest in it.

Sam Box testified that he made no payment on the date this item was credited.

Appellee also stated that appellant made no demand on him for payment of the note sued on until about May 1, 1914, and five or six years after he had paid his own note of a like amount to appellant.

(1) When payments are relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence in addition to the endorsement that the payment was in fact made. *Simpson* v. *Brown-Desnoyers Shoe Co.*, 70 Ark. 598; *Brown* v. *Hutchings*, 14 Ark. 84.

(2) It is likewise true that the date of the payment and not the endorsement, or entry of it, marks the time of the interruption of the statute, unless a future date is agreed upon by the parties. 25 Cyc. 1375; *Alston* v. *State Bank*, 9 Ark. 455; *Borden* v. *Peay*, 20 Ark. 293.

(3) The law is also well settled that the partial payment of the debt by one of the joint and several debtors after the same is barred by the statute of limitations, does not revive the debt as to the co-debtor. *Borden* v. *Peay*, *supra*; *Biscoe* v. *Jenkins*, 10 Ark. 108; *Mason* v. *Howell*, 14 Ark. 199.

The testim[illegible]s in conflict as to whether the credit of $10.00 first [illegible]sed was ever paid by either of the makers of the note and the preponderance of the testimony certainly shows that the second credit, entered as of May 7, 1901, was the price of a certain piece of land sold and conveyed and the possession thereof delivered to appellant by Sam Box as a payment upon the note in 1896, the date of deed being November 24, of that year, the undisputed proof showing that the appellant entered into possession immediately thereafter. His statement that the endorsement was made, as of the date shown upon the note, by agreement as against the denial of the payor, Sam Box, and his statement that it should have been entered as of the date of the delivery of the deed and possession of the land, which was in 1896, or '97 at most, if the transaction should not be regarded consummated until the execution of the commissioner's deed thereafter under the mortgage foreclosure, can not be said to con-

stitute a clear preponderance of the testimony against the chancellor's finding to the contrary.

The next credit as shown by the endorsement, was more than five years thereafter, if the payment was in fact made, and if it was made by Sam Box by the delivery of an iron safe, there does not appear to be any good reason for saying that it should not have been entered as of the date of delivery of the safe to appellant, who admits that the safe was in the said house he purchased of Sam Box when he moved in.

It is not contended by appellant that appellees made the payment of $2.00 endorsed of September 22, 1910.

Within the principles of law announced, if the partial payments were not made before the bar of the statute attached, they would not have effect to continue the debt alive, nor would the payment by one of the makers after the bar had attached, revive the debt as to his co-maker.

The evidence is in conflict as already said, but we are not able to ascertain that the chancellor's finding that the debt was barred by the statute of limitation is clearly against the preponderance of it, in fact, his findings as to the dates of some of the payments appear to be supported by the preponderance of the testimony.

We find no prejudicial error in the records and the decree is affirmed.

LASHBROOKE v. COLE.

Opinion delivered May 15, 1916.

SURETYSHIP—RELEASE OF ONE SURETY—RIGHT OF CONTRIBUTION—FAILURE TO PLEAD DEFENSE—RES ADJUDICATA.—A. and B. were sureties on a note to C. B. was released from liability by reason of C.'s failure to bring suit as required by Kirby's Digest, § § 7921 and 7922. Judgment was obtained against A. for the full amount, which A. paid and sued B. for contribution. *Held*, A. had the right to plead the discharge of B., thereby releasing himself from one-half his original liability to C., and having failed to do so, can not recover contribution from B.

Appeal from Poinsett Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

Basil Baker and *Horace Sloan,* for appellant.

1. The giving of the alleged notice did not discharge the liability to contribution, because (1), the notice was not sufficiently peremptory, or definite. (2) Jacobs, the principal, was insolvent at the time of giving the notice. (3) The notice was not properly served. (4) The statute has no application to the right of contribution between co-sureties, but applies solely to liability to creditors. Kirby's Dig., § § 7921, 7922.

2. The plea of *res adjudicata* was untenable, and the notice was not sufficiently peremptory or definite. The statute must be strictly construed. 82 Ark. 407, 413; 15 *Id.* 132; 2 Brandt on Sur. & Guar., § 771; 7 Ark. 394-6; 46 Am. Dec. 293; 32 Cyc. 104. The notice must be that suit will be brought against all parties. 36 Iowa 270; 64 Ia. 423; 20 N. W. 744. The notice was not sufficient. 7 Ark. 396; 46 Am. Dec. 293; 32 Cyc. 104; 36 Iowa 270; 64 *Id.* 423; 20 N. W. 744.

3. Jacobs was insolvent at the time of notice. 27 A. & E. Enc. Law 515; 62 Ark. 629; 34 S. W. 78; 43 Ga. 442; 7 N. C. 27; 73 Iowa 451; 25 Pa. St. 525; 76 S. W. 317; 9 Cal. 537; 37 Am. St. 587.

4. The notice was not properly served. Kirby's Dig., § 6267.

5. This statute has no application to the right of contribution between co-sureties, but applies solely to liability to the person notified, *i. e.,* the creditor. 27 N. E. 443; 61 Me. 541.

5. Under the statutes the liability is both joint and several. The notice to sue is strictly personal in its effect to the surety who gave it. 38 Miss. 499; 94 Ind. 433; 96 Ind. 491; 32 Ind. 438; 44 Ark. 349.

6. The plea of *res adjudicata* is not tenable. Kirby's Digest, § § 6247, 6228, 6232. The burden was on defendant. 111 Ill. App. 105; 76 N. E. 286, and many others.

L. C. Going, for appellee.

1. By giving notice, appellee was released. Kirby's Dig., § § 7921-2; 6 Ark. 354; 3 Dana (Ky.) 160.

2. The surety is not liable. 58 Miss. 581; 3 S. C. 564; 11 Mo. 524; 121 Mass. 116; 54 Pac. 995; 62 Ark. 92; 47 W. Va. 817; 1 Ohio St. (59 Am. Dec. 631); 37 Vt. 537.

3. The rule of *res adjudicata* applies. 105 Ill. App. 454; 94 Ind. 366; 24 N. W. 158; 57 Mich. 422; 93 N. W. 158; 47 Vt. 620; 79 Ark. 450; 5 S. W. 536; 39 S. E. 732; 44 S. W. 254; 91 *Id.* 416; 60 N. E. 1110; 63 N. E. 823.

4. To sum up, appellee was released, because: (1) Lashbrooke having paid the note after judgment, was subrogated to the rights of Mrs. Briant; (2) Cole was released from liability to Mrs. Briant, and plaintiff's cause of action being based upon the fact that he paid the judgment and succeeded to her rights; and she has none against Cole. 105 Ill. App. 454; 94 Ind. 366; 24 N. W. 158; 93 *Id.* 158; 47 Vt. 620; 79 *Id.* 450; 5 S. W. 536; 39 S. E. 732; 44 S. W. 254; 91 *Id.* 416; 60 N. E. 1110; 64 *Id.* 823.

SMITH, J. The parties to this litigation were the sureties of Ed. L. Jacobs upon a note executed by him to the order of Mrs. W. A. Briant. A year after the maturity of the note Mrs. Briant sued appellant alone on this note, but before the trial of the case she amended her complaint and made appellee a party also. Appellee filed an answer in which he alleged his discharge from liability by reason of Mrs. Briant's failure to bring suit within thirty days of a notice requesting her so to do, pursuant to sections 7921 and 7922 of Kirby's Digest. At the trial of the cause the jury returned separate verdicts upon the issues raised, the first of which was as follows: "We, the jury, find for the defendant, B. F. Cole (signed) N. J. Hazel, foreman." The second verdict read: "We, the jury, find for the plaintiff in the sum of $1,000 note and with interest from date less $250. (Signed) N. J. Hazel, foreman." The $250 represented a payment made by Jacobs, and is a fact of no importance in this case. And upon these verdicts the following judgment was rendered: "It is therefore considered, ordered and adjudged

by the court that the plaintiff, Mrs. Briant, have and recover of and from the defendant Ed L. Jacobs and the defendant, C. E. Lashbrooke the sum of $1,007.39, and all the costs of this proceeding."

Later, upon the issuance of an execution, Lashbrooke paid this judgment, and he thereupon demanded of Cole that he pay one-half thereof, and upon Cole's refusal so to do brought this suit and has prosecuted this appeal from a judgment of the court below denying him the right of recovery.

A number of interesting questions are discussed in the briefs, among others, the sufficiency of the notice given by Cole to Mrs. Briant to sue. But, we think those questions are concluded by the judgment above mentioned.

It is now urged by appellee that the judgment in his favor, in the suit of Mrs. Briant against him and his cosurety, exonerates him from any liability in favor of Lashbrooke, and we think the decision of that question is decisive of all other questions raised in the case.

Appellant says first that there has been no judgment in Cole's favor, but we do not agree with him in this contention. The judgment sets out the verdicts of the jury in *haec verba* and upon these verdicts judgment is pronounced in favor of the plaintiff against Jacobs and Lashbrooke only and the necessary effect of this recital and judgment is to exclude Cole from liability to Mrs. Briant on account of this note.

The real question in the case is whether or not the judgment is *res adjudicata* of the right of contribution between these sureties. We find a sharp conflict in the authorities on this subject, and the leading cases are cited in the note to the case of *Central Bank & Security Co.* v. *U. S. F. & G. Co.,* 80 S. E. 121, 51 L. R. A. (N. S.) 797. This is an opinion by the Supreme Court of West Virginia, and there are well considered opinions by the judge who delivered the opinion of the majority, and by the judge who delivered a dissenting opinion. The majority opinion supports appellant's view, and in doing so, overruled in effect the former opinion of that court in the case

of *Hood* v. *Morgan,* 47 W. Va. 817, 35 S. E. 911. In this case note, it is said: "And the principles applied and decision reached in the Central Bkg. & Security Co. case are in full accord with those of *Koelsch* v. *Mixer,* 52 Ohio St. 207, 39 N. E. 417, wherein it was held that it was no defense to an action for contribution between co-sureties that the defendant surety had been exonerated by the jury in the original action, which had been brought by the obligee jointly against both sureties, the ground being that they were not adversely interested in the original action, and that the conclusiveness of the judgment therein depends upon the question whether an issue was joined between the parties and determined material to their respective rights in the action for contribution."

In reviewing the cases on the subject, the author of this case note says: "One line of cases is authority for the rule that the original judgment is not *res judicata* as between the sureties, unless such sureties are adversely interested in the original action, and held that sureties, when jointly sued, are not so adversely interested. These cases, however, seem hard to justify, because the sureties, although co-defendants, are in effect adversely interested, since exoneration of one ordinarily increases the liability of the others. This would certainly be true where the surety or sureties held liable would have a right to question the exoneration of the other sureties in an appellate court.

"The other, and seemingly the better, rule is that the judgment in the original action is conclusive as between all those who were parties thereto, even though they were not in form adverse parties, and irrespective of the objection that the cause of action between the obligee and the sureties is technically different from that between the sureties for contribution."

This case note cites as foremost perhaps among those cases which adopt the view we approve, the case of *Ruff* v. *Montgomery,* 83 Miss. 185, 36 So. 67. This Mississippi case is identical with the case under consideration. Chief Justice Whitfield, speaking for that court, said: "Mont-

gomery's defense was that the judgment in the first suit before the justice of the peace, releasing him from all liability, is a bar to any recovery against him by Ruff for contribution, the said judgment of the justice of the peace standing unreversed. Ruff should have appealed from the judgment of the justice of the peace holding him and releasing Montgomery. On such appeal there would have been presented for decision not only the right of the creditor to hold Ruff, but the rightfulness of the release of Montgomery. Ruff had the right, necessarily, to have that question also examined and determined on appeal because of the fact that the release of Montgomery directly affected the measure of Ruff's liability to Blackard, the plaintiff. He had an appealable interest in the rightfulness of the determination of the justice of the peace in discharging Montgomery. As said in 2 Cyc. p. 633: 'In legal acceptation, a party is aggrieved by a judgment or decree when it operates on his rights of property, or bears directly upon his interest,' * * * The extent of Ruff's liability was directly affected by Montgomery's discharge, and the relation between Ruff and Montgomery was such, arising out of their suretyship contract and the principles of contribution flowing therefrom, that it would have been perfectly proper on the appeal to have determined the rightfulness of Montgomery's discharge. This being so, the judgment constitutes a bar to any recovery from Montgomery, as properly held by the circuit judge."

Other cases supporting this view are cited in this case note.

In the dissenting opinion in the West Virginia case, the learned judge who delivered that opinion quoted the rule applicable to such cases as stated in 2 Black on Judgments, section 591, as follows: "Where, in a suit against one of two sureties, judgment is fairly obtained against him, and no collusion existed between him and the party recovering the judgment or the principal obligor of the bond, if notice of the pendency of such suit has been given his co-surety, the latter stands virtually in privity with him against whom the judgment has been obtained. The

co-surety in such case is bound to avail himself of any defense which he may have, and he will not be permitted afterward, in a suit for contribution brought against him by his co-surety, who has paid and satisfied the judgment, to set up any defense which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defense to the action. Having failed to do so, though he had full notice of the pendency of the action, he waives all defenses he might have had, and in the suit for contribution, the matter is *res judicata.*"

The law, as there stated, finds full support in the opinion in the case of *Love* v. *Gibson,* 2 Fla. 598. But we are not required to approve the rule thus broadly stated to support the conclusion we have reached. As was stated in this dissenting opinion, we need only to give the judgment conclusive effect in those cases where the sureties are parties in the suit against their principal.

In the case of *Gordon* v. *Moore,* 44 Ark. 349, the facts were that Moore had recovered judgment by default against Gordon for balance due on a note executed to Moore by Gordon, Robinson and Childress. Later, Gordon filed a petition under section 4692 of Gantt's Digest (6220, Kirby's Digest), alleging that Moore had sued Robinson and Childress upon the same note in the United States Court for the Northern District of Mississippi, and had recovered judgment there, and that this judgment had been satisfied by a payment by Cole to Moore of $450, which release operated as a discharge of the claim against the petitioner, as well as against Childress, and that inasmuch as Moore had executed to Childress a release in his favor against this judgment, that release also operated to discharge the petitioner. In answer to the petition to vacate this judgment, Moore alleged that Robinson was the principal in the note and Childress and Gordon were his sureties and denied that this release was intended to, or that it did, operate to discharge his claim against Robinson or the other surety, Gordon, further than the extent of the sum received. The principal in the note was shown

to be insolvent. The motion for a new trial was overruled, but the judgment was modified by allowing credit of the payment made. Upon the appeal it was said that it would have been proper to have rendered judgment for only one-half the unpaid balance of the debt with interest, leaving out of the estimate of that balance the $450 paid by Childress. With that payment, Gordon had nothing to do, that it was the consideration of the release to Childress and was paid in behalf of Childress personally. But, "as to Moore, all were principals from the beginning inasmuch as he had the right to collect the debt of all or either. He was only required to take cognizance of their release to the extent of avoiding any act which would prejudice the rights of the sureties to obtain exoneration from the principal or contribution amongst themselves." After a review of a number of authorities, the court quoted with approval from Brandt on Sureties, etc., section 383, the following language: "If there are several sureties liable for the same debt, and the creditor releases one of them from liability, but does not thereby materially alter the contract, he generally releases the remaining sureties to the extent that such released surety would otherwise have been liable to contribute to his co-surety," and it was there adjudged that while a release of a surety is no release of the principal, yet the release of one of two sureties is a release of the other from one-half of the debt.

On the filing of Cole's answer, an issue arose in the decision of which Lashbrooke was vitally interested. He was not in a position to say that he did not owe the note, but he was in a position to say, under the authority of the case of *Gordon* v. *Moore, supra,* that if Mrs. Briant had been guilty of any act of commission, or omission, as a result of which she had lost her right to pursue Cole and obtain satisfaction of her debt from him, that to that extent he had the right to have Mrs. Briant's demand against him remitted, and as in the *Gordon* v. *Moore* case, the release of liability was for one-half of the whole debt. By appropriate pleadings, Lashbrooke should have asserted this right when a judgment was asked against him

for the full amount of the debt in a suit in which his co-surety was a party, and was asking to be exonerated from any liability.

It is the policy of our law to avoid circuity of actions. All necessary parties were before the court for the decision of all questions involved. In section 6098 of Kirby's Digest, in prescribing what the answer shall contain, it is said, among other things: "(4) The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off, whether legal or equitable, as he shall have. * * *"

These questions should, therefore, have been raised at the time of the original suit, and, being within the issues of that case, we hold that the judgment of the court is *res adjudicata* as to the question under discussion, and the judgment of the court below is therefore affirmed. *Gould* v. *Evansville & Crawfordsville Railroad,* 91 U. S. 533.

McCULLOCH, C. J. (concurring.) This case was tried before the circuit judge sitting as a jury, and my opinion is that the evidence was sufficient to sustain the finding that the notice given by appellee to Mrs. Briant was in substantial conformity with the statute, and that the latter's failure to sue appellee exonerated him from liability not only to Mrs. Briant but also to appellant his co-surety. *Wilson* v. *Tebbetts,* 29 Ark. 579. For that reason I concur in the judgment of affirmance. It is unnecessary to discuss the details of that defense, for the reason that the majority have put the decision on another ground.

I am not willing, however, to agree to the statement of the law that the former action in which Mrs. Briant, the obligee, sued the two sureties, was an adverse adjudication of appellant's claim against appellee for contribution. The adversary rights of the two parties to the present controversy were not in issue between them in the former suit, nor could there have been any issue between them in that suit. The only issues in that case were those raised between the plaintiff, Mrs. Briant, on one side, and

appellant and appellee, who were the two defendants, on the other side. The defense of discharge, by notice to sue, was not one which was necessarily common to both of the two defendants, for the one who did not give notice may or may not have consented to the discharge, and therefore would not have been exonerated by the failure to sue. *Coddington* v. *Brown,* 123 Ark. 486, 185 S. W. 809. Appellant's alleged right of contribution was not then mature, and he had no cause of action against the appellee as his co-surety. The right of contribution arises, not out of the contract of suretyship but as an incident thereto upon payment of the debt to the obligee. If it be conceded that appellant might, in the former action, have pleaded the discharge of his co-surety as against the right of the plaintiff to recover against him, and that so far as the plaintiff in that suit is concerned, he is bound by the judgment, whether he pleaded the discharge or not, it does not affect his right to make an issue now with appellee which he did not have a right to make at that time.

In *Wilson* v. *Tebbetts, supra,* this court approved the decision of the Kentucky Court of Appeals (*Letcher, Admr.* v. *Yantis,* 3 Dana. 160), in holding that the defense of discharge of a surety for failure to sue the principal is personal to the surety who gives notice and that it also exonerates him from liability to a co-surety for contribution. That being the law, it is difficult to see how the judgment in the former case has any bearing on appellant's right to call his co-surety to account for contribution.

The judgment of the court discharging appellee may or may not have been correct. Appellant had no way under the statute of testing the correctness of the judgment. He could not file a motion for a new trial on the ground that the judgment in favor of his co-surety was erroneous, nor could he appeal from the judgment. His attitude then in failing to plead the discharge of his co-surety is consistent with his attitude now in asserting that the co-surety was not in fact discharged

and that he can establish that fact on a trial of the issue. His failure therefore, to plead the discharge against Mrs. Briant does not bar him the right to assert his cause of action against appellee for contribution after he has paid the debt.

It seems to me that the reasoning of the two opinions of the West Virginia and Ohio courts, cited by the majority, is clear and convincing, and that they correctly state the law on the subject. The controlling principle is very clearly stated by the Ohio court as follows: "It is not enough that an issue may have been joined between the obligee and the defendant as to the liability of the latter on the bond. Whatever that issue may have been, it was not an issue between himself and his co-defendant, the plaintiff in this action, and could not, therefore, conclude the latter. Though parties to the suit, they were not such in an adversary character, being simply co-defendants to the suit on the bond. The plaintiff in this suit could not, in the former suit, as a matter of right, have insisted on the admision or rejection of evidence on the trial of the issue, had no right to move for a new trial, nor prosecute error, if aggrieved by the rulings of the court; and hence he can not be held bound by the judgment in any subsequent litigation to which he may be a party. * * * It is a general rule that parties to a judgment are not bound by it in a subsequent controversy between each other unless they were adversary parties in the original action." *Koelsch* v. *Mixer,* 52 Ohio St. 207, 39 N. E. 417.

The same principle was also announced by the Missouri court in the case of *Comstock* v. *Keating,* 115 Mo. App. 372, 91 S. W. 416, where the court said: "The general rule is that the parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversaries in the action wherein the judgment was entered. This rule is subject to an exception, when in the course of litigation, co-plaintiffs or co-defendants do in fact but not in form occupy the attitude of adversaries."

The case in which that statement was made was similar to the present case in that there was a plea of a former adjudication against the rights of co-sureties for contribution. I am unable to see the force of the reasoning of Chief Justice Whitfield in the case of *Ruff* v. *Montgomery,* 83 Miss. 185. The conclusion of the learned judge is based entirely upon what he conceives to have been the right of the surety to make an issue in the former suit with a co-surety. But whatever may have been the rights of the parties under the Mississippi practice it seems clear to me that there was no way in which appellant could have raised an issue with the appellee in the case now before us. The other cases in which the same rule is announced (*Love* v. *Gibson,* 2 Fla. 598; *Cross* v. *Scarboro,* 6 Baxter 134), do not undertake to state the reason for the rule, but merely lay it down as the correct one. I prefer the sound rule stated by the courts of West Virginia, Ohio, and Missouri, and I am therefore constrained to dissent from the views of the majority.

CLARK COUNTY *v.* HARRIS.

Opinion delivered May 15, 1916.

INQUESTS—DUTY OF CORONER.—A coroner is not required to hold an inquest merely because a dead body is found or because the death was sudden, if there is no reason to suspect foul play, or the circumstances of the death are not known.

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

Tilman B. Parks, Prosecuting Attorney, *John H. Crawford* and *Dwight H. Crawford,* for appellant.

The county is not liable. Kirby's Digest, § 794; 52 Ark. 361; 100 Pa. St. 624; 37 Neb. 328; 21 L. R. A. 394; 45 Am. Rep. 402.

Hardage & Wilson, for appellee.

The coroner in this case exercised all the precaution the statute contemplates. The county is clearly liable for the fee. 52 Ark. 361; 65 *Id.* 557; 74 *Id.* 183.

SMITH, J. Appellee filed a claim in the county court of Clark County for the fees allowed by law for holding an inquest on the dead body of one George Griffith, and the claim was disallowed by the county court, but was allowed by the circuit court on appeal. In support of his claim, appellee testified that on July 10, 1915, a Mr. Gordon telephoned him that a negro boy had drowned. Witness went to the scene and asked parties who were there how the boy came to drown, and these parties said they did not know, and being unable to learn the circumstances of the drowning, he empaneled a jury and held an inquest. He was asked if there was any suspicion by any one of foul play, and answered that he did not know until he had investigated, that he could not find out, but when the witnesses were examined, he ascertained that the boy was in the river bathing, and was accidentally drowned.

It does not appear that there was any reason to suspect, or that any one suspected, that the boy had been foully dealt with, and the only uncertainty which appeared to exist was as to the circumstances under which the boy was drowned. Section 794 of Kirby's Digest provides for holding an inquest in only two instances: "(1) If the dead body of any person be found and the circumstances of his death be unknown, and (2) if any person die and the circumstances of his death indicate that he has been foully dealt with." The duty of the coroner under this statute is defined in the cases of *Clark County* v. *Calloway,* 52 Ark. 361; *Jefferson County* v. *Cook,* 65 Ark. 557; *Young* v. *Pulaski County,* 74 Ark. 183.

As these cases interpret the duty of a coroner, that officer is not required to hold an inquest merely because a dead body is found, or because the death was sudden, if there is no reason to suspect foul play, or the circumstances of the death are not known. We think the proof does not show that the cause of this boy's death was

unknown, although the details of the unfortunate incident were not known, and there was nothing to indicate he had been foully dealt with. Therefore, the fees for this inquest should not have been allowed, and that judgment will, therefore, be reversed and the cause dismissed.

YOUNG, ADMINISTRATOR, v. RED FORK LEVEE DISTRICT.

Opinion delivered May 15, 1916.

1. LEVEE AND DRAINAGE DISTRICTS—CONDEMNATION—ACT 53, ACTS OF 1905.—Act 53, page 143, Acts of 1905, providing for condemnation proceedings, providing for proceedings by "the board of directors of the St. Francis Levee District, and all other levee and drainage districts, * * *" *held* to be a general statute and applicable to all levee and drainage districts in the State, whether organized under general or special statutes.
2. STATUTES—CONSTRUCTION—TITLE.—The title of an act may be looked to in construing the same.
3. LEVEE DISTRICTS—CONDEMNATION—RED FORK LEVEE DISTRICT—REPEAL OF FORMER STATUTES.—Act 53, page 143, Acts of 1905, *held* to repeal the special provisions of Act 93, page 169, Acts of 1891, creating the Red Fork Levee District, as amended by Act 146, page 253, Acts of 1893, with reference to condemnation proceedings by the said levee district.
4. LEVEE DISTRICTS—CONDEMNATION PROCEEDINGS—NON-RESIDENT OWNERS.—Proceedings to condemn the land of non-resident owners, by a levee district, under Act 53, Acts 1905, are *in rem*, and the assessment of damages is not required to be made by jury, unless the owner appears within a certain time and demands the same.
5. EMINENT DOMAIN—LEVEE DISTRICTS—DAMAGES—ASSESSMENT BY JURY.—A non-resident land owner is deprived of no constitutional right, where a statute provides that his damages shall be assessed by a jury, in condemnation proceedings by a levee district, only when he appears and demands the same within a certain time, after due notice by publication.
6. EMINENT DOMAIN—NON-RESIDENT OWNER—NOTICE BY PUBLICATION.—In the absence of a showing to the contrary, it will be assumed that all steps were taken to confer jurisdiction upon the clerk, in the matter of the condemnation of land of a non-resident land owner by a levee district by the service of notice by publication.

Appeal from Desha Circuit Court; *James C. Knox*, Special Judge; affirmed.

F. M. Rogers, for appellant.

1. Act 53, Acts 1905, is a special act limited in its operation to the St. Francis Levee District and to lands "bordering upon and near the Mississippi River." Sections 1 and 8 specifically mention the St. Francis District; section 9 limits the act to lands bordering upon and near the Mississippi River. The act only applies to the St. Francis District. But if not, appellee has no right to condemn until it had first attempted to "acquire it by compromise or agreement with the owners." Notice to the owner is a prerequisite. Kirby's Digest, § 6055, subd. 6. If the proceeding is *in rem,* the lands at least should be described.

2. The Red Fork Levee District was created by Acts 1891, p. 169, amended by Acts 1893, p. 293. The power of eminent domain was conferred by said acts. The St. Francis Act of 1905, even if held to be a general statute, does not repeal section 18 of said special acts of 1891 and 1893. 50 Ark. 132; 51 *Id.* 159; 53 *Id.* 417; 54 *Id.* 237; 53 *Id.* 339; 60 *Id.* 59; 63 *Id.* 397; 72 *Id.* 119; 88 *Id.* 324; 93 *Id.* 621.

X. O. Pindall, for appellee.

1. Condemnation proceedings are not common law actions, and when they meet local constitutional requirements, and provide for due notice to parties affected, they are valid. 1 Lewis on Em. Dom., § § 311, 314; 69 Ark. 642. Even before the act of 1905 and before the case of 114 Ark. 338 in a proceeding in which it was sought to substitute an attack of an act for a failure to follow it that while a litigant had certain rights "she did not have the right to ignore a pending suit in which her rights could be ascertained and her wrongs redressed." The code forbids such unnecessary action and the courts must enforce this salutary provision. 79 Ark. 159, 160. The act gives any one dissatisfied the right to except within ten days from the notice and secure a trial by jury. Acts 1905, p. 147; Page & Jones on Taxation by Assessments, § 133; Hamilton on Law of Assessments, § 437.

2. Appellee availed itself of the provisions of the Act 1905, pp. 143-153. Warning order was issued as prescribed and published and no exceptions were filed. Appellants came in too late.

3. The act is general and repealed all other special acts. 121 Ark. 601; 88 Ark. 327; 82 *Id.* 302; 97 U. S. 546; 114 Ark. 338. The judgment is right. 50 Ark. 132; 93 *Id.* 621.

McCULLOCH, C. J. Appellee is a levee district created by special statute enacted by the General Assembly of 1891,* and appellants are severally the owners of tracts of land through which a portion of the levee was located and constructed during the year 1914. The right-of-way for the levee was condemned and damages to the owners assessed pursuant to the terms of the Act of February 24, 1905, entitled "An Act to provide a method for the exercise of the right of eminent domain by levee, drainage, and ditching districts." Acts 1905, p. 143, Act No. 53.

(1) Appellants contend that the Act of 1905 is, in the first place, inapplicable to the Red Fork Levee District for the reason that the Act of 1891,* creating that district, and the amendatory Act of 1893,† provided a different method of condemnation; and also contend that the Act of 1905 is void in some respects which affect the validity of the present proceeding. The language of the Act of 1905 is peculiar in that it provides that "the board of directors of the St. Francis Levee District, and all other levee and drainage districts organized under the laws of the State of Arkansas, are hereby authorized," etc. That language is found in the initial sentence of the first section of the act, and the same language occurs in section 8, which confers certain powers on "the board of directors of the St. Francis Levee District, or any other levee or drainage district." It is difficult to understand just what was in the legislative mind at the time this language was used, but when the ordinary effect is given to the words "all other levee and drainage dis-

*Act 93, p. 169, Acts of 1891.—(Reporter.)

†Act 146, p. 253, Acts of 1893.—(Reporter.)

tricts organized under the laws of the State of Arkansas," it renders the preceding designation of the St. Francis Levee District purely surplusage, for that is one of the levee districts organized under the laws of Arkansas (a special statute) and is included within the general description. The statute is, in other words, a general statute applicable to all levee and drainage districts in the State, and we have so decided in another case. *Russell* v. *Board of Directors of Red River Levee District No.* 1, 110 Ark. 20. The Red River Levee District was created under a special statute of the State, and in that respect was like the St. Francis Levee District.

It has been suggested in argument that the fact that the lawmakers saw fit to insert the name of the St. Francis Levee District indicated that the general words used were intended to be applied only to levee and drainage districts created pursuant to general laws of the State, and not to those created by special statutes, and that it was necessary to designate that particular levee district in order to bring it within the terms of the statute. We do not think that that is the proper interpretation of the language of the act, for it is too general an expression to be open to that interpretation. If the statute amounts to a general one, which is applicable at all to levee and drainage districts other than the one especially mentioned, it necessarily includes all that are created by or under the laws of the State, whether pursuant to special statutes or pursuant to the general statutes authorizing the formation of those districts. It is proper to consider the title of an act for the purpose of determining its true meaning, and we find that in the title of this act language is employed which refers to all levee and drainage districts generally and not a particular one. It is true there is certain language in section 9 of the act, declaring that "all lands bordering upon and near the Mississippi River shall be subject to public servitude," which might be construed as referring only to levee districts organized for the purpose of giving protection from flood waters of

the Mississippi River, but we can treat that language as only applying to levee districts along the Mississippi River without impairing the general force of the statute in its application in other respects to all other districts in the State. We are convinced, therefore, that the lawmakers intended to include all levee and drainage districts in the State, or at least that the language used by the lawmakers is susceptible only of that interpretation.

(3) When the act is thus construed, it necessarily repeals the special provision in the Act of 1891,* creating the Red Fork Levee District, and the Act of 1893† amendatory thereof. *Hampton* v. *Hickey,* 88 Ark. 324. Those statutes which apply especially to the Red Fork Levee District contain no provision for condemnation other than proceedings to be initiated by the land owner for the assessment of damages. The act seems to contemplate that the directors shall have full authority to locate the levee, and that the initiative is on the land owner to institute proceedings to secure an assessment of damages. It provided that notice should be given by the land owner and that a jury should be then summoned to assess the damages. The statute also provided that that remedy should not be exclusive, but that the land owner could choose the common law right of action to recover damages for the trespass. We are of the opinion, however, that that statute was repealed by the Act of 1905 which applies to all such districts organized under the laws of the State. The Act of 1905 gives authority to levee and drainage districts to condemn rights-of-way through lands of private owners for the purpose of constructing the improvement, and provides, in substance, that on the written application of the president or secretary of any such district, the judge of the circuit court of the county shall appoint three disinterested resident land holders of the county as appraisers to assess damages, and that when the route of the right-of-way is selected, and when-

*Act 93, p. 169, Acts of 1891.—(Reporter.)

†Act 146, p. 253, Acts of 1893.—(Reporter.)

ever, it becomes necessary to "take or use or appropriate any right-of-way, land, material, or other property for levee, drain, ditch, or canal purposes hereinbefore mentioned, or when the same has already been entered upon by them," then such district, acting through its proper officers or agents, may file a petition with the clerk of the circuit court of the county, describing the property taken or proposed to be taken, and thereupon the said appraisers shall proceed to assess the damages and make an award in writing and file the same with the clerk of the circuit court. The clerk is then required to issue a summons to the sheriff commanding him to serve the owner or owners, if they reside in the county, and make return thereof; but that "if such owner, or owners, be nonresidents of the county, or unknown to the officers of the levee or drainage district, it shall be the duty of the clerk to publish a warning order in some newspaper published in the county, for four insertions, which warning order may be in the following form:

"To (name supposed owner)and all other persons having any claim or interest in and to the following described land, situated in ..... County, Arkansas: namely (here describe the land over which the levee or drainage passes according to U. S. Surveys) are hereby warned to appear in this court within thirty days, and file exceptions to the award which has been filed in this office by the levee and drainage appraisers of this county for the appropriation of the portion of the hereinbefore described land, for the construction, or intended construction of a levee, ditch, canal, or drain, as the case may be over and across the same."

The act then further provides that if no exceptions be filed by the owners within ten days after service of summons, or within ten days of the date of the last publication of the warning order, "the court shall proceed to enter a judgment condemning such property and land for the right-of-way purposes, and a judgment in favor of the owner, or owners, of such land against the levee or drainage district for the amount awarded by such

appraisers;" but that if exceptions be filed within the time aforesaid, and trial is demanded by either party, the question at issue shall be tried "as other common law cases are tried, and the owner, or owners, of the land shall be entitled to recover the value of the land appropriated, or intended to be appropriated," etc.

Section 4 of the statute contains the following provision with reference to payment of award: "But, in the event the owner, or owners, of such land, material, or property being unknown, or if it is uncertain who they are, or if there are conflicting claims to the land, or to the award, or any part thereof, then the said levee or drainage district shall pay the same to the clerk of the chancery court of the proper county, for such owner, or owners, and take the clerk's receipt, as provided herein from the owner, and shall have the same recorded in the book provided for the recording of petitions; that said clerk and his sureties shall be answerable for the safe keeping of said money. That any claimants to said land may file an application in the chancery court, and set up title to said land or property, and after giving notice to all adverse claimants by summons, if residents of the county, and by warning order, if nonresidents of the county or unknown, shall have their claim to such money adjudicated and tried as other cases are tried under the rules and practice of the chancery court, and upon a final hearing the chancery court shall direct a proper disposition of the money, which judgment shall be a bar to a recovery against the levee or drainage district for any other or further compensation or damages for the construction or maintenance of such levee, ditch, drain or canal."

(4) The proceedings in the present case are not satisfactorily abstracted by the attorneys on either side, but we understand from the meager abstract furnished that the provisions of the statute were strictly complied with in the present proceedings. Appellants were nonresidents of the county, and a warning order was issued which described the lands as required by the statute.

S. B. Anderson, one of the appellants, owned a tract of land proceeded against, but in the warning order the Anderson-Tulley Company, a corporation of which appellant Anderson was a stockholder and officer, was named as the supposed owner of the tract. None of the appellants appeared within the time authorized for filing exceptions, and as to them there was final judgment entered by the circuit court approving the award of the appraisers. They appeared later, however, and filed petitions demanding a trial by jury. It is insisted on behalf of appellant Anderson that the judgment was void, and that he is entitled to a trial by jury, because of the giving of the wrong name as owner. It will be observed that the statute authorizes proceedings *in rem* against the lands of nonresident owners and unknown owners, and that it does not require that the name of such nonresident owner be correctly given in the warning order. On the contrary, the statute provides for the insertion of the name of the supposed owner, and it necessarily follows that any error in the mention of the name does not affect the validity of the proceedings.

That portion of the proceedings relates only to the condemnation and assessment of damages, and not to subsequent proceedings for the ascertainment of the identity of the persons to whom the money should be paid over. If the district pays the money to the wrong person, it does so at its peril, for the statute provides that if there is any uncertainty about who the real owner is, the money must be paid over to the clerk of the chancery court where proceedings are authorized in the nature of an equitable interpleader to bring in all persons who can assert an interest in the funds. The district can protect itself, therefore, by complying with that part of the statute, but, as before stated, if it voluntarily pays the money over to a supposed owner it does so at its peril for it must determine who is the real owner notwithstanding its inability to ascertain with certainty who the owner is.

(5) We discover no reason for declaring this legislative provision invalid. It is contended that its provisions wrongfully deprive the owner of a trial by jury for the ascertainment of damages, but the answer is that the act itself provides that there shall be a jury trial in the event the owner appears within the time given and demands such trial. There is no express provision of our Constitution requiring the assessment of damages by a jury in this class of proceedings. The constitutional guaranty of trial by jury in condemnation proceedings relates only to condemnations by private corporations. Article 12, section 9, Constitution of 1874. In other words, the statute is valid in all respects material to this controversy because it gives the land owner a day in court by personal service if he resides in the county and is known, and by publication where it is a proceeding *in rem;* and also he is given a day in court by proper service of summons or warning order in the event of uncertainty as to ownership and the payment of the money to the clerk of the chancery court. Every constitutional requirement is therefore covered in the statute.

(6) The statute is criticised because of its failure to provide expressly upon what information the clerk shall issue the warning order for nonresidents and unknown owners. The statute, as before mentioned, provides for personal service upon owners who reside in the county, but merely states that "if such owner, or owners, be nonresidents of the county, or unknown to the officers of the levee or drainage district, it shall be the duty of the clerk to publish a warning order," etc. In order to give jurisdiction, there must be an allegation concerning the ownership of the property so that the clerk can determine whether there shall be issued a personal summons or a warning order. The abstract of the record made by appellants, who are the attacking parties, fails to show how the matter was brought to the attention of the clerk, and we must assume, in the absence of a showing to the contrary, that all steps necessary to confer jurisdiction were complied with. There was no

error, therefore, in refusing to grant appellants a trial by jury on their application made after the expiration of the time prescribed by the statute.

Affirmed.

MOTT v. AMERICAN TRUST COMPANY.

Opinion delivered May 15, 1916.

1. MORTGAGES—PURCHASE OF MORTGAGED LANDS—LIABILITY OF PURCHASER.—The acceptance by appellant of a deed containing a recital showing that the land purchased was subject to a certain mortgage, did not constitute an obligation on appellant's part to pay the mortgage debt, nor did it render him legally liable for its payment.
2. MORTGAGES—PURCHASE OF MORTGAGED LANDS—PERSONAL LIABILITY OF PURCHASER.—Appellant purchased lands, the deeds reciting "subject, however, to a mortgage in the sum of $1,000 due and payable to" * * * the appellee; *held*, parol testimony to show appellant's personal liability was inadmissible, and a personal judgment against him for the amount of the debt was erroneous.

Appeal from Craighead Chancery Court, Western District; *N. F. Lamb*, Special Chancellor; reversed.

Hawthorne & Hawthorne and *Little & Lasley*, for appellant.

1. The contract is clear, complete and unambiguous, and it was not competent to show by parol testimony an additional consideration. 99 Ark. 223.

2. There was no assumption of the mortgage debt by Mott. 27 Cyc. 1344; 3 Pomeroy 2404; 2 Devlin on Deeds, 2072.

3. An acceptance of a deed subject to a specified mortgage does not imply a promise by the grantee to pay the debt. 47 Ark. 197; 90 *Id.* 426; 15 L. R. A. (N. S.) 1087.

4. The burden was on plaintiff to establish the assumption of the debt. 63 Am. St. Rep. 892.

J. R. Turney, for appellees.

1. The evidence is clear to show an assumption of the mortgage debt and the testimony was admissible. 18

Ark. 65; 55 *Id.* 112; 75 *Id.* 89; 90 *Id.* 429; 110 Ark. 70; 90 S. W. 426; 110 Ark. 63; 160 S. W. (Mo.) 63.

McCULLOCH, C. J. E. P. Mathes owned a tract of land in Poinsett County, Arkansas, containing one hundred acres, and on April 4, 1914, mortgaged it to American Trust Company, a corporation engaged in the banking business in the city of Jonesboro, Arkansas. On the same day, but after the execution and recording of the mortgage to American Trust Company, Mathes sold and conveyed the land to W. R. Flannigan and F. V. King, the deed containing a recital that it was executed "subject to first mortgage of this date to American Trust Company for $1,000, with interest at 10 per cent., due April 4, 1915." In June, 1914, Flannigan and King conveyed the land to Mott, the deed reciting the consideration to be $2,500 "cash in hand paid," and containing a further recital that the deed was made "subject to a mortgage to the American Trust Company for $1,000, with interest at the rate of 10 per cent. per annum, due April 4, 1915."

There was default in the payment of the mortgage note, and the mortgagee, American Trust Company, instituted this action in the chancery court of Poinsett County, praying for a foreclosure, and Mathes, Flannigan, King and Mott were all joined as defendants. Mathes and Flannigan filed cross-complaints against Mott, and those pleas, as well as the original complaint, alleged that Mott had expressly agreed as a part of the consideration for the conveyance of the land to him to pay said mortgage debt. Mott answered, denying that he had entered into any such agreement or had in any wise obligated himself to pay the mortgage debt. The chancellor, on the final hearing of the cause, decreed in favor of the American Trust Company for foreclosure of the mortgage and for the recovery from each of the defendants personally the amount of the mortgage debt. Mott has appealed to this court.

(1) It is conceded that the acceptance by Mott of the deed containing the recital showing that it was subject

to the mortgage did not constitute an obligation on his part to pay the mortgage debt nor render him legally liable for its payment. *Patton* v. *Adkins,* 42 Ark. 197; *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426. There was an effort to prove by parol evidence that Flannigan and King agreed orally, as a part of the consideration of their purchase from Mathes, to pay the mortgage debt to American Trust Company, and that appellant Mott agreed orally, as a part of the consideration of the deed to him from Flannigan and King, to pay said mortgage debt. There was a conflict in the evidence on that issue which we deem it unnecessary to attempt to reconcile inasmuch as we reach the conclusion that the testimony was incompetent. That is one of the points raised by this appeal, and we think that the decision of that point is conclusive of the case.

(2) Appellee relies upon the case of *J. H. Magill Lumber Co.* v. *Lane-White Lumber Company, supra,* as conclusive of the right to introduce oral testimony, but that case does not reach to the facts of the present one. If there were nothing else in the present case in the form of a written contract except the deeds containing the recital, there would be no legal objection to the introduction of parol testimony to establish the agreement to pay an additional consideration, for that would not constitute an attempt to vary the terms of the written contract. There is, however, more than that involved in this case. It appears from the evidence that the conveyance of the land to appellant Mott was a part of the consideration of a written contract entered into by Flannigan and Mott for the sale by Mott to Flannigan of a livery stable outfit in the city of Jonesboro. The contract was produced and it sets out in great detail the terms of the sale, and among other things stipulated that Flannigan should, as a part of the consideration for the sale of the livery stable property, convey to Mott the Poinsett County land "subject, however, to a mortgage in the sum of $1,000 due and payable to American Trust Company, of Jonesboro, Arkansas," which is the exact

language of the recital in the deed. No mention is made in the contract of any agreement on the part of appellant Mott to assume the payment of the mortgage. The contract recites the various items of the consideration, all of which aggregated the sum of $11,400, consisting of $4,000 in cash and several conveyances of real estate in addition to that conveying the Poinsett County land. The contract also recites many other reciprocal obligations of the respective parties. The consideration mentioned in this writing was contractual in its nature, and an attempt to prove by parol an additional consideration necessarily constitutes a variance of the terms of the writing itself. This distinction is clearly recognized in our decisions, and we have held that it was improper to permit oral evidence of an additional consideration where there was a written contract showing that the different considerations were of a contractual nature.

This question is thoroughly discussed in the case of *Williams* v. *Chicago, Rock Island & Pacific Railway Co.*, 109 Ark. 82, where we quoted with approval the following rule stated in 17 Cyc. 661: "Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part."

We also quoted from the Supreme Court of Minnesota, in the case of *Kramer* v. *Gardner*, 104 Minn. 370, as follows: "But where the expressed consideration is more than a stated amount of money paid or to be paid, and is of a contractual nature, parol proof is inadmissible to vary, contradict or add to its terms."

Many other authorities are discussed in the opinion, and quotations are taken therefrom which bear with great force upon the question involved in the present case. We reach the conclusion, therefore, that this case falls within the doctrine announced which renders parol

testimony inadmissible. There being no other evidence of liability on the part of the appellant Mott, it results that the decree against him was erroneous so far as it held him personally liable for the amount of the mortgage debt.

The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

MARTIN v. MANNING, EMERSON & MORRIS.

Opinion delivered May 15, 1916.

1. APPEAL AND ERROR—CHANCERY CASE—INCOMPETENT TESTIMONY—PRACTICE.—On appeal, chancery causes are tried *de novo*, and this court will consider only competent testimony, although incompetent testimony was considered by the court below, and brought into the record before this court.
2. APPEAL AND ERROR—FINDING OF CHANCELLOR—CONTRACT.—On the issue of the existence of a contract, the finding of the chancellor will not be disturbed, when not against a preponderance of the evidence, although some incompetent testimony was admitted.
3. ATTORNEY'S FEES—CONTRACT WITH CLIENT—PROOF OF CONTRACT.—In an action by an attorney to collect certain fees, there was a contract made between the parties as to the amount to be paid the attorney. *Held*, the finding of the chancellor would not be disturbed on appeal.
4. ATTORNEY'S FEES—AMOUNT—FINDING OF CHANCELLOR.—The finding of the chancellor that appellees were entitled to fees of $5,000 for professional services, where appellant was relieved by their services from a liability of about $170,000, held correct.
5. FRAUDULENT CONVEYANCES—CONVEYANCES TO NEAR RELATIVES.—Transfers of property by an insolvent debtor, against whom suits for large amounts are pending, for a grossly inadequate consideration, are *prima facie* fraudulent, and the burden is upon the debtor to show the contrary.

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

STATEMENT BY THE COURT.

This was a suit brought by the appellees against the appellants for legal services. The appellees alleged in their complaint that at the time they were employed

by the appellant J. H. Martin a judgment had been rendered against him for the sum of $28,000; that execution had issued and the sheriff had levied upon a large stock of goods and other property of appellant and same had been advertised for sale; that appellant, J. H. Martin, having been away from the county several weeks, was not advised at the time as to what other suits were pending against him; that he had been a director and stockholder in the Bank of Commerce and Trust Company, at Stuttgart, which was then in process of liquidation through the State Bank Commissioner; that it was agreed in consultation with the senior member of appellees' firm that appellees should represent appellant J. H. Martin in all these matters upon the basis of a retainer of $1,000, and that when all the matters involving appellant J. H. Martin's interests were terminated a reasonable fee should then be fixed for the services rendered by appellees; that in pursuance of the contract the senior member of appellees' firm immediately began the matter of representing appellant J. H. Martin in litigations which had been instituted in Arkansas. The complaint then alleged that in addition to the $28,000 judgment there was another suit pending against him for $139,797 and another for $3,900; that the senior member of appellees devoted practically his entire time during the month of December to the pending litigations against appellant J. H. Martin, and that as a result of his efforts appellant's property was released from the levy of the execution for $28,000, and that judgment satisfied, and that the other suits were adjusted and dismissed at the cost of the parties instituting the same; that appellant J. H. Martin was liable for all of the above sums, but as a result of the services of the appellees he was relieved from such liability, and that the services rendered by appellees to the appellant J. H. Martin were reasonably worth the sum of $5,000.

Appellees further alleged that the appellant J. H. Martin was insolvent and for the purpose of defrauding them and other creditors, had conveyed all of his real and personal property to his wife and brother. They

prayed that these conveyances be set aside, and that appellant J. H. Martin's property be subjected to the payment of such judgment as might be rendered in appellee's favor.

Appellees also had *lis pendens* notice filed in the recorder's office of Arkansas County.

The appellant J. H. Martin answered admitting that he had employed appellees to render him certain legal services, and that he had agreed to pay them the sum of $500, which he had done; that in consideration of such payment appellees agreed "that they would keep him (J. H. Martin) from signing a certain bond which this defendant had been asked and begged to sign, indemnifying any new corporation which might take over the assets and assume the liabilities of the Bank of Commerce and Trust Company."

The appellant J. H. Martin denied all other material allegations as to the employment of appellees and stated that the $500 was all the fee that they charged him or that he agreed to pay.

All of the appellants admitted the execution of certain instruments by which the appellant J. H. Martin conveyed to the other appellants, his co-defendants, certain property, but denied that they were made to defraud appellees or other creditors of appellant J. H. Martin; and they set up also that they were innocent purchasers for value.

These were the issues upon which evidence was adduced. The court found all the issues in favor of appellees and found that the appellant J. H. Martin was indebted to the appellees in the sum of $4,500, with interest amounting to $225, and rendered a decree in their favor for $4,725.

The court further found that certain conveyances made by the appellant J. H. Martin to the other appellants (describing the lands embraced in these conveyances) were without consideration and were fraudulent as to appellees, the creditors of J. H. Martin at the date of such conveyances, and entered a decree setting aside

these conveyances, and also found that the appellant J. H. Martin had made a sale of his entire stock of goods, wares and merchandise and certain other personal property, without consideration, for the purpose of defrauding the appellees and other creditors in the collection of their debts, and entered a decree setting these aside.

Such other facts as may be necessary will be stated in the opinion.

Thos. J. Moher, for appellant.

1. The amount rendered in favor of appellees by the chancellor is decidedly against the preponderance of the testimony as to the value of the services and labor performed. *Sain* v. *Bogle,* 122 Ark. —; 4 Elliott on Cont., § 2866; 106 Ark. 571; 20 A. & E. Ann. Cas. 53. The fee allowed is unreasonable.

2. The burden to establish a contract was upon appellees. 93 Ark. 312.

3. No fraudulent transfer was proven, nor was insolvency shown. Kirby's Digest, § 3313; 66 Ark. 486; 56 *Id.* 481; 63 *Id.* 416; 20 Cyc. 465-6-7-8, etc., section B; 2 Moore on Fraud. Conveyances, 577; 18 Ark. 124; 23 *Id.* 264; 17 *Id.* 152. No participation in the alleged fraud by the other appellants was shown.

Murphy & McHaney, for appellees.

1. The contract was made as claimed by appellees. The fee was reasonable for the services performed.

2. The conveyances were fraudulent. Kirby's Dig., § 6137. Insolvency was not denied. 108 Ark. 164-9; Wait on Fraud. Conv., § 231, 20 Cyc. 407-8, 754; Kirby's Digest, § 3658; 101 Ark. 573; 106 *Id.* 230; 110 *Id.* 335; 107 *Id.* 581; 50 *Id.* 314; 55 *Id.* 579; 59 *Id.* 614-624; 86 *Id.* 225; 91 *Id.* 394; 73 *Id.* 174-183; 68 *Id.* 162-7. The findings of the chancellor are sustained by the evidence.

WOOD, J., (after stating the facts). The issues involved on this appeal are principally of fact.

The first question is, what was the contract between the appellant J. H. Martin and the appellees as to the

character of the employment and the consideration for the legal services that appellees rendered Martin.

Appellant J. H. Martin admits that he was to pay appellees the sum of $500, which he says he had paid. The appellees admitted that appellant had paid them the sum of $500, but they contend that this sum was paid by appellant only as a part of a retainer of $1,000 charged by appellees when they were first employed by appellant and that the balance of their fee was to be determined upon a *quantum meruit,* the amount depending upon the labor connected with and the results of the litigation to the appellant J. H. Martin.

M. J. Manning, the senior member of appellees' firm, with whom appellant J. H. Martin entered into the contract, testified substantially as follows: That while he was attending court at Clarendon in December, 1914, J. H. Martin came over there to see him and stated to him that he did not know what suits had been brought against him (Martin), but that he had been told that he had been sued by the Bank Commissioner; that he did not know the nature of the suit nor the amount involved; that he had also been sued by the prosecuting attorney for county funds of Arkansas County, and that judgment had been rendered against him for the sum of $28,000, and that his stock of goods had been levied upon at Gillett. Upon asking what appellees' firm would charge for their services the witness stated that they would charge a retainer of $1,000, and that when the matters were ended they would make a reasonable charge, depending upon the amount of services and the results obtained. Whereupon Martin stated that he had been away from home for several weeks and that the boys running his business had drawn checks and that he did not know the exact condition of his bank account, and that he would therefore give a check for $500 of the retainer and pay the other within a short time. Witness told Martin that this was satisfactory and that he could pay the other $500 of the retainer about January 1 unless his matters had been disposed of before that time. Martin readily consented to this agree-

ment and gave the check for $500. Immediately after Martin left, witness went into another room of their office, gave the check to his partner, Mr. Emerson, told him of the contract he had made with Martin, and this was within a minute or two after the final arrangement had been made with Martin.

Witness then testified in detail as to the services rendered the appellant Martin, stating that he went to Stuttgart on the next train, found that Martin, as one of the stockholders of the Bank of Commerce & Trust Company, had been sued for over $139,000, in addition to the $28,000 judgment that had been rendered against him on which execution had been issued and his stock of goods and personal property levied upon. Witness then testified as to the services rendered by which he succeeded in having the sheriff release the personal property, consisting of the stock of goods, stock, etc., and to levy upon certain lands, all of which were greatly desired by and to the interest of Martin.

The testimony of Manning shows that it was the purpose of the directors and stockholders of the Bank of Commerce & Trust Company to make an arrangement satisfactory to the Bank Commissioner and the depositors and creditors of the Bank of Commerce & Trust Company by which a new bank could be organized to take over the assets of the Bank of Commerce & Trust Company and pay its debts and collect and dispose of its assets. The Bank Commissioner had all of its assets appraised and ascertained that it would take at least $90,000 to pay the debts after collecting all the assets. He shows that other directors and stockholders had arranged to execute a bond in the sum of $90,000 to secure the payment of the indebtedness of the Bank of Commerce & Trust Company, and that the other directors had executed mortgages upon their properties, which had been appraised at the sum of $250,000, to secure the bond. The witness details how he made an arrangement with the other directors and the Bank Commissioner by which if Martin signed the bond he was to be only secondarily

liable, and he inserted a provision in the bond to the effect that no steps were to be taken to collect any of the sums due for eighteen months, and that Martin should not be liable until the property of the other bondsmen had been exhausted. Witness talked with his client and advised him fully as to the arrangement, telling him that he did not believe he could escape liability as a director or stockholder. The appellant then had some little changes made in the bond, signed it and sent it to witness at Stuttgart with directions to witness to deliver it after the $28,000 judgment had been satisfied and the other suits dismissed. Witness stated that the sole purpose of the services rendered his client was to have him relieved of the judgment and the suits pending against him. Witness spent practically his entire time from December 4 to the date when the new bank was organized, in appellant's interest, and about the matters for which Martin had employed him.

Witness shows that the Bank Commissioner refused to accept the bond without Martin's signature to it, and that witness, on behalf of Martin, insisted that Martin would not sign the bond unless the other directors were made primarily liable, and he succeeded in having the bond so framed that the other directors would be primarily liable, and had deeds of trust executed by them on property sufficient to cover the face of the bonds, and that through his efforts the judgment against Martin for $28,000 was satisfied and the other suits, which if the arrangement had not been made might have resulted in judgments against him for the sums of $139,000 and $3,900, were dismissed.

Witness Emerson, a member of the firm of appellees, testified that he was at Clarendon attending court when Martin came to employ his firm, through Mr. Manning. Martin and Manning had a long consultation in one of the rooms of the office. Witness passed through during the conversation. After the consultation between Manning and Martin they both came out of the room in which the consultation was held into the room where wit-

ness was engaged. Martin passed on through and Manning stopped at witness' desk and handed witness Martin's check for $500 and stated that: "we had been employed upon terms of a retainer of $1,000 and the balance of the fee to be fixed at a reasonable sum based upon the services rendered and the results procured," and upon witness' return home (to Little Rock) witness had Martin charged on the books with a retainer of $1,000 and credited him with the check for $500. Mr. Manning devoted practically the entire month of December to Martin's affairs.

Martin testified concerning this employment substantially as follows: He met Manning at Clarendon. He went to Clarendon on December 4, 1914, to employ Manning in reference to a particular legal matter and met Manning in the back room of his office; that there was no one present but Manning and witness. The Stuttgart people, stockholders and other parties, wanted the witness to sign the bond. It was a bond to be signed by the directors of the Bank of Commerce & Trust Company guaranteeing the sum of about $90,000. Witness understood that if he signed the bond that the stockholders would not be sued by the depositors and the new bank would be opened and the judgment would be satisfied. The bond was to indemnify a new bank in taking over all the assets of the old bank. Witness had talked with Mr. Covey, the deputy bank commissioner, and several others before he went to Mr. Manning. Witness told them that he did not want to sign the bond. Mr. Covey stated that if witness would sign the bond the bank would get a charter and the judgment would be satisfied. Witness told him that he did not want to sign the bond. That was three or four days before he went to see Mr. Manning. When he went to see Mr. Manning the main thing he employed Manning to do was to keep witness from signing the bond. Manning told witness that he would not have to sign the bond. Witness and Manning talked about the fee and Manning told witness that the parties at Stuttgart had employed him for 10 per cent. on the stock, and

Manning said that he would charge witness a little more than that. Witness had something near $4,000 in the Bank of Commerce & Trust Company. Manning said he would charge witness $1,000. Witness put his check book in his pocket and started to leave the office, stating to Manning that he would not pay it. Manning then asked witness what he would pay. Witness replied that he would cut it in two and make it $500. Manning said "write your check." Witness wrote the check, handed it to Manning and stated to him, "This is to keep me from signing the bond." Witness stated that they were engaged in the conversation with reference to this employment from five to eight minutes.

Witness met Manning the next morning in a private room at the hotel, and the first thing Manning told witness was that witness would have to sign the bond. Witness replied that he did not want to do it, and recalled his conversation of the previous day, telling Manning that he had paid him to keep witness from signing the bond, whereupon Manning stated that he would make the bond so that witness would be only secondarily liable. Witness did not have any written contract with Mr. Manning with reference to his employment.

Witness then stated that an execution had been levied upon his property and that he had not heard of any execution being levied upon the property of the other defendants in the judgment for $28,000.

Witness then proceeds in detail to deny the testimony of the appellee Manning as to the services rendered in regard to the releasing of his property from the execution, stating that he himself induced the sheriff to release his personal property and levy on the land. In this connection he stated that Manning was in the sheriff's office while witness was getting the list of property from the clerk. Witness stated that it was understood that if he signed the bond they would release all the other stockholders and also the directors of both civil and criminal liability; that the deputy bank commissioner told witness that if he signed the bond the bank would get a charter

and the judgment would be satisfied. Witness stated that he could sign the bond without the services of an attorney; that Mr. Manning was representing the other stockholders. He was representing the Underwoods, who were directors, in the criminal line. They were afraid the grand jury would indict them and also afraid the depositors would sue them, and by witness signing the bond that would release all of them and the new bank would go ahead, and that would expedite matters for Mr. Manning. Witness finally signed the bond, and the bank was opened and the Underwoods were not indicted for criminal liability, and the other judgments against witness were released. Witness changed the bond. After that Manning wrote witness to send him a check for $3,500, threatening that if witness did not do so he would bring suit.

On cross-examination witness was asked whether Manning, on the morning of the 5th of December, showed witness a memorandum as to the value of certain real estate which the other directors of the Bank of Commerce & Trust Company would be required to give a deed of trust upon, which amounted to $250,000. Witness answered, "It sure got to me somewhere, but to say where it was I could not say." He was then asked if it was not explained by Mr. Manning in that conversation that the other directors would be required by Mr. Manning to give a deed of trust upon real estate which would not be less in value than the amount above stated, which would be subject to the payment of the bond, together with any other property the directors might have, before any liability should attach to witness as a signer of the bond, and he answered that he did not remember any such conversation, but he did remember that Mr. Manning stated that he would make the bond so that witness would be only secondarily liable. Witness further stated that Mr. Covey and the other directors of the Bank of Commerce & Trust Company had asked the witness if he would sign the bond, and witness stated that he refused to sign it until he could see Mr. Manning, and that when he saw

Mr. Manning he said he would make the bond so that witness would be only secondarily liable. Witness further stated that he consented to sign the bond if Manning would draw it so that witness would be liable only secondarily.

(1) Appellant moved in the court below to strike out the testimony of Emerson, which motion the court overruled, and appellant now contends that this testimony should be stricken from the record as hearsay. Chancery causes are tried here *de novo,* and the rule here is to consider only competent testimony, no matter if incompetent testimony was considered by the court below and brought into the record before this court.

(2) That part of the testimony of Emerson concerning the statements of Manning made to him in the absence of Martin and after Martin had left the office were but the recitals of past transactions and therefore hearsay testimony. This testimony was not competent as a part of the *res gestae.* That part of Emerson's testimony to the effect that Martin and Manning had a long consultation in the office on the day Martin employed appellees corroborates Manning in this particular and was competent. But even excluding that part of the testimony of Emerson that was incompetent as to these statements of Manning, from our consideration, it can not be said that the finding of the chancellor is clearly against the preponderance of the evidence. On the contrary, when all the facts and circumstances as discovered by the testimony both on the part of appellant J. H. Martin and appellee Manning are considered, it appears to us that the preponderance is in favor of the appellees.

The undisputed testimony shows that at the time of the contract between Manning and Martin a judgment had been rendered against Martin and other directors of the Bank of Commerce & Trust Company for the sum of $28,000 for public funds deposited in the bank. The bank was also in process of liquidation by the State Bank Commissioner. He had instituted suit against Martin and other directors for the sum of $139,797.26. He had also

instituted suit against Martin individually for the sum of $3,900 under what is known as the "double stock liability law."

It appears that the stockholders of the bank were proposing to organize a new bank to take over all the assets of the old bank and assume its liabilities. This had met the approval of the Bank Commissioner upon certain conditions, one of them being that the directors of the old bank should execute a bond in the sum of $90,000, guaranteeing that the assets of the old bank would realize that sum. The Bank Commissioner had told Martin that if he would sign the bond the bank would get a new charter, and that the judgment for $28,000 would be satisfied. Appellant Martin testified that it was "to keep him from signing this bond" that he employed the appellees, and he states that he was to pay them $500 for their services, which it is admitted had been paid.

The uncontroverted testimony shows that at the time of the employment Martin knew that the judgment had been rendered against him for $28,000, and that his stock of goods and other personal property had been levied upon. Martin testified that he did not know of other suits pending against him, while Manning testified that Martin stated to him at the time that he had learned that other suits had been brought but he did not know the nature of these suits or the amounts involved.

While the testimony does not clearly reveal the reason why Martin did not wish to sign the bond along with the other directors, it is fairly inferable that he was contending that, inasmuch as he had not been in attendance on the stockholders and directors meetings and had taken no part in the active management of the affairs of the bank, that the other directors alone were liable, and therefore he was unwilling to sign the bond. He testified in one place that the main thing he employed Manning to do was to keep him from signing the bond; that when he handed him the check for $500 he stated, "this is to keep me from signing the bond," that he was only engaged in the conversation with Manning from five to eight minutes.

In another place he stated that he could have signed the bond without the services of an attorney. In another place in his testimony he stated that he consented to sign the bond, and did sign it, after Manning promised him that he would draw the bond so that witness would be only liable secondarily.

(3) While the testimony of Martin is confused and unintelligible if taken literally in reference to his conduct in signing the bond, we conclude that the meaning of the witness was that he employed Manning to represent him in connection with the affairs of the bank in such way that he would not be made liable along with the other directors and stockholders on the judgment that had been rendered or any judgments that might be rendered against them. This, we think, is the only reasonable conclusion that can be drawn from his testimony, and if it does not mean this it is nonsensical, for it is manifest that so far as the mere signing or not signing of the bond was concerned Martin did not need the services of a lawyer. It appears that what he did really need was the services of an attorney to represent and protect his interests as a stockholder and director in litigation that had been and might be brought against him as such. If his testimony is to have any meaning at all, in its final analysis, this is the only effect that can be given it, and when thus considered it but accords with the testimony of Manning as to the character of the services he was employed to render Martin. Manning's testimony was to the effect that Martin employed appellees to represent him in the $28,000 suit in which judgment had already been rendered against him and in all matters affecting his interests as director and stockholder in the bank in any suits that had been brought against him; that a retainer was fixed for this service in the sum of $1,000, and the full fee was to be charged after the service had been rendered, the amount to be determined after considering the nature of the services and the results thereof.

Inasmuch as the testimony of both Manning and Martin shows that a judgment of $28,000 had already

been rendered against Martin and that he was anticipating other suits in which judgments involving large amounts might be rendered against him, it appears to us more reasonable to say that the attorneys would not have agreed in advance upon a fee of only $500 as full compensation for the services that appellees would be required to render, especially if those services contemplated that the attorneys should conduct Martin's affairs as director and stockholder in the bank in such a way as to relieve him of any liability as such director and stockholder in the suits that were pending against him.

Manning's testimony is consistent and reasonable and, to our minds, more believable than Martin's as to the work to be performed by appellees and the consideration to be paid therefor.

(4) The next question is, what was the reasonable value of the services performed?

Martin testified that he employed Manning to keep him from signing a bond in the sum of $90,000 to be signed by the directors of the bank. If, as we have seen, Martin meant by this that he employed Manning to represent him in pending and threatening litigation in connection with the affairs of the bank in such a way that he would not be liable as stockholder and director for the claims that had been asserted against him, then the results show that Manning faithfully performed his contract.

The undisputed evidence shows that the Bank Commissioner would not accept the bond for $90,000 unless Martin signed the same. Martin stated that he refused to sign the bond until Manning said that he would so frame it that he (Martin) would be liable only secondarily.

Manning's testimony shows that he framed the bond so as to make the appellant liable only secondarily, and that through his efforts deeds of trust or mortgages were taken on property of the other directors appraised at $250,000, which was amply sufficient to pay in full the face value of the bond, thus relieving Martin of any lia-

bility; that after this was done Martin, after making a few immaterial changes, executed the bond, and the judgment for $28,000 was paid off and satisfied and the other suits dismissed, thus relieving Martin of liability in judgments and suits pending against him in the sum of about $170,000 for which he might have been liable. As a result of the efforts of Manning in this behalf his stock of goods and lands that had been levied upon and advertised for sale to satisfy the judgment for $28,000 were released from the levy.

Manning testified that the services rendered by him covered practically his entire time from December 4 to December 29; that the services were really worth more than $5,000. In addition to Manning's testimony as to the value of the services, several attorneys of long experience and good repute were introduced and were asked if they had read a copy of the complaint in the case, and having answered in the affirmative, they were further asked as to what would be a fair and reasonable fee for the services rendered as set forth in the complaint in the case, and they answered that $5,000 would be a reasonable fee. Two of these testified to facts showing that they had personal knowledge of the services rendered by Manning, and that $5,000 would be the minimum fee for such services as were set forth in the complaint.

Appellants contend that the testimony of these experts was incompetent because the hypothetical question upon which the opinion was based did not embrace undisputed facts that were essential to the issue, relying upon the well settled doctrine of this court that hypothetical questions must embrace all the undisputed facts that are essential to the issue about which the expert is testifying, citing *Taylor* v. *McClintock*, 87 Ark. 243; *Mo. & North Ark. Rd.* v. *Daniels*, 98 Ark. 352; *Arkansas Midland R. Co.* v. *Pearson*, 98 Ark. 399; *Ford* v. *Ford*, 100 Ark. 518: *Williams* v. *Fulkes*, 103 Ark. 196.

Appellant does not abstract any testimony that tends to prove that Manning did not perform the services as alleged in the complaint. The testimony of Manning and

other witnesses who were personally familiar with the matters set forth shows that the services were rendered in the manner indicated.

The finding of the chancellor that the services rendered were reasonably worth $5,000 is therefore correct.

(5) The last question is whether or not the transfers of personal property and conveyances of real estate by appellant J. H. Martin to his wife and brother were with the intent to defraud creditors.

The appellee alleged that J. H. Martin was insolvent at the time of these transfers and conveyances and this allegation is not denied. The transfers and conveyances were made to near relatives and the consideration named in the deeds was one dollar and other valuable consideration. At the time these transfers and conveyances were made suits were pending against appellant J. H. Martin for large amounts. It thus appears that while J. H. Martin was insolvent and when suits for large amounts were pending against him he made transfers and conveyances to his near relatives which upon their face show grossly inadequate consideration. The proof of these facts was sufficient to show that the conveyances and transfers were *prima facie* fraudulent, and the burden was cast upon the appellants to show to the contrary.

As was said in *Simon* v. *Reynolds-Davis Grocery Co.*, 108 Ark. 164-9: "While the burden of proof is upon the plaintiff who alleges fraud to show it, yet that burden has been discharged where, as in this case, he shows that an embarrassed debtor, pending a suit against him by his creditors, has made conveyances of all the land he owned, * * * to his sons for a consideration which upon the face of the conveyance appears to be a grossly inadequate one. Such circumstances are sufficient to raise a suspicion of fraud and to cast a doubt upon the legality of the transaction, and the burden is then on the one holding under the deed to show a consideration." *Buchanan* v. *Williams,* 110 Ark. 335; *Papan* v. *Nahay,* 106 Ark. 230.

The court was therefore correct in its finding that the conveyances were fraudulent. The decree is in all things correct, and it is therefore affirmed.

KIRBY, J., dissenting.

ARLINGTON HOTEL COMPANY v. RECTOR.

Opinion delivered April 17, 1916.

1. CONTRACTS—CONSTRUCTION—INTENTION OF PARTIES.—Legal contracts are to be interpreted in accordance with the intention of the parties making them.
2. CONTRACTS—CONSTRUCTION — INTENTION—CONSENT JUDGMENT—LIABILITY OF ASSIGN OR SUCCESSOR OF OBLIGOR.—A consent judgment was rendered against A. company, under the terms of which A. company was to pay to one R. a certain sum annually so long as A. company "or its successors or assigns shall continue in the possession of the aforesaid premises, or any part thereof, as aforesaid." The lease of A. company expired and a new company of the same name was organized, assuming all the debts of the old company, and taking a new lease from the lessor, the United States Government. *Held*, it was the intention of the parties to the consent judgment, that the successors of the old be liable for the amount of the judgment, and that the new company was liable on said judgment.
3. CORPORATIONS—EXPIRATION OF CHARTER—LIMIT OF EXISTENCE—Under the statutes, the time limit for the existence of a corporation rests primarily with the incorporators, and unless they specify a time in their articles of association the franchise continues indefinitely.
4. CORPORATIONS—RIGHTS OF DE FACTO CORPORATION.—A corporation *de facto* may sue and be sued, and, as a rule, do whatever a corporation *de jure* can do, and none but the State can call its existence in question.
5. CORPORATIONS—DEBTS—SURRENDER OF CHARTER.—The debts or liabilities of a corporation existing at the time of its dissolution are not extinguished thereby, and, in equity, they may be collected out of the assets of the defunct corporation in the hands of the shareholders, or any parties receiving the same, except innocent purchasers.
6. DEFINITIONS—"ASSIGN."—The definition of "assign" is "to make a right over to another, as to assign an estate, annuity, bond, etc., over to another."
7. CONTRACTS—PUBLIC POLICY—BURDEN.—Unless it is shown to the contrary, a consent judgment will not be held to contravene sound public policy.

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

STATEMENT BY THE COURT.

On the 3d of March, 1892, the United States of America, through its Secretary of the Interior, acting under the authority of an act of Congress, executed its lease to S. H. Stitt & Co. (a firm composed of S. H. Stitt, Samuel W. Fordyce and Albert D. Gaines), demising the ground and premises upon which the Arlington Hotel, in the city of Hot Springs, was situated. The act of Congress provided that no lease should be for a longer period than twenty years. Among other things it prohibited an assignment of the lease without the approval of the government, and prescribed various terms with which the lessee had to comply, and provided for a forfeiture of the lease upon the failure of the lessee to observe these requirements. And in case of forfeiture, or at the expiration of the term of the lease, all the buildings and fixtures on the premises were to become the property of the United States.

The Government had the option, at the expiration of the lease, to execute another lease to the same party, or if it declined to do so, then the former lessee was to be given an opportunity to be remunerated for the improvements which he had put on the property during the term of the lease, the value of such improvements to be ascertained by a board of appraisers selected by the parties, and the sum fixed by the appraisers was to be paid to the first lessee by the second lessee before possession was taken by the latter, and if the second lessee declined to pay the amount, then the Government, at its option, could lease the premises to such parties as would agree to pay the amount and to observe the regulations fixed by the Secretary of the Interior concerning the use of the Government's property at Hot Springs.

The lease was in the standard form for leases at Hot Springs, following the requirements of the act of Congress for the Government Reservation at Hot Springs.

The Arlington Hotel Company was a corporation organized on the 30th day of March, 1892, under the laws of the State of Arkansas for the organization of manufacturing and business corporations. It was organized, as declared in its articles of association, "for the purpose of constructing a hotel and bath house at Hot Springs, Arkansas, and for the purpose of running and operating such hotel and bath house when constructed." It was to continue for twenty years. Among the incorporators were E. W. Rector, H. M. Rector, and H. M. Rector, Jr.

On the 11th day of June, 1892, S. H. Stitt & Company, with the approval of the Secretary of the Interior, assigned its lease to the Arlington Hotel Company. The Arlington Hotel Company occupied the premises during the full term of the lease. After the expiration of the lease in March, 1912, the Government that year executed three leases of ninety days each to the Arlington Hotel Company (the old company), and also another lease to it for the full period of twenty years.

In 1914 the Secretary of the Interior demanded that the officers of the Arlington Hotel Company furnish the Government with a certified copy of a new charter or an extension of the old one. Thereupon the Arlington Hotel Company—"the new company," was organized, having the same officers as the former company, which we will hereafter designate as the old company. The new company was formed for the purpose of obtaining and receiving a lease from the Government of the Arlington Hotel site. The operation of the Arlington Hotel was continued without interruption during the period between the expiration of the charter of the old company and the organization of the new company by the officers of the old company, apparently as if no change had occurred.

At a meeting of the stockholders of the new company the following resolution was adopted:

"*Whereas*, the old The Arlington Hotel Company has expired by limitation, and this corporation has been organized for the purpose of taking over all of the assets

of the former, The Arlington Hotel Company, and to continue the business of the old company; and

"*Whereas,* the old The Arlington Hotel Company has agreed to pass a resolution, authorizing and directing the conveyance of all of its assets, property and effects, real and personal, including all real estate owned and held by it in fee and by leasehold in Garland County, or in the city of Hot Springs, in said county, and to effect proper assignments, transfers and deeds to carry out that purpose, provided this company will assume all of the indebtedness of every kind of the old The Arlington Hotel Company, and will issue its full paid capital stock to each and all of the holders of the stock in the old The Arlington Hotel Company in exchange, share for share; and

"*Whereas,* It is desirable that this company shall accept the provisions of said resolution, and the transfer and conveyance therein provided;

"Now, therefore, Be it Resolved by the stockholders of Arlington Hotel Company:

"We do hereby agree that we will accept a conveyance and assignment of all of the property and effects whatsoever of the Arlington Hotel Company, and will assume each and every of its liabilities of every kind and character which are in existence at that date, and that upon said transfer and conveyance, Arlington Hotel Company will issue its full paid capital stock to the holders of the stock of The Arlington Hotel Company, in exchange share for share."

On the 18th day of April, 1914, the old company executed its conveyance, reciting that for the consideration of $500 of the full paid capital stock of the Arlington Hotel Company, "We hereby grant, bargain, sell and convey, set over and assign to the said Arlington Hotel Company, its successors and assigns, all our right, title, interest and estate of every kind and character in and to the assets of the Arlington Hotel Company, a corporation organized under the laws of the said State on the 6th day of February, 1892, and heretofore operating and con-

ducting the Arlington Hotel at the city of Hot Springs. This conveyance includes all our right, title and interest in all the real estate owned by said corporation, either in fee or leasehold, which is situated in the city of Hot Springs, Garland County, Arkansas."

In pursuance of the resolution the new company issued its stock to the former stockholders of the old company in exchange for their stock share for share.

The Government, on March 24, 1914, executed a lease to the new company, which contained, among others, the following recitals:

"Whereas, the period for which the Arlington Hotel Company of Hot Springs, Arkansas, was incorporated under the laws of the State of Arkansas, has terminated; and

"Whereas, the Arlington Hotel Company has again filed articles of agreement and incorporation, as required by the laws of the State of Arkansas, as is evidenced by the appended copy of certificate of the Secretary of State of Arkansas, dated March 21, 1914; and

"Whereas, by reason of the termination of the original corporate existence of the said Arlington Hotel Company, it is necessary and desirable that the contract entered into on December 24, 1912, between the Secretary of the Interior and said company for the leasing of a hotel site on the Hot Springs Reservation, Arkansas, be terminated, and said contract be and the same is hereby cancelled, such cancellation to be effective as of date of March 20, 1914; and

"Whereas, by reason of the reincorporation of the said Arlington Hotel Company as aforesaid, it is necessary and desirable that a new contract be entered into with said company for the use of the hotel site and the buildings thereon on the Hot Springs Reservation hereinafter described;

"Now, Therefore, This indenture, made and entered into this 24th day of March, 1914, by and between Lewis C. Laylin, Assistant Secretary of the Interior, for and on behalf of the United States of America, party of the

first part, and the Arlington Hotel Company, a corporation organized under the laws of the State of Arkansas, its successors and assigns, party of the second part."

Following these recitals, embodied in the lease is a copy of the act of Congress under which the lease was executed. Rent was reserved at the rate of $10,000 per annum to and including the 21st day of March, 1917, "and during each succeeding period of five years thereafter such sum as the Secretary of the Interior may determine."

In June, 1906, E. W. Rector, as surviving executor of the will of H. M. Rector, deceased, in a case pending in the Garland circuit court against the old company, obtained, by consent, a judgment which recites in part as follows:

"It is agreed that the defendant will pay the plaintiff the sum of five thousand dollars in cash and six hundred dollars per annum on the first day of each year beginning on January 1, 1907, as long as the Arlington Hotel Company, or its successors or assigns shall continue to occupy the Arlington Hotel site, leased by the United States to S. H. Stitt & Co., for a term of twenty years by a lease dated March 3, 1892, embracing the grounds included in said lease, or any part of said grounds, for the purpose of operating a hotel, or for any other purpose, as the lessee or lessees of the United States, or otherwise.

"And thereupon * * * it is considered, ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of five thousand dollars, aforesaid, and the further sum of six hundred dollars per annum so long as the Arlington Hotel Company, or its successors or assigns shall continue in the possession of the aforesaid premises, or any part thereof, as aforesaid."

E. W. Rector had been discharged as executor of the estate of H. M. Rector, deceased and he and others, as heirs at law of H. M. Rector, deceased, were the owners of the above judgment. They instituted this suit against

appellant for the sum of $600, which they alleged had accrued to them under the above agreement and judgment by reason of appellant's occupancy of the Arlington Hotel site in the city of Hot Springs, its assumption of the debts of the old company, and its failure to pay above sum when due.

Appellant, in its answer, denied that it was a corporation of the same name as the corporation referred to in the judgment mentioned, and denied that it was organized by all the stockholders and directors of such corporation, or that it agreed to discharge any of the obligations of the defunct corporation except debts existing at the date of its organization; that the lease and the charter life of the old corporation had expired and that appellant was not the same corporation, or its successors or assigns. It further set up that if the provisions of said judgment were upheld they would impose a burden upon the making of a lease by the United States Government, and for that reason would be contrary to and against the policy of the statutes of the United States authorizing leases to be made on the Hot Springs Reservation.

The above are the issues and the facts upon which the trial court, sitting as a jury, rendered the judgment against appellant in the sum of $600, from which this appeal has been duly prosecuted.

Martin, Wootton & Martin and *Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellant.

1. The liability expired with the life of the old company, because (1) such was the intention of the parties (2) the company had no right to bind itself after its existence must terminate. (a) What did the parties intend? The hotel company was bound to pay only so long as it lived. 9 Cyc. 631; 6 J. J. Marshall 527; 48 N. E. 688; 59 Cal. 44.

(b) It was not within the power of the hotel company to bind itself on a continuing liability through an indefinite period of years beyond its corporate existence.

5 Thompson on Corp., § 5743; 28 Mo. App. 215; 10 So. 934.

2. The hotel site is not occupied by the old company, nor by its successors or assigns, and there is no liability within the terms of the compromise agreement or judgment. 2 Mor. on Corp., § 1005, 24; 2 *Id.*, § 1038, 1031; 5 Thomps. Corp., § § 6719, 6720-3.

3. The demand was not a liability of the new company, as it was not a liability of the old company which the new company promised to pay. 5 Thomps. on Corp., § 6743.

Moore, Smith, Moore & Trieber, for appellees.

1. The liability under the compromise judgment was not limited to the existence of the charter of the corporation or the term of the lease.

2. The new company assumed all the liabilities of the old company. 5 Thomps. on Corp. 6559; 163 U. S. 564; 118 Fed. 981; 194 U. S. 18; 132 Fed. 498; 64 *Id.* 628; 184 U. S. 368; 111 N. Y. 1; 123 *Id.* 242; 105 Ark. 421; 9 Ark. 463.

3. The corporation is bound by the judgment. 1 Herman on Estoppel, etc., § 288; 91 Ark. 376.

4. The defendant is liable; it stands in the shoes of the old company. 47 Ark. 318; 8 *Id.* 353; 53 Wis. 609; 35 Ark. 144, 365, 380; 62 *Id.* 229; 45 N. Y. 412; 51 *Id.* 235.

WOOD, J., (after stating the facts). (1) In *Wood* v. *Kelsey,* 90 Ark. 272-277, we said: "Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described." See also, *Fort Smith Light & Trac. Co.* v. *Kelley,* 94 Ark. 461-471; *Ford Hardwood Lumber Co.* v. *Clement,* 97 Ark. 522-532; *Keopple* v. *National Wagon Stock Co.,* 104 Ark. 466; *Alf Bennett Lumber Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421.

It is an old and familiar rule that "every legal contract is to be interpreted in accordance with the intention of the parties making it." *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400-411.

In arriving at the intention of the parties to a contract it must be considered as a whole, all of its parts being considered in order to determine the meaning of any particular part. No word should be treated as surplusage if any meaning can be given to it that is reasonable and consistent with the other words of the contract. *Railway* v. *Williams,* 53 Ark. 58-66; *Earl* v. *Harris,* 99 Ark. 112; *Phoenix Cement Sidewalk Co.* v. *Russellville Water & Light Co.,* 101 Ark. 22-27; *Yellow Jacket Mining Co.* v. *Tegarden,* 104 Ark. 573; *Pittsburg Steel Company* v. *Wood,* 109 Ark. 537.

I. Keeping in mind these elementary rules, did the parties to the contract evidenced by the consent judgment intend that the old company should pay the $600 per annum beginning with the first of January, 1907, only until the expiration of its charter, or during the term of the lease under which it held, or was it their intention that the old company should be liable for these payments as long as it or anyone deriving any interest in any way under it occupied the Arlington Hotel site even after its charter expired?

It was but little more than five years from January 1, 1907, the date when the first payment was to be made under the contract, until the charter of the old company would expire. The lease under which the old company held, expired a few months before the expiration of its charter. So the life of the old company and the leasehold estate under which the old company occupied the hotel site were not for coterminous periods. If it had been the intention of the parties to fix either one of these periods as the limit beyond which the liability of the old company should not extend, it seems reasonable that they would have named specifically one or the other of these periods, for these were definite and certain and but a few years in the future.

If the parties had really intended that the company should pay the sum of $600 per annum only for a definite period of a little more than five years, the most natural way to have expressed such intention would have been to fix the liability at an aggregate sum embracing that period, to be paid in annual payments; or, to designate the sum of $600 to be paid annually, beginning the first of January, 1907, and continuing until the charter or lease of the old company expired, naming the date. If the parties had contemplated that the liability of the old company should continue until its charter expired, then they could not have intended that its liability should cease with the termination of the lease under which it held; for, as we have seen, the time when the lease expired was a few months before the time of the expiration of the charter life of the old company. It is manifest that the lease from the United States to S. H. Stitt & Co. was mentioned simply for the purpose of designating the hotel site as the property constituting the subject-matter of the contract between them, and not for the purpose of fixing a definite time when the liability of the old company should end. If the purpose in mentioning the lease from the Government to S. H. Stitt & Co. had been to fix the time of the expiration of that lease as the time also when the liability of the old company to pay the annual sum named should cease, then the natural language would have been as follows: "As long as the Arlington Hotel Company, or its successors or assigns, shall continue to occupy the Arlington Hotel site under a lease by the United States to S. H. Stitt & Co. for a term of twenty years beginning March 3, 1892, and ending March 3, 1912." And doubtless the language "embracing the grounds included in said lease, or any part of said grounds, used for the purpose of operating the hotel, or for any other purposes, as the lessee or lessees of the United States or otherwise," would not have been added, because it was meaningless surplusage, and because the words "or for any other purposes" and "or otherwise" were entirely inconsistent with the theory

that the liability of the old company to pay $600 per annum ended when either the charter or the lease expired.

The consent judgment was doubtless drafted by the attorneys for the respective parties, and the court rendered the judgment in the language used to express their intention. The old company, its assigns or successors, could not have occupied the hotel site under its charter and the Stitt & Co. lease for any other purpose than operating a hotel. Under the charter and lease then existing the old company was holding only as a lessee of the United States government, and only for the purpose of operating a hotel. But the language, "or for any other purpose as the lessee or lessees of the United States or otherwise," shows that the parties contemplated that the old company or its successors or assigns might occupy the hotel site under lease from the Government for some other purpose than operating a hotel, and that the old company, its successors or assigns, might occupy the site as lessee under some other lessor than the Government.

The parties who framed the consent judgment knew of course when the old company's charter and the Stitt lease would expire; yet they used language which is absolutely incompatible with an intention to limit the annual payments to the time of the expiration of the charter or lease, and language which shows affirmatively that such was not the intention.

(2) We conclude therefore that the intention of the parties to this contract was that the old company should be liable for the sum of $600 per annum on the first day of each year, as stipulated, as long as the old company, or those who succeeded to its rights as assigns, or successors, continued to occupy the Arlington Hotel site, or any part of the grounds embraced in said site, for any purpose whatever, whether it was occupied under a lease from the United States or in any other manner, even though such occupancy continued beyond the life of the old company and the term of the Stitt lease. This construction is the correct one if effect is to be given to the language of the contract when considered as a whole, and

if any meaning is to be attached to many of the words which the parties used to express their intention. Any other construction would result in ignoring much of the language of the contract, and in treating some of the words in which the latter portion is couched as meaningless. This we can not do. Any other construction would also do violence to the familiar rule, that where the contract is ambiguous in its term the parties will be held bound to the construction which they themselves have placed upon it. *Hastings Industrial Co.* v. *Copeland,* 114 Ark. 415; *Clark* v. *J. R. Watkins Medical Co.,* 115 Ark. 166-176.

After the charter of the old company had expired in 1912 its officers and agents continued to occupy the Arlington Hotel site, accepting leases from the Government in the name of the old company, paying the sum named to Rector, and operating the hotel just as it had done before. And not until the Secretary of the Interior, some two years after the expiration of its charter, demanded that the charter be extended or renewed, did they take steps towards the organization of the new company, thus showing that it was the intention of the old company long after its charter had expired to continue to occupy and operate the hotel just as if its charter had not expired. This conduct upon the part of the old company shows that it was not its intention to treat its contract with Rector as at an end when its charter expired. The officers of the old company knew, when the charter expired, and if they had intended to treat the liability under the contract with Rector for payment of the $600 per annum as at an end when the charter expired it stands to reason that they then would have refused to pay and thus have repudiated the obligation.

II. It is a well settled principle in the interpretation of contracts that where parties contract for a service that is purely personal, or with reference to the continued existence of some particular thing constituting the subject matter of the contract, if the person dies or the thing ceases to exist, then the performance of the contract will

be excused because impossible. 9 Cyc. 631; Pollock's Principles of Contract, p. 362. See also *Collins* v. *Woodruff,* 9 Ark. 463.

Appellant invokes this rule, citing *Smith* v. *Preston,* 48 N. E. (Ill.) 688, and *Janin* v. *Browne,* 59 Cal. 44. But the rule has no application here because in the sense contemplated by the parties to the consent judgment, the old company did not die when its charter expired, but continued to exist in legal effect, at least, until the new company was organized. And because the occupancy of the Arlington Hotel site by the parties designated, which was the particular thing or subject matter of the contract between them, has not ceased. As we have seen, the parties to the contract intended that the Arlington Hotel site should be occupied by the old company or its successor assigns for an indefinite period beyond the time of the expiration of its charter or the lease under which it then held.

(3) In those jurisdictions where the law limits the existence of corporations to a certain period of time, the expiration of that period, *ipso facto,* would dissolve the corporation. But the general statutes under which business corporations are organized in this State do not limit the time of the existence of such corporations; nor do they require that any definite time for the existence of the corporation be specified in their articles of association declaring the purposes for which the corporation is formed. See Kirby's Digest, sections 837 to 845, inc. The time for the existence of a corporation therefore rests primarily with the incorporators, and unless they specify a time in their articles of association, the franchise continues indefinitely. Where the statutes limit the existence of a corporation to a certain period there could not be such a thing as a *de facto* corporation after the time limit. But such is not the case where the law of incorporation does not prescribe a time limit, even though a time limit may be specified by the incorporators themselves in their charter. See 2 Mor. on Corporations, section 1003; 7 R. C. L. 47-48, and cases cited in note.

(4) Mr. Morawetz, *supra,* says: "If the shareholders of the corporation should preserve the corporate organization, and continue the company's operations after the expiratin of their charter, the corporation would be a corporation *de facto* existing without legal right."

In R. C. L. *supra,* it is said: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid."

The doctrine of our own court is: "That a corporation *de facto* can sue and be sued, and, as a rule, do whatever a corporation *de jure* can do, and none but the State can call its existence in question." *Whipple* v. *Tuxworth,* 81 Ark. 391.

The shareholders of the old company, after the expiration of its charter, continued the business of operating the hotel under leases from the Government just as it had done before until the organization of the new company. The old company, therefore, to all intents and purposes, had a corporate existence *de facto* up to that time. Likewise, the particular thing, the Arlington Hotel site, and the occupancy thereof, which was the subject-matter of the contract, had not ceased to exist. Furthermore, the payment of the annual sum provided for by the contract was not a purely personal service that could be performed only by the old company.

In *Janin* v. *Browne, supra,* cited by the appellant, it is held: "Where an executory contract is of a strictly personal nature, the death of a party by whom work is to be done before its completion determines the contract, unless what remains to be executed can certainly be done to the same purpose by another; but where the personal representative can fairly and sufficiently execute all that deceased could have done, he may do so and enforce the contract."

Concerning contracts and their obligations, that do not involve a purely personal service, and the liabilities created by breaches or nonperformance of those contracts, there is no distinction between the contracts of individuals and corporations. In other words, the debts of corporations and the debts of individuals are alike after the death of the debtor except as to the remedy for nonpayment.

(5) The debts or liabilities of a corporation existing at the time of its dissolution are not extinguished thereby, and, in equity, they may be collected out of the assets of the defunct corporation in the hands of the shareholders or any parties receiving the same except innocent purchasers without notice. *Jones, McDowell & Co. et al.* v. *Ark. Mechanical & Agricultural Co.*, 38 Ark. 17. See, also, *Worthen* v. *Griffith,* 59 Ark. 562-575; 2 Morw. on Corp., sections 1034, 1035; Woods Field on the Law of Corporations, section 442, *et seq.*

We conclude therefore, that if it was within the power of the old corporation to create a liability to Rector in the sum named as specified in the contract it was a continuing and existing liability at the time the new corporation was formed.

III. Was it within the power of the old company to create such liability?

The record does not disclose the nature of the claim that Rector was asserting against the old company. But the appellant does not challenge the consideration for the contract. We must assume, therefore, that whatever the nature and character of Rector's claim, it was entirely sufficient to justify the old company in agreeing to pay the amount specified according to the terms of the contract. It was certainly within the power of a corporation to settle by a consent judgment a lawsuit that was pending against it.

IV. The transactions set out in the statement which led to the organization of the new company and the taking over by it of all the assets of the old company, were

such as to constitute the new company a successor or assign of the old one.

After the expiration of the Stitt & Co. lease under which the old company held, and the expiration of its charter, it continued the business of operating the Arlington Hotel under precisely the same organization, and under lease from the Government, just as if its charter had not expired, under the same name and with the same officers and shareholders as it had done before. The officers and stockholders did not consider it necessary or advisable to take out a new charter. They had procured a lease from the Government for another term of twenty years and operated under that lease for a period of two years, when the Secretary of the Interior, having discovered that the time for the expiration of the charter of the old company had expired, demanded that the charter be renewed and extended. It was not until then that the shareholders of the old company took steps to organize a new company.

The new company was organized, as expressed in a resolution of its stockholders, "for the purpose of taking over all of the assets of the former, The Arlington Hotel Company," and to continue the business of the old company. To further this purpose, the shareholders of the old company passed a resolution authorizing its president to convey to the new company "all the assets, property and effects, real and personal," and to execute such deed of conveyance as may be necessary for vesting title to the property" in the new company. The resolution also provided that the consideration for these transfers was the assumption by the new company "of all indebtedness and liabilities of every kind" of the old company, and the agreement upon the part of the new company "to issue its full paid capital stock" to the holders of the stock of the old company "in exchange share for share."

The shareholders of the new company passed a resolution accepting the transfers "of the assets, property and effects, real and personal, including all real estate owned and held" by the old company "in fee or by lease-

hold" in Garland County, in the city of Hot Springs, and agreeing to accept the transfers of the capital stock of its shareholders, and in consideration of all these transfers, the new company agreed to "assume each and every of its liabilities of every kind and character which are in existence at that date, * * * and to issue its full paid capital stock to the shareholders" of the old company "in exchange share for share."

The transfers were made in pursuance of these resolutions. The deed of the old company to the new recited, among other things, "This conveyance includes all our right, title and interest in all the real estate owned by said corporation, either in fee or leasehold, which is situated in the city of Hot Springs, Garland County, Arkansas, or in said county."

The lease executed by the Government to the new company, after setting forth that the period for which the old company was chartered had expired, recited that "The Arlington Hotel Company has again filed articles of agreement and incorporation." And also set forth that, "by reason of the reincorporation of the said Arlington Hotel Company aforesaid," etc. The lease executed by the Government, with change of date, was but a copy of the lease that had been executed to the old company.

It was the manifest intention of all the parties concerned in these transactions to substitute the new company for the old, and to make the new company a successor to the old. Treating the old company as a *de facto* corporation, the transfers as set forth above from it to the new company were sufficient to constitute the latter company an assign of the former in the ordinary and literal acceptation of that term.

(6) The definition of "assign" is, "to make a right over to another, as to assign an estate, annuity, bond, etc., over to another." *Seventh National Bank* v. *Shenandoah Iron Co.*, 35 Fed. 436; *Richie* v. *Cralle*, 56 S. W. 963. 108 Ky. 483; Bouv. Law Dic.; Webster's Dic.; 1 Words & Phrases, p. 559.

Now, during all these transactions and before the lease was entered into with the new company, the old company, under the act of Congress, had the right to compensation for the improvements on the Arlington Hotel site. This was a property right of great value, of which the Government could not deprive it until an opportunity had been given the old company to have compensation for these improvements in the method provided by the act of Congress. No lease could be entered into with another party until the old company had had the opportunity for compensation. The old company had never received compensation for these improvements prior to the lease to the new company according to the method provided by the act of Congress. The old company waived this method and accepted its compensation in the transaction entered into with the new company which met with the approval of the Government as evidenced by its lease to the new company.

It would be most unreasonable to conclude that the old company, or its shareholders, would have surrendered its right to be compensated for its improvements without a satisfactory equivalent, which it received when the new company took over all of its assets, assumed all of its liabilities and issued to its shareholders the same amount of stock in the new company that they had in the old.

V. The old company, in its contract with Rector made itself liable to pay annually the sum of $600 as long as it or its successors or assigns should continue to occupy the Arlington Hotel site. Appellant, the new company, as the successor of the old company, had occupied the Arlington Hotel site and was occupying the same at the time of the institution of this suit, and refused to pay the annual sum when it was due. Having taken over the assets of the old company under the arrangements above set forth, it would have been liable for the sum named even if there had been no express agreement upon its part to pay the same.

In *Hibernia* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516, Judge Treat, speaking for the court, used this lan-

guage: "The facility with which new corporations are formed under local statutes to succeed to rights of property by transfer from the old corporations is to be considered, and such transfers are not to be held in equity destructive of prior and existing rights. A corporation with obligations determined or undetermined can not change its name or assume the form of a new corporation, and thus escape its obligations, or relieve the new corporation of the obligations of the old. * * * It is the duty of the court to examine the whole transaction, and to cut through mere paper transfers designed to obstruct or destroy the rights of parties. The evidence sufficiently discloses that the new corporation was a mere continuance of the old, with substantially the same parties in interest—a mere change of name. Whether that change, with attendant transfers, was designed or not to defeat all outstanding demands of the old corporation, it is evident that substantially the two corporations are the same, and that the new must respond to the obligations of the old. The evidence is clear enough that there was a hidden purpose in the change of corporate existence to escape possible liabilities which equity does not tolerate. A mere change of name can not avoid obligations. The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones, was, in short, the old corporation." See, also, *Blair* v. *H. & K. Ry.*, 22 Fed. 36; *Parsons Mfg. Co.* v. *Hamilton*, 73 Atl. (N. J.) 255, and other cases cited in appellant's brief.

The above language is appropriate to the facts of this record. True, it was used in equity proceedings, but that can make no difference, because, under the facts discovered by the agreed statement, although the appellee sued at law upon an express promise of appellant to assume the liabilities of the old company which inured to his benefit, he was nevertheless entitled to have the principles of equity applied in considering the facts and circumstances out of which the liability arose. *Organ* v. *Memphis & L. R. R. Co.*, 51 Ark. 235-259, and cases cited.

VI. (7) The facts presented do not show that the contract between Rector and the old company violated any principle set forth in the Constitution and laws of the United States or of this State, nor in the decisions of their courts. These are the sources which must be consulted to determine an issue of public policy. *Vidal* v. *Girard's Executors,* 2 How. 127-197; Elliott on Contracts, § 651 and note; *Hartford Fire Ins. Co.* v. *Chicago, etc., Ry. Co.,* 62 Fed. 904 s. c., affirmed 17 C. C. A. 62, 30 L. R. A. 193; Greenhood on Pub. Policy, p. 1, rule 2,note. The burden as to this issue was on appellant. *Hartford Fire Ins. Co.* v. *Chicago Ry. Co., supra.* In the absence of proof to the contrary, we must assume that Rector was asserting a meritorious claim against the old company—one that presented a formidable obstacle to the operation of its hotel business—and that in order to remove it the old company was fully warranted in making the contract evidenced by the consent judgment. There is nothing in the record to show that the public weal was in any manner injuriously affected by the contract between Rector and the old company.

Affirmed.

McCULLOCH, C. J. (Dissenting). It ought not to be difficult to construe the language of a contract when its subject-matter, and the situation of the parties with respect thereto, are made perfectly clear. In the present case there is no dispute on those points. The Arlington Hotel Company was a corporation whose legal existence expired on a certain date, and it owned a leasehold estate for a period substantially co-extensive with its own legal existence. The lease expired on March 3, 1912, and the franchise of the corporation expired on March 30, 1912. The stipulation was that the corporation should pay to the plaintiff the sum of "six hundred dollars per annum on the first day of each year beginning on January 1, 1907, as long as the Arlington Hotel Company or its successors or assigns shall continue to occupy the Arlington Hotel site leased by the

United States to S. H. Stitt & Co. for a term of twenty years, by lease dated March 3, 1912," and it strains the meaning of that language very much to say that it constituted an agreement to pay beyond the period of the lease mentioned. The parties were, in other words, evidently contracting with reference to a certain leasehold estate then in existence, for the corporation did not have the legal right to occupy the premises for a longer period, and they are presumed to have had in contemplation only that particular term unless words be found in the contract clearly indicating the contrary intention. Nothing in the language used manifests an intention to the contrary.

There is also the presumption, if the language admits of it, that those acting for the corporation did not intend to contract for liability continuing beyond its own lifetime, for the obligation was personal to the corporation itself. They had no power to bind the "successors or assigns" of the corporation beyond the existence of the lease or of the corporation itself, therefore, the presumption should be indulged that they did not intend to do so. In fact, they did not, according to the express language of the contract, attempt to do that.

The case falls within the principle that "a man's contracts shall not be so strained as to be unreasonable, or that it was impossible to be so intended, without necessary words to make it such." *Singleton* v. *Carroll,* 6 J. J. Marshall 527. The opinion of the majority takes refuge behind the use of the word "successors" in addition to the word "assigns," as being indicative of an intention to extend the contract beyond the life of the corporation and of the lease then in existence, but even if those words can not be construed as interchangeable terms, with the same meaning, there is a proper use for the word "successors" without the implication contended for. Some person or other corporation could have become the successors of the lessee corporation during the period of the lease otherwise than by voluntary assignment of the lease, and the use of both terms is consistent with an intention to confine the operation of the contract to the conditions then ex-

isting. The United States Government had the option, at the expiration of the existing lease contract, to lease the premises to another lessee, and the Arlington Hotel Company did not even have a preferential right to a new lease. It was only to be protected to the extent of the value of its improvements. If the parties meant to extend the operation of the contract beyond the period of the existing lease, they could easily have expressed that intention by stipulating that the payments should be made as long as the premises should be occupied under that or any subsequent lease. They would not likely have stopped at the mention of that particular leasehold estate if they had intended to provide for further occupancy. The absence from the contract of any provision with reference to the procurement of a new charter at the expiration of the old, or the procurement of a new lease, shows that the parties did not have in contemplation the operation of the contract beyond the period of the existing franchise or lease. It was optional with the stockholders of the corporation whether they would attempt to renew the charter or to procure another lease, and there is nothing in the contract which requires them to do either, so an agreement to pay in the event the lease or the charter should be renewed and the premises occupied thereunder would be entirely lacking in mutuality, and is not presumed to have been within the contemplation of the parties in the absence of an express statement to that effect.

But if we attach the fullest significance to the use of the word "successors," there is no liability established in the present case for the reason that the new corporation is not the successor of the old one within the meaning of this contract. Conceding that it is the successor of the old corporation so far as concerns the rights of creditors of the latter, it does not follow that it is the successor of the old corporation within the meaning of this contract.

The new corporation did not succeed to any of the rights of the old corporation, so far as concerns the occupancy of the premises in question, for the new company did not take an assignment of the lease, but acquired all

of its rights under a new lease contract made with the Government more than two years after the franchise of the old corporation had expired and after the old lease had expired. The new company, it is true, took over the assets of the old company, but the leasehold estate had expired at that time, and was not a part of the assets of the old company. The new company also assumed and agreed to pay the indebtedness and liabilities of the old company, but if there was no agreement on the part of the old company to pay except during the occupancy of itself and those who should hold as its successors, then there was no liability on that score to assume.

I am of the opinion, therefore, that the majority of the judges have reached the wrong conclusion in this case, and am constrained to record my dissent.

Mr. Justice SMITH, concurs.

KING v. BOLES.

Opinion delivered May 8, 1916.

BILLS AND NOTES—TENDER OF PRINCIPAL AND INTEREST—LIABILITY FOR FURTHER INTEREST AND COSTS.—Payments by a debtor are good, whether the payments are endorsed on the back of the note or not, and when thereafter the debtor tendered the balance of the principal due, with interest thereon, and kept the tender good, his act discharged the accrued interest after that time, and he is not liable for costs in an action to collect the debt.

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

McDonald & Grabiel, for appellants.

1. A lawful tender of principal and interest was made and kept good. This stopped the interest and the costs should have been adjudged against plaintiff. 4 Ark. 251; 17 *Id.* 648; 37 *Id.* 110; 30 *Id.* 505; 31 *Id.* 429; 34 *Id.* 582; 83 *Id.* 484; 93 *Id.* 497; 96 *Id.* 156; 68 *Id.* 505, 521.

2. Payment to the agent, Jones, was payment to plaintiff. It was her duty to make the endorsement of

payment on the note. 5 Ark. 558. The mortgage should have been satisfied in full and the costs adjudged against the plaintiff.

E. P. Watson, for appellee.

1. The proof does not warrant the finding and decree that King paid the $275.00.

2. Jones had no authority to accept payment under the power of attorney. 45 Minn. 121; 8 Wend. (N. Y.) 49; 22 Minn. 287; 16 Gray (Mass.) 60. A person dealing with an agent is chargeable with notice of the contents of the power under which he acts. 23 Wendel 260; 5 John (N. Y.) 58; 74 Ark. 557; 55 *Id.* 627; 103 N. Y. 472; 31 Cyc. 1336; 128 Fed. 243; 1 A. & E. 985, and note 2. Jones was not a general agent and not authorized to collect. 65 Ark. 385; 68 N. Y. 130; 50 *Id* 410; 13 East. 432; 89 Ga. 223; 31 Cyc. 1373-4-5; 42 Am. Rep. 771; 77 Am. St. 630, etc.

HART, J. Clementine Boles instituted this action in the chancery court against W. R. King and Bessie King, his wife, to recover judgment on a promissory note for $375.00, and to foreclose a mortgage on their homestead in the city of Fayetteville, Washington County, Arkansas, given to secure the note. The defendants filed an answer, setting up that they had paid the note in suit. They further alleged that after this note had been paid, they borrowed $100.00 from the plaintiff. They alleged that prior to the institution of this action, they had tendered an amount equal to the principal and interest of the amount last borrowed, to the plaintiff and she had refused to accept the tender. Counsel for plaintiff admitted that she had refused to accept the tender and that the tender had been kept good. The facts are as follows:

The plaintiff, Mrs. Clementine Boles, made Theo. F. Jones her attorney in fact to lend her money for her. A written power of attorney was executed by her, which is as follows: "Know all men by these presents: that I, Mrs. Clementine Boles, of Washington County, State of

Arkansas, have made, constituted and appointed, and by these presents do make, constitute and appoint Theo. F. Jones, Jr., of Fayetteville, Washington County, Arkansas, as my true and lawful attorney, for me and in my name, place and stead to negotiate and make loans, same to be secured by a mortgage or mortgages on unencumbered real estate, to furnish or cause to be furnished, abstracts of title to any and all real estate so mortgaged, the borrower to pay all expenses of such abstract, writing mortgages, etc., and in my name to draw out of any bank or banks in Fayetteville, Arkansas, any money belonging to me in such bank or banks for the purpose of making such a loan or loans, and to pay taxes assessed against my property, to receive and collect any and all money due or owing to me, and to give receipts for the same, and to satisfy or enter a full release of any mortgage when the debt secured thereby to me shall have been fully paid, and to enter credit on the margins of the records of said mortgages when necessary so to do, to extend time for paying any note, endorsing such extension on back of any such note or notes.

"Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute shall lawfully do or cause to be done by virtue hereof."

On June 24, 1912, Jones lent to W. R. King for Mrs. Boles, the sum of $225.00 evidenced by two promissory notes, one for $100.00 and the other for $125.00. King and his wife executed a mortgage to Mrs. Boles on certain town lots in the city of Fayetteville to secure the payment of the money borrowed. On July 19, 1912, Jones again lent King $375.00 and took his promissory note payable to Mrs. Boles for this amount. King and his wife executed a mortgage on their homestead in the city

of Fayetteville, Washington County, Arkansas, to secure this note. Before the notes became due, King sold part of the mortgaged property to Dr. J. P. Hight for the sum of $700.00. Jones, for Mrs. Boles, agreed that the money should be paid by Hight to King. King paid $637.50 of the purchase money to Jones. Hight purchased all the property embraced in the two mortgages except the homestead. Jones and Hight went to the clerk's office where the mortgages on the property purchased by Hight, were marked satisfied by Jones. Jones also marked the $100.00 note and the $125.00 note paid.

In regard to the payment, King testified as follows: When I paid Jones the $637.50 he put it in the safe. I then told him that I owed my employer and would like to borrow one hundred dollars to pay him. Jones agreed to lend it to me and turned around to get the $100.00 out of the safe. I agreed to secure it with a mortgage on our home. He marked paid, the $100.00 note and the $125.00 note, in my presence. He declined to cancel the $375.00 note and the mortgage given to secure it until I executed a new note and mortgage for the $100.00. On the left-hand margin of the $375.00 note he placed these words and figures: "12-24-12, paid $275.00 and interest to date." A number of times I offered to execute a note and mortgage for the $100.00 which I last borrowed and Jones kept putting me off on one pretext or another. I paid Jones $10.00, which was the first year's interest on the $100.00 loan.

Jones committed suicide, and it was ascertained that he misappropriated part of the funds which he had obtained from Mrs. Boles for the purpose of lending for her. After the death of Jones, King went to Mrs. Boles and told her that he had borrowed $100.00 of her money from Jones and that he was ready to pay it and the accrued interest to her. He made a tender to her of $110.00, which was a little more than the principal and interest due at the date of the tender. Mrs. Boles refused the tender upon the advice of her attorney, but it is admitted that

King kept the tender good. Mrs. Boles admitted executing the power of attorney, which is set forth above, but stated that she did not know that Jones had lent any of her money to King, or that he had collected any part of the loan. The chancellor found that Mrs. Boles, through her agent, Theo. F. Jones, Jr., on July 19, 1912, lent King the sum of $375.00 and that King and wife executed a mortgage to Mrs. Boles on his homestead to secure it; that on December 24, 1912, King paid to Jones, as agent of Mrs. Boles, the sum of $275.00, and the amount of interest due at that date. The court further found that the power of attorney given to Jones by Mrs. Boles was broad enough to authorize Jones to accept the payment made on the note and mortgage on December 24, 1912. The court further found that King, before the institution of the suit, had tendered to Mrs. Boles $110.00 in payment of the amount due by him to her and that she refused to accept the tender and that plaintiff kept the tender good in court at all times and at the date of the rendition of the decree tendered $110.00 in full settlement of the claim. The court was of the opinion that because King failed to take up the old note and mortgage and execute a new one and because he failed to have the $275.00 payment credited on the back of the note, and because he failed to have his payment of interest of December 24, 1913, endorsed on the back of the note, that he should be taxed with the costs and that he was liable for interest. Whereupon judgment was rendered in favor of the plaintiff against him for $117.80 principal and interest found to be due on the note sued on at the date of the rendition of the decree. The decree gave King ten days within which to pay this amount and the costs and in default of the payment, foreclosure of the mortgage was ordered. The decree provided for the cancellation of the mortgage upon the payment of the amount. The defendant, King, took an appeal to the Supreme Court and the plaintiff, Mrs. Boles, took a cross-appeal.

The finding of the chancellor was sustained by the evidence except on the question of tender. The defendant, King, made a tender of more than enough to pay the principal and interest due before this suit was commenced. It is admitted in the record by counsel for the plaintiff that the tender was kept good. This preserved the legal effect of the tender. *Abbott* v. *Herron,* 90 Ark. 206.

Under the evidence as disclosed by the record, the chancellor was justified in finding that King paid $275.00 and the accrued interest on December 24, 1912, on the $375.00 note. This left $100.00 due on that note. At the end of the year 1913, King testified that he paid Jones $10.00, which was the interest due at that time. In April, 1914, he tendered to Mrs. Boles the sum of $110.00. This was a little more than the balance due her, principal and interest. The court erred in taxing King with the costs and with interest, because he did not have the $275.00 credit entered on the back of the note and in failing to take up the old note and mortgage and in failing to have the interest payment of December 24, 1913, endorsed on the back of the note. The question was not whether he had the payments endorsed on the note, but whether or not he had made them. If he had made the payments he did not owe anything to the plaintiff except balance due, regardless of whether or not the payments made had been endorsed on the back of the note or not. When King made the payment to Mrs. Boles' agent, this constituted a settlement of that much of his debt, regardless of the fact whether it was credited on the note or not. So, when he tendered the amount of principal and interest before the institution of this suit and kept his tender good, this discharged the interest that accrued after that time and saved him from the costs of this action. The chancellor, therefore, should have decreed that the $110.00 be paid to the plaintiff and that the note and the mortgage on the homestead of King and his wife be cancelled.

On the cross-appeal but little need be said. The power of attorney is very broad and comprehensive and speaks for itself. Jones collected the $275.00 before it was due. It is contended by counsel for the plaintiff that he had no authority to receive payment of the note before its maturity because this amounted to a change of the terms of the contract and that the power or attorney did not give him such authority. We can not agree with counsel in this contention. The language of the power of attorney was sufficiently broad and comprehensive to enable the agent to use his own judgment about making and collecting the loans for his principal. He was given the authority to extend the time of payment and to do and perform all and every thing necessary to be done in regard to the loans. He was given general authority to receive and collect all money either due or owing to his principal.

Therefore, the finding of the chancellor that the power of attorney was broad enough to allow the agent to collect money owing to his principal before it fell due was correct. For the error indicated in charging the defendant with interest after the tender was made and with the costs of the action, the decree will be reversed and cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

PRESCOTT & NORTHWESTERN RAILWAY COMPANY v. HENLEY.

Opinion delivered May 22, 1916.

1. MASTER AND SERVANT—INJURY TO SERVANT—JOINT NEGLIGENCE.—In an action against a master on account of an injury received by an employee, if the acts of negligence set up in the complaint are proved, and it is shown that the injury was the direct result of such acts, and that such acts were the sole cause of, or if they contributed or combined with other causes, to produce the injury, the defendant is liable, unless some negligent act on the part of the plaintiff concurred in or contributed to the injury.

2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.—In an action for damages for personal injuries, an instruction that defendant would be liable if its negligent acts "contributed to cause" the injury. The words "contributed to cause" held to mean "caused the injury."

3. MASTER AND SERVANT—INJURY TO MINOR SERVANT.—ASSUMED RISK.—A minor servant, eleven years of age, inexperienced in the operation of machinery, will not be held to have assumed risks due to defective appliances, although the same would have been patent and obvious to an experienced adult.

4. PLEADING AND PRACTICE—PERSONAL INJURY ACTION—INEXPERIENCED SERVANT—ALLEGATIONS—TREATING COMPLAINT AS AMENDED AFTER JUDGMENT.—In an action by plaintiff, a minor, for damages for personal injuries, no allegation of his inexperience was made in the complaint, but, *held*, undisputed evidence as to the boy's age would supply these allegations, and the complaint, after judgment, will be treated as conformed to the proof.

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

STATEMENT BY THE COURT.

Appellee instituted this suit against the appellant, and alleged in his complaint that he was in the employ of appellant as a water carrier and errand boy for a section crew operating on appellant's road and was provided by appellant with a hand car as a means of transportation; that the place designated for him to stand was on the front of the hand car; that while so standing, and as the car was being run by the section crew, it was suddenly lurched with such force that appellee was thrown to the ground and run over and severely injured. He alleged that the hand car was unsafe in that it had a defective bull-wheel and an unsafe handlebar, which caused the car to jerk; that the servants of appellant propelled the car at an excessive speed and allowed the car to run over the appellee by failing to stop the same after appellee was thrown to the ground; that "all of these acts and causes combining and co-acting together produced a common result," towit, the injuries of which appellee complained.

The appellant answered, denying all the material allegations of the complaint and setting up the affirmative defenses of contributory negligence and assumption of risk.

The testimony on behalf of the appellee showed that he was in the employ of the appellant as errand boy and water carrier. He was eleven years of age at the time the injury occurred. He was directed by the foreman to go with some men on the hand car to Highland to get the dinner for the crew and to bring it back to where they were working. He got on the front of the hand car, where he usually rode. When they got nearly to the place where they were going, the car was on an upgrade, the lever pinched appellee's hand and he turned it loose; the car jerked and threw him off in the middle of the track and the car ran over him.

There was other testimony on behalf of the appellee, tending to show that on the hand car which was being used when appellee was hurt, one of the wheels of the car had two or three cogs broken out and when the wheel would get around to that place it would bump or spring. Also, one or both of the handlebars were loose enough to slip through if pulled sideways. The broken cogs would cause the car to give and jerk every time the wheel turned around. The car had been in that condition for a long time and the roadmaster knew of such condition.

Witnesses who accompanied appellee on the hand car testified that as they went up the hill the cogs on the car would slip in the bull-wheel and that caused the car to jump, which overbalanced the appellee and caused him to fall in front of the car; that the handlebar caught his hand and the cog slipped and threw him off.

On behalf of the appellant, the proof tended to show that the appellee stepped off of the hand car, made an awkward step which caused him to fall in front of the car.

The court, among other instructions, gave the following:

No. 1. "You are instructed that it was the duty of the defendant to use ordinary care to provide the plaintiff with reasonably safe instrumentalities or tools with which to perform the duties required of him and to use like degree of care to keep them in reasonably safe condition; and in this case, if you find from the preponderance of the evidence that the defendant failed to exercise such care, and that it negligently furnished a car which was defective in the particulars named in the complaint and that such defects either caused or contributed to cause the injuries complained of, then the defendant was guilty of negligence."

Appellant saved a general exception to the instruction, and also this special objection, "because it leaves out of consideration the question that the defendant knew of the defective condition of the car, or by the exercise of reasonable care should have known of it. It should also state that there is no presumption that they did know it, but on the contrary, the presumption is that they did not know of the defective condition."

The court also gave the following:

No. 5. "You are instructed that the plaintiff was a minor, and if you find that he was inexperienced and that by reason of his age and inexperience he did not know or appreciate the danger of his employment, if any, and that the defendant knew or ought to have known this in the exercise of ordinary care on its part, then it was the duty of the defendant to so instruct plaintiff as to latent and patent dangers, so that, as far as might be with proper care on his part, the plaintiff would be enabled to perform his duties in safety to himself; and if you find from a preponderance of the evidence that the defendant failed to discharge such duty and that by reason of such failure and the negligence of the defendant complained of, the plaintiff was injured, then you are instructed that the plaintiff did not assume the risk."

The court also gave instruction No. 7, which, in effect, told the jury that appellee was only required to use the

same care and caution expected of one of his age, experience and intelligence.

Appellant duly saved exceptions to the above instructions. Such other instructions and facts as may be necessary will be set forth in the opinion.

The jury returned a verdict in favor of the appellee for the sum of $8,000. Judgment was entered for that sum, and this appeal was duly taken.

McRae & Tompkins and *J. C. Pinnix,* for appellant.

1. The court erred in telling the jury that the appellant was liable if the defect in the car caused or contributed to cause the injury. The injury occurred before the passage of the Act March 8, 1911. The old law of negligence applied. 120 S. W. 78, 83, 87; 120 S. W. 96; 140 *Id.* 963; 111 *Id.* 1166, 1171; 87 Ark. 576; 55 *Id.* 510; 97 *Id.* 160; 101 *Id.* 376, 386; 61 *Id.* 381; 101 *Id.* 376.

2. The court erred in giving the 5th instruction, asked by appellee. 3 Labatt on Master & Servant, § 1155. The only duty to warn a minor is to apprise him of the danger. If he knows and appreciates the danger, no warning is necessary. 96 Ark. 461; 73 *Id.* 49; 29 L. R. A. (N. S.) 111, and note. There is no allegation of lack of experience nor failure to comprehend the danger, nor failure to warn. 97 Ark. 843. If instruction or warning was necessary, it should have been alleged.

Langley & Steel and *Steel, Lake & Head,* for appellee.

1. There was no error in the modification of instructions. 95 Ark. 297; 62 *Id.* 108; 90 *Id.* 326; 54 *Id.* 289; 58 *Id.* 217; 86 *Id.* 36; 71 *Id.* 445; 67 *Id.* 1; 79 *Id.* 20; 92 *Id.* 573; 88 *Id.* 29; 104 *Id.* 59; 186 Fed. 130; 69 *Id.* 823; 214 U. S. 249; 218 *Id.* 78. The case of 120 S. W. 78 does not apply. The rule is stated in the dissenting opinion of Judge Valliant in that case and seems to be the better rule and is sustained in Missouri. 79 S. W. 445; 92 *Id.* 481; 104 *Id.* 99; 120 *Id.* 96; 120 *Id.* 766; 91 *Id.* 527, etc.

2. The instructions are not misleading. Taken together they state the law. 105 Ark. 334; 95 *Id.* 291; 100

Id. 437; 98 *Id.* 211; 97 *Id.* 358; 101 *Id.* 548; 78 *Id.* 355, etc. No specific objections were made, or request made for a specific instruction embodying appellant's theory. 74 Ark. 212; 92 *Id.* 6; 115 *Id.* 538, and many others.

3. Defendant's negligence was established. 101 Ark. 376. The modifications complained of were harmless. 103 Ark. 307; 91 *Id.* 310; 110 *Id.* 86. Omissions and apparent conflicts in instructions are cured when read together with other instructions properly stating the law. 93 Ark. 564; 98 *Id.* 352; 75 *Id.* 261. Proof of negligence was made without objection and the complaint, if necessary, will be treated as amended to conform to the proof. 118 Ark. 206; 113 Ark. 265.

4. There is no error in appellee's 5th instruction as to latent dangers, etc. 83 Ark. 217; 75 *Id.* 261; 93 *Id.* 457; 92 *Id.* 6; 77 *Id.* 64; 102 *Id.* 140. The instruction is in line with the principles announced in 97 Ark. 180; 90 *Id.* 407; 91 *Id.* 102.

5. The jury had the right to consider plaintiff's age and the amount of his experience in testing the degree of care to which he should be held. 100 Ark. 437, etc. The verdict is moderate; no prejudicial error is shown and the judgment should be affirmed.

WOOD, J., (after stating the facts). The appellant contends that the court erred in telling the jury that if the hand car was defective in the particulars alleged and that these defects caused or contributed to cause the injury, the appellant was guilty of negligence.

Learned counsel for appellant insists that under the allegations of the pleadings and the evidence appellee's injury could only have been produced by the negligence of appellant as alleged in the complaint, or by the negligence of the appellee as set up in the answer, or by the negligence of the appellant and the concurring contributory negligence of the appellee; that the issues stated and the evidence showed that appellee's injury was produced either solely by the negligence of the appellant or by the negligence of the appellant, which, concurring with the

negligence of the appellee, caused the injury; that the instruction was misleading because there was no evidence of contributory negligence except that of the appellee; that there was no evidence to warrant a finding that appellant's negligence contributed to produce the injury in any other way than concurring or combining with the negligence of the appellee, in which case the appellant would not be liable.

When the charge of the court is considered as a whole, as it must be, the instruction is not fairly open to the criticism suggested by counsel. The jury are plainly told in instructions numbered 2 and 3, given at the instance of the appellee, that if plaintiff himself was guilty of contributory negligence, that is, if he failed in the exercise of ordinary care, and that the injury would not have occurred had he been without fault, then the appellant would not be liable. And in instructions numbered 3 and 4, given at the instance of the appellant, the jury were told that, even if they believed that the hand car was defective and such defect was the cause of the injury, or contributed to cause the same, defendant would not be liable if the jury found that the plaintiff was guilty of negligence which "contributed to cause" the injury; that if the plaintiff himself was guilty of negligence which "helped to cause" the injury, he could not recover.

The fifth instruction on the part of appellant told the jury that contributory negligence was an absolute defense, and that if the evidence on the part of the plaintiff or on the whole case showed that the plaintiff was himself negligent and that such negligence upon his part helped to cause the injury, he could not recover, no matter how negligent the defendant may have been.

Now, when these instructions are read together, it is obvious that the court used the words "contributed to cause" to define independent acts, on the part of the appellant alone, that would constitute actionable negligence on its part.

The words "contributed to cause," used in the instructions, had no reference whatever to the subject of contributory negligence, which is wholly a matter of defense. Acts of omission and commission, constituting the subject-matter of contributory negligence, are attributable alone to the plaintiff, and never to the defendant. Therefore, the court could not have used the words "contributed to cause" for the purpose of conveying to the jury the meaning that the defendant would be liable if its acts of negligence, combined with acts of negligence on the part of the plaintiff, caused or contributed to the injury. In this connection we approve of the language of Chief Justice Valliant, in his dissenting opinion in *Krehmeyer* v. *St. Louis Transit Co.,* 120 S. W. (Mo.) 78-95: "If the defendant's negligent act did directly contribute to cause the injury, then the injury would not have occurred without his negligent act, and the defendant is held liable, not because of the acts of others or of conditions for whose existence he is not responsible, but because of his own negligence. If defendant's own act contributed to the result by concurring with other acts or conditions, and the result would not have occurred but for his contribution, he is liable, no matter what other possible causes might have existed, provided, of course, that the negligence of plaintiff himself was not one of the causes."

(1) The manifest purpose of the court by the use of the words "or contributed to cause" was to tell the jury that if the acts of negligence set up in the complaint were proved and that the injury was the direct result of such acts, that if such acts were the sole cause of, or if they contributed or combined with other causes to produce the injury, appellant would be liable. This is the law. See *Zei* v. *Brewing Co.,* 104 S. W. (Mo.) 99. For it is wholly immaterial whether there existed other causes and whether these causes were alleged in the complaint or proved by the evidence if the acts of negligence as alleged and proved did cause or contribute directly to produce

the injury complained of. In such case defendant would be liable unless some negligent act on the part of the appellee also concurred in and contributed to the injury.

(2) The appellant was not prejudiced and can not complain if there were other co-operating and concurring causes which were not alleged or proved. These would neither increase nor lessen appellant's liability. The words "or contributed to cause," in the connection used, are but synonymous with the word "cause." As was said in *Bragg* v. *Street Ry. Co.*, 91 S. W. (Mo.) 527: "In this class of cases, *contributing* to the injury on the part of a tort-feasor is, in the eye of the law, precisely the same as causing it. No gradation is tolerable."

Here, when the court told the jury that if the acts of negligence *contributed to cause* the injury, it was precisely the same, in legal effect, as saying if they "caused the injury." And the words "contributed to cause," to which strenuous objection is urged, really were surplusage and added no material significance to the word "caused" already used.

(3-4) We have examined instructions numbered 5 and 7, given on behalf of the appellee, to which objections have been urged, and, under the facts of this record, these instructions were correct. The appellee was a minor, eleven years of age, at the time the injury occurred, and, under the defense of assumed risk, instruction No. 5 was proper and a correct declaration of law. The alleged defects in the hand car and the dangers incident to operating the same with such defects, which would have been perfectly patent and obvious to an adult of experience, would not be so to an infant eleven years of age and without experience in the operation of such machinery. While there is no allegation of a lack of experience, nor of the necessity to warn on account of tender years of the employee, the undisputed evidence as to the boy's age supplies these allegations and the complaint, after judgment, will be taken to conform to the proof. Moreover, the defense of assumption of risk, set up in the answer, made the instruction proper.

The instructions, upon the whole, fairly presented the issues to the jury. There is no reversible error in the record, and the judgment must, therefore, be affirmed.

LONG, ADMINISTRATOR *v.* BIDDLE, *et al.* RECEIVERS ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered May 22, 1916.

1. MASTER AND SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT—RECOVERY BY ADMINISTRATOR—NO NEXT OF KIN.—There can be no recovery against a master under the Federal Employer's Liability Act, by the administrator of a deceased employee where decedent did not leave surviving him a widow or children, parents or other next of kin dependent upon him.
2. MASTER AND SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT—RIGHT OF RECOVERY.—The right of recovery under the Federal Employer's Liability Act, arises only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed by the carrier in such commerce.
3. MASTER AND SERVANT—INJURY TO SERVANT—INTERSTATE COMMERCE.—Deceased, an employee of defendant railway company, was killed while engaged in repair work upon a bridge, the same being used by the carrier in interstate and intrastate commerce. *Held*, the work the deceased was engaged in was in the interstate commerce of the carrier.

Appeal from Lawrence Circuit Court, Western District; *Dene H. Coleman*, Judge; affirmed.

W. P. Smith and *G. M. Gibson*, for appellant.

1. The deceased was *not* engaged in interstate commerce at the time of his injury. 229 U. S. 146; 233 *Id.* 473; 180 S. W. 443; 238 U. S. 439; 181 S. W. 375; 177 *Id.* 465; 150 *Id.* 201.

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

The Federal Act applies. Deceased was engaged in interstate commerce and there can be no recovery. 229 U. S. 146; 238 *Id.* 260; 233 *Id.* 473; 154 Pac. 1102; 36 U. S. Rep. 188; 210 Fed. 870, 92; 219 *Id.* 150, 180; 172

S. W. 519; 150 N. W. 489; 155 N. W. 504; 196 Fed. 337; 179 *Id.* 893; 192 *Id.* 901; 197 *Id.* 695; 198 *Id.* 1.

HART, J. J. C. Long, as administrator of the estate of Lex Long, deceased, instituted this action against the receivers for the St. Louis & S. F. Rd. Co. to recover damages for the alleged wrongful death of his intestate, while in the employment of the railroad company. The material facts are as follows:

In March, 1915, the St. Louis & San Francisco Railroad Company was in the hands of receivers, who operated its line of road. The road extended through Crittenden County and other counties in the State of Arkansas, into the State of Missouri and other states, and was engaged in interstate commerce.

Lex Long was employed as a bridge repairer at the time he received his injuries and was engaged in knocking drift bolts from bridge timbers when he got hurt. His injury resulted in his death. At the time Long received his injuries he was a member of a crew which was engaged in constructing new bridges and removing the old ones. The work is done so as not to interfere with the operation of the road. The crew drives new piling inside of the old ones and caps are put on the new piling. Timbers are then laid on top of the caps or bents, which run the same way the rails run, and are called stringers. The railroad company's ties are laid on top of the stringers and then the rails are laid on top of the ties. The old caps or bents are removed, and, if there is no water under the bridge, they are dropped down on the ground. There was water under the bridge in question, and in such case it was the custom to lay the bents along the side of the dump, clear of the rails, so that the bolts might be removed from the bents. The bents which are sound enough to use elsewhere, are then piled up along the right-of-way to be moved. When they are not sound enough for further use, they are piled up along the right-of-way and burned.

Lex Long and a companion were engaged in removing the drift bolts from the bridge timbers when, by some means, the bridge timbers began to roll down the embankment and one of them struck Long, inflicting the injuries which resulted in his death. The bolts were being taken out of the bents in order that they might be piled up and then loaded on the cars and carried into the State of Missouri for use in repairing other bridges. Without stating the particular circumstances which caused the injury to Long, it may be said that they were such as would warrant a jury in finding that they were caused by the negligence of his fellow-servant. That the railroad company was engaged in interstate commerce is conceded. The circuit judge was also of the opinion that Long was employed by the carrier in such commerce at the time he was injured. He did not leave surviving him a widow or children, parents or any other next of kin dependent upon him. Therefore, the circuit judge directed a verdict in favor of the railroad company, and from the judgment rendered, the plaintiff has appealed.

(1-2) It is conceded that if the Federal statute was applicable, the State statute must yield to it and the plaintiff is not entitled to recover because decedent did not leave surviving him a widow or children, parents or other next of kin dependent upon him. Federal Employer's Liability Act of April 22, 1908, 35 Stat. L. 65, c. 149; (Fed. St. Ann. 1909, Supp., p. 584). The Federal Act is printed in full in 223 U. S. 6. The Federal Employer's Liability Act has for one object, the lessening of danger to employees during interstate transportation and to broaden the relief for damages sustained by employees while so engaged. This statute has been broadly considered and liberally construed by the Supreme Court of the United States. That court has repeatedly held that the right of recovery under the act arises only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed by the carrier in such commerce.

(3) It is conceded that the railroad company was engaged in interstate commerce at the time its employee was injured and that the real question is whether or not the injuries which caused the death of the deceased were sustained while he was employed by it in interstate commerce. In *Pedersen* v. *Delaware, Lackawana & Western Rd. Co.,* 229 U. S. 146, Am. & Eng. Ann. Cas., volume 33, 1914C, p. 153, an employee of an interstate railway carrier was killed while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly in use in both interstate and intrastate commerce. It was held that he was employed in interstate commerce within the meaning of the Federal Employer's Liability Act of April 22, 1908, giving a right of recovery against the carrier for the death of an employee while so employed. In that case the court said: "Tracks and bridges are as indispensable to interstate commerce by railroads as are engines and cars, and sound, economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment,' used in interstate commerce. But, independently of the statute, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used, is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroads can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate

commerce in which the carrier is engaged?'' The point was made in that case that the employee was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the material to be used therein and was, therefore, not employed in interstate commerce. The court thought there was no merit in this contention and said: ''It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce.'' So, too, in the present case, the contention is made that the employee was not employed in interstate commerce at the time he received the injuries which resulted in his death.

Counsel point to the fact that the caps or bents had been removed from the bridge and were lying by the side of the dump, far enough to be clear of passing trains. For this reason they insist that the employee was through with constructing the bridge and that the work he was engaged in at the time of his injury was not a part of the interstate commerce. It must be admitted that this is a border-line case, but when tested by the rule already laid down by the Supreme Court of the United States, we think the employee was employed in interstate commerce at the time he received his injuries. It will be remembered that when the timbers taken from the bridge are old and worthless, they are piled up and burned. When they are sound enough to be used again, the bolts are removed from them and they are piled up on the right-of-way and thereafter carried to the place where they are to be again used. It is not sufficient that they should be moved far enough away from the track so that they would not be struck by passing trains. The work of constructing and repairing the bridge would not be accom-

plished by removing the bridge timbers only this far. Their presence so near the track would not only be a constant source of danger to the employees engaged in operating trains, and the traveling public, but would also materially hinder the employees in operating the train. The engineer is required to keep a constant lookout, and would be frequently at a loss to know whether the logs lying so near the track were obstructions on the track or not. Again, it will be readily seen that when the timbers became dry and rotten they would easily catch fire from the passing trains and the fire thus put out would endanger the bridges and tracks near which they were piled. Many other reasons readily suggest themselves why it would be dangerous to leave these timbers so near the track. We think it was a part of the work of constructing the bridge to remove the timbers a safe distance away from the track after they were taken from the bridge, and that a part of this work consisted in drawing bolts out of the timber so that they might be more easily stacked and made ready for shipment.

Therefore, we are of the opinion that the deceased was employed in interstate commerce at the time he was injured and the plaintiff is not entitled to recover.

The judgment will be affirmed.

HILL v. MORRIS.

Opinion delivered May 22, 1916.

1. EQUITABLE MORTGAGES—DEFINITION.—Every instrument intended to secure the payment of money, whatever may be its form and whatever name the parties may choose to give it, is in equity a mortgage.
2. EQUITABLE MORTGAGES—HOW CREATED.—Equity requires no particular words to be used in creating a lien, and if from the instrument evidencing the agreement, the intent appears to give or to charge or to pledge property, real or personal, as a security for an obligation, and the property is so described, that the principal things intended to be given are charged so as to be sufficiently identified, a lien follows.

3. EQUITABLE MORTGAGES—AFTER-ACQUIRED PROPERTY.—After-acquired property may be subject to the lien of an equitable mortgage.

4. LIENS—RENT LIEN—PROPERTY OF ASSIGNEE OF LESSEE.—The lessee of certain premises can not bind the property of his assignee, afterward put into the building, with a lien for the payment of the rent to the lessor, none being allowed him by statute or the common law, without the consent and agreement of the said assignee.

5. LIENS—ASSIGNMENT OF LEASE—RENT—LIABILITY OF ASSIGNEE.—The assignee of a lease agreed "to assume all the obligations of the said lease, and to pay the rent as it became due and specified in the lease, during the remainder of the term," but did not charge or pledge his personal property afterward put into the building, *held*, the goods subsequently put in the building by the assignee were not subject to the lien.

6. EXEMPTIONS—PROPERTY FREE FROM LIEN.—A debtor may claim as exempt, property upon which no lien has been given, when the same is otherwise properly a subject of a claim of exemptions.

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

Carmichael, Brooks, Powers & Rector, for appellant.

1. A person can not waive his exemptions by stipulations in an executory contract. 18 Cyc. 1450, 1451, note; 45 Am. St. Rep. 763; 94 Tenn. 651; 86 Ill. 141; 25 Am. Rep. 301; Underhill on Landlord & Tenant, volume 2, p. 1446, § 842; 30 Ark. 56, 120; 72 Am. Dec. 741.

2. A lien can not be created in a lease on property acquired after the execution of the lease. 163 Ill. 546; 45 N. E. 414; 111 Ark. 362.

3. The language is not sufficiently clear to create a lien on after-acquired property. 2 Underhill on Landlord & Tenant, § 833, p. 1428; 111 Ark. 362.

4. The lien is not assignable. 31 Ark. 597; 96 Ark. 557; 61 *Id.* 266; 39 *Id.* 346; 52 *Id.* 60; 61 *Id.* 274; 96 *Id.* 557; 34 *Id.* 83; 36 *Id.* 567; 51 *Id.* 437; 33 *Id.* 800; 37 *Id.* 185.

S. L. White, for appellee.

1. An exemption can be waived by stipulation. 31 Ark. 438; 33 *Id.* 795; 2 N. W. 963; 21 Atl. Rep. 74.

2. A lien can be created in a lease on after-acquired property. 26 Ark. 72; 52 *Id.* 371; 30 *Id.* 56.

3. The language is sufficiently clear to create such a lien and the lien is assignable. The assignability was not raised below and can not be raised here. 107 Ark. 462. See 51 Ark. 433; 60 *Id.* 595; 97 *Id.* 534.

KIRBY, J. The Union Trust Company as agent, on the 20th day of September, 1913, leased certain stores at numbers 612 and 614 Center street, Little Rock, and the property therein contained, to Comer-Dobyns Company, for a term of three years at a stipulated price, the lease containing, among others, the following clause: "And the said tenant hereby gives the said landlord a lien upon any and all property of said tenant, had or used upon said premises, whether exempt from execution or not, for all rents due or to become due by virtue of this lease."

On February 11, 1915, the leesee transferred and assigned the lease to J. D. Hill and E. A. Perkins, the assignment stipulating, "The said J. D. Hill and E. A. Perkins hereby agree to assume all the obligations of the said lease and agree to pay rent as it becomes due and as specified in said lease during the remainder of the term of the said lease."

E. A. Perkins disposed of his interest in the partnership to J. D. Hill, who got behind with the payment of his rent and in July executed a note for $540, payable to appellees, therefor and put up with it some collateral. The note not being paid, a suit was brought in equity thereon, in which it was alleged that they had a lien upon all the property of the defendant situated in the storerooms and a receiver was asked and appointed to take charge thereof. Appellant then went into bankruptcy, and the receiver turned over the property to the trustee, and this note was filed as a claim with the trustee. Appellant claimed and was allowed and secured his exemptions out of the property contained in the building.

These facts were set up in an amendment to the complaint, which also alleged a further indebtedness of

$67.50 due for rent of the building, from September 1st to 5th, and that they had a lien on the property in the store building at the time of the filing of the original suit and that defendant was seeking to claim as exempt from such lien, which it was alleged he had no right to do, the property claimed and allowed as exempt in the bankruptcy court, and asked a foreclosure of the lien and sale of the property for the payment of the debt.

It was admitted that appellant is a married man, the head of a family and entitled to claim the property attempted to be subjected to a lien for the payment of the rent, unless the lease and assignment thereof created a valid lien or equitable mortgage upon it between the parties.

The chancellor found in favor of plaintiff, and from the decree the defendant appealed.

Counsel say that the only question raised by the appellee is whether the lease, by its terms, and the assignment thereof, creates such a lien against the property as prevents J. D. Hill, the owner, from claiming the same as exempt from the payment of the debt and free from the lien.

Conceding, without deciding, that the terms of the lease are sufficiently definite and specific to constitute an equitable mortgage as between the original parties, binding the after-acquired property, had and used in the building by the lessee, upon its installation therein, it does not follow that it would necessarily constitute such a mortgage as between the lessor and appellee, the assignee of the lessee.

(1) Every instrument intended to secure the payment of money, whatever may be its form and whatever name the parties may choose to give it, is in equity a mortgage. *Turner* v. *Watkins,* 31 Ark. 438.

(2) Equity requires no particular words to be used in creating a lien * * * if from the instrument evidencing the agreement, the intent appears to give or to charge or to pledge property, real or personal, as a se-

curity for an obligation, and the property is so described that the principal things intended to be given are charged to be sufficiently identified, a lien follows. *Martin* v. *Schichtl,* 60 Ark. 595; *Ward* v. *Stark,* 91 Ark. 268; *Ark. Cypress Shingle Co.* v. *Meto Valley Ry. Co.,* 97 Ark. 536.

(3) It is also true, that after-acquired property may be subject to the lien of an equitable mortgage, which attaches as a charge against the particular property, when it comes into being, or the title thereto is acquired by the mortgagor, when the property is sufficiently described in the contract between the parties. *Morton* v. *Williamson,* 72 Ark. 390.

(4-5) Certainly the lessee could not bind the property of his assignee afterwards put into the building, with a lien for the payment of the rent to the lessor, none being allowed him by statute or under the common law, without the consent and agreement of said assignee. The assignee's liability is measured by the terms of his contract, which was "to assume all the obligations of the said lease and pay the rent as it became due, and specified in the lease, during the remainder of the term," which does not evince an intention to give or charge or pledge the personal property afterwards put into the building by the assignee of the lease, a stock of goods to be resold, as a security for the obligation to pay the rent, and is not sufficient to constitute an equitable mortgage of such property by said assignee.

(6) Since no lien was given upon the property of appellant by the terms of the contract, there was no legal barrier preventing his claim of the property as exempt from the payment of his debt by contract.

The court erred in holding otherwise and the decree is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

MOORE v. WADE.

Opinion delivered May 22, 1916.

1. BILLS AND NOTES—PARTIAL FAILURE OF CONSIDERATION—RENEWAL.—One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or false representations by the payee, waives such defense, and cannot set it up to defeat or reduce a recovery on the original note. If the maker executes the renewal note without knowledge of the facts which would constitute a valid defense, the renewal does not operate as a waiver of the original defense.
2. BILLS AND NOTES—FALSE REPRESENTATIONS OF PAYEE—KNOWLEDGE—RENEWAL.—If the maker executes a renewal note upon the faith of false representations as to the facts affecting his right to plead his original defense, he is not estopped by the renewal of the note, to plead the original defense.
3. BILLS AND NOTES—BONA FIDE PURCHASER—KNOWLEDGE OF DEFECTS—BURDEN OF PROOF.—Defendant executed a renewal note to plaintiff who alleged that he was a *bona fide* purchaser of the original note. In an action on the renewal note, defendant set up that plaintiff was not a *bona fide* purchaser. *Held*, in order to make out a defense, defendant must offer some testimony that would show, or tend to show, that at the time plaintiff purchased the note, that he was in possession of knowledge or information that would lead to knowledge, that there was some defect in the transaction, or some condition attached to the note that would constitute a defense against the original maker.

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

E. B. Wall, for appellant.

1. The court erred in directing a verdict for plaintiff. It was error to exclude the testimony offered by defendant, as it tended to show a good defense in that the renewal was obtained by false representations, and that plaintiff had knowledge of the fraudulent character of the original note. The issues should have been submitted to a jury. 89 Ark. 368; 92 *Id.* 569; 41 *Id.* 249; 1 Daniel on Neg. Inst. (2 ed.), § 769.

2. Wade paid nothing for the note. 48 Ark. 454. The plea of fraud and notice raised all issues and was a case for a jury. 98 Ark. 82. Notice of the fraud was

sufficient. 1 Dan. Neg. Inst. (5 ed.), § 799; 79 Ark. 149; 86 *Id.* 191; 94 *Id.* 426; 90 *Id.* 93. The plea of no consideration constituted a defense. 96 Ark. 163; 4 Enc. Pl. & Pr. 945.

John Mayes, for appellee.

The court properly directed a verdict. One who gives a note in renewal of another, with knowledge at the time of a failure of consideration, or false representations by the payee, etc., waives such defense, and can not set it up to defeat recovery on the note. 111 Ark. 361; 1 Dan. Neg. Inst., p. 302; Joyce on Defenses to Com. Paper, § 220; 62 Ark. 270.

2. The testimony offered was properly excluded; it showed no fraud. 111 Ark. 361.

3. One who with knowledge that a fraud has been committed enters into a contract, can not be heard to say that he was misled. 77 Ark. 269; 95 *Id.* 136; 98 *Id.* 44; 77 *Id.* 261-271; 93 U. S. 55; 99 *Id.* 578; 96 *Id.* 371.

4. Issues of fact are for the jury, but here there are no disputed facts. 89 Ark. 368.

McCULLOCH, C. J. This is an action instituted before a justice of the peace of Washington County by the plaintiff, H. K. Wade, against the defendant, J. F. Moore, to recover the amount of a promissory note executed by defendant to plaintiff, dated March 3, 1915, in renewal of a negotiable promissory note previously executed by the defendant to one W. L. Laurence, and by the latter assigned to the plaintiff. On appeal to the circuit court from the judgment of the justice of the peace, there was a trial before a jury, but the court excluded certain testimony adduced by the defendant and gave a peremptory instruction in the plaintiff's favor. The plaintiff rested his case after introducing the note sued on and showing that the note was executed in renewal of the other note executed by defendant to Laurence. The contention of the defendant was and is that the note to Laurence was executed on a certain condition which had subsequently

failed, and that he executed the renewal note to plaintiff upon faith of the latter's representation, which is alleged to be false, that he was an innocent purchaser of the note from Laurence and had no notice of the alleged condition.

Appellant in his testimony gave a history of the execution of the note to Laurence and the consideration upon which it was based. It appears from his testimony that during the summer of 1914 Laurence visited the city of Fayetteville, where all the parties to this litigation resided, for the purpose of promoting a corporation organized to establish mausoleums for the burial of the dead. Laurence was selling stock in the corporation, and the consideration for the note executed to him by defendant was the sale of certain shares of stock. He gave defendant a receipt for the price of the stock represented by the note, reciting in the receipt that the said corporation would "guarantee to Mr. J. F. Moore that in case we have not a building under construction or constructed, and Mr. Moore desires us to return his purchase price and cancel stock, then we agree to do so any time after five months and before maturity of his note," and that "any compartments or crypts sold by Mr. Moore, he shall receive a commission of 15 per cent. on same." The testimony also shows that after Laurence completed his operation at Fayetteville and returned to Little Rock, he absconded with the funds of the corporation and that no further steps were ever taken toward carrying out the contracts of the corporation.

The note executed by defendant to Laurence was dated June 30, 1914, and was due and payable six months after date, being in the form of a negotiable note. Laurence assigned the note to plaintiff by endorsement on the back of it. The defendant testified that the first he knew of his note having been purchased by the plaintiff was in the latter part of the summer of 1914, or the early part of the autumn, which was before the maturity of the note, when he went to the banking house of the McIlroy Banking Company, of which the plaintiff was the cashier, for

the purpose of disposing of another note, and was then informed by the plaintiff that he held the Laurence note. He testified that he informed the plaintiff at that time that his note had been executed to Laurence upon certain conditions which had not been performed, but that plaintiff replied to him that he was an innocent purchaser of the note and that he would bring suit on the note unless it was paid. He testified also that after the note became due plaintiff made written demand on him to pay and threatened to sue him unless the note was paid, and that he went around to see the plaintiff on March 3, 1915, and upon the faith of the plaintiff's representations of being an innocent purchaser of the note he executed the renewal note now in suit.

Defendant stated in his testimony that he suggested at the time of his last conversation with the plaintiff that the latter was not in fact an innocent purchaser and that his suspicion was aroused on account of the refusal of the plaintiff to allow him (defendant) to write a letter to Laurence demanding that he make good his guarantee for the reason that otherwise the plaintiff would not endeavor to enforce payment of the note. He says that plaintiff positively refused to allow his name to be used in such a letter for the reason that he was unwilling to appear to be conceding that he was not an innocent purchaser of the note.

At this stage of the proceeding there was a motion made by the plaintiff to exclude the defendant's testimony, and after hearing argument the court indicated its ruling sustaining the motion on the ground that it was not sufficient to show a defense to the renewal note, whereupon the defendant made the following offer, as shown in the record, concerning the introduction of further testimony:

"The defendant also offers to show by testimony that he submits is competent, and that the McIlroy Banking Company had considered and passed upon—whether formally or informally—the question of subscribing for

any stock in this proposed organization; that the matter had been definitely decided in the negative; and further, not to handle any of their paper. And further, by testimony of one Frank Rall, assistant cashier of the bank, who purchased one note, similar to the note actually in controversy, and that when that action came to the knowledge of the bank, the matter was settled and compromised and gotten out of the way. And that the evidence submitted is to show that the plaintiff, H. K. Wade, in his capacity as cashier of the McIlroy Bank, must necessarily have had notice of such action and such knowledge on the part of the bank."

The court refused the defendant's offer and thereupon instructed the jury to return a verdict in plaintiff's favor, which was done, and judgment was rendered accordingly.

(1-2) In the case of *Stewart* v. *Simon,* 111 Ark. 358, and also in other cases which followed it, we have adopted the rule sustained by many of the authorities that "one who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or false representations by the payee, etc., waives such defense, and can not set it up to defeat or reduce a recovery on the original note." The important condition upon which this rule is based is that at the time of the renewal the party must have had knowledge of the failure of consideration or the alleged false representations upon which his defense against the payment of the original note was based. If he executes the renewal note without knowledge of the facts which would constitute a valid defense, the renewal does not operate as a waiver of the original defense. The same principle demands that if the party execute the renewal note upon the faith of false representations as to facts affecting his right to plead his original defense, he is not estopped by the renewal of the note to plead the original defense.

Applying that rule to the present case, if the defendant could show that notwithstanding the fact that he was

fully advised as to his having a valid defense against the original note in the hands of Laurence, he executed the renewal note upon the faith of a false representation made by the plaintiff to the effect that he was an innocent purchaser, which fact if true would have deprived him of his right to defend against the note on that ground, then he is not estopped by the renewal. The difficulty about the defendant's case is that he failed to bring in testimony tending to establish the fact that the plaintiff made any false representation to him. He shows by his own testimony that he knew as much about the Laurence note then as he knows now. He also shows that he executed the renewal note on the faith of the plaintiff's statement to him that he had purchased the note for value and was an innocent purchaser, but he offered no proof at all tending to show that the representation of plaintiff was false. It devolved on him to prove not only that the representation was made but that it was false, and he has failed to do so.

(3) When the trial court ruled against him, he offered in substance to show that the bank, of which the plaintiff was the cashier, had considered and passed upon the question of subscribing for stock in the proposed corporation and had decided not to do so, and not to handle any of the paper; and further, that the bank had purchased one of the notes of another party executed to Laurence, and when the facts of the transaction became known to the bank there was a compromise of that note. Now, this does not show that the defendant could prove that the plaintiff at the time that he purchased defendant's note from Laurence was advised of this condition or any fraud in the transaction. In order to make out a defense, he had to lay his finger upon some testimony that would show or tend to show that at the time the plaintiff purchased the note from Laurence he was in possession of knowledge, or information that would lead to knowledge, that there was some defect in the transaction, or some condition attached to the note that would constitute a defense against the original maker.

It was a negotiable note, and plaintiff had a right to buy it if he was not advised of any defense against its enforcement. When it was presented to defendant for payment, he was then aware of all the facts concerning his defense against the note, and instead of standing upon that defense he elected to renew the note upon the representations of plaintiff, as he says that the latter was an innocent purchaser, so in order to defend against the renewal note it devolved upon him to show that those representations were false. He has not done so, and the court was correct in refusing to submit the case to the jury.

Judgment affirmed.

W. D. REEVES LUMBER COMPANY v. DAVIS.

Opinion delivered May 22, 1916.

1. PLEADING AND PRACTICE—ACTION BY ONE OF TWO PARTNERS—OTHER MAY BE JOINED AS DEFENDANT.—Where a right of action accrues to two persons, growing out of a contract with defendant, an attempt by one of them to cancel the contract, is equivalent to his refusal to join in an action against defendant, and the other in suing may make him a party defendant.
2. ACTIONS—TRANSFER TO EQUITY—PARTNERSHIP ACCOUNTS.—A. and B. entered into a contract with C. Thereafter B. relieved C. of any liability to him. *Held*, where A. sued C., the trial court properly refused to transfer the cause to equity.
3. DAMAGES—BREACH OF CONTRACT.—Damages for a breach of contract are to be measured by the value of the contract to the plaintiff at the time it was broken.
4. PARTNERSHIP—PAROL PROOF OF.—A. and B. contracted to do certain work for C. Thereafter B. undertook to relieve C. from liability on the contract. *Held*, oral testimony showing that A. and B. were partners for the purposes of this contract, was admissible.

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

Fink & Dinning and *Moore, Vineyard & Satterfield*, for appellants.

1. The demurrer should have been sustained because plaintiff could not sue alone for breach of the contract. Giles was a partner and should have been joined as plaintiff. Kirby's Dig., § § 5099, 6005; 106 N. E. 243; 1 Ark. 59; 31 *Id.* 175; 29 S. W. 313; 180 S. W. 499; 9 Cyc. 704; 46 N. E. 220; 5 *Id.* 83; 2 Dana (Ky.) 460; 38 Ark. 72; 19 *Id.* 566; 24 *Id.* 555; 110 U. S. 215.

2. A partner can not sue alone for his share of a firm claim. 30 Cyc. 564; 25 S. E. 938; 53 Md. 364; 36 N. W. 95. Misjoinder may be raised by demurrer. Bliss Code Pl. (2 ed.), § 413; 6 Enc. Pl. & Pr., p. 348.

3. The cause should have been transferred to equity. 93 Ark. 447; 110 U. S. 215; 128 S. W. 41.

4. The court erred in excluding the testimony offered. 50 Ill. 332; 98 Me. 57; 9 Cyc. 656; 35 S. W. 272; 42 N. E. 251; 46 *Id.* 423.

5. If the cancellation of the contract by Giles was in good faith and free from fraud, it bound the partnership. The instructions refused were based upon this theory, and the court erred in excluding the testimony on this subject. 50 Ill. 332; 57 Atl. Rep. 83; 9 Cyc. 356; 35 S. W. 272; 42 N. E. 251; 46 *Id.* 423. Plaintiffs could not sue for one-half the profits. 93 Ark. 447.

Bevens & Mundt, for appellee.

1. The demurrer was properly overruled. Kirby's Dig., § 6007. Giles was made a defendant properly and there was no misjoinder. 31 Ark. 175; 9 Cyc. 704; 93 Ark. 447. This court only holds that all persons interested must be parties plaintiff or defendant. This was done. 3 Ark. 364; 33 *Id.* 240; 37 *Id.* 511; 59 *Id.* 191; 28 *Id.* 171.

2. The motion to transfer was properly denied. 93 Ark. 447.

3. One partner has no power to sell the whole firm property, without the consent of his copartner. 1 Ark. 206; 37 *Id.* 228; 104 *Id.* 119; 27 Mo. 536; 29 Kan. 551; 49 Miss. 569.

4. There never was a partnership. Davis and Giles were joint owners of the contract. 30 Cyc. 402; 140 Okla. 523; 78 Pac. 94; 87 S. W. 182; 44 Ark. 423; 63 *Id.* 518; 6 Col. App. 334; 38 Me. 246; 24 W. Va. 411; 41 Me. 9; 178 Mo. 789; 60 Me. 169; 56 N. Y. 424; 80 Ark. 23; 93 *Id* 52.

5. There was no error in excluding the testimony offered nor in the court's instructions. Only general objections were made. 81 Ark. 191; 75 *Id.* 325; 87 *Id.* 396; 104 *Id.* 409; 140 U. S. 76. The testimony was irrelevant.

HART, J. J. M. Davis sued the W. D. Reeves Lumber Company to recover the sum of $8,000 for the alleged breach of a written contract whereby J. M. Davis and C. C. Giles agreed to cut and haul for the W. D. Reeves Lumber Company the timber on the lands described in the contract for a stipulated price per thousand feet. The complaint alleged that Giles had released all his right in the contract to the Reeves Lumber Company, and he was also made a party defendant to the action. The jury returned a verdict for the plaintiff for $3,375. Judgment was rendered in favor of the plaintiff against the W. D. Reeves Lumber Company for that amount. The lumber company has appealed. The material facts are as follows:

The W. D. Reeves Lumber Company entered into a written contract with J. M. Davis and C. C. Giles to cut and haul to a certain point on the Mississippi River the timber on lands described in the contract at a stipulated price per thousand feet. It was provided in the contract that the timber should be cut and hauled by the first day of September, 1916, and the contract was executed on July 8, 1914. Davis and Giles at once entered upon the land with a full line of equipment, including about thirty teams, for the purpose of performing the contract on their part. On August 10, 1914, the Reeves Lumber Company notified them to stop hauling the timber that was already cut because financial conditions were such that the lumber company could not get money to meet the pay rolls. Giles and Davis stopped the work and Davis thereafter asked the president of the lumber company several times

when they would be allowed to commence operations again and was told by him that they could do so when conditions would permit. A short time after this Giles called Davis up and told him that he wanted to get out of the contract. On October 1, 1914, the president of the lumber company told Davis that the contract had been canceled by Giles and that he would not permit any work to be done under the contract until Giles and Davis had a settlement. Davis told the president that Giles had no right to cancel the contract and that he knew nothing about him having done so. He also told him that he would not waive any of his rights under the contract and expected to carry it out. About October 16, Davis entered upon the land again and proceeded to perform the contract. On October 20, 1914, the lumber company notified him to quit cutting timber under the contract and stated that it would not pay for the cutting, and denied the authority of Davis to proceed with the work.

Davis testified that he was financially able to perform the contract and also testified in regard to the profits he could have made under it. It is not necessary to abstract the testimony on this point, but it is sufficient to say that under the evidence adduced by the plaintiff his profits would at least have equaled the amount recovered by him before the jury.

On the part of the defendant it was shown that Giles entered upon the land soon after the contract had been executed and that he did nearly all the work that was done before the lumber company requested them to cease working. On the 1st of October, 1914, Giles canceled the contract with the lumber company.

It is first contended by counsel for the defendants that the demurrer of the defendant lumber company to the complaint should have been sustained. The demurrer was based on the ground that the plaintiff could not bring the action in his name alone, but should have joined his partner, Giles, in the complaint. Section 6007 of Kirby's Digest provides, "Of the parties to the action,

those who are united in interest must be joined as plaintiffs or defendants; but when, for any cause, it may be necessary for the purpose of justice, a person who should have been joined as plaintiff may be joined as defendant, the reason therefor being stated in the complaint."

In *Imgham Lumber Co.* v. *Ingersoll,* 93 Ark. 447, the court held that in a suit upon a contract made by a firm, all of the partners have an interest in the subject-matter and are necessary parties. In that case, in construing section 6007 of Kirby's Digest, it was said that where a partner refuses to join in an action to recover a claim of the firm he may be made a party defendant. In the instant case the complaint of Davis alleges that Giles had released and relinquished all of his rights in the contract to the Reeves Lumber Company. Giles in his answer admitted that he had canceled the contract and released the Reeves Lumber Company by a written release in the name of Davis and Giles.

(1) If Giles had canceled the contract and by an instrument in writing had released the Reeves Lumber Company from further performance of the contract, this was equivalent to a refusal on his part to join in an action to recover damages for an alleged breach of the contract. Therefore, under the section of the statute above quoted, the plaintiff properly made Giles a party defendant to the action.

(2) It is next contended by counsel for the lumber company that the court erred in not sustaining its motion to transfer the cause to the chancery court. There was no error in this regard. The action of Giles in canceling the contract and the relinquishment of all his rights thereunder to the lumber company absolved it from any further liability to him under the contract. The lumber company was not interested in any partnership equities between Davis and Giles. The court did not err in refusing to transfer the action to equity.

(3) The court was requested by counsel for the lumber company to give instruction No. 4, which reads as fol-

lows: "The jury is instructed that before the jury can find for the plaintiff in any event they must find from the testimony that the plaintiff could have made a profit in carrying out said contract, in accordance with its terms, after the cancellation." The court refused to give the instructions as asked but struck out the words "after the cancellation" and gave the instruction as thus modified. Counsel for the lumber company contend that the words stricken from the instruction should have been given, because the right of recovery must necessarily have been from the date of the breach of the contract. The court, however, did give instruction No. 2, which reads as follows: "If you find for the plaintiff in this case his damages are to be measured by the value of the contract to him at the time it was broken and this value is estimated by the profits he would have realized during the continuance of the contract had it been faithfully carried out by the parties, but in estimating the profits which a party under such contract would realize, allowance must be made for every item of cost and expense necessarily attending a full compliance on his part." This instruction plainly tells the jury the damages are to be measured by the value of the contract to plaintiff at the time it was broken.

The plaintiff acquiesced in stopping the work in August and under the undisputed evidence there was no breach of the contract until it was canceled on Ocober 1, 1914, by Giles and the lumber company. Therefore, instruction No. 2 was a correct instruction on the measure of damages and was as favorable to the theory of the lumber company as it was entitled to.

(4) It was the theory of the lumber company that Davis and Giles under the contract were partners in cutting and hauling the timber. The lumber company offered to introduce testimony to the effect that Davis was indebted to it in the sum of $12,000 during the summer and fall of 1914. It also offered to introduce in evidence a letter dated September 16, 1914, to it from Da-

vis. In this letter Davis stated that he was confined to his house on account of his eyes and that his physicians had advised him to go to Memphis or some other city and have them examined. That for this and some household expenses he needed from $150 to $200, which he wanted to borrow from the lumber company. The action of the court in refusing to admit the offered oral testimony and this letter is assigned as error by counsel for the lumber company. We think the refusal of the court to admit the oral testimony and the letter was erroneous and calls for a reversal of the judgment. Davis and Giles entered into a contract with the lumber company jointly to cut and haul the timber on the land of the lumber company for the purpose of speculation. Under the terms of the contract, manifestly it was their intention to form a partnership. See *Beebe* v. *Olentine,* 97 Ark. 390. The contract of partnership was not for the performance of personal services and either partner could carry out the contract. *Smith* v. *Hill,* 13 Ark. 173. It is not claimed that Giles had any express authority to cancel the contract, but it is claimed such authority was implied. The cancellation of the contract practically terminated the business for which the partnership was formed. Such act on the part of Giles was a fraud upon Davis, and he had a right to avoid it. The rescission called for the exercise of a power by Giles which was not incident to the conduct of the firm's business in the ordinary manner and it could not bind Davis unless he authorized it or assented to it. *Phoenix Insurance Co.* v. *Fleenor,* 104 Ark. 119; 30 Cyc. 491 and 495. While Giles had no authority to cancel the contract as far as the rights of Davis were concerned, still the lumber company might interpose as a defense to the action the inability of Davis to perform the contract after Giles had abandoned it and refused to assist in the performance of it.

Davis had testified that he was financially able to perform the contract, and the excluded testimony was competent to discredit his testimony, and, also, as affirmative

evidence tending to show that he was not able to perform the contract after Giles had terminated it, as far as he was concerned, and thus to establish the defense of the lumber company, that Davis was not able to perform it.

For the error in refusing the offered testimony, the judgment will be reversed and the cause remanded for a new trial.

DRIVER v. LACER.

Opinion delivered May 22, 1916.

1. VENDOR'S LIEN—PURCHASER OF NOTE—MERGER.—L. transferred land to H. taking notes secured by a vendor's lien, recited in the deed. H. conveyed the land back to L.; L conveyed to G., and G. thereafter conveyed to defendant. Meantime L. executed a note to plaintiff, giving the notes of H. as collateral; *held*, while as a general rule the lien would have been cancelled when L. acquired the property the second time, but, that under the facts, plaintiff had no knowledge of any of the transfers subsequent to that from L. to H., and that no merger took place as to her, and that defendant, being bound by the recitals in the deeds in his chain of title, that plaintiff could enforce her lien, as against the land.
2. TITLE—RIGHTS AGAINST GRANTEES—CHAIN.—The purchaser of land is bound by whatever affects his title, which is contained in any instrument through which he traces title, even though it be not recorded, and he has no actual notice of its provisions.

Appeal from Mississippi Chancery Court, Chickasawba District; *C. D. Frierson,* Chancellor; reversed.

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

1. The legal and equitable title never merged in Lilly by virtue of the conveyance. Nothing that Lilly and Holloway could do could divest the vendor's lien. Kirby's Digest, § 51. The case, 171 S. W. 144, is conclusive of this case. See also 105 Ark. 156; 27 Cyc. 1377-8, note 2 and B; *Ib.* 1379, note D; 42 S. E. 5; 68 Am. St. Rep. 685.

2. The assignment of the notes was an assignment of the lien. Kirby's Digest, sec. 510; 68 Am. St. Rep. 691. There was no satisfaction of the mortgage. Kirby's Di-

gest, secs. 5401-3. We have no statute for the recording of assignments of mortgages. Kirby's Dig., secs. 510, 511, 512; 27 Cyc. 1296, 1314, note 2; *Ib.* 1315, note B; 51 N. W. 520; 115 Ark. 366.

3. The notes were negotiable and appellant has a valid lien by reservation in the deed of which all subsequent grantees must take notice.

The appellee *pro se.*

1. The notes sued on had actually been paid and the vendor's lien extinguished by the merging in Lilly of the vendor's lien in the legal title and by the deed from Lilly to Grant. The blank endorsement of Lilly did not carry the lien. 39 Cyc. 1810; 23 Ark. 258. Prior to Kirby's Dig. § 610, the assignment of a note did not pass the vendor's lien. 28 Ark. 401. Since the passage of the Act April 21, 1873, our courts have gone no further than required by the act in holding that the lien passed to the assignee, the policy being to discourage secret liens. 23 Ark. 258.

2. There was a merger. 2 Jones on Mortgages, § 848, 854; 70 N. E. 903; 2 Pom. Eq. § 798, note; 27 Cyc. 1379, note D. 1379. The deed from Lilly to Grant cancelled the lien. 33 Ark. 310; 27 U. S. (Law. Ed.) 531.

HART, J. Mrs. S. L. Driver sued O. R. Lilly, Allen Holloway, M. P. Grant and Philip Lacer to recover on four promissory notes, each for the sum of $112.50 and to foreclose a vendor's lien in a deed from O. R. Lilly to Allen Holloway to certain lands in Mississippi County. At the September, 1914, term of the chancery court, judgment by default was taken against all the defendants except Lacer, who filed his answer denying the right of plaintiff to assert a vendor's lien on the lands in controversy and averring that he was an innocent purchaser for value without notice of any equities of the plaintiff.

The material facts are as follows: On the 24th day of June, 1907, O. R. Lilly conveyed to Allen Holloway the lands in controversy and as evidence of the purchase money Holloway executed and delivered to Lilly his four

promissory notes each for $112.50, dated June 24, 1907, and due respectively on or before Nov. 15, 1911, 1912, 1913, 1914. Lilly executed his warranty deed to Holloway and each of the above notes was recited in the deed and a lien was expressly reserved in the deed to secure the payment of the notes.

On the second day of December, 1909, Allen Holloway and his wife sold and conveyed the land to J. B. Barron and O. R. Lilly, who agreed to assume the $450 lien existing against the land in favor of Lilly by virtue of his former deed. On the 20th day of May, 1910, Barron and wife conveyed his undivided one-half interest in the land to O. R. Lilly and the latter assumed and agreed to pay all encumbrances against the land. On the 12th day of September, 1910, O. R. Lilly and wife conveyed the land to M. P. Grant for a valuable consideration. On the 2nd day of January, 1912, M. P. Grant conveyed the land to Philip Lacer for a valuable consideration. On the 6th day of March, 1911, O. R. Lilly executed a promissory note for $10,000 in favor of Mrs. S. L. Driver, and put up as collateral security in addition to other notes, the four notes executed to him by Holloway above referred to. On the 20th day of January, 1914, Mrs. Driver caused to be entered on the record of the deed from Lilly to Holloway a certificate to the effect that the four notes described in the deed had been hypothecated to her to secure the indebtedness of O. R. Lilly to her.

The chancellor found that Philip Lacer was an innocent purchaser of the land for value without notice of the assignment of said notes, and that because the notes had not been assigned to Mrs. Driver until after the date of the deeds reconveying the land to Lilly, that the legal and equitable title to the land merged in Lilly and constituted a cancellation of the vendor's lien retained in the deed from Lilly to Holloway. From the decree entered of record the plaintiff has appealed.

It is contended by counsel for the plaintiff that this case is controlled by *Hebert* v. *Fellheimer,* 115 Ark 366. They insist that the facts in that case are in all essen-

tial respects similar to the facts in the instant case; but it will be noticed that in that case the vendor had transferred the notes to a third person before the land had been reconveyed by the purchaser to him. There, as here, the holder of the note purchased them in the usual course of trade for value and before maturity, but in the instant case the reconveyance of the land to Lilly was made before he transferred the notes as collateral security to Mrs. Driver. While there is this difference in the facts, we think the principle of law announced in that case is controlling here. It is true the general rule is that where one having a vendor's lien on land becomes the owner thereof, the lien is entirely extinguished, still there are exceptions to the rule and this is one of them.

Under the principles of law decided in *Hebert* v. *Fellheimer, supra,* and cases cited, Lacer was necessarily affected with notice of the lien retained for the benefit of Lilly in his deed to Holloway. This is in application of the settled rule that one is bound by whatever, affecting his title, is contained in any instrument through which he traces title, even though it be not recorded, and he has no actual notice of its provisions. The notes were specifically set out and recited in the deed from Lilly to Holloway and this deed being in Lacer's chain of title he is bound by whatever is contained in it. On the other hand the deed to Lacer was not in the chain of title to Mrs. Driver. The notes were transferred before their maturity. She paid value for them and had no notice whatever that the land had been reconveyed to Lilly or that Lilly had conveyed the land to Grant and that Grant had conveyed it to Lacer. So far as she was concerned, then, there was no merger of the legal and equitable title in Lilly by reconveyance of the land to him. Lacer being bound by the recitals in all the deeds through which he must trace his title will be deemed to have knowledge that the notes were outstanding and not yet due at the time the land was reconveyed to Lilly. Therefore in order to protect himself he should have required Lilly to have produced the notes or to have canceled them on the

margin of the record of the deed from himself to Holloway. In no other way could he protect himself against a bona fide holder for value of the notes before their maturity. The notes having been described in the deed, the notes and the vendor's lien stand in the same relation. "They are as inseparable as the note and mortgage. As in the latter case, the note is the principal and essential thing, and the lien the accessory and incident. The lien passes with the transfer of the note and expires when it is paid. The lien is, in effect, a mortgage, and, like it, passes to the assignee of the note, it being negotiable, freed from any defense the maker had against it in the hands of the vendor." *Pullen* v. *Ward,* 60 Ark. 90.

It follows that the decree must be reversed and the cause will be remanded with directions to the chancellor to render a decree in accordance with the prayer of the complaint.

TANCRED v. FIRST NATIONAL BANK OF FORT SMITH.

Opinion delivered May 1, 1916.

1. BILLS AND NOTES—PAROL EVIDENCE OF SURETYSHIP.—Parol evidence is admissible to show that one whose name appears on a note as maker, was in fact a surety.
2. BILLS AND NOTES—RELEASE OF JOINT MAKER—RELEASE OF SURETY.—The release from liability of one of two joint makers of a note, without the consent of one who signed the note as surety, operates to release the surety also.

Appeal from Sebastian Chancery Court, Fort Smith District; *Wm. A. Falconer,* Chancellor; reversed.

Read & McDonough for appellant.

1. The appellant was a surety and not a primary debtor. It was the duty of the court to cancel the note as to appellant and require its surrender to him. 54 Ark. 97; 34 *Id.* 44; 9 *Id.* 418; 14 *Id.* 218; 106 *Id.* 160; 73 *Id.* 484; 92 *Id.* 606. The release of Mrs. Harper released Tancred. 20 L. R. A. 712 and note; 52 *Id.* (N. S.) 368 and note; 7 Cyc. 732; 32 Cyc. 40, 201. A renewal

is not the creation of a new debt; it is merely the extension of the old one. 96 Ark. 268.

2. The bank discharged Tancred by releasing Annie R. Harper from any obligation to pay the note to Tancred. 45 Ark. 290; 44 *Id.* 394 and cases *supra.*

3. The release of Mrs. Harper was a release of Tancred, whether he was a maker or surety. The release of one jointly and severally bound is a discharge as to all. 45 Ark. 290; 16 *Id.* 331; 44 *Id.* 356; Baylies on Suretyship, p. 274; Pingrey on Suretyship, § 94; 30 Ark. 667. By making the new contract the bank released appellant, as a matter of law. 111 Fed. 590; 58 Ill. 479; 74 Ark. 600; 77 *Id.* 128; Pingrey on Sur. § 94; 45 Ark. 293.

4. An extension of time releases a surety. 34 Ark. 44; 35 *Id.* 463; 54 *Id.* 97. A release of one of the principals releases the surety. 27 Am. & Eng. Enc. L. p. 454; 76 Ark. 171. Where a new contract takes the place of an old one the parties are released. Baylies on Sur. p. 260 and cases cited.

H. C. Mechem, for appellee.

1. Tancred was not a surety. He was a principal as the court found. The burden was on him to show that he was a surety. 92 Ark. 604. The decree is not against the clear preponderance of the proof. 112 Ark. 341; *Ark. Nat'l Bk.* v. *Stuckey,* 121 Ark. 302.

2. Mrs. Harper was never under any obligation to pay the note to Tancred and the note was not released. Her release would not release Tancred the principal. 44 Ark. 357; 44 *Id.* 293; 80 Kans. 196.

3. No extension of time was given. The loan was made to Tancred and he was never released.

MCCULLOCH, C. J. Harper & Wilson, a partnership composed of George W. Harper and C. P. Wilson, who were engaged in the mercantile business in the city of Fort Smith, became indebted to the appellee, First National Bank of Fort Smith, in the sum of $40,000 for borrowed money, and their indebtedness to other creditors amounted to about the same sum. The partnership

owned a large amount of property, both real and personal, and each partner possessed individual property. Harper died in the year 1913, leaving surviving his widow, Annie A. Harper, to whom he bequeathed and devised all of his property.

After the death of Harper, the appellee became desirous of obtaining security for the debt of Harper & Wilson, and the surviving partner, C. P. Wilson, and Mrs. Harper, the widow of George W. Harper, were desirous of giving security and also of obtaining an additional loan of money to use in payments to other creditors. There was a conference between the interested parties, appellee being represented by its president, Mr. Handlin, and C. P. Wilson and the attorney for the firm of Harper & Wilson were present at the conference. Appellant, M. T. Tancred, who is Mrs. Harper's brother, was also present. Wilson stated that he needed $20,000 in cash to make payment to other creditors sufficient to satisfy pressing demands. His statement was that the desired sum would pay about 50 cents on the dollar of the amounts owing to general creditors and that that would satisfy them for the present, and he offered to execute a mortgage to the bank to secure the indebtedness of $40,000 to the bank and also the further sum of $20,000 which he desired to borrow. Mr. Handlin offered to lend the sum of $15,000, but said that that was the limit of the amount he was wiling to lend for the reason he would subject the management of the bank to criticism by the Comptroller of the Currency if as much as $20,000 additional was loaned. Wilson thought that he could not get along with only $15,000 in addition to the indebtedness to the bank, as that sum would be insufficient to satisfy the general creditors.

Finally it was suggested by Mr. Handlin to appellant that his credit was good for $5,000 with the bank, and that that sum would be loaned on his credit and would make up the additional amount of $20,000 which was thought necessary to use in the settlement with the cred-

itors of Harper & Wilson. Appellant at first demurred, but finally an arrangement was made whereby the full amount of $20,000 was advanced. There is some conflict in the testimony as to the precise language used in the conversation, but the substance of the agreement was that $15,000 was to be loaned directly to Harper & Wilson, and to be secured by a mortgage which also secured the original debt of $40,000, making a total direct indebtedness of $55,000 from Harper & Wilson, and that the additional sum of $5,000 was to be advanced to and to be used by Harper & Wilson but was to be put in the form of a loan to Tancred, the appellant. This agreement was carried out and the mortgage was executed to the bank by Wilson, as surviving partner of the firm of Harper & Wilson, and by him individually, and by Mrs. Harper, on real estate of the partnership and also some owned by Wilson himself, to secure the said sum of $55,000. A note was also executed in the sum of $5,000 and signed by Wilson and Mrs. Harper and endorsed by appellant.

This occurred on May 12, 1913, and on the same date Wilson and Mrs. Harper executed a mortgage to appellant which contained the recital that appellant had "upon his credit obtained from the First National Bank of Fort Smith, Arkansas, the sum of five thousand dollars ($5,000) which he has loaned to C. P. Wilson and Annie Harper to apply upon debts owing by the late firm of Harper & Wilson," and conveyed the property described in the mortgage to appellant on condition that "should the said C. P. Wilson as surviving partner and C. P. Wilson individually, or Annie Harper save the said M. T. Tancred harmless from the indebtedness which he has incurred to the First National Bank of Fort Smith, Arkansas, for Five Thousand Dollars for the benefit of said parties and pay said indebtedness or cause the same to be paid without any liability upon the said M. T. Tancred then this conveyance to be of no further force and effect." The mortgage embraced the property which is embraced in the mortgage to appellee and cer-

tain other property owned by Wilson. The mortgage to the bank was placed of record first.

The additional funds thus received by Harper & Wilson, including the $5,000 embraced in the transaction in which appellant was a party, were all placed to the credit of Harper & Wilson on the books of the bank, and checked out by Wilson, as surviving partner, in making payments to other creditors. None of the funds ever, in any form, passed through the hands of appellant, but were, as before stated, placed by the bank directly to the credit of Harper & Wilson.

Subsequently there arose a controversy between appellee and Mrs. Harper as to the latter's right to renounce under the will of George W. Harper and take her statutory allotment of dower instead of the provisions of the will, and in settlement of the controversy an agreement was reached whereby certain property of the decedent's estate was released from the mortgage, and Mrs. Harper was released from certain portions of the debts secured by the mortgage in consideration that she would not renounce the will of her deceased husband. A written agreement was entered into, dated September 19, 1914, and among its recitals concerning the debt secured by the mortgage is a recital of the "note of C. P. Wilson and Annie A. Harper to First National Bank, endorsed by M. T. Tancred." The clause releasing Mrs. Harper reads as follows: "Fifth: That all individual estate of George W. Harper except said seven lots and stock in the Harper Coal & Coke Company, and the liability of Annie A. Harper, for the said debts owned by said bank, including the Parker Distilling Company debt, be and the same is hereby released in consideration of said Annie A. Harper not renouncing the will of George W. Harper."

The agreement was signed by appellee and by Mrs. Harper, and also by Wilson, and contained a clause whereby Wilson expressly consented to the release of Mrs. Harper and the estate of George W. Harper, and an express agreement on the part of Wilson that he would

pay the indebtedness of the firm of Harper & Wilson after exhausting the partnership assets for that purpose. Appellant was not a party to that agreement and there is no evidence showing that he consented thereto. The point of the controversy in the present litigation is whether or not the release of Mrs. Harper by appellee discharged appellant from the obligation.

There is, as before stated, a conflict in the testimony as to the exact language used by the parties when the loan of $5,000 was procured, but there is no dispute about the fact that the substance of the transaction was the procurement of $5,000 from the bank for the use of Wilson, as surviving partner of the firm of Harper & Wilson, and of Mrs. Harper, in discharging *pro tanto* the indebtedness of that firm to general creditors other than the bank itself, which was the heaviest creditor. The sole purpose of placing the loan in the form of an extension of credit to appellant Tancred was to satisfy the Comptroller of the Currency and to shield the officials of the bank from any criticism because of having made too large a loan to one party. Whatever may have been the form in which the parties intended to place the loan, it was only in the form of a loan to Tancred which in fact was made for the use and benefit of Harper & Wilson. The evidence shows that appellant was selected merely as the conduit through whose hands the funds were to be conveyed so as to reach the hands of Harper & Wilson, and the funds were in fact paid over to Harper & Wilson not through appellant but directly by placing the same to the credit of Harper & Wilson on the books of the bank.

(1) The recitals in the contract between the bank and Mrs. Harper, releasing her from liability, show that the bank treated Harper & Wilson as the primary debtors and appellant merely as a surety, because the note is referred to in that instrument as the "note of C. P. Wilson and Annie A. Harper to First National Bank, indorsed by M. T. Tancred." The indorsement by appellant of his name on the note made him a joint maker so

far as the face of the note is concerned, but it was competent to show by parol testimony the real facts that he signed only as a surety for the other makers. *Vandeventer* v. *Davis,* 92 Ark. 604. The release by the bank of Mrs. Harper, one of the principals, with knowledge of the fact that appellant was merely an accommodation indorser, operated as a release of the latter from the obligation of the contract.

(2) But even if we discard the testimony showing the real facts as to the transaction and treat appellant as a joint maker of the note, as he appears to be on the face thereof, still a release of one of the joint makers releases him from the obligation. This would not be true if the instrument amounted only to a covenant not to sue Mrs. Harper, but it amounts to more than that and is an unqualified release of Hrs. Harper from the obligation. The distinction between a release of a debtor and a covenant not to sue is fully discussed in the case of *Pettigrew Machine Co.* v. *Harmon,* 45 Ark. 290, where it was said that in order to have the effect of discharging other obligors a release "must contain a plain and distinct remission of the claim, and in that event parol testimony cannot be heard to show a contrary intention." It is further said that the whole instrument should be considered together in determining whether it was intended by the parties to be a release and to remit the claim or merely to create an undertaking not to sue one of the parties. In that case there was an express reservation of liability of the other obligors and it was held that the effect of the instrument was to constitute merely a covenant not to sue. In the present case the instrument on its face shows all three of the obligors to be joint makers, and in the contract of release there was an express reservation as to the liability of Wilson, one of the makers. There was no mention, however, of reserving the liability of appellant. He was not a party to the instrument and did not consent thereto. An unqualified release of one of his co-obligors necessarily deprived him of the right of contribution and must therefore, as to him, be

treated as a complete satisfaction of the obligation. 34 Cyc. 1081; *Carroll* v. *Corbitt,* 57 Ala. 579; *Hale* v. *Spaulding,* 145 Mass. 482.

We are of the opinion, therefore, that the release of Mrs. Harper operated as a discharge of appellant from all liability, whether he be treated as a surety according to the real purport of the transaction, or whether he be treated as a joint maker of the note according to the face thereof.

The decree is reversed with directions to enter a decree in favor of appellant.

FIRST NATIONAL BANK OF FORT SMITH *v.* THOMPSON, ADMINISTRATOR.

Opinion delivered May 29, 1916.

1. APPEAL AND ERROR—AGREED STATEMENT OF FACTS.—When a cause was tried upon an agreed statement of facts, the same cannot be considered on appeal, unless the statement appears in the bill of exceptions or is set out in the judgment of the court; in such a case the appellate court will look only to the facts set out in the judgment of the court below.
2. APPEAL AND ERROR—FINDING OF FACT—RULING—INCONSISTENCY—REVERSAL.—A cause will be reversed when the court's rulings of law are inconsistent with his findings of fact.
3. EXECUTORS AND ADMINISTRATORS—GUARDIAN AND WARD—PAYMENT TO PERSON IN DUAL CAPACITY.—When a party acting in two capacities receives money in the wrong capacity, the payment is in law, referable to the capacity in which he is authorized to act, and constitutes a payment.
4. GUARDIAN AND WARD—PAYMENT TO GUARDIAN IN CAPACITY AS EXECUTOR.—A. was executor of the estate of B., deceased, and also the guardian of C., B's daughter and heir. Appellant paid money in its hands, belonging to C. to A., in the capacity of executor. *Held,* since A. acted in two capacities, that the payment to him operated as a discharge of the appellant.

Appeal from Sebastian Circuit Court; *Paul Little,* Judge; reversed.

Warner and Warner for appellant.

1. Though the payment was made to Matt Grey, as administrator of the estate of Mary A. Hare, deceased, it should be treated as a payment to him as curator of the estate of Ella Hare, upon the principle that where one acts in a dual capacity, the exercise of the power is referable to the true authority conferred. 98 Ga. 193; 26 S. E. 736; 95 Pa. St. 117; 55 *Id.* 364; 1 Morse on Banks & Banking, § 343; 28 Kans. 415; 104 U. S. 54; 48 Conn. 550, 567; 82 Conn. 8; 72 Atl. 150; 22 L. R. A. (N. S.) 4008, 413; Zane on Banks etc. p. 213, § 134, 51 Kans. 359. Payment to the legal guardian discharged the bank. 104 Ark. 187, 195; 116 Ark. 10; 3 R. C. L. § 177, pp. 549-50; 88 Ind. 215.

2. The case was tried on an agreed statement of facts which is made part of the record. 46 Ark. 18; 30 *Id.* 527. But the court's findings are incorporated in the judgment. This is sufficient. 106 Ark 282; 55 *Id.* 354-5; 116 *Id.* 10.

Winchester & Martin for appellee.

1. The agreed statement of facts is not a part of the bill of exceptions and cannot be considered. 99 Ark. 99; 107 *Id.* 29; 95 *Id.* 303, 309; 38 *Id.* 597; 84 *Id.* 342; 111 *Id.* 201; 117 *Id.* 221, 233.

2. The court is familiar with the efforts of the guardian to get this money. 84 Ark. 32; 92 *Id.* 15; 104 *Id.* 187 and 105 *Id.* 5. See also 116 Ark. 10. The payment to the administrator instead of the guardian was a conversion. No order of court was made and the bank is liable as the court properly held. 116 Ark. 10, 17.

McCULLOCH, C. J. The subject-matter of the present controversy, which is a fund paid into the appellant bank by the Ft. Smith & Western Railroad Company, as a deposit in a condemnation proceeding, has been before this court on two former occasions. In the year 1901, the Ft. Smith & Western Railroad Company instituted proceedings in the Circuit Court of Sebastian County to condemn a right-of-way over certain lands which, it now appears, were owned by Ella Hare, who was a person

of unsound mind. Ella Hare was made defendant in the proceedings, not as a person of unsound mind, but as one who was *sui juris,* though as a matter of fact she was under guardianship at that time as a person of unsound mind, and one Matt Grey was curator of her estate. Matt Grey was also administrator of the estate of Mary A. Hare, deceased, who was the mother of Ella Hare, and as such administrator of the Mary A. Hare estate, Matt Grey was made a party defendant to the condemnation proceedings.

At the institution of the proceedings, the circuit court fixed an amount to be deposited so that possession could be taken of the lands sought to be condemned, and pursuant to that order the railroad company deposited with appellant, the First National Bank of Ft. Smith, the sum of $2,000, the amount fixed by the court. The jury in the condemnation proceedings assessed the damages at the sum of $3,000, and judgment of the court was entered accordingly, but there was no order of the court made concerning the payment of the money over to the proper parties except the order that the sum "deposited in court be paid over to defendants, or to such one or more of them as shall establish his or her right to receive the same." The railroad company then paid the sum of $1,000 over to Matt Grey, as administrator of the estate of Mary A. Hare, deceased, and the present controversy relates to the sum of $2,000 deposited in the bank, which, according to the record now before us, was also paid over by appellant to Matt Grey as such administrator.

The case first appeared here in an appeal from the order of the court refusing to permit Ella Hare to vacate the judgment in the condemnation proceedings without bringing in all other parties to the cause. *Hare* v. *Fort Smith & Western Rd. Co.,* 104 Ark. 187. Subsequently Ella Hare brought in the other parties, and the court on her application made an order on the railroad company to pay over to her the said sum of $3,000 assessed as damages, but on appeal to this court we reversed the judgment so far as concerned the $2,000 which

had been deposited in appellant's bank pursuant to the order of the court. *Ft. Smith & W. Rd. Co.* v. *Hare,* 116 Ark. 10. As to that fund we held that when the money was deposited by the railroad company pursuant to the orders of the court, the company had no further control over the money and was not liable even though the bank paid out the money improperly. However, we affirmed the judgment ordering the railroad company to pay over the additional sum of $1,000. After the rendition of the judgment here, reversing and dismissing the case as to the $2,000, Ella Hare, through her guardian, made application to the court for an order on appellant, as the court's depositary, to pay over said sum of $2,000 with interest, and the order was made as prayed for, and an appeal has been prosecuted to this court. Ella Hare died since then, and the case is proceeding in the name of her administrator.

(1) The case was tried below on an agreed statement of facts, which was merely filed with the clerk and referred to in the judgment of the court, but is not brought in the record by a bill of exceptions. Therefore we cannot consider it on this appeal. *Coonrod* v. *Anderson,* 55 Ark. 354. The mere reference in the judgment entry to the agreed statement of facts does not make it a part of the record when the case is brought here for review, and in order to bring it upon the record it must be in the bill of exceptions or must appear in full in the record entry of the judgment. We cannot, therefore, consider the agreed statement of facts, but the trial court recited in the judgment entry its findings of fact, and it is our duty to consider that recital in order to determine whether or not the judgment of the court is consistent with the facts found by the court. All of the facts herein recited are found recited by the trial court in the judgment entry.

(2) In other words, the court finds the facts to be that appellant paid the money over to Matt Grey, as administrator of the estate of Mary A. Hare, deceased, and he accounted for it in his settlement, and that he was

at that time also curator of the estate of Ella Hare, who was the owner of the lands and to whom the funds should have been paid. The court then declares the law to be, upon those facts, that the payment did not inure to the benefit of the curator of Ella Hare and did not exonerate appellant from accountability to her for the money on deposit. The question of the correctness of that ruling is therefore presented to us for our decision, regardless of the fact that the agreed statement of facts is not in the record, for if the court's decision upon the law is inconsistent with the facts found, it calls for a reversal of the judgment.

Appellant contends that though the payment was made to Matt Grey, as administrator of the estate of Mary A. Hare, deceased, it should be treated as a payment to him as curator of the estate of Ella Hare, upon the principle that where one acts in a dual capacity the exercise of the power is referable to the true authority conferred. It seems to us that that principle is sound and should be applied here to protect the appellant from further liability. The money was in fact paid to Matt Grey, the person entitled to receive it, but it was received by him in the wrong capacity. It was, however, his duty to account for the money in the right capacity; or, in other words, he was responsible on his bond as guardian, and therefore the payment discharges the bank from further liability. We find the principle laid down that "if a person occupying the dual relation of guardian and executor or administrator or trustee holds funds in the latter capacity which are due and payable to the ward, the sureties on the guardian's bond are chargeable with his failure to account therefore as guardian." 21 Cyc. 228. The principle is stated in somewhat different language in the same work, as follows: "Where an executor or administrator also occupies some other character with regard to the estate, such as guardian or trustee, it will be presumed that the property in his hands is held in that capacity in which he ought to receive it." 18 Cyc. 1258.

Cases are cited which support that text. *Clancy* v. *Dickey,* 2 Hawks (N. Car.) 497; *Harris* v. *Harrison,* 78 N. C. 202; *Loftin* v. *Cobb,* 126 N. C. 58; *Adams* v. *Gleaves,* 78 Tenn. 367; *In re McIntosh,* 158 Pa. St. 525; *Pratt* v. *Northam,* 5 Mason (R. I.) 95; *Seegar's Executors* v. *State, use Benton,* 16 Harr. & J. (Md.) 162, 14 Am. Dec. 265; *Kirby* v. *State, use Pascault,* 51 Md. 388. In the Maryland case last cited, we find the following statement of the principle: "The general doctrine is well settled that where a man holds money in several capacities, the law will attach liability to him in that capacity in which of right the money ought to be held."

(3-4) It is true those are cases where the fund rightfully came into the possession of the party in the capacity in which he received it, and the question decided was the accountability for failing to hold the money in the other capacity, where it has become his duty after having received it to pay it over and account for it in the other capacity. But it seems to us that the principle is the same where he received the money in one capacity and should rightfully have received it in the other, and notwithstanding the fact that he accepts the money in the wrong capacity it operates as a payment to him in the capacity in which he should have received it. It is a familiar principle, as contended by appellant's counsel, that where one acts in a dual capacity, the act done will be referred to the power possessed, and not necessarily to the capacity in which the party professes to act. *Duckworth* v. *Ocean Steamship Co.* (Ga.) 26 S. E. 736. It follows from the application of the principle announced that where a party acting in two capacities receives money in the wrong capacity, the payment is in law referable to the capacity in which he is authorized to act and constitutes a payment.

There is nothing in the former decisions of this court concerning the subject-matter of the present litigation which conflicts in any wise with the views now expressed. In the last case brought here we held that the railroad company was liable for $1,000 of the sum

awarded, notwithstanding the payment to Matt Grey as the administrator of the estate of Mary A. Hare, but it was not shown in that case that Matt Grey acted in any other capacity. We merely decided that the money should have been paid to the guardian of Ella Hare, and that a payment to the administrator of Mary A. Hare, deceased, did not exonerate the railroad company from liability for the funds.

We are of the opinion, therefore, that the judgment of the circuit court is inconsistent with the facts of the case as recited in the judgment, and for that reason the judgment is reversed and the cause dismissed.

FITZPATRICK, ADMINISTRATOR *v.* OWENS.

Opinion delivered May 29, 1916.

1. HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND FOR TORT.—A married woman, under Acts of 1915, p. 684, entitled, "An act to remove the disabilities of married women in the State of Arkansas," may maintain against her husband an action to recover damages for tort committed by him against her, and resulting in her injury.
2. TORTS—INJURY TO WIFE BY HUSBAND—DEATH OF WIFE—ACTION BY HER ADMINISTRATOR AND NEXT OF KIN.—After a husband and wife were divorced from bed and board, the husband killed the wife. The wife's administrator and next of kin brought an action against him for damages. *Held*, a judgment of the trial court, sustaining a demurrer to the complaint was erroneous, and would be reversed.

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

Bevens & Mundt and *Hughes & Hughes* for appellant.

1. Mrs. Owens, if she had lived, would have been entitled to maintain an action for damages. Kirby's Digest. § 6289; Cont. Art. 9. § 7; Acts April 28, 1873, March 19, 1895, and March 19, 1915; 93 Ark. 42. On her death the right to sue vested in appellants. *Ib.* She had

the right to sue her husband for tort. 88 Conn. 42; 89 Atl. 889; 52 L. R. A. (N. S.) 185; 140 Pac. 1022, 52 L. R. A. (N. S.) 189; 154 S. W. (Tex.) 322. Appellants have the same right under § 6289 Kirby's Digest.

Also review the various married women's acts and decisions of this and other states and contend that the act removes all disabilities to sue for torts, citing many authorities.

Moore, Vineyard & Satterfield, Andrews & Burke and *Fink & Dinning* for appellee.

If the deceased had survived she could not have maintained this action for damages in tort and hence the administrator and heirs cannot. The action did not survive because she had none. Acts 1915. Act 159, p. 694; Kirby's Digest. § 6289, 6288, etc.; 21 Cyc. 1528; 77 Am. Dec. 72; 44 Ark. 265; 82 *Id.* 247; 20 L. R. A. 525; 102 Ark. 460; 156 Cal. 32; 42 Iowa 182; 42 Barb. 641; 44 *Id.* 367; 48 N. Y. Supp. 25; 43 Am. Rep. 589; 65 Tex. 281; 112 S. W. 422; 177 S. W. 382; Cooley on Torts (3 ed.) 477 and notes; 218 U. S. 611; 177 S. W. 628.

As opposed there are only two cases from Connecticut and Oklahoma. See also 179 S. W. (Mo.) 628.

McCULLOCH, C. J. According to the allegations of the complaint, plaintiff's intestate, Henrietta Owens, was the wife of the defendant, F. M. Owens; and said parties had, by a decree of the Chancery Court of Phillips County, Arkansas, been divorced from bed and board but not from the bonds of matrimony; that while the said relation subsisted, the defendant made a felonious assault upon said Henrietta Owens and killed her; and that by reason of said wrongful act of defendant the estate of said decedent and her next of kin suffered injury which entitled them to recover damages in the large sum named in the complaint. The court sustained a demurrer to the complaint and dismissed the action on the ground that a right of action on the part of either the administrator or next of kin was not set forth. In test-

ing the sufficiency of the complaint, we must, of course, accept as true all the allegations set forth.

(1-2) The action is based on the statute which provides as follows: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." Kirby's Digest, section 6289.

This court construed that statute, not as a continuation of the right of action which the deceased had in his lifetime, but as arising by the preservation of the cause of action which was in the deceased, and that if the latter never had a cause of action none accrues to his representatives or next of kin. *Davis* v. *Railway*, 53 Ark. 117.

The question then for determination is the one stated by the appellant in the brief, whether or not a married woman, under the statute now in force in Arkansas, may maintain against her husband an action to recover damages for tort committed by him. The cause of action, if any exists, arose since the enactment of a statute by the General Assembly of 1915 entitled "An Act to remove the disabilities of married women in the State of Arkansas," and reads as follows: "Section 1. That from and after the passage of this Act, every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a *femme sole.*" Acts of 1915, p. 684.

It is difficult to find authority bearing upon the construction of this statute, for there are no statutes in other states in precisely the same language, or enacted under the same circumstances as this statute was passed. The disposition of all the courts, in the construction of statutes relating to the rights of married women, is to hold tenaciously to the rule that stautes in derogation of the common law must be strictly construed. This court has announced that rule in many cases and has given it effect in confining within the narrowest possible limits statutes passed by the Legislature to emancipate married women from their common law disabilities. There are many cases cited on the brief construing statutes of this kind, and in most of the decisions the statutes were held not to give a married woman the right to maintain an action against her husband for tort. But, as before stated, none of the statutes are similar to ours nor were they passed under the same circumstances. One of the leading cases on the subject is that of *Thompson* v. *Thompson,* 218 U. S. 611, where the court decided that the statute of the District of Columbia declaring that married women "shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried," did not confer upon the wife the right to sue her husband for damages on account of tort committed by him.

In reaching that conclusion, the court said that "It is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention and control of her husband, and to maintain actions separately for the recovery, security and protection of her property," and to sue separately for torts as freely as if she were not a married woman, but that the statute "was not intended to give a right of action as against the husband, but to

allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband." The case was decided by a divided court, there being a dissenting opinion by Mr. Justice Harlan in which Justices Holmes and Hughes concurred. The statute then under consideration was not as strong in the enlargement of the rights of married women as the one passed in this State, but the opinion of the court undoubtedly shows the tendency of the court, at least at that time, to restrict as far as possible those statutes and to only follow the legislative will as expressed in the most irresistible language in enlarging the rights of married women.

There are statutes in many States enlarging the rights of married women to contract and to maintain suits both upon contract and for tort the same as that given by law to the husband, and those statutes have uniformly been construed to give no greater rights than the husband had, and that therefore the right to maintain an action for tort was not conferred for the reason that the husband had no such right. *Strom* v. *Strom*, 98 Minn. 427, 6 L. R. A. (N. S.) 191; *Shultz* v. *Christopher*, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780; *Drum* v. *Drum*, 69 N. J. L. 557; *Rogers* v. *Rogers* (Mo.), 177 S. W. 382.

In other States where there are statutes authorizing the wife to contract, either with her husband or with others, and providing that she may sue or be sued alone, the courts have construed those statutes to refer solely to contractual rights, and to provide a remedy merely for the enforcement of those rights. *Peters* v. *Peters*, 156 Cal. 32; *Main* v. *Main*, 46 Ill. 106; *Bandfield* v. *Bandfield*, 117 Mich. 80, 40 L. R. A. 758.

In still other States, statutes somewhat similar are held merely to give the right to sue upon causes of action which existed at common law, and not to otherwise enlarge the common law rights of a married woman. *Peters* v. *Peters*, 42 Ia. 142; *Abbott* v. *Abbott*, 67 Me. 304; *Freethy* v. *Freethy*, 42 Barb. (N. Y.) 641.

Counsel for appellee rely, with much apparent confidence, on the decision of the Supreme Court of Tennessee in the case of *Lillienkamp* v. *Rippetoe,* 179 S. W. (Mo.) 628, but we think that decision has little if any bearing on the construction of the statute now before us. In that case the court construed a recent enactment of the Tennessee Legislature declaring that married women "are hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effects on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married," and that "every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married;" and the court decided that the statute did not confer the right on the wife to sue the husband for tort. In disposing of the matter the court said: "We must assume that the Legislature had in mind in the passage of the act the fundamental doctrine of the unity of husband and wife under the common law, and the correlative duties of husband and wife to each other, and to the well-being of the social order growing out of the marriage relation, and that, if it had been the purpose of the Legislature to alter these further than as indicated in the act, that purpose would have been clearly expressed, or would have appeared by necessary implication."

All the statutes of this character do, as stated by the Supreme Court of the United States in *Thompson* v. *Thompson, supra,* "treat the wife as a *femme sole* and to a large extent to alter the common law theory of the unity

of husband and wife." The difficulty is that the courts, in their reluctance to change the common law rules of law and procedure, place too narrow restrictions upon the manifest designs of the lawmakers. There are two decisions brought to our attention which hold broadly, under statutes not near so strong as ours in the emancipation of married women from all common law disabilities, that the wife can sue the husband on account of torts committed by him. *Brown* v. *Brown,* 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185. *Fiedler* v. *Fiedler* (Okla.), 140 Pac. 1022, 52 L. R. A. (N. S.) 189. The Connecticut statute construed in the case above cited merely declared that "all property hereafter acquired by any married woman shall be held by her to her sole and separate use," and that court held that giving that statute full scope each party to the marriage retains his or her legal identity and capacity to own property, and each may sue or be sued at law, not only for breach of contract, but may sue each other for a tort.

In stating the conclusions of the court, it was said: "It is true that courts in some of the States have held that statute more or less similar to the one here in question give a married woman no right of action against her husband for a tort. They find in the statutes construed no legislative intent to change the legal status of husband and wife as regards the legal identity of the two, but simply an intent to ameliorate the condition of the wife by permitting her to retain and deal with her own property, and to contract with and sue and be sued by others than her husband. These courts generally hold that, unless there is an express provision giving her the right to sue her husband, she has no action against him upon contract or for tort. * * * If the legislative intent in such an enactment is not to change the foundation upon which the status of married persons was based at common law, namely, their legal identity, but its purpose is to empower the wife, while that status exists, to contract and sue in her own name, like a *femme sole,* it might well be held that language bestowing this right could not be

so extended as to permit her to contract with her husband or to sue him for a tort, because the statute intends that her identity shall still be merged in that of her husband."

The court then proceeds further to hold that the effect of the statute of that State with respect to the rights of married people was that "the parties retained their legal identity and their several rights are to be determined in accordance with the status thus established," and that the wife's separate identity not being lost by her coverture it necessarily resulted from the "retention of her legal identity after coverture that she had a right of action against her husband for a tort committed by him against her and resulting in her injury."

In the Oklahoma case referred to, the court held that under the general statutes there declaring that women shall "retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man," gave her the right to sue him for tort.

It is unnecessary for us, in order to sustain the right of action of the plaintiffs in the present case, to go as far as did the Oklahoma case, because that case is in conflict with the decisions in those States which hold that a statute merely enlarging the rights of married women to those of the husband do not give her the right to sue for torts. Our statute must be construed in the light of previous legislation in this State, which had already gone very far towards complete emancipation of a married woman from all the common law disabilities of coverture. Those statutes provided that married women could own property of any kind, and hold the same in their own right, and convey it as a *femme sole;* that she could enter into contracts with reference to her separate property, and sue and be sued with reference thereto. The Act of 1873 provided that "any married woman may bring and maintain an action in her own name for or on account of her sole and separate estate or property, or for damages against any person or body corporate, for any

injury to her person, character or property, the same as if she were sole." Another statute conferred upon married women the power to enter into executory contracts for the sale of her lands. Act of March 19, 1895, Kirby's Digest, sec. 5209; *Sparks* v. *Moore,* 66 Ark. 437. After this court had decided in *Kies* v. *Young,* 64 Ark. 381, that the husband was liable for the ante-nuptial obligations of his wife, the Legislature changed that rule, thus indicating the further desire to preserve the separate identity of the wife. Act of February 1, 1899, Kirby's Digest, sec. 5223.

These enactments left but little in the way of restrictions upon the rights of married women, but the Legislature deemed it proper to provide further legislation to completely emancipate her, and they did so by this statute which declares its purpose in the broadest terms to "remove the disabilities of married women." An analysis of the language of the statute shows that the Legislature meant to complete the work of emancipation and to give married women all the rights and remedies possessed by unmarried women. The words "to sue and be sued," when considered by themselves, merely enlarge the remedies of a married women and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and undoubtedly the use of those words serves to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of the married woman "to contract and be contracted with," and the words which follow declare in the very broadest terms her right "in law and equity" to "enjoy all rights and be subjected to all the laws of the State as though she were a *femme sole.*" If this language be given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and equity all the rights which she would enjoy if she still remained a single woman,

and that with respect to those rights she may sue and be sued.

The inquiry arises whether the language of the statute giving her only such rights and remedies as she would enjoy if she were a *femme sole,* necessarily excludes the right to maintain a suit against her husband for the reason that if she were a *femme sole* she would have no husband to sue, and therefore it is not intended to give her any greater right than she would have is she were a *femme sole.* We scarcely think that the lawmakers had that in mind, for they were dealing entirely with enlarged rights and remedies of a married woman, and it was evidently meant to confer upon her the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried.

We are convinced, therefore, that this was the intention of the lawmakers, and it would be doing violence to their manifest purpose to further apply the rule of restriction on account of the statute being in derogation of the common law and to hold that a married woman has no right of action against her husband. We have, as has been so often said by this and other courts, nothing to do with the policy of the law, for that is controlled entirely by its legislative branch of government. It cannot be said that there is any such fixed policy on the subject that the Legislature has not the power to change.

As to the policy of such a statute, the Connecticut court, in the case referred to, said: "The danger that the domestic tranquility may be disturbed if husband and wife have rights of action against each other for torts, and that the courts will be filled with actions brought by them against each other for assault, slander, and libel, as suggested in some of the cases cited in behalf of the defendant, we think is not serious. So long as there remains to the parties domestic tranquility, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such action will be impossible. When the purposes of the marriage relation have wholly failed by reason of the mis-

conduct of one or both of the parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted by the other spouse which the courts would give them against other persons. Courts are established and maintained to enforce remedies for every wrong, upon the theory that it is for the public interest that personal differences should thus be adjusted rather than that the parties should be left to settle them according to the law of nature. No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another, and one slander with another slander, until the public peace is broken and the criminal law invoked against them."

Again it is said against this construction of the statute that it confers a greater right upon the wife than it does upon the husband. That may be true, and still the statute is in accord with previous legislation on the subject which gives the wife greater rights than the husband. It was within the power of the Legislature to give the wife new rights without conferring reciprocal rights upon the husband, and that view of it does not militate against the validity of the statute, nor does it prevent that construction being placed upon it.

Upon the whole, we are convinced from the language of this statute and the fact that it was enacted to add something more to the whole sum of the law on that subject, that the statute meant to give the wife the right to maintain an action against her husband, either upon contract or for tort. The conclusion of the circuit court was therefore erroneous, and the judgment is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

HART, J. (dissenting). I do not think the construction placed upon the act under consideration is justified by its language, and it seems to me that the construction is opposed to the trend of our former decisions relating to the question. In the case of *Kies* v. *Young,* 64 Ark.

381, the court expressly recognizes the rule in the construction of married women acts to be that where the Legislature does not by express words or by clear implication express an intention to repeal the existing law in regard to married women, the presumption is that they intended the rule should remain.

The court said that the common law unity of husband and wife still exists in this State except so far as the legislative purpose to change it has been expressed by statute. The statute under consideration is as follows: "Section 1. That from and after the passage of this act, every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a *femme sole.*" Reliance seems to be placed in the decision of the majority in the dissenting opinion of Judge Harlan in *Thompson* v. *Thompson,* 218 U. S. 611. A statute governing the District of Columbia was under consideration in that case and it specially provided that married women might sue for torts committed against them as fully and freely as if they were unmarried, and Judge Harlan's dissent was based upon this special provision of the statute. I think that an examination of his dissenting opinion will lead to the conclusion that had it not been for this special provision, he would not have dissented from the majority opinion.

The first part of our act providing that married women shall have all rights to contract and be contracted with, to sue and be sued, I think gives her the right to make contracts with her husband as well as with third persons and to sue or be sued by him as well as others in regard to such contracts. Before the passage of the act, by the common law a husband and wife were deemed to be one person and no suit at law of any character could be maintained by one against the other in this

State. Suits between a husband and wife, however, have long been permitted in equity.

It seems to me that the object of the statute was the placing of the husband and wife upon an equal footing in regard to the making of contracts and ascertaining their rights thereunder. Under the common law the husband did not have the right to sue the wife for a tort. I do not think the language of the present statute indicates a legislative intent, "to make a departure from the common law so radical and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character." See *Peters* v. *Peters,* 23 L. R. A. (N. S.) 699. In the case of *Jackson* v. *Williams,* 92 Ark. 486, it was held that a husband was liable for a tort of the wife not committed in his presence and the ruling was based upon the unity of person in husband and wife. But it is said that no force can be given to the latter part of the section unless the construction placed upon the act by the majority opinion is adopted. It can be said with equal force that all the language preceding that is useless if the opinion of the majority is adopted because if the language of the latter part of the section is broad enough to include suits by the wife against the husband for personal torts, it is certainly broad enough to include suits by her against him on contracts, and it was entirely useless to have embodied the language used in the first part of the section in the statute. It is our duty to give force and effect to every part of the statute if we can do so without doing violence to its language. I think the first part of the section gives the wife the right to contract and be contracted with by her husband and that the words sue and be sued have relation to such contracts; and that the latter part of the section which provides that "in law and equity shall enjoy all the rights and be subject to the laws of this State as though a *femme sole*" were intended to remove the rigor of our former rule in regard to making the husband liable for

torts of his wife not committed in his presence, and other matters of that kind. I believe, however, it was the intention of the law-makers to still preserve the legal unity of husband and wife, and that marriage still "acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." In other words, if the Legislature had intended such a radical departure from the rule as it now exists as indicated by the majority opinion, it would have said so in plain terms.

Many cases might be cited to show that statutes broader than ours have not conferred upon husband and wife the right to sue each other for personal tort.

But my dissent is based upon what I believe to be an adherence to the principles of law heretofore decided by this court. I have no regret that, by judicial construction, the rules of the common law on this subject "have gone to that bourne from which no traveler returns, where they must rest undistinguished by a single tear shed for their departure."

Mr. Justice Wood concurs in this dissent.

ROWLAND v. ARKANSAS LUMBER COMPANY.

Opinion delivered May, 29, 1916.

TIMBER DEEDS—SALE OF TIMBER—EXPEDITIOUS CLAUSE.—In an action to recover the value of certain timber cut by the grantee in a deed to the timber, the deed containing a clause that the timber be cut as expeditiously as possible, *held*, a verdict in favor of the defendant was sustained by the evidence.

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

Mahony & Mahony and *H. S. Powell* for appellants.

1. The company having failed to cut and remove the timber expeditiously, forfeited all rights, and plaintiffs were entitled to recover for all timber cut after the notice was given. Plaintiffs instructions 1 and 2 should

have been given without modification. The court erred in giving defendant's request No. 2. No time was specified in the contract and hence appellee had only a reasonable time to cut and remove the timber. 99 Ark. 112; 120 Ark. 165; 118 Ark. 94; 111 Ark. 253.

Fred L. Purcell and *B. L. Herring* for appellee.

The law was correctly declared in the court's charge to the jury and the verdict is sustained by the evidence. Appellee used this expedition in removing the timber. 118 Ark. 94; 120 Ark. 105; 99 Ark. 112; 111 *Id.* 253; 116 *Id.* 393.

HART, J. R. E. Rowland and Mrs. R. B. Byrd sued the Arkansas Lumber Company for the value of certain timber which they alleged the lumber company wrongfully cut and removed from their lands in Bradley County, Arkansas. The lumber company admitted cutting and removing the timber, but as a defense to the action stated that it was the owner of the timber. The case was tried before a jury which returned a verdict for the defendant and from the judgment rendered the plaintiffs have appealed.

The material facts are as follows:

In March, 1910, the Arkansas Lumber Company was duly organized as a corporation under the law of the State of Arkansas, and it took over the lumber mill of Crannell & Leavitt at Warren, Arkansas. The mill at that time, had a capacity of about 80,000 feet. The capacity of the mill was increased by the defendant company until in 1905, it had a capacity of 150 or 160 thousand feet per day. The defendant also took over from Crannell & Leavitt a log road which extended something over two miles west from Warren. At that time the only railroads in Bradley County were a branch road of the St. Louis, Iron Mountain & Southern, extending from Dermott to Warren and the log road just mentioned. On the 23d day of August, 1901, R. B. Byrd, by deed, conveyed to the Arkansas Lumber Company all the pine timber on about 176 acres of land owned by her in the

western part of Bradley County, Arkansas. The deed provides that the lumber company "shall cut and remove said timber as expeditiously as possible and it is agreed that unless it shall have removed all the same within a period of 15 years from the date thereof, it shall be responsible for and pay to the first party the full amount of taxes assessed against said lands after the expiration of said period of 15 years from this date until such time as said timber is removed and said possession returned said first party."

The defendant company began constructing its log road westward, cutting the timber and logging its mill as it proceeded, and was so doing at the time it bought the timber from Mrs. Byrd. In 1905 the defendant had constructed its railroad to a point about 11 or 12 miles west of its mill. During the year 1906, the Rock Island Railroad Company constructed its line of railroad through Bradley County from the northwest to the southeast corner thereof. The defendant extended its log road to Banks to connect there with the Rock Island Railroad. Banks was the nearest point on the Rock Island Railroad to Warren. The log road was then 15 or 16 miles long and was incorporated as the Warren & Ouachita Valley Railroad. The timber in controversy was situated south of Banks and at its nearest point was four and one-half miles from the Rock Island Railroad. At this point it was necessary to cross the L'Aigles which were marshy lands a mile and one-half wide so that it was impracticable to haul timber across them, and it would also be very expensive to build a log road across it.

The Southern Lumber Company was also located at Warren and owned timber in the western part of Bradley County. In 1907 the defendant and the Southern Lumber Company commenced to build a log road south from the western terminus of the road of the defendant near Banks and by the first of January, 1911, it had established a camp about two and one-half miles from the Byrd timber. The Byrd timber was on the west side of the L'Aigles but the defendant owned other timber on the

east side thereof. The road built by the defendant and the Southern Lumber Company is known as the A. & S. Railroad. While it was being built, the defendant operated from a station on the Rock Island Railroad and built spurs out into the timber owned by it on the east side of the L'Aigles and operated there.

According to the testimony of the plaintiffs, the A. & S. road was within two and one-half miles of the Byrd timber, sometime in 1910, or at least by the first part of 1911. It may be fairly inferred from the testimony of the plaintiffs' witnesses that it was practicable for the defendant to have cut and removed the timber from the Byrd land in the latter part of 1910 or during the early part of the year 1911. We need not abstract the plaintiffs' testimony on this point because the verdict of the jury was in favor of the defendant and in testing the sufficiency of the evidence to support the verdict, it must be viewed in the light most favorable to the defendant.

According to the testimony of the defendant, the A. & S. road from the point where it left the W. & O. V. Railway was constructed through territory where the defendant had no timber. That was one of the reasons which prompted it to go to Vick a station on the Rock Island railroad and operate from there while the A. & S. road was being constructed. Vick was situated too far from the timber in question to make it practicable to build a spur from there to it. The spur would have to run through several miles of territory where the defendant had no timber and this would be so expensive that it would not pay the defendant to build the spur.

After it had cut all the timber which it had in the territory near to Vick, the defendant moved to a temporary camp at the end of the A. & S. road which was nearly completed. This was in the latter part of January, 1911. The usual log haul is from one-quarter to a half-mile. The proper way to operate is for the mill company to build the spur through the timber and work back. As soon as a permanent camp was completed at the end of the A. & S. road about seven and one-half

miles south of the temporary camp, the temporary camp was abandoned and the permanent one established, and operations carried on from there.

When the permanent camp was established, spurs were extended out from it in every direction as fast as possible and the Byrd timber was reached in the latter part of 1912 and most of it cut then.

Mrs. Byrd executed a deed to R. E. Rowland to the timber in controversy on November 20, 1912. Under this state of the record we think the testimony was legally sufficient to support the verdict. The mill of the defendant was operated at full capacity from the time it purchased the timber until it cut and removed it, except for a short time while it was being rebuilt after having been burned.

It is true, some of the timber which had fallen down and also a small part of the other timber on the Byrd land was cut several years before by other mill owners under contract with the defendant, but the defendant had the right to cut the timber itself and was not required to assign its rights under the contract in order that the timber might be cut earlier. It is also true that a temporary camp was established within two and one-half miles of the timber in the latter part of 1910 or at least the first part of 1911, but according to the testimony of the defendant, this was only done in order to keep the mill in timber until the permanent camp was established at the end of the log road.

The testimony on the part of the defendant shows that the establishment of a permanent camp at the end of its line, and to work back through the timber, was the most practicable way for it to operate.

It may be fairly inferred from the evidence that it would have been a losing venture for the defendant to have run its spur line to the timber in controversy while it had its temporary camp within two and one-half miles of the timber. The record is quite voluminous and we have only attempted to give the substance of the testimony. When all the facts and circumstances adduced in

evidence are considered, we think the jury was warranted in finding a verdict for the defendant.

In the case of *Earl* v. *Harris,* 99 Ark. 112, the court had under consideration a deed containing a similar clause as to the time in which the timber should be removed from the land and the court in construing it said, "The controlling question involved in the case, we think, is whether or not defendant did, under the circumstances of the case, proceed with all possible expedition in cutting and removing the timber. If he did, then he had a reasonable time after January 20, 1908, in which to cut and remove the same. In order to determine whether or not the defendant did thus proceed in cutting and removing the timber from this land, it would be necessary to take into consideration the location of the land, its accessibility, the character and quantity of the timber thereon, the seasonableness of the weather, and the facilities which were obtainable for cutting and removing the timber, and all other conditions and circumstances which might affect the cutting and removing thereof."

The rule has been reaffirmed in the following cases: *Yelvington* v. *Short,* 111 Ark. 253; *Newton* v. *Warren Vehicle Stock Co.,* 116 Ark. 393; *Burbridge et al* v. *Arkansas Lumber Co., et al,* 118 Ark. 94, 178 S. W. 304; *Louis Werner Sawmill Co.* v. *Sessoms,* 120 Ark. 105, 179 S. W. 185.

The court gave to the jury instruction No. 2 which reads as follows: "You are instructed that under the timber deed executed by R. B. Byrd to the Arkansas Lumber Company on the 23d day of August, 1901, and under which the defendant company claims title to the timber in question, the defendant was not allowed a period of 15 years, or any other definite length or period of time in which to cut and remove the timber in controversy from the land on which it was situated, but that it was its duty to begin to cut and remove the timber from the land as expeditiously as possible after the contract was made, and that it should continue to cut and remove the same as expeditiously as possible from that date until

it was all cut and removed. In order to determine whether or not the defendant thus proceeded in cutting and removing said timber from the land, it will be your duty to take into consideration the location of the land, its accessibility, the character and quantity of timber thereon, the facilities which were *reasonably* obtainable by the defendant for the cutting and removing of the timber, and all other conditions and circumstances as detailed by the evidence, which might affect the cutting and removing of said timber.

"If, therefore, you believe from the evidence in this case that the defendant, by beginning to cut and remove the timber expeditiously after the contract was made on the 23d day of August, 1901, *acting with reasonable dispatch under all the circumstances,* and by continuing to cut and remove the same as expeditiously as possible from that date until it was all cut and removed, could have cut and removed all of the timber prior to the time same was cut, then you are told that the defendant forfeited its right to the timber and that plaintiffs are entitled to recover of the defendant the reasonable cash market value of said timber cut in the latter part of 1912, together with interest thereon at six per cent. per annum from said date." This instruction was originally asked by counsel for the plaintiff and the court modified it by inserting the words in italics. There was no error in the modification contained in the instruction.

The jury in determining whether the defendant cut the timber as expeditiously as possible were only required to take into consideration the facilities which were reasonably obtainable by the defendant for cutting and removing the timber. With the word "reasonable" left out, the jury might have thought that it was required to take into consideration the facilities which were obtainable by the defendant for cutting and removing the timber regardless of the cost and expense to the company or as to whether or not it was proceeding in a practical way in cutting the timber. So, too, the words "acting with reasonable dispatch under all the circumstances,"

do not constitute error. They were merely explanatory of the instruction as requested by counsel for the plaintiffs and in no sense contained a departure from the rule of law governing the construction of deeds like this as laid down in the case of *Earl* v. *Harris, supra,* and our other cases relating to the questions.

At the request of the defendant the court gave the following instructions: "The court instructs you that the evidence in this case shows that R. B. Byrd, on the 23d day of August, 1901, conveyed by his timber deed, all the pine timber over 12 inches in diameter on the lands described in this controversy, and all the pine and oak timber of the northwest fractional quarter of section 4, in township 15 south of range 11 west, to the Arkansas Lumber Company, defendant in this suit; and the court instructs you that by deed of conveyance, the timber described in the said deed became the property of the Arkansas Lumber Company with the right to enter upon said lands and to cut and remove the said timber described in said deed, unless the defendant, Arkansas Lumber Company, has forfeited its right to said timber by a failure to comply with the terms of the timber deed, and the court instructs you that while it was the duty of the defendant to cut and remove the timber from the land in question as expeditiously as possible, yet, in arriving at what is an expeditious removal, you must take into consideration the distance this timber was from the mill plant of defendant, the facilities which the company had at the date of the deed, with which to remove the timber, the method of removal in contemplation of the parties at that time, and the amount of timber the company had to cut before it should reach this timber, and all other circumstances favoring, and all other obstacles opposing the removal, and if you believe from the evidence in this case that the defendant was proceeding with reasonable dispatch to cut and remove the timber, according to reasonable and customary methods, taking into consideration all the circumstances in the case, then it was proceeding

as expeditiously as possible, and your verdict will be for the defendant."

The counsel for the plaintiff specifically objected to that part of number two which reads as follows: "the amount of timber the company had to cut before it should reach this timber." This was a proper circumstance to be considered. At the time the deed in question was executed, the defendant was operating a sawmill and was extending a log road in the general direction of this and other timber purchased by it. The plaintiff knew that the defendant was purchasing the timber to be cut and used by it in the usual course of business, and for that reason the clause requiring the timber to be cut as expeditiously as possible was inserted in the deed. For a like reason there was no error in placing in the instruction the clause, "with reasonable dispatch," and also the clause, "according to reasonable and customary methods," which were specifically objected to by counsel for the plaintiff.

Counsel for the plaintiffs now insists that the instruction was erroneous because the court added the words "had at the date of the deed" after the word "facilities" making the instruction read, "the facilities which the company had at the date of the deed," etc. They insist that these words limited the jury to a consideration of the facilities which the defendant had at the time the deed was executed and did not permit them to take into consideration the additional facilities which it afterwards acquired. We do not think the instruction is open to this objection. The defendant itself introduced testimony in regard to the increased capacity of its mill and of the extension of its log road in the direction of the timber in question. It also proved that it ran its mill at full capacity during the whole time. It is perfectly apparent that all parties to the suit understood that the jury should take into consideration not only the facilities had at the time the deed was executed, but any additional facilities the company subsequently acquired. The instruction taken as a whole, we think,

conveys this idea and this view is strengthened when we consider the fact that counsel for plaintiffs made specific objections to this instruction in other respects, and the contention now made was not one of them.

The judgment will be affirmed.

THE MERRIMAC MANUFACTURING COMPANY *v.* BIBB.

Opinion delivered May 29, 1916.

CONTRACTS—SALESMAN'S CONTRACT—BREACH BY SALESMAN.—Where plaintiff agreed to devote his entire time to the service of defendant, whom he was serving as a traveling salesman, and it appeared that plaintiff also carried a side line, it will be held as a matter of law that the plaintiff committed a breach of the contract, and it is error to submit that issue to the jury.

Appeal from Cleburne Circuit Court; *John I. Worthington,* Judge; reversed.

Marcellus L. Davis and *Brundidge & Neelly* for appellant.

The admission of the testimony and the submission of the question whether plaintiff carried a side line was prejudicial to the rights of defendant. 178 S. W. 403; Webster's Dict. 1953. There is no evidence to sustain the verdict and the instructions were prejudicial.

Bratton & Bratton for appellee.

1. The instructions given cover all theories of the case, but if not, appellant cannot complain because it did not ask an instruction on its theory. 75 Ark. 260; 76 *Id.* 166; 95 *Id.* 597; 78 *Id.* 362.

2. The contract was severable and there was no breach by appellee. 13 N. Y. Supp. 553; 20 N. Y. 423; 4 Bing. (N. C.) 187; 50 N. C. 173; 186 Ill. App. 390; 86 N. E. 306; 213 Fed. 340; 113 N. W. 827; 78 Ark. 177; 88 *Id.* 491.

3. Whether there was a breach of the contract or not was for the jury and they have settled it by their verdict.

4. There was no error in admitting testimony as to the "side line." Jones on Ev. § 455; 2 Car. & P. 525; 94 Ala. 545; 49 N. Y. 464; 8 Cent. Dict. & Enc., "Side-line." Appellant cannot complain because it introduced the same kind of testimony. 88 Ark. 489; 67 *Id.* 48, etc.

HART, J. R. L. Bibb sued the Merrimac Manufacturing Company to recover commissions alleged to be due him as a traveling salesman by them. The defendants averred that they had paid him all that was due him except $214.50 which was tendered to the plaintiff. The plaintiff refused to accept the tender and sued for a larger amount. This is the second appeal. The opinion on the former appeal is reported in 119 Ark. 443, 178 S. W. 403, under the style of *Merrimac Manufacturing Company* v. *Bibb*. The jury returned a verdict for plaintiff and the defendants have appealed. The material facts are as follows:

The defendants were engaged in manufacturing and selling clothing in the State of New York and the plaintiff was a traveling salesman. On the 15th of July, 1912, they entered into a written contract whereby the plaintiff agreed to travel and devote his entire time, zeal and energy towards selling the goods of defendants in the States of Arkansas and Missouri, and to carry no side line of any nature whatever. The defendants agreed to pay the plaintiff 10 per cent. on all accepted orders, including mail orders and house sales coming from his territory. They agreed to pay him five per cent. on all accepted orders and to notify him of all declined orders within thirty days after receipt of the same.

The plaintiff testified that the defendants committed a breach of the contract by failing to pay him as provided by the terms of the contract. He said that defendants owed him commission on individual orders in the sum of $3,035.20; that another representative of the defendant's was permitted to come into his territory and take orders to the amount of $5,490 on which he was entitled to commissions. After deducting the amount

paid him, the defendants owed him $2,625.70. According to the testimony of the defendants they accepted orders sent in by the plaintiff in the sum of $12,850, on which they owed him commissions at 10 per cent. They paid him at different times sums amounting to $1,071.50. They tendered him the sum of $214.50, the balance which they claimed they owed him. The plaintiff declined the tender.

In the opinion on the former appeal the statement of facts shows that the plaintiff admitted that he carried a side line. That is to say, that he carried another line of clothing in addition to that of the defendants. He testified, however, that the side line did not interfere with the sale of the defendants' line of clothing. The court held that the admission of this testimony was erroneous because the contract in express terms provided that the plaintiff should carry no side line of any nature whatever. On the retrial of the case the plaintiff admitted that he carried another line of clothing while working for the defendants and made sales of it but he testified that is was not a side line. He said that to carry a side line a salesman must have samples or a catalogue of the goods which he was selling. Other traveling salesmen testified to the same effect.

Counsel for defendants assign as error the action of the court in admitting this testimony before the jury and in submitting to the jury the question of whether or not the plaintiff carried a side line and thereby violated his contract. We think counsel for the defendants are correct in their contention. The court should not have admitted the testimony and should have told the jury as a matter of law that the plaintiff violated his contract by carrying a side line. Webster defines a side line in commercial usage to be a line of goods sold in addition to one's principal articles of trade. The Century Dictionary defines it to be a line or course of business aside from or additional to one's regular occupation. Within this meaning the plaintiff, according to his own testimony, carried a side line. It does not make any difference that he did not carry samples or have a

catalogue of the goods sold. The catalogue or samples would be only instrumentalities to be used in facilitating the sale of the goods and could not of themselves characterize the business as a side line.

It necessarily follows that the admission of the testimony and the submission of the question of whether the plaintiff carried a side line was prejudicial to the rights of the defendants. Under the law as announced in the opinion on the former appeal the plaintiff, notwithstanding he committeed a breach of the contract, was entitled to commissions on all individual orders sent in by him after he breached the contract, which were accepted by the defendants. After he had breached the contract he was not entitled to commissions on house orders sent from his territory or to orders sent in by other salesmen of the defendants and accepted by them.

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

WILKES v. HICKS.

Opinion delivered May 29, 1916.

1. FRATERNAL INSURANCE—CHANGE OF BENEFICIARY.—A change of beneficiary in a policy in a fraternal order cannot be made by the insured unless there is a substantial compliance with the by-laws and regulations of the society.
2. FRATERNAL INSURANCE—ATTEMPTED CHANGE OF BENEFICIARY—DEATH OF MEMBER.—While the beneficiary named in a policy of fraternal insurance has no vested right to the collection of the benefit, so long as the member had the absolute right to change the beneficiary, but upon the death of the member without any such change having been made or effected in accordance with the by-laws of the order, the beneficiaries' right to the proceeds of the policy become vested and cannot be defeated by the claim of another person whom the policy holder desired named as beneficiary in the policy, instead of the one therein written, such request not having been forwarded, nor attempted to be, to the officer of the order authorized to make the change, until after the member's death.

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

STATEMENT BY THE COURT.

The question alone of the right to the benefit provided in a policy issued to Prince Bedford, a member of the Knights of Pythias of North America, etc., an Arkansas Fraternal Insurance Society, is involved in this appeal.

The policy was issued on April 10, 1906, to Prince Bedford and none of the parties to this suit were named as beneficiaries therein; later the names of appellants were written in the policy as beneficiaries. The member continued in good standing until his death at Attalla, Ala., on February 25, 1913. On that day Prince Bedford called in some officers of the local lodge of the order at that place and informed them that he desired to change the beneficiary in his policy from appellants to his nephew, George Hicks, appellee, and signed a written request, in the presence of certain members, designating the said George Hicks as the beneficiary and requested that same be forwarded to the Grand Keeper of Records and Seal in order that the change of beneficiary should be made. He died afterwards on the same day and the request for the change of beneficiary with the proof of the death of the member was sent to the Grand Keeper of Records and Seal in the same enclosure, the proof of death being made on February 26, 1913.

The policy was issued with no beneficiary named therein and the insured had the right to insert the name of the beneficiary. The names of appellants were not written in the policy by the Grand Keeper of Records and Seal nor had the name of George Hicks been written in the policy at all. The by-laws of the order relative to a change of beneficiary provide:

"Any member of the Order is hereby authorized to change his beneficiary named in his policy, at any time, but no such change shall take effect or be in force until after the beneficiary's name has been furnished to the

Grand Keeper of Records and Seal and inserted by him in the face of the policy."

Several persons claimed the right to the benefit under the policy and the order filed a bill of interpleader in the Pulaski Chancery Court and paid the amount of the policy into court, naming the several claimants as defendants.

The case was submitted on an agreed statement of facts, virtually as above set out and from the decree adjudging George Hicks entitled to the fund, appellants prosecute this appeal.

Carmichael, Brooks, Powers & Rector for appellant.

The beneficiary in a fraternal insurance company cannot be changed when the request for change is not received until after the death of the insured. 48 Ark. Law Rep. 86; 44 *Id.* 123. The change must be made during the life of the insured. 34 Mont. 357; 115 Am. St. Rep. 532; 86 Pac. 423; 34 L. R. A. (N. S.) 279 note; 82 N. W. 331; 86 N. E. 216; 64 *Id.* 506; 76 *Id.* 234; 50 N. Y. Supp. 470; 218 Ill. 189; 109 Am. St. 283; 34 L. R. A. (N. S.) 280, 277; 69 Pac. 1020; 40 Tex. Civ. App. 593; 90 S. W. 526.

Bradshaw, Rhoton & Helm for appellee. *Gardner K. Oliphint* on the brief.

1. Appellants had no vested interest as beneficiaries and cannot complain. 131 S. W. 336; 131 N. W. 1127; 102 Ark. 76; 97 *Id.* 50.

2. Where a member has done everything in his power to conform with the rules of the association in attempting to change the beneficiary, but before all the formalities have been performed he dies, a court of equity will decree that to be done which ought to be done and effect the change. 48 Ark. Law Rep. 85; 44 *Id.* 123; 97 Ark. 50; 34 L. R. A. (N. S.) 277; 127 S. W. 645; 76 *Id.* 44; 134 Pac. 132; 146 S. W. 102; 154 *Id.* 9; 149 *Id.* 937; 150 N. W. 110; 200 Fed. 1; 126 N. W. 946; 138 S. W. 178; 132 N. W. 329; 75 Miss. 175; 77 S. W. 1091; 88 Pac.

106; 113 Ill. App. 398; 114 N. Y. 1149; 153 Ill. App. 232; 60 Tex. 532; 5 S. W. 385-7.

KIRBY, J., (after stating the facts). In *Robinson* v. *Robinson,* 121 Ark. 276, 181 S. W. 300, the court said: "The established rule and the one adopted in this State is that the change of the beneficiary cannot be made by the insured unless there is substantial compliance with the by-laws and regulations of the society." Citing cases.

The member's right to change the beneficiary named in his policy under the provisions of the by-laws of this order was absolute and could be made at any time upon a substantial compliance with the by-laws. The by-laws however provide that no such change shall be effective until after the beneficiary's name has been furnished to the Grand Keeper of Records and Seal and by him inserted in the face of the policy.

It is not contended that this provision of the by-laws was complied with, but that the member, whose right to change the beneficiary was absolute, had done all he could within the requirements of the by-laws in order to effect such a change by making the request in writing in the presence of the officers of the local lodge of the order, where he was, designating George Hicks as his beneficiary and directing that his designation and request be forwarded to the Grand Keeper of the Records and Seal, that the desired change should be made effective.

It is contended that since the beneficiary had no vested interest in the policy, he could not question the manner of the change of beneficiary and that said acts of the insured effected a change of said beneficiary within the authority of *Robinson* v. *Robinson, supra.*

We do not agree with this contention. It was said in that case that notwithstanding the member's right to change the beneficiary was absolute, the beneficiary having no voice in the matter, that such transactions manifestly required some formalities for the protection of the order, the member and the beneficiary, and that

such formalities must be substantially complied with before a change of beneficiary becomes effective. There, the member had appeared in open session of his local lodge, announced the separation from his wife and informed the lodge that he desired to change his beneficiary from his wife to his brothers and sisters, at the time writing his request for a change of beneficiary on a slip of paper and placing it with the policy and his statement was incorporated in the minutes of the lodge's meeting. This was more than a year before the death of the member and the order did not dispute its liability to the payment of the benefit, and the court held the beneficiary was changed.

The facts of this case are altogether different and do not bring it within the rule announced there, but rather within the doctrine of *Sovereign Camp W. O. W.* v. *Israel,* 117 Ark. 121. Here the member was not in his local lodge nor within any lodge in the State of its domicile at the time of indicating his desire and intention to change the beneficiary in his policy and naming George Hicks, appellee, as such. He wrote the request and directed it forwarded to the Grand Keeper of the Records and Seal and died before it was sent, the request for the change being forwarded along with the proof of the member's death. While it is true, the beneficiary named in the policy had no vested right to the collection of the benefit so long as the member had the absolute right to change the beneficiary, but upon the death of the member without any such change having been made or effected in accordance with the by-laws of the order, his right to the proceeds of the policy became vested and could not be defeated by the claim of another person whom the policy holder desired named as beneficiary in the policy instead of the one therein written, such request not having been forwarded, nor attempted to be, to the officer of the lodge authorized to make the change, until after the member's death.

The action of the deceased member in attempting to make a change of beneficiary to George Hicks upon the

day of his death was not effectual for the purpose and the court erred in so holding.

The decree is reversed and the cause remanded with directions to enter a decree in favor of appellants for the amount paid into court by the lodge in settlement of the amount due under the benefit certificate.

WOOLBRIGHT v. STATE.

Opinion delivered May 29, 1916.

1. EVIDENCE—ASSAULT WITH INTENT TO KILL—EVIDENCE OF INTENT.—Where appellant was indicted as a principal for assault with intent to kill, the evidence showing concerted action between appellant and his two sons looking to the assault of one P., evidence of a threat made by one of appellant's sons, that he intended to cut P's. throat, is admissible in a prosecution of appellant, although made in his absence.
2. ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE.—Defendant was properly convicted of an assault with intent to kill one P. when he was present when P. was brutally assaulted with clubs by his sons, and although he did not engage in the difficulty, he approved of it and encouraged the assailants.

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

STATEMENT BY THE COURT.

This appeal is prosecuted by Henry Woolbright from a judgment for assault with intent to kill one B. F. Palmer.

It appears from the testimany that bad feeling was engendered as the result of appellant's failure to win a law suit brought in the justice court by him against Palmer, his tenant. He was greatly dissatisfied with the judgment, refused to pay the costs and made threats in the presence of several persons that he would beat h—— out of Palmer the first time he caught him out. As the parties were leaving town in the afternoon of the day of the trial, appellant rode out a part of the way with

W. R. Palmer, who stated, he said, "Well I fed him all the year and now he has beat me out of it," or something to that effect. Of course, I can't remember everything, but during the conversation he said, "If he don't look sharp or ain't careful, I will beat h—— out of him." Witness replied, "You have had trouble enough," and advised it would be better not to have any more.

Wash and Leman, sons of appellant, and Sam Rogers, a boy about 18 years old, started out of town riding in his wagon, overtook appellant who got in with them and came upon B. F. Palmer, a man about 57 years of age, who in company with his wife was walking home from Vanndale, each carrying some packages of groceries. They drove up to Palmer, stopped the wagon and all got out except appellant, and with clubs assaulted and beat him, knocking him down two or three times or more and he remained unconscious from the beating for a week thereafter. Two gashes were cut in his head, to the skull, one three or more inches long and the other two.

Mrs. Palmer testified that she and her husband left Vanndale about 4 o'clock with an armful of groceries and were in a half-mile of their home when overtaken by the assailants; that Wash came running with a club in his hand about 4 feet long, hallooed and told Ben " 'Hold on there, you g— d— s— of a b—, we are going to settle with you now.' " He knocked my husband down, then the wagon came up with Henry, Leman and Sam Rogers. Leman jumped out, picked up a club and drawed back to hit Ben. He said to me, 'Shut your g— d— mouth,' and throwed and hit Ben on the left shoulder, and Wash knocked him down again, and then turned to his father, Henry, who was driving the wagon and asked him if that would do, and Henry replied, 'Them is baby licks; why don't you use your pistols?' " After Ben knocked her husband down again, she asked him not to hit him any more, and he replied, " 'Now you have paid for what you eat,' and I said, 'Yes and more too.' Then

he told Sam to hit him and Henry said: 'Come on, that will do.' They left laughing."

She identified the sticks that were used in beating her husband who made no attempt to resist the assault, and said he never spoke from the time he was knocked down for more than two weeks thereafter.

Neither appellant nor his son Wash testified, and Leman and Sam Rogers stated that when they came in the wagon to the turn in the road, they saw Wash talking to old man Palmer. Rogers said they were pointing their fingers at each other like they were quarreling and just before they reached them with the wagon, Wash struck at Palmer, who had his knife out, with his fist, and Leman ran up and asked what he meant by that and Palmer ran at Leman with the knife and Wash knocked him down; that the knife struck and cut Leman's coat. Palmer said something else to him that witness could not hear and Wash hit him again in the back of the head, struck him with a white oak stick witness thought. "Did not think the stick was as big as the one that was shown in court."

He testified that Henry Woolbright was in the wagon, a short distance away, all the time the fight was going on, and said nothing that he heard to encourage the fight and that he was as close to him as Mrs. Palmer. Said they went up to where the Palmers were and stopped the fight and after Wash knocked Palmer down the last time Mrs. Palmer said, "You fellows will have a job in court, if you don't mind." Wash said, "Get up and go on up the road." The first thing Wash said afterwards was, "We will have to go off somewhere to keep from paying a fine," and they did go to Helena that night and stayed away a day or two.

Leman stated that they were driving out in a wagon and his father got in after they left town and at that time they did not know where Wash was; that later he saw him and Mr. Palmer up the road and remarked, "I believe they are quarreling," and said to Sam Rogers, "Let's walk up there." When he got there he asked,

"What does this mean?" and Mr. Palmer ran at him and struck at him twice with a knife and Wash knocked him down; that his father drove up about the time Wash struck Palmer with the club the second time and they got in and drove off. That his father said nothing whatever during the fight; that he and Sam jumped out of the wagon to go to where they were fighting because his father said, "That old man has got a pistol."

Will Campbell stated over appellant's objection that Wash Woolbright before he got in the wagon going home, asked, "How far down the road is old man Palmer?" and said, "If I catch up with him, I am going to cut his throat."

The court instructed the jury, refusing to give appellant's requested instruction that the fact that Wash fled after the crime was committed, should not be considered as proof against the defendant and before the jury could find him guilty of assault with intent to kill, they must find beyond a reasonable doubt that at the time of the assault, the defendant Henry Woolbright had in mind a specific intent to kill B. F. Palmer.

Killough & Lines for appellant.

1. There is no allegation of conspiracy and evidence to show same was not admissible. 8 Cyc. 661; 12 *Id.* 436, 441; 101 Ark. 153; Wharton Cr. Ev. (9 ed.) § 698; 59 Ark. 430; 92 *Id.* 592; 87 *Id.* 40; 77 *Id.* 450; 87 *Id.* 40.

2. There was error in the court's charge to the jury. The fact of flight was not proof against defendant. 78 Ark. 284; 81 *Id.* 25; 12 Cyc. 441. A specific intent to kill was necessary. 94 Ark. 75; 91 *Id.* 505; 1 Wharton Cr. Law (10 ed.) 252-3.

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

1. The question of conspiracy is not involved. Kirby's Digest § 1588. Appellant was a principal. 89 N. W. 984; 104 Ark. 245; 101 *Id.* 153; 87 *Id.* 40. But if it was, there is ample proof. 98 Ark. 575; 96 *Id.* 629.

2. The jury were properly instructed. 96 Ark. 52. The judgment is fully sustained by the evidence.

KIRBY, J., (after stating the facts). Appellant was indicted as a principal for assault with intent to kill and the testimony of the witness, Will Campbell, of the statement made by Wash Woolbright shortly before he assaulted Palmer with the club, that if he caught up with him he was going to cut his throat, made in the absence of appellant was competent to show the intent or disposition of mind of the said actor in the crime in making the assault.

The undisputed testimony shows that appellant was personally present when Palmer was brutally assaulted with the clubs by his sons and although he did not get out of the wagon and engage in the difficulty, that he approved of it and encouraged the assailants and suggested after the old man had been knocked down twice that the blows were only "baby licks, that they should use their pistols." He had stated before leaving town that he was going to beat h— out of Palmer as soon as he caught him out, and his son Leman testified that he suggested that the old man had a pistol before he and Sam Rogers got out of the wagon and went to where they were fighting. Under these circumstances, he was as guilty of the offense as was the principal actor who wielded the club. *Hunter* v. *State,* 104 Ark. 246.

The proof was sufficient to show a concert of action between the parties and the threat made by Wash Woolbright in the presence of Campbell, when his father, appellant, was not present, would have been admissible in any event against him. *Turner* v. *State,* 121 Ark. 40, 180 S. W. 211.

The court did not err in refusing to give appellant's requested instruction, directing the jury that they must find beyond a reasonable doubt that he had in mind a specific intent to kill B. F. Palmer, before they could find him guilty. Instructions were given correctly defining the offenses of murder and assault with intent to kill and appellant was guilty of the offense if his son, Wash

Woolbright, who wielded the club, did it with the intent required by law to constitute the offense as the jury found.

Appellant's witnesses, Leman Woolbright and Sam Rogers, voluntarily stated without objection, that they went that night to Helena with Wash upon his suggestion, in order not to be arrested for the offense, and the court made no reference to their flight in its charge to the jury herein, and no error was committed in refusing appellant's requested instruction relative thereto.

The instructions given by the court, correctly declared the law and the testimony is sufficient to sustain the verdict. We find no prejudicial error in the record and the judgment is affirmed.

SECURITY LIFE INSURANCE COMPANY OF AMERICA v. MCCRAY.

Opinion delivered May 29, 1916.

PRINCIPAL AND AGENT—CONTRACT OF AGENCY — INSURANCE SOLICITOR — COMMISSIONS—TERMINATION OF CONTRACT.—A contract of agency, having been terminated by the act of the parties in accordance with its terms, which provided that the agent should receive commissions only so long as the contract continued in force, ended his right to claim commissions thereafter.

Appeal from Yell Circuit Court, Dardanelle District; *M. L. Davis*, Judge; reversed.

STATEMENT BY THE COURT.

A. S. McCray brought this suit for the collection of certain renewal commissions, alleged to be due him under the terms of his agency contract for writing insurance for appellant company.

It is admitted that the written contract was terminated on the 20th day of November, 1914, in accordance with its terms and all commissions and renewals paid to that

time, the suit being brought for commissions for renewals from said 20th day of November, 1914, the date of the cancellation of the contract.

Section 3 (A) of the contract provides: "The company in consideration of the services to be rendered by the agent agrees to pay the agent, as long as this contract is in force, on all business written by him, a commission upon the first year's premium of each policy accepted and paid for in cash, and a renewal commission upon subsequent premiums, when paid in cash in accordance with the following tables" which show the commisions to be 5 per cent. on all except three kinds of policies designated and "an additional renewal commission of 2 per cent. for five years will be paid on premiums of policies written on the first three plans scheduled above."

Section 18 of the contract stipulates:

"It is agreed that the provisions of this contract may be modified and changed without the consent of the agent if the same shall conflict with any state laws or rulings of any State Insurance Department; and should the license of the company to do business in the resident State of the agent, or any other State in this contract, at any time be withheld or revoked, or the company for any cause cease to do business in said State, this contract shall immediately terminate, except as to any rights the agent may have acquired as to renewal commissions."

Appellee testified that he was entitled under the terms of the contract, notwithstanding the termination of it, to the $130 claimed as renewal commissions, and recovered judgment therefor, from which this appeal is prosecuted.

J. T. Bullock and *Bradshaw, Rhoton & Helm,* for appellant; *E. B. Buchanan,* of counsel.

1. Plaintiff failed to make a case. There was no liability after the contract was canceled. It was only binding as long as the contract was in force. 63 Atl. 377; 193 Fed. 512; 112 S. W. 327; 70 *Id.* 251; 61 Minn. 330; 2 May on Ins. (4 ed.), § 576; 49 Am. Rep. 637; 50 *Id.* 21;

78 Am. St. 522; 13 Am. Rep. 529. No indebtedness whatever was proven.

John B. Crownover, for appellee.

The agent had a vested right in the renewals, and the cancellation of the contract did not divest his right *"acquired"* in the renewals. Bouvier Dict., p. 61, 625; Cooley's Const. Lim., sections 356-7; 45 Ark. 415; 8 Cyc. 894. There was proof of the indebtedness and appellant failed to prove payment. 65 Ark. 269; 12 Fed. 465.

KIRBY, J., (after stating the facts). It is conceded that the contract was terminated in accordance with its provisions on the 20th day of November, 1914, and admitted by appellee that he had received all renewal commissions to that time, his contention being that under the terms of the contract he is entitled to the designated per cent. of renewals on the three classes of policies written for the term of five years of the policies' existence.

The parties had the right to agree upon the terms of their contract and their rights are determined by its provisions, the whole of the contract and all its terms being considered in arriving at their intention in making it, each provision being given full effect as far as the language of the whole instrument will permit.

It is plain from the provisions of said section 3-A, that there was only an agreement to pay the agent as long "as this contract is in force." Then follows the stipulation as to the amount of the commissions upon the first year's premiums and the renewal commissions upon subsequent premiums paid in cash upon the entire table of policies designated, with additional renewal commissions of 2 per cent. for five years on premiums of policies written on the first three plans or classes designated in the schedule or table. The payment of 5 per cent. commission on the policies specified in the table, extended to the life of the policy and there is no more reason for saying that the agent's right to collect the 7 per cent. renewal commission for five years on the policies in the first three

classes designated continued after the termination of the contract of agency, than to say that he was entitled notwithstanding its termination, to the 5 per cent. renewal commissions for the life of all the policies written.

It is insisted that the last clause of said section 18, providing that the contract may be changed in certain events, or for the termination of it upon the company's ceasing to do business in the State, which concludes, "except as to any rights the agents may have acquired as to renewal commissions," indicates a contrary intention and the right of the agent to renewal commissions after the termination of the contract, but we do not think so.

The insurance company recognized its liability to the payment of all commissions, renewal commissions included, up to the time of the termination of the contract, in accordance with section 11 providing for the termination thereof by the act of the parties, and under which it was terminated, and paid him all commissions of every kind due to that date, as shown by his own statement. It was evidently only the intention by this latter clause to protect the agent's right to renewal commissions upon the termination of the contract by the company's being refused permission or ceasing to do business in the State, and whether the renewal commissions could have been exacted by the agent upon the termination of the contract under such contingency for a longer time than the date of its termination, is not necessary to decide, since it was terminated by act of the parties.

The agent having the right to receive commissions only so long as the contract continued in force and it having been annulled was without right to any commissions on renewal premiums, after the date of the termination of his contract of agency. *Stagg* v. *Insurance Co.*, 10 Wall. 589; *Fidelity & Deposit Co.* v. *Washington Life Ins. Co.*, 193 Fed. 512; *Scott* v. *Travelers Ins. Co.*, 63 Atl. 377, 16 Am. & Eng. Enc. Law, 919; 2 May on Ins., section 576.

The contract of agency having been terminated by the act of the parties in accordance with its terms, which provided that the agent should receive commissions only,

so long as the contract continued in force, ended his right to claim commissions thereafter and the court erred in holding otherwise. The judgment is reversed and the cause dismissed.

Justice Hart being disqualified did not sit in case.

GRIST v. LEE.

Opinion delivered May 29, 1916.

PLEADING AND PRACTICE—COMPLAINT SOUNDING IN CONTRACT—PROOF OF TORT.—Where a complaint states a cause of action for breach of contract, it is error for the trial court to permit the plaintiff by his evidence to completely change the nature of his suit, and to make a suit for damages for a tort.

Appeal from Logan Circuit Court, Northern District; *James Cochran,* Judge; reversed.

Robt. J. White, for appellant.

1. This was a suit upon a contract and it was error to allow testimony to show a tort by conversion of the property. One can not sue upon contract and recover in tort. 69 Ark. 209; 76 *Id.* 335; 64 *Id.* 213; 70 *Id.* 319, 325; 67 *Id.* 1; 49 *Id.* 94. The court improperly instructed the jury.

D. E. Johnson, for appellee.

1. Whether the issue was one of contract or of tort, the matter grew out of the same facts and could be plead in the same suit. Acts 1905; 83 Ark. 288; 86 *Id.* 130.

2. There is no error in the instructions. The answer does not deny conversion and the proof shows it. 63 Ark. 268; 54 *Id.* 30; 56 *Id.* 450. The verdict is amply sustained by the evidence and Lee's property was taken, as admitted, without his knowledge and consent.

SMITH, J. The complaint in this cause contained the following allegations: That on the 16th day of January, 1915, the defendant (appellant) entered into a contract with plaintiff (appellee) agreeing to purchase the inter-

est and equity of plaintiff in a certain well drill and to pay therefor the sum of $250 and to assume the payment of balance due on said machine to the Lester-Sicard Machine Company, of Fort Smith, in the sum of about $254. That defendant immediately took from the possession of plaintiff said machine and, as he is informed and believed, has paid said balance due on said machine to the Lester-Sicard Machine Company.

That defendant on said date agreed to execute to plaintiff his two promissory notes in the sum of $175 each, bearing interest at 10 per cent., with security subject to plaintiff's approval. That said contract has been in all parts complied with except the execution of said notes on the part of defendant and that he still neglects and refuses to execute said notes and thereby has converted to his own use the said property of plaintiff, to his damage in the sum of $350. Wherefore, judgment is prayed. The answer contained a general denial of these allegations.

Appellee's testimony as a witness was in substantial support of these allegations; but after the conclusion of his cross-examination he testified, on his redirect-examination, that he never authorized Mr. Grist to get the drill and that he did not know he had gotten it until it had been hauled away. This evidence was given over appellant's objection and exception.

Appellee says his suit is for the conversion of the drill and that the effect of his allegations in regard to the contract is merely to furnish a measure for the damages sustained by the wrongful conversion of his property, and instructions were given which conformed to this view.

We do not agree, however, with the view that this is the effect of the allegations of the complaint. We think the complaint states clearly a cause of action for damages for a breach of contract and that the court erroneously permitted appellee by his evidence to completely change the nature of his suit and to make it a suit for damages for a tort.

In the case of *Patrick* v. *Whitely,* 75 Ark. 468, the court quoted with approval the following language from

the New York Court of Appeals: "Pleading and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action, and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." See also *K. C. So. Ry. Co.* v. *Tonn,* 102 Ark. 20; *Wood* v. *Wood,* 59 Ark. 446; *Midland Valley Ry. Co.* v. *Ennis,* 109 Ark. 217; *White River Ry. Co.* v. *Hamilton,* 76 Ark. 333; *St. Louis, I. M. & S. Ry. Co.* v. *Gillihan,* 77 Ark. 551; *Shapleigh Hardware Co.* v. *Hamilton,* 70 Ark. 319; *Fluty* v. *School Dist.,* 49 Ark. 94; *Conant* v. *Storthz,* 69 Ark. 210; *Railway Co.* v. *State,* 59 Ark. 165; *Railway Co.* v. *Dodd,* 59 Ark. 323; *Necklace* v. *West,* 33 Ark. 682.

We think, therefore, that error was committed in thus permitting appellee to change the nature of his cause of action and the judgment must, therefore, be reversed and the cause will be dismissed.

HUFFMAN v. FUDGE.

Opinion delivered May 29, 1916.

MORTGAGES—PURCHASE OF MORTGAGED LAND—RIGHTS OF PURCHASER.—The mere purchase of the equity in land subject to a mortgage, imposes no obligation upon either the purchaser or seller *inter se,* to pay the mortgage debt, and constitutes only a recognition that the debt is a lien on the land, and that neither party is to look to the other for indemnity. The grantee, having no obligation to pay the debt, is at liberty to deal with it as he pleases, and may treat the lien as superior to his own equities, and purchase the mortgage debt and enforce the lien against the land.

Appeal from White Chancery Court; *John E. Martineau,* Chancellor; reversed.

Brundidge & Neelly, for appellant.

The appellant contends. (1) That the only contract or agreement it had with appellee was that it was to accept a deed for the equity in the lands in satisfaction of its

judgment. It never assumed the mortgage or agreed to pay it and did not assume it by purchasing the equity. (2) The alleged contract to convey twenty-one acres was within the statute of frauds. The court erred in granting relief under the cross-complaint. The only thing the bank agreed to do was to satisfy its judgment. 2 Am. & Eng. Ann. Cases, 286; 95 U. S. 289; 136 *Id.* 68; 148 *Id.* 481; 10 Okla. 527; 51 Mich. 636; 46 *Id.* 610; 8 Okla. 489; 23 Ark. 706; 32 Kans. 62; 2 Pom. Eq. Rem. 764; 113 Ark. 438; 103 *Id.* 191.

Eugene Cypert and *John E. Miller*, for appellees.

The bank agreed to accept in full satisfaction of its judgment the conveyance of a portion of the lands and to assume the mortgage debt. The deed was tendered and refused. Now appellants say the deed was indefinite in description and attempt to set up the statute of frauds. The description was sufficient. 61 N. J. Eq. 501; 8 Eng. & Am. Dec. in Equity, 639; Fry on Spec. Perf., § 328-9; 27 Beavers, 437; 66 Ark. 400; 85 *Id.* 442, and many others.

Huffman was trustee for the bank which assumed the mortgages. The court properly decreed specific performance.

McCULLOCH, C. J. This is an action instituted in the chancery court of White County by appellant, C. S. Huffman, against the appellees, J. T. Fudge and W. H. Thomas, to foreclose a mortgage executed by appellees to Frank D. Thomas, of Camp Point, Illinois, on certain real estate in White County to secure the payment of a note for the sum of $4,000, with interest, dated February 15, 1909, and due and payable on February 14, 1914, which said note and mortgage had been assigned by Frank D. Thomas to appellant.

Appellees answered, denying the allegation that Huffman was the owner of the mortgage by assignment from Frank D. Thomas or otherwise, but alleged that on the contrary the mortgage had been paid by the Columbus State Bank of Columbus, Kansas, pursuant to

an agreement with appellees to assume the obligation. Appellees filed a cross-complaint, as well as an answer, in which they alleged that they were indebted on contract to the Columbus State Bank in the sum of $3,000, for which judgment had been rendered against them in favor of said bank by the circuit court of White County, and that the bank had entered into an agreement with them to accept in full satisfaction of said judgment a conveyance of a portion of the lands conveyed by said mortgage and agreed further, in consideration of said conveyance, to assume and pay off said mortgage debt. They alleged further, in the cross-complaint, that they had offered to comply with said agreement but that the bank had refused to perform the same, and that the bank had procured an assignment of the mortgage to Huffman to hold for the benefit of the bank, and that the bank was really the owner of the mortgage.

The prayer of the cross-complaint was that the Columbus State Bank be made a party to the suit, that appellant Huffman be declared a trustee holding the note and deed of trust for the use of the bank, and that the note and deed of trust be canceled and treated as satisfied on account of said agreement of the bank to assume the payment thereof. The Columbus State Bank was made defendant to the cross-complaint and entered its appearance, and on final hearing of the cause the court entered a decree in accordance with the prayer of the cross-complaint, and an appeal has been duly prosecuted to this court.

The property in controversy comprises three hundred acres of land near the city of Searcy, and several small lots inside the city limits. Fifteen acres of the land constitutes the homestead of appellees. The alleged agreement set forth in the cross-complaint is evidenced by correspondence, beginning with a letter from appellee Thomas to appellant Huffman, dated April 27, 1914, proposing to "deed to the bank our equity in 285 acres for their judgment;" the letter proceeds with a

statement that "our equity is worth at least $2,000 more than your judgment, but we are not in position to hold so as to realize the real value of the land." The letter contains the further statement that "the mortgage is now due and something must be done or they will foreclose, and in case they do, the only way we would ever pay our obligation with the bank would be as we have suggested."

The bank replied to the letter, under date of May 12, 1914, as follows: "Replying to your letter of recent date wherein you propose to deed to the Columbus State Bank your equity in 285 acres of land near to the city of Searcy, Arkansas, in consideration of the release of the judgment the Columbus State Bank holds against you, I will say that we accept your proposition, and ask that you execute deed for same and forward to the Cherokee County State Bank, for examination, and if satisfactory we will forward release of our judgment against you."

Huffman was a stockholder and director in the Columbus State Bank, and had been its president, but was not president at the time this transaction occurred, having been succeeded by W. S. Norton. Appellees executed a deed conveying the land to the Columbus State Bank, reciting in the face of the deed the prior mortgage executed to Frank D. Thomas, and also containing a recital that the Columbus State Bank, as a part of the consideration, assumed the payment of the mortgage. This deed was forwarded to the Cherokee County Bank for delivery to the Columbus State Bank, but the latter refused to accept the deed because of the recital therein concerning the assumption of the mortgage debt by the grantees, and for other reasons unnecessary to mention in this connection.

On May 18, 1914, the Columbus State Bank forwarded to Frank D. Thomas the amount of the note, with accumulated interest, aggregating, principal and interest, the sum of $5,069.55, and directed that the note and mortgage be transferred to Huffman, and Thomas accepted the money and executed a written assignment

transferring the mortgage and note to Huffman. The letter from the bank to Thomas showed that the transaction was to be for the benefit of the bank, and that the assignment was to be to Huffman merely for the accommodation of the bank for the reason that under the laws of Kansas the bank was restricted in its holdings of real estate. The letter further contains the statement that "we have accepted the proposition made by Messrs. Fudge & Thomas, whereby we become the owners of the fee in this real estate." Mr. Norton, the president of the Columbus State Bank, subsequently visited Searcy and had some conference with appellees, but it does not appear that there was any additional agreement made different than that expressed in the correspondence.

It will be noted from the correspondence set forth above that the proposition made by appellees was to sell to Huffman their "equity in 285 acres," and the acceptance by the bank was couched in the same language. The contract thus established by the correspondence contained no obligation on the part of appellant or the bank to assume the payment of the mortgage debt, therefore the bank was justified in refusing to accept the offered conveyance reciting an assumption on the part of the bank of the mortgage debt. The conveyance was not in accordance with the terms of the contract, and appellees did not comply with their contract in tendering this deed, and, on the contrary, broke their contract by refusing to execute a deed in any other form. For that reason, if for no other, they are not in an attitude to seek specific performance of the contract. But in addition to that, under the terms of the contract neither Huffman nor the Columbus State Bank agreed to assume the payment of the mortgage debt and can not be compelled to do so. Some of the authorities seem to make a distinction between the purchase of real estate "subject to" a prior mortgage and the purchase of the equity therein, a few of the courts holding that a purchase subject to a prior mortgage implies the obligation to pay it, while

the mere purchase of an equity does not amount to an obligation to pay. Other courts hold that there is no distinction between the two, and that the purchase subject to a mortgage is equivalent merely to a purchase of the equity. Such is the express holding of the Massachusetts court in the case of *Fiske* v. *Tolman,* 124 Mass. 254, where it is said: "It is settled in this Commonwealth, that, where land is conveyed in terms subject to a mortgage, the grantee does not undertake, or become bound by the mere acceptance of the deed, to pay the mortgage debt. In the absence of other evidence, the case shows that he merely purchased the equity of redemption." That case was cited with approval by this court in *Patton* v. *Adkins,* 42 Ark. 197, where it was held that "the acceptance of a deed subject to a specified mortgage does not imply a promise by the grantee to pay the mortgage debt." That doctrine has been adhered to by this court in later cases. *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426; *Mott* v. *American Trust Co.,* 124 Ark. 70.

While the authorities are not altogether in harmony on this subject, our position on the question seems to be in accord with the weight of authority. "If the purchaser buys a mere equity of redemption," says Mr. Jones in his work on Mortgages, Vol. II, section 738, "he is not personally liable for the mortgage debt, or liable either legally or equitably to indemnify his grantor against the mortgage. He may give up the property at any time in satisfaction of the lien." Now, according to this doctrine the mere purchase of the equity imposes no obligation upon either of the parties *inter se* to pay the mortgage debt, but constitutes merely a recognition that the debt is a lien on the land and that neither party is to look to the other for indemnity. It necessarily follows that under those circumstances, the grantee, having no obligation to pay the debt, is at liberty to deal with it as he pleases, and has a legal right to treat the lien as superior to his own equities and to pur-

chase the mortgage debt and enforce the lien against the land.

According to the undisputed evidence in this case, the contract of Columbus State Bank was merely to purchase the equity in a certain portion of the mortgaged lands in consideration of a release of its judgment against the appellees, and if that contract had been consummated it would not have constituted an extinguishment of the mortgage, nor would it have prevented appellant from purchasing the mortgage and enforcing the lien thereof against all of the lands described in the mortgage.

The chancellor was therefore in error in sustaining the prayer of the cross-complaint, and the decree is reversed and the cause remanded with directions to dismiss the cross-complaint and enter a decree foreclosing the mortgage in accordance with the prayer of appellant's complaint.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* CRABTREE.

Opinion delivered June 5, 1916.

LIFE INSURANCE—DEFAULT IN PAYMENT OF PREMIUM—NOTE—ELECTION BY COMPANY—NOTICE TO ASSURED.—Under a policy of life insurance, after the payment of two years premiums, certain provisions were made, where the insured became in default in the payment of an annual premium. *Held*, under the terms of the policy, that when the insured executed a note to cover a premium then due, that upon the non-payment of the premium note, that the company was put to an election whether it would apply the unpaid amount of the earned premium to the cash surrender value, and thus reduce the term of the extended insurance, or hold the amount as indebtedness against the insured, and that in order to exercise the option to reduce the extended insurance, notice to the insured was essential.

Appeal from Greene Circuit Court, First Division; *W. J. Driver*, Judge; affirmed.

Jones, Hoeker, Sullivan & Angert and *Block & Kirsch*, for appellant.

1. The policy and note embody the contract of the parties. 96 U. S. 234; 187 *Id.* 335; 104 Ark. 294; 75 *Id.* 814; 160 Fed. 646.

2. On August 9, 1914, 102 days after the third premium became due, and default in payment of the note, all rights of the insured and beneficiary ceased and determined without notice. 74 Ark. 507; 85 *Id.* 337; 160 Fed. 646; 104 Ark. 288; 81 *Id.* 145; 79 *Id.* 38; 75 *Id.* 25; 74 *Id.* 507; 65 *Id.* 240. The policy was forfeited and there was no estoppel or waiver by the company. 93 U. S. 24; 104 Ark. 297. 74 S. W. 663 is not an authority for appellee. The law should have been declared as contended for by appellant.

M. P. Huddleston, Robert E. Fuhr and *J. M. Futrell,* for appellee.

1. Upon the nonpayment of the premium note the company was put to an election whether it would apply the unpaid amount of the earned premium to the cash surrender value, or hold the amount as indebtedness against the insured and notice was necessary. 72 N. E. 358; 23 Minn. 491; 74 S. W. 663; 9 Cyc. 647; Bishop on Contracts, § 783. The policy remained in force until affirmative action was taken by the company. 3 Cooley Briefs on Insurance, 2278; 80 Ark. 563.

McCULLOCH, C. J. This is an action on a life insurance policy issued by appellant; the defense asserted is that there was a forfeiture of the policy on account of nonpayment of the third annual premium. The policy, which was on the ordinary life plan, was issued on April 29, 1912, to J. S. Crabtree, and the sum named was made payable to appellee, Mary M. Crabtree, the wife of J. S. Crabtree, in the event of the death of the latter and due proof thereof being made to the home office. The annual premium was the sum of $34.13, payable on the 29th day of April of each year during the life of the assured. The facts of the case are undisputed, and the question presented on this appeal is whether or not the

trial court, before whom, sitting as a jury, the case was tried, erred in rendering judgment against appellant.

The policy contained the following clause with respect to payment of premium and the options allowed on nonpayment thereof.

"After completion of premium payments for the first two policy years if any subsequent premium is not paid on the date when due, and remains unpaid during the month of grace, the insured shall, during said month, have the following options:

"1. To surrender this policy at the home office of the company for its cash value; or,

"2. To surrender this policy at the home office of the company for a paid-up life policy; or,

"3. To let the insurance for the face amount hereof continue as term insurance.

"If the insured shall not within the month of grace surrender this policy at the home office of the company for its cash value as provided in Option 1, or for a paid-up life policy as provided in Option 2, the insurance will be automatically continued as provided in Option 3."

There is a further stipulation in the policy that the term of continued insurance mentioned in the third sub-division quoted above "will be such as the cash value of this policy less any indebtedness hereon to the company, will purchase at the company's single life and term rates, respectively, for the attained age of the assured, counting each completed quarter of policy year in arriving at such age."

The first two premiums were paid when they fell due, and it is agreed that the length of the term of the continued insurance was one year and seven months from the date of the expiration of the time for the payment of the third premium—that is to say, that length of time from the expiration of the thirty day grace period running from April 29, 1914. The insured gave the company a promissory note for the amount of the third premium due and payable six months from April 19, 1914,

the day that premium was due, which said note contained the following stipulation:

"That if this note is not paid on or before the day it becomes due, said policy shall be deemed to have ceased and determined on the date when said premium was due and all rights to extended or paid-up insurance shall be for the term and amount secured by said policy on and from the day when said premium became due; but, nevertheless, the maker of this note shall be personally liable to the company for a sum equal to one-half of the principal, of this note, said sum to be due and immediately collectible as compensation for the rights and privileges hereby granted and as the earned premium for the insurance granted from maturity of this note (or at the pleasure of the company said sum, with interest at 6 per cent., may be treated as an indebtedness on account of the policy to reduce any of its nonforfeiture values or benefits in accordance with the terms of the policy); and the payment to or collection by said company of said sum shall not revive said policy or any of its provisions."

That note was not paid and appellant charged the sum equal to one-half of the principal of the note against the assured in reduction of the amount of the nonforfeiture value, which left of the original cash value of the policy on the last premium date a sufficient balance to purchase extended insurance for 102 days. No notice, however, was given to the insured of the company's election to so apply the so-called earned premiums evidenced by the note. The assured, J. S. Crabtree, died on April 15, 1915, which was within the original term of extended insurance.

The contention of appellant, therefore, is that under the contract specified in the note it had the right to charge the earned premium against the cash surrender value, and thus reduce the amount which went under the policy towards the purchase of extended insurance, and that inasmuch as the sum left was only sufficient to purchase extended insurance for the period of 102 days,

the policy was automatically terminated on the due date of the note without any further action on the part of the company. On the other hand, the appellee contends, and the court so held, among other things favorable to appellee, that upon the nonpayment of the premium note the company was put to an election whether it would apply the unpaid amount of the earned premium to the cash surrender value, and thus reduce the term of the extended insurance, or hold the amount as indebtedness against the insured, and that in order to exercise the option to reduce the extended insurance, notice to the assured was essential.

We are of the opinion that the court was correct in holding that appellant's option could not be exercised by applying the sum of the unearned premiums in reduction of the terms of the extended insurance, without notice to the insured. It will be observed from consideration of the express terms of the note that the amount of the earned premiums was to be a personal liability of the maker of the note to the company, unless the company elected to treat it "as indebtedness on account of the policy to reduce any of its non-forfeiture values or benefits," and in order to exercise that option it was necessary to furnish some evidence thereof by notice to the other party to the contract. The note itself was the evidence of the liability, and the company by retaining this evidence, without any notice to the maker of the note, elected to treat the amount as a continuing personal liability of the maker. If the assured had outlived the original term of extended insurance, the company, by retaining the note and failing to make an election to the contrary, might have sued him for the amount of this personal liability, and there is no reason why a recovery could not have been had upon that liability. Of course, the company had no right to speculate on the result by retaining the evidence of liability and at the same time treating the liability as extinguished by application of the sum in reduction of the amount of extended insurance.

This is not a question of the necessity of declaring a forfeiture which under the terms of the contract results automatically, but it is a question of exercising an option, and in that case it is necessary to give some notice of what the intention of the party is with respect to the election. The principle has been settled by this court in several cases. *Lenon* v. *Mutual Life Ins. Co.*, 80 Ark. 563; *Patterson* v. *Equitable Life Assurance Society*, 112 Ark. 171.

Appellant relies upon the case of *Citizens' National Life Ins. Co.* v. *Morris*, 104 Ark. 288, but we think the principles announced in that case have no application to the present one.

There is another question in the case, whether or not the company had a right to stipulate in the note a restriction upon the term of the extended insurance, there being nothing in the policy which authorized it. The policy is payable to appellee, but there is a stipulation that the insured could change the beneficiary at any time. Whatever vested interest the beneficiary had in the policy, was beyond the power of the company to restrict by an additional contract not authorized by the terms of the policy itself. However, we pretermit any further discussion of that question for the reason that the point already decided is conclusive of the case and calls for an affirmance of the judgment.

It is ordered, therefore, that the judgment be affirmed.

NELMS *v.* ORNE.

Opinion delivered June 5, 1916.

TAX SALES—SUIT TO CONDEMN—SERVICE UPON MINOR.—An action to condemn lands for non-payment of levee taxes, brought under Act 19, p. 24, Acts 1893, as amended by Act 71, p. 88, Acts 1895, is in the nature of a proceeding *in rem*, and personal service upon an infant land owner or his natural or statutory guardian is not necessary.

Appeal from Crittenden Chancery Court; *Chas. D. Frierson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This suit involves the title to a certain tract of land in Crittenden County, Arkansas. In January, 1891, J. F. Earle, who owned the land, died and the title to the land descended to his only children Ben R. and Ruth. They were nonresidents of Crittenden County. In 1903 Ben conveyed his undivided interest to his sister, Ruth Earle (now Nelms).

A suit was brought July 1, 1895, by the board of directors of the St. Francis Levee District against the Arkansas Land & Timber Company and others under the Levee Act of 1893, as amended by the Act of 1895, to enforce the payment of the levee taxes for the years 1893 and 1894. The land was proceeded against as the property of Julia Miller (now Orne), who was served with summons. There was also a warning order duly issued, in which the land was described as the property of Julia Miller.

Ben Earle reached his majority December 11, 1891, and Ruth Earle reached her majority May 31, 1901. She was married April, 1904, to one Nelms.

Ben and Ruth Earle, in the tax suit above mentioned, were constructively summoned. Ruth Earle at that time was a minor fourteen years of age. C. L. Lewis was her guardian, and he was made a party in his individual capacity to the tax suit and personally served with process. He was not, however, served as guardian or as guardian of Ruth Earle, a minor.

A decree was rendered in the suit to enforce the levee taxes condemning the land to be sold and sale was made to the St. Francis Levee District on July 21, 1896, and the deed to the district was duly executed and confirmed.

On October 19, 1899, the levee district executed its deed to Julia Miller (now Orne). She was in possession of the land in July, 1898, and since that time has

been in the actual, adverse, exclusive, hostile, open and notorious possession of the land.

On November 24, 1902, Ruth Earle (now Nelms) brought suit in the Crittenden chancery court against W. M. Brown, *et al.* Julia Orne was made a party, and in that suit Ruth Earle (now Nelms) sought to recover the lands now in controversy. On motion of Julia Miller the case was severed as to her and that branch of the case ordered to the law court on September 29, 1905. The case did not appear on the docket in the law court during the years 1905, 1906, 1907 and 1908. At the November term, 1909, an entry appears on the docket of the law court as follows: "No. 1049. Ruth Earle Nelms v. Julia Orne."

On December 30, 1909, the complaint now before the court was filed. No summons was issued, but the appellee filed her answer. The case was by consent transferred to chancery court on April 21, 1910.

The court, on this agreed statement of facts, entered a decree dismissing appellant's complaint for want of equity, from which this appeal has been duly prosecuted.

Allen Hughes and *B. J. Semmes,* for appellant.

1. There was no abandonment of the suit by appellant. 1 Corpus Juris., 1169, 1170.

2. The sale for taxes was void even on collateral attack. Appellant was a minor and no service was had upon her or her guardian. Kirby's Digest, § 6049; 11 S. W. 438; 15 *Id.* 1025; 101 Ark. 309. The court obtained no jurisdiction either of the land or person.

W. W. Hughes, for appellee.

1. The proceeding was *in rem.* Personal service is only required where the owner is in the county, or there is an occupant of the land. Neither was the case here. The warning order was duly published and this gave the court jurisdiction. 74 Ark. 174; 94 *Id.* 588; 101 *Id.* 390. Kirby's Dig., § 6049 does not apply. Nor do 11 S. W. 438 and 15 *Id.* 1025. See 74 Ark. 174 and 94 *Id.* 588.

2. Infants are not excepted from the act. The courts can make no exceptions. 46 Ark. 25; 53 *Id.* 418; 79 *Id.* 1; 86 *Id.* 368; 108 *Id.* 219. Appellant is barred.

WOOD, J., (after stating the facts). It appears from the agreed statement of facts that the appellee was in possession of the land in suit and claiming title thereto under a decree of the chancery court of Crittenden County condemning the land to be sold for delinquent levee taxes. The suit by the appellant was a collateral attack on that decree. She contends that inasmuch as she was a minor under fourteen years of age and a nonresident, and that inasmuch as her guardian, who was a resident, was not made a party to the suit as her guardian and served as such, that the court by the order of publication acquired no jurisdiction to condemn her lands, and that the sale was therefore void. She admits that she has no title to the part conveyed to her by her brother.

The suit to condemn the land for levee taxes was brought under the Act of 1895,* amending the Act of 1893.† This court in several cases has construed that act, holding that the proceedings were in the nature of proceedings *in rem,* and that where a decree is rendered upon a complaint properly describing the lands and where the nonresident land owners are constructively served, by warning order as prescribed by the statute, in which the lands are properly described, the court has jurisdiction to enter a decree condemning the lands to be sold for the delinquent levee taxes.

In *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390, we said: "By such notice, all nonresident persons having an interest in the land are warned of the pendency of the suit and are concluded thereby, whether they are made parties to the suit or not. It is, therefore, not necessary to name the true owner, in event he is a non-

*Act. 71, p. 88, Acts 1895.

†Act 19, p. 24, Acts 1893. (Rep.)

resident, either in the complaint or in the notice, and the decree entered upon such notice is not open to collateral attack by reason of the failure to name the true owner either in the notice or to make him a party to the suit. Notice is sufficiently given to every one who is a nonresident and has any interest in the land by the description of the land which is proceeded against, and which is set out in such notice."

And further on in the same case, speaking of the service by publication, we say: "If the land is duly described in such published notice or warning order, it is sufficient to give the court jurisdiction over all nonresident persons who have any claim whatsoever in said land, although it is noted as belonging to one who actually has no interest therein, in event such land is actually owned by a nonresident." See also *Ballard* v. *Hunter,* 74 Ark. 174; *Pattison* v. *Smith,* 94 Ark. 588.

But appellant contends that these cases have no application for the reason that the complaining nonresident land owners in those cases were adults, and that inasmuch as appellant was a minor under the age of fourteen years she had to be served under the provisions of section 6049 of Kirby's Digest, which provides:

"Where the defendant is an infant under the age of fourteen years, the service must be upon him, and upon his father or guardian, or, if neither of these can be found, then upon his mother, or upon any other person having the care or control of the infant, or with whom he lives. Where the infant is over fourteen years of age, service on him shall be sufficient."

But the acts under which the land in controversy was condemned are all comprehensive, and, as construed by the court, the notice there prescribed was to be the only method of service upon nonresident land owners. The statute makes no exception as to infants and the courts can make none. As it is in the nature of a proceeding *in rem,* no reason is perceived why personal service should be had upon the infant or his natural or

statutory guardian. Section 6049, *supra,* has no application here, and this case is ruled by the above cases.

While the agreed statement shows that appellant had a guardian who was a resident of Crittenden County, it does not show that the lands were occupied by him. He was made a party to the suit as an individual, presumably for the reason that he was also an owner of some of the lands sought to be condemned.

The decree of the chancery court being correct on the merits, we pretermit a discussion of the question as to whether there had been an abandonment of the suit by the appellant.

The decree is therefore affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* HOWLE.

Opinion delivered June 5, 1916.

1. APPEAL AND ERROR—FORMER APPEAL.—Where the facts are the same, the law, as declared on a former appeal, will be controlling on a second appeal.
2. EVIDENCE—SANITY—NON-EXPERT WITNESSES.—Non-expert testimony as to deceased's sanity is admissible, when the witnesses show proper familiarity with his habits and conduct.
3. ASSAULT—TEMPORARY INSANITY—USE OF INTOXICANTS.—It is no defense, that deceased was temporarily insane when he committed an assault, where such temporary insanity was produced by the voluntary and recent use of ardent spirits.
4. CRIMINAL LAW—DRUNKENNESS AS A DEFENSE.—Voluntary drunkenness is no excuse for the commission of a crime.
5. ASSAULT—DRUNKENNESS—TEMPORARY INSANITY.—Where one has threatened to kill another, and with that purpose in his mind, has imbibed intoxicating liquors in order to embolden him to the deed, and commits the deed while his reason is temporarily dethroned from the use of intoxicants, he is nevertheless guilty of a crime.

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

Brundidge & Neelly, for appellant.

1. The court erred in its charge to the jury and in refusing defendants prayers No. 1 and 8. 120 Ark. 530; 98 Ark. 135; 98 *Id.* 232; 109 *Id.* 402; 54 *Id.* 588; 51 *Id.* 244.

Rachels & Yarnell and *John E. Miller,* for appellee.

1. Howle was insane. 103 Ark. 196; 76 *Id.* 286; 118 Ark. 226.

2. There is no error in the court's instructions. 89 Ark. 230; 81 *Id.* 205; 71 *Id.* 299; 104 *Id.* 417; 79 *Id.* 172; 78 *Id.* 574; 89 *Id.* 24; 105 *Id.* 213; 101 *Id.* 353; *Ib.* 469; 76 N. Y. 426; 11 N. E. 620; 91 *Id.* 230; 43 Ind. App. 126; 6 L. R. A. 731; 42 *Id.* 247; 97 Iowa, 226; 136 U. S. 276; 170 Ill. App. 79; 57 Mo. App. 87; 53 L. R. A. 743, etc. But if there was error it was not prejuidical.

WOOD, J. This is the third appeal in this case. (*Eminent Household of Columbian Woodmen* v. *Howle,* 109 Ark. 400; *Id.* 118 Ark. 226). The facts are stated in the first opinion.

John W. Howle was shot and killed while a member of appellant fraternal insurance company. This suit was brought by the appellee, his wife, as beneficiary in a policy for the sum of $1,000. Howle was killed by a marshal of the town of Searcy. Howle made an attack upon the marshal by shooting at him twice.

First: The first question to be determined on this appeal is whether or not the appellant can contest the policy under the clause which reads: "This covenant shall not be contested except for misrepresentation in the application or in the health statement, providing this guest has complied with the conditions of this covenant."

(1) On the second appeal we said: "It is too late to raise the question now that under a clause in the policy, appearing to limit the grounds for contest thereof to two, not including the death of the insured while engaged in the violation of the law, that such provision can not be considered a defense, it having been held in

the former opinion, which is the law of the case, that such provision of the by-laws became a part of the contract of insurance and constituted a defense to the suit." Appellee contends that this was not a correct statement of the holding on the first appeal. But be this as it may, the declaration in the last opinion to the effect that the provision in the policy holding that a violation of the law on the part of Howle resulting in his death was a defense to the action under the by-laws of appellant is the law of this case. For the facts on this hearing are precisely the same as they were on the second appeal, and what we said on this issue in the opinion on that appeal is the law of the case. *Morgan Engineering Co.* v. *Cache River Drainage Dist.,* 122 Ark. 491.

The court did not err therefore in allowing the case to go to the jury on the issue as to whether or not the death of Howle occurred while he was engaged in a violation of the law.

Second: Witnesses on behalf of the appellee testified to the effect that they had known Howle for periods ranging from eight to twenty-five years; that they had been intimately acquainted and closely associated with him; that when they talked with him about his trouble with Sowell at times he would go crazy mad and nothing could be done with him. One witness stated that "He would go to pieces and looked like his mind would leave him." Another witness stated that when he talked with him concerning his trouble with Sowell "he acted like a crazy man." Another stated, "He would go off and go wild when the subject of his trouble with Mr. Sowell was raised; he would not have any reason about him at all."

(2) These witnesses testified that in their opinion Howle, at the time of the killing, was crazy. The witnesses sufficiently detailed the facts upon which their testimony was based to make the same competent, although they were not experts, and the case is ruled in this particular by *Williams* v. *Fulkes,* 103 Ark. 196. Several of the witnesses testified that he was crazy on

the subject of his troubles with Sowell. Some of them testified that when he was in this frame of mind he would be drinking, while the testimony of others showed that he seemed to be crazy on the subject of his troubles with Sowell when not drinking.

There was testimony tending to prove that Howle and Sowell had had trouble before the killing, and that on the day and at the time of the killing Howle "looked like he was drinking pretty heavy." It was shown that Howle had made frequent threats to kill Sowell, covering a period of about three months before the killing. One of the witnesses stated that he never made these threats except when he was drinking. This witness also stated that Howle did not appear to be insane or crazy. There was testimony to show that it was the habit of Howle to get drunk. It was shown that he had conducted a restaurant in Searcy and had carried the mail to Kensett. One witness stated that Howle went about his business, attended to it all right, carried the mail and ran a restaurant. This witness stated that in his opinion Howle was crazy because he would get very angry and would want revenge.

(3) Among other alleged errors of which appellant complains was the refusal of the court to give the following prayers for instructions:

"1. The court instructs the jury that one, who, in possession of a sound mind, commits a criminal act, under the impulse of passion or revenge, which may temporarily dethrone his reason, or for the time being control his will, can not be shielded from the consequences of the act by the plea of insanity."

"8. The jury are instructed that if you believe from the evidence in this case that at the time the deceased Howle made an attack upon the town marshal of the city of Searcy, he was temporarily insane, and that such temporary insanity, if such there was, was produced by the voluntarily recent use of ardent spirits, it would afford no excuse for the assault made by him upon the officer, if the act was otherwise criminal."

(4) Instruction No. 1 was sufficiently covered by instruction No. 9,* given at the request of appellee. While instruction No. 8 might have been more aptly drawn, it was a correct declaration of law and was applicable to the facts above set forth and should have been given. This instruction was intended to submit the issue covered by that phase of the testimony which tended to prove that sometimes when Howle would get mad and threaten to kill Sowell that he would be drinking. The instruction was intended to declare the well known doctrine of the criminal law that voluntary drunkenness is no excuse for crime. Kirby's Digest, section 1557; 1 Bishop Cr. Law, section 400-1.

(5) Where one has threatened to kill another and with that purpose in his mind has imbibed intoxicating liquors in order to embolden him to the deed, and he commits the deed while his reason is temporarily dethroned from the use of intoxicants, he is nevertheless guilty of a crime. When one has been "in his cups" so often and so long as to produce a disease of the mind which renders him incapable of forming a specific intent, and acting under the influence of and impelled alone by such disease, he kills another, he will not be guilty. But temporary insanity, caused by voluntary intoxication, is not such a disease of the mind. 1 Bishop Cr. Law, § 406.

The instruction is in accord with the doctrine of criminal law often announced by this court. See the recent case of *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186-196, where we said: "But it must be remembered that one who is otherwise sane will not be excused for a crime

*9. The jury is instructed that if you find from the evidence that at the time the deceased Howle made the assault upon the marshal Sowell, he knew right from wrong, and he knew it was wrong to make said assault, then, under the law, he was sane, unless you find that at the time he was acting under an irresistible impulse arising from a defect in his will caused by the diseased condition of his mind, and was not acting from mere anger or revenge.

which he has committed while his reason is temporarily dethroned, not by disease, but by anger, jealousy or other passion." See also *Casat* v. *State*, 40 Ark. 511-519. The instruction was essential to make the charge of the court as a whole a correct statement of the law.

We have carefully examined the other instructions to which objection is urged and find no reversible error in any of them. But for the error in refusing to give appellant's prayer No. 8, the judgment is reversed and the cause remanded for a new trial.

BUTLER COUNTY RAILROAD COMPANY v. EXUM.

Opinion delivered June 5, 1916.

1. PLEADING AND PRACTICE—AMENDMENTS—TRIAL.—The trial court has a discretion to allow amendments to the pleadings, and its ruling in allowing amendments before the trial has commenced, after it has begun, and before it is ended, and in allowing an amendment to conform to the proof, after all the evidence has been taken, will be sustained unless there is a manifest abuse of discretion.
2. PLEADING AND PRACTICE—AMENDMENT TO COMPLAINT—PERSONAL INJURY ACTION.—It is not error, in an action for damages for mental anguish, to permit the plaintiff to amend her complaint, after the answer was filed, and while the evidence was being taken, by alleging "that she was made violently sick by reason of tobacco smoke wrongfully permitted on the train."
3. TRIAL—AMENDMENT TO PLEADING—SURPRISE.—Where defendant is surprised by the introduction of certain testimony, and the amendment of the complaint in conformity therewith, in order to gain relief, defendant should ask for the suspension of the trial or for a continuance.
4. CARRIERS—DUTY TO ARREST DRUNKEN PASSENGERS.—It is the duty of the conductor of a train, under Act 44, p. 99, Acts 1909, to arrest, and hand over to a peace officer, drunken passengers on his train, and where he fails to do so, the carrier will be liable in damages for an injury sustained by a fellow passenger in consequence thereof.
5. DAMAGES—DRUNKEN PASSENGER—MENTAL ANGUISH.—Where a female passenger on a train was subjected to outrageous treatment at the hands of drunken fellow passengers, a verdict of $100 will not be held to be excessive.

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

STATEMENT BY THE COURT.

The appellee sued appellant, alleging that it was operating a railroad from Poplar Bluff, Mo., to Piggott, Ark.; that appellee purchased a ticket at Poplar Bluff for Pollard, on appellant's line; that she and her four children were passengers on the train; that appellant unlawfully permitted drunken persons to get on the train, and that they abused appellee, cursing her, tearing up her basket and scattering its contents over the car, calling her vile names and using vulgar language in her presence; that her basket of clothing was damaged in the sum of $10, and that she suffered mental anguish in the sum of $1,000. She prayed for actual damages in the sum of $10, damages for mental anguish in the sum of $1,000, and for punitive damages in the sum of $1,000 making a total of $2,010.

The appellee answered denying the material allegations of the complaint and setting up that whatever damage was done to appellee's basket was settled for by the parties who did such damage, and that appellee accepted the amount paid her by them as a full settlement.

After the answer was filed and the evidence was being adduced appellee was permitted, over the objection of appellant, to amend her complaint by alleging "that she was made violently sick by reason of tobacco smoke wrongfully permitted on the train."

There was testimony on the part of appellee tending to sustain the allegations of her complaint. She testified that men got on the train who were drunk and in the presence of a large crowd of passengers on the train they were cursing and their conduct made her nervous. She says that men were smoking in the car. She called the attention of the auditor and the conductor to that and they requested the men to quit smoking as there were ladies in the car. The car was absolutely full of smoke. She could hardly get her breath, and "it made

her sick with a headache," and she was "going to vomit." The men riding on the train tore up her basket. She told the conductor of it and the man said "You are a damned liar." The conductor looked at him but never said a word. One of the drunken men, when his attention was called to the fact that there were ladies in the car, said: "God damn the ladies; let's drink. He cursed us and blackguarded us and drank." She saw three quarts of whiskey. She "didn't hear the trainmen say a word to protect us." The clothes had clay-mud all over them where the men had walked on them. They tore up the basket in which she had the clothes and threw it out of the window. She stated on cross-examination that the men asked her what the basket was worth and her sister told them a dollar and they gave a dollar to her boy, to which she made no objection. The boy might have put the dollar in her pocket book; if so, she got it.

The appellee's testimony was substantially corroborated by the testimony of her sister, who was at the same time a passenger on the train.

The testimony on behalf of the appellant was to the effect that there was no one drunk on the car on the occasion mentioned by the appellee. Passengers who were on the same car with appellee testified that they were in position to see and hear what was said and done. One of these witnesses stated that the lady's basket was sitting between two seats, a part of it extending out in the aisle. A man by the name of Farmer came along and picked up the basket to sit it on another seat. When he took hold of the basket the handle came off and some of the clothes fell on the floor. Appellee said if they would pay her a dollar it would be settled and they paid it.

The conductor and the auditor, in their testimony, denied that there was any disturbance on the train or any abusive or insulting language. They did not permit drunken men to get on the car because it was a violation of the law for them to do so. There were some

men on the car who were smoking and the auditor asked them to quit and they did so. The conductor testified that there was not any profane or abusive language used; stated that the general conduct of the passengers on the train was good; that the appellee made no complaint about smoking or objectionable words in the car.

There was a judgment in favor of the appellee in the sum of $100, and both parties have appealed.

Spence & Dudley, for appellant.

1. It was error to permit plaintiff to amend her complaint so as to set up a new cause of action. Kirby's Digest, § 6145; Pomeroy Rem. & Rem. Rights, § 554; 59 Ark. 165; 75 *Id.* 465; 34 *Id.* 144; 56 *Id.* 166; 94 *Id.* 276.

2. The verdict is contrary to the law and the evidence. A verdict should have been directed for defendant. All the injury done was paid for and accepted.

C. T. Bloodworth, for appellee.

1. The complaint was properly allowed to be amended. 58 Ark. 13; 103 *Id.* 82.

2. Appellee should have been allowed to recover for the profane, obscene and abusive language. 118 Ark. 1, 141 S. W. (Tex.) 821.

3. Physical injury was proven and punitive damages should have been allowed.

WOOD, J., (after stating the facts). (1) Large discretion is vested in trial courts under our statute and decisions in the matter of permitting amendments to pleadings. The ruling of a trial court in allowing amendments before the trial has commenced, and after it has begun and before it is ended, and even after the evidence has all been taken to conform to the proof, will be sustained unless there is a manifest abuse of discretion. *American Bonding Co.* v. *Morris,* 104 Ark. 276; *Oakleaf Mill Co.* v. *Cooper,* 103 Ark. 82; *Rucker* v. *Martin,* 94 Ark. 365; *McFadden* v. *Stark,* 58 Ark. 7.

(2-3) Appellant could not have been surprised by the amendment. It was not inconsistent with the claim

for damages set up in the complaint. The effect of the amendment was not to change the cause of action, but only to supply the necessary allegation to support appellee's prayer for damages for mental anguish. But even if appellant had been surprised it was its duty to have asked the court to suspend the trial or continue the case before it could complain. See *St. Louis, I. M. & S. Ry. Co.* v. *Power,* 67 Ark. 142. The appellant was not prejudiced by the court's ruling.

The only other ground urged for a reversal is that there was no evidence to sustain the verdict. The evidence was amply sufficient to sustain the verdict.

(4) It appears from the testimony on behalf of the appellee that persons on the train and in the same coach with her were permitted to engage in a scene of drunken debauchery and ribaldry. They absolutely filled the car where appellee was riding with smoke, which gave her a headache and made her sick at the stomach. It was the duty of the conductor, when his attention was called to the intoxicated condition of these persons to have arrested them and handed them over to some peace officer at the first opportunity. Act 44, Acts of 1909, p. 99.

The purpose of the above act, in making conductors peace officers and giving them power to arrest drunken persons on their trains, was to protect passengers from just such insults and indignities as is discovered by the testimony on behalf of appellee in this record. The jury accepted the testimony of appellee, thereby assuming that the testimony of appellee was true.

(5) A verdict in the sum of $100 is but a moderate compensation for the outrageous treatment and the mental and physical suffering which she endured at the hands of drunken rowdies as the direct result of the negligence of appellant's conductor in failing to do his duty under the circumstances.

The judgment is therefore correct, and it is affirmed.

GRIFFIN v. BOSWELL.

Opinion delivered June 5, 1916.

1. JURISDICTION—EXERCISE OF SPECIAL JURISDICTION BY COURTS.—When a matter of special jurisdiction is conferred by statute upon a superior court of record, and the jurisdiction is to be exercised in a special manner, the judgment can only be supported by a record which shows jurisdiction affirmatively, and no presumption as to jurisdiction will be indulged.
2. ROAD DISTRICTS—FORMATION.—A compliance with sub-division B. of section one of Act 338, Acts of 1915, providing for the filing of certain plats and estimates, is a condition precedent to the exercise of jurisdiction in the matter of forming a road improvement district under the act, and a failure to comply with its provisions renders all subsequent proceedings void.
3. CERTIORARI—WANT OF JURISDICTION—REMEDY.—Where there is a want of jurisdiction in the court to act, *certiorari* is an appropriate remedy to review the proceedings of the county court. In such cases the trial is solely by inspection of the record, and no inquiry as to any matter not appearing by the record is permissible; if the want of jurisdiction appears by the record, the proper judgment is that the record be quashed.
4. COURTS—PROCEEDINGS UNDER STATUTE—JURISDICTION.—Where proceedings in the county court are under statute and not according to the course of the common law, every material requirement must be observed and the proceedings must show on their face a substantial compliance with the statute.

Appeal from Pope Circuit Court; *A. B. Priddy*, Judge; affirmed.

J. T. Bullock and *Wilson & Williams*, for appellants.

1. The judgment and order of the county court were not void and can not be attacked collaterally, but only directly by appeal. 23 Cyc. 1074, 1088; 100 Ark. 63; 66 *Id.* 113; 43 *Id.* 328; 152 U. S. 327; 10 Peters 479; 5 Ark. 424.

2. Appellees are barred. 115 Ark. 88; 89 *Id.* 604; 52 *Id.* 213.

J. G. Wallace & Son, for appellees.

1. *Certiorari* is a direct proceeding to quash a void order. 123 Ark. 205; 123 Ark. 298. Where a judgment is void on its face for want of jurisdiction *certiorari*

is the proper remedy. 9 Ark. 73; 28 *Id.* 359; *Ib.* 173; 38 *Id.* 159; 39 *Id.* 173; 68 *Id.* 205; 69 *Id.* 587; 94 *Id.* 54; 111 *Id.* 79.

2. When the record itself discloses error there are no presumptions in favor of the regularity of the proceedings. 31 Ark. 567; 61 *Id.* 464; 89 *Id.* 160; 91 *Id.* 527.

3. There was no waiver nor are appellees estopped, nor barred by laches. 68 Ark. 205, 208; 111 *Id.* 79. The writ is within the sound discretion of the court. 89 Ark. 604; 52 *Id.* 213; 5 R. C. L. 257.

HART, J. On the 25th day of March, 1916, appellees filed their petition in the circuit court praying for a writ of *certiorari* requiring appellants to produce the records and proceedings of the county court of Pope County relating to the formation of Road Improvement District No. 1 of Pope County, Arkansas, to the end that the proceedings and orders establishing said road improvement district be quashed. Appellants answered and made a copy of the records of the county court a part of their answer and demurred to the petition of appellees. Appellees demurred to the answer of appellant. The court overruled the demurrer of appellants and sustained the demurrer of appellees to the answer of appellants. A judgment was accordingly entered, quashing and annulling all the orders and proceedings of the county court relating to the formation of said road improvement district. The case is here on appeal.

The district was created under a general act of the Legislature of 1915, Acts of Arkansas, 1915, page 1400. The record affirmatively shows that the provisions of the act were in all respects complied with except that it does not show that a preliminary survey, plans, specifications and estimates of the costs of improvement were filed with the county court before the petitions for formation of the district were circulated, and appellees allege that no such plans, specifications or estimates were filed. They contend that the judgment of the county

court establishing the road district is void because of the failure to comply with the act in this respect.

On the other hand it is the contention of appellants that appellees' remedy to correct the alleged error was by appeal and that the time for appeal having elapsed, they can not now complain of jurisdictional defects or irregularities in the formation of the district. In other words they contend that the present proceeding is a collateral attack upon the judgment of the county court and for that reason can not be maintained.

(1) As we have already seen the road district in question was formed under act number 338 of the Acts of 1915. In *Lamberson* v. *Collins,* 123 Ark. 205, the court held that a compliance with both subdivisions of section one of the act is necessary in order that the formation of a road district under said act shall be held valid. The record does not show that there was any attempt to comply with subdivision B of section 1 of the act in the matter of procuring a preliminary survey and plans, specifications and estimates from the State Highway Commission before circulation of the original petition among the land owners. The effect of our decision in the case of *Lamberson* v. *Collins* just referred to, is that the proceedings for the formation of road improvement districts under the act are statutory and not according to the course of the common law. It is also apparent from the decision that the procuring a preliminary survey, plans, specifications and estimates from the highway commissioner as required by the act is a jurisdictional fact and under the statute further proceedings are a nullity unless the record affirmatively shows a compliance with the statute in this respect. It is now too well settled in this State to require or admit of discussion that when a matter of special jurisdiction is conferred by statute upon a superior court of record, and the jurisdiction is to be exercised in a special manner, the judgment can only be supported by a record which shows jurisdiction affirmatively, and no presumption as to jurisdiction will be indulged. *St. Louis, I. M.*

& S. Ry. Co. v. *Dudgeon,* 64 Ark. 108; *Cribbs* v. *Benedict,* 64 Ark. 555; *Beakley* v. *Ford,* 123 Ark. 383; *Tipton, Admr. ex parte,* 123 Ark. 389.

(2-4) A compliance with subdivision B of section 1 of the act is a condition precedent to the exercise of jurisdiction in the matter of forming a road improvement district under the act, and failure to comply with its provision renders all subsequent proceedings void. Hence it is not necessary to decide whether the present proceeding is a direct or collateral attack upon the judgment of the county court. It is true an appeal was taken in *Lamberson* v. *Collins* and *Churchill* v. *Vaughan,* 123 Ark. 298, but it is well settled in this State that where there is a want of jurisdiction in the court to act, *certiorari* is an appropriate remedy to review the proceedings of the county court. *Cotter School Dist. No.* 60 v. *Cotter School Dist. No.* 53, 111 Ark. 79; *Lyons* v. *Green,* 68 Ark. 205; *Street* v. *Stuart,* 38 Ark. 159; *Baxter* v. *Brooks,* 29 Ark. 173. In such cases the trial is solely by inspection of the record and no inquiry as to any matter not appearing by the record is permissible. If the want of jurisdiction appears by the record, the proper judgment is that the record be quashed. Here it appears that the county court exceeded the limits of its jurisdiction and *certiorari* was the proper remedy to review its proceedings. The proceedings in the county court being statutory and not according to the course of the common law, every material requirement must be observed and the proceedings must show on their face a substantial compliance with the statute. Not having done so, the circuit court was right in quashing the proceedings in the county court and its judgment will be affirmed.

PARKER v. FRIERSON.

Opinion delivered June 5, 1916.

1. ACTIONS—CONSENT DECREE—DISMISSAL IN VACATION.—In an action in the name of the State, brought by the prosecuting attorney, a consent decree, purporting to dimiss the action, but also including matters of importance in addition to the direction for dismissal of the action, cannot be entered in vacation.
2. ACTIONS—DECREE ENTERED IN VACATION—JURISDICTION OF CHANCELLOR.—The chancellor may order expunged from the record, a decree entered in vacation, dismissing an action brought by the prosecuting attorney in the name of the State, but containing other matters besides the agreement to dismiss.
3. WRIT OF PROHIBITION—ORDER SETTING ASIDE CONSENT DECREE, ENTERED IN VACATION—ADMISSION OF NEW PARTIES.—The chancellor ordered expunged from the record, a decree, entered in vacation, dismissing a certain action, ordered the cause to proceed to trial, permitting other parties to intervene. *Held*, a writ of prohibition would not lie, on the part of the defendant to prevent further proceedings.

Prohibition to Crittenden Chancery Court; *Chas. D. Frierson,* Chancellor; petition denied.

STATEMENT BY THE COURT.

This proceeding is for a writ of prohibition to the chancellor, to prevent his further proceeding in the suit of *State of Arkansas* v. *B. S. Parker, et al.,* with a prayer also for a mandamus, requiring him to enter of record the order of the prosecuting attorney dismissing said suit.

The State of Arkansas, through her prosecuting attorney for the second circuit, with other counsel assisting, filed a complaint in the Crittenden chancery court against B. S. Parker, president of the Five Lakes Outing Club, a voluntary unincorporated association, organized for the purpose of maintaining a game and fish preserve, and certain others, employees, members and officers of the association.

It was alleged that the association and individuals named, constructed a pumping station in the waters of Horse Shoe Lake, a navigable lake in Crittenden County,

about 600 feet from high water mark and were engaged in constructing a fence from Happy Jack Island on a designated section of land, to a point in the lake, known as Lone Cypress, and then southwardly to the club house. That said fence was being constructed wholly within the navigable waters of the lake and when completed enclosed over 800 acres of lake bed, the property of the State of Arkansas, and that the fence and the pumping station constituted an obstruction to the navigability of the lake.

A restraining order was prayed against the construction of the fence and upon final hearing, a decree requiring the defendants to remove the pumping station. An answer was filed admitting that the lake was a navigable body of water, but denying that defendants had constructed a pumping station within the waters of said lake or that they were engaged in constructing a fence within the bed of the lake. Alleged that the outing club owned certain lands to the original meander line of said lake as established by the government in sectionizing the land in 1834; that certain of their lands, describing them, were low lands, bordering on the lake and had become overflowed and submerged to a depth of from two to five feet by the ponding of the waters of the lake thereon due to the construction of a levee by the St. Francis Levee Board in 1905, across the mouth of Buck Bayou, the only outlet for the waters of the lake. That said submergence of its lands worked no forfeiture of title; that they were still the owners thereof and had the right to fence the same for the purpose of preventing trespassing thereon by the general public and also that in *Barboro* v. *Boyle,* 119 Ark. 377, the Supreme Court had held that they had the right to enclose said lands and upon doing so would have the exclusive right to hunt and fish thereon. That unless permitted to fence the lands because of the peculiar character of the bank of the lake, they could not prevent trespassing.

It is further alleged that it was their intention to construct their fence within the original meander line

of the lake but by mistake eight of the piles or posts which they offered to remove had been driven north of said line; and that the pumping station was within 150 feet of the present bank of the lake and well within the original meander of the lake and on land owned by the defendants.

In November, 1915, the State by her prosecuting attorney and the defendants by R. G. Brown, their attorney, agreed that the case should be dismissed upon payment of the costs by defendants. A consent decree dismissing the complaint was drawn up, marked approved by counsel, filed in the office of the clerk on November 10, and by him entered upon the chancery record in vacation, which was ordered by the chancellor expunged on January 24, 1916, "because under the rules of this court, nothing in the form of a decree can be entered without the signature of the chancellor." Said consent decree is as follows:

"In this cause, in vacation, comes the parties by their attorneys of record, the State of Arkansas being represented by M. P. Huddleston, Esq., and the defendants by R. G. Brown, Esq., and by consent this cause is dismissed and the restraining order heretofore granted herein is set aside and for naught held, it appearing from the answer filed herein by the defendants that they claim the right only to build their fence within the original meander line of the lands owned by them within the peninsula formed by Horse Shoe Lake, and the State of Arkansas admitting of record that the defendants have the right to build and construct their fence within said original meander line, title to the lands within the meander line being admitted by the plaintiff to be in the defendants to this action.

"By consent, the costs of this proceeding will be paid by the defendants. The clerk is directed by both parties to this proceeding to enter this decree at once in vacation."

On the first day of January term, 1916, the defendants appeared and moved the court to enter of record

said consent order of dismissal. On the 24th of January, Miles Thompson filed a motion in the cause, alleging that he was a citizen and taxpayer of Crittenden County and as such entitled to the use of Horse Shoe Lake and to the privilege of hunting thereon and fishing therein in all parts, and prayed to be made a party plaintiff, which motion was granted.

The court further overruled petitioners motion to enter as a decree of the court said consent order already set out, and expunge the entry thereof from the record as erroneous, it being done in vacation and contrary to the rules, without the signature of the chancellor and further ordered that the action proceed to trial, as the *State of Arkansas on relation of Miles Thompson, plaintiff,* v. *B. S. Parker, et al.*.

The defendants excepted to all of the court's rulings and prayed and were granted an appeal, and also filed a petition here for a writ of prohibition to the chancellor to prevent further proceedings in the case, and a writ of mandamus as stated.

Brown & Anderson, for petitioners.

The prosecuting attorney had the right to dismiss the suit. Kirby's Digest, § § 7779, 6168; 68 Ark. 205; 14 Cyc. 416; 22 *Id.* 981. The chancellor had no power or right to abrogate the consent decree dismissing the cause.

N. F. Lamb, Eugene Sloan, J. R. Turney, A. B. Shafer, Hugh Hayden and *E. L. Westbrooke,* for respondent.

1. The consent decree could not be entered except by the chancellor. Kirby's Digest, § 6168 merely authorizes the plaintiff to dismiss his suit before the clerk. 73 Ark. 66; 4 *Id.* 537. Prohibition will not lie. 5 Ark. 21; 12 *Id.* 70; 26 *Id.* 52; 48 *Id.* 227; 33 *Id.* 192; 26 *Id.* 452. The rules of the chancellor did not permit such a decree to be recorded without his approval. 11 Cyc. 740 A, 741, 888, 948, 952; 80 Ark. 61. The dismissal was properly set aside. 14 Cyc. 423, 430. Prohibition does

not lie—the remedy was by appeal. 33 Ark. 191; 74 *Id.* 217; 77 *Id.* 148; 84 *Id.* 231.

2. Miles Thompson was properly made a party. Kirby's Digest, § 6011-12; 31 Cyc. 477; 33 Ark. 173.

3. This court has no jurisdiction. 73 Ark. 66. The prosecuting attorney had no authority to compromise away the State's rights. 93 Ark. 490; 10 R. C. L., § 32; 28 L. R. A. 42; 34 *Id.* 487; 180 U. S. 343; 32 Ark. 346.

4. Chancellors have power to make reasonable rules. 10 R. C. L., par. 345, p. 559; Fletcher Eq. Pl. & Pr. 747; Simkins Fed. Eq. Suit 608-9.

5. A compromise and settlement can not be a consent decree without the sanction of the court. 16 Cyc. 471-3; 34 L. R. A. 487; 75 Ark. 415; 51 L. R. A. (N. S.) 1191; 6 Enc. Pl. & Pr. 846; 109 U. S. 702; 1 Oh. St. 170; 73 S. W. 74; 7 Stand. Enc. Proc. 656; 1 Whitehouse Eq. Pr. 57, 58; 31 Cyc. 486; 25 Atl. 915. The writ should be denied.

M. P. Huddleston, pro se.

KIRBY, J., (after stating the facts). It is insisted that the suit was properly dismissed in vacation and that the chancery court was without jurisdiction thereafter to proceed further in the hearing thereof. Appellants in support of their position rely upon *Lyons* v. *Green,* 68 Ark. 205, and sections 7779 and 6168 of Kirby's Digest, which provide:

"Sec. 7779. All actions in favor of and in which the State is interested shall be brought in the name of the State in the circuit court of the county in which the defendant may reside or be found, and shall be prosecuted by the prosecuting attorney for the State, prosecuting in such circuit."

"Sec. 6168. The plaintiff may dismiss any action in vacation, in the office of the clerk, on the payment of all costs that may have accrued therein, except an action to recover the possession of specific personal property, when the property has been delivered to the plaintiff."

There is no question but that a plaintiff may dismiss his action in vacation in accordance with said section 6168, nor that all actions in favor of and in which the State is interested are required to be brought in its name by the prosecuting attorney of the circuit court of the county designated, and conceding without deciding that such official would have the right to dismiss such a suit for the State, brought by him, in vacation, it does not follow that said consent order now claimed to be only a dismissal of the suit was entitled to entry upon the record as a matter of course upon its presentation to the clerk.

In *Lyons* v. *Green,* it was held proper, under the authority of said section 6168, for the clerk as custodian of the record to enter up the order of dismissal at the request of the plaintiff's attorney and that if by misprision of the clerk the actual order desired by the plaintiff as to the dismissal was not entered, it could and should be corrected in the court by proper notice and proceedings before the final decree was taken.

(1) It is claimed that the consent decree of dismissal was not such a dismissal of the action in vacation as is authorized by law, that it contained an admission of record by the State of Arkansas that the plaintiffs were the owners of the lands claimed in the action and had the right to build the fence within the original meander line of the lake as they were attempting to do, a recital which was certainly not necessary if the purpose was only to dismiss the suit and which may have been and doubtless was, beyond the power of the prosecuting attorney to make for the State if the rights of individuals or the public were thereby concluded. It was in form a consent decree, including matters of importance in addition to the direction for dismissal of the action, and there was no authority under the law permitting its entry of record in vacation.

(2-3) The court upon presentation of the matter at the next term upon motion of petitioners requesting the order of dismissal entered of record, refused to grant

the relief and ordered the said decree as erroneously entered by the clerk in vacation, expunged from the record. It was acting within its authority and jurisdiction in making such order and if error was committed therein or in permitting other parties to intervene in the suit and ordering that it proceed to a hearing, it must be taken advantage of and corrected by appeal, and prohibition will not lie to prevent such further procedure. The petition is accordingly denied.

WEBB v. BOWDEN.

Opinion delivered February 14, 1916.

1. ELECTIONS—ACTS OF COMMISSIONERS—SELECTION OF JUDGES—UNFAIRNESS—VALIDITY OF ELECTION.—Where the election commissioners select judges for the election, under Kirby's Digest, § § 2764, 2765 and 2800, the election is not rendered void because judges who were selected did not possess the requisite qualifications, and although the judges selected were all strong partisans of one side of the issue to be determined at the election.
2. ELECTIONS—CONTEST—LOSS OF POLL BOOKS.—In an election contest, where the poll books were lost, *held*, under the evidence that the contestees were not responsible for the loss of the books.
3. ELECTIONS—CONTEST—CHARGE OF FRAUD—BURDEN OF PROOF—PRESUMPTION—COUNTY ELECTION.—The returns of an election as declared by the judges are presumed to voice the will of the electorate, and any spoliation of the poll books by the election commissioners would not invalidate the election or shift the burden of proof to the contestees to show the validity of the election, and that the result as declared was correct.
4. ELECTIONS—CONTEST—SPOLIATION OF POLL BOOKS—BURDEN OF PROOF.—Even though the proof connects the contestees with the spoliation of the poll books, this would not have relieved the contestants of the burden of proving the allegations of their petition that the election returns were fraudulent and void.
5. EVIDENCE—SPOLIATION OF EVIDENCE—BURDEN OF PROOF.—The presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden.
6. ELECTIONS—CONTEST—FRAUD—FINDING OF TRIAL COURT.—In a contest of a county seat election, the evidence held insufficient to warrant

the disturbance of the finding of the trial court, to the effect that the election was not void, although there were some irregularities at the voting places.

7. ELECTIONS—ILLEGAL VOTES—WILL OF MAJORITY.—Although illegal votes are received at an election, or legal votes rejected, the election is not invalidated if the will of the majority is not thereby overcome.

8. ELECTIONS—CONTEST—COUNTY SEAT REMOVAL—DISCREPANCY.—In the contest of an election for the removal of a county seat, it appeared that there were 845 more votes cast in favor of removal, in a certain township, than were names shown in the printed list of those who had paid their poll taxes and were entitled to vote, it was error for the trial court to refuse to declare the law "that the discrepancy, as shown by the collector's list of poll tax payers in D. township, and the number of votes alleged to have been cast at said election, casts upon the contestees the burden of proof to show that the excess votes were qualified electors."

9. ELECTIONS — CONTEST — IRREGULARITIES — PRESUMPTION — BURDEN OF PROOF.—The presumption of the regularity and correctness of the official action of election officers is overcome when there is direct and undisputed proof of facts tending to impeach the integrity of the returns, and to show that the *prima facie* evidence of correctness is not in fact true; such proof being made by those who challenge the returns, the law then casts upon those who would be benefited by the *prima facie* returns, the burden of showing that they are in fact true and correct.

10. ELECTIONS—CONTEST—DISCHARGE OF BURDEN OF PROOF BY CONTESTANTS —PRACTICE.—In a contest of the county seat election in Hempstead County, *held*, the contestants, had, in the trial court, overcome by proof, the presumption in favor of the validity of the election; and that the burden then rested upon the contestees to account for the apparent fraud in the returns; and, *held* further, the cause will be remanded in order to give the contestees an opportunity to discharge that burden.

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

Dan W. Jones, Etter & Monroe and *D. B. Sain,* for appellants.

1. There was fraud, irregularities, misconduct of voters and judges, etc., sufficient to destroy the integrity of the returns and vitiate the election. 41 Ark. 123; 59 *Id.* 270; McCrary on Elections (2 ed.) § § 199, 303,

184, 441, 442; 86 Ark. 259; 50 N. H. 140; 63 Ill. 401; 11 Kans. 308.

2. The election judges were not appointed at the county seat. Kirby's Digest § § 2764, 2765.

3. Both sides were not represented in the appointment of judges and other officers Kirby's Digest, § 2709.

4. The place of holding the election was changed. McCrary on Elections (2 ed.) § § 114, 115; *Ib.* (4 ed.) § § 158, 160.

5. The declaration of the voter as to the fact of voting and how he voted are admissible as evidence, where the purpose is not to exclude the particular votes, but to show the existence of an unlawful combination. 41 Ark. 129, 130.

6. As to what constitutes the returns of an election, see 94 Ark. 482. The poll books, tally sheets or ballots must be preserved as prescribed by law, or they cannot be used as evidence. In this case they were not, and hence contestants failed to make even a *prima facie* case. *Ib.*

7. Excessive votes were cast. McCrary on Elections (2 ed.) § 449.

8. Fraud vitiates the returns of any precinct or ward. What proof is necessary and numerous illustrations are discussed in 86 Ark. 259; 61 *Id.* 249; *Ib.* 259; 53 *Id.* 161; 73 *Id.* 187; 21 Wis. 506; 10 A. & E. Enc. L. p. 771 (2 ed.); 12 Phila. 626. Where fraud is shown it will be presumed to be for the benefit of the party having a majority. 10 A. & E. Enc. L. (2 ed.) p. 833; Smith El. Cas. 410. It may be proved by circumstantial evidence. Cases *supra;* 10 A. & E. Enc. L. (2 ed.) p. 834 and note.

9. While township lines were proved by oral testimony, yet it was shown for many years the lines recognized by the election judges had been acted on as the true lines, etc., yet that does not excuse voters who voted in the wrong township. 75 Ark. 457; 10 A. & E. Enc. L.

(2 ed.) p. 833. Voting in the wrong township and by men who did not have a poll tax was a fraud. *State* v. *McKinley,* 120 Ark. 165; 67 Ark. 549; 97 *Id.* 221.

10. The ballots were not as prescribed by law. Kirby's Digest, § 1120.

11. While there was no proof of stealing the poll books, yet there was strong circumstantial evidence to show it.

12. It was error to refuse to declare the facts as requested by appellants.

Jas. H. McCollum, O. A. Graves and *T. C. Jobe,* for appellees.

1. The returns are *prima facie* true; they must be shown to be false. 50 Ark. 94; 73 *Id.* 193; 94 *Id.* 481; McCrary on Elections, § § 459, 515.

2. No fraud was perpetrated in holding the election. Fraud must be proven clearly; it is never presumed. 11 Ark. 378; 31 *Id.* 554; 92 *Id.* 509; McCrary on El., § § 569, 573; 41 Ark. 111. Not even any improper act or illegal act, knowingly or corruptly, either in holding or making returns of the election was shown. Cases *supra.*

3. Voters should not be deprived of their votes by changing township lines or change of voting place. 75 Ark. 457; 77 *Id.* 166.

4. Voters who cannot make out their own tickets are entitled to have the assistance of the judges. Kirby's Digest, § 2819. It is not fraudulent to allow votes to be cast by persons who do not show poll tax receipts.

5. Receiving or drinking whiskey by voters, unless it is shown that votes for removal were thereby influenced, is no reason for throwing out a box or votes. Ann. Cas. 1913 E. 443; 31 Okla. 304; 30 Pac. 936; 24 Okla. 707; 104 Pac. 56; McCrary on Elections, Art. 215; 6 N. M. 643.

6. The presumption is that sworn officers of an election do not violate the law. In order to cast out a ballot the proof must be clear and positive. 47 N. W.

196; 64 So. 63; 130 Pac. 405; 47 Ill. 252; 20 *Id.* 159; 108 Ark. 306; 178 S. W. 1123; McCrary on Elections, § 466a.

7. No law was violated by the appointment of the election officers. Kirby's Digest, § § 2764, 2765, 2800; 39 Ark. 556. At least the appointees were officers *de facto.*

8. The loss of the poll books or failure to preserve and return to court copies which the law requires to keep does not vitiate the election. It was not shown that contestees were responsible for the failure or loss. 53 S. E. 706; 159 S. W. 632; 16 Cyc. 1058 (6); 14 L. R. A. 471; 107 Am. St. 790. The presumption arising from spoliation of evidence does not relieve the other party from proving his case. 107 Am. St. 790; 16 Cyc. 1059 and note.

9. All ballots "For Change" should be counted "for Hope." 51 S. W. 622; 10 Am. St. 312; 1 Bouvier 983.

10. Upon proof of illegal voting the court will purge the poll—not throw out the box. 39 Ark. 549; 41 *Id.* 123; 43 *Id.* 67; 49 *Id.* 241; 54 *Id.* 409; 73 *Id.* 193; McCrary on El., § 523. Irregularities do not affect the returns. 32 Ark. 561; 36 *Id.* 450; 92 *Id.* 67; McCrary on El. § 225, 403; 10 A. & E. Enc. L. 766; 15 Cyc. 372 and many others.

11. The findings of the court are conclusive as to matters of fact, if there is any evidence to support them. 104 Ark. 154; 112 *Id.* 53. Contestant's failure to specifically set up in their motion for a new trial that the findings are against the evidence was a waiver of their right to insist here that the findings are not supported by the testimony. 65 Ark. 278; 70 *Id.* 418. Their exceptions were *in gross,* not specific. 80 Ark. 528; 102 *Id.* 627; 38 *Id.* 528; 60 *Id.* 250.

WOOD, J. In pursuance of an order of the county court of Hempstead County, Arkansas, made on the 8th day of July, 1914, an election was held in the various voting precincts in that county on the 15th day of August, 1914, on the proposition of the removal of the county seat from

the town of Washington to the city of Hope, in Hempstead County. The returns were made by the judges of the election to the commissioners, who canvassed the same and declared the result of the election in favor of the removal of the county seat to Hope. The appellants, citizens and tax payers of Hempstead County, instituted this proceeding in the county court for contesting the election. There was a trial and judgment in that court in favor of the contestees, and on appeal to the circuit court the cause was heard anew in that court upon the depositions of witnesses and record and documentary evidence.

The contestants, in their petition, set forth specifically numerous grounds of illegality, irregularity and fraud on the part of the election officers, which they contend invalidated the election. These were specifically denied by the contestees.

Among other things the contestants alleged that the election commissioners, a majority of whom favored the removal of the county seat, wilfully and corruptly removed all of the regular judges of election who had been appointed at previous general elections, because they did not favor the removal, and appointed men who were in the employ of and had received money from the contestees and were strong partisans of the contestees, and failed to give contestants any representation in the appointment of the election judges, thereby perpetrating a fraud upon contestants and the citizens of Hempstead County who were opposed to the removal. They further alleged that they demanded of the election commissioners a copy of the poll books returned by the judges of election of the various wards and precincts, but that the election commissioners, under the advice of the contestees, refused to give contestants a copy of the poll books or to permit the same to be copied by them, and that contestants were therefore unable to specify and name each illegal and fradulent vote that was polled. And, by way of amendment, they set up that since the institution

of the suit to contest the election the contestees had destroyed the poll books and tally sheets of the election.

In addition to these charges of misconduct on the part of the election commissioners and the contestees, the contestants further, at great length, charged that the election judges at various voting precincts in the county, which are designated in the complaint, knowingly, wilfully and corruptly permitted and induced many illegal votes to be cast for removal in the several precincts named. In some of the allegations there is a general charge of fraud on the part of the election judges and in others the judges are charged with specific acts of fraud.

At the conclusion of the evidence the contestants asked the court to find certain facts, to the effect that as soon as the result of the election was declared by the election commissioners the contestants served them with written notice that the election would be contested and to preserve the ballots, poll books and tally sheets as evidence to be used in the contest; that the contestants requested the election commissioners to permit them to inspect and copy the poll books, which they refused; that the poll books were stolen or destroyed while in the possession of two of the election commissioners, and that the contestants therefore never had an opportunity to inspect the same, and that the commissioners failed to produce the poll books to be used as evidence in the case after demand made upon them, and failed in that respect to comply with the order of the court. The court made these findings of fact as requested by the contestants.

The contestants further asked that the court make several findings of fact, numbered from 1 to 5 inclusive, to the effect that there was such fraud practiced by the election judges at the several voting precincts in certain townships, designated, as rendered the election at those precincts void. Among these requests for findings were several covering the various precincts in DeRoan

township, in which the city of Hope is situated. The court refused to make these special findings as requested.

The court found that those who paid their poll taxes in the county for the year 1913 were 5315, and that more than 2658 qualified electors, and therefore a majority of such electors of Hempstead county voted at the election for a change and removal to the City of Hope, and entered a judgment declaring the City of Hope to be the county seat of Hempstead County, with proper orders for the removal of the county seat from the town of Washington to the city of Hope, and from such judgment this appeal has been duly prosecuted.

To sustain their allegations of misconduct on the part of the election commissioners appellants proved that two of the election commissioners were partisans of Hope, and that on the 8th day of August, 1914, they met at Hope, and, over the protest of one of the commissioners, who was not a partisan of Hope, they passed a resolution removing all of the then election judges and appointing in their stead other judges.

Appellants contend that this action of the election commissioners was illegal and a part of a pre-arranged plan to hold a dishonest election.

(1) The statute provides that the election commissioners shall meet at the court house at least twenty days prior to the general election and organize themselves into a body; that after their organization, and not less than five days before any general election, they shall appoint three judges of election for each voting precinct in the county. The statute further provides that those appointed to be judges of election shall continue to be judges of election within their respective precincts until the next general election unless sooner removed by the county election commissioners. Kirby's Digest, secs. 2764, 2765 and 2800.

The removal of the old election judges by the commissioners and the appointment of new judges, under the above provisions of the law, even though all the new judges selected were strong partisans of Hope, was

within the authority of the commissioners. The statute only prescribes that the judges of election shall be discreet persons, able to read and write the English language, and qualified electors in the precincts for which they are appointed, and that they shall not be selected from the same political party if competent persons of different politics can be found. Kirby's Digest, sec. 2799.

There is no statute requiring that the meetings of the election commissioners, after their organization, shall always be held at the court house.

It will thus be seen that the selection of the judges by the commissioners in the manner charged was not illegal, and therefore, even though the election commissioners appointed judges who were strong partisans of Hope, there was nothing in this to constitute a conspiracy on their part to hold a dishonest election. Moreover, even if the election commissioners had appointed judges who did not possess the requisite qualifications, and although they appointed judges who were all strong partisans of one side of the issue to be determined at the election, this conduct, while a manifest impropriety tending to show a spirit of unfairness on the part of the election commissioners, nevertheless did not make void the election. See *Swepston* v. *Barton,* 39 Ark. 556.

The proof showed that the election commissioners, after the election, refused to allow the contestants to inspect the poll books, and that the issue as to whether or not they could be so inspected was raised and finally determined by this court in favor of the contestants; that before this question had been determined, and while it was pending in the courts, one of the election commissioners, a partisan of Hope, in a conversation in regard to whether or not the contestants were entitled to inspect the poll books, stated "The people of Washington (the contestants) will never get them; they will never see them." It was further shown that a brother-in-law of this same election commissioner, in a conversation with a witness, was discussing the question of the right of contestants to see the poll books, and witness said to

him: "You fellows ought to show up," and he said, "It will be a cold day in August when we (meaning the contestants) would get to see them poll books." Witness asked him why contestants should not see the poll books, and he said: "They (contestees) could not afford to permit them to do so;" said, "If we do not show them then there might be two or three go to the pen, and if we were to, a whole bunch might go." The party using this language said he was in favor of the removal. This conversation was had after it was decided by the trial court that the contestants were entitled to see the poll books. Witness stated that there were several present during the conversation, and they were all jolly, laughing and talking, including the man who used the above language, but that he did not seem to be joking about what he said.

It was further shown that after it had been decided by this court that the contestants were entitled to inspect the poll books the attorneys for the contestees had requested the election commissioners to furnish them a copy of the poll books. One of the commissioners, who was not in favor of the removal, held the key to the box in which the poll books, tally sheets, etc., had been locked. Without sending for him, one of the other commissioners went to a hardware store and procured a key and unlocked the box, and he and the third commissioner were proceeding to make a copy of the poll books. They continued about this work until near half past nine or ten o'clock in the evening, and not having finished the copy, they adjourned until the next morning. Davis, one of the commissioners, at the suggestion of Cornelius, the other commissioner, took charge of the poll books, and, having the same under his arm in a brown paper, started to his home with them. It was several blocks to where he was going. He details what took place with reference to the taking of the poll books away from him as follows: "I met a man; he punched me in the side and told me to throw up my hands, and he said, 'I want that bundle.' I didn't know the man. He had his hat pulled down. He took the bundle. I didn't give him the pack-

age; he took it. I did what he told me. I was surprised; I didn't know what it was. There was just one man. He didn't ask for any money. What he said was, 'I want that bundle.' "

Appellant contends that this testimony was sufficient to show that the poll books were stolen by the election commissioners, and that, when taken in connection with the other charges of fraud and misconduct on their part, it showed a conspiracy on the part of the election commissioners to destroy the evidence by which the contestants would be able to show that the election was fraudulent and void, and that contestees, who would reap the benefit of this spoliation of the election returns, should be held responsible therefor and the election declared null and void on that account.

(2-4) In answer to this contention, it is sufficient to say that the evidence would not warrant a finding that the contestees were responsible for the loss of the poll books. The most that could be said of it would be that it would be sufficient to sustain a finding that the two election commissioners who were making a copy of the poll books were chargeable with their loss. But the evidence would not warrant this court in overruling a finding of the trial court to the contrary. Furthermore, even if it had been proved that the two election commissioners were parties to the crime by which the loss of the poll books was brought about, still this fact would not justify the trial court in ignoring the official returns made by the judges of election. These returns are presumed to voice the will of the electorate throughout the county and any spoliation of the poll books by the election commissioners would not have the effect of invalidating the election or shifting the burden of proof to the contestees to show the validity of the election and that the result as declared was correct. "Against a party not privy to the destruction no prejudicial inference arises." 16 Cyc. p. 1059, and cases cited. Even if the proof had connected contestees with the spoliation of the poll books, this would not have relieved the contestants of the burden of

proving the allegations of their petition that the election returns were fraudulent and void.

(5) The rule of law applicable to such a case is well stated in *Patch Mfg. Co.* v. *Protection Lodge,* 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 765 at p. 790, as follows: "The presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden. It cannot supersede the necessity of other evidence. The presumption is regarded as merely matter of inference in weighing the effect of evidence in its nature applicable to the question in dispute." *Cartier* v. *Troy Lumber Co.* 14 L. R. A. 470-471; 16 Cyc. 1058, 1059.

It follows that the court did not err in refusing the following request for a declaration of law: "The conduct of the election commissioners in destroying the poll books and other election returns rendered such returns void, and throws upon the contestees the necessity of showing what votes were cast in DeRoan township, and by whom."

It is unnecessary for us to set out and discuss in detail the evidence concerning the alleged fraud on the part of the judges of election at the various voting precincts outside of DeRoan township. It would extend this opinion at great length to do so. It suffices to say that we have carefully examined the same and have reached the conclusion that the court did not err in refusing to make the findings requested by the appellants to the effect that the conduct of the judges of election in these several precincts resulted in permitting illegal votes and was such fraud as vitiated and destroyed the result of the election as shown by the returns from those precincts.

(6) While certain irregularities were shown at many of these voting places, we do not feel warranted in holding as a matter of law that there was no substantial evidence to sustain the finding of the trial court to the effect that these irregularities did not render the entire election returns at those places void. The most that could be said of the conduct of the election judges at the

various precincts outside of DeRoan township is that it was irregular in some particulars which resulted in permitting some illegal votes to be cast. But the evidence does not show that there was such a system of illegal voting permitted by the election officers as indicated that they knowingly perpetrated illegal acts in connection with the election, such as constituted a fraud in holding the same and vitiated the entire returns from those precincts. At least we are not warranted in overturning the finding of the trial court holding in effect that there was no such fraud in these precincts as vitiated the entire returns therefrom, and such as rendered the election therein void.

This court, in *Freeman* v. *Lazarus,* 61 Ark. 247, 257, quoted approvingly the following from McCrary on Elections, sec. 539: "If an officer is detected in a willful and deliberate fraud upon the ballot-box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of the rule is that an officer who betrays his trust in one instance is shown to be capable of defrauding the electors, and his certificate is good for nothing."

(7) Having in view this rule, we do not find in the conduct of the election judges in the voting precincts outside of DeRoan township any evidence of a willful and deliberate fraud upon the ballot. The irregularities on the part of the election officers, resulting in the illegal votes that were cast in those precincts, should only result in purging the returns of such illegal votes. But if the returns had been purged of all the illegal votes shown to have been cast in those precincts, it could not have affected the general result. "It is no valid objection to the election that illegal votes were received or that legal votes were rejected if they were not numerous enough to overcome the majority." *Swepston* v. *Barton, supra.*

"Frauds of individual voters and the casting of unqualified and fraudulent votes do not vitiate the returns unless the officers are parties thereto; but, in such cases,

the returns are accepted and purged of the illegal votes." *Schuman* v. *Sanderson,* 73 Ark. 187-193.

"Where an election has been legally held and fairly conducted nothing will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of the votes were given." *Dickson* v. *Orr,* 49 Ark. 241.

This brings us to a consideration of the question as to whether the court erred in refusing to make the findings of fact requested by the appellants numbered 16 to 21, inclusive, to the effect that the election returns in various voting precincts of DeRoan township were fraudulent and void and should be thrown out. In this connection, the court made the following finding of fact: "That the paid poll tax receipts as shown by the collector of Hempstead County, Arkansas, for the year 1913, for DeRoan township, in said county, were only 1299 and at the county seat election held for removal of county seat on the 15th day of August, 1914, the judges of the various wards and precincts in said DeRoan township, as shown by the certificate of the county election commissioners; that 2144 votes were cast on the question of removal, and 13 against removal, leaving a majority of 2131 votes for removal in DeRoan township."

The undisputed evidence showed that at the general election in September, 1912, there was a total of 905 votes cast in DeRoan township. They were distributed according to the voting precincts as follows:

270 votes cast in Ward 1;
114 " " " " 2;
48 " " " " 3;
114 " " " " 4;
294 " " at Bridewell's office box, and
65 votes cast at Shover Springs.

At the general election subsequent to the county seat election, held in September following, it was shown that the greatest number of votes cast for any state officer

without opposition was 838, and that the total votes cast for governor, including all of the votes that were cast for each of the party candidates in that election, was 814. The 838 votes were distributed in the different wards and precincts as follows:

226 votes cast in Ward 1;
120 " " " " 2;
86 " " " " 3;
124 " " " " 4;
235 " " at Bridewell's office box, and
47 votes cast at Shover Springs.

The 2131 votes that were cast in DeRoan township for removal of the county seat, as shown by the election returns, were distributed in the various wards and precincts as follows:

617 votes in ward 1;
359 " " " 2;
113 " " " 3;
366 " " " 4;
596 " " at Bridewell's office box, and
80 votes cast at Shover Springs.

These, with the 13 votes that were returned as against removal, made the total of 2144 votes cast in DeRoan township.

There was evidence on behalf of the contestants to the effect that parties were permitted to vote at the various voting precincts in DeRoan township who were not qualified electors. For instance, it was shown that at Bridewell's box several persons voted who did not live in that voting precinct and in a different township; that they were permitted to vote without being asked questions. It was shown on cross-examination of these witnesses that they lived near the line between Ozan and DeRoan townships, and most of them had been in the habit of voting in DeRoan township, but had voted at times in Ozan township. They were "liners." At this box a

minor was permitted to vote without being asked any questions. One voter lived close to the town of Washington, but voted in DeRoan township. The judges asked him no questions. Another witness who did not live in DeRoan township told the judges the place where he lived. but they asked no questions as to the township. Another witness voted there, stating that one of the judges knew where he lived; that the judges told him to vote there. He had voted before in DeRoan township, but did not live in that township.

Another witness testified that he was a timber man from Louisiana. He had been in Hope six or seven days; thought his home would be in north Arkansas. He went in and they took his name and he voted "for the court house to come to Hope." He voted at that election just because he was asked to vote. He first tried to vote at Ward 3. The fellow at the gate told him that they wanted to do the right thing, and told him to go over to the other ward closer to where he lived and vote. The judges at the ward where he voted asked him no questions whatever as to his qualifications. He had paid no poll tax. The judges made out the ticket. The ticket was made out right there by the box where they deposited the vote, at the table where the men sat all the time. He never had the ticket in his hands and did not see them deposit the ticket in the box.

Another witness testified that he came from Louisiana on the 4th or 5th of August. His home was in Texas. He voted in Hope at a box just below the Capital Hotel, near the depot. He had never paid a poll tax in Arkansas. A fellow called him in there and asked him if he wanted to vote, and witness told him he did not have a poll tax receipt, and the man said it didn't make any difference, and asked him, "Do you want the court house to come to Hope?" Witness replied, "Yes, I guess so." The man made out a ticket for witness and handed it to the fellow that was over inside at a desk. It was the man in the inside of the house that called witness in. Witness did not know whether he was

one of the judges of election or not, but he was the man that made out the ticket. The man that sat at the table made out their tickets.

Another witness, a brother of the last witness, testified substantially to the same effect, except that he had come from Missiouri and had arrived at Hope three or four days before they voted him. Stated that he and his brother were standing in front of the polls and some fellow came to the door and invited them in and asked them if they wanted to vote. Witness replied that he had no poll tax receipt, and the man said that didn't make any difference, to come and vote anyway. Witness on that occasion was on a visit to his brother-in-law, who lived in Hope. He stated that the man who invited them in went back and got a ticket and made it out. "They asked me to vote for Hope. He signed my name and wrote something on the ticket." Witness could not say what the man did with the ticket. The deputy sheriff at that box on that day, who was around or near the voting place all day, testified, denying the testimony of the last two witnesses above mentioned.

It will be observed that at the Bridewell box at this the county seat election, there were 596 votes.

It was shown that at Ward 3, in the city of Hope, there were 34 votes cast of persons whose names did not appear on the printed list of those who had paid their poll taxes for the year 1914.

It was shown that in Ward 2 a minor voted who was 20 years old in December after the election. The witness testified that they asked him if he was twenty-one and he told them that he was going on twenty-one. That was all that was said, and they did not swear him; said he knew all the judges and clerks. Witness did not see the judges put the ticket in the box; he saw them write his name on the poll books. Witness weighed 137 pounds and was five feet seven and a half or seven and three-quarters inches in height. This witness voted for removal.

Another witness, who was 21 years old in November following the election voted for removal, stated that the judges asked him no questions.

(8) We have set forth the above testimony because it tends to throw light upon the conduct of the officers conducting the election at the various precincts in DeRoan township; and while this testimony of itself would not be sufficient to overcome the finding of the trial court to the effect that there was no fraud upon the part of the election judges in DeRoan, at least no such evidence of fraud as would justify throwing out or excluding from the count the entire vote of DeRoan township, as shown by the returns of the election officers, yet this testimony, when taken in connection with the undisputed evidence showing that there were 845 more votes cast for removal of the county seat to the city of Hope than were shown on the printed list of those who had paid their poll taxes and were entitled to vote, convinces us that the court was in error in refusing appellant's prayer for declaration of law No. 3, as follows: "The court declares the law to be that the discrepancy as shown by the collector's list of poll tax payers in DeRoan township and the number of votes alleged to have been cast at said election, casts upon the contestees the burden of proof to show that the excess votes were qualified electors."

In *Powell* v. *Holman,* 50 Ark. 85-94, we said: "The duly certified official returns of election officers are not subject to the same rules of suspicious reflections and doubtful imputations as attend the ballots under certain circumstances. The official returns are quasi-records and stand with all the force of presumptive regularity, and *prima facie* integrity, not only till suspicion is cast upon them, but until their self-authenticated verity is overcome by affirmative proof that they do not speak the truth. These returns may be impeached by any legitimate evidence, showing that they do not speak the truth, and when so overcome, they lose their character as evidence, and thereupon, other sources must be looked to for testi-

mony in ascertaining and establishing the result of the vote. Had it been shown by appellee that fraud, unfairness or illegal voting attended the election, entered into and became a part of the official count, and thus involved the correctness of the certified returns; * * * or any other legitimate proof, tending to impeach the verity of the returns so placed in evidence, then the trial court might have found specially, that the presumption of credit and *prima facie* truthfulness which the law gives to the official acts and returns of election officers, had been overcome."

(9) It is familiar doctrine, as announced by this court in many cases, and as late as *Letchworth* v. *Flinn,* 108 Ark. 301-306, "that where it appears that a person was registered, or that his vote was accepted by the election officers, there is a presumption, in the absence of proof to the contrary, that such person was a qualified voter." But it is equally well settled by the authorities that the presumption of the regularity and correctness of the official action of election officers is overcome when there is direct and undisputed proof of facts tending to impeach the integrity of the returns and to show that the *prima facie* evidence of correctness is not in fact true. Such proof being made by those who challenge the returns, the law then casts upon those who would be benefited by the *prima facie* returns, the burden of showing that they are in fact true and correct.

The law is well expressed by the Supreme Court of Illinois in *Rexroth v. Schein,* 69 N. E. 240-242, as follows "It became incumbent upon the appellant, in order to justify the court in rejecting the ballots of these voters, to overcome by proof this presumption of innocence on the part of the voters and the presumption of the regularity and correctness of the official action of the election officers. As the law cast upon the appellant the burden of proving a negative, full and complete proof in rebuttal of these presumptions is not required, but, in order to remove the presumptions, it is necessary proof should be

produced sufficient to render the existence of the negative probable." Citing cases.

Mr. McCrary lays down the law and gives an illustration applicable to the facts of this record as follows: "Every circumstance which tends to show that an election was fradulent may be proven, and the court must determine, from all the evidence, whether fraud has been shown. As, for example, if the aggregate vote cast is largely in excess of the number of legal voters resident in the precinct, or if the vote cast at the election in question is largely in excess of the vote cast at any previous or subsequent election, such facts as these, if unexplained, will often establish the fact that frauds have been perpetrated and illegal votes cast, and make it necessary to throw out the poll altogether, unless it can be sifted and purged.

"While it is true that mere irregularities in the conduct of an election, where the will of the voter has not been suppressed or changed, will be disregarded, yet a succession of unexplained irregularities, and a disregard of law on the part of the officials, is sufficient to deprive the ballot box and the returns of the credit to which they are otherwise entitled, and shift the burden upon the party maintaining the legality of the official count." McCrary on Elections, secs. 582, 583.

In *Todd, et al,* v. *Cass County,* 47 N. W. 748, the following language, applicable in that case is also exceedingly apposite to the facts under review in the instant case "Had proof shown that the number of votes cast in 1887 and in 1888 were but 1300, and that the number of votes cast at the general election in 1889 were about 1300, and that this number at the bond election, June, 1889, had been swelled to more than 2200, the conclusion would be almost irresistible, in the absence of proof explaining such votes, that the increase had been obtained by fraud. * * * Where, however, a city or precinct without adequate cause shows a grossly excessive vote, which is unexplained, it may be cause for reducing the vote to the ordinary, average limit, or, if it cannot be separated,

and it is clearly apparent that fraud has been perpetrated, rejecting it altogether.''

Appellees' counsel urge that the official list of poll tax payers cannot be accepted as the correct number of legal voters because persons may have paid their poll tax whose names were not put on the official list, and because such list would not show the names of minors who became of age since the first Monday in July previous, when the official list was made up, and because such list would not show the names of those voters who may have moved from other counties of the State into Hempstead six months and into DeRoan township, thirty days, before the election.

(10) A complete answer to that argument is that contestants have adduced proof which makes it probable that the excessive vote in DeRoan township, over the official list of qualified voters, did not occur in any of the legitimate ways suggested. Contestants have proved by the figures set out above that at nearly all of the voting precincts in DeRoan township the vote at this special county seat election was more than double that of the vote in these precincts at the general election of 1912, and also at the general election of 1914, which occurred about a month after the special election. It is a matter of common knowledge that at general elections, where there are candidates of opposing parties, and especially in presidential years, as was the year 1912, the interest of the entire electorate is stirred and they are usually brought to the polls in full voting strength. Contestants also showed by affirmative evidence that the judges of election in DeRoan township permitted a considerable number of illegal votes to be cast. Whether this was done through negligence or corruption on the part of the judges is immaterial, as contestants have proved that there was a difference of 845 votes between the official list of poll tax payers and the election returns of DeRoan township. The testimony thus adduced by contestants was sufficient to render it probable that the disparity shown between the official list of poll tax payers and the

official returns of the election judges was caused by illegal voting. Contestants, therefore, have fully met the requirements of the rule heretofore announced, placing upon them the burden of proving a negative, that is, of overcoming the presumption of the *prima facie* correctness of the official returns.

Contestants having adduced affirmative proof to this effect, it was then incumbent upon the appellees to explain how this excessive vote between the official list of poll tax payers and the official returns occurred. Appellees did not attempt to show by the election judges themselves, or otherwise, any facts that would warrant the learned trial judge in finding that the 845 votes could be accounted for by any of the legitimate methods now suggested in the brief of counsel for the appellees. The court could not find that such was the case without any evidence upon which to base such finding. So the affirmative evidence on the part of the contestants has impeached the integrity of the official returns from DeRoan township, and the trial court erred in not so holding, and these returns cannot now be considered in the count, which would result in favor of the county seat remaining at the town of Washington.

But as it has been suggested by appellees that it might have been shown in the manner indicated that these returns were indeed correct, and as it is manifest that the evidence has not been fully developed along these lines, the appellees should be and will be given the opportunity on a new trial to purge the official returns of DeRoan township and to lift the cloud that now hangs over them. See *Rhodes* v. *Driver,* and *Lovewell* v. *Bowen,* 69 Ark. 501-511.

Since the court, in addition to certain special findings, also made a general finding and holding in favor of the appellees and against the contestants, the general assignment in the motion for a new trial that the verdict is contrary to the law and the evidence, was sufficient to challenge the correctness of the finding and judgment of the court.

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

McCULLOCH, C. J., dissenting. The following words of warning were written by Judge McCrary in his work on Elections, section 523: "The power to reject an entire poll is certainly a dangerous power, and though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested election case, it should be exercised only in an extreme case, that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote." These words find echo in the following statement by this court in *Wheat* v. *Smith*, 50 Ark. 266: "Elections are not to be lightly set aside, though the law has not been strictly complied with."

The majority have, in their decision, overturned not only the certificate of the sworn election officials, but the findings of fact made by the circuit judge in drawing the inferences from the evidence adduced before him. The rule as to conclusiveness of the findings of the trial court upon conflicting evidence applies to a contested election case. *Schuman* v. *Sanderson*, 73 Ark. 187.

It seems to me that the court has done violence to the utterance in *Powell* v. *Holman*, 50 Ark. 85, as follows: "The duly certified official returns of election officers are not subject to the same rules of suspicious reflections and doubtful imputations as attend the ballots under certain circumstances. The official returns are *quasi* records and stand with all the force of presumptive regularity, and *prima facie* integrity, not only till suspicion is cast upon them, but until their self-authenticated verity is overcome by affirmative proof that they do not speak the truth."

The effect of the decision in the present case is to hold that the validity of the certificate of the election officers, concerning the number of votes that were cast at the election in August, 1914, is overturned by the county clerk's certificate of the number of poll taxes paid the preceding year in DeRoan township. It is conceded that the other facts proved by the contestants do not establish fraud conclusively, and that testimony can not

be pieced together with the conflict between the two certificates in order to set aside the trial court's finding of fact. The turning point of the case then comes down to this: Does the prior certificate of the clerk, concerning the number of poll taxes paid, as a matter of law overturn the apparent conflicting certificate of the election officers? I say that it does not. The two certificates are of equal dignity. The first was based upon and related back to an assessment of taxes made more than a year before this election was held, and there being more than a year intervening, the presumption of regularity ought to attend the last certificate, which was that of the election officers, until it is overturned by sufficient evidence. At least, it ought to, and does in my judgment, raise such a presumption as, in the absence of proof, the trial court is authorized to draw the inference of regularity.

The discrepancy is indeed large, but we have authority for the application of the rule of presumption concerning a much larger discrepancy than that. *Todd* v. *Cass County,* 31 Neb. 150, 47 N. W. 196. The intervening period of time between the original assessment for taxes in the year 1913, and the election held in August, 1914, was sufficient to make it possible for there to have been a substantial increase in the number of voters. This could have been brought about by the coming of age of young men, and the removal of voters into the township from other sections of the State, inside as well as outside of the county. There was no proof offered on this score, but the trial court had the right, in determining what inferences to draw from the two conflicting certificates, to find that it was possible for the number of voters to have been very substantially augmented. In addition to that, there may have been many mistakes in the original assessment rolls as to the residences of voters, whether in the school districts composing that township or in other portions of the county; and also mistakes of the collector in registering the paid poll taxes. It is true that there was no proof introduced on that subject, and the court's

opinion constitutes an imposition on the contestees of the duty of making that proof.

It is said in the opinion of the majority that when it appeared that the certificate of the election officers was in conflict with the prior certificate of the county clerk, the burden of proof shifted to the appellees to make an affirmative showing of the correctness of the last certificate. I do not think that is the correct statement of the law, for the burden of proof does not shift. It abides throughout the trial with the contestants, upon whom rests the duty of establishing the affirmative of the issue which they present. The statutes of this State declare that "the party holding the affirmative of an issue must produce the evidence to prove it," and that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." Kirby's Digest, § § 3106-7.

In the American and English Encyclopedia of Law (Vol. V, page 22) the rule with respect to the burden of proof is stated as follows: "The burden of proof in the sense of the duty of producing evidence passes from party to party as the case progresses, while the burden of proof meaning the obligation to establish the truth of the claim by a preponderance of evidence rests throughout upon the plaintiff; and unless he meets this obligation upon the whole case, he fails." That rule has been adopted in several well considered cases. *Egbers* v. *Egbers,* 177 Ill. 82; *Supreme Tent Knights of Maccabees* v. *Stensland,* 206 Ill. 124; *Maxwell* v. *Wright,* 160 Ind. 516; *Shepard* v. *Western Union Tel. Co.,* 143 N. Car. 244; *Boardman* v. *Lorentzen,* 155 Wis. 566. The rule is also stated substantially the same in Ruling Case Law, Vol. X, page 897: "Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

This burden of proof never shifts during the course of a trial but remains with him to the end."

Now, the application of that rule to the present case it seems to me is this: Conceding that the production of the prior certificate made out a *prima facie* case in favor of the contestants,which, unless overcome, warranted the inference of the falsity of the last certificate, and in that sense the burden was shifted to the contestees, yet the burden upon the whole case of establishing the affirmative of the issue was upon the contestants, and as long as it was impossible to draw different inferences of fact from the conflict in the two certificates it was within the province of the trial court to determine which of the inferences should be drawn. The findings of the trial court, based upon legitimate inferences, should not be overturned because, as has already been decided by this court, there is a conclusive presumption in favor of the findings of the trial court if there was evidence upon which it is based.

Even if there was an irreconcilable conflict between the two certificates, why should we say that the circuit court erred in concluding that the certificate of the election officers was correct and that the former certificate of the clerk concerning the number of poll taxes was incorrect. Is that consistent with the oft repeated rule that the official returns are *quasi* records and stand with all the force of presumptive regularity and *prima facie* integrity, not only till suspicion is cast upon them, but until their self-authenticated verity is overcome by affirmative proof that they do not speak the truth? But the two certificates are not in irreconcilable conflict, for it is possible to harmonize the two upon the assumption that the number of qualified electors had increased by reason of the coming of age of young men, and removals into the precinct. It was the duty of the circuit judge to reconcile those two certificates if possible to do so, and I do not think that we ought to say, as a matter of law, that the circuit court erred simply because the contestees failed to introduce proof tending to show that there had been

an increase in the number of voters. As long as the certificate of the election officers bore the verity which the law says shall be attached to it, it cast upon the contestants the burden of offering proof tending to show that there had been no change in the number of voters since the last assessment. That was not compelling them to prove a negative, but to offer proof which overcame the *prima facie* case made out by the certificate of the election officers.

Some significance is attached, in the opinion, to the fact that there were more votes cast at this election than at the last preceding general election and the next succeeding one, and the majority of the judges expressed the view that there is more interest manifested at general elections than at a special election of this kind. I think it may be stated to be a matter of common knowledge, at least in Arkansas, that no kind of an election excites keener interest than a contest over the removal of a county seat. It is a matter of common knowledge, too, that in this State a nomination by the dominant political party is equivalent to an election, and that there is comparatively little interest manifested in the general elections. Therefore I think the fact that the vote in the general elections, preceding and subsequent, falls short of the number of votes cast at the special election, which is being contested, ought not to be cast into the scales against the contestees so as to make them account for the discrepancy.

This case seems to have received the most painstaking care and attention of the trial judge, and I am unwilling to say that he erred in refusing to declare as a matter of law that the discrepancy between the two certificates concerning the number of poll tax payers in that township made out an undisputed case of fraud which destroyed the integrity of the polls. I dissent, therefore, from the conclusions of the majority.

EVANS v. WILLIAMS.

Opinion delivered May 8, 1916.

1. APPEAL AND ERROR—TRANSFER OF JUDGMENT—FINDING OF CHANCELLOR.—The finding of the chancellor that a judgment against appellant had been transferred from the original holder thereof to another party, and was valid against appellant, although appellant had advanced the money to pay off the same, *held* valid.
2. MORTGAGES—FORECLOSURE AGAINST WIDOW AND HEIRS—COLLATERAL ATTACK BY MINOR HEIRS.—In a suit to foreclose a mortgage against the widow and heirs of the deceased mortgagor, the decree ordering a sale, being regular on its face and showing that the court had jurisdiction, is not subject to collateral attack by the minor children.
3. BILLS AND NOTES—PAYMENT.—The evidence held to show payment of a certain note held by a bank against appellant, by a check, sent by appellant to the bank.
4. PRINCIPAL AND AGENT—COMMISSIONS DUE AGENT.—The finding of the chancellor as to the amount due appellee as commissions for services as confidential agent for appellant, *held*, erroneous.

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; Case No. 4079 reversed; Case No. 4078 affirmed.

STATEMENT BY THE COURT.

Appellees in the first above styled case, brought suit to renew the order of sale of certain lands, decreed to be sold under a foreclosure of a mortgage, in the case of *J. W. Robinson, et al., trustees* v. *Mary E. Blanton, et al,* the day of sale of said lands in the original decree having passed and it being necessary to appoint a new commissioner for the purpose.

The petition stated that the Bank of Forrest City had guaranteed to the Home Life and Accident Co., the present owner of said decree, the payment of the amount thereof in the sale to it and was interested on that account in the foreclosure.

It appears that J. P. Blanton, now deceased, with his wife, Mary E. Blanton, now Evans, appellant herein, on January 28, 1901, executed to the Colonial and United States Mortgage Co. their promissory note for $5,000, due

January 1, 1906, with interest, and a deed of trust of the same date, on certain lands and town lots in St. Francis County, to secure the payment thereof.

J. P. Blanton died May 10, 1904, testate, his wife, Mary E. Blanton, their two children, minors, John Cecil and Annie Bell, were the sole beneficiaries under his will. The note was assigned by the mortgage company to John W. Robinson on April 11, 1910, who obtained said decree of foreclosure, in a suit against Mary E. Blanton and the minor children. The decree was assigned to the Bank of Forrest City January 13, 1911, which released the N. W. ¼ section 34, township 4 N. range 3 east, from its lien and assigned it afterwards on January 16, 1911, to the Mississippi Valley Life Insurance Co., which assigned it on December 9, 1912, to A. B. Banks, who on November 20, 1913, transferred it to the Home Life and Accident Co., which, with the Bank of Forrest City, brought this suit to renew the order of sale thereunder. Mrs. Blanton, who since married Evans, for herself and as next friend for the two minors, brought suit against Eugene Williams, the Bank of Forrest City, the Mississippi Valley Ins. Co., A. B. Banks and the Home Life and Accident Co. to cancel and set aside said decree, in which the order of sale was sought to be renewed in the other suit, alleging that it had been paid and fraudulently transferred, stating all the facts relative thereto, by Eugene Williams, the cashier of the Bank of Forrest City, who was her confidential adviser and agent.

The answers denied that the decree had been paid or fraudulently transferred and alleged the purchase in good faith of same by each assignee for a valuable consideration paid, and "for the purpose of saving a foreclosure or sale of the land condemned to be sold thereunder and of giving the plaintiff, Mary E. Evans, an extension of time thereon and with her knowledge, consent and by her approval, and that said decree is a valid and subsisting judgment against the land ordered to be sold thereunder."

Eugene Williams and the Bank of Forrest City answered, admitting the allegations of the complaint, except as to the payment and transfer of the decree, denied that the transfer thereof was fraudulent and alleged that the different transfers were made in order to secure an extension of time and that they were made with the knowledge, consent and approval of said Mary E. Evans, who was unable to pay it, stating all the facts relative thereto.

An amendment was filed to the complaint and a response to the motion or petition for appointment of a commissioner and order to sell, in which it is alleged that the decree was null and void as to the minors, since the demand was not presented to the executrix of the estate before suit brought thereon, and a judgment by default was rendered against the minor defendants.

A master was appointed to state an account and did so, covering a period of several years, showing the transactions between Eugene Williams, who was cashier of the bank, as agent of Mrs. Mary Evans, and the Bank of Forrest City and herself as a depositor in the bank.

The record is voluminous and the account intricate and the abstract and brief not especially helpful in clearing up certain points of contention. The undisputed testimony shows that Mrs. Evans sold a piece of her individual property for $4,000 cash, which she stated was done for the purpose of obtaining money to pay off the judgment of the Colonial mortgage; that she gave this money to Eugene Williams, the cashier of the Forrest City Bank, who was her confidential agent and adviser, which, with about $2,000 other money he held for her, she directed paid in satisfaction of said judgment.

Williams admitted taking the $4,000 and enough additional money from the bank, which was charged to her account, with which to pay the judgment; that he went to Memphis and paid this money to the owners of the judgment and took a transfer thereof to the Bank of Forrest City, he said, by the consent and approval of

Mrs. Evans, who had asked him to take care of the judgment and procure an extension of time, saying she was unable to do so. She flatly contradicted this statement and said it was for the purpose of paying the judgment; that it was directed by her to be paid and she had no information that it had not been paid until long afterwards and after several of the assignments had been made.

The evidence also discloses that Eugene Williams, the cashier of the bank, kept an account as her agent, depositing her funds to his credit as such, and from time to time transferring certain amounts to her credit, as a depositor, usually about the time her bank balance was becoming small and sometimes not till it had been largely overdrawn. He explained that this was done in order to discourage the expenditure of too much money on her part and because she was spending money in excess of her income and ability. The accounts kept by the bank show, however, that she was credited with the full amount for which the judgment sold upon the assignment of it, having been charged with the amount required to purchase it in the first instance, as Williams claimed was the only way in which to secure an extension of time and prevent a sale of the lands. The bank held a second mortgage upon the piece of land, the separate property of Mrs. Evans, sold by her for the $4,000 given to Williams for payment on the judgment, according to her contention.

The master's statement of account shows the balance due from Mrs. Evans to the bank, which included $453.11 to Eugene Williams for commissions for compensation as her agent, which was approved and confirmed in all things by the chancellor and sale of the lands ordered for the payment thereof, from which judgment this appeal comes.

Grant Green, J. W. Morrow and *C. W. Norton,* for appellants.

1. The decree in the original cause has been paid off in full. If not, it can not be enforced by Williams and

the bank and the suit was barred by non-claim. Kirby's Digest, § § 6137-8; 73 Ark. 344; 84 S. W. 703; 85 *Id.* 561; 109 *Id.* 545; 88 Ark. 460; 114 S. W. 923; 92 Ark. 522.

2. The $300.00 note was paid and no foreclosure could be had for Williams' commissions, $453.11.

R. J. Williams and *Mann, Bussey & Mann,* for appellees.

1. The decree was not paid.
2. The $300.00 note was not paid.
3. The commissions were part of the expenses of the loan and properly included.

KIRBY, J. (after stating the facts). (1) We are unable to say, after a careful consideration of the whole record, that the chancellor's finding against the contention that the decree was paid and should have been satisfied, is clearly against the preponderance of the testimony. It is undoubtedly true that enough money to satisfy it was taken by Eugene Williams to Memphis and paid to the owner of the decree, but about $2,000 of this sum was furnished by the bank and charged against Mrs. Evans as a depositor and the other $4,000 was realized from a sale of a piece of land, her separate property, upon which the bank held a second mortgage. Said Williams, the bank cashier, stated positively that Mrs. Evans was unable to pay the decree, desired an extension of time that the lands might be saved to the estate or something realized from it therefor, and that he was unable in any other way to procure such extension. He took the transfer of the judgment to the bank and thereafter sold and transferred it, crediting her account as a depositor in the bank with the entire sum realized from its sale, the amount that was paid in the purchase of it. She made no complaint at the time about this transaction and, although it is true she said she had no notice of it, it is undisputed that the whole amount of the money realized from the assignment of the judgment by the bank, to which it was transferred in the first instance, was checked

out and used by her, which transaction corroborates the cashier's statement that it was but a purchase of the judgment in the first instance and a matter of bookkeeping in the accounts to secure the desired extension of time.

(2) The contention that the debt upon which the Robinson decree was entered was barred by the statute of limitation, insofar as it affected the rights of the Blanton minors and should be set aside and vacated as to them, is without merit. The proceeding was an ordinary suit for foreclosure of a mortgage against the widow and heirs of the deceased mortgagor, Blanton, and not against the executrix of his estate, and there was no plea of the statute therein and the decree being regular on its face and showing the court had jurisdiction, is not subject to collateral attack by the minors. 22 Cyc. 804; *Trapnall* v. *State Bank,* 18 Ark. 53.

It is not such a decree as the infant heirs are allowed to show cause against by the statute (Section 6248 and Div. 8, Section 4431, Kirby's Digest), being one for the foreclosure and sale of mortgaged premises for the payment of the debt secured, and not to divest them of an interest in land or require of them a conveyance of lands in which they had a personal interest. *Blanton* v. *Rose,* 70 Ark. 415; *Paragould Trust Co.* v. *Perrin,* 103 Ark. 67. The decree in No. 4078 is accordingly affirmed.

(3) It is urged in No. 4079 that the chancellor's finding that the $300 note, dated February 19, 1909, had not been paid, is not supported by the testimony, and this contention must be sustained. There is a decided conflict in the testimony upon this point, the appellant testifying that she sent a check from Hot Springs for $300, payable to the order of the bank, which was later charged to her account, in payment of the note. This check appeared to be personally endorsed on the back by her, and the cashier, who had no recollection of the transaction, thought from the endorsement that the money had been paid directly to her and it also appeared

that the amount of the note had been included in a larger note of later date, given in renewal of all her smaller notes due and unpaid to the time of its execution. Her positive statement that the note was paid with the check payable to the bank for the amount thereof, which was later charged to her account, and denial of the collection of the check or receipt of any money thereon, with the inability of the master to find where she could have been credited with the whole of said sum, if the principal part thereof had been paid to her in cash, as the cashier thought was the case, furnishes a clear preponderance of the testimony against the finding that the note was not paid.

The fact that the amount thereof was claimed to be included in a note for a much larger amount executed by her in renewal of all smaller notes, due and unpaid at the bank, is not entitled to much weight under the circumstances of this case, against the testimony showing the payment of the note, since she relied implicitly upon the bank cashier, who was her confidential agent and adviser, and executed such papers as he requested her to sign. The amount of the decree must, accordingly, be reduced by said sum of $300.

(4) The chancellor's finding relative to the commissions due Eugene Williams as agent for Mrs. Evans, for making collections and attending to her affairs, and foreclosing a lien therefor under the mortgage to the bank, is likewise erroneous. According to the master's report said Williams was not entitled to more than the sum of $953.11 on all business transacted, and the undisputed testimony, and his own admissions show that he has received and been paid more than $1,000.00 commissions for his services, and the finding that $453.11 was due him on that account was clearly against the great preponderance of the testimony, and since the mortgage, taken to secure her indebtedness to the bank, did not cover any indebtedness due to her said agent, the chancellor erred in so finding and decreeing a foreclosure therefor.

The decree is erroneous and will be reversed and the cause remanded with directions to reduce the amount of the recovery against appellant, Mrs. Evans, in the sum of the said items of $300, and $453.11—$753.11 in all, and to enter a decree for the balance due after making such reduction, and for foreclosure of the lien and sale of the land.

It is so ordered.

CABELL v. BOARD OF IMPROVEMENT OF IMPROVEMENT DISTRICT NO. 10, OF TEXARKANA.

ROBERTS v. BOARD OF IMPROVEMENT OF IMPROVEMENT DISTRICT NO. 10, OF TEXARKANA.

Opinion delivered May 15, 1916.

1. TAX SALES—"UNKNOWN OWNER"—IMPROVEMENT TAXES—FRAUD ON COURT.—A sale of property within a local improvement district, will not be set aside on the grounds of fraud practiced in procuring the sale, where it was set out in the petition for sale that the property belonged to "unknown owners," where in fact the property was in the possession of tenants of the owners, whose ownership could have been ascertained.
2. JUDGMENTS—FRAUD IN PROCUREMENT.—A judgment will be set aside for fraud only when fraud was practiced on the court in the procurement of the judgment.
3. TAX SALES—LOCAL ASSESSMENTS—PURCHASE BY ATTORNEY FOR COMMISSIONERS—VALIDITY.—A purchase by an attorney of the commissioners of a local improvement district, of land sold for the nonpayment of an assessment, is invalid and will be set aside.

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

STATEMENT BY THE COURT.

The issues involved in the appeal in each of these cases is the same and on that account one opinion may serve in both cases. Each case was begun in the chancery court by the owner of property in an improvement district in the city of Texarkana, Arkansas, to set aside the statutory foreclosure sale made by the board of com-

missioners of the improvement district and to quiet their title. The material facts are as follows:

In 1911, Improvement District No. 10 was created out of part of the city of Texarkana, Arkansas, for the purpose of laying and maintaining a sewer system. Texarkana is a city lying partly in the States of Arkansas and Texas. At the time the improvement district in question was organized, J. B. Cabell was the owner of a lot which had on it two frame buildings, one a dwelling house and the other a store building. At the time of the creation of the district and since that time, Cabell has resided at New Boston, Bowie County, Texas, where he is principal of the colored schools. Cabell had a deed to his property, which was duly recorded on February 18, 1911, before the improvement district was created.

At the time the improvement district was organized, Mary J. Roberts and her sister, Mrs. E. A. Blankenship, owned two lots within the boundaries of the improvement district, on which was situated tenement houses. Miss Roberts, her sister and brother, John P. Roberts, moved to the city of Texarkana, Texas, many years before the improvement district in question was organized. With their joint means they purchased the property, the title to which was taken in the name of their brother. They had a written agreement by which the property went to the sisters after the death of the brother. The brother died before the creation of the improvement district. After the creation of the improvement district the commissioners thereof instituted a suit under sections 5691-96 of Kirby's Digest, against W. G. Cook and certain unknown owners to collect the assessments, penalties, and costs, which it was alleged the property owners had not paid within the time required by law. The property of Miss Roberts and her sister and of Cabell was included in the suit as that of unknown owners. A sale was had under the foreclosure suit and the property was bid in by one of the attorneys for the improvement dis-

trict commissioners, who had brought the suit and had had charge of the subsequent proceedings thereunder.

A decree was rendered in the suit on April 3, 1912, and all the property was sold under the decree on June 15, 1912, each piece for the taxes, penalties and costs assessed against it. This amounted to $19.60 on the property of Cabell, and his property was worth $2,000. The property of Miss Roberts and her sister was sold for $13.70, being the taxes, penalties and costs. The property was worth $1,500. Miss Roberts and her sister exhibited tax receipts showing that they had paid the State and county taxes on the property in 1909, 1910, 1911, 1912, 1913 and 1914, in the name of J. P. Roberts. Miss Roberts went to the court house on April 5, 1915, to pay the 1914 taxes on the lots in controversy and was informed by the collector that the taxes had been paid on the lots by one of the attorneys of the improvement district commissioners. This was the first time that either of the sisters had knowledge of the organization of Improvement District No. 10 of Texarkana, Arkansas, or of the suit to collect the delinquent taxes. There were three houses on one lot and one on the other, which had been there for twelve or fourteen years. During the years 1911 and 1912 and since that time, negro tenants have been living in these houses. It was shown on the part of appellees that a copy of the summons in the foreclosure cases was affixed to one of the houses on the property in controversy, but the tenants testified that no such notice was posted there. Neither Miss Roberts nor her sister saw the notices posted there.

Cabell admitted that he knew that the district had been organized and supposed that he would be assessed to pay for the improvement, but said that he also thought that notice would be given him to pay his assessment and that no notice was ever given him. He further stated that he had no knowledge that suit had been brought against his property to collect unpaid assessments. He did not know that his property had been sold until he was

served in April, 1915, with summons in an action of ejectment brought against him to recover the property. He had been in possession of his property through his tenants since he had purchased the property, which was before the district was organized.

The attorney for the board of improvement commissioners testified, that he did not purchase the property until he had sought advice of the chancellor, and the chancellor told him that he had a right to purchase it. There were no other bidders at the sale and, as before stated, the attorney purchased each piece of property for the penalties and costs assessed against it.

Miss Roberts and her sister offered to pay the purchaser at the sale the sum of taxes, penalties, and costs that he had paid on the lands and all other sums that he was out thereon with lawful interest, and offered to pay that amount into the registry of the court without delay if appellee would state the amount. The prayer of their complaint was that the decree, deed and other proceedings under the foreclosure suit be held null and void and that they have a decree setting aside the same upon the payment of the sum aforesaid.

Cabell instituted an action in the chancery court to vacate the decree rendered in the foreclosure proceedings and to set aside the sale. He also filed an answer in the ejectment suit and asked that it be transferred to equity and this was done without objection and the two causes were consolidated.

The chancellor found the issues against the appellants in each case and was of the opinion that the sale under the foreclosure proceedings in each case was valid. A decree in accordance with his findings was entered in each case, and to reverse that decree, appellants in each case have prosecuted an appeal.

Webber & Webber, for appellant.

1. The owner, if known, shall be made a defendant. Kirby's Digest, § 5694. Appellant was the owner; the record title was in him and he was in actual possession.

It was a fraud to proceed against his property as an unknown owner, and the sale should be set aside as void. 68 S. W. 329, 332; 115 *Id.* 888; 119 *Id.* 879; 127 *Id.* 164. The owner was known and a failure to make him a party was jurisdictional and he is not bound by the decree. 177 S. W. 10 should be overruled. 119 S. W. 880; 63 Ark. 323; 115 S. W. 888; 86 *Id.* 781. The facts of this case bring the owner within the terms of subd. 7, of section 4431, Kirby's Digest. 63 Ark. 323; Kirby's Digest, § 4431.

2. It was error to sell the whole property. Kirby's Digest, § 5700.

3. No member of the board could purchase at the sale. Simms was the attorney of the board and it was unlawful for him to purchase. 33 Ark. 575; *Ib.* 94; 34 *Id.* 582; 86 *Id.* 368; 90 *Id.* 500; 8 Ohio 552; 1 Cox 134. The foreclosure sale should be vacated.

John N. Cook, Amicus curiae.

1. Possession is notice of ownership to the world. 33 Ark. 464; 76 *Id.* 25; 82 *Id.* 455; 90 *Id.* 149; 101 *Id.* 163; 107 *Id.* 320. The sale was void.

2. It was error to sell the whole of the lot. Kirby's Digest, § 5700. Simms was the attorney for the board and could not purchase. He was also an officer of court. Kirby's Digest, § 444. The sale should be set aside.

Paul J. Cella and *James D. Head,* for appellee.

1. This is a collateral attack on the decree. 177 S. W. 10; 23 Cyc. 1063. The court had jurisdiction and the judgment is conclusive. 94 Ark. 588; 108 N. W. 356; 90 Ark. 166; 181 S. W. 303.

2. The court had jurisdiction. The decree recites that the owners were unknown. Kirby's Digest, § § 5694, 5696; 118 Ark. 449. The proceeding was *in rem* and conclusive. 60 Ark. 369; 88 Mo. App. 553; 127 S. W. 164; Act 71, Acts 1895; 74 Ark. 174.

3. The complaint is defective and the proof insufficient to vacate the decree. Kirby's Digest, § 4431, *et*

seq.; 33 Ark. 788; 50 *Id. State* v. *Gill,* p. 458; 84 Ark. 527; 94 *Id.* 347; 72 *Id.* 101; 52 *Id.* 80; 102 *Id.* 252; 89 *Id.* 163; 83 *Id.* 21; 54 *Id.* 541; 57 *Id.* 423; 56 *Id.* 544, 559. This case is ruled by 177 S. W. 10.

4. The purchase by the attorney was valid. 146 S. W. 1117; 23 Ark. 622; 30 *Id.* 44; 33 *Id.* 575; 54 *Id.* 627; 49 *Id.* 242; 38 *Id.* 1; 36 *Id.* 383; 39 *Id.* 196; 145 U. S. 349; 146 Fed. 929; 20 Ark. 583; 22 *Id.* 143; 4 Cyc. 958-9; 24 Cyc. 29.

HART, J., (after stating the facts). It is contended by counsel for appellants that the decree was procured by fraud because the complaint in the statutory proceeding to collect the delinquent assessments alleged that the owners of the lots in controversy were unknown when it was well known to the commissioners that appellants were the owners of the lots. This contention was settled adversely to appellants in the case of *Cassady* v *Norris,* 118 Ark. 449, 177 S. W. 10. There Cassady, who was a non-resident of the State of Arkansas, owned property in Mena, Arkansas. His property was placed in an improvement district but he had no knowledge of that fact and on that account did not pay any assessments against it. A complaint was filed against the unknown owners of lots on which the special assessments had not been paid. Cassady's lot was included in the complaint and the same was proceeded against as the land of an unknown owner. It was sold and Norris became the purchaser of it. He waited until the time for redemption had expired before notifying Cassady of his purchase. In this case the facts are in all essential respects the same, and have been stated and need not be repeated. In regard to a precisely similar contention in the case of *Cassady* v. *Norris,* the court said:

"But these allegations were not sufficient to constitute a fraud practiced by the successful party in obtaining the judgment. The allegation in the complaint, in the suit to condemn, that the owner was unknown was sufficient to give the court jurisdiction to proceed against

the property. It was not a fraud on the court to make this allegation, although it was untrue; for the court had the power to inquire into its jurisdiction and to determine whether or not it was true. The recitals of the decree condemning the lot in controversy to be sold were, in effect, that the owners of the lots were designated as unknown, and that they were unknown to the board of improvement. We must presume, in the face of these allegations, that the court did make inquiry as to its jurisdiction to proceed against the property, and found that it had jurisdiction. In other words, that the complaint alleged that the owners of the lots were unknown, and that such was the fact."

(1) The court held that, since a decree of sale of real estate for non-payment of taxes may be impeached for fraud only where such fraud is extrinsic of the matter tried in the cause, such decree may not be set aside because the owner of the lot was proceeded against as an unknown owner, when in fact he was known to the plaintiff.

Counsel for appellants have asked us to overrule *Cassady* v. *Norris,* upon the authority of the following cases from the State of Texas: *Hollywood* v. *Wellhausen,* 68 S. W. 329; *Sellers* v. *Simpson,* 115 S. W. 888; *Wren* v. *Scales,* 119 S. W. 879 (affirmed by the Supreme Court), and opinion reported in 127 S. W. 164. In *Hollywood* v. *Wallhausen,* the court avoided the sale where the owner was sued as an "unknown owner," saying:

" * * * Appellants were in possession of the land when the suit for taxes was instituted, and had been for ten years; and the State of Texas was charged with knowledge of such possession, and the officers representing the State had no basis for the affidavit that the owner was unknown. If no one had been in possession of the land, the judgment against the unknown owner might bind the owner, but we can not subscribe to the doctrine that a man in possession of his homestead can be deprived of his title by a suit against an unknown

owner. If the rule should prevail that a man occupying a homestead can be dispossessed of the same through a suit against an unknown owner, of which he had no actual notice, no citizen could feel secure in the title to his property."

These decisions were not before us when we decided the case of *Cassady* v. *Norris,* but the principles decided in them were fully considered and discussed by the court in that case. The majority of the court think that the principles decided in *Cassady* v. *Norris* are sound and adhere to the opinion for the reasons expressed therein. It is not necessary to repeat the reasoning of the court here. Mr. Justice SMITH and myself thought the opinion in *Cassady* v. *Norris* was unsound at the time it was written, and dissented. We have not changed our opinion and, because we did not express in writing our dissent in that case, it may not be amiss if we should briefly express our views here.

The principles governing the sale of land for taxes are clearly stated in Cooley on Taxation, volume 2, 3d. ed., page 912, as follows: "Tax sales are made exclusively under a statutory power. The officer who makes them, sells something he does not own, and which he can have no authority to sell, except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail, the power is never created. If one of them fails, it is as fatal as if all failed. Defects in the conditions to a statutory authority can not be aided by the courts; if they have not been observed, the courts can not dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with. Neither, as a general rule, can the courts aid the defective execution of a statutory power; they may do this when the power has been created by the owner himself, and when such action would presumptively be in furtherance of his purpose

in creating it; but a statutory power must be executed according to the statutory directions; and, presumptively, any other execution is opposed to the legislative will, instead of in furtherance of it. It is, therefore, accepted as an axiom when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law, in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; special reasons make it peculiarly applicable to the case of tax sales."

Our statutes on improvement districts provide that the board may file a complaint in equity for the sale of delinquent property for the payment of assessments, penalties, and costs of suit. The statute provides that such suits may be brought against one or more owners; it provides that the owner of the property assessed shall be made a defendant, if known; if he is not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding *in rem* against the property assessed. Kirby's Digest, § § 5691-96. This court has repeatedly held that possession or occupation is sufficient to put on inquiry every person seeking an adversary interest in the property and is, therefore, constructive notice of such title as the possessor or occupant has. *Hamilton* v. *Fowlkes,* 16 Ark. 340; *Hughes Bros.* v. *Redus,* 90 Ark. 149, and cases cited. The ordinance creating an improvement district definitely defines its boundaries. It is usually only a part of a city or town. So when the owner or his tenant is in the actual possession of the property, the board of commissioners and its attorneys are without excuse in stating that the owner is not known. In the State of Alabama there is a statute requiring the assessor to make out a complete list of all the land in his county subject to taxation and set opposite each division or subdivision of section, the name of the reputed owner thereof; and when the owner is not known, these words,

"owner unknown." In the case of *Oliver* v. *Robinson,* 58 Ala. 46, the court said: "It is manifest that proper inquiry and search were not made, to ascertain who was the owner of these lands. Lands can not be lawfully assessed to 'owner unknown,' when the owner is known; and if the assessor or collector, who makes assessments, has, at the time, the means of ascertaining who the owner is—such as open possession by the owner—this is equivalent to actual knowledge, and will avoid a sale made under such assessment."

(2) Even if it be held that this is a collateral attack and that every question that could have been determined in the foreclosure case is presumed to have been determined in the former judgment, and has become *res adjudicata,* still we think the conclusion of the majority of the court is wrong. Section 4431 of Kirby's Digest provides that the court in which a judgment has been rendered shall have power after the expiration of the term, to vacate it, among other things, for fraud practiced by the successful party in obtaining the judgment. It is true we have repeatedly held that the fraud which entitles a party to impeach a judgment must not consist of any false or fraudulent act or testimony, the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is thus assailed; but that it must be a fraud practiced upon the court in the procurement of the judgment. *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, and cases cited.

In the application of this rule in the case of *Moore* v. *Price,* 101 Ark. 142, the court held that where the sheriff made a false return of service, and a decree was had on such return, reciting service, the record and return may be impeached on the petition to set aside the decree for want of service and notice. So, too, in *Corney* v. *Corney,* 79 Ark. 289, a decree of divorce was set aside. Under our statutes suits for divorce must be brought in the county where the plaintiff resides. In that case the

plaintiff, for the purpose of procuring the issuance of a warning order, made affidavit that his wife was not a resident of the State of Arkansas, when he knew that she was in the State, and he fraudulently induced her to leave the State immediately thereafter, without disclosing his purpose of suing for a divorce. The court vacated the decree on the ground of fraud in its procurement. In the present case, the known owner is entitled to his day in court and to be heard in defense of his rights. The owners were in possession of their lands by their tenants and under such circumstances for the commissioners or their attorneys to state in the complaint that the owners were unknown was to practice a fraud upon the court in the very act of obtaining the judgment itself. Their conduct deceived or misled the court as to a material fact and constituted an abuse of the process of the court which resulted in the rendition of a judgment which would not have been given if the conduct of the whole of the case had been fair.

As we have already stated, however, the majority of the court is of the opinion that the decision in *Cassady* v. *Norris* is sound and adhere to it, both on that account and because it has become a rule of property. Therefore, the decision in that case has become the settled law of this State.

(3) It is earnestly insisted by counsel for appellants that the sale should be set aside because the attorneys for the board of commissioners bid the property in at the sale. In this contention a majority of the court agree with counsel. In the case of *Roger* v. *Whitham,* 56 Wash. 190, 105 Pac. 628, 21 A. & E. Ann. Cas. 272, the Supreme Court of the State of Washington, in discussing a similar principle, held: "A city attorney who becomes a purchaser at a foreclosure sale for the non-payment of a special assessment owes to the city and to the owner of the property a duty to exercise due care in locating the owner and to pursue such sources of inquiry as are open to him leading to the means of giving notice to the owner,

and where the city attorney violates this duty the sale may be avoided at the suit of the injured party."

There, as here, counsel sought to uphold the sale upon the well known rule that any person can purchase at a judicial sale who has no duty to perform in reference thereto inconsistent with the character of a purchaser. The court held, however, that in that case the attorney was confronted with a two-fold duty, with a duty to the city and a duty to the owner. The court indorsed the utterance of this court in speaking of the right of an attorney for an administrator to purchase at his own sale. In *West* v. *Waddill,* 33 Ark. 575, the court said:

"The doctrine has been extended to all persons intrusted with the management and direction of sales, in such manner as to impose upon them the duty of taking care that the property may be sold to the best advantage for all concerned. They can not purchase at all, however fair their intentions. As purchasers their interests would conflict with their duties, and the courts of equity regarding the weakness of ordinary men, takes from them all temptations by rendering them incapable of purchasing at all."

We think the principles announced in that case apply with equal force here. In *Fitzgerald* v. *Walker,* 55 Ark. 148, in discussing the power of improvement districts, the court said that its powers are derived directly from the legislature and in exercising them the board acts as the agent of the property owners whose interests are affected by the duties it performs. In *Davis* v. *Gaines,* 48 Ark. 370, the court said, that the board is a distinct agency for accomplishing the purposes of the statute. It is true that in foreclosure suits to collect delinquent assessments, the actual sale is made by a commissioner appointed by the court for that purpose; but it by no means follows that the board of commissioners and its attorney have no duties to perform relating thereto. As we have already seen, section 5694 provides that the owner of the property assessed shall be made a defendant if known,

if he is not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding *in rem* against the property assessed. The property owner is entitled to his day in court. The duty then devolves upon the board and its attorney to ascertain who owns the property. Under the decision of the majority of the court the question of whether the owner of the property is known becomes *res adjudicata* when it has been passed upon by the chancellor in the foreclosure sale. The act requires that the owner be made a party if known and if he is not known, that fact shall be stated in the complaint. So the act imposes a very delicate and very important duty upon the board and its officers. The means of effectuating a wrongful purpose are very simple and would readily suggest themselves to any one who desired to profit thereby. At least the board would be exposed to the temptation of a dereliction of duty in order that its members and attorney might earn a profit by purchasing at the sale. Hence, it will be seen that a very important trust has been imposed upon the board by the Legislature in the accomplishment of the purposes of the statute. Hardly any public agency exists which possesses to an equal extent the power of wrong-doing. It is true no wrong motive or intentional wrong-doing can be imputed to the purchasers in the present case because they asked the chancellor if it would be proper for them to purchase at the sale, and received his assent thereto before they became purchasers.

The policy of the law, however, must be preserved in all cases in order to effectuate its beneficial purposes. As said in *Clute* v. *Barron,* 2 Mich. 192, "This object can be best effected by declaring their incapacity to become purchasers at tax sales; and by treating as void any purchase made by them, or by any person for them; or, in the language of Mr. Justice STORY, to treat all such sales as if there had been no sale, and the ownership of the property as never having been legally divested. This is

the only remedy for the mischief; this is striking at the root of the evil."

It is true this language was used in regard to a sale under the statute by the county treasurer for the non-payment of taxes, but if we are correct in holding that the statute contemplates that the board and its attorneys have duties to perform relative to the sale, the language quoted applies with equal force here.

Therefore, the decree in this case will be reversed and the cause remanded with directions to the chancellor to render a decree in accordance with the prayer of the complaint, and not inconsistent with this opinion.

McCULLOCH, C. J., dissenting. The question of the right of an attorney to purchase at a judicial sale as against the interests of his clients must not be confused with the questioninvolved on this appeal. It is too well settled for further controversy, that an attorney owes the highest duty to his client, and can not, as against the interests of his client, purchase at a judicial sale in which his client is interested. In the present case the client of the attorney who purchased does not complain, and we have only the question of the right of the adversary to object to the sale on account of the purchase by the attorney who represented the plaintiff in the foreclosure proceedings.

The writer asserts with the utmost confidence that no case can be found sustaining the views of the majority except the one case of *Rogers* v. *Whitman,* decided by the Supreme Court of Washington. That decision is entirely without harmony with the settled principles which should control, and it should not be followed. The opinion in the case cites a number of cases which did not in the slightest degree support it. Among others it cites decisions of this court which merely hold that the attorney of a party who has a duty to discharge with respect to a judicial sale can not become the purchaser. There is another case cited as sustaining this view (*Busey* v. *Hardin,* 2 B. Munroe, Kentucky, 407), but an examina-

tion of the opinion in that case shows that it has little bearing upon the question now before us, or which was before the Washington court. In that case there had been a judicial sale, at which the solicitor for the plaintiff purchased the property, and there was an objection to confirmation on numerous grounds, among others that the price at which the property was sold was grossly inadequate. The objection was made by the original owner, who tendered to the purchaser the amount of his bid, which was sufficient to discharge the lien against the property, and the court decided that in consideration of all the circumstances, the inadequacy of the price, the conduct of the solicitor, and other circumstances pertaining to the sale, that confirmation should be denied.

All that was said in the opinion in that case which appears to sustain the view of the majority, is that the fact that the purchase was made by the attorney, has been, in some quarters, deemed sufficient to vitiate a sale as being "against the policy of justice." The learned court doubtless had in mind the English and Canadian rule, which is that an attorney for either party may not purchase without permission of the court. That rule has, however, never obtained in this court, or in any other of the American courts.

"In the United States the rule is that property offered at judicial sale may be purchased by either party to the suit in which such sale was ordered, or by the attorney for either party. But in England and Canada there are numerous cases holding that neither the parties nor their attorneys can become purchasers without having previously obtained permission of the court to bid at such sale. This rule is, however, probably due to the fact that at one time it was customary to give the conduct of the sale to one of the parties, or to his attorney, in which case it would be eminently improper for one person to combine the two characters of buyer and seller." 17 Am. & Eng. Ency. of Law 963.

The rule stated above is the one that is recognized in all of the American decisions with regard to judicial sales under foreclosure of lien. All of the authorities are to the effect that where the sale is made by order of the court, the lienor or his attorney may purchase. 1 Wiltsie on Mortgage Foreclosure, sections 609-610; Freeman on Void Judicial Sales, section 33.

The test as to the right of a litigant or attorney to purchase at a judicial sale is whether or not he has any duty to discharge with respect to the sale itself. Now, the statutes of this State may be examined without finding the slightest imposition of a duty upon an attorney for an improvement district concerning the sale of the property upon foreclosure of the lien for assessment. The proceedings are like other chancery proceedings *in rem,* and the court ordering a foreclosure appoints a commissioner to make the sale. The attorney has no duty to discharge with respect thereto. Whatever may be the duty of the attorney in instituting the action for the improvement district, the proceeding is an adversary one and the attorney does not act in any fiduciary capacity towards the defendants in the proceedings, who are like other persons that are sued and must look after their own interests.

In addition to that, it affirmatively appears that the permission of the court for the purchase to be made by the attorney was obtained, and when these facts were brought to the attention of the court the sale was confirmed. The loss by appellants of their property works a hardship on them, but it resulted from their own failure to pay the assessments and I am unwilling to wreck the settled principles of law for the purpose of protecting them.

Mr. Justice KIRBY concurs in the views here expressed.

HIGH v. REED.

Opinion delivered May 22, 1916.

1. BILLS AND NOTES—ALTERATION.—In an action on a promissory note, the defendants set up that the note had been altered. *Held*, under the evidence, that it was a question for the jury whether the note had been altered or not, after its execution.
2. BILLS AND NOTES—CONSIDERATION—PROOF.—In an action upon a note, where defendants claimed that the note was without consideration as to them, *held*, evidence of transactions on the day the note was dated, competent as showing the consideration.
3. BILLS AND NOTES—CONSIDERATION—ANTECEDENT DEBT.—An antecedent indebtedness is a good consideration to support a new note as to one who signs the note as surety.
4. BILLS AND NOTES—CONSIDERATION—LIABILITY OF SURETY.—If, subsequent to the execution and delivery of a note, it was signed by appellees solely on account of a loan previously made to one S., the maker of the note, and it was no part of the consideration that appellees should subsequently sign the note, then the note is without consideration as to appellees, but the appellees are liable if they executed the note before its delivery to the payee.

Appeal from Lonoke Circuit Court; *Thomas C. Trimble,* Judge; reversed.

W. J. Waggoner, for appellant.

1. It was error to direct a verdict. The evidence was conflicting and presented disputed questions which should have been presented to a jury. 17 Ark. 478; 88 *Id.* 164; 100 *Id.* 629.

2. It was error to refuse to permit Walls to testify as to the consideration of the note and in excluding the check. The judgment is contrary to the law and the evidence. Reed and Minton were joint makers and both liable. 77 Ark. 53; 24 *Id.* 511; 40 *Id.* 546; 80 *Id.* 285; 99 *Id.* 319.

3. An antecedent debt is a good consideration. 30 Ark. 684; 103 *Id.* 476. Here there was a new consideration *good* and *valid.* 88 Ark. 97; 89 *Id.* 132; 96 *Id.* 110. The question of presentment, demand, protest and notice is immaterial. 64 Ark. 470.

Manning, Emerson & Morris, for appellee J. B. Reed.

1. The note is without consideration as to Reed. Anson on Contracts (11 ed.) 108; 121 Mass. 116; 8 Johnson 29; 5 Am. Dec. 317; Pingrey on Suretyship, § § 40, 41; Stearns on Suretyship 239; 1 Brandt on Sur. Guar. (2 ed.), § 17; 21 Ark. 18. Past or executed consideration is not sufficient to sustain a promise founded upon it. Cases *supra.* 103 Ark. 473. Reed was only a surety and not bound. 43 Ark. 21; 23 S. W. 1023. Here there was no new consideration. The loan was not requested by Reed.

2. Parol evidence was admissible to show that a joint maker signed as surety. 54 Ark. 97; 34 S. W. 78.

3. The note was raised to $150.00 after Reed signed as surety for $100.00. A material alteration avoids a note. 49 Ark. 40; 111 *Id.* 263. The judgment is right.

SMITH, J. Appellant prosecutes this appeal from a judgment adverse to her which was rendered upon a verdict returned under the directions of the court. The suit was upon a promissory note signed by appellees and one J. M. Swaim, payable to appellant's order. The note was dated March 21, 1911, and was for the sum of $150.00, and was due October 21, 1911. Appellees defended upon two grounds. The first defense was that the note as signed was for the sum of $100 only, and the second defense was that the note was executed by appellees as security for Swaim and that it was without consideration as to them.

(1) In support of the first defense appellee Reed testified that he was only asked to sign a note for $100 and that, to the best of his knowledge, the one he signed was for only $100, but he did not testify unequivocally that the note was not for $150. The other surety testified that he was not certain whether the note was for $100 or for $150. As it read at the trial the note was for $150, and we think the evidence presents a question

for the jury as to whether the note had been altered after its execution.

(2) Appellees insist in support of their second defense that the evidence shows that appellant had loaned her brother $150 on February 18th or 20th under an oral agreement that she should have a lien on a horse which he owned, and that on the 21st of March thereafter, for this consideration, the note in question was signed by them. Appellant admitted that she had loaned her brother $150 in February under an oral agreement that she should have a lien on a horse owned by him, but she also says that it was agreed that the money should be repaid when the horse was sold, and that the horse was sold on the date of the note, and that after selling the horse Swaim offered to give her either the money or the note, and she accepted the note. And she says the note was signed by all the parties before it was delivered to her.

Over appellant's objection and exception the court excluded evidence showing the sale of the horse and the payment of the money on the date the note was executed. We think the excluded evidence was competent and relevant. It tended to support appellant's contention that a new trade was made and a new consideration furnished for the note.

In 3 R. C. L. 928, it is said: "The general rule sustained by the great weight of authority is that the undertaking of one not a party to the original transaction, who, in pursuance of some subsequent arrangement, signs as surety, guarantor, or indorser after the original contract has been fully executed and delivered, is a new and independent contract, and to be binding must be supported by a new and independent consideration from that of the original contract. But it is a well established exception to this rule that if the original contract is induced by the promise of one of the parties that he will procure the signature of the person who subsequently signs in

pursuance of such agreement, no new consideration is necessary to support the latter's undertaking."

(3) Among other cases cited in support of the text is that of *Killian* v. *Ashley,* 24 Ark. 511. See also *Williams* v. *Perkins,* 21 Ark. 18; *Platt* v. *Snipes,* 43 Ark. 21; *Kissire* v. *Plunkett-Jarrell Gro. Co.,* 103 Ark. 473. Appellees insist on the authority of these cases that the verdict was properly directed in their favor. But we do not think so. The authority of the case of *Harrell* v. *Tenant, Walker & Co.,* 30 Ark. 684, has not been impaired by the cases cited, nor by any other subsequent decision.

The syllabus of that case is: "An antecedent indebtedness is a good consideration to support a new note, as to one who signs the note as surety." Applying this rule of law to the facts of that case, which were very similar to the facts, as appellant states them, in this case, Judge English said: "If the Johnsons thought proper to give their note to the appellees for an old debt, and appellant thought proper to sign the note as their surety, the old debt was a sufficient consideration to uphold the note against both principal and surety." "If the Johnsons had made the note and delivered it to appellees for the old debt, and afterwards they had induced appellant to sign it without consideration, it might, perhaps, have been invalid as to him."

(4) So, therefore, if subsequent to the execution and delivery of the note, it was signed by appellees solely on account of the loan previously made Swaim, and it was no part of the consideration that appellees should subsequently sign it, then the note was without consideration as to them. However, if the note was executed to be used in lieu of the cash upon the sale of the horse, or was executed by appellees before its delivery to appellant, then appellees are liable, although there was no other consideration. A verdict should not, therefore, have been directed, and for this error the judgment will be reversed and the cause remanded.

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

Opinion delivered May 22, 1916.

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCE—FEDERAL EMPLOYER'S LIABILITY ACT.—Where a servant of a railway company is injured, and the case is controlled by the Federal Employer's Liability Act, the presumption prevails, even after proof of the defect, that the railway company was not aware of its existence, and until it is shown that the railway company knew, or, in the exercise of ordinary care, should have known of the defect, it is not charged with that knowledge.
2. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF MASTER TO INSPECT FOR DANGERS.—The master is required to make an inspection only when ordinary care suggests the necessity for it; and the inspection must be such as ordinary care suggests as being necessary under the circumstances of the case.
3. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO INSPECT—FAILURE.—In an action for damages for personal injuries, *held*, under the evidence that it was a question for the jury whether the master had failed to discharge his duty to make an inspection.
4. JURORS—BIAS—QUALIFICATION—PERSONAL INJURY ACTION.—Where a juror is called who has recently had protracted litigation with one of the parties to the suit then before the court, in which ill-will was engendered, and in which the juror was represented by the same attorney who was then appearing against the juror's former adversary, it is the better practice for the court to hold the juror disqualified, without reference to his existing opinion as to his own freedom from bias or prejudice, but this court will not say that that should be done, as a matter of law, nor that error was committed where the trial court held the juror competent.
5. DAMAGES—PERSONAL INJURY ACTION—AMOUNT.—A judgment for $9,000 is not excessive, when plaintiff sustained a severe injury to his leg by reason of defendant's negligence, where seven different operations, each under an anaesthetic, were performed on the leg, plaintiff being confined to a hospital many weeks, suffering intense pain, and partially losing the use of his leg.
6. RAILROADS—PERSONAL INJURY ACTION—STATUTORY LIEN—LIMITATIONS.—The statutory lien, fixed by Kirby's Digest, § § 6661-6662, does not attach against a railroad, or the receivers thereof, where an action against it for personal injuries is brought after the lapse of one year.
7. LIMITATIONS—STATUTORY RIGHT.—When a statutory right is created which did not exist at common law, and the statute giving the right, also fixes the time within which the right may be enforced,

the time so fixed becomes a limitation or condition upon the right of action and controls, and where the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but also of the right of action itself.

Appeal from Jackson Circuit Court; *John W. Stayton,* Special Judge; modified and affirmed.

Troy Pace, for appellant.

1. This suit is based upon the Federal Employers' Liability Act, and liability must be determined by it. 229 U. S. 146; Roberts, Injuries Interstate Employees, § 30; Thornton, Fed. Employers' Act (3 ed), § 45. This is but a re-enactment of the common law liability of the master. 233 U. S. 492; 234 *Id.* 725. The general presumption is that the appliance was not defective, and if shown defective there is a further presumption that the master had no notice. The burden is on the servant to negative these presumptions and show negligence. 4 Thompson on Negl., § 3865; 7 Jur. (N. S.) 767. Negligence is not proven or inferred simply from the occurrence of the accident. 152 U. S. 684, 690. The burden is on the servant. Wood on Master and Servant, § 382; Sh. and Redf. on Negl., § 99; 2 Thompson on Negl., § 48; 1 White on Pers. Inj. on Railroad, § 79.

There was no evidence that the appliances had the appearance of being defective. 79 Ark. 437; 101 *Id.* 119; 100 *Id.* 476. Negligence must be proven. 88 *Id.* 465; 92 *Id.* 350; 99 *Id.* 265. A verdict for defendant should have been directed. 71 S. W. 540; 78 *Id.* 99; 93 *Id.* 682; 71 *Id.* 507.

2. No duty of inspection devolved upon the master. The skid was a simple contrivance or appliance. 72 S. W. 712; 88 *Id.* 36; 108 *Id.* 383.

3. No presumption of any kind arises against appellant from the fact that the skid broke. 51 Ark. 467; 74 *Id.* 19; 79 *Id.* 76; 90 *Id.* 326; 105 *Id.* 161.

4. Craft was not a competent juror. 102 Ark. 180; 60 *Id.* 221; 93 *Id.* 301.

5. Appellee testified that he could not walk without a crutch and yet the next day he walked freely without one. Appellee wilfully exaggerated and a new trial should have been granted. 51 L. R. A. (N. S.) 286, and notes; 37 *Id.* 429.

6. The verdict is excessive and it was error to declare the judgment a lien on the roadbed, etc., under section 6661, Kirby's Digest, because the year had expired. 93 Ark. 234, 238-9; 74 *Id.* 528, 532.

Gustave Jones and *L. L. Campbell,* for appellee.

1. Where an appliance breaks in consequence of a visible defect, or of a defect which should have been discovered by the master in the exercise of reasonable care, then the question of negligence is one for the jury. 4 Thompson on Negligence, § 2803. This principle is recognized by appellant in its 4th and 6th instructions.

2. "Ordinary care" and "reasonable care" are defined in Bouvier Law Dic., Vol. 3, 2426; 4 *Id.* 150; 113 Ky. 952. Appellant can not complain of the instruction on this subject.

3. The liability of the master for injury from defect in a simple tool is stated in 13 L. R. A. (N. S.) 668, 687; 40 *Id.* 832; 132 Ga. 221; 140 Mo. App. 524; 41 Ind. App. 588. Our court follows this rule. 117 Ark. 524.

4. These skids may have been reasonably safe for stakes, but that would not imply that they were reasonably safe for skids. 48 Ark. Law Rep. 316, 320; *Ib.* 242. Appellee had a right to rely upon the foreman's superior knowledge and there was no question of assumed risk.

5. No inspection was made of the skid. By the observance of ordinary care notice of the defect would have been brought home to the master. 51 Ark. 467; 92 *Id.* 350.

6. The supplemental motion for new trial was properly denied. 91 Ark. 362; 53 *Id.* 166; 60 *Id.* 257; 85 *Id.* 179. The verdict is not excessive and the judgment should be affirmed.

SMITH, J. This is the second appeal of this case. The opinion upon the former appeal will be found in 118 Ark. 377, and the facts as there stated are substantially the same as those developed at the trial from which this appeal is prosecuted, except in the respects to which attention will be called. At the trial from which the first appeal was prosecuted, appellee predicated his right of recovery on the Act of the General Assembly of this State approved March 8, 1911 (Acts 1911, p. 55), but on the remand of the cause appellant amended its answer and alleged that, at the time of his injury, appellee was employed in interstate commerce and that his right of recovery, therefore, depended upon the Federal Employers' Liability Act of April 22, 1908, and not upon the State statute under which the first trial was had. Appellee conceded that this was correct, and all the instructions given were drawn to conform to the Federal statute.

The difference between the two statutes, so far as it is material here to consider the difference, is that, under section 2 of our statute, the railroad company is deemed to have knowledge of the defect in its appliances, and proof of the existence of the defect is *prima facie* evidence of negligence; while, under the Federal statute, the common law rule in this respect has not been changed.

(1) Under the State statute the servant need only to prove that he was injured by reason of a defective appliance to make a *prima facie* case; while, under the Federal statute, the presumption prevails, even after proof of the defect, that the railway company was not aware of its existence, and until it is shown that the railway company knew, or, in the exercise of ordinary care, should have known, of the defect, it is not charged with that knowledge.

At the trial from which the first appeal was prosecuted it was shown that appellee was injured by reason of the fact that a skid broke and threw a piece of piling on him. There was expert evidence showing that a sound skid should have safely supported a weight several times

greater than that of the piling which caused the skid to break. Thereupon the court directed the jury to find for the plaintiff upon the question of negligence, and submitted to the jury the question only of the assessment of damages. We held that this was error, as, under the evidence, the jury should have been permitted to pass upon the question of the primary negligence of the company. Attention was called to the evidence of the foreman of the gang, of which appellee was a member, wherein he stated that "he observed the guard rails after they were taken from the bridges and that there were no defects in them." At the trial from which this appeal is prosecuted the foreman was not so definite on the subject of the inspection of the timbers from which the skids were made. Indeed, appellant undertook to impeach him by proof of contradictory statements on this subject contained in his evidence on the former trial. At this last trial he was asked, "How close did you ever get to the skids that were being used?" and he answered, "I suppose I passed them in my work laying on the ground." He was asked the following questions and gave the answers set out: "At that time did you give them any particular inspection?" A. "No, sir." "You just saw them like passing by this courthouse, and see them?" A. "Yes, sir." "Did you ever make inspection of the skid that broke with a view to see if it was defective?" A. "No, sir."

It appears, therefore, that the jury was warranted in finding that no inspection was, in fact, made.

Appellant insists, however, that the evidence is not sufficient to warrant the finding that reasonable care required that an inspection be made; and it also insists that an inspection such as would have been required by the exercise of ordinary care only would not have revealed any defect in the skid. In other words, if a defect existed the exercise of ordinary care in inspecting the skid would not have disclosed its existence.

As at the former trial, so in this, the proof showed that a skid the size of the one in use when appellee was injured should have safely supported several times the weight of the piling which caused it to break. The expert witness stated it should have sustained ten times the weight of the piling. The conclusion, therefore, is warranted that the skid was, in fact, defective.

It will be borne in mind that appellee was not employed at the skid which broke and he was not, therefore, afforded an opportunity to make an inspection of it.

(2) Appellant insists that this case is controlled by the principle announced in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Andrews,* 79 Ark. 437, in that an inspection which ordinary care only would have suggested, would not have revealed the defect in the skid.

The Andrews case contains a very clear declaration of the law on this subject. The master is required to make an inspection only when ordinary care suggests the necessity for it. And the inspection made must be such as ordinary care suggests as being necessary under the circumstances of the case.

(3) Was the jury warranted, under the evidence in this case, in finding that such a duty rested upon appellant and that there was a negligent failure to discharge it? As has been shown, the jury was warranted in finding that an inspection was not made, and no attempt is made to show that appellee was guilty of contributory negligence. The timbers were old and had been long in use on a bridge and thereby exposed to the action and effect of the weather. They had been so exposed for a sufficient length of time to suggest the necessity that they be replaced with newer timbers. They had been "dapped" or notched so as to fit down over the ties about two inches. Before they had been "dapped" they were 6x8 timbers. When they were removed these notches were trimmed down so that the timber became 4x8. The interval between the time they were "dapped" and afterwards trimmed down represents the time they were used

as guard rails on the bridge, and the length of this time is not shown further than that it had become necessary to replace them. These guard rails were trimmed down to be used as stakes to put on the sides of flat cars as uprights to hold lumber or logs on the flat cars when wired at the top, and might have been safe when used for this purpose without also being safe for skids. At least the jury might have so found. This skid was not produced at the trial, and the nature of the defect can only be conjectured. Yet that it was defective is reasonably certain, or it would have safely held up the weight which caused it to break. Although similar skids have been safely used for loading this piling it is not shown that this defective skid had been so used. Notwithstanding the timber had been dressed down to be used as a guard stake, the foreman directed its use as a skid and did this without causing any inspection to be made to ascertain whether its previous use and exposure had rendered it unfit for that purpose. We think this evidence presents the question whether the master discharged his duty in failing to make an inspection.

(4) It is insisted that error was committed by the court in holding competent to serve as a juror one J. T. Craft, who was a member of the regular panel of the petit jury. It was shown that Mr. Craft was the plaintiff in the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Craft,* 115 Ark. 483, which case was carried to, and affirmed by, the Supreme Court of the United States (237 U. S. 648), and that in all this litigation he had been represented by the same firm of attorneys which was representing appellee at the trial below, and he admitted that during the progress of this trial some ill-will had been engendered between himself and some of the subordinate officials of the railroad company. In answer to the question if he did not entertain some slight ill-will towards the appellant company he answered, "Not a thing in the world, sir; not a thing in the world against them. My difficulty was settled, I will say, satisfactorily settled."

And in other answers he disclaimed any bias or prejudice which would have disqualified him. He was held competent and appellant exhausted its last peremptory challenge on him. As has been said in numerous cases, the trial court, is, of necessity, vested with a large discretion in passing on the questions of fact which arise in the examination of a juror on his *voire dire.* He sees and hears the examination and can judge of the candor and truthfulness of his answers to the questions asked, and in such cases we reverse only where it appears that the trial judge abused his discretion. While it is true that in a case such as this, where it appears that the juror has recently had protracted litigation with one of the parties to the suit before the court, in which ill-will was engendered, and in which the juror was represented by the same attorney who is then appearing against the juror's former adversary, it is safest always, in view of the frailty of human nature, to hold such juror disqualified without reference to the juror's existing opinion as to his own freedom from bias or prejudice, yet we can not say, as a matter of law, that this should be done in all cases; nor can we say that error was committed in not so holding in the present case.

(5) It is urged that the damages assessed are excessive, the verdict having been for $9,000, for which amount a judgment was rendered. It is true appellee did not lose his leg as a result of his injury, nor will he entirely lose the use of it, yet there is evidence to support the finding that the injury is a permanent one. According to appellee and the evidence in his behalf his damages are far greater than they would have been had he lost his leg by amputation. Seven different operations were performed on his leg, each being done under an anaesthetic, and these operations were made necessary by a condition which confined appellee in hospitals for many weeks, during which time his suffering was very intense. In view of this suffering and the loss of time and expense

and the impaired earning capacity we can not say the verdict is excessive.

A supplemental motion for a new trial was filed, in which a showing was made that appellee's injuries were exaggerated by him; but this motion was heard and disposed of on conflicting evidence, and we can not say the finding of the court is unsupported by the evidence.

(6-7) It appears that the former appeal in this case was prosecuted from the Independence Circuit Court, in which county the suit was originally brought, but that upon the remand of the case a nonsuit was taken and a new suit brought in the Jackson Circuit Court, but that more than a year had elapsed after appellee's injury before this last suit was brought, yet, notwithstanding this fact, the lien provided by sections 6661 and 6662 of Kirby's Digest was adjudged in his favor.

Section 6661 provides that "* * * every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law * * * shall have a lien on said railroad * * * for said damages and upon the road-bed, buildings, equipments, income, franchise, right-of-way, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, and beneficiaries under trusts or owners."

Section 6662 reads as follows:

"The lien mentioned in the preceding section shall not be effectual unless suit shall be brought upon the claim, or the claim shall be filed by order of court with the receiver of said railroad within one year after said claim shall have accrued."

Appellee insists that these sections should be construed to mean that the claimant has one year after his claim has been reduced to judgment, in which to file his claim with the receivers who now have charge of the appellant railway company. We think the language of the

statute, however, precludes any such construction. No difference in time is made in favor of a claimant against a railroad company which is in the hands of a receiver over that given a claimant against a road which is not being operated by a receiver, and if there was no receivership, the contention would scarcely be made that more than one year was given in which to bring the suit. We think the word "claim" as here used refers to the cause of action and that the suit to establish it must be brought within one year after it accrued. Such appears to be the effect of the decisions of this court in the cases of *St. L. & N. Ark. R. R. Co.* v. *Bratton,* 93 Ark. 234, and *St. Louis, I. M. & S. Ry. Co.* v. *Love,* 74 Ark. 528.

Nor do we think that the fact that a suit was brought within one year of the accrual of the cause of action entitles appellee to the benefit of this lien. The present suit in which a lien is sought to be enforced was not brought within a year, although it was brought within less than a year of the date of the nonsuit in the former case. That fact might be sufficient to give the benefit of the lien if the provision for bringing the suit within one year was treated as a statute of limitations. But we think it is not to be so treated. It is rather a condition upon the performance of which the right to the lien is created. A very similar question was involved in the case of *Anthony* v. *St. Louis, I. M. & S. Ry. Co.,* 108 Ark. 219. That was a case arising under section 6290 of Kirby's Digest, commonly known as Lord Campbell's Act, in which certain minors sought to recover damages for the alleged negligent killing of their father more than two years prior to the institution of their suit. It was there contended that the provision that the suit be brought within two years of the death of the person for whose death damages were claimed was a statute of limitations and did not apply to persons under disabilities, which exempted them from the operation of the statute of limitations, but it was there said that when a statutory right was created which did not exist at common law, and

the statute which gave the right also fixed the time within which the right might be enforced, that the time so fixed becomes a limitation or condition upon the right of action and controls, and that inasmuch as the act which created the limitation also created the action to which it applied, the limitation was not merely of the remedy, but also of the right of action itself. See authorities there cited. So, here, a preference is given for which no authority can be found in the common law. The preference exists only because the statute has given it, and one who wishes to avail himself of its benefits can do so only by complying with its terms. As appellee did not bring his suit within the time limited by the statute he can not claim the lien there given and, in this respect, the judgment of the court below will be modified, and, as thus modified, will be affirmed.

HARRIS v. TRUEBLOOD.

Opinion delivered May 29, 1916.

1. FRAUD AND DECEIT—FALSE STATEMENT PROMISSORY IN CHARACTER.—**A false statement merely promissory in its character, can not be made the basis of an action for fraud and deceit.**
2. CONTARCTS—WRITTEN CONTRACT—PAREL PROOF—AGREEMENT TO STAY OUT OF BUSINESS.—**Where the whole terms of a contract are in writing, oral proof of an agreement to stay out of business is inadmissible.**
3. ACTIONS—JOINDER—TORT AND CONTRACT.—**An action for the recovery of damages for tort, can not be joined with an action on contract.**

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

Geo. F. Youmans and *John P. Woods,* for appellant.

1. False statements merely promissory in character can not be made the basis of an action for fraud and deceit. 121 Ark. 23; 91 Ark. 324; 241 Ill. 521; 24 L. R. A. (N. S.) 733; 25 S. E. 529; 15 Ind. 11; 92 Va. 1.

2. An action *ex delicto* and one *ex contractu* can not be joined in the same complaint. Kirby's Digest, § 6079; 23 Cyc. 415; 69 Ark. 209; 82 Mo. 242; 35 *Id.* 483; 34 Ind. 72; 31 Pac. 259.

3. The falsity of the alleged representations, and plaintiff's ignorance of same are not alleged nor shown, nor that plaintiff relied upon them. 20 Cyc. 99, 101-2; 130 U. S. 643; 77 Ga. 151; 11 Vt. 615; 91 N. Y. Supp. 909; 34 N. J. L. 296. The verdict is not supported by the evidence.

4. The instructions are erroneous and improper evidence was admitted. Cases *supra.*

J. F. O'Melia, for appellee.

1. 91 Ark. 324 does not apply. Plaintiff paid $500 to defendant to stay out of business, and he was entitled to recover for fraudulent representations and a breach of the contract.

2. The amended complaint did not set up separate causes of action. The suit grew out of one transaction, but if the complaint did set up separate causes of action the court should have consolidated the suits. Kirby's Digest, § § 6083, 6079; 33 Ark. 316; 32 *Id.* 733. The court had jurisdiction of the whole cause of action.

3. The objections were properly overruled. Kirby's Digest, § 6091.

4. The evidence supports the verdict. 57 Ark. 577; 73 *Id.* 377; 75 *Id.* 111; 76 *Id.* 326.

5. There is no error in the instructions.

McCULLOCH, C. J. The controversy in this case between appellee, C. W. Trueblood, who was the plaintiff below, and appellant, G. L. Harris, who was defendant below grew out of a transaction between the parties whereby the former conveyed his farm in Crawford County to the latter in exchange for a meat shop in the city of Fort Smith, and also sold to the latter, as alleged, a lot of personal property. The parties entered into a written contract, dated October 27, 1914, as follows:

"Whereas Charles W. Trueblood has this day sold and conveyed by warranty deed to G. L. Harris the following described real estate lying in Crawford County, Arkansas (here follows description), for the consideration of four thousand three hundred ninety-nine ($4,399.00) dollars; and

"Whereas in said deed the said Harris as grantee assumes and agrees to pay as part of said consideration two mortgages set out in said deed, the one to J. T. Nelson for $1,700.00, and the other to L. J. Bronson for $500.00, the balance of said consideration, towit: $2,000.00 being paid by said Harris as recited in said deed by the sale and transfer of 'a lot of meat market fixtures,' to the said Trueblood; and

"Whereas it was a part of said contract that the said Trueblood should have the privilege of selling said tract of land at any time within one year from the date of said deed upon condition that he shall have all he can get for said land over and above the said sum of $4,399.00, and such taxes and charges as may accrue upon said land within said year:

"Now, therefore, in consideration of said agreement, and of the sum of one dollar each to the other paid, the receipt of which is hereby acknowledged, it is mutually agreed between the said Charles W. Trueblood and the said G. L. Harris that said real estate may be sold within one year from this date, either by the said Trueblood or the said Harris, provided it can be sold for more than $4,399.00 and that the said Charles W. Trueblood shall have all that said real estate can be sold for over and above a sum sufficient to pay off said mortgages and to pay said Harris $2,000.00; and said Harris agrees to convey said land by proper deed to any purchaser who can be found during said year who will pay for said land a sum in excess of what is required to pay off said mortgages and to pay said Harris $2,000.00, and it is further agreed that said land may be sold during said year in forty-acre tracts, the north forty acres for not less than

$2,500.00, and the south forty acres for not less than $1,900.00."

The discrepancy between the price of the land named in the contract ($4,399.00) and the three items constituting the amount to be paid is explained in the testimony as being covered by the interest on the notes, which it is conceded amounted to $199.00, and which makes the three items correspond with the aggregate price mentioned in the contract.

Appellee subsequently conveyed the land to appellant pursuant to the terms of the contract, and later appellant sold and conveyed the land to one Burrough, appellee also joining in the conveyance. At the time of the execution of the contract and delivery of the meat market fixtures, appellee also delivered certain personal property at an agreed price of $700.00, and afterwards he recovered all of it except certain articles alleged to be of the value of $250.00. The suit was to recover said sum of $250.00, alleged to have been the agreed price which appellant was to pay appellee for the property, and also to recover damages for alleged breach of the contract, and for alleged false representations and deceit in the sale of the meat shop. The original complaint contained five paragraphs, setting up different causes of action, but the court sustained a demurrer to two of the paragraphs, and one paragraph was dismissed by appellee himself, so we need only make reference to the two paragraphs to which the court refused to sustain the demurrer and upon which the case was sent to the jury.

In the first paragraph it is stated in substance that "when said trade and exchange was made, defendant fraudulently represented that he would stay out of business in the city of Fort Smith, Arkansas, for the period of one year; that the meat market was earning $200.00 per month, over and above all expenses; that said fraudulent representations were made by defendant for the purpose of deceiving and defrauding plaintiff, all of which was well known to defendant, at the time; that, by

reason of said fraudulent representations, in reliance upon the truth of which plaintiff has been damaged in the sum of $1,000.00, for which plaintiff prays judgment."

The remaining paragraph declares upon the alleged contract for the payment of $250.00 as the price of the personal property.

Appellant moved to strike out the first paragraph on the ground that it stated a cause of action for tort and could not be joined with the other causes of action on contract. The court overruled the motion. On the trial of the case the jury returned a verdict in favor of appellee for the sum of $250.00 for the price of the personal property, and "damages in the sum of $500.00" Since the transcript was lodged here on appeal, appellant Harris was declared to be a bankrupt and the trustee of his estate has been substituted.

(1-2) The verdict does not show upon which item of the first paragraph the damages were awarded, whether under the first item for the alleged false representations or the second item for breach of the alleged promise to stay out of business. The first paragraph embodied alleged false representations in two respects, namely, concerning the earning capacity of the meat market and the promise of appellant to stay out of the business in the city of Fort Smith for the period of one year. Appellee attempted to show that he was damaged in the sum of $500.00 by reason of appellant's failure to comply with his promise to stay out of the business, and it is probable that the sum awarded by the jury was to cover that item. It is sufficient to say, however, concerning that feature of the case, that appellee was not entitled to recover anything at all for the reason that a false statement merely promissory in its character can not be made the basis of an action for fraud and deceit (*Harriage* v. *Daley,* 121 Ark. 23, 180 S. W. 333); and that parol proof of the promise for the purpose of establishing a contract on the part of appellant to stay out of the business was not admissible for the reason

that there was a written contract reciting all of the considerations, which were of a contractual nature, and the introduction of the parol proof would vary the terms of the contract itself. *Mott v. American Trust Co.*, 124 Ark. 70.

(3) If the jury awarded any damages to appellee for alleged false representations concerning the earning capacity of the meat shop, we are unable to discover it from the verdict or to separate it from the other damages awarded. The testimony was conflicting on that point, and it appears probable that the award of $500.00 was intended to cover the special damages which appellee attempted to prove for appellant's breach of promise to stay out of the business for a year. The judgment must, for that reason, be reversed, and inasmuch as an action for recovery of damages for tort can not, under our statute, be joined with an action on contract, this branch of the action will be dismissed.

It is earnestly insisted that the evidence is insufficient to support the verdict on the paragraph asking a recovery for the price of personal property. It will be observed that the written contract relates entirely to the exchange of the farm for the meat shop, and nothing is said therein concerning the sale by appellant of the personal property. That was established by the evidence as an independent transaction, and the evidence adduced by appellee tends to support his right to recover the price of the personal property. We are of the opinion, therefore, that that part of the judgment should be affirmed.

BRYANT LUMBER COMPANY *v.* FOURCHE RIVER LUMBER COMPANY.

Opinion delivered May 29, 1916.

1. RAILROADS — INCORPORATION — POWERS OF STATE BOARD OF RAILROAD INCORPORATION.—Kirby's Digest, § § 6545-6546, confers upon the State Board of Railroad Incorporation plenary powers and ab-

solute discretion in the matter of incorporating and granting charters to railroads.

2. CONTRACTS—CONSIDERATION—VALIDITY—ASSISTANCE IN PROCURING CORPORATE FRANCHISE.—A contract between the B. company and the F. company, whereby the former was to assist the latter in procuring a charter for a certain railroad, *held* invalid as against public policy.

3. CONTRACTS—VOID PROVISIONS—INVALIDITY OF ENTIRE INSTRUMENT.—The B. company agreed to assist the F. company in procuring a railway franchise, the contract containing other provisions also; *held*, that portion of the contract which was void as against public policy, rendered the whole agreement void.

4. CONTRACTS—FREIGHT RATES.—A contract whereby appellant agreed to assist appellee in procuring a franchise for a certain railroad, and appellee agreed to haul freight for appellant at a certain agreed rate, or at a rate to be fixed by arbitration, is void.

5. RAILROADS—RIGHT-OF-WAY—PURCHASE—DISCRIMINATORY FREIGHT RATES.—A contract whereby appellee acquired a right-of-way over appellant's land in consideration of reduced freight charges to appellant, is void.

6. CONTRACTS—ILLEGAL PROVISIONS—INVALIDITY OF WHOLE.—Where a part of the consideration for a contract is illegal, and the illegal portion is not separable from the whole consideration, then the whole instrument is void.

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

STATEMENT BY THE COURT.

Appellant and appellee are lumber corporations organized under the laws of the State of Arkansas. Appellant had its principal place of business at Fourche, and the appellee its principal place of business at Bigelow, in Perry County.

Appellant instituted this suit against the appellee in the Perry Circuit Court to recover damages growing out of an alleged violation by the appellee of a written contract between appellant and appellee entered into on the 3d day of August, 1905. The complaint is based on the contract, and the contract is set out in full and made an exhibit to the complaint.

The appellant alleged substantially that it owned a saw mill plant and was engaged in the manufacture of

lumber at Fourche, Arkansas; that it owned large bodies of timbered lands that were situated several miles from its plant; that the removal of the timber from these lands to the mill of appellant was necessary in the operation of its business; that the appellee desired to build a railroad running through the timbered lands owned by appellant and entered into a contract with appellant whereby it was agreed that the appellant should convey a right-of-way over its lands to the appellee, and in consideration therefor the appellee was to build and have built a railroad over this right-of-way. It was alleged that the railroad was to be built thirty-four miles from a point ten miles south of Bigelow; that certain specified distances were to be completed within specified times and the whole to be completed by August 3, 1910. Appellant also alleged that by the terms of the contract appellee was to haul and carry all timber equally and impartially for the appellant over its railroad when constructed; that the appellee changed the route of the railroad and ran the same into timbered lands which were owned solely by the appellee, and that by the failure of the appellee to construct the road as required by the contract and to have the timber of appellant carried on equal terms with that of the appellee, appellant was damaged.

The complaint alleged that appellant had complied with all the terms and provisions of the written contract on its part, and alleged that the appellee had violated the contract in the particulars above mentioned, which were set forth in detail, together with the various amounts constituting the damages claimed by appellant, which, in the aggregate, were alleged to be over four hundred thousand dollars, for which the appellant prayed judgment.

The appellee demurred to the complaint, setting up that the obligations on the part of the appellee were based upon reciprocal obligations of the appellant which constituted an entire consideration; that by the terms of the contract appellant had obligated itself to join with the

incorporators of the Fourche River Valley & Indian Territory Railroad Co., in their efforts to secure a charter in accordance with the articles of association and map presented to the board of railroad incorporation; that in consideration of the obligations on the part of the appellant, as set up in the contract, the appellee had agreed on its part that the railroad company, when it was incorporated and its road built, would haul the timber then owned by the appellant at a rate specified, and that the price for hauling timber acquired in the future should be fixed by a board of arbitrators.

The appellee set up that the contract, in the particulars named, was contrary to public policy and in violation of the acts of Congress and of the State of Arkansas regulating the conduct of business of railroad companies.

It is unnecessary to set out the complaint and the contract at length. Both parties have treated the contract as a part of the complaint, and such portions of the contract as may be necessary will be set out and commented on in the opinion. The above are substantially the issues. The court sustained the demurrer and entered a judgment dismissing appellant's cause, from which judgment this appeal has been duly prosecuted.

W. M. Lewis, C. C. Reid, and *Sam Frauenthal,* for appellant.

1. The contract is not against public policy. It was merely an agreement to convey the right-of-way. It does not suggest or contemplate any improper or sinister influence with the Board of Railroad Incorporation. 71 Ark. 189; 97 *Id.* 86; 75 *Id.* 89; 86 *Id.* 309; Kirby's Digest, § 6546; Acts 1907, p. 194.

2. It is not void because rates are fixed for hauling timber in violation of the requirement that uniform rates shall be fixed. Appellee was not a railroad company at the time. But if so, this provision was separable and could be stricken out and the remainder of the contract upheld. 230 U. S. 316; 25 Ark. 351; 64 *Id.*

398; 96 *Id.* 105; 26 L. R. A. (N. S.) 106; 94 Ark. 461; 9 Cyc. 569; 1 Page on Contracts, § 510; 7 A. & E. Enc. L. 95; 6 L. R. A. (N. S.) 547; 32 L. R. A. 494; 77 U. S. 395; 6 R. C. L. 815, § 119.

J. F. Sellers and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellee.

The contract is void as against public policy. It violates sections 6802 to 6805 of Kirby's Digest. See, also, *Ib.,* § 6813, 6546; 230 U. S. 316; 9 Cyc. 481; 54 Am. Rep. 9; 23 N. J. L. 352, 357; 45 N. E. 507, 509; 13 Am. Rep. 353; 11 Atl. 264; 26 *Id.* 981; 93 N. W. 72; 110 *Id.* 106; 2 Wall. 45; 27 Am. St. 274; 65 Pac. 263; 61 Am. Dec. 347; 20 S. E. 733; 32 Am. Dec. (7 Watts, Pa.) 753; 82 Pac. 810; 74 N. E. 469; 14 Hun (N. Y.) 392; 63 Cent. Law, J. 41; 13 So. 107; 118 S. W. 849; 35 Am. St. 801; 130 *Id.* 754; 17 Am. Dec. 479; 6 R. C. L. 713, 730, 741; 16 So. 516; 67 Ill. 256; 108 Ark. 171; 63 *Id.* 318; 51 *Id.* 26, 32; 71 *Id.* 552; 106 *Id.* 239; 219 U. S. 467, etc.

2. If void, the whole contract is tainted—every provision is unenforceable. 65 Pac. 263; 25 Ark. 352; 46 *Id.* 420; 95 *Id.* 552; 108 *Id.* 180; 64 *Id.* 398, 405; 102 *Id.* 568, 572; 103 *Id.* 611; 209 U. S. 56; 219 *Id.* 478.

WOOD, J., (after stating the facts). It appears by the preamble to the contract under review that the appellee had already constructed a railroad across lands belonging to the appellant, and that there was a controversy between appellee and appellant as to whether or not the appellee had any authority to build this railroad, and it was recited that the controversy between the parties was detrimental to the interests of each other, and that in order to settle the same in so far as it affected *the future rights of any and all the parties and their successors as to the building, maintaining and operating a railroad, and the granting of rights-of-way, hauling freight,* etc., the parties had agreed to settle said controversy by entering into mutual covenants and agreements. The preamble shows, in other words, that

the covenants and agreements entered into by one of the parties were in consideration of the covenants and agreements entered into by the other.

Under this contract the appellee bound itself to haul the timber then owned by the appellant, when loaded by it on the cars of the appellee, at the rate of 37½ cents per thousand feet, and also to haul timber thereafter acquired by the appellant, when loaded on the cars of the appellee, at a price to be fixed by arbitration, and to haul after-acquired timber of the appellant for a period of ten years to points on the lines of the Fourche River Valley & Indian Territory Railroad Company, or to the end of its line, if consigned to points beyond it, without transfer of freight from one car to another.

The appellee also bound itself to cause the incorporators of the Fourche River Valley & Indian Territory Railroad Company, to renew its application for a charter, and if a charter was granted, it guaranteed that certain parts of the railroad should be completed within certain specified dates on a definite line specified, and that the whole should be completed within five years from the date of the charter.

In consideration of these obligations on the part of the appellee, the appellant bound itself *"to join with the incorporators of the Fourche River Valley & Indian Territory Railroad Company in their effort to secure a charter,"* for that company in accordance with the articles of association and map that had been presented to the board, and which were then on file in the office of Secretary of State. It also bound itself to allow the appellee to enjoy the right-of-way occupied by it over the lands of the appellant, and to execute a deed for the right-of-way over the lands of appellant to the Fourche River Valley & Indian Territory Railroad Company as soon as that company was incorporated.

The contract contained also the following provision:

"No application shall be made to the board of railroad incorporators for the incorporation of the Fourche

River Valley & Indian Territory Railroad Company until this contract is ratified by the respective boards of directors of the Bryant Company and the Fourche Company as above provided for. * * * This contract shall be void unless the charter of the Fourche River Valley & Indian Territory Railroad Company shall be granted by the board of railroad commissioners within sixty days from this date."

By these and other provisions of the contract it appears that appellee and appellant entered into the contract in order that the appellee, under the name of the Fourche River Valley & Indian Territory Railroad Company, might incorporate, build and operate a line of railroad in accordance with certain articles of incorporation, and a map then on file in the office of the Secretary of State, and to enable the appellant to have the timber on the lands it then owned hauled over appellee's railroad at a specified rate fixed by the parties to the contract, and to have the timber that it might thereafter acquire hauled at a price not specified, but to be fixed by arbitration.

(1) Under our law charters to railroads are granted by a State Board of Railroad Incorporation composed of certain State officers. It is made the duty of this board, "whenever any articles for the incorporation of any railroad company have been filed with the Secretary of State, together with a preliminary survey of the route to be occupied and appropriated by said company, and the affidavits of the directors, at the request of said directors, to meet at the office of the Secretary of State for the purpose of determining whether or not it may be to the interest of the public, and whether such charter should be granted."

"Said board shall hear and determine the matters in interest as between the public and said company, and as to whether there may be any interferences in the territory to be occupied and appropriated by the said company. Said board shall have power, and it shall be its duty to investigate, and if, in the opinion of the majority of the board, it is to the interest of the public that said company

should be invested with corporate powers, the president and secretary shall indorse their approval and thereupon said company shall become incorporated and chartered." Kirby's Digest, sections 6545, 6546.

It will be observed that this statute confers upon the board plenary power and absolute discretion in the matter of incorporating and granting charters to railroads. It is made the duty of this board, in the interest of the public, to investigate, and it is expressly provided that it shall determine the matters in interest as between the public and the company and as to whether there may be any interferences in the territory to be occupied and appropriated by the company. In hearing and determining the matters in interest between the public and the company seeking a charter, the board exercises *quasi*-judicial functions. These functions must be exercised in the interest of the public. Hence, the question as to whether a charter shall be granted or refused a particular company applying therefor can not be made the subject of a contract between that company and some other company.

(2) Sound public policy forbids that the fountain source from which charters to railroads must emanate shall be subjected to contaminating influences. The necessary tendency and effect of contracts between individuals or companies by which one of the parties to the contract, for a money consideration or its equivalent, agrees that he will use his influence to aid the other party in procuring a charter is to bring to bear upon the board of railroad incorporation a corrupting influence. A contract of this kind is of no greater validity than would be a contract between parties by which one agreed, for a money consideration, or upon mutual covenants requiring the expenditure of money, to assist the other in obtaining a decision in his favor on an issue that might be pending between him and some other before a judicial tribunal, and is of no more validity than would be a contract by which one party agreed, for a money consideration, to assist another in procuring advantageous legislation. All

such contracts are absolutely void. Courts will not inquire as to whether the board in the particular instance under consideration was incorruptible, or whether the contract had any effect in fact on the conduct of the public officials. Such contracts will be judged by their tendency, and not by the actual results in any given case.

As was aptly said in *Doane* v. *Chicago City Railway Co.,* 45 N. E. 507 (Ill.): "Contracts for the purchase of the influence of private persons upon the action of public officials, either executive or legislative, are against public policy, and void. It is sufficient that their tendency is bad."

In 9 Cyc. 481, the authors, speaking of such agreements, said: "The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance." *Brooks* v. *Cooper,* 26 Atl. (N. J.) 978-981; 6 R. C. L. 730, 741; see, also, *Buchanan* v. *Farmer,* 122 Ark. 562.

While the contract under review does not disclose the precise nature of the service that the appellant was to render the appellee to enable it to procure the charter, yet the purpose in entering into the contract, as shown by the preamble and various provisions in the body of the contract, was to enable the appellee, under the name of the Fourche River Valley Railroad Company, to build a railroad according to a certain map, and the articles of association of that company then on file with the secretary of the board of railroad incorporation.

It is shown by the preamble that there was a controversy between the appellant and the appellee affecting *"the future rights of the parties as to the building, maintaining and operating a railroad."*

If the appellant could have presented to the board of railroad incorporation any valid reasons why such board, acting in the interest of the public, should withhold a charter from the appellee, the board, charged with the duty of making an investigation to see whether appellee should be granted a charter, was entitled to know those reasons.

If appellant had any such valid objections as would cause the board to refuse appellee a charter, then in granting such charter the interests of the public would be injuriously affected. As a consideration to appellant for joining in the efforts of the appellee to procure a charter the latter was to perform certain covenants on its part. Thus virtually the effect of such a contract would be to enable the appellant and the appellee to convert conditions and influences that might be utilized by the board in the interest of the public for their own private gain. But, as we have seen, even though the public interest might not in fact be injuriously affected, the tendency of the contract into which such a covenant enters is bad, and unless the covenant which gives the taint can be eliminated, leaving legal and enforceable obligations, the whole contract will be declared void.

To sustain this contract, appellant relies upon certain decisions of this court in which we held that where a railroad obtained a deed to its right-of-way, upon consideration that it would locate a depot at a certain place that it would be liable in damages for a failure to comply with the contract. *Ark. Central Rd. Co.* v. *Smith,* 71 Ark. 189; *St. Louis & N. Ark. Rd. Co.* v. *Crandell,* 75 Ark. 89; *St. Louis, I. M. & S. Ry. Co.* v. *Berry,* 86 Ark. 309. But in these cases the issue now presented was not raised or decided, and the principle was not the same, or even analogous. Until the passage of Act 149, p. 356, Acts 1907, there was no public agency or tribunal in this State charged with the duty of locating depots. See *St. Louis, I. M. & S. Ry. Co.* v. *Bellamy,* 113 Ark. 384. That was left to the companies. Hence, in the above cases, influence to control the conduct of public functionaries was no part of the consideration for the contract. Appellant also relies upon *Fourche River Lbr. Co.* v. *Bryant Lumber Co.,* 97 Ark. 633, 634, as sustaining this contract. But that case likewise is not in point. The validity of the contract was not challenged in that case.

Learned counsel for appellant contend that the covenant on the part of appellant to join with the appellee in

its efforts to obtain a charter may be removed and leave the appellee to respond in damages for violations of its other covenants. "It is perfectly well settled that where one provision in a contract, which does not constitute its main or essential feature or purpose, is void for illegality, or otherwise, but is clearly separable and severable from the other parts which were relied upon, such other parts are not affected by the invalid provision, and may be enforced as though no such provision has been incorporated in the contract." 6 R. C. L. 815, sec. 214. *Fort Smith L. & T. Co.* v. *Kelley,* 94 Ark. 461.

(3) But this doctrine has no application here, for the reason that this tainted covenant on the part of the appellant to join appellee in its efforts to procure a charter, as appears from the preamble and various provisions of the contract, was an essential, if not the sole, inducement for the reciprocal covenants and obligations on the part of the appellee.

When the contract is viewed as a whole, it is clear that the appellee would not have entered into the separate covenants on its part if it had not realized that its efforts to obtain the charter sought might fail unless appellant joined in those efforts. And it is likewise clear that the appellant would not have entered into such a covenant unless the appellee had agreed on its part to do the things specified in its separate covenants. The tainted covenant therefore permeates and poisons the whole contract, rendering it illegal and void.

(4) There is another reason why the contract is against public policy and void. It is the policy of the laws of this State, as evidenced by constitutional provisions and statutory law, to prevent undue or unreasonable discriminations in freight charges and facilities for transportation. All individuals, associations and corporations have equal rights in these particulars, and there shall be no unjust or undue discrimination in these matters by common carriers in this State. Const. of Ark., art. 17, sections 3 and 6; Kirby's Digest, ch. 133, sections 6802 to 6805, inclusive.

To insure the public having business with common carriers as shippers of that fair and equal treatment in the matter of uniform rates of freight and in the other matters mentioned in the Constitution and statutes, railroads, as common carriers, are not only liable in damages to the party aggrieved, but there is a heavy penalty prescribed, to be recovered by a suit in the name of the State, for a violation of the statutory requirements providing for uniform rates of freight. See Kirby's Digest, sections 6808, 6813.

Even if the appellee and the Fourche River Valley & Indian Territory Railroad Company should be treated as independent corporations, the contract nevertheless entered into between the appellant and the appellee bound the appellee to have the Fourche River Valley & Indian Territory Railroad Company violate the provisions of the statute in regard to freight charges. In entering into this contract the appellant and the appellee, by their mutual covenants, assumed to usurp the functions of another one of the public agencies of the State, towit, the Railroad Commission, whose duty it is to fix the tariff charges for freight in this State. See Kirby's Dig., chap. 133, secs. 6802, 6803.

In 6 R. C. L. 713, it is said: "Contracts are against public policy when they tend * * * to the violation of a statute, or to interfere with or control executive, legislative or other official action, or to prevent competition whenever a statute or any other known rule of law requires it."

In *Heart* v. *Brewing Co.*, 130 Am. St. Rep. 754, the court said: "It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality or public policy."

In the recent case of *Arlington Hotel Co.* v. *Rector*, 124 Ark. 90, we held that in determining whether or not a contract was against public policy, courts will look to see whether any principles set forth in the Constitution and laws of the United States or of the State

in which the contract was executed, or the principles set forth in any of the decisions of their courts were violated; that these sources must be consulted in determining the issue as to whether a contract is contrary to public policy. When these sources are consulted, the contract under consideration must be condemned.

In addition to this the contract in suit must fall under the condemnation of statutory law.

While the charter was to be granted in the name of the Fourche River Valley & Indian Territory Railroad Company, the language in the various provisions of the contract make it plain that the incorporators of that company were the stockholders and owners of the appellee. They are treated as identical in the complaint and in the contract between the parties to this litigation, and on the issue here presented the appellee must be regarded as the Fourche River Valley & Indian Territory Railroad Company. Appellee assumes throughout the contract to act for that company. The parties therefore to this contract, by their mutual covenants, violated the provisions of the statute requiring railway companies to transport freight at uniform tariff rates fixed by the Railroad Commission, and preventing them from demanding or receiving from any shipper any greater or less rate for similar and contemporaneous services than is demanded or received from any other shipper, etc. Kirby's Digest, sections 6802, 6803, 6804.

(5) But appellant contends that the covenant as to the rates is only incidental to the main purpose of the contract which was to have the timber transported; that this covenant as to rates, if illegal, should be ignored and damages awarded for alleged violations of the contract as set up in the complaint just as if the illegal provision as to the rates did not exist. The contention is unsound. It would have been legitimate for appellee and appellant to have entered into a contract whereby appellee obligated itself to pay for a right-of-way over appellant's lands by building a railroad on same and by transporting appel-

lant's timber at a schedule of rates fixed according to law. They could have contracted that the right-of-way should be paid for in money or in legitimate services, or both. But they could not contract that appellee should pay appellant for a right-of-way by making a preference in its favor in the matter of freight charges. *Chicago, R. I. & P. Ry. Co.* v. *Whedbee,* 106 Ark. 237-240; *St. Louis, I. M. & S. Ry. Co.* v. *Miller,* 103 Ark. 37, 42, 43; *St. Louis, I. M. & S. Ry. Co.* v. *Wolf,* 100 Ark 25; *Myar* v. *St. Louis S. W. Ry. Co.,* 71 Ark. 552; *N. Y., N. H. & H. R. Co.* v. *Int. State Com. Commission,* 200 U. S. 361, 391, 392; *Armour Packing Co.* v. *U. S.,* 209 U. S. 56, 72, 80; see, also, *Fourche River Lbr. Co.* v. *Bryant Lumber Co.,* 230 U. S. 316; *Adams Exp. Co.* v. *U. S.,* 212 U. S. 522, 523.

(6) Along with the covenants which would be legal and valid, if standing alone, the parties to this contract have included other covenants for illegal services to be performed by each. These covenants are so correlated to and dependent upon each other as to constitute one entire contract. As we said in *Ensign* v. *Coffelt,* 102 Ark. 568, 572: "Where the contract is entire and a part of the consideration thereof is illegal and the illegal portion is not separable from the whole consideration, then the whole contract is unenforceable." Such is this case.

Appellant, by reason of its ownership of the lands over which appellee desired to build, was able, it appears, to dominate the situation so far as procuring the charter was concerned. The obtaining of the charter was fundamental. It was an essential feature, because the road could not have been built without it. All the promises made by appellee therefore were necessarily conditioned upon securing the charter. Having its charter, appellee could have condemned appellant's right-of-way and built its road, notwithstanding any opposition of appellant. Then who can say that appellant would have consented to join appellee in its efforts to procure the charter without exacting in return the obligation of appellee to build the road and also to give appellant preferential rates; and

who can say that appellant did not also demand preferential treatment in regard to freight rates as an essential feature of the consideration for its covenant to join efforts in procuring the charter and granting appellee the right-of-way? The contract furnishes no basis for separation of the covenants and apportionment of the consideration. These are matters of contract between the parties, and the courts can not make contracts for them. This is not a suit for the value of the right-of-way. But appellant bottoms its action on the contract and prays damages for its breach. It is necessary for appellant to prove the illegal contract, therefore, courts will not enforce it. *Wood* v. *Stewart*, 81 Ark. 41-48; *Peay* v. *Pulaski County*, 103 Ark. 611.

The judgment is therefore correct, and it is affirmed.

HART and KIRBY, JJ., dissenting.

CHUNN v. LONDON & LANCASHIRE FIRE INSURANCE COMPANY.

Opinion delivered May 29, 1916.

1. EVIDENCE—OPINION OF WITNESS—CAUSE OF FIRE.—In an action to recover on a policy of fire insurance, it is not error to exclude a question addressed to a witness as to fire caused from defective electric wiring, where the witness had stated that he had no knowledge of the condition of the wiring in the particular house.
2. EVIDENCE—FIRE LOSS—VALUE OF ARTICLE BURNED—PROOF.—It is not error to permit a non-expert witness to testify in an action to recover on a policy of fire insurance, as to the value of certain articles of household furniture, which were destroyed.
3. EVIDENCE — REBUTTAL TESTIMONY — DISCRETION OF TRIAL JUDGE.—A large discretion abides with the trial judge in permitting the introduction of rebuttal testimony.
4. FIRE INSURANCE—REMOVAL OF PROPERTY.—Where, shortly before a fire, plaintiff, the owner, removed certain property from the building, it is improper to tell the jury that plaintiff had the right to remove the property from the house, if the hazard was not thereby increased, the defense having been interposed that the fire was of incendiary origin.

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

R. S. Coffman, Rachels & Yarnell and *John E. Miller,* for appellant.

1. The court erred in its rulings as to the admission of testimony. 1 Wharton on Ev., § 20; 42 Ark. 542; 5 Enc. of Ev. 15, and note, 523, and note 24. Witnesses must state facts. 24 Ark. 250. Opinions of witnesses having *knowledge* of particular facts are admissible as to value. 91 Ark. 128; Rogers Expert Testimony 13, and note 3. See, also, 10 Enc. Ev., p. 637; 34 Ark. 480; 99 *Id.* 604.

2. Plaintiff's requested instruction No. 5 should have been given. 62 Atl. 289; 2 L. R. A. (N. S.) 521; 85 N. Y. 162; 39 Am. St. 365. "Vacant" means naked or containing no article of value. 44 N. J. L. 220; 43 Am. St. 365; 13 A. & E. Enc. Law 273. Under the vacancy permit plaintiff had the right to remove all the personal property.

3. It was error to give defendant's instruction No. 3. It is abstract and not applicable to this case. 69 Ark. 380; 80 *Id.* 260; 74 *Id.* 19; 77 *Id.* 109.

4. The remarks of counsel were improper and prejudicial. 99 Ark. 558; 58 *Id.* 353; 48 *Id.* 106; 61 *Id.* 130, 137; 62 *Id.* 516; 63 *Id.* 174; 65 *Id.* 389; 65 *Id.* 619; 70 *Id.* 179; 71 *Id.* 415; 72 *Id.* 138; 74 *Id.* 210, etc.

Brundidge & Neelly, for appellee.

There are no errors relative to the introduction and refusal of testimony. Nor are there any errors in the instructions. The remarks of counsel were wholly within the record in discussing the weight of circumstantial evidence. The judgment should be affirmed.

SMITH, J. This is the second appeal of this case, and a statement of the material facts will be found in the opinion on the former appeal. *Chunn* v. *London & Lancashire Fire Ins. Co.,* 115 Ark. 555, 172 S. W. 837.

(1) A Mr. Candor, who was the manager of the electric light plant in the city of Searcy, where appellant's

house was located, was asked the question, "I will ask you if it is not a fact that frequently the wiring of a house ignites and burns it?" But an objection was sustained to the question. The insurance company claimed the fire was of incendiary origin, and this question was intended to furnish a possible explanation of the origin of the fire. However, it appeared that immediately preceding this question the witness was asked, "Do you know how that building was wired, and whether or not it was properly wired?" and he answered, "I do not know." No other attempt was made to show that anything about the wiring of this house could have been responsible for the fire. The answer of the witness, therefore, could only have furnished a speculative or possible cause for the fire, and we think no error was committed in excluding the answer.

(2) A witness named Smith was permitted, over appellant's objection, to testify that a lounge which was destroyed in the fire was without value. It was the contention of the insurance company that appellant had removed from the building most of the furniture of any value, and appellant had proved the loss of this lounge. It is urged that the witness did not show himself qualified to testify as to the value of the lounge. This witness, however, had gone to the house a few days before the fire for the purpose of looking at the furniture with a view of buying some of it, and while there had observed the lounge, and answered that it had no value. The witness evidently had some personal knowledge of values, and we think no error was committed in permitting him to testify that this simple article of furniture had no value, as this was not an article about which expert evidence was necessary.

(3) A witness, W. L. Burnett, was asked the question, "I will put the question to you, did you or not a few days prior to the time of the fire go to this building and put new locks on the back doors, and do certain other repair work on the building?" Appellee objected to this question on the ground that it was not rebuttal testimony, it being asked after appellant had taken up her cause in

rebuttal. Appellant's theory was that this proof would tend to show that she was making improvements on her place just prior to the time of the fire, and that she was not contemplating a fire. But it appears that this was the third trial of this case, and the issues in it were well-defined and sharply drawn, and appellant had substantially developed her case. Of necessity, a large discretion must abide with the trial judge in permitting the introduction of evidence in rebuttal which is not strictly of a rebuttal nature, and we can not say that any error was committed here in this respect.

It is also insisted that the court erred in permitting Mrs. Phillips to detail a conversation had with appellant the day after the fire. In response to the question, "What else did she say?" this witness answered: "She said when she got the money, she was going to travel on it, and that she was going to see that no other woman enjoyed it." It was appellee's theory that this answer explained appellant's motive, and it was, therefore, competent for that purpose. It further appears that, without objection, appellant was asked practically the same question in her cross-examination and gave substantially the same answer.

(4) Appellant asked an instruction numbered 5, which reads as follows: "The jury is further instructed that the plaintiff had the right to remove goods from her house, without notice to the defendant company, so long as the hazard was not increased thereby, the policies, of course, covering only the building and such goods as remained in the building. The jury, however, will not render a verdict of any kind concerning the goods, as that part of it has been adjudicated at a former trial."

This instruction was not proper under the circumstances, as its effect was to tell the jury that appellant had the right to remove the goods from the house if the hazard was not thereby increased, when that circumstance might have been regarded by the jury as highly important as bearing upon the origin of the fire, although it did not

increase the hazard from natural causes. Moreover, the instruction relates to the *policies,* one of which was on the house, and the other on the furniture, and the liability of the insurance company was, of course, affected by the amount of property left in the building.

Other instructions appear to raise questions which were passed upon in the former opinion.

Upon the whole case it appears that the instructions fairly submitted the case to the jury.

Finding no prejudicial error, the judgment is affirmed.

SEELBINDER *v.* WITHERSPOON.

Opinion delivered May 29, 1916.

1. JUDGMENTS—SERVICE OF SUMMONS—COUNTY OTHER THAN DEFENDANT'S RESIDENCE.—A. and B. were sued in justice court in S. County. A. resided in C. County and was served with process there. B. was served in S. County. Judgment was rendered against the parties, who appealed to the circuit court, A. having objected to the court's jurisdiction in both courts. In the circuit court plaintiff took a nonsuit as to B., judgment being rendered against A. *Held,* A. was not properly served, and having objected to the court's assumption of jurisdiction in apt time, the judgment against him would be reversed and dismissed.
2. JUDGMENTS—IMPROPER SERVICE—APPEALS.—Where a party is improperly served, the trial court not acquiring jurisdiction, the cause will be dismissed on appeal, and this will not be affected by the fact that defendant appealed from the judgment of the trial court, and filed a claim for set-off, where it appeared that he had objected to the court's exercise of jurisdiction in apt time.

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

E. L. Matlock, for appellant.

1. The court had no jurisdiction for want of proper service. The motion to dismiss should have been granted. Kirby's Digest, § § 6074, 4555, 4558; 59 Ark. 593; 77 *Id.* 412; 84 *Id.* 573; 63 *Id.* 30.

2. By filing a counterclaim, appellant did not waive his objections, nor make the court his forum. Kirby's Digest, § 6093; 57 Ark. 500; 70 *Id.* 505; 80 *Id.* 339; 88 *Id.* 153; 95 *Id.* 118; 108 *Id.* 283; 31 *Id.* 345; 55 *Id.* 312; Kirby's Digest, § 6231.

3. Nor did appellant waive his objections by appeal. The cases 45 Ark. 295, and 101 *Id.*, 124, are not in point. He renewed his objections on appeal.

4. The evidence is not sufficient to support the verdict and the instructions are erroneous. 92 Ark. 437.

Kimpel & Daily, for appellee.

1. Appellant was properly summoned. Kirby's Digest, § 4558.

2. By appealing he entered his appearance. 101 Ark. 124; 45 *Id.* 295; 69 *Id.* 429; 84 *Id.* 573; 85 *Id.* 431; 62 *Id.* 144.

3. He submitted to the jurisdiction by filing a counterclaim. 131 S. W. 860; 34 Cyc. 660; 50 Hun 566; 34 Wisc. 139; Kirby's Digest, § 6231.

4. The evidence is ample to sustain the verdict. No exceptions were saved to the instructions. 88 Ark. 505; 89 *Id.* 25; 94 *Id.* 147; 113 *Id.* 463.

SMITH, J. This is a suit for damages which was brought originally before a justice of the peace of Sebastian County against appellant and his son Hugo. The suit grew out of an automobile collision in the city of Fort Smith on May 13, 1915. Before the trial in the justice's court, appellant filed the following motion:

"Comes the defendant, A. Seelbinder, and states to the court that he was served with the summons in this action in Crawford County, Arkansas, where he resided at the time this suit was commenced, and at the time the summons was served and where he now resides.

"Wherefore, he objects to being put upon trial in this cause in Sebastian County, Arkansas, and objects to the proceedings of this court in this cause against him, because he is a resident of Crawford County, and the sum-

mons in this suit was served upon him in said county, and prays an order and judgment of the court dismissing the action."

The other defendant, Hugo Seelbinder, was personally served with summons in the township where the suit was brought. This motion was overruled, whereupon appellant filed an answer denying liability, and alleging that the collision was the result of negligence on the part of plaintiff (appellee), and judgment was asked for the damages done appellant's automobile. On the trial, in the justice court, there was a judgment against appellant and his son Hugo, and an appeal was prosecuted to the circuit court. When the case was called for trial in the circuit court, all parties appeared and announced ready for trial, whereupon, before any evidence was offered, appellee asked and obtained permission to take a nonsuit as to Hugo Seelbinder, and the cause was dismissed as to him. Whereupon, appellant renewed his objection to the cause proceeding against him and read his motion to the court, and, over his objection and exception, the trial proceeded and resulted in a verdict against him for damages. Before judgment was rendered on the verdict, appellant again objected to a judgment being entered against him for the reasons set forth in his motion, and because there was no finding or judgment against his co-defendant, which motion was overruled, and the judgment was rendered from which this appeal is prosecuted.

Appellee now insists that the proof did not substantiate the fact that appellant was a resident of Crawford County. But the motion was not overruled because the fact was not established, but because it was not a defense. The evidence at the trial developed the fact that appellant was a resident of Crawford County, and the motion was renewed before judgment was pronounced, when it was again overruled, manifestly for the same reason which prompted the court to overrule it in the first instance.

Appellee insists that the question of the sufficiency of the service is foreclosed by the fact that appellant filed

a counterclaim, and also by the fact that he prosecuted an appeal from the adverse judgments of both the justice and the circuit court.

If it be conceded that appellant's claim for damages to his own automobile constituted a proper subject for a counterclaim, we think that neither the fact that it was filed, nor the fact that an appeal was taken from the judgment of the justice of the peace, precluded appellant from filing his motion to quash the service when the state of the record permitted that motion to be filed. Nor does the appeal to this court have the effect of entering his appearance here.

The authority for this suit against appellant as a resident of Crawford County, where he was served with process, in the courts of Sebastian County, is found in section 6074 of Kirby's Digest, which section reads as follows:

"Sec. 6074. Where any action embraced in section 6072 is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of a summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him."

This section has been several times construed by this court. In the case of *Wernimont* v. *State,* 101 Ark. 219, Justice Frauenthal, speaking for the court, said:

"It is the policy and spirit of our law, enacted into statute by our Legislature, that every defendant shall be sued in the township or county of his residence. To this general principle there are statutory exceptions, chiefly in cases where there is a joint liability against two or

more defendants residing in different counties. In such cases it is provided that suits may be brought in the county of the residence of any of the defendants, and service of summons can then be had upon the other defendants in any county, thereby giving jurisdiction over their persons to the court wherein the suit is thus instituted. Kirby's Digest, sections 6072 and 4558. But before this jurisdiction can be acquired by virtue of these statutes over the person of such defendants, nonresident of the county wherein the suit is instituted, it is essential that the defendant resident of the county where the suit is brought shall be a *bona fide* defendant. By our statute, it is further provided that, before judgment can be had against such nonresident defendants, a judgment must be obtained against the resident defendant. Kirby's Digest, section 6074."

In the case of *Wood* v. *Stewart,* 81 Ark. 41, the service was had on defendant Bell in Miller County and on his co-defendant Stewart in Crawford County, where the suit was brought. It was later alleged by Stewart, in an attack which he made on the judgment, that he had been joined in the suit only for the purpose of procuring service on Bell in Crawford County and not for the purpose of enforcing the judgment against him. The court, refused him the right to make this showing, and in discussing the service of process there had, said:

"In the action against Bell and Stewart in the circuit court Bell did appeal and object to the proceeding against him, but the judgment against his co-defendant who resided in the county barred him absolutely from objecting to the exercise of the court's jurisdiction. He was bound to submit to that jurisdiction unless the action had been discontinued or dismissed as to Stewart, or judgment rendered in his (Stewart's) favor."

In the case of *Stiewel* v. *Borman,* 63 Ark. 30, Abe, Joe, Ed and Harry Stiewel were sued in the Johnson Circuit Court for damages for personal injuries. The three defendants last named answered and denied any

ownership or interest in the mine where the injury occurred for which the damages were asked. The remaining defendant did not answer, but filed a motion to quash the summons as to himself on the ground that he was illegally served with process in Pulaski County, the suit having been brought in Johnson County. A verdict was returned in favor of Joe and Harry Stiewel and against Abe and Ed Stiewel. Upon appeal to this court the judgment was reversed as to Ed Stiewel, whereupon, in a discussion of the sufficiency of the service of process as to Abe Stiewel, the court said:

"As to the sufficiency of the service of the summons upon Abe Stiewel in Pulaski County for a basis of judgment against him, section 5698 of Sandels & Hill's Digest (Section 6074 of Kirby's Digest) is decisive. That section is as follows: (After quoting the section the opinion continues:) According to this statute, appellee is not entitled to judgment in this action against Abe Stiewel, although he may be entitled to recover against him, unless judgment is recovered against one of the defendants who resided in the county in which the action was brought at its commencement, or was summoned in such county, or he fails to object before judgment to its proceeding against him."

Appellee strongly insists that appellant made the justice court his own forum when he filed his counterclaim, and that he can not, therefore, now question the process by which he was brought into court. But as has been shown, he never came voluntarily into court, and he filed his answer and cross-complaint only after his motion had been overruled, and this motion was renewed and pressed at every opportunity. Section 6074 gives the defendant who is sued upon a transitory cause of action in a county other than that in which he resides, or was served with process, the right to object to the service at any time before judgment is rendered against him, except upon the conditions there stated, and the statute makes no exception against the defendant thus served who has filed an

answer and counterclaim, and we can not read the exception into the statute. When the nonsuit was taken as to Hugo Seelbinder, appellant's right to object to the service arose, and he could not object before that time, but the objection was made in apt time and should have been sustained, and for the error of the court in not sustaining his motion, the judgment will be reversed and the cause dismissed.

BOARD OF COUNTY COMMISSIONERS OF CREEK COUNTY, OKLAHOMA v. SPEER.

Opinion delivered June 5, 1916.

1. CONTRACTS—UNEXECUTED CONTRACT—CHANGE IN TERMS.—It is within the power of contracting parties, as long as the contract remains unexecuted, to make any changes that they may agree upon; the modification amounting to a new contract.
2. CONTRACTS—SALE OF BONDS—MODIFICATION.—Where a contract for the sale of improvement bonds is made, a change in the mutual undertakings of the respective parties concerning the price to be paid, and the acceptance of the bonds by the purchaser, without further delay will constitute a sufficient consideration for the modification of the original contract.
3. CONTRACTS—SALE OF IMPROVEMENT BONDS—AUTHORITY OF COMMISSIONERS—CONFLICT OF LAWS.—A contract for the sale of improvement bonds, was made by the county commissioners of a certain county in Oklahoma, *held*, under the laws of Oklahoma, the board of commissioners had authority to contract with the purchasers of the bonds for the allowance to the latter of compensation for their expenses and services in the preparation and approval of the bonds, and to fix the price of the bonds.

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

W. Morris Harrison for appellant. *Geo. L. Burke* of counsel.

1. The board acts in a representative capacity and its powers are prescribed by statute. It had no power to allow Speer & Dow $1,250 for their services, and no right to make the additional contract and discount the

bonds or reduce the amount to be paid for them. 143 Pac. 1145; Laws of Oklahoma, 1909, ch. 32, Art. 2; 11 Cyc. 467-468; 84 N. W. 822; 2 Kans. 115; 3 Okla. 281; 41 Pac. 592; 44 Ark. 437; 23 Pac. 713; 18 S. E. 374; 73 N. W. 845.

2. Oral testimony was not admissible. 33 Mo. 168; 71 Tex. 99; 8 S. W. 634; 40 Am. Dec. 135; 77 Tex. 515; 14 S. W. 152; 79 N. W. 34.

3. The court erred in its declarations of law. 143 Pac. 1145.

Read & McDonough, for appellee.

1. The power to make a contract carries with it the power to set that aside and make another. 143 Pac. 1145 is not in point. Speer & Dow's claim was properly allowed as expenses to be paid out of the "proceeds" of the sale of the bonds. For definition of "Proceeds" see 35 So. 828; 51 N. W. 514; 30 Atl. 1032.

2. An executory contract may be modified by agreement between the parties making a new contract. 9 Cyc. 593; Revised Laws of Okla., 1910 § 1497, p. 507, etc.

3. Appellee's claim was properly allowed. It was a compromise. 122 Pac. 999; 142 N. W. 294; 148 Pac. 97. The board is the general agent of the county and their powers are broad. 139 Pac. 958.

4. There is nothing in the laws of Oklahoma requiring contracts for the sale of bonds to be in writing. Laws 1909, § 9; 90 Ind. 362; 11 Cyc. 476; 20 Ga. 328; 113 Ark. 15; Hainer on Mun. Secur. p. 25.

5. Parol evidence was admissible. 11 Cyc. 401; 145 Ill. 138 ; 46 Ind. 38; 36 Kans. 121; 122 Wis. 85; 122 Pac. 999; 99 N. W. 603.

6. Time was of the essence of the contract. 35 Cyc. 175, 176; 19 Barb. (N. Y.) 416. Appellant is estopped. 145 Pac. 932; 3 Okla. 281. The board ratified in writing the third contract. 152 Pac. 63. The law presumes that officers perform their duties as required by law. Harris on Mun. Bonds, p. 124.

McCULLOCH, C. J. This is an action instituted by the Board of County Commissioners of the County of Creek, State of Oklahoma, against appellees, Speer & Dow, to recover the sum of $5,300 alleged to be due as a balance on the price of bonds of that county sold by the commissioners to appellees. The cause was tried before the circuit judge sitting as a jury, and there was a judgment in favor of appellees, from which an appeal has been prosecuted.

Creek County, Oklahoma, acting through the County Board of Commissioners, and upon a vote of the people, issued bonds in the sum of $200,000 for the construction of bridges in the county, and a contract, evidenced by correspondence between the parties and an order spread on the county record, was entered into between the county and Speer & Dow whereby the latter agreed to become the purchasers of the bonds at a premium of $6,050, which, with interest on the bonds from date up to the time of delivery, aggregated the total sum of $207,300. The bonds were to be delivered in monthly installments, beginning June 1, 1910. When the date for the first delivery arrived, the bonds were not ready, and on June 7th there was an additional agreement modifying the original contract with respect to the time of delivery. On June 21st another agreement was entered into, as evidenced by the order spread on the county record, allowing Speer & Dow the sum of $1,250 for services and expenses in connection with the preparation and approval of the bonds, said sum to be allowed only in reduction of the amount due on the purchase price of the bonds. At that time Speer & Dow made an advance payment of $2,000 on the price of the bonds. The contract at that time still contemplated a delivery of the bonds in installments, but on July 26, 1910, before any of the bonds were delivered, there was a still further modification of the contract to the effect that in consideration of immediate acceptance of the bonds, without requiring delayed deliveries according to the original contract, the price would be reduced to the sum of $203,-

250 and credited with the $1,250 allowed for services as aforesaid, thus reducing the additional amount to be paid at the time of delivery to the sum of $200,000. The modification of the contract was entered at large upon the county records, and pursuant thereto the bonds were delivered and paid for.

(1-2) The present suit is to recover the amount of the price of the bonds as originally agreed upon, after deducting the $202,000 actually paid by Speer & Dow. The contention is that the board had no authority to allow Speer & Dow the sum of $1,250, or any sum, for their services, and that the board was also without power to make the additional contract and reduce the amount to be paid for the bonds. It appears from the testimony that after the failure to begin delivery of the bonds at the time specified in the original contract, the parties began negotiations for a modification so as to meet the changed conditions, and the sale was consummated pursuant to the last modification, which enabled the county to realize the stipulated price without delaying the delivery of the bonds as specified in the original contract. Ordinarily it is within the power of contracting parties, as long as the contract remains unexecuted, to make any changes that they may agree upon. The modification, of course, amounts to a new contract. In this instance it appears that the contract was modified in the same way in which the original contract was made, that is to say by correspondence between the parties and by an entry of the terms of the agreement upon the records of the county. The change in the mutual undertakings of the respective parties concerning the price to be paid, and the acceptance of the bonds without further delay, constituted a sufficient consideration for the modification of the original contract.

(3) Counsel for appellant contend that the Board of Commissioners had no authority to enter into an additional agreement, but they bring to our attention no statute or decision from the State of Oklahoma to show that the board was lacking in that authority. On the

contrary, it appears that the Supreme Court of Oklahoma has held that the Board of Commissioners is the general agent of the county and may enter into compromises, even to the extent of compromising a judgment in favor of the county. *Sequoyah County* v. *Helms* (Okla.) 139 Pac. 958; *Ironside* v. *State, ex rel.* (Okla.), 148 Pac. 97.

It is also contended that the board was without authority to enter into a contract for the allowance of compensation to appellees for their expenses and services in preparation and approval of the bonds, but it is seen from the terms of the contract that this was a part of the contract for the sale of the bonds; and since the authority of the Board of Commissioners to fix the price of the bonds was ample, the agreement to make this allowance in the way of reduction of the price of the bonds was within the scope of its authority. The effect of the contract was an agreement to accept the stipulated net amount as the price of the bonds and to consider the services rendered by appellees in fixing the price of the bonds. The decision of the case rests upon the law of the State of Oklahoma with respect to the power of the board, and we find nothing which restricts that power to the extent contended for by counsel.

We are of the opinion, therefore, that the circuit court reached the correct conclusion and the judgment is affirmed.

FEARS v. WATSON.

Opinion delivered June 5, 1916.

1. SALES—RESERVATION OF TITLE—RIGHTS OF VENDEE.—Where chattels are sold with an express reservation of title to the vendor, until the purchase price was paid, the vendee cannot vest an absolute title in another until the purchase price is paid.
2. SALES—RESERVATION OF TITLE—WRITTEN CONTRACT—PAROL EVIDENCE TO VARY.—A note was taken, in payment for the purchase of chattels, expressly reserving title in the vendor. *Held*, parol evidence was inadmissible to prove that the vendor, did not intend to reserve title, and that the form of note so reserving title was used through inadvertence.

3. SALES—RESERVATION OF TITLE—ATTACHMENT TO REALTY.—The right of the vendor of chattels is not defeated, when the vendee, attached the chattels purchased, and to which the vendor retained title, to land, which he held by lease.

Appeal from Greene Circuit Court, First Division; *W. J. Driver,* Judge; reversed.

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

1. The sale was conditional, the legal title being reserved in Bertig Bros., and it was error to admit testimony to contradict the written instrument. 78 Ark. 569; 91 *Id.* 319; 2 Wig. on Ev. § § 897, 898; 82 Ark. 286; 81 *Id.* 595; 86 *Id.* 169; 11 Cyc. 724, 728.

2. The articles did not become fixtures. 27 Ark. 332; 62 *Id.* 450; 73 *Id.* 227; 56 *Id.* 52; 93 *Id.* 77. It was error to direct a verdict.

No brief filed for appellee.

HART, J. B. M. Fears sued R. L. Watson in replevin to recover some wire fencing, some pump pipe and a pump point. The material facts are as follows:

John Zollman leased certain lands from R. L. Watson. During the life of the lease, Zollman purchased from Bertig Bros. some wire fencing, a pump point and some pump pipe for the sum of $13.60, for which he executed a note due Oct. 15, 1914. Ben Fears signed the note as surety. The note contained the following: "It is expressly agreed that the title and ownership of all said property shall remain in Bertig Bros. until the full purchase price is paid," etc. The note was made on the regular printed form prepared and used by Bertig Bros. when they sold personal property and retained title in themselves until it was paid for. On the back of the note was endorsed the following:

Pump	$13.60
Pipe	.75
Point	14.35
Wire	

Bertig Bros. assigned the note to Ben Fears and also gave him a bill of sale of the personal property above described. After the articles were purchased by Zollman he attached them to the leased property. It was shown by parol evidence that Bertig Bros. did not intend to retain title to the articles in question, but that form of note was used because it happened to be lying upon the desk at the time the purchase was made. The court directed a verdict for the defendant Watson and the plaintiff Fears has appealed.

In the case *of Peck-Hammond Company* v. *Walnut Ridge School District,* 93 Ark. 77, where a heating apparatus was sold to the contractor of a public schoolhouse, to be installed there upon condition that the title should remain in the vendor until the purchase price was paid, but the school board had no knowledge of such condition, and the apparatus was installed in the building, it was held that the reservation of title could not be enforced. In that case the vendor knew that the articles sold were to be installed in the building and that the building was not erected for the contractor but was being built for use as a school house by the public. The principle there announced has no application to the facts of the present case. Here the vendor of the articles expressly reserved the title until the purchase price was paid, and the vendee could vest no absolute title in another until he paid the purchase money.

Zollman could not by affixing the article to the land leased by him from Watson vest the title in the latter. This point was so ruled in the case of *Butler* v. *Adler-Goldman Commission Co.,* 62 Ark. 450. It was not competent to show by parol testimony that it was not the intention of Bertig Bros. to reserve title in themselves until the property was paid for. The admission of this testimony violated the well-known rule that parol evidence is not admissible to contradict or to vary or add to any of the terms of a written contract. When Bertig Bros. sold the articles to Zollman and took his note therefor on the printed form of contract, their previous negotiations be-

came merged in the written contract and it could not be varied by parol testimony. The note in plain terms reserved the title to the property sold in the vendors until it was paid for. The printed form of contract did not have room enough to place more than one article and there being more than one article sold, these articles were placed upon the back of the printed form. This was done for the purpose of identifying the articles and the endorsement became a part of the written contract.

It follows that the court erred in directing a verdict for the defendant and for this error the judgment will be reversed and the cause remanded for a new trial.

CANNON v. HARMON, TRUSTEE.

Opinion delivered June 5, 1916.

PARTNERSHIP—ENFORCEMENT OF CLAIM—PARTIES—PARTNERSHIP CONTRACT.—All the partners are proper and necessary parties plaintiff in an action to enforce a partnership claim. A contract made in the name of a partnership is a contract made with all of the partners jointly, and all must join in an action to enforce it.

Appeal from Union Chancery Court; *J. M. Barker,* Chancellor; reversed.

Geo. M. LeCroy, for appellant.

One partner cannot foreclose for his *pro rata* of a partnership debt. 110 U. S. 215; 93 Ark. 451. The testimony shows a failure of consideration and false representations.

HART, J. On the 26th day of March, 1912, W. M. Cannon executed a deed of trust on thirty acres of land in Union County, Arkansas, to J. W. Harmon as trustee to secure a note for $60, payable to McWilliams & Sample, a partnership. The note represented the purchase price of a mule sold by the partnership to Cannon. After the note became due F. L. Sample, a member of the firm of McWilliams & Sample, caused the trustee named in the deed of trust to advertise the land for sale to satisfy

an indebtedness of $33.75 which he claimed to be the amount of the partnership debt due him. Cannon instituted this action in the chancery court against the trustee and Sample to restrain them from foreclosing the deed of trust on the ground that one member of a partnership could not foreclose the same to satisfy his *pro rata* of the indebtedness due the partnership. He further alleged that the execution of the note was procured by false representations and that the mule was wholly worthless at the time he purchased it. He asked that the note and mortgage be cancelled and that the foreclosure of the deed of trust be enjoined. The defendants denied the material allegations of the complaint.

The plaintiff, Cannon, testified in his own behalf. He admitted the execution of the note and mortgage. He stated that Sample, one of the members of the firm, represented to him that the mule was perfectly sound and was only ten years old and that he relied upon this representation because he did not know anything about mules. Other witnesses for the plaintiff testified that the mule was about thirty years old and was what is known as a "snide" mule. That is to say, they testified that the mule was a good-looking one but was not capable of doing any work.

Sample testified that he made no representations whatever to Cannon when he purchased the mule and did not tell him that the mule was only ten years old. He admitted that he and McWilliams owned the mule as partners.

The chancellor found in favor of the defendants and from the decree entered of record the plaintiff has appealed.

All the partners are proper and necessary parties plaintiff in an action to enforce a partnership claim. 30 Cyc. 561; *Coleman* v. *Fisher,* 67 Ark. 27; *Summers* v. *Heard,* 66 Ark. 550; *Matthews* v. *Paine,* 47 Ark. 54; *Ingham Lumber Co.* v. *Ingersoll,* 93 Ark. 447.

The reason is that a contract made in the name of a partnership is a contract made with all of the partners

jointly. Hence, all must join in an action to enforce it. There is nothing in the record to show that Sample had acquired from McWilliams his interest in the note and mortgage which was demanded to be foreclosed and that he had become the exclusive owner thereof. Nor does it appear from the record that McWilliams refused to join in the foreclosure of the mortgage. He was a necessary party to the proceeding to foreclose the mortgage and the court should have granted an injunction to the plaintiff to prevent Sample from foreclosing the mortgage without making his partner a party to the proceedings. Having reached this conclusion, it is not necessary to determine whether the chancellor should have sustained the plea of no consideration or that the execution of the note was procured by false representations.

It follows that the decree must be reversed and the cause will be remanded with directions to the chancellor to enjoin the trustee and Sample from foreclosing the mortgage to satisfy the *pro rata* part of the partnership indebtedness alleged to be due Sample.

LAPRAIRIE v. CITY OF HOT SPRINGS.

Opinion delivered June 12, 1916.

1. TAXATION—ILLEGAL TAX—RIGHT OF CITIZEN TO RESTRAIN COLLECTION.—A citizen and tax payer may bring an action in equity to enjoin the collection of an illegal tax.
2. MUNICIPAL CORPORATIONS—OCCUPATION TAX.—The Legislature has authority under the constitution to delegate to cities the power to tax occupations.
3. MUNICIPAL CORPORATIONS—POWERS.—Municipalities possess no inherent powers and can exercise only such powers as are delegated to them by the legislative branch of the state government, either expressly or by necessary implication.
4. STATUTES—CONSTRUCTION—AMBIGUITY—TITLE.—In the interpretation of statutes, where the court is in doubt, it may look to the legislative title of the statute. The title itself forms no part of the enactment, but it may show the legislative intent.

5. MUNICIPAL CORPORATIONS—OCCUPATION TAX—POWERS UNDER ACTS OF 1907, PAGE 782, ACT NO. 322—INDEPENDENCE COUNTY.—Act No. 322, page 782, Acts of 1907, entitled "An act for the enlargement of the powers of cities of the first and second class and incorporated towns in Independence County," *held,* to be a special statute for Independence County and that the language used in Section 2 of the act does not extend its operation to other localities.

6. MUNICIPAL CORPORATIONS—OCCUPATION TAX—SCOPE OF ACT 322, ACTS OF 1907.—Section 2 of Act 322, Acts of 1907, provides, "That this Act shall apply only to Independence County and any other county, or counties that may desire to take advantage of the provisions of this Act." *Held,* that portion of the section, which declares that the act shall apply to other counties than Independence, which may desire to take advantage of it, is wholly inoperative.

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

Davies & Davies.

The ordinance is void for the reasons that:

1. The act was void.

2. It was a special act.

3. If intended as a general act no method of adoption by counties or cities outside of Independence County was provided.

4. It was purely a revenue measure.

5. The occupations themselves could not be licensed, and if they were there was discrimination both in licensing and taxation. 112 Ark. 17.

6. The ordinance was a violation of the law as being contrary to the general laws of the State.

7. It is oppressive and a matter to which the police power does not extend.

8. It was a fraud upon the tax-payers and the city and is unconstitutional. Const. 19, § 27; 43 Ark. 471; 55 *Id.* 148; 69 *Id.* 679; 90 *Id.* 679; 43 *Id.* 525; 59 *Id.* 513; *Bryan* v. *Malvern,* 122 Ark. 379; 90 Ark. 127; 69 S. W. 679; 161 *Id.* 575; 93 Ark. 612; 34 *Id.* 553; 171 S. W. 871; 106 Ark. 376; 33 *Id.* 690; 56 *Id.* 370; 70 *Id.* 28; 101 *Id.* 238; 96 *Id.* 199; Kirby's Digest, § § 6873, 6894, 6895. It is clear from the title and text of the act that

it only applied to Independence County. 66 Ark. 575; 103 *Id.* 552; 48 *Id.* 370; 27 *Id.* 419; 28 *Id.* 200.

See also as to the intent of the Legislature, 27 Ark. 419; 3 *Id.* 285; 28 *Id.* 200; 48 *Id.* 305; 102 *Id.* 373; 35 *Id.* 56, 60; 71 *Id.* 556; 100 *Id.* 175; 90 *Id.* 520; 86 *Id.* 518.

Jas. W. Mehaffy, for appellee.

The ordinance conforms to the act, which is a general act and is constitutional. 76 Ark. 303-308; 65 *Id.* 521-532; 68 *Id.* 83; Const. Art. 5, § § 21-24, Art. 2, § 23, Art. 12, § 4; 46 Ark. 477.

Courts have nothing to do with the wisdom or the expediency of an act. 70 Ark. 549; 72 *Id.* 195; 65 *Id.* 521; Kirby's Digest, § § 5526-5527, 6873. There is no discrimination nor class legislation. 121 Ark. 606.

McCULLOCH, C. J. Appellants, who are citizens and taxpayers engaged in various business pursuits in the City of Hot Springs, instituted this action in the chancery court of Garland County to restrain the enforcement of an ordinance of the city council requiring those who desire to operate certain lines of business to procure a license and pay the fee therefor. The contention is that it amounts to an occupation tax which the city has no power to impose. On final hearing of the cause, the chancellor decided that the ordinance was valid and dismissed the complaint for want of equity.

It is not contended by counsel for appellee that the imposition was intended otherwise than as an occupation tax, and it seems clear from a consideration of the terms of the ordinance that it was so intended and that such is its necessary effect. It is not really necessary, however, to determine that question, for there are occupations included in this controversy which the city council is not empowered even to regulate or to license unless it is under the statute relied on by appellee, and the controversy here narrows to a decision of the question whether or not the statute mentioned has any general application so as to confer authority upon the city council of Hot Springs.

(1) It is clear that the appellants had the right to institute this action, not for the purpose of restraining criminal prosecutions, but to enjoin the collection of an illegal tax. *Taylor, Cleveland & Co.* v. *City of Pine Bluff,* 34 Ark. 603; *City of Little Rock* v. *Prather,* 46 Ark. 471.

(2) We may treat as settled that the Legislature "has authority under the constitution to delegate to cities the power to tax occupations." That question was expressly decided in he case of *City of Little Rock* v. *Prather, supra.* The clear reasoning of that opinion leaves nothing further to be said on that subject, and its force has been recognized in subsequent decisions of this court. *Ft. Smith* v. *Scruggs,* 70 Ark. 549; *Conway* v. *Waddell,* 90 Ark. 127. The Prather case involved the validity of the Act of March 21, 1885 (Acts of 1885, p. 92), the fifth subdivision of section three of which expressly authorized the council of any city of the first class, by a two-third vote, to pass an ordinance imposing an occupation tax, and the court decided that the power thus delegated was not in contravention of any provision of the Constitution and that the statute was valid. That part of the statute was, however, repealed by the General Assembly of 1887. Acts of 1887, p. 44. The doctrine of the Prather case has not been in the slightest degree impaired by any subsequent decision of this court. It is true, in the case of *Fort Smith* v. *Scruggs, supra,* Judge Riddick, in delivering the opinion, said that a tax upon the use of property might under some circumstances amount to a tax on the article as property, but that the ordinance then under consideration, which imposed a tax on vehicles, was not a property tax but in effect an imposition of the payment of tolls upon those who used the streets of the city. The force of the Prather case was clearly recognized.

(3) Municipalities possess no inherent powers and can exercise only such powers as are delegated to them by the legislative branch of the state government, either expressly or by necessary implication. There is no gen-

eral statute in operation in this State authorizing municipalities of any class to impose an occupation tax, unless that authority be found in an act of the General Assembly of 1907 entitled "An Act for the Enlargement of the Powers of Cities of the First and Second Class and Incorporated Towns in Independence County." Acts of 1907, No. 322, p. 782. The contention of appellee is that while the title of this act indicates that its operation was restricted to Independence County, the scope was broadened by the full text of the statute so as to make it general in its nature.

The three sections of the statute read as follows:

"Section 1. That in addition to the powers now conferred by law upon cities of the first and second class and incorporated towns that for the purpose of raising revenues to defray the expenses of additional police force and fire protection, they be and are hereby empowered to, by proper ordinance, require the payment of a license from all merchants, restaurant keepers, hotels, butcher shops, barber shops, ten pin alleys, and all other places of business within their limits where articles are kept for sale or exchange, or where any kind of game is indulged in and a charge is made therefor, and to provide penalties for the violation of such ordinances, as now prescribed by law for the violation of ordinances of a similar character.

"Section 2. That this Act shall apply only to Independence County and any other county or counties that may desire to take advantage of the provisions of this Act.

"Section 3. That this Act take effect and be in force from and after its passage."

(4) It will be observed that section 1, which undertakes to prescribe the powers to be conferred upon municipalities, is general in its nature and contains no restriction to any particular locality; but the language of section 2 is very peculiar, to say the least of it, and when considered in the light of the title, it is by no means clear that the Legislature intended to enact a general

statute, or that it adopted language of sufficient force to accomplish that end. *St. L., I. M. & S. R. Co.* v. *State,* 86 Ark. 518. When in doubt, we are at liberty to look to the legislative title of the statute, and there is certainly enough ambiguity in this one to warrant us in giving careful consideration to the language of the title. *Western Union Tel. Co.* v. *State,* 82 Ark. 302. There is no provision in the Constitution of 1874, as there was in the Constitution of 1868, requiring that there be a title to every statute, and that "no act shall embrace more than one subject, which shall be embraced in its title." The only provision of the Constitution of 1874 prescribing any restrictions as to the unity of subjects to be embraced in a statute, relates to general appropriation bills. Constitution of 1874, Art. 5, Sec. 30. The Constitution provides a form of the enacting clause of all statutes (Art. 5, Sec. 18), but stops there without any further restriction.

However, the legislative form of affixing a title to a statute is a custom of such general nature in American legislation that it has been always followed here regardless of any express requirement in the organic law. The title itself forms no part of the enactment, but in this instance it shows very clearly the legislative intent that the statute was meant only to apply to Independence County. Section 1 is couched in very broad language, but the next section was evidently intended either to explain, restrict or amplify the preceding section; and if any meaning be given to it at all it is that it was intended to put the statute into immediate operation in Independence County, whether it applied to any other locality or not. If it had been intended by the lawmakers to make the statute apply generally, section 2 need not have been inserted at all, so if we are to give any effect to that section we must construe it to mean that the Legislature intended to put the statute into operation in Independence County, as distinguished from its operation in other localities, and leave it to the option of other counties whether or not the benefits of the provision should be taken advantage of. It is argued that the statute being one merely

to delegate authority to city councils, the language in the last clause of section 2 was evidently intended to confer authority upon municipalities in other counties, and that such is a fair interpretation of the statute. This part of the statute was dealing, however, not with separate municipalities within a given territory, that is to say, with municipalities included within the territory of the county named, and it does not warrant the inference that the Legislature merely meant to say that the Act should be one of general application to be taken advantage of by the municipalities in any other county.

(5-6) It is possible that the framers of the statute intended to use that language as an invitation to representatives from other counties to include their constituents in the bill during its passage through the Legislature. It is well known that bills for statutes are often inartificially drawn and have to be gotten into shape durthe progress of the passage of the statute by those who are more skillful in the framing of laws. But we often find examples where a statute has failed of its purpose because of the fact that in the hurry of legislation the defects have escaped attention. Whatever may have been the purpose, and however much we may speculate as to what this language means, we are of the opinion that it does not demonstrate to a certainty that the Legislature meant to enact a general statute, operative, without any further action, in all of the counties of the State. It is too clear that the Legislature intended to make some distinction between Independence County and other localities of the State, so far as concerns the immediate effect of the statute. In other words, there is a very clear manifestation to put the law into effect in Independence County, but only to open the way for its adoption in other localities, and that language is not strong enough to provide a method for its adoption. A mere declaration that the Act shall apply in "any other counties that may desire to take advantage" of it, wholly fails to provide any means for extending the scope, even if that could be done

otherwise than by a positive declaration of the lawmakers extending the provision.

The Constitution recognizes a clear distinction between special legislation having only local effect and general legislation. There are certain requirements concerning such special legislation that are not imposed as to general legislation. Whether or not the Legislature has the power to embrace both classes of legislation in one enactment, we need not stop to inquire at this time, since we have reached the conclusion that the language of the statute now under consideration is only effective to put it into operation as a special one in the particular locality named, and that it does not extend the operation of the statute to other localities. In reaching this conclusion, we do not attach any importance to the prohibition in the Constitution (Art. 5, Sec. 22) against reviving, amending or extending the provisions of the law by title only, for this is not an attempt to extend the provisions of the statute by reference to title. If the Legisature had put into the statute a clear expression of the intention to make it one of general application, it would not have offended against the provision of the Constitution just referred to. Having reached the conclusion, however, that the language is not sufficient to extend the provision, it renders that part of the statute, which declares that it shall apply to other counties which may desire to take advantage of it, wholly inoperative. We recognize our duty to give effect to every sentence and every word in a statute if possible to do so in harmony with all of its provisions, but this statute presents a case where something must be rejected and we are of the opinion that if we give any effect at all to that part of the statute which makes it special in its application to Independence County, it necessarily results that the other language intended to be more general must be rejected as being without sufficient potency to accomplish what the lawmakers may have intended.

We have not overlooked, in our consideration of this question, the decision in *Russell* v. *Board of Dir. of Red*

River Levee Dist. No. 1, 110 Ark. 20, and in *Young, Admr.* v. *Red Fork Levee Dist.,* 124 Ark. 61, construing the Act of the General Assembly of 1905 (p. 143), which referred especially to the St. Francis Levee District, and we held that the statute was general in its application. The language of that statute, however, was entirely different from the statute now under consideration, and notwithstanding the fact that it mentioned a particular levee district, the remaining language was of sufficient force to extend the operation to all other districts in the State. The present statute only constitutes an attempt to make it apply to such other counties as may desire to take advantage of it, and as there is no provision made for manifesting a desire to so adopt its provisions, the language fails to be of any effect.

There being no statute in the State delegating to municipalities the authority to impose an occupation tax, it follows that the chancery court erred in not restraining the officials of the City of Hot Springs from undertaking to enforce the ordinance. The decree is therefore reversed, and the cause remanded with directions to enter a decree in accordance with the prayer of the complaint.

HART, J., dissents.

GRAYLING LUMBER COMPANY v. HEMINGWAY.

Opinion delivered June 12, 1916.

1. MASTER AND SERVANT—REPRIMAND—WAIVER OF RIGHT TO DISCHARGE.—The mere fact that a master reprimands his servant for not performing his work in an efficient manner, does not operate to waive his right to discharge his servant for inefficiency.
2. CONTRACTS—COMPLAINT—WAIVER OF BREACH.—The mere fact that one party to a contract complained to the other that the latter was not performing his contract according to its terms, does not amount to a waiver of such breach of the contract.
3. CONTRACTS—CONSIDERATION—MUTUALITY.—An agreement entered into between parties to a contract, in order to be binding, must be mutual; where the consideration consists of mutual promises, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.

Appeal from Desha Circuit Court; *James C. Knox,* Special Judge; reversed.

J. Bernhardt and *Sam Frauenthal,* for appellant.

1. The verdict is contrary to the evidence, because there was no binding contract. It was too indefinite and uncertain as to distance the logs were to be hauled and the price to be paid. Tiedeman on Sales, § 45; 1 Mechem on Sales, § 209; Benjamin on Sales, § 69; 97 Ark. 613.

2. There was no mutuality in the alleged contract. 100 Ark. 510; 96 *Id.* 184; 64 *Id.* 398; 6 L. R. A. (N. S.) 431; 20 *Id.* 899. The court erred in refusing instruction No. 5 asked by defendant, and in modifying No. 3.

3. The verdict is excessive. 43 Ark. 439; 73 *Id.* 336; 91 *Id.* 427; 97 *Id.* 522; 105 *Id.* 105. Profits should not be allowed upon conjectural testimony, on opinions of parties or witnesses. 13 Cyc. 53; 103 Ark. 584; 78 *Id.* 336; 91 *Id.* 427; 97 *Id.* 522; 105 *Id.* 421, etc.

F. M. Rogers, for appellee.

1. The evidence is ample to sustain the verdict. The price and terms were stated and proven. The profits were shown. 80 Ark. 228; 97 *Id.* 522.

2. There is no error in the instructions and the verdict is not excessive. The damages by defendant's breach of the contract were proven by competent evidence.

HART, J. C. C. Hemingway, Jr., sued the Grayling Lumber Company to recover damages for a breach of an alleged contract by which he was employed to haul and deliver logs for said company.

The plaintiff alleges that Hemingway entered into a verbal contract with the Grayling Lumber Company in February, 1915, to haul and deliver logs to the company for the balance of the year 1915. That the company agreed to pay him for the hauling as follows: For all logs delivered, where hauled a distance not exceeding one-quarter of a mile, $2.00 per thousand feet; for all logs delivered where hauled a distance exceeding one-quarter of a mile, but not exceeding one-half of a mile,

$2.50 per thousand feet; all logs delivered which were hauled over one-half of a mile, but not exceeding three-quarters of a mile, $3.00 per thousand feet; all logs hauled over three-quarters of a mile, and not exceeding one mile, $3.50 per thousand feet. The plaintiff further alleges that he entered upon the performance of the contract and hauled logs thereunder until May, 1915, at which time the lumber company without cause refused to permit him to further perform the contract. The material facts are as follows:

C. C. Hemingway, Jr., testified: B. J. Terry was the local manager of the Lumber Company. I had a logging outfit which consisted of forty mules and eight wagons and tents. Five mules constituted a team for a log wagon. I had done some logging for the company in 1914. My father acted as my agent in making that contract. In February, 1915, Mr. Terry came to me and asked me to go to work logging for the mill. I told him I would not put my team in the mud, water and ice unless he guaranteed me work for the balance of the year of 1915. He told me to go ahead and asked me how long it would take me to get ready. I told him that it would take me three of four days to get my outfit together and move it. I moved out on the job and hauled logs until in April, when I went to Mr. Terry and asked him again about the job. I needed new equipments, such as tents and harness, and I had heard rumors to the effect that the logging would be shut down. Terry told me to get the additional equipment and proceed with the work. I did so and about the 13th day of May I again heard rumors that the mill would stop the work of logging and went to see Mr. Terry about it. On that day Terry notified me to stop work. I endeavored to get other work after that but was unable to do so. I turned back some of the mules which I had not paid for. I had not been able to make any money up to time I was discharged. This was on account of the weather conditions which made the hauling very heavy. The roads were getting better in May so that thereafter I could have made a profit on the haul-

ing. After the time I was discharged I could have hauled with each team an average of 8,000 feet a day. The price I would receive would be $2.50 per thousand feet for hauling from a turn-round to one-half mile. I could have worked twenty-two days a month. I would have made $20.00 per day each team, and $412.75 of that would have been profit. My profits with eight teams counting twenty-two days as a month would amount to $2,250 per month. The testimony of the plaintiff was corroborated by other witnesses.

For the defendant B. J. Terry testified: I did not employ the paintiff in 1914. I did employ his father for that year to haul logs for the lumber company. I never made any contract with plaintiff on behalf of the company. I told the plaintiff's father that he could go to work logging the mill in 1915 with the understanding that it would have to be mutually satisfactory. I knew that his son was working with him. I never agreed to keep them in work for any particular length of time. During the whole time they worked in 1915, their work was unsatisfactory. I repeatedly told them that their work was not satisfactory, and urged them to do better. The woods foreman and his assistant corroborated the testimony of Terry as to the manner in which plaintiff did his work. They said that frequently he would leave logs and go to another place and commence hauling, that they would constantly have to watch him and make him go back and clean up the logs. It was also shown on the part of the defendant that Terry had told the plaintiff and his father that the price for hauling would be decreased when the weather conditions got better.

The jury returned a verdict for the plaintiff in the sum of $3,000, and the defendant lumber company has appealed.

It is insisted by counsel for the defendant that the evidence is not legally sufficient to sustain the verdict. They point to the fact that plaintiff bases his right to recover on his testimony to the effect that each team could haul on an average of 8,000 feet per day and that

he would receive $2.50 for hauling from a turn-round to one-half mile. There is no testimony in the record to support a finding that plaintiff could have made the haul as testified to by him. There were several distances which his complaint alleges that he was to haul logs and the prices varied with the distance. There is a total lack of evidence to show that any of the hauling which he would have done in the future would have been for a distance exceeding one-quarter but not exceeding one-half a mile. He might have been assigned to the task of hauling for a greater distance and for aught that appears from the record he might not have made any profit in hauling the increased distance. The burden was on him to show what his profits would have been. In other words in order to recover damages for an alleged breach of the contract, it was incumbent upon the plaintiff to show that he would have been assigned the task of hauling more than a quarter of a mile and not exceeding a half of a mile before he can recover for hauling that distance. Proof that he could have made a profit in hauling that distance does not tend to prove that the defendant company would have assigned him work at that distance for the balance of the year.

(1-2) Counsel for the defendant also insists that the court erred in giving in its modified form instruction number three as follows:

"3. If the jury find from the evidence that there was a contract between the parties, and that the plaintiff breached it, then the defendant will not be liable in this action; unless you further find from a preponderance of the evidence that such breach was condoned." The modification consisted in these words, "unless you further find from a preponderance of the evidence that such breach was condoned." We think the addition of these words to the instruction rendered it misleading and prejudicial to the rights of the defendant. The testimony on the part of the defendant shows that the work of the plaintiff and his father was not performed in a satisfactory manner during the year 1915. The local manager

of the defendant testified that he had occasion frequently to complain at the plaintiff and to urge that he and his father do their work in a more efficient manner. The mere fact that a master reprimands his servant for not performing his work in an efficient manner does not waive his right to discharge his servant for inefficiency. So here the mere fact that the defendant complained to the plaintiff that he was not performing his contract according to its terms did not amount to a waiver of such breach of the contract.

(3) Again it is contended by counsel for the defendant that the court erred in refusing to give instruction number five. The instruction reads as follows: "5. The court instructs the jury that in order that a contract be entirely binding and legal, the observance of its terms and conditions must be binding upon all the parties thereto. So, if the jury believe from the preponderance of the testimony in this case that the terms of the contract sued on, left it entirely optional with the plaintiff whether or not he would perform his promise, if you find there was a promise, then this contract would not be binding on the defendant, and you should find for the defendant." We think the court erred in refusing to give this instruction. It is a general principle in the law of contracts that an agreement entered into between parties to a contract in order to be binding must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184; *St. L., I. M. & S. Ry. Co.* v. *Clark,* 90 Ark. 504. The jury might have found from the evidence that the plaintiff was under no legal obligation to haul logs for the defendant any longer than he chose, and on this account the agreement was void for want of mutuality Even if the jury should find that the defendant had agreed to employ the plaintiff to haul logs for the balance of the year 1915, the defendant had a right to

have its contention on this phase of the case submitted to the jury in concrete form and this was not done in any instruction given by the court.

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

COFFIN v. PLANTERS COTTON COMPANY.

Opinion delivered June 12, 1916.

1. DEED OF TRUST—TRANSFER OF NOTE—CANCELLATION OF TRUST DEED—EFFECT.—Certain notes were given secured by a deed of trust, and one of them was transferred to plaintiff who was a *bona fide* purchaser thereof, for value before maturity, said note being endorsed to her. *Held*, the action of the original holder of the said notes in cancelling the trust deed, and releasing the lien, did not operate to defeat the lien held by the plaintiff to secure her note.
2. PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT.—Before one can be held to have ratified any unauthorized act of one who assumes to be his agent, the principal must have knowledge of all the material facts upon which said agency is predicated, and ignorance of such facts renders the alleged ratification ineffectual and invalid.
3. PRINCIPAL AND AGENT—UNAUTHORIZED ACT—RATIFICATION.—When the principal has the knowledge as stated above, and remains silent when he should speak, or accepts some benefit which he obtains by virtue of his reputed agent's acts, he cannot thereafter be heard to deny the agency.
4. PRINCIPAL AND AGENT—UNAUTHORIZED ACT—RATIFICATION.—There is no ratification if at the time it becomes known that the agent exceeded his authority, the principal has put it beyond his power to return or restore the benefits received, or if without his fault conditions are such that he cannot be placed in *statu quo*, or repudiate the entire transaction without loss.
5. PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT—CANCELLATION OF TRUST DEED.—Plaintiff held a note secured by a certain trust deed. Plaintiff's agent undertook to release the lien retained in the trust deed, and *held*, plaintiff, by her conduct, ratified the agent's act.

Appeal from Mississippi Chancery Court; *Charles T. Coleman*, Special Chancellor; affirmed.

Hughes & Hughes, for appellant.

1. Mrs. Coffin has priority. 105 Ark. 152; 115 *Id.* 366; 27 Cyc. 1294; 1 Jones on Mortg. (6 ed.), § 956a,

814; 57 Kans. 743; 97 Ill. 156; 156 S. W. 483; 59 Fed. 917; 109 Cal. 42; 54 Neb. 262; 145 Mo. 142; 85 Md. 315; 50 Ind. 441; 57 So. 671; 205 N. Y. 105; 162 Mass. 72; 100 Ga. 236 and many others. The great weight of authority is that the holder of a negotiable note under circumstances like these, has priority as against one who assumes to pay off the mortgage debt to the original mortgagee, whether such payment be made by the mortgagor personally or by some one for him, intending to take and actually taking a new mortgage. Cases *supra.* 203 U. S. 296; 39 L. R. A. 75; 97 U. S. 369, etc.

2. The loan company paid the mortgage. 97 Ill. 156; 102 *Id.* 148; 191 *Id.* 174; 183 *Id.* 523.

3. French was not appellant's agent and she never ratified his acts. There can be no ratification without full knowledge of all the material facts, or where it is known the agent exceeds his authority and the principal has put it beyond his power to return or restore the benefits received, or without his fault conditions are such that he cannot be placed in *statu quo,* or repudiate the entire transaction without loss. 2 C. J. 496; 64 Ark. 217; 76 *Id.* 472; *Ib.* 563; 90 *Id.* 104; 105 *Id.* 512; 26 S. W. 381; 2 Corpus Juris., 480, 496; 1 Mechem Agency (2 ed.) § 403.

Caruthers Ewing, of Memphis, for appellee.

1. French was the agent of Mrs. Coffin with authority to act for her. If he violated his instructions this violation did not affect the loan company. Mrs. Coffin with full knowledge ratified the substitution of securities. The cases cited by appellant do not sustain her position. Many of them support our contention. 58 Mich. 138; 68 *Id.* 36; 77 N. W. 355; 68 Pa. 985; 71 N. W. 538; 77 Pac. 512; 102 U. S. 545; 107 *Id.* 478; 46 Minn. 156; 13 Oh. St. 419; 15 L. R. A. (N. S.) 1025 and note. The *bona fide* purchase of a legal right, whether of security or otherwise, cuts short prior equities. Cases *supra.*

2. Mrs. Coffin ratified the acts of her agent with notice of facts and circumstances equivalent to knowledge

of all facts reasonable diligence would enable one to discover. 58 Ark. 84; 23 *Id.* 735; 32 *Id.* 251; 16 *Id.* 94, 340; 114 Tenn. 467; 38 S. W. 733, 740; 94 U. S. 432; 101 *Id.* 140; 142 *Id.* 438; 150 *Id.* 96; 151 *Id.* 607; 5 L. R. A. (N. S.) 896; 73 Pac. 360, etc.

3. She had knowledge of *all* the facts. 28 Ark. 59; 54 *Id.* 216; 55 *Id.* 112, 240; 11 L. R. A. 81; 118 N. Y. 563; 64 Ark. 217 and many others.

SMITH, J. A condensation of the allegations of the complaint is contained in appellant's brief, from which we copy the following statement:

"The complaint alleges, in substance, that G. L. Waddell is the owner of a plantation in Mississippi County, Arkansas, known as the Shawnee Village. At the times mentioned he owed a balance of purchase money of about $20,000 on the land. Defendant, Planters Cotton Company, in March, 1911, loaned him approximately $30,000 on the land, taking three $10,000 notes due several months later. The plaintiff, two days thereafter, bought one of said notes from the Planters Company, before maturity, in good faith, without notice of any defense, and paid therefor $10,000 in cash. This indebtedness was renewed in 1912, and three new notes taken by the Planters company, one of which was thereupon indorsed to plaintiff, who also took a separate note for the interest then due her.

"On February 22d, 1913, the defendant Commonwealth Farm Loan Company (herein called the loan company) took a mortgage on the same land to secure a loan of $35,000. Of this sum, $20,000 was applied to liquidate the purchase money lien, which was in front of all the mortgages. The remainder, about $15,000, was paid to Planters Cotton Company, and that company placed of record on the same day a power of attorney to the clerk to satisfy the record of both the mortgages to it, which was done.

"The plaintiff was ignorant of all the proceedings. No part of the note held by her has peen paid, nor has

she in any way authorized the release of record of the mortgage securing her note. The Planters Cotton Company is now in the hands of a receiver, and Waddell, the maker of the note, is insolvent.

"There were various other allegations on subordinate features of the controversy, but these were the main facts.

"The prayer is, in effect, for judgment on the note, for sale of the property, and that plaintiff be decreed to have priority in the proceeds except as to the $20,000 paid toward the purchase money."

Certain junior lienors are also parties defendant, but as the decree in the cause finds, and as they themselves concede, that their their liens are inferior to the ones here involved, we make no statement of the issues as to them.

The loan company and the cotton company do not deny the execution of the different deeds of trust and other instruments referred to in the complaint, but they do deny that the deed of trust originally given had been satisfied of record without appellant's consent, but aver that she had authorized this action, and that she had fully ratified the action of the Planters Cotton Company in satisfying the deeds of trust, and that the loan company is an innocent purchaser.

The two principal questions in the case are, first, that of the priority of the mortgages and, second, whether the plaintiff, Mrs. Coffin, ratified the action of the Planters Cotton Company in satisfying the deed of trust securing the note on which this action is based. The principal question of fact which is important to consider in determining these questions is that of the nature and extent of the authority of one C. T. French as appellant's agent. Appellant's husband had been a member of the firm of Dillard & Coffin Company, and during the last years of his life French was employed by that firm and was held in the highest regard by its members. After the death of Mr. Coffin, French severed his connection with that firm and became connected with the Planters Cotton Company in the capacity of general manager.

He continued, however, to be the agent and confidential adviser of Mrs. Coffin, and her confidence in him appears to have been unreserved.

We agree with appellant in her claim of priority. This view conforms to the opinions in the recent cases of *Driver* v. *Lacer,* 124 Ark. 150; *Calhoun* v. *Ainsworth,* 118 Ark. 316, 176 S. W. 316; *Calhoun* v. *Sharkey,* 120 Ark. 616, 180 S. W. 216; *Koen* v. *Miller,* 105 Ark. 152.

(1) The note in question was negotiable and had been properly endorsed and was owned by appellant at the time the deed of trust securing it was cancelled. It was, therefore, the duty of the loan company to know who the owner of the note was, and it could not claim protection through the mere cancellation of the deed of trust by the cotton company, if that company was not the holder of the note at the time that action was taken.

It is earnestly insisted that French was the agent of Mrs. Coffin in causing the deed of trust to be cancelled. But a majority of the court do not accept that view of the evidence. All of us, however, do agree with the learned special chancellor in his finding that Mrs. Coffin ratified the action of French in cancelling the lien of this deed of trust.

(2) We have been favored with very excellent briefs in this case which evince much learning and research on the part of opposing counsel; but the legal principles involved are not difficult and have been settled by the decisions of this court. It is well settled that, before one can be held to have ratified any unauthorized act of one who assumes to be his agent, the principal must have knowledge of all the material facts upon which said agency is predicated, and ignorance of such facts renders the alleged ratification ineffectual and invalid. *Schenck* v. *Griffith,* 74 Ark. 557; *Lyon* v. *Tams & Co.,* 11 Ark. 189; *Martin* v. *Hickman,* 64 Ark. 217; *Niemeyer Lbr. Co.* v. *Moore,* 55 Ark. 240.

(3) But it is equally as well settled that when one has this knowledge and remains silent when he should

speak, or accepts some benefit which he obtains by virtue of his reputed agent's acts, he cannot thereafter be heard to deny the agency. In other words, he will be held to have ratified the unauthorized acts. *Ladenberg* v. *Beal-Doyle Dry Goods Co.,* 83 Ark. 440; *Atlanta National Bldg. & Loan Assn.* v. *Bollinger,* 63 Ark. 212; *Dierks Lbr., etc., Co.* v. *Coffman,* 96 Ark. 505; *Lyon* v. *Tams & Co.,* 11 Ark. 189; *Billingsley* v. *Benefield,* 87 Ark. 128; *Pike* v. *Douglass,* 28 Ark. 59; *Creson* v. *Ward,* 66 Ark. 209; *Kelly* v. *Carter,* 55 Ark. 112.

(4) Appellant quotes and relies upon the rule as stated in 2 C. J. 496, where it is said:

"There is no ratification if, at the time it becomes known that the agent exceeded his authority, the principal has put it beyond his power to return or restore the benefits received, or if without his fault conditions are such that he cannot be placed in *statu quo,* or repudiate the entire transaction without loss."

This statement of the law is, of course, correct, and is in accord with the prior decisions of this court. It becomes necessary, therefore, to determine whether Mrs. Coffin remained silent when she should have spoken, or whether she accepted benefits flowing out of the unauthorized acts of French, or whether the action taken by her was such only as was necessary to obtain the best security possible for her debt after the lien securing it had been cancelled. The evidence shows that French's conduct of Mrs. Coffin's affairs had previously been highly satisfactory and profitable to Mrs. Coffin and that her confidence in his integrity and judgment was unlimited. That she was also the owner of $10,000 of the preferred stock of the cotton company, and neither she nor anyone else questioned the solvency of that company at the time of her purchase of the note. The following endorsement appears on the back of the note in suit, which French testified was made by him at the time of the cancellation of this deed of trust:

"This note renewed by notes attached, due December 15, 1913, also 4 rent notes, $4,800 each, attached, as additional security."

(5) There was also executed a deed of trust covering the lands in question in Mrs. Coffin's favor which the parties refer to as the third deed of trust. This instrument was given to Waddell to be placed of record but was not recorded until some months later. The four notes mentioned were given to G. L. Waddell by his tenant pursuant to a contract for their execution, but upon a showing made that the notes had been executed for an excessive amount they were surrendered with the understanding that new notes for the correct amount of rent should be substituted. At the time of the acceptance of these rent notes the cotton company was a going concern and would probably have paid Mrs. Coffin her money had she refused to accept them, or, had the payment been refused and the loan company apprised of that fact, that company could have taken proper steps to be subrogated to the right of Waddell's vendor with respect to the money paid this vendor, in discharge of their vendor's lien, which lien was prior both in time and right to either the Planters Cotton Company or Mrs. Coffin, this vendor's lien having been discharged on February 2d, 1913.

It is also shown that upon default being made in the payment of the interest due the loan company, in order to prevent a foreclosure of the deed of trust given that company, Mrs. Coffin surrendered one of the rent notes, the proceeds of which, when collected, were applied to the payment of the interest due the loan company.

This was done in January, 1914, but Mrs. Coffin's attorney testified that at that time he thought the only security held by her consisted of the rent note, a note that had been transferred to her in lieu of her original note endorsed by the cotton company and the deed of trust on the Shawnee Village plantation securing this substituted note, which was inferior to the loan company's deed of trust. It is said, however, that notwithstanding these new securities were taken, no ratification was accom-

plished because Mrs. Coffin did not know the manner in which the cancellation of the deed of trust by the cotton company had been accomplished, and that she did not know that she had the note in her possession, nor did she know that it had not been surrendered. That she assumed, as she had the right to do, that the note had been surrendered, or had been exhibited by the cotton company to the loan company as being in its possession and, therefore, its property. In other words, that the satisfaction of the deed of trust had been accomplished in such a manner as to bind her effectively and to leave her no choice but to take such securities as were taken then available.

We cannot, however, accept this view. Mrs. Coffin had knowledge that French had undertaken to satisfy this deed of trust at a time when, had she repudiated that action, the loan company might have protected itself as above stated. Nor do we agree that her lack of knowledge as to the possession of the note protects her. If she did not possess this knowledge—and it appears that she did not—she yet possessed the means of acquiring all this information. The original note was found in her deposit vault and although she did not actually know it was there, she must be charged with this knowledge. We think, when she became aware of the cancellation of the deed of trust by French, she should immediately have informed herself as to the circumtsances connected with that transaction, and that although she did not do so, she must be charged with the knowledge which the slightest inquiry would have disclosed.

We agree with the learned special chancellor in the following finding which he made "Mrs. Coffin believed that the satisfaction was in behalf of all the owners of the notes, including herself. She was mistaken as to the form, but not as to the substance; for the substance included the representations of two essential facts; first, that the party in whose name the satisfaction was entered was the owner of the entire debt; and, second, that the debt itself had been fully paid. If these representa-

tions had been true, the loan company would have acquired a first lien by its mortgage. If the satisfaction had been in the form supposed by Mrs. Coffin, its legal effect would not have been different from that arising from these representations, if true. It therefore appears that while there may have been a want of knowledge as to the exact form of the satisfaction, all the parties, including Mrs. Coffin, had the same idea of its scope and effect, and all believed that it was a complete satisfaction. If the satisfaction had actually been in form as Mrs. Coffin believed it to be in effect, her ratification of it would have given priority to the mortgage in favor of the loan company."

But, as we have said, Mrs. Coffin did not acquaint herself with the facts in regard to the manner of the satisfaction of this deed of trust, although the means of information were open to her, but without repudiating the unauthorized act of her agent she accepted, and still retains, other securities delivered to her by French.

We conclude, with the chancellor, therefore, that appellant must be held to have ratified the action of the cotton company in cancelling the deed of trust and the decree will, therefore, be affirmed.

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

Opinion delivered June 12, 1916.

1. STREETS AND SIDEWALKS—STREETS INCLUDE SIDEWALKS.—The streets of a city or town extend to and include that portion thereof, occupied and used for sidewalks.
2. RAILROADS—MAINTENANCE OF STREET CROSSINGS—EXTENT.—In constructing and maintaining crossings over public roads and streets railroad companies must anticipate the reasonable demands of the public, and where the traffic requires it, the crossing must be made available for the entire width of the road or street.
3. RAILROADS—PUBLIC STREET CROSSINGS—MAINTENANCE—EXTENT.—Defendants track crossed a street in a certain town, which street was extensively used by pedestrians as well as vehicles, it was the duty of the defendant company to maintain a crossing in good repair the entire

width of the street, including the sidewalks on either side of the street, and that it would be liable in damages for an injury resulting to a pedestrian from a breach of that duty.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; affirmed.

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

The company is not required to construct a footway across the tracks between the ends of the sidewalks at the street crossing, and no liability was incurred for the injury. There was a well-constructed crossing 15 to 25 feet wide in the middle of the street. Act No. 36, Acts 1905, amending § 6681 Kirby's Digest and *Ib.* § § 6682, 6683; Act No. 301, Acts 1907, § 1. The council had passed no ordinance under this act. The court erred in its instructions.

Robert J. White, for appellee.

The sidewalk was a part of the street and it was appellant's duty to maintain the sidewalk crossing. 3 Elliott on Railroads (ed. 1897), § 1092; 49 N. E. 2; 65 *Id.* 192; 7 Pac. 442; 67 Cal. 130; 128 *Id.* 141; 56 Pac. 201; 11 Kans. 384; 73 Ind. 194; 65 N. E. 192; 30 *Id.* 156; 65 *Id.* 192; 175 S. W. 415. The court properly instructed the jury as to the railroad's duty under the common law and our statutes.

SMITH, J. Appellee undertook to cross appellant's railroad track at the principal street crossing in Bigelow, Arkansas, a town of a thousand or fifteen hundred inhabitants. It was alleged in the complaint that appellant had failed to make the crossing safe for pedestrians. There was proof to the effect that appellee's fall and injury were attributable to the condition of the track at the point where she crossed. The evidence shows that there was a safe crossing in the middle of the street, about 16 feet wide; but the proof also shows that while this space could be used by pedestrians in crossing the track that it was ordinarily used only by vehicles and that pedestrians crossed the track generally on the edge

of the street by walking straight across from the end of the sidewalk which reached to the right of way on one side and the end of the sidewalk which reached to the right of way on the opposite side.

Appellant concedes that there is no substantial conflict in the testimony and states the question at issue as follows:

"The question involved in this case is whether or not a railway company is required to construct a footway across its roadbed and railroad tracks between the ends of a sidewalk which runs along beside the street up to within fifteen or twenty feet of the ends of the cross-ties on each side of the roadbed where the street crosses the railroad, and is liable for an injury to a pedestrian for its failure to do so."

The proof shows this street was largely used in the travel from one side of the town to the other and that 75 to 90 per cent. of the pedestrians walked along the sidewalk until they reached the end of it near the railroad track and then continued straight across the roadbed to the end of the sidewalk on the other side.

Instructions were given at the request of appellee which told the jury, in effect, that it was appellant's duty to use ordinary care and diligence to put and maintain the crossing in a reasonably safe condition for pedestrians in crossing the track at the point at which appellee crossed; while instructions were refused which appellant requested which told the jury that appellant's duty was discharged if it maintained in the center of the street a crossing which was safe for pedestrians, and that the fact that people walked along the side of the street and had thereby made a pathway across the roadbed did not impose upon appellant the duty to keep the pathway safe for pedestrians.

(1) In one of the instructions the court told the jury that "the sidewalk and walkway for pedestrians along the public streets are parts of the public street."

Appellant insists that this was an issue of fact which was in dispute and that the court should not have elimi-

nated this question from the consideration of the jury. But we think no error was committed here in so charging the jury. The streets of a city or town extend to and include that portion thereof occupied and used for sidewalks. *City of Bloomington* v. *Bay,* 42 Ill. 503; *State* v. *Berdetta,* 73 Ind. 185; Vol. 7, Words & Phrases, title "Sidewalks," p. 6506.

The language above quoted was contained in instruction numbered 2 and that entire instruction reads as follows:

"2. The sidewalks and walkways for pedestrians along the public streets are parts of the public streets and the defendant is under the same obligation to keep crossings of such sidewalks and walkways over its track in proper condition for the use of pedestrians that it is to keep the middle and other parts of the streets in proper condition for the use of vehicles and persons on horseback; that is, it must use care and diligence of ordinary and reasonable persons under such circumstances considering the dangers and perils to be encountered by persons crossing its track along a public highway; to keep its entire crossing, including the walkway for pedestrians, in a safe condition for the public travel."

The correctness of the remaining portion of the instruction presents the real question in the case.

In the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Smith,* 118 Ark. 72, 175 S. W. 415, we quoted from Vol. 8, Am. & Eng. Enc. of Law (2 ed), p. 363, as follows:

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

And we held in the case cited that the railroad company was responsible in damages for any injury proximately resulting from the failure to perform this duty.

Appellant concedes it would be liable if the injury had been occasioned by a failure to observe this duty; but it says it had discharged this duty by installing a safe crossing in the center of the street of a width of from 15 to 20 feet and that having made a safe crossing in the center of the street it was under no duty to provide a safe crossing in other parts of the street.

The duty of railroads at highway crossings is stated in 3 Elliott on Railroads as follows:

"Sec. 1097. What is included in highway crossing.—Strictly speaking, a highway crossing may be defined as the space included within the boundaries of the right of way and the boundaries of the highway. * * * And where a railway company is required to construct good and sufficient crossings it is held that it is not necessary to construct a crossing the full width of the highway. This, perhaps, would be the rule only where a limited portion of the highway was used for the actual purpose of travel. In cities where the entire width of the highway is used for travel, we are of the opinion that a crossing would, ordinarily at least, be required for the entire width of the highway. And under certain circumstances barriers and guard-rails may be such a necessary part of a railway crossing that the company will be bound to maintain them."

"Sec. 1107. * * * Approaches and embankments need not, as a rule, be constructed over the entire width of the highway. The company has performed its duty in this respect when it has properly constructed approaches and embankments for the width of the portion of the highway available and actually in use. An additional use of the highway for an increased width will, however, necessitate an increased width in the approaches and embankments. * * * It is impossible to lay down any rule defining just what kind of structures shall be used in any particular case. Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necessary

to the safety and convenience of the travelers using the crossing."

"Sec. 1114e. Width of crossings to be maintained.—The question is sometimes important as to the width of the highway crossing to be maintained by a railroad company. Here it seems a sensible rule that the railroad company must construct and maintain crossings and approaches for the entire width of the street in populous and busy cities where great numbers of vehicles and people use them. But where few people and vehicles use the crossings, the width to be constructed and maintained is to be determined largely by what is reasonably required to accommodate the public travel over such crossings, and it has been observed that this 'is fixed, for the time being at least, by the actual crossings and approaches which are made by the railroad companies with the acquiescence of the public and the public authorities.'"

In the case of *Ellis, Respondent,* v. *Wabash, etc., Railway Co.,* 17 Mo. App. 126, a statute of that State was reviewed which required railroads to construct and maintain good and sufficient crossings where its railroad crosses public roads. The court said the statute did not mean that railroad companies are to construct crossings the whole width of the public highways; but the court also said that the streets of a crowded town or city would doubtless be an exception to this rule.

A similar statute of the State of Illinois was reviewed by the Supreme Court of that State in the case of *City of Bloomington* v. *I. C. R. R. Co.,* 39 N. E. 478. It was there said:

"It would be absurd to suppose that the Legislature intended by the act of 1869 to require of railroad companies, in all cases where they crossed public highways outside of the limits of cities and villages, that they should erect, construct and maintain approaches of the entire width of each and all of said highways, and reaching from the natural surface of the ground to the railroad tracks at the crossings. In most, if not all, of such rural localities, the travel on such roads and highways

did not and does not demand or require more than a fraction of such width of approach. And it cannot be imputed to the Legislature that it was intended to impose so heavy and so useless an expense and burden upon the railroad corporations of the State."

But the court also said:

"What would be regarded as the approaches to the crossing would largely depend upon the demands of the traveling public, upon the action of the local authorities, and upon what would be reasonable under the circumstances and local situation in each case. It is manifest that they do not and should not in all cases include all that part of the right of way that is covered by the street or highway, and is not immediately at the crossing."

In the case of *Wabash Railroad Co.* v. *DeHart,* 65 N. E. 192, Mr. Justice Black, speaking for the Supreme Court of Indiana, said:

"The appellant was under legal obligation to maintain the crossing so as not to interfere with the free use thereof by the public, and in such manner as to afford security to life and property thereat. It was its duty to erect and maintain such structure as to make the crossing reasonably safe for persons lawfully and properly using the way. Such obligation and duty rested upon the railroad company by statute, and also without regard to any express statutory requirement."

(2-3) The manner of discharging this duty is a proper subject of statutory regulation; but the duty is not created by the statute. It exists independently of it. Our Legislature has seen proper to exercise its authority in this respect only by prescribing the elevation of crossings by designating the ratio of horizontal to perpendicular feet; but the duty exists to adapt the width of the crossing to the demands of the public. We are not called upon to say, and do not decide, that the railroad company, must, in all cases, make its crossings co-extensive with the roads and streets over which they are placed, but they must anticipate the reasonable demands of the public, and where the traffic requires it, the crossing must be

made available for the entire width of the road or street. Here was a crossing only 15 to 20 feet in width, whereas the street itself was 50 feet, or more, in width. And the crossing was in the center of the street, whereas the sidewalks used by pedestrians were on the side of the street. There was an intervening space between the edge of the street and the crossing which the railroad company had not prepared for the public use. The walk was used by nearly all of the pedestrians, and the proof shows there was a large amount of such travel. The sidewalk running to the edge of the right of way on each side of the track was, of itself, a constant notice to the railroad company of the route pedestrians would take if they continued directly across the track, and we think it was the duty of the railroad company under these circumstances to restore this part of the street to as safe condition as it was before the construction of its track as was consistent with its use for railroad purposes.

Appellant argues that inasmuch as the town of Bigelow had passed no ordinance to avail itself of the benefits of Act. No. 301 of the Acts of 1907, page 726, the railroad company was under no duty to make this part of the crossing safe. We think, however, that counsel mistake the purpose and effect of this Act. Its title is "An Act to empower councils of cities and incorporated towns to require railroad companies to construct and maintain foot walks to their passenger depots in certain cases." From a perusal of the Act it is seen that it has no application to the facts of this case.

We think no prejudicial error was committed in this case and the judgment of the court below is, therefore, affirmed.

ARKANSAS, LOUISIANA & GULF RAILROAD COMPANY v. MORSE.

Opinion delivered June 12, 1916.

RAILROADS—INJURY TO HORSE—LIABILITY.—Plaintiff's horse, coming onto defendant's right-of-way, became frightened and ran into a cut, several hundred feet long, but with steep sides, and with a cattle-guard at the further end. The engineer sounded his whistle, slowed down his train and stopped within thirty to seventy-five feet of where the horse was injured. The horse was injured while attempting to escape. *Held*, under the facts, the railway company was liable.

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

STATEMENT BY THE COURT.

This appeal is prosecuted by the railroad company from a judgment against it for $25 damages for injury to a horse of appellees. The facts are substantially as follows:

As defendant's south bound freight train approached Whitlow station, two horses belonging to appellees came from out of the woods on the railroad track about 100 feet ahead of the engine and about 100 yards from the beginning of the cut, which was 530 feet long, from five to six feet deep, with steep sides and with a cattle gap or guard at the far end eight feet wide and ten to twelve feet long. There was no way for the horses to escape from the cut without climbing the embankment or jumping the cattle gap. There was a place on the east side of the track and north of the gap, which had been worn down by the cattle.

The engineer, after sounding the alarm, began to slow up the speed of the train when the horses entered the cut running, and continued sounding the alarm and brought the train to a stop seventy-five feet before he reached the injured animal. He stated that the horse attempted to climb the side of the cut and fell back and was injured. Others said that the injured horse attempted to cross from the west to the east side of the track north of the trestle and when he stepped between the rails that he fell and was injured by the fall.

One witness said that when the running horse fell he "skelped the ties," or slid for a distance of from twenty to thirty feet, knocking the hair off his hip and tearing a great hole in his shoulder or neck.

The train stopped within thirty to sixty feet of where the horse fell. The other horse cleared the cattle guard and escaped.

The court instructed the jury, giving among others, over appellant's objection, instruction numbered 2, as follows:

"If the jury believes from the evidence that the horse was injured by reason of the running of the train, either by actual collision with the engine or on account of fright caused by the running of the train, then the burden is on the defendant railway company to prove that such damage did not occur on account of the negligence of the employees operating the train."

Henry & Harris, for appellant.

1. The court erred in instructing the jury as to the burden of proof as set out in instruction No. 2 for plaintiff. 70 Ark. 481; 33 *Id.* 816; 84 *Id.* 510; 33 *Id.* 607.

2. The verdict is without evidence to support it. 57 Ark. 16; 84 *Id.* 421.

Williamson & Williamson, for appellee.

1. The burden of proof was upon appellant and there was no error in instruction No. 2. Kirby's Digest, § 6773; 66 Ark. 248; 92 *Id.* 372; 33 *Id.* 816.

2. The verdict is sustained by the evidence. 92 Ark. 372; 105 *Id.* 294; 80 *Id.* 284; *Ib.* 382; 79 *Id.* 247; 76 *Id.* 37; 81 *Id.* 604, and many others. Appellant was clearly liable under the evidence. 90 Ark. 4; 92 *Id.* 377; 63 *Id.* 638; 66 *Id.* 248.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in the giving of said instruction and that the evidence is not sufficient to support the verdict.

It is true the horse was not injured by being struck or coming in contact with the train, nor by falling into a trestle or cattle guard upon the track in attempting to escape therefrom. It is also true that the operatives of the train were keeping a lookout and discovered the horses when they first came on the track 100 feet ahead of the engine. The alarm was immediately given and the engineer began to slow up the train, seeing that the distance was so short between where they came on to the track—evidently to cross, and the mouth of the cut, that they would probably go into it. He continued sounding the alarm and finally stopped the train from thirty to seventy-five feet from the place where the horse fell. Certainly the horse would not have been injured but for the running of the train and the sounding of the alarm frightening and causing it to run into the cut, from which it could not have been expected to escape except at the one place near the cattleguard, without jumping the cattle guard, which was eight feet wide. The trainmen knew of the condition of the track in the cut and the cattle guard and could have anticipated that injury would probably result if the horse was followed by the train until the cattle guard was reached. They also knew that it was well nigh impossible for the horse to leave the track except across the cattle guard. They regarded it necessary to stop the train and did so, but the jury might have found from the testimony that they were negligent in not stopping the train sooner and before the injury occurred.

If the horse fell back and injured himself from trying to climb the side of the cut, as may have been the case, or if it fell in trying to cross from the west to the east side of the track, as the evidence tended to show, near the lowest place on the side of the cut, its action might have been anticipated. Necessarily it was more frightened with the noise of the train coming into the cut and might be expected to do anything possible to escape the danger.

The instruction complained of, in the opinion of the majority, was not incorrect in placing the burden upon the railway company to prove that the damage did not occur on account of its negligence in operating the train after the horse was shown to have been injured by reason of the running of the train, either by actual collision with the engine or on account of fright caused by the running of the train.

Under the peculiar circumstances of the case, there being the hindrance and obstruction in the way of the animal's getting off the track, of both the steep sides of the cut and the cattle guard at the end thereof, the trainmen seeing the condition, might have foreseen as a probable consequence of not sooner stopping the train the injury to the animal, or that it would in its fright attempt to climb out of the cut or pass over the cattle guard and be injured, and the fact that it was not injured by falling into the cattle guard, but by falling on the track in its attempt to cross and escape by climbing the cut on the opposite side of the track at the lowest place, was reasonably to be foreseen by them.

No error was committed in the giving of said instruction, and the testimony is sufficient to sustain the verdict.

The judgment is affirmed.

BRANDON v. PARKER.

Opinion delivered June 12, 1916.

1. TITLE—ACTION FOR LAND—POSSESSION—LIMITATIONS.—Where appellant's father, under whom she claimed, and who held the land in controversy, under a donation deed from the State, died, his death terminated the possession under the donation deed, and although appellant was only nineteen years old when she brought the action, her father having died more than three years prior to the enactment of Kirby's Digest, § 5075, the same did not apply, and Kirby's Digest, § 5061, without the exception in favor of infants, was in effect.
2. TITLE—COLOR OF TITLE— ACTION TO QUIET TITLE—VOID SALE—LIMITATIONS.—Deeds to lands by the State, though based on void sales, constitute color of title, and under Kirby's Digest, § 5061, actual possession

under this color of title, will bar the owner from maintaining a suit for its recovery, unless the suit was brought within the time there limited.

3. TITLE—PAYMENT OF TAXES UNDER COLOR OF TITLE.—Kirby's Digest, § 5057 inures to the benefit of any holder of color of title who pays taxes for seven years.

4. TITLE—COLOR OF TITLE—POSSESSION.—Kirby's Digest, § 5061, inures to the benefit of the holders of the particular color of title there named, who occupy the land thereunder for the period of two years.

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

J. R. Coates and *B. J. Semmes,* for appellant.

1. Possession under a donation deed gives title under the two year statute, although the deed is void. Kirby's Digest, § 5061; 92 Ark. 30; 84 *Id.* 614; Kirby's Digest, § 5056; 73 S. W. 559; 41 *Id.* 542; 26 *Id.* 649. Appellant was a minor and this suit was filed within two years after appellant became of age.

A. B. Shafer, for appellee.

1. The seven years statute, Kirby's Digest, § 5056, can not apply, nor does section 5075. Appellant was a minor and the vendor of appellee was in possession for more than two years prior to the passage of the act. Adverse possession destroys title, but not color of title. The court properly held that possession under an uncancelled donation deed is entitled to the benefit of the statute applying to possession under donation deeds. 177 S. W. 6-8; 19 Ark. 139-141; 83 Wisc. 364; 53 N. W. 686; 35 Am. St. 67; 89 Ia. 270; 56 N. W. 456; 139 Ill. 21; 28 N. E. 748; 33 Tex. 476; 21 Tex. 97.

SMITH, J. This case was submitted and heard on the following agreed statement of facts:

"1. That the plaintiff, Miss Constance Brandon, and Bettie Brown, are the sole heirs-at-law of N. B. Brandon, deceased, and that plaintiff, Miss Constance Brandon, was nineteen years of age when this suit was filed.

"2. That N. B. Brandon died intestate on the 1st day of February, 1896.

"3. That the northwest quarter of section 14, in township 8 north, range 7 east, in Crittenden County, Arkansas, was duly patented by the United States Government and became subject to taxation in the year 1836, and was forfeited to the State for the nonpayment of taxes of the year 1872, and was again forfeited to the State for the nonpayment of taxes of the year 1885, which said forfeiture was void for irregularities.

"4. That on the 28th day of July, 1893, the Commissioner of State Lands executed a donation deed to said property to said N. B. Brandon and that said N. B. Brandon went immediately into possession of same under said donation deed and stayed in the open, actual and continuous possession of same, clearing five acres of land and remaining in the continuous, adverse possession of same until the 1st day of February, 1896, the day of his death.

"5. That on the 9th day of January, 1883, the Commissioner of State Lands executed to Robert Hill, a donation deed, covering said land, and that said Robert Hill immediately after said donation deed was executed, died intestate leaving as his sole heir, his daughter, Lillie Hill who subsequently married Will Stokes; that Lillie Hill did not take actual possession of said land until the 1st day of March, 1897, on which date, she entered same and built a house, cleared up land and fenced same, claiming under the donation deed to said Robert Hill, which was executed on January 9, 1883, as aforesaid, that said Lillie Hill has cleared and put in cultivation nearly all of the said land and that she and those claiming under her, have paid State and county taxes on said land continuously since the said 1st day of March, 1897, and that she and those claiming under her have been in the continuous, open, notorious and adverse possession since that date.

"6. That on the 15th day of January, 1910, said Lillie Hill (now Stokes) executed conveyance to Guy A. Blann, conveying said land for the sum of $2,350.00

which deed recited that said Lillie Stokes was the sole heir-at-law of Robert Hill, deceased.

"7. That Guy Blann and wife on the 10th day of June, 1913, executed warranty deed to defendant, A. C. Parker; that defendant, A. C. Parker, and those under whom he claims, have been in the open, notorious, actual and continuous possession of the said land since the 1st day of March, 1897, having cleared and put in cultivation nearly all of said land and have paid taxes continuously thereon since said date, claiming to own all of said land under the donation deed executed in 1883 to Robert Hill, as aforesaid.

"8. That Bettie Brown, daughter of N. B. Brandon, above mentioned, was twenty-seven years old at the date this suit was instituted and that Constance Brandon, plaintiff in this cause, was nineteen years old at the date this suit was instituted."

(1) Notwithstanding the fact that it appears that appellant was only nineteen years old at the time of the institution of this suit, section 5075 of Kirby's Digest is of no avail to her because her ancestor died in February, 1896, which was three years prior to the enactment of this section, and the death of her father terminated the possession under his donation deed. Section 5061 of Kirby's Digest was, therefore, in effect without the exception in favor of infants, which section 5075 enacted. *Sims* v. *Cumby,* 53 Ark. 418; *Sparks* v. *Farris,* 71 Ark. 117. This section—5061—reads as follows:

"Sec. 5061. No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector, or commissioner of state lands, for the nonpayment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the nonpayment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized

or possessed of the lands in question within two years next before the commencement of such suit or action."

(2) It is here contemplated that the tax sales upon which these deeds would be based might be void. Indeed, only that fact could make the statute necessary. If these sales were valid there would be no necessity for this statute of limitations. These deeds, though based on void sales, constituted color of title, and by this section it was enacted that actual possession under this color of title barred the owner from maintaining a suit for its recovery, unless the suit was brought within the time there limited.

It is said, however, that the prior possession of appellant's ancestor under a donation deed ripened into title under this section, and that when that possession had so ripened into title the prior donation deed of appellee's ancestor became cancelled and subsequent possession under it would not entitle the donee there named to claim the benefit of the provisions of section 5061 of Kirby's Digest.

The decision of the case, therefore, turns upon the effect to be given to appellant's ancestor's possession upon the donation deed under which appellee's ancestor entered into the possession.

It is conceded, of course, that appellant's ancestor acquired the title by virtue of his possession under his donation deed. But did this possession cancel the prior outstanding donation deed of appellee's ancestor? A similar question was involved in the case of *Moore* v. *Morris*, 118 Ark. 516, 177 S. W. 6. There the facts were that the owner of the paper title lost his title by the adverse possession of an occupying claimant, but this claimant, after acquiring title by possession, abandoned the land and it became wild and unoccupied land. The original owner continued to pay the taxes on the land and paid for more than seven years after it had again become wild land. It was there urged that the original owner's paper title had been cancelled and he was not

entitled to the benefit of the provisions of Section 5057 of Kirby's Digest, which provides that unimproved and unenclosed land shall be deemed and held to be in the possession of the person who pays the taxes thereon if he have color of title thereto, for at least seven years in succession.

We think the controlling point here, as it was in the case of *Moore* v. *Morris, supra,* is that the color of title as such was not cancelled. The owner in the case cited lost his title, but his deed, not having been cancelled by any order or judgment of court, remained as color of title and entitled him to the benefit of the provisions of Section 5057 of Kirby's Digest, upon complying with its terms.

(3-4) This section inures to the benefit of any holder of color of title who pays taxes for seven years. Section 5061 of Kirby's Digest inures to the benefit of the holders of the particular color of title there named who occupy the land thereunder for the period of two years. When appellee's ancestor entered upon the land on March 1, 1897, under his donation deed, his attitude was that merely of one who had only color of title and his situation would not have been improved had the sale upon which his deed was based been perfectly good. He had lost his title by the previous adverse occupancy, yet his deed was color of title and he entered under it and remained in possession of the land for more than two years, and he thereby became entitled to claim the benefits of Section 5061 of Kirby's Digest.

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

HART and KIRBY, JJ., dissent.

CLARK COUNTY LUMBER COMPANY v. HANNON.

Opinion delivered May 29, 1916.

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE TO WORK—TRESTLE.—Defendant's servant was instructed to do a piece of work requiring him to cross a certain trestle. *Held*, the master was liable for an injury to the servant, where one of the ties in the trestle was not nailed down, and tilting when plaintiff stepped thereon, threw and injured him.

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

T. D. Wynne, for appellant.

The evidence does not support the verdict. There was no breach of duty on the part of appellant. 29 N. E. 825; 106 Ark. 436; 76 *Id.* 69; 88 *Id.* 292.

McMillan & McMillan, for appellee.

The appellant was liable for failure to use ordinary care in furnishing a reasonably safe place on which to work. 117 Ark. 204; 90 *Id.* 226; 105 *Id.* 401. The trestle was the place furnished by appellant on which appellee was required to work. It was unsafe and the injury occurred. 99 Ark. 108; 90 *Id.* 223; 88 *Id.* 181; 105 *Id.* 392; 103 *Id.* 434; 99 *Id.* 265; 117 *Id.* 198. The question of negligence was properly submitted to the jury. The evidence is ample to sustain the verdict under the above cases.

SMITH, J. This appeal questions only the sufficiency of the evidence to support the judgment from which it is prosecuted. There is a sharp conflict in the evidence in several material particulars, but in testing the legal sufficiency of the evidence we assume the jury credited the evidence offered in appellee's behalf. The facts, may, therefore, be stated as follows: Appellee was a member of a section crew, and, as such, was engaged in repairing a part of appellant's railroad track, when his foreman directed him to go across a trestle in said track to a point where some spikes had been left and to bring a

shovelful of these spikes. Appellee placed about 25 pounds of spikes in his shovel and put the shovel on his shoulder and started to return. The ties in the trestle were unevenly laid, were not parallel, were not equidistant, and this condition was apparent to appellee, and he was required to and did, exercise care in making his steps. He says his injury was occasioned by the following defect in this trestle: That one of the ties was from a quarter to a half-inch thinner than the other ties, and the iron rail did not rest upon it, and no spikes were driven into it to hold it in place and when he stepped on this tie it tilted slightly and threw him between two other ties and inflicted the injury, to compensate which, this suit was brought. That he did not anticipate this condition and had not expected the tie to slip and turn under his foot, and was, therefore, thrown more easily than would otherwise have been the case. Appellee went across the bridge in obedience to the command of the foreman, who testified that he had shortly before crossed the trestle and that he had stepped on every tie as he went across to see if they would rock or roll, and that none of the ties did so, and that after appellee's injury he inspected all the ties carefully and found they were properly spiked. But this is one of the respects in which the evidence is conflicting, and appellee testified positively that the tie was thin and was not held in place by a spike either on the inside or the outside of the rail.

The evidence does not present a clear case of liability even when viewed from appellee's standpoint. Yet we cannot say that it is not legally sufficient to support the verdict. By the foreman's command the trestle had been made the place for appellee to work in, although it was not primarily intended as a foot path. The evidence showed that it was customary for ties to be placed parallel with each other and equidistant and to be of uniform size and they were to support the rails by having spikes driven in them both on the inside and the outside of the rails, and that there was an absence of all these

conditions in the tie which turned and caused appellee to fall. When called upon to perform in part his duties on this trestle, appellee had the right to assume that there was nothing about the trestle which rendered it less safe than it appeared to be, but that ordinary care had been exercised in making it as reasonably safe as such places usually are. *Ozan Lumber Co.* v. *Bryan,* 90 Ark. 223; *Oak Leaf Mill Co.* v. *Littleton,* 105 Ark. 392.

A somewhat similar question was involved in the recent case of *St. L., I. M. & S. Ry. Co.* v. *Duckworth,* 119 Ark. 246, 177 S. W. 1148. There it was contended by the railroad company that its employee Duckworth, who was injured as he walked along a beaten path on the railroad right of way, by being entangled in a wire attached to a passing train, was a mere licensee and that the railroad company was, therefore, under no duty to make the path a safe place in which Duckworth might walk. It was shown, however, that Duckworth and other employees had used this path in going to and returning from their work with the knowledge of the railroad officials for a period of five years and that, therefore, it could not be said that Duckworth was on the path solely for his own convenience, but that he was there upon an implied invitation of the company. It was there held that the negligence of the railroad company in regard to the wire was the proximate cause of the injury, as the probability of this injury should have been foreseen under the circumstances. Here appellee was acting under the immediate orders of his foreman and had the right to assume that the place in which he was required to perform his duties contained no defects which made the place unsafe, yet under the circumstances the tie made the place unsafe and was the proximate cause of appellee's injury. Finding no error the judgment is affirmed.

CLOW v. WATSON.

Opinion delivered June 12, 1916.

1. APPEAL AND ERROR—SUFFICIENCY OF COMPLAINT ON APPEAL.—The issue of whether the allegations of a complaint are sufficient to support a judgment, will be considered by the Supreme Court, only on an appeal from a judgment by default.
2. APPEAL AND ERROR—ABSENCE OF BILL OF EXCEPTIONS OR MOTION FOR NEW TRIAL—PRESUMPTION AS TO THE PROOF.—Where there is no bill of exceptions and no motion for new trial, this court will presume that every fact susceptible of proof that could have aided plaintiff's case was fully established.
3. JUDGMENTS—PRESUMPTION AS TO VALIDITY.—Every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it appear affirmatively that it is erroneous.
4. PLEADING AND PRACTICE—COMPLAINT—CURE OF DEFECTS.—In an action in which the trial court has jurisdiction of both the subject-matter and of the defendant, it is not necessary that the complaint should state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption is that the defects in the complaint were cured by the proof at the trial.
5. APPEAL AND ERROR—FAILURE TO OBJECT TO TESTIMONY—PRESUMPTION—AMENDMENT TO CONFORM TO PROOF.—Where no objections were made to any evidence introduced by plaintiff, the complaint will be considered as amended to conform to the proof.

Appeal from Baxter Circuit Court; *J. B. Baker*, Judge; affirmed.

Z. M. Horton, for appellant. *Allyn Smith*, of counsel.

1. The amended complaint stated no cause of action. Its allegations are not sufficient to authorize the judgment. 10 Kans. 131; Kirby's Digest, § 6096; 67 Ark. 184; 82 *Id.* 196; 49 N. Y. 261.

S. W. Woods, for appellee.

1. The court had jurisdiction and the complaint stated a cause of action. There was no motion for a new trial and no bill of exceptions. Appellant makes no showing at all for a reversal. 67 Ark. 426; 62 *Id.* 431; 59 *Id.* 215.

2. There were no objections shown to any evidence or ruling. By failing to object defendant waived any defects. 63 Ark. 510.

3. The answer supplied and cured all defects. 37 Ark. 551; 60 *Id.* 70; 77 *Id.* 1; 97 *Id.* 508; 82 *Id.* 188.

4. If the complaint was not sufficiently definite and certain, the remedy was by motion to make it so, not by demurrer. 52 Ark. 378; 87 *Id.* 136; 31 *Id.* 657; 56 *Id.* 629.

5. By pleading to the merits defendant waived all objections. 44 Ark. 202; 92 *Id.* 297.

HART, J. Chas. A. Watson employed G. C. Clow to act as his agent in the purchase of a tract of land. He sued Clow to recover $200, which he claimed that the latter received from him to be used in payment of the land and converted it to his own use. The case was tried before a jury which returned a verdict for Watson in the sum of $200, and from the judgment rendered Clow has appealed.

(1-2) It is insisted by counsel for defendant that the judgment should be reversed because the allegations of the complaint are not sufficient to authorize the judgment, and this being the only assignment of error relied upon for reversal of the judgment, counsel has set out the complaint in full. It is only in cases of appeal from a judgment by default that the question for the consideration of the supreme court is whether the allegations of the complaint are sufficient to authorize the judgment. *Neimeyer* v. *Claiborne,* 87 Ark. 72; *Euper* v. *State,* 85 Ark. 223. In the instant case there was no motion for a new trial and no bill of exceptions. Under such circumstances this court will presume that every fact susceptible of proof that could have aided plaintiff's case was fully established.

(3) The salutary rule of law is that every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it appear affirmatively that it is erroneous. *McKinney* v. *Demby,* 44 Ark. 74; *Young* v. *Vincent,* 94 Ark. 115. Hence we

must presume that the judgment below is right if the complaint states a cause of action.

(4-5) The court had jurisdiction of the subject matter and of the person of the defendant. It is not necessary that the complaint should state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption would be that the defects in the complaint were cured by the proof at the trial. *Sorrels* v. *Self, Admr.,* 43 Ark. 451. So far as the record discloses there was no objection made to any evidence introduced by plaintiff and in such cases the well-settled rule in this State is that the complaint will be considered as amended to conform to the proof. *Townsley* v. *Yentsch,* 98 Ark. 312; *Citizens Fire Ins. Co.* v. *Lord,* 100 Ark. 212; *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576; *Griffin* v. *Anderson-Tully Co.,* 91 Ark. 292; *Wrought Iron Range Co.* v. *Young,* 85 Ark. 217; *Roach* v. *Richardson,* 84 Ark. 37. In the application of this settled rule of law it is not necessary to set out the complaint and it follows that the judgment must be affirmed.

DAVIES v. JOHNSON.

Opinion delivered June 12, 1916.

1. ESTATE BY THE ENTIRETY—RIGHT OF SURVIVORSHIP.—The right of survivorship where property is held by the entirety was not destroyed by Kirby's Digest, § 739.
2. ESTATE BY THE ENTIRETY—EFFECT OF DIVORCE.—The character of an estate by the entirety is not changed by divorce of the parties.

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

Davies & Davies, for appellant.

1. An estate by entireties, after a divorce, and the conveyance by the wife of her interest to third parties, becomes subject to partition. Kirby's Dig., § 4423; 61 Ark. 388; 63 *Id.* 289; 66 *Id.* 305. A divorce destroys an

estate by entirety. 55 L. R. A. (N. S.) 396; Bishop on Mar. & Div. (5 ed.), § 716; Freeman on Cotenancy (2 ed.), § § 76, 92; 136 S. W. 127; 168 *Id.* 1178; 108 *Id.* 9; 109 Md. 690; 72 Atl. Rep. 414. The divorce made Johnson and his wife tenants in common. Tiffany on Real Property, p. 383, ch. 7, § 165; 84 Ala. 368; 21 Cyc. 1201; 103 Ala. 488; 65 Miss. 124; 15 A. & E. Enc. Law (2 ed.) 848. If a tenancy in common, of course the estate was subject to partition.

Martin, Wootton & Martin, for appellee.

1. This was an estate by entirety in both real and personal property. 15 A. & E. Enc. Law., p. 551; 156 Penn. St. 628; 36 Am. St. Rep. 64; 117 Mich. 449; 72 Am. St. Rep. 568; 173 Mo. 91; 96 Am. St. Rep. 486, 499; 188 Penn. St. 33; 16 Mass. 480; 92 Md. 567. There is no distinction between real and personal property.

2. A divorce does not change the status of property held in entirety. 66 Ark. 305; Thorburn on Real Property, § 425; 2 Bishop on Mar & Div., § 717; 1 Washburn Real Prop., § 425; 85 Mich. 340; 24 Am. St. 94; 22 Pick. 61.

McCULLOCH, C. J. The question involved in this appeal is this: "Does an estate held by entireties become subject to partition after conveyance by the wife of her interest to a third party, and divorce of the original tenant." The divorce was granted April 24, 1915.

(1) Appellant contends, first, that the right of survivorship was destroyed by the enactment of what is now section 739 of Kirby's Digest. This section reads as follows:

"Every interest in real estate granted or devised to two or more persons other than executors and trustees as such shall be in tenancy in common unless expressly declared in such grant or devise to be a joint tenancy."

In answer to this it may be said that the same contention was made in the case of *Robinson* v. *Eagle,* 29 Ark. 202, where the court said:

"The act referred to in Gould's Digest (Section 9, Ch. 37, Gould's Digest, 265, which is sec. 739 of Kirby's Digest) was intended to remedy what was regarded as an evil growing out of an estate of joint tenancy, whereby a survivor, though a stranger, on the death of his cotenant, would take the whole estate by survivorship, and other reasons. But it certainly was not intended to apply to the case of husband and wife, who are regarded by the law, divine and human, as one person, and hold the estate as an entirety and not as joint tenants."

Appellant also cites us to the cases collated in the note to *Stelz* v. *Schreck,* 13 L. R. A., 325, and *McKinnon, Currie & Co.* v. *Caulk,* 55 L. R. A. (N. S.) 396.

These cases hold that divorce destroys the right of survivorship in an estate by the entirety, and it appears that the weight of authority numerically speaking supports that view. The Supreme Courts of Michigan and Pennsylvania support the opposite view. *Alles* v. *Lyon,* 216 Pa. 604, 10 L. R. A. (N. S.) 463; *In Re Appeal of Nellie B. Lewis,* 85 Mich. 340. The reasoning of the courts which take the former view is that the right of survivorship having attached at the creation of an estate it cannot be divested by a decree of divorce subsequently granted. The Pennsylvania court stated, in the case just cited, that the estate by the entirety "arises, not out of unity of person alone, but out of unity of person at the time of the grant." The court then quotes from Coke's Littleton the statement that "if an estate be made to a man and a woman and their heirs, before marriage, and afterwards they marry, the husband and wife have moities between them," and then reasons in support of its view as follows: "If subsequent unity of person cannot change a tenancy in common to one by entireties, *e converso,* a subsequent severance of the unity of person ought not to change a tenancy by entirety to one in common."

The courts adopting the other view take the position that the very question presented is, whether this right of survivorship did attach as an inseparable incident of

ownership, or was dependent upon the unity of person between the husband and wife and consequently destroyed when that unity ceased to exist. The majority of the court are of the opinion that the question has been decided in this State and that the decision has become a rule of property.

In *Branch* v. *Polk,* 61 Ark. 388, the rule was laid down that under a deed to husband and wife "the entire estate is vested in each of the tenants by the entireties, for they hold, not by moities, but by entireties." That, in fact, conforms precisely to the common law definition of an estate by the entirety. If the entire estate is vested at the time of the conveyance in each of the tenants, how could it be divested merely by the granting of a divorce in the absence of a statute authorizing it to be done? Suppose one of the parties executes a deed to a third party during the coverture, purporting to convey the whole estate, the deed would convey all of the vested interest of the grantor, including the rights resulting from survivorship, and it would be an anomalous situation to hold that such a vested interest could be divested by divorce of the parties.

(2) The necessary effect of the decision in the case of *Roulston* v. *Hall,* 66 Ark. 305, was that the character of an estate by the entirety is not changed by divorce of the parties. The facts of that case were that Ben and Addie Hall, his wife, purchased property in their joint names, creating an estate by the entirety. Afterwards Addie Hall sued Ben Hall, and obtained a decree in her favor for divorce, as well as for one-half of the property absolutely in fee simple and one-third of the other half belonging to Ben Hall for her life time. After this decree was rendered Ben Hall conveyed one-half of the property to Roulston, who instituted an action of ejectment against Addie Hall for one-half of the property. In disposing of the case the court used the following language in holding the wife was not entitled to the one-third interest presumably given her as dower interest in her husband's one-half interest:

"We suppose the court below gave the appellee the decree for one-third interest for her natural life in the appellant's half of said property, because it was adjudged to her in the suit of *Addie Hall* v. *Benjamin Hall* in the Garland Chancery Court. And we suppose that the learned chancellor in that case awarded it to her under section 2517 of Sandels & Hill's Digest, where it is provided that 'in every final judgment for divorce from the bonds of matrimony granted to the wife against the husband, (the wife) shall be entitled to one-third part of the husband's personal property absolutely, and one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been so relinquished by her in legal form.' But the husband, Ben Hall had not an estate of inheritance in these lots. Where land is conveyed to husband and wife, they do not take by moities, but both are seized of the entirety—the whole in contradistinction to a moiety or part only. *Robinson* v. *Eagle,* 29 Ark. 202; 2 Kent's Comm. 132; 4 Kent's Comm. 414. * * * Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seized at the time of the conveyance. The husband may do what he pleases with the rents and profits during coverture, but he cannot dispose of any part of the inheritance, without his wife's consent."

It being the view of the majority that the language quoted is decisive of the question submitted, it must necessarily follow that the decree of the chancellor in refusing to grant partition must be affiirmed.

Justices Hart and Smith are of the opinion that the case of *Roulston* v. *Hall, supra,* is not decisive of this question, and that upon both reason and authority it should be held that a divorce granted a tenant by the entirety, destroys the right of survivorship.

FORTNER v. PHILLIPS.

Opinion delivered June 12, 1916.

WILLS—BEQUEST OF MONEY—"FIFTY DOLLARS EACH AND EVERY MONTH."—RIGHTS OF CREDITORS OF LEGATEE—TRUST.—S. died, naming her son as executor and trustee, and directing the executor to "pay over to my beloved husband, J. P., the sum of $50 each and every month so long as he shall live." The husband was otherwise insolvent. *Held,* the husband's creditors could not secure satisfaction of their claims out of the amount to be paid to the husband.

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

STATEMENT BY THE COURT.

Sarah Phillips made a will in which she named her son, William James Phillips, as executor and trustee. The will contains, among others, the following provision: "I further direct and instruct that my said executor shall pay over to my beloved husband, James Phillips, the sum of fifty dollars each and every month so long as he shall live."

Appellant recovered a judgment against James Phillips, the beneficiary, and brought this suit in the chancery court, alleging that Phillips, unless restrained, would attempt to sell and transfer his income under the will for the purpose of preventing appellant from levying on the same to satisfy the judgment, and prayed that he be restrained from so doing.

The appellee James Phillips answered and set up as one of his defenses that the amount of the monthly income provided for him under the will was no more than was necessary for his support and that same was not subject to execution.

The cause was heard upon an agreed statement of facts, in which the parties agreed that the sum of $50 per month was necessary for the support of the beneficiary, James Phillips, and that he had no other income than this; that no payments had been made to him under the will.

The court dismissed the complaint for want of equity, and this appeal has been duly prosecuted.

Carmichael, Brooks, Powers & Rector, for appellant.

1. An annuity or monthly income for life, by will, is subject to garnishment or other legal process to subject it to the debts of the beneficiary. 79 Ark. 547; 52 *Id.* 547; 50 *Id.* 253; 49 *Id.* 114; 41 *Id.* 249; 63 *Id.* 542; Kirby's Digest, § 3228.

2. The burden was on defendant to show that the income was not subject to execution, etc., and the burden has not been met.

3. The language of the will is insufficient to create a trust or to remove the income from the reach of creditors. 104 Ark. 448.

4. Trusts are liable for debts. 84 Am. St. Rep. 450; 2 Blackf. (Ind.), 198; 2 Ruling Case Law, 16; Tiedeman on Real Prop. (3 ed.), § 374, p. 544; 2 Cyc. 471; 104 Ark. 439-448.

5. A gift of the income for life carries an estate. 90 Me. 463; 84 *Id.* 475; 72 *Id.* 109; 92 *Id.* 184; 9 Mass. 372; 29 *Id.* 47; 39 Atl. 134; 56 N. J. Eq. 251; 193 Pa. 45; 180 *Id.* 127, 215; 105 *Id.* 215, etc.

Ben D. Brickhouse, for appellee.

1. By the will a trust fund was created for the support of the husband, which could not be reached by creditors, because the fund was and is only sufficient to cover his necessary expense, there being no surplus. 107 Ark. 535; Tiedeman on Real Prop. (3 ed.), p. 370; Perry on Trusts, 386; 191 Ill. 598; 122 Mo. 341; 166 S. W. 1024; 101 N. Y. S. 1110; 18 L. R. A. 49; 140 N. Y. S. 152; 67 Atl. 474; 80 Conn. 223; 92 Atl. 955; 150 N. Y. S. 673. Phillips had no curtesy or estate of any kind by the will. 104 Ark. 439 was a different case from this. There the will vested the title in the beneficiary.

WOOD, J. (after stating the facts). The language of the clause of the will quoted *supra* does not vest any estate in the appellee James Phillips. No property right

is conferred upon him by this clause in the estate of his deceased wife. The clause merely directs that the executor and trustee, William James Phillips, shall pay to appellee the above sum. The entire estate, real and personal, is devised and bequeathed to William James Phillips and the other devisees and legatees named in the will, but no estate whatever is vested or created in appellee James Phillips. No estate in his property is even vested in William James Phillips.

It will be observed that the testatrix does not bequeath to her husband, James Phillips, the sum of $50 out of her estate and direct her executor and trustee to pay the same, nor does the will in express terms devise and bequeath any real estate or personal property to the executor and trustee in trust charged with the payment of the sum of $50 per month to appellee James Phillips out of such estate or funds. The language of the clause is peculiar in that it does not express the purpose that the testatrix had in mind in directing the monthly payments of $50 to her husband so long as he shall live. It is shown however by the agreed statement of facts that the purpose of the testatrix was to provide $50 per month for the support of her husband, and that this sum was necessary; that he had no other income and that it would take the entire sum for his support.

The language of the will must be construed in the light of this agreed statement. The fact that the testatrix designates her son, William James Phillips, as executor and trustee and directs him to pay the sum of $50 per month to her beloved husband, James Phillips, as long as he lived showed her intention to create a trust in favor of her husband out of the property devised and bequeathed to her son. In other words, the property going to him under the will was burdened with the trust of paying to the extent of $50 per month for the specific purpose of the support of the appellee James Phillips.

Says Mr. Perry: "But a trust may be so created that no interest vests in the *cestui que trust;* consequently, such interest cannot be alienated, as where property is

given to trustees to be applied in their discretion to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So if property is given to trustees to be applied by them to the support of the *cestui que trust* and his family, or to be paid over to the *cestui que trust* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities and is in other respects legal, neither the trustees, nor the *cestui que trust,* nor his creditors or assigns, can divest the property from the appointed purposes." 1 Perry on Trusts, sec. 386 (a), pp. 632, 633, and cases cited.

In *Robertson* v. *Schard,* 119 N. W. 529-531, it is said: "The wife is under no obligation to give or devise to an insolvent husband her own estate when she knows that it will be immediately absorbed by his creditors, and if she can construct a trust from which he may derive some benefit, without vesting him with an estate or interest which is subject to levy, or other legal process, at the suit of such creditors, and thereby makes sure that he will not become an object of public charity, there is no good reason in law or morals why she should not be allowed to do so." Citing cases.

The above is the doctrine applicable to the undisputed facts of this record. Since it would require all of the monthly stipend to support appellee James Phillips, the money in contemplation of the will, has been expended before it is paid over to him and there are no accumulations in his hands which creditors can reach. See 18 L. R. A. (Miss.) 49.

Nothing that is said in *Booe* v. *Vinson,* 104 Ark. 439, is contrary to the doctrine here announced. In that case the clause of the will was "all my estate, real, personal and mixed, I give and bequeath to my aunt," etc. Thus the will vested the title to the estate in the beneficiary. But in that case we quoted from *Wenzel* v. *Powder,* 100 Md. 39, 59 Atl. 195, 108 Am. St. Rep. 380, the American

rule, as follows: "But in this country the Supreme Court of the United States, the court of last resort in some states, and this court, have, after full consideration determined that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of the property may so dispose of it as to secure the enjoyment by the beneficiary without making it alienable by him or liable for his debts.

The agreed statement of facts shows that such was the intention of the testatrix by the clause of the will under review.

The decree is correct and it is affirmed.

JAMESON v. DAVIS.

Opinion delivered June 12, 1916.

1. DOWER—DEATH OF HUSBAND WITHOUT CHILDREN.—A widow takes a one-half interest in fee in the lands of her deceased husband, where he died without children, but she takes such estate by way of dower, and not inheritance, and the probate court has jurisdiction to allot dower by setting apart to the widow a one-half interest in the lands of her deceased husband.
2. DOWER—PETITION TO SET ASIDE—PARTIES.—The heirs and devisees of deceased are necessary parties to a suit to have dower set aside to the wife.
3. DOWER—ALLOTMENT—SUIT BY EXECUTORS.—The executors of a deceased husband may not bring an action to have dower set aside to the widow.

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

STATEMENT BY THE COURT.

The appellees, as executors of the estate of T. N. Jameson, deceased, commenced this action by filing their petition in the Columbia probate court, asking that court to appoint commissioners to allot dower out of the estate to Mrs. Isadore Jameson, the appellant. They described the land in their petition and set up that the appellant was entitled to be endowed as the widow of T. N. Jameson with one-half of the property in fee sim-

ple, her husband, T. N. Jameson having died siezed thereof.

The appellant responded to the petition, alleging that her interests had already been determined by the judgment of a proper court to be an undivided one-half interest in fee in the land set out in the petition. She alleged that therefore the probate court had no jurisdiction of the subject matter to allot her dower. She further set up that there were no proper parties to the petition and that the court was without jurisdiction of the necessary parties. The court rendered judgment for the allotment of dower and appointed commissioners to lay off the same. The appellant appealed to the circuit court.

The circuit court found that T. N. Jameson died leaving his widow, the appellant, with no children; that at the time of his death he was not indebted to any one, and that he was the owner, seized and possessed of the lands described in the petition; that the land was not an ancestral estate, and that Mrs. Jameson was entitled to be endowed in fee simple of one-half thereof. The court then entered a judgment, "that Mrs. Isadore Jameson be endowed in fee simple of one-half of the following real estate of which her husband died seized and possessed lying in the county of Columbia and State of Arkansas, to-wit:" Then follows an exact description of the land as set forth in the petition. The court ordered that its judgment be certified "to the probate court of Columbia County, Arkansas, to the end that said court may proceed to allot dower of the said Mrs. Isadore Jameson according to the terms of this decree." From that judgment this appeal has been duly prosecuted.

Stevens & Stevens, for appellant.

1. The widow, upon refusing to take under the will, inherited from her husband a half interest in all of his real estate and in addition thereto a homestead in the real estate and her statutory rights under Kirby's Digest, § § 3, 72, 74, 2709; 117 Ark. 142; 102 *Id.* 322; 75 *Id.* 240; 83 *Id.* 293. She takes by descent. 87 S. W. 459;

5 L. R. A. 748; Tiffany on Real Prop., § 427; 1 Woerner on Adm., § 67. The interest is not "dower." 14 Cyc. 880. It is a freehold estate. 31 Ark. 576; 1 Tiffany on Real Prop., § 18, note 8. 14 Cyc. 960, 1013.

2. The executors had no right to allot dower and the probate court had no jurisdiction. Kirby's Digest, § 2717, 2720; 47 Ark. 317; 5 Ark. 608, etc. Besides all interested parties must be before the court. Kirby's Digest, § 2721. Each of the devisees had an interest and should have been parties. 104 Ark. 439; 57 L. R. A. 253.

C. W. McKay, for appellees.

1. If not entitled to dower the widow is entitled to nothing by virtue of having declined to take under the will. Kirby's Digest, § 2709; 98 Ark. 118; 117 Ark. 142.

Probate courts have power to allot dower. 112 Ark. 483. The law that gives the widow the right to decline to take under the will, gives her only the alternative right to take dower in preference. 98 Ark. 118; 117 Ark. 142.

WOOD, J., (after stating the facts). The appellant contends that she was entitled to an undivided one-half interest in fee simple in the lands in controversy, not as dower but by inheritance from her husband, and that inasmuch as the title in fee simple to the one-half interest was vested in her by inheritance at her husband's death the probate court had no jurisdiction to allot this interest to her as dower.

Section 2709 of Kirby's Digest provides that, if a husband die leaving a widow and no children, his widow shall be endowed in fee simple of one-half of the real estate of which her husband died siezed where said estate is a new acquisition, etc.

In *Barton* v. *Wilson,* 116 Ark. 400, 405, we held that the widow, under the above statute, "takes absolutely an undivided interest in fee simple, and it is such an interest as immediately vests, and without assignment becomes subject to transmission by conveyance or inheritance." We also held in that case that "it is a mistake

to assume that the widow takes as an heir, for the statute expressly declares that the widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized." And, quoting from the Supreme Court of Maine, we said: "The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes, not as heir, but as widow." *Golder* v. *Golder,* 95 Me. 259.

In *McGuire* v. *Cook,* 98 Ark. 118-120, we said: "The interest which the widow possesses in the lands of her deceased husband is known as dower. * * * By this enactment we do not think the Legislature intended to create in the widow an estate in her husband's lands different in any essential from the estate of dower known at the common law, except as therein expressly provided."

While the statute enlarges the quantity and extends the duration of the estate, it in no manner changes the character of the estate nor the method by which it is set apart or allotted to the widow. Probate courts in this State are vested with jurisdiction in matters of dower. *Carter* v. *Younger,* 112 Ark. 483-487. It follows that the probate court has jurisdiction to allot dower to appellant by setting apart to her one-half of all the lands described in the petition, and the circuit court did not err in so holding.

But appellant is correct in her contention that the appellees as executors had no power to allot dower in the lands to appellant. "It shall be the duty of the heir at law of any estate of which the widow is entitled to dower to lay off and assign such dower as soon as practicable after the death of the husband of such widow. Section 2717, Kirby's Digest; *Hill's Admrs.* v. *Mitchell,* 5 Ark. 608. And those who have an interest in the lands must be made parties to the proceedings for the allotment of dower. Kirby's Digest, § § 2720 and 2721.

The devisees of Jameson had an interest in the lands embraced in the petition and they were necessary parties to any proceedings for the allotment of dower.

The court erred, therefore, in directing the probate court to proceed to the allotment of dower. The appellant was not asking such allotment and the appellees could not have it allotted.

The judgment is, therefore, reversed, and the cause is remanded with directions to dismiss the petition.

LOYD *v.* BENNETT.

Opinion delivered April 10, 1916.

1. HUSBAND AND WIFE—DEPOSIT OF MONEY IN WIFE'S NAME.—Money deposited in a wife's name, when done to defeat the husband's creditors, may be reached by them.
2. GARNISHMENT—MONEY IN WIFE'S NAME.—A husband's creditors garnished a bank, which held funds deposited in the wife's name. The wife intervened, and appealed to the circuit court from a judgment against her. *Held*, a judgment against her in the circuit court, that the funds really belonged to her husband, would be upheld.

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

The appellant, *pro se.*

1. The evidence is insufficient to sustain the verdict. The proof shows that the money in bank belonged to her. No fraud was alleged or proved.

2. No judgment was ever recovered against W. R. Loyd.

C. T. Bloodworth, for appellee.

1. Where a wife permits her husband to use her funds as a basis of credit, she is not permitted to claim it as against her husband's creditors. 107 Ark. 458; 86 *Id.* 486; 84 *Id.* 355.

2. There was no contest over the debt. Loyd did not appeal from the judgment of the justice. The only contest was over the funds in bank.

KIRBY, J. Appellee brought suit in the justice court against W. R. Loyd and appellant, Elga Loyd, for $200 claimed to be due as the balance of the purchase price of certain hotel fixtures sold to W. R. Loyd, and caused a garnishment to be issued against the First National Bank. The bank answered, stating it held in its possession a certain amount of money, about $600 due Elga Loyd, but no money or property belonging to W. R. Loyd.

Elga Loyd filed an intervention, claiming the money in the bank as her separate property, and upon the trial a verdict was rendered in her favor, from which Bennett appealed to the circuit court, where upon the trial judgment was rendered against Elga Loyd, from which this appeal is prosecuted.

It is not claimed that appellant was liable to the payment of the debt. It appears from the testimony that appellant had earned a sum of money equal to that deposited in the dank during two years, while engaged as a cook upon a boat of the Northern Construction Company. That she permitted her husband to deposit the money in the bank in his name with his earnings, he already having a bank account, and he checked it out and used it as he did his own.

After the hotel fixtures were bought, the hotel was conducted in the name of both of them, the stationery printed showing them proprietors. The hotel and fixtures burned after Bennett had brought suit to foreclose the lien for the balance of the purchase money and W. R. Loyd agreed to pay him $200 out of the insurance money when collected in settlement of the indebtedness. When the check for $1,000 in payment of the loss was received by Loyd, he deposited $600 of it in the bank in the name of his wife, appellant, and the other $400 in his own name, and drew his out within the day. She gave her husband a check for $325 of the amount deposited to her credit, which was paid to him, and also paid a grocery bill owed by them of $43. She claimed that she had furnished or loaned her husband the amount of $600, which he agreed

to return and that he paid her the money back upon collection of the check from the insurance company, given in payment for the loss, and that it was her individual money and separate property.

The testimony is in conflict, but the evidence is sufficient to warrant the finding by the jury that she had permitted her husband to use the money as his, or without any expectation of it being repaid as a loan, and that the deposit of it in her name was but a subterfuge resorted to to prevent the collection of his debts and the money was in fact being checked out by her for him and used as before, and the judgment can not be disturbed on appeal. *Mitchell* v. *State,* 86 Ark. 488; *Wyatt* v. *Scott,* 84 Ark. 355; *Haycock* v. *Tarver,* 107 Ark. 458.

Appellant's contention that the case must be reversed because the record does not show a judgment had against the defendant or principal debtor in the suit, is not well founded. She claimed to be the owner of the funds in the bank, which the garnishee answered it held for her and filed an intervention therefor, and on appeal to the circuit court, the jury rendered a verdict in favor of the plaintiff and judgment was entered against her claim of ownership of the fund garnished, and it can make no difference with the garnishee about the payment of it so far as her claim is concerned, she having been adjudicated to be without right thereto.

The judgment is affirmed.

ROBERTSON v. JOHNSON.

Opinion delivered June 12, 1916.

1. TAXES—ATTEMPTED PAYMENT—CLERICAL ERROR—RELIEF.—An attempt to pay taxes, made in good faith by the land owner or his agent, and frustrated by the mistake, negligence or other fault on the part of the collector renders the subsequent sale of the land for the non-payment of taxes, void.

2. TAXES—CLERICAL ERROR—NON-PAYMENT OF PENALTY.—A land owner attempted to pay his taxes upon certain land, and by an error in the

collector's office, received a receipt upon another tract. A penalty was due at the time, which the collector did not assess. *Held*, the errors of the collector would operate to make a subsequent sale of the land for taxes, void.

Appeal from Mississippi Chancery Court, Chickasawba District; *Chas. D. Frierson*, Chancellor; affirmed.

W. D. Gravette, for appellant.

1. Johnson did not pay the taxes, penalty and cost on the land in question for the year 1911 to the collector or his deputy. Acts 1909, No. 262; 93 Ark. 400; 35 *Id.* 509. The failure to pay was the party's own neglect; it is not shown that the error was that of the collector. 35 Ark. 508; 70 *Id.* 500; 92 *Id.* 630; 99 *Id.* 139; 105 *Id.* 40; 114 *Id.* 551. No penalty was paid, although the land was delinquent more than thirty days. 62 Ark. 188.

2. Johnson is barred by laches and negligence. 93 Ark. 490; 33 *Id.* 161; 36 *Id.* 532; 114 *Id.* 551; 105 *Id.* 40.

3. A purchaser at a judicial sale acquires vested rights. 65 Ark. 152; 66 *Id.* 493; 86 *Id.* 253.

4. The mistake of the party who wrote the receipt was not the mistake of the collector, but the negligence of Johnson.

P. A. Lasley and *S. J. Gee*, of Illinois, for appellee.

1. When the owner of land applies in good faith to the proper officer to pay taxes on his land, but payment is prevented by the mistake, negligence or other fault of the collector, a subsequent sale of the land for non-payment of taxes is void. 53 Wash. 483; 151 U. S. 545; 23 Ark. 375; 70 *Id.* 500; 92 *Id.* 630; 35 *Id.* 505; 99 *Id.* 137; 115 Ill. 218; 81 Pa. St. 336; 57 *Id.* 40; 28 Ore. 322; 42 Pac. 130. In such cases the purchaser takes no title.

2. Johnson was constructively served and this suit was filed within time. Kirby's Digest, § 6259; Acts 1909, p. 783; 83 Ark. 534.

3. There is no such thing as an innocent purchaser of tax titles. 249 Ill. 82; 125 *Id.* 447.

4. Johnson had a right to presume the collector would do his duty. Cooley on Tax., § § 532, 540; 100 Ill.

215. There were no laches or negligence by Johnson as the court found.

HART, J. This action was instituted in the chancery court by appellee against appellants under section one of Act 262 of the Acts of 1909. The object of the suit was to vacate and set aside a decree ordering the land sold for the non-payment of levee taxes upon the ground that the owner had paid the taxes on the land for the year for which it was sold. The material facts are as follows:

The appellee, D. F. Johnson, a resident of the State of Illinois, in December, 1906, purchased for the sum of $2,400, the north half of the northeast quarter of section 19, township 15, north, of range 11 east, containing eighty acres, in Mississippi County, Arkansas. He at once went into possession of the land through his tenants and is still in possession of it.

J. B. Fields, a resident of Mississippi County, was his agent and paid taxes on the land for him. On Nov. 15, 1911, Fields went to the office of the collector and notified the person in charge of the office that he wished to pay the levee taxes on Johnson's land in section 19 and the person in charge of the office gave him a receipt on the regular printed form used by the collector, but in it, by mistake, described the land as the south half instead of the north half of the section. Fields paid to the person in charge of the office the amount of taxes which he stated was due on the land. Johnson had no other land in said section 19 or in Mississippi County. Fields testified that he told the person in charge of the collector's office that he wanted to pay the levee taxes on his own land and on that of Mr. Johnson and that he doesn't think he told him the numbers of the land, but is positive he told the particular section the land was in.

The collector and his deputy both testified that the receipt was not in their handwriting, but they stated that the receipt was on the regular printed form used by them in collecting levee taxes and that sometimes they

left other parties in charge of the office with authority to issue receipts and collect the levee taxes. The lands of Johnson were returned as delinquent and proceedings were had under the statute to collect the taxes by suit.

R. A. Nelson became the purchaser at the sale and subsequently a deed, properly acknowledged by the commissioner, appointed to sell the land under the decree, was executed and presented to the chancellor, who examined and approved the same. The deed from the commissioner to the tax purchaser was duly recorded. Subsequently Nelson sold the land to J. T. Robertson. Robertson paid part of the purchase money in cash and gave his note for a part of it. Nelson transferred the note to J. F. Wilhite. Johnson instituted this action in the chancery court within three years after the rendition of the final decree in the suit to collect the delinquent taxes against his land and Robertson, Nelson and Wilhite are all made parties to the action. Nelson executed a warranty deed to Robertson for the land.

The chancellor found that Nelson was financially able to carry out his warranty contained in his deed and was also of the opinion that the sale for the non-payment of taxes made by the commissioner should be set aside because the taxes had been paid by the agent of Johnson. A decree was therefore entered cancelling the tax sale and divesting out of the defendants any interest in the land and vesting the title thereto in the plaintiff. It was also decreed that the plaintiff pay the costs of the action and reimburse Nelson the amount of the purchase price paid by him for the land together with six per cent. interest thereon from the date of the purchase. The defendants have appealed.

(1) It is the settled rule in this State that an attempt to pay taxes made in good faith by the land owner or his agent, and frustrated by the mistake, negligence or other fault on the part of the collector renders the subsequent sale of the land for the non-payment of taxes void. *Hickman* v. *Kempner,* 35 Ark. 505; *Gunn* v. *Thompson,* 70 Ark. 500; *Scroggin* v. *Ridling,* 92 Ark.

630; *Knauff* v. *National Cooperage & Woodenware Co.*, 99 Ark. 137.

It is insisted by counsel for the defendants that in the first place the payment was not made to the collector or his deputy. The payment was made by the duly authorized agent of Johnson. He went to the collector's office and paid the taxes to the person left in charge of the tax books and received a receipt on the regular printed form used by the collector. While the collector and his deputy testified that the receipt was not in their handwriting they admitted that at times they left another person in charge of the office with the power to collect taxes and issue receipts therefor. Under these circumstances we think the payment was made to the collector.

(2) It is next insisted that the payment having been made on November 15, the collector could not receive the taxes without the penalty and that no penalty having been paid by the plaintiff, that there could be no valid payment of the taxes. It is true that under Act 262 of the Acts of 1909 (Acts of 1909, 783), the collector is required to proceed to collect the assessments on the first Monday of October in each year, and if said assessments are not paid within thirty days a penalty of 25 per cent. shall at once attach for such delinquency. While the thirty days had expired on November 15, and the penalty had attached, still the collector was authorized to receive the taxes. The tax books properly made out and duly certified to the collector constituted his warrant for the collection of taxes. The collector was the legal custodian of the tax books which contained a correct description of all the lands in his county and the amount of taxes assessed against them. The collector is supposed to familiarize himself with the numbers and descriptions of the lands in his county. It is his duty to inform the land owner of the amount of taxes and penalty against his land and it is not right for an error or mistake on the part of the collector in this respect to aid in depriving the owner of his land. Here the land

owner by his agent went to the office of the tax collector and offered to pay him all the taxes assessed against his land. He told the person in charge of the office and of the tax books the section in which the land was situated. The lands were assessed in the name of the owner and the tax books showed this fact. He paid the amount demanded and by mistake of the collector, the amount was credited to an adjoining tract. The land owner did all that was required of him. He made a bona fide attempt to pay all the taxes assessed against his land and his acts under the circumstances should stand as the equivalent of actual payment. This is in application of the principle decided in our own cases cited above and of the almost universal rule which substitutes a tender for performance, when the tender is frustrated by the act of the party entitled to performance. It was the official duty of the person in charge of the collector's office to have stated to Fields, who applied on behalf of Johnson, in good faith, to pay all the taxes on the land, the entire amount of all the taxes and penalty against it. The failure of Johnson under these circumstances to pay the penalty was not his fault, but its non-payment was owing to the mistake or failure of the collector to perform his duty. For these reasons we hold that the plaintiff was entitled to the relief granted him by the chancellor. See *Bray & Choate Land Co.* v. *Newman* (Wis.) 65 N. W. 494; *Laird* v. *Hiester,* 24 Pa. St. 452. The law and equities are all with the plaintiff, and the decree will be affirmed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* KEATHLEY.

Opinion delivered June 12, 1916.

MASTER AND SERVANT—INJURY TO SERVANT—RAILROADS—APPLIANCES—EVIDENCE OF CUSTOM OF OTHER ROADS.—Plaintiff, a locomotive fireman, was injured when his fuel shovel struck a hole in the floor of the tender, which hole was used to let the coupling pin of the draw-bar pass through, *Held,* it was error to exclude evidence of the custom of defendant and other railroads, to permit the placing of such holes in the floor of the tender.

Appeal from Lawrence Circuit Court, Eastern District, *Dene H. Coleman,* Judge; reversed.

W. F. Evans and *W. J. Orr,* for appellant.

1. Testimony as to the custom on other railroads was admissible. 105 Ark. 392; 20 Atl. 517; 57 Ark. 76; 20 S. W. 808; 122 U. S. 194 and 200 other cases.

2. There was a total failure of proof to show any negligence.

3. Instruction No. 3 for plaintiff as to the duty of the company to provide *"a safe shovel board"* was error. No such duty rests even upon carriers of passengers. Absolute safety is unattainable. 105 Ark. 205; 80 *Id.* 68; 92 *Id.* 143, and cases *supra.*

W. P. Smith and *G. M. Gibson,* for appellee.

1. There was no error in excluding the testimony as to the custom of other railroads. The testimony was not admissible. But the company was allowed to introduce evidence as to the use of like tenders on its own road and this obviated any error or prejudice. The testimony really was immaterial, but appellant failed to move to exclude this testimony.

2. It is true, the master is under no obligation to furnish the safest or most modern appliances; that he is not an insurer, but here the attention was called to the defect and there was a promise to repair.

3. Under the proof there was no assumption of risk and there is no error in the instructions. 87 Ark. 396; 112 S. W. 886. There is no prejudicial error.

MCCULLOCH, C. J. The plaintiff, L. Keathley, worked for the defendant railroad company as fireman, and while in the discharge of his duties received injuries for which he seeks, in this action, to recover compensation. He was fireman on an engine hauling a through freight train from St. Louis to Chaffee, Missouri, and the injury occurred on July 12, 1912, at or near St. Genevieve, Missouri. Plaintiff was engaged in shoveling coal from the tender into the fire box of the engine, when the

shovel he was handling struck the edge of a hole in the metal sheet which constituted the floor of the tender and he was thrown down and his wrist was broken in the fall.

The charge of negligence is not very specifically set out in the complaint, it being alleged only in general terms that the shovel which plaintiff used was obstructed "in a large hole about seven inches in diameter in the shoveling sheet"; that it was "necessary to use considerable force in operating the shovel, and it was customary and proper for the shovel to slide along the surface of the shoveling sheet without obstruction;" and that the defendant "knew of the defective condition of the shoveling sheet, or could have known thereof by the proper inspection, but that the same was covered with coal at the time this plaintiff was injured and on that account he had no knowledge of such defective condition of said shoveling sheet."

In the trial of the case the plaintiff undertook to specify the acts of negligence by showing that the hole was too large, and that it was unnecessary to have any hole at all in the floor of the tender. He testified, also, that on account of the hole being too large the edges of it had become battered and that this was what obstructed the free passage of the shovel. Plaintiff himself testified that the proper method of constructing a floor of a tender was to cover the hole with a metal false sheet, or that in the event of there being a hole left there it ought not to be over four inches square, whereas the hole in this tender was, according to his testimony, about seven inches in size. Plaintiff referred to the metal flooring as the "shoveling sheet," and explained that it was necessary to have a smooth surface so that the shovel could be shoved along the floor until it reached the fire box of the engine.

It appears from the testimony that the reason there is a hole left in the floor is to allow the coupling pin of the draw-bar to pass through. The testimony adduced by the defendant tends to show that this is a common device on engines and it is the customary method of con-

structing them. The evidence was that there has to be an opening for the coupling pin to drop through, and that the pin must be left accessible so that it may be drawn out when the engine and tender are disconnected. Also that it is necessary to draw the pin out occasionally in making inspections. The testimony adduced by defendant shows that this hole was about the customary size, and that the engines with this device were commonly in use, not only on defendant's railroad but other railroad systems of the country. At least, defendant offered the testimony to that effect, but the court excluded it so far as it related to custom on other lines of railroad. That is one of the errors assigned, and we are of the opinion that it is well taken.

In the case of *Oak Leaf Mill Co.* v. *Littleton,* 105 Ark. 392, after reviewing the authorities on the subject, we adopted the following rule: "What was the custom of others under like conditions and circumstances is evidence of what a reasonably prudent man would ordinarily do, but it is not conclusive evidence of that fact." That statement of the law, as the correct rule of evidence, was deduced from Professor Wigmore's discussion of the subject which was quoted at length in the opinion just referred to. The decision of the court was directly in conflict with that rule, and calls, we think, for a reversal of the judgment in the present case. There is a sharp conflict in the testimony of the witnesses, and it made a very close question for the decision of the jury as to whether or not the defendant was guilty of negligence in allowing the metal floor of the tender to become thus obstructed, or whether it in fact constituted an obstruction.

There was, it is true, testimony that the edges of the hole had become battered or frazzled, and this testimony alone might have authorized the jury in reaching the conclusion that there was negligence on the part of the company, but the plaintiff's testimony was that the alleged battered condition of the edges of the hole resulted from the hole being too large, and the substance of his testimony was to make the size of the hole the

primary charge of negligence. So if the jury had been permitted to consider evidence which might have convinced them that there was no negligence in making the hole too large, the jury could have found that there was no negligence on the part of the company even though the edges of the hole had become to some extent battered and rough. It does not answer the contention, therefore, to say that they might have based their verdict entirely upon the evidence showing that the edges of the hole were battered, or that they found that that alone constituted negligence of the company.

The court permitted defendant's witnesses to testify concerning the use of tenders with this device on its own road, and the size of the holes in such tenders, but that did not obviate the prejudice which resulted from refusing to allow proof showing what the custom was on other roads. Without the excluded testimony, the jury may have found that it was negligence to leave a hole of that size in the floor of the tender, but if they had been permitted to consider the fact that that was the custom on many of the great railroad systems of the country they might have concluded that it did not constitute negligence to leave a hole of that size. In other words, the jury might have adopted the general standard as the correct measure of what a reasonably prudent man would do under those circumstances.

We do not deem it necessary to discuss the case any further. The evidence was sufficient to sustain the verdict, and there was no prejudicial error in the instructions of the court nor in its rulings on the introduction of evidence other than in the respect already mentioned. One of the instructions (No. 3) is technically incorrect in stating the degree of care which the employer should observe, but there was no specific objection to the defect. We merely call attention to it now so that it will not be repeated in the next trial.

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

SHULTS v. MUNN.

Opinion delivered June 12, 1916.

1. FERRIES—FRANCHISE—PUBLIC GRANT.—A franchise for the operation of a ferry is a creature of the sovereign power and can not be exercised without the consent of the State.
2. FERRIES—LICENSE.—All ferries upon or over public navigable streams shall be deemed public ferries, and no person shall keep any ferry over or across any such stream or lake and charge compensation for the use thereof, without procuring a license.
3. FERRIES—PUBLIC COUNTY ROAD CROSSING—LIABILITY FOR TAX.—If a public road passes appellee's ferry at a convenient place to cross a stream, to a public road on the other side thereof, and the travelling public on these roads on each side of the stream were accustomed to resort to appellee's ferry for crossing, the same will be held to be a ferry, and subject to the provisions of Kirby's Digest, § § 3558, *et seq.*

Appeal from Miller Circuit Court, *Geo. R. Haynie*, Judge; reversed.

STATEMENT BY THE COURT.

Appellant who was regularly licensed by the Miller County Court to keep a public ferry across Red River, a navigable stream from a point on the western bank, opposite the town of Fulton in Hempstead County, brought this suit against M. J. Munn, *et. al.*, to collect penalties denounced by the law (3582 Kirby's Digest) for operating a ferry across navigable streams without procuring a license therefor.

The answer denied the allegations of the complaint and alleged that defendant had paid the license required by Miller County during the time of the operation of the ferry.

It appears from the testimony that M. J. Munn kept a ferry during said years at a point on the bank of Red River, a navigable stream, the boundary between Miller and Hempstead counties, called Buzzard's Bluff, in Miller County, about eight miles south of Fulton, and carried persons and property across the river there for hire during said years. A public road has existed in Miller County, now in Road District No. 13, from a point near the Finn place to Fulton, since 1877. This road a

witness, D. R. Coleman, testified "crossed Buzzard's Bluff at the old house and went down to the river bank and went up the river." The road was located along the river at Buzzard's Bluff, as close to the bank of the river as it could be made, and frequently the road had caved into the river and a new one was established further back. This bluff is caused by a point or hill from 30 to 50 feet higher than the bottom land north and south of it, coming into the river and from the point of the bluff bank, from which appellee's ferry was operated it is fifty feet distant from the high-water mark of the river, to said public road running virtually north and south and parallel to the river.

He made and maintained a road sloping from the public road down to his ferry landing. Appellant offered to show that a public road had been established in Hempstead County in January, 1912, to appellant's ferry landing on the Hempstead County side of Red River, opposite Buzzard's Bluff, but the testimony was excluded.

It was also shown that no license had been issued by the county court of Miller County for the operation of Munn's Ferry.

The court held that it was necessary to prove that the public road of Miller County crossed at the unlicensed ferry, in order to establish liability to the payment of the penalties by the operator thereof and directed the jury to return a verdict in defendant's favor, and from the judgment thereon, this appeal is prosecuted.

Will Steel, for appellant.

1. It was error to direct a verdict for defendant. Kirby's Dig., § 3570 is not applicable to this case. Red River is a navigable stream and appellee operated a public ferry for the general public and for compensation. Kirby's Dig., § § 3555, 3558, 3559, 3561, 3565, 3582. Appellee is liable for the penalties prescribed by § 3582. He had paid no tax and had no license. 25 Ark. 26, 29;

20 *Id.* 565; 26 *Id.* 467; 94 *Id.* 190; 88 *Id.* 330; 48 *Id.* 325; 109 *Id.* 324.

2. Even though § 3570 applies, plaintiff has met all its requirements by showing that a county road crossed at his ferry point by order of the county court. Also that Red River was a navigable stream.

Henry Moore, Jr., for appellees.

A verdict was properly directed. The court properly construed § 3570 of Kirby's Digest as well as § 3582. The evidence shows that no public road in Miller County crosses Red River at or near Buzzard's Bluff. There was no liability. Rev. Stat. 1838, Ch. 62; 7 Ark. 132; Kirby's Dig., § § 3571-3574, 3782, etc.; 97 Ark. 43; 102 *Id.* 416; 117 *Id.* 623; 79 *Id.* 215; 89 *Id.* 495; 118 *Id.* 273; 79 *Id.* 521. § 3582 applies to ferries located at points where public roads cross the river and therefore there is no conflict between it and the proviso of § 3570.

KIRBY, J., (after stating facts). A franchise for the operation of a ferry is a creature of the sovereign power and cannot be exercised without the consent of the State. Secs. 3555, 3558 Kirby's Digest; *Murray* v. *Menefee,* 20 Ark. 561: *Darnell* v. *State,* 48 Ark. 321; *Finley* v. *Shemwell,* 94 Ark. 190.

Said section 3558, Kirby's Digest, provides: "No person shall keep any ferry over or across any public navigable stream or lake, so as to charge any compensation for crossing the same, without first procuring a license from the county court of the county in which such ferry is situated."

Section 3570 provides: "It shall be the dutyof the county courts to levy a tax on all ferry privileges in their respective counties, whether application be made by any person for the same or not; provided, however, no ferry at which the public county road does not cross shall be subject to the tax herein provided."

The penalties of section 3582 Kirby's Digest, are denounced against any person who shall keep a ferry

over any navigable stream and charge for transportation of persons and property without complying with the provisions of law in relation to obtaining license.

Appellee contends and the trial court held that since the public road in Miller County did not cross the navigable river at his ferry or run thereto, that he was not bound by the provisions of the law to obtain license to operate a ferry nor liable to the penalties prescribed for the operation of same without license.

(2-3) The law declares all ferries upon or over public navigable streams shall be deemed public ferries, and that no person shall keep any ferry over or across any such stream or lake and charge compensation for the use thereof without procuring a license. (Sections 3555, 3558). But it is also provided in said section 3570 that "No ferry at which the public county road does not cross shall be subject to the tax" for ferry privileges. This provision is not necessarily in conflict with nor repugnant to the others. The ferries across navigable rivers are declared to be public and license is granted to persons on sites along said streams for the establishment and operation thereof when the public convenience will be promoted thereby and it was doubtless intended to be determined by the legislature in the making of said proviso that the public convenience would not be promoted by the establishment of a ferry across navigable streams, except at points where public roads crossed and this being true, it does not follow that appellee was not violating the law in the operation of the ferry complained about. If the public road passed his ferry at a convenient place to cross the stream to a public road on the other side thereof and the traveling public on these roads on each side the river were accustomed to resort to his ferry for crossing thereof, it was as much a ferry at which the public county road crossed as though the road had run directly to the ferry and stopped there. The ferry is established for the convenience of the public traveling upon the public roads, and if a public road existed and was in use by the public on the Hempstead

County side coming down to appellee's ferry there, which transportated persons and property from that side to the Miller County side of the river and in effect to the public road running by the ferry, it was a ferry at which the public county road crossed, since the persons, vehicles and stock traveling same crossed at the ferry to which the public roads extended on each side of the river within the meaning of the act.

The court erred in refusing to permit the introduction of the testimony showing the establishment of a public road on the Hempstead County side of the river to appellee's ferry and in directing the verdict and for said errors the judgment is reversed and the cause remanded for a new trial.

SOUTHERN SEATING & CABINET COMPANY *v.* GLADISH.

Opinion delivered April 10, 1916.

COUNTIES—CONTRACT TO PURCHASE CHATTELS—PERSONAL LIABILITY OF OFFICIALS.—The county judge and certain commissioners purchased furniture for the county courthouse, agreeing to pay for the same with county scrip, to be redeemed upon certain dates, the contract containing the words "to be guaranteed by us individually * * *." *Held,* the contract would not be construed as binding the officials to the individual payment of the debt, county warrants having been given to the seller in accordance with the agreement.

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

R. F. Spragins, of Tennessee, for appellant.

The effect of the contract is that appellees individually promised for a valuable consideration, that in the event the county did not redeem the warrants that they would do so. 22 Cyc. 495; 9 *Id.* 580-583; 1 App. Cas. (D. C.) 223; 93 Ill. 599; 35 Am. Rep. 641; 18 S. E. 640; 6 Words & Phrases, 5675. The court erred in sustaining the demurrer.

J. T. Coston, for appelles.

The contract simply bound appellees to pay in scrip of Mississippi County. This was done and there was no further liability. 65 Ark. 75; 9 *Id.* 61.

McCulloch, C. J. The defendants, one of whom was the county judge of Mississippi County, Arkansas, and the other three commissioners appointed by the county court of that county to purchase seats and other furniture for the court house, entered into a contract in the name of the county with the plaintiff, Southern Seating & Cabinet Company, for the purchase of a certain number of seats and other furniture, to be delivered at Osceola and installed in the county court house. A written contract was entered into covering the transaction and it was signed "Mississippi County, Arkansas, court house," by the commissioners, the name of each of the commissioners and the county judge having been signed following the name above mentioned.

A clause of the contract stating the undertaking on the part of the purchaser reads as follows: "To accept said furniture and pay for the same the sum of Nineteen Hundred Eighty-Six and 60/100 Dollars ($1,986.60) above sum to be paid in scrip issued by Mississippi County officials and to be redeemed by said county as follows: $232.20 in July, 1914; $249.40 in July, 1915; $266.60 in July, 1916; $283.80 in July, 1917; $301.00 in July, 1918; $318.20 in July, 1919; and $235.40 in July, 1920. Scrip to be issued and paid to Southern Seating and Cabinet Company when furniture is installed. All payments to be made by remittance direct to your office at Jackson, Tenn., unless otherwise directed by you in writing; deferred payments, if any, to be evidenced by notes properly executed in behalf of said Church, to be guaranteed by us individually, and to bear interest from date at the rate of at least 6 per cent."

The seats and furniture were duly installed in the court house and plaintiff instituted this action against the county judge and the commissioners, individually,

to recover the amount of the first installment payable under the contract, it being alleged in the complaint that a county warrant had been issued to the plaintiff for the amount of the first installment and presented to the treasurer for payment but was not paid. The circuit court sustained a demurrer to the complaint and, upon the plaintiff declining to amend, final judgment was entered dismissing the action. The plaintiff has appealed

We pass over, without discussion, the question whether or not the form of the signatures is sufficient to render the defendants liable individually for the amount of the plaintiff's claim. It is contended that under the contract itself, which in terms binds the defendants in their "official capacity and individually" (quoting from the contract), they are individually liable upon the failure of the county to redeem the scrip. We do not think that a correct interpretation of the contract imposes any such liability on the defendants. Their undertaking, conceding that it was individual as well as official, was to accept the furniture and pay for the same "in scrip issued by Mississippi County officials," and it appears from the allegations of the complaint that that undertaking has been fully discharged. It is true that the contract reads that the scrip is "to be redeemed by said county," but the language is not sufficient to constitute an undertaking on the part of the defendants that it shall be redeemed at the stated time and that they will pay in the event that it is not so redeemed. The language used was merely intended to indicate when the scrip was to be payable or redeemable by the county, and not to constitute an agreement on the part of the defendants to pay or redeem the scrip.

The contract was a very unusual one. A printed blank form was used which was not altogether adapted to this kind of a sale, but was interlined to express the terms that the parties intended. If it had been intended that the defendants should personally guarantee the redemption of the scrip, it could easily have been expressed in definite terms. The language of the contract is not

sufficient to warrant the circuit court in holding, even if there was personal liability at all that the defendants undertook to pay otherwise than by delivery of county warrants, which, according to the allegations of the complaint, they have done. The warrants were redeemable at the time specified in the contract, and the fact that there was not sufficient funds in the county treasury to redeem the warrants does not render the defendants liable for the amount.

The judgment of the circuit court is therefore affirmed.

MORGAN COMPANY v. ELMES.

Opinion delivered June 5, 1916.

1. FRADULENT CONVEYANCES—FRAUD ON CREDITORS—RIGHT OF REDEMPTION.—It is a fraud on creditors, where property is conveyed, and the parties to the conveyance reserve the right of redemption in such a way as to deny its existence and refuse its execution for the benefit of the creditors.
2. FRAUDULENT CONVEYANCES—INSOLVENT CORPORATIONS.—Insolvent corporations are not allowed to prefer their creditors, and a conveyance that has the effect of doing so, is fraudulent and void as to them.
3. FRAUDULENT CONVEYANCES—FRAUD ON CREDITORS—TRANSFER OF PROPERTY BY INSOLVENT CORPORATION.—A transfer of all its property by an insolvent corporation, to one creditor, held to be fraudulent as to other creditors.

Appeal from Prairie Chancery Court, Northern District, *John M. Elliott,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant Morgan Company brought suit on June 30, 1914, against appellees upon a note of the Buena Vista Veneer Co., dated January 5, 1914, and caused an attachment to be issued against certain property transferred by said company to Charles W. Elmes, which transfers were alleged to be fraudulent and prayed to be set aside as made in fraud of creditors.

On September 29, 1915, the S. H. Smith Co., appellant, brought suit against the same parties for $650.00

due on account by the Veneer Co., and alleged that the transfers of the property from the Veneer Co. to Elmes were fraudulent, and caused an attachment to be levied upon the mill site of the Veneer Co. that had been included in said transfers to Elmes. Afterwards Charles W. Elmes brought suit against Herman Romunder, who was president of the Veneer Co., the Buena Vista Veneer Co., the appellant companies and several others, alleging that the two sets of transfers of property from the Veneer Company to himself were to secure valid debts due him and constituted an equitable mortgage and prayed a foreclosure thereof. He answered the complaints of appellants denying the allegations thereof and filed a copy of his complaint in the foreclosure suit as a cross-complaint, in each of their suits. Appellants answered, denying the allegations of the complaint in the foreclosure suit, which were confessed by Romunder and the Veneer Company, and also the cross-complaints, and all the suits were consolidated and heard together.

The Veneer Company on the 21st day of March, 1914, after receiving $2,500 from the Morgan Co. as an advance for the purchase of veneer lumber stock, for which the Buena Vista Veneer Co. executed its note, and a deed and bill of sale, absolute in terms, of its manufacturing plant to Charles W. Elmes, appellee, who leased the plant back to the company which continued to operate it for a short while and shipped one car of veneer upon the contract with Morgan & Co., the proceeds of which was credited on the note, leaving a balance due of $2,002.54.

Prior to the 26th day of May, 1914, the Veneer Co. ceased operating the manufacturing plant and on that day executed a supplementary agreement, contract and bill of sale by which it conveyed in absolute terms, all of the property it owned not transferred in the March bill of sale to said Charles W. Elmes, forfeited and surrendered its lease, and all the stockholders of the Veneer Company, who had previously endorsed, transferred and

delivered to said Charles W. Elmes, every share of stock of the corporation, allowed their time to redeem to lapse. Upon the first information Morgan Co. had of these transfers, it diligently took the matter up and wrote to Mr. Elmes that it had been informed by the commercial agency of his purchase of the Buena Vista plant at Des Arc, asked a confirmation of the report and explained its interest in the matter by informing of the $2,500 advance to and due from the company. Elmes replied to this letter on the 29th of May, evasively, saying he did not buy the business and was not interested in the manufacturing part of the company and not in a position to give the desired information.

His attorney, E. C. Ferguson, on June 2, answering a letter of the Morgan Company to C. W. Elmes, stated it was referred to him, calling attention to the debt of $2,500 and said they were not responsible in any way for the Veneer Company, but naturally interested in keeping track of its doings. He also mentioned receiving a letter from Des Arc informing that Morgan Company had sent an order to be filled, saying "he had advised them that the shipper of the material must have its dealings direct with you as they are going to turn the order over to another mill to fill and he was giving the information in advance that the shipment would not be the property of the Buena Vista Company nor credited on its account."

Appellant also wrote to the Buena Vista Veneer Company at South Bend, Ind., to Herman Romunder, the president of the company, at the same address, and received from him on July 1 a letter stating he had received on his return from an extensive trip their letters and telegrams, which had not been answered because he was out of town, and "after disposing of my holdings in the Buena Vista Veneer Co. to Mr. C. W. Elmes of Chicago, I have been attending to other business." Regretted that the condition at the plant, which he had formerly controlled, had required him to give

it up and thought that the plant would be operated again very shortly and be able to take care of all the business that came to it."

A written agreement was made between Herman Romunder and Charles W. Elmes on the 21st day of March, 1914, reciting an indebtedness from Romunder to Elmes "due and owing by Romunder" and that he desired to procure further money and additional advances from Elmes to induce him to perform certain conditions set out and to secure the payment of the indebtedness of the first party, Romunder, and expend further money in his behalf and provide for the payment of moneys now due and other moneys to be advanced. In consideration of $1.00 the first party, Herman Romunder, agreed to deed 761 acres of land in Woodruff County and 160 in Prairie, and that the corporation, the Veneer Company, would execute a deed to the mill site "and for the further consideration of the cancellation of the following indebtedness due and owing by Herman Romunder to Elmes, approximating $21,000 and also to the State National Bank and others," etc., reciting an agreement as to the payment of certain other debts and that Elmes was to furnish the money to pay certain creditors in order that Romunder might be released. He, Romunder, agreed to procure the consent of the Buena Vista Veneer Company to continue its liability on certain paper and through the corporation to pay said indebtedness himself, but if it could not be done Elmes was to pay it; to procure a deed from the company to Elmes of the mill site and a bill of sale of all the corporate assets, except the manufactured veneer, logs, notes and accounts receivable, and a transfer of the insurance policies. He agreed "as an inducement to the execution of the contract that the moneys obtained from said Elmes, the banks and Daley were used by and for the benefit and purchase of property and conduct of business of the company, although it appears that some of said indebtedness is represented by notes executed by Herman Ro-

munder individually," "that the notes due the banks and Daley may be assigned to Elmes without recourse, Elmes to protect Romunder from any liability of payment of same, it being the intention to continue the liability of the Veneer Company on said notes in order to evidence the liability of said company for the moneys received, either by the corporation or said Romunder at the time the moneys were procured."

He was also to procure the endorsement of his own and all the other stockholders' stock in the Veneer Company and transfer and deliver same to Elmes as additional security, and if the contract expired by limitation, the stock was to become the absolute property of Elmes at his election, but if Romunder paid the $40,000 when due, the stock was to be surrendered to him.

Elmes agreed to surrender to the first party a note due June 1, 1913, for $20,500 and interest and accept the deeds and conveyances in payment and satisfaction of the $40,000 due and owing by said Herman Romunder and the Buena Vista Veneer Company to him. It was also stipulated, "It is mutually agreed between the parties that this agreement shall not in any wise be construed as a mortgage."

Elmes agreed that if the debt was paid within the year, to transfer the property back to Herman Romunder or to whomsoever he should direct, and if payment was not made within the year from date, the contract was to be void, and Romunder's rights cancelled. It was mutually agreed that Romunder was to lease the plant in his name or in the name of the company and operate it for one year, but if it was closed down for thirty days, beginning five months after the date of the instrument, Elmes was to take possession of the plant and Romunder released all claims under the contract.

The agreement was made binding upon the heirs and executors of both parties and signed "Herman Romunder, President;" Charles W. Elmes. Below the signatures follows the endorsement: "For one dollar and

other valuable considerations the Buena Vista Veneer Company hereby consents to become a party to the agreement and agrees to execute deeds and other papers as may be necessary to make the same effective. Signed, "Herman Romunder, President; Cannie Jones, Secretary."

This instrument was not acknowledged.

Romunder and wife conveyed the lands to Elmes, and the Veneer Company conveyed the mill site and the plant. On the 26th day of May, another agreement was entered into between Herman Romunder, party of the first part, and Charles W. Elmes, reciting the making of the agreement of the 21st of March, relating to the conveyance of the property and payment of the debt, and privileges of Romunder in regard to the sale of the mill site, etc., "and for the purpose of creating a supplemental agreement affecting a part of said contract and except insofar as modified hereby the original agreement stands." One dollar and other considerations are recited, and "it is agreed that the plant has been closed down more than 30 days, that it is desirable to sell said plant and property at the earliest possible time and Romunder waives his right under the agreement of March 21 in this regard and agreed to assist in converting the property into cash, waives the right to further time and gave the second party the right to sell the property at any time before September 21, for a sum not less than $40,000, "and if said sale is for a greater sum, the surplus shall be refunded to Herman Romunder," fixed the date for the sale of the timber lands and continued, "but it is specially agreed that this agreement and the agreement of March 21, 1914, shall not in any manner be construed to in any way create a trust holding of said property by said Elmes or to in any way restrict his right of giving an absolute deed thereto." This agreement was signed by Romunder and Elmes and by the Veneer Company.

Another contract was made on May 26, about advances of money for payment of certain debts of the Veneer Company from which were excluded the account of Robt. Romunder, the Morgan Company and others, which recited that it did not affect the agreement of the 21st of March, to which reference was made.

On the same day the Buena Vista Veneer Company executed a bill of sale to Charles W. Elmes of all of its right, title and interest in all its personal property not already conveyed and all its bills and accounts receivable and all property of every other kind and of its insurance policies, reciting that it was mutually agreed that an inventory was to be made and attached to the bill of sale and become a part of it. All money in the bank, all checks in transit and all the indebtedness due said company was transferred to said Elmes.

The Morgan and Smith companies, appellants, recovered judgments for the amount of their claims against the Veneer Company but the court decreed the conveyance executed to Elmes to be an equitable mortgage and not made in fraud of creditors, that the lien of same was superior to any claim of appellant companies and ordered the property sold free of their claim, from which decree this appeal is prosecuted.

Emmett Vaughan, for appellants.

The company was insolvent and the transfer of all its property to Elmes was fraudulent and void as to creditors. Romunder, the company and Elmes all worked in collusion for the purpose of defrauding the creditors. 3 Bump on Fraud. Conv. 41; 67 Ark. 122; Waite on Fraud. Conv. § 272; Bump on Fraud. Conv. 34; 65 Ark. 270; 74 *Id.* 186; 107 *Id.* 587; 39 *Id.* 70; 70 *Id.* 273; 50 Pac. 1020; 18 Wash. 114; 63 Am. St. 872. The decree is against the preponderance of the evidence and should be reversed. 41 Ark. 292. The managing officers of a corporation have no power to transfer the assets to a single creditor in payment of his claims. 5 Thompson on Corporations, 6285. It was *ultra vires* to use the

corporate assets to pay the debt of the president of the corporation. 172 S. W. 868; 95 Ark. 368.

J. G., C. B. and *Cooper Thweatt,* for appellees.

The transfers were a mortgage to secure a debt and were not in fraud of creditors. 103 Ark. 484; 88 *Id.* 289; 75 *Id.* 551; 101 *Id.* 135; 64 *Id.* 187; 61 *Id.* 442; 71 *Id.* 438; 28 *Id.* 82; 79 *Id.* 571. The transfers were *bona fide* and made for a valuable consideration, and the chancellor so found and his findings are sustained by the evidence.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the Veneer Company was indebted for money advanced to it by the Morgan Company at the time of the first transfers; that a statement of its business made to Elmes showed such indebtedness, which statement did not show an indebtedness of the company to him for $20,500 later claimed to be the company's debt for money furnished it, the renewal note being executed by Herman Romunder, individually instead of for the company. The company was insolvent at the time of the execution of the first and all subsequent agreements between Romunder and Elmes and by these agreements and conveyances all its property of every kind was transferred to appellee, Elmes, to secure the payment, it is true, of said sum already claimed to have been advanced to the company, as well as the advances thereafter made in accordance with the agreements.

If appellee, Elmes, did not know that the company was insolvent when the first agreement and transfer was made, he was bound to know it was thereby rendered so, and to have known it when the later contracts and transfers, stripping it of every vestige of its property were made, all of which recited that they were but supplemental to the first agreement of March 21, referred to, which agreement was not, nor were any of the other agreements recorded. This first agreement provided that if the property sold for more than the indebtedness men-

tioned therein, the surplus should be returned to Romunder, without requiring it paid upon the company's other indebtedness. The agreement also expressly stipulated that it should not be considered as a mortgage and it was construed by Elmes' attorney as an absolute conveyance of the property.

(1). Taking such a conveyance in accordance with said agreements was calculated to deceive creditors and lead them to believe that no part of the property was subject to their demand, when in fact such was not the case. "The right to redeem is an interest of value and to reserve it in such a way as leaves it altogether in confidence between the parties enabling them to form a trust between themselves, and at their pleasure to deny its existence, and refuse its execution for the benefit of creditors, is plainly deceptive, and tends to delay, hinder and defraud creditors." Bump on Fraudulent Conveyances, p. 41; *Davis* v. *Jones,* 67 Ark. 122; Waite on Fraudulent Conveyances, Sec. 272.

The parties reiterated in the last agreement that neither of the agreements should in any manner be construed to in any way create a trust holding of said property by said Elmes or in any way restrict his right of giving absolute deeds thereto, while the complaint for a foreclosure and the cross-complaint allege that the instruments were but equitable mortgages for the security of debts and all the answers of the parties thereto, admitted that such was the case.

Appellee admits that it requires all the said agreements, contracts, bills of sale and conveyances to constitute what it now claims to be an equitable mortgage, contrary to the express terms of said instruments, saying in his brief: "The first mortgage consists of a deed from Romunder to lands in Woodruff County, a deed from Romunder to lands in Prairie County, a deed from the company to the mill site, seventeen acres, and a bill of sale from the company to the machinery and some other personal property and a contract signed by Elmes,

Romunder and the company, which provides that Elmes was to advance to the company certain money, which with a note of Romunder already due and owing to Elmes, would aggregate in all $40,000," etc. * * *

"The second mortgage consists of a bill of sale from the company to Elmes to all of its personal property and a contract which provided that said bill of sale was to secure Elmes for certain advances to be made to the company for the purpose of paying off certain specified debts, * * * was not an agreement of Elmes to pay the company's debts generally."

Conceding that the proof is sufficient to sustain the chancellor's finding that the indebtedness shown by the individual note of Herman Romunder for the payment of which the property was conveyed on the 21st of March was a debt of the corporation's for the payment of which its property was liable, it does not follow that the creditor in order to secure his own debt could advance other money to be used by the corporation and for the payment of certain of its debts, excluding the claim of appellant creditor and thereafter consume all the property of the said corporation in the payment of his said debt, leaving the corporation without any assets whatever out of which said creditors could make their debts.

(2-3) Insolvent corporations are not allowed to prefer their creditors and a conveyance that has effect to do so is fradulent and void as to them. Sec. 949 Kirby's Digest; *Dozier* v. *Arkadelphia Cotton Mills,* 67 Ark. 11. And since it requires all of said agreements, contracts, and conveyances, the ones first made as well as the last, and all must be considered together to constitute the mortgage appellee is attempting to foreclose, and were in effect but one transaction, effecting the purpose and intention of appellee and the insolvent Veneer Company, to transfer all its assets for the payment of appellees' debt and of the other creditors preferred, appellants whose claims were attempted thereby to be de-

feated, were in time in the filing of their suits to protect themselves against said fraudulent transfers.

The court erred in not so holding and the decree is reversed and the cause remanded with directions to enter a decree in favor of each of appellants for its *pro rata* of the fund realized from the sale of the assets of the corporation in proportion as their debts bear relation to the claim of Elmes and the proceeds realized therefrom. It is so ordered.

LIVINGSTON v. PUGSLEY.

Opinion delivered June 12, 1916.

1. RES ADJUDICATA—ACTION ON MORTGAGE.—A judgment in a former case which did not involve the validity of the mortgage, but which turned entirely upon the question of the mortgagee's right to purchase without having furnished an itemized account, will not bar a right of action to foreclose the mortgage.
2. CONTRACTS—INTERPRETATION—PAROL EVIDENCE.—While the terms of a contract can not be extended by parol evidence, such evidence may be admitted to show the circumstances under which the contract was executed, in order to construe the language thereof.
3. MORTGAGES—TERMS—EXTENT OF INDEBTEDNESS SECURED.—A mortgage recited that it was given as security "for all other moneys, advances, goods, wares, merchandise, supplies, services, etc., furnished by the parties of the second part to the parties of the first part." *Held*, the language used was broad enough to embrace an indebtedness to either of the parties, or a joint indebtedness to both.

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

G. B. Oliver, for appellants.

1. The mortgage did not cover *individual* indebtedness. This was a joint contract; a unilateral contract, and Pugsley could not sue alone. Kirby's Digest, § § 4420, 6010; 27 Cyc. 1044, C; *Ib.* 1564, b; 8 *Id.* 88 v; 15 Enc. Pl. & Pr. 528; 9 Cyc. 655, 656, note 40; 5 A. & E. Enc. Law, 956 (5), b; 67 Ark. 27; 93 *Id.* 447; 91 *Id.* 10.

2. Parol evidence was inadmissible to show that the mortgage was given to secure an individual debt.

17 Cyc. 567, 586, 627, 708; 66 Ark. 393; 95 *Id.* 131; *Ib.* 458.

3. The former judgment was *res judicata.* Defendant must set up every defense he had, legal or equitable. 76 Ark. 423; 77 *Id.* 379; 79 *Id.* 185; 84 *Id.* 92; 117 *Id.* 492. If defendant had a valid mortgage he was entitled to retain possession, even if he had not served plaintiff with a verified, itemized account. 65 Ark. 316, 319.

T. J. Crowder, for appellee.

1. This was not a *joint* debt. Sutton claimed no interest except to indemnify him against loss as surety on the note. This is a suit in equity, and appellants having bought the goods and admitted the debt cannot procure relief without doing equity.

2. The plea of *res judicata* was properly overruled. There never was a trial on the merits, the judgment was based solely upon the fact that no itemized account was rendered before suit, as required by statute. The validity of the mortgage as a security for Pugsley's debt was not in issue. Appellants do not deny the debt and the decree is right and should be affirmed.

McCULLOCH, C. J. This is an action instituted at law originally by appellee against appellants to recover possession of certain personal property for the purpose of foreclosing a chattel mortgage executed by appellants, and on motion of appellants the cause was transferred to the chancery court and there proceeded to a final decree in appellee's favor foreclosing the mortgage.

Appellee was a merchant engaged in business at Knobel, Clay County, Arkansas, and appellants were farmers living in that vicinity. Appellants rented land from J. N. Sutton and they ran an account with appellee for supplies furnished to enable them to carry on their farming operations. They became indebted to appellee and borrowed $700 from a bank at Paragould to use in paying off appellee's debt, and for other purposes. Appellee and Sutton endorsed the note of appellants to the bank

and appellants executed to them a note for a like amount ($700), and also executed a chattel mortgage to secure that note.

The mortgage contains the following recital with respect to the indebtedness secured thereby: "Whereas, the parties of the first part are indebted to the parties of the second part in the sum of $700, payable as follows, towit: January 1, 1914, with 10 per cent. interest from date, and for all other moneys, advances, goods, wares, merchandise, supplies, services, etc., furnished by the parties of the second part to the parties of the first part up to the foreclosure of this instrument, with interest at the rate of 10 per cent. per annum from date of furnishing until paid. In the event any default shall be made in any of the payments, either principal or interest, as above set forth, then all shall become due and payable at once. Now, therefore, if the parties of the first part shall well and truly pay to the parties of the second part the sum hereinafter mentioned, and all other indebtedness which may then be due the parties of the second part by the parties of the first part, together with the costs of this trust, on or before the maturity hereof as above set out, then this conveyance shall be void, otherwise to remain in full force and effect."

Appellants opened an account with appellee a few days after the execution of the mortgage and the indebtedness involved in the controversy was incurred, being evidenced by the books kept by appellee. There is no controversy involved on this appeal as to the amount. Appellants paid the note to the bank at maturity and called upon appellee and presented the note and demanded the surrender of the note and mortgage executed to appellee and Sutton. Appellee surrendered the note to appellants, but refused to surrender the mortgage on the ground that he was entitled to hold it as security for the account. Subsequently appellee in some way obtained possession of the mortgaged chattels, and appellants instituted an action at law against him to recover

possession, and a trial of the case resulted in a verdict and judgment in favor of appellants.

(1) There is a plea of *res adjudicata* in the present case, and the record of the former action and judgment therein were introduced in support of that plea. It appears from the record of the trial of the former case that it was submitted to the jury on instructions which related entirely to the question of the right of appellee to foreclose the mortgage without furnishing an itemized account in accordance with the statute, and upon that issue the verdict of the jury was in favor of appellants.

It is earnestly insisted that the chancellor should have sustained the plea of *res adjudicata* on the ground that notwithstanding the fact that the former judgment between the parties was based entirely upon the right to foreclose the mortgage without having complied with the statutory requirements, yet appellee could have asserted his right of foreclosure and protected his possession under the mortgage, and that his failure to do so does not prevent the judgment becoming conclusive of the rights of the parties. We are of the opinion that the position of the appellants is not sound, and that the court was correct in refusing to sustain the plea. There was no issue made in the former case as to the validity of the mortgage, but the decision turned, as before stated, entirely upon the question of the right of appellee to foreclose the mortgage without having furnished an itemized account. The decision of that question may or may not have been erroneous, but it did not bar appellee's right of action to foreclose the mortgage, for that question had never been tried out as an issue.

In *McCombs* v. *Wall,* 66 Ark. 336, the court said: "To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear, by the record or by extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit." To the same effect see the case of *Fogel* v. *Butler,* 96 Ark. 87, where we held that a judg-

ment restraining the defendant from interfering with the plaintiff's right to cut timber "from what is known as the second bench on certain land, without determining what the 'second bench' was, will not preclude the defendant from litigating the question as to what was meant by the words 'second bench' in such contract and judgment."

This court also held in *Fourche River Lumber Co.* v. *Walker,* 96 Ark. 540, that "the rule that a valid decree in a suit cuts off all defenses which might have been pleaded therein refers only to such matters as properly belonged to the subject of the controversy and are within the scope of the issues." See also *Pulaski County* v. *Hill,* 97 Ark. 450.

(2-3) It is also contended that the mortgage did not cover the individual indebtedness of appellants to appellee Pugsley, but that its language was only sufficient to cover indebtedness from appellants to Pugsley and Sutton. Appellants rely upon the principle that the terms of a mortgage cannot be extended by parol testimony. In that respect a mortgage is like any other contract. Counsel also rely upon authorities to the effect that the promise made to several jointly, cannot be enforced as a separate obligation to one of the obligees. Those principles have no application to the present case, for it is merely a question here of interpretation of the contract of the parties. While the terms of the contract cannot be extended by parol evidence, such evidence may be admitted to show the circumstances under which the contract was executed in order to construe the language thereof. *Moore* v. *Terry,* 66 Ark. 393. The mortgage recites that it is given as security "for all other moneys, advances, goods, wares, merchandise, supplies, services, etc. furnished by the parties of the second part to the parties of the first part." The language is broad enough to embrace an indebtedness to either of the parties or a joint indebtedness to both.

The evidence which was competent for the court to hear and consider, shows that appellee and Sutton were not engaged in any joint enterprise except the single one of becoming surety for appellants on the note to the bank. Appellee was a merchant and Sutton was a farmer, and there is nothing in the record to show that they were jointly interested in their business relations with appellants. On the contrary, the proof is that appellants opened up an account with appellee very soon after the execution of the mortgage. Now, when these facts are considered, as they may be in interpreting the language of the contract, it is clear that the mortgage was intended as security to either of the parties for any indebtedness that appellants might incur. The language is adapted to such transactions as they were likely to have with either of them—with Sutton as their landlord or with appellee as their merchant.

We are convinced upon the whole that the chancellor was correct in his decision, and the decree is affirmed.

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

Opinion delivered June 12, 1916.

1. MASTER AND SERVANT—INJURY TO LOCOMOTIVE ENGINEER—QUESTION FOR JURY.—Plaintiff, a locomotive engineer, was injured when he jumped from the cab of his engine after discovering that a collision was imminent, with a switch engine, on a track crossing the track upon which he was proceeding; plaintiff had been given a signal by the yardmaster to proceed; *held*, it was a question for the jury, as to whether this plaintiff was negligent in not keeping his engine under control.
2. MASTER AND SERVANT—ABROGATION OF RULE—ACT OF RAILWAY YARDMASTER.—A railway yardmaster has no authority to unmake rules which have been promulgated by the company for the guidance of all its servants, and it is his duty to enforce them or to report infractions thereof, and his continued acquiescence in the violation of one of the rules constitutes, *pro tanto*, an abrogation thereof.
3. MASTER AND SERVANT—ABROGATION OF RULE—ERRONEOUS INTERPRETATION.—An erroneous interpretation by servants of an unam-

biguous rule, where they are under a duty to obey it, does not amount to a modification or abrogation of the rule.

4. MASTER AND SERVANT—VIOLATION OF RULE—RECOVERY—COMPARATIVE NEGLIGENCE—FEDERAL STATUTE.—Where plaintiff, a locomotive fireman, was injured, while engaged in interstate traffic, his own negligence in violating a rule of defendant company, will prevent his recovery of damages, except such as are allowed by the Federal statute for the comparative proportion attributable to the negligence of the company.

5. MASTER AND SERVANT—INJURY TO SERVANT—OPERATION OF TRAIN IN YARD—ABROGATION OF RULE—QUESTION FOR JURY.—Plaintiff, a locomotive engineer, was injured by jumping from his engine cab, upon discovering that a collision with a switch engine was imminent. *Held,* in submitting the issues to the jury, that it was error to submit an instructions which omitted the issue of whether plaintiff was keeping his engine under control, and operating it, at the time of the injury, within a certain speed limit, as required by the rules of defendant company, and also the issue as to whether such rules had been abrogated. It was also error to fail to instruct specifically on the issue of excessive speed.

6. MASTER AND SERVANT—ABROGATION OF RULES—PROOF.—It is a question for the jury, whether rules promulgated by the master, have been abrogated.

Appeal from Lincoln Circuit Court; *A. H. Rowell,* Special Judge; reversed.

E. B. Kinsworthy, for appellant.

1. A verdict should have been directed for appellant. There was no evidence to sustain the verdict. Plaintiff violated the rules of the company which caused the accident. 100 Ark. 526, 533; 97 *Id.* 443. Stewart's testimony is absolutely contradicted by the physical facts. 100 Ark. 380; 157 Fed. 347; 86 Pac. 472; 74 Kans. 256. Failure to obey the rules was negligence. 100 Ark. 380; 140 S. W. 544; 120 Ark. 61; 52 Ark. Law Rep. 312; 119 Ark. 349; 174 Fed. 352. Neither custom nor order can justify a servant in doing an act which is negligence *per se.* 212 Mo. 338; 244 Mo. 647; 193 *Id.* 715; 176 *Id.* 547; 87 *Id.* 295; 94 Ala. 285; 109 *Id.* 256; 95 U. S. 439; 43 Kans. 145; 56 Va. 710; 161 Fed. 722; 249 Mo. 509; 110 *Id.* 394; 60 Fed. 370; 23 L. R. A. (N. S.) 768; 157 Fed. 347; 80 *Id.* 495. *"Under control"* means to stop within vision. 86 Pac. 1053; 200 Fed. 359.

An employee has no right to violate a rule of the railroad company, even if ordered to do so by an officer or superior. 22 S. E. 833, 836, par. 4; 27 N. E. 110; 145 N. Y. 190. The "high ball" had nothing to do with the accident.

2. The court erred in refusing to give defendant's instruction No. A. No other instruction was given covering this point. The violation of a rule by an employee is negligence *per se.* 174 Fed. and cases *supra;* 100 Ark. 380.

3. The high ball did not give the plaintiff any authority to violate the rules of the company. 145 N. Y. 190; 63 Fed. 228; 60 *Id.* 370; 157 *Id.* 347; 200 *Id.* 359; 86 Pac. 1053; 20 So. Rep. 67.

4. The court erred in refusing to give instruction No. F for defendant. 119 Ark. 349; 178 S. W. 320; 200 Fed. 359; 52 Ark. 45.

5. It is error to refuse a specific instruction correctly and clearly applying the law to the facts in a case, even though the law, in a general way, has already been covered. 69 Ark. 134; 82 Ark. 499; 87 *Id.* 243; 96 *Id.* 206.

6. The high ball was not the proximate cause of the injury. If subsequent to the original negligent act, a new cause intervened * * * the original negligence is too remote. 87 Ark. 576; 97 *Id.* 276; 104 *Id.* 506; 91 *Id.* 260.

7. An instruction which ignores a material issue about which the evidence is conflicting is misleading and prejudicial. 93 Ark. 564.

8. The defense of assumed risk has not been abolished under the Federal Act. 177 S. W. 875.

9. The verdict is excessive.

Pace, Seawell & Davis, for appellee.

1. The verdict is sustained by the evidence. The yardmaster was in complete charge of the yard; appellee obeyed the signal and did not violate any rule of the company. He was running under control. Further, the rules of the company had been abrogated by customary viola-

tion when a highball signal was given. The finding of the jury is final. 77 Ark. 1; 115 Ark. 308; 88 *Id.* 204; 12 Cyc. 1270. Disobedience of a rule in compliance with the instruction of a representative of the master does not constitute contributory negligence. *Ib.* 1274; 194 U. S. 136; 88 Ill. App. 614. See also 94 Tex. 100; 130 Mo. 657; 92 *Id.* 359; 118 Ky. 166; 106 Minn. 281; 132 Mo. App. 380; 37 Mont. 575; 214 Pa. St. 252; 214 Pa. 252; 125 S. W. 45; 41 Kans. 661; 89 Ind. 453; 3 Labatt, Master and Servant (2 ed.), 1137; 98 Ark. 232; 202 U. S. 438; 227 *Id.* 559; 196 Mass. 705.

Habitual violation of a rule is an abrogation, if known to the master. Cases *supra;* 77 Ark. 405; 166 Fed. 1; 105 Ark. 334; 88 *Id.* 204.

2. But the company is liable, even if the act of the yardmaster in giving the highball signal did not abrogate the rule. Under the Federal statute contributory negligence is not a bar. 115 Ark. 316. The act of the yardmaster was negligence for which the master was liable.

3. The cases cited by appellant do not apply. There was no error in refusing the instructions asked by defendant. No. A invades the province of the jury. 101 Ark. 376; 188 Fed. 55; 26 Cyc. 1269; 25 L. R. A. 320. It is misleading. No. 7 is not the law. 84 Ark. 74; 105 *Id.* 334; 88 Ark. 204; No. B ignores the evidence as to the abrogation of the rules. No. F is abstract and misleading. No. 17 made the act of appellee in failing to keep a lookout negligence. 98 Ark. 202, etc.

4. Appellee's instructions were correct. 115 Ark. 308. The court left the question of negligence, contributory negligence, etc., to the jury. 91 Ark. 388; 82 *Id.* 11; 87 *Id.* 443; 92 *Id.* 554. Appellee was not employed in interstate commerce at the time of the injury. 233 U. S. 473; 238 *Id.* 260.

5. The verdict is not excessive. 105 Ark. 533; 114 *Id.* 224; 113 *Id.* 265.

McCULLOCH, C. J. The plaintiff, Charles Stewart, was engaged in the service of the defendant as a locomo-

tive engineer and received personal injuries while he was running a train through the railroad yards at Little Rock. This is an action against the company to recover compensation for his injuries, which are alleged to have been caused by negligence of other servants of the company. It is conceded that the service being performed by the plaintiff at the time of his injury was connected with interstate traffic so as to bring the case within the operation of the Federal Employers' Liability Act. Plaintiff was bringing an extra freight train from Pine Bluff to Little Rock, and as he came through the Little Rock yards his fireman discovered a switch engine on the track ahead, and when plaintiff discovered that a collision was impending, he shut off the throttle and put on the emergency brakes and jumped from the engine, and in doing so he fell upon the edge of the track and received serious injuries.

Plaintiff's testimony was that he was coming along at a speed of eight or nine miles an hour, and that as he approached a curve of the track the yardmaster came out from the yard office and first looked around the curve and then turned and gave him the "high ball" signal, which meant that the track was clear and that he could proceed expeditiously, and that as the engine started around the curve the fireman discovered the switch engine ahead and called out to him "jump," which he did, after having, as before stated, shut off the throttle, put on the brakes and opened the sand. Plaintiff's train was running north and the switch engine was coming south. Plaintiff's fireman stepped from the engine when it lacked a few feet of striking the switch engine and was not injured. The engineer on the switch engine and the other operatives also escaped unhurt. The testimony of the plaintiff tends to show that his engine would have come to a stop before it reached the switch engine if the latter had been properly controlled, but that the switch engine was allowed to run on and produce the collision. On the other hand, all the other eye witnesses testified

that the switch engine came to a stop and turned backward and ran about forty-five feet before plaintiff's engine struck. The testimony of the plaintiff also tended to show that the yardmaster could have seen the switch engine from the point where he was standing when plaintiff says that the "high ball" signal was given.

Mr. Brown, the yardmaster, was introduced as a witness, and testified that he did not give the plaintiff any signal at all, but that the plaintiff's engine came along, running at a speed of at least fifteen miles an hour, and that just before it reached the yard office he heard the switch engine whistle back up the track and he looked around and it was in sight and appeared to have come to a stop, and that when he looked toward plaintiff's engine again he saw the plaintiff making the jump. Other testimony adduced by the defendant tended to show that the plaintiff was running his engine at a rate of from fifteen to twenty miles an hour when he approached the curve and jumped from the engine.

Certain rules of the company, regulating the handling of trains through the yards, were introduced in evidence and they are relied on as establishing negligence on the part of the plaintiff in violating those rules.

Rule A-12 reads in part as follows: "Freight trains will not exceed a speed of ten (10) miles per hour between Argenta and South yard limits East Little Rock yard."

Rule A-16 reads as follows: "Second and inferior class trains and extras must run under control through yard limits at Little Rock, Argenta, East Little Rock, Pine Bluff and McGehee. In case of accident, responsibility rests with the approaching train."

Those rules were in force at the time of the injury, and plaintiff had a copy of the book of rules with him on his engine and was familiar with them.

It is agreed that running "under control" means to run trains so as to stop within vision, or, in other words; to keep the engine under such control that it can be stopped within view of any object which may appear ahead

on the track. Plaintiff's train was "the approaching train" within the meaning of the rules. It was also conceded that the switch engine belonged to the same class of trains and had equal right-of-way, that the switch engine was rightfully on the main track at the time of the collision, and that the only limitations upon the right to operate it there were those prescribed by the rules herein mentioned.

In order, however, to obviate the force and effect of the rules as written, plaintiff undertook to show that a custom had been built up whereby the giving of the "high ball" signal by the yardmaster was construed to be an assurance that the track was clear, and as a direction to hurry on without regard to the rule requiring that the engine be kept under control. There is a sharp conflict in the testimony on this branch of the case. Several witnesses introduced by plaintiff testified as to that custom. In view of the controversy concerning the effect of the testimony, it is well to set out that which appears to be the strongest in favor of the plaintiff. The following extracts are taken from the testimony of witness Smith, who had worked for defendant as a locomotive engineer, and showed familiarity with the customs and the operation of trains.

Q. Now, what do you mean by "under control?"

A. Why, you would handle your train in a way that you could stop it within the distance that you could see, that is what I consider under control, and that railroads generally consider to be under control.

Q. Within the distance of your vision down the track?

A. Yes, sir.

Q. State whether or not in passing through the yards how one proceeds—do you proceed under control?

A. Yes, sir.

Q. Now, who has charge of the yards?

A. The yardmaster.

Q. What power has the yardmaster in the yards?

A. Relative to the handling of trains through the yards, he has power to stop you, and hold you any place he wants you, or head you in on any track he sees fit to, or tell you to proceed.

Q. Now, then, suppose you are proceeding through the yards, and are approaching a curve, and as you approach the curve the yardmaster gives you what is called a high ball—what does that mean to the engineer?

A. That means for him to go ahead, and go through the yards; that he wants to occupy that track or wants you to get off that track, and through the yards.

Q. Whenever he gives you a high ball it is an order to you to hurry through the yards?

A. Yes, sir; that the track ahead of you is clear.

Q. That is a rule that has obtained wherever you have worked as an engineer, in coming through the yards of the various systems you have worked for?

A. Yes, sir; that is the rule that is practiced.

Q. And it means that the track is clear?

A. Yes, sir.

Q. Now, it is true that switch engines have a right to occupy the main line—that is, as against second and third class trains, but who has a right to put them on there?

A. The yardmaster or some one directly under the yardmaster.

Q. Then, if the yardmaster gives him the high ball, and indicates the track is clear, it is the duty of the yardmaster to know it is clear, isn't it?

A. Yes, sir; absolutely.

CROSS-EXAMINATION.

Q. Mr. Smith, a second and third class freight train passing through the yard limits at East Little Rock, or and other yard, for that matter, when it enters the yards, it is the duty of the engineer to pass through that yard with the engine under control, isn't it?

A. Yes, sir.

Q. That means that he must travel under such speed as to be able to stop within vision; if he goes into the yards, and does not see the yardmaster at all, it is his duty to proceed through the yards with his engine under control?

A. Yes, sir.

Q. The yardmaster has no right, or no signal given by him would authorize the engineer to proceed with his engine out of control, would it?

A. No, I will answer, no, to that question.

Q. That would violate the printed rules, wouldn't it?

A. Yes, sir; but if he received a signal from that yardmaster—what is commonly called a high ball by the railroad men, that would give him a right to hurry through that yard. That would be the same thing as telling him to hurry through this yard.

Q. Do you mean to tell this jury that any kind of a signal would obviate or do away with the printed rules about going through that yard with your engine under control?

A. I do.

Q. Mr. Smith, suppose a man comes along there with a freight train under control, and should see the yardmaster, and the yardmaster would high ball him, wouldn't he still have to continue under control?

A. No, not absolute control. Of course, he wouldn't go fifty miles an hour through the yards, but he would hurry through and would increase his speed and get through. On a curve like that you would have to proceed slow around that curve if you didn't get a signal—any man with ordinary intelligence, of course, would know that—but when a yardmaster comes out there, and gives you a signal, what does he give you that signal for if he wasn't wanting you to hurry along, because he knows you will proceed under control anyway.

Q. He knows you will proceed under control when you get the signal?

A. Yes, sir.

Q. And, even after you get the signal, it is your duty to proceed under control?

A. No, sir.

Other witnesses testified to the same effect. Plaintiff testified that he was running under control at the time he received the "high ball" signal from the yardmaster and also when the fireman notified him that the switch engine was ahead and that a collision was imminent. The plaintiff's engine ran only a short distance after the "high ball" signal was received, before the fireman discovered the switch engine ahead and gave the alarm.

(1) It is earnestly insisted that according to the undisputed evidence plaintiff's injuries resulted solely from his failure to observe the rules of the company promulgated for the use of himself and other engineers for their own protection, and that for that reason a peremptory instruction ought to have been given to the jury to return a verdict in defendant's favor. We are of the opinion that the evidence was sufficient to warrant the submission of certain issues to the jury, and that the court did not err in refusing to give a peremptory instruction. The switch engine, with which plaintiff's engine collided, was rightfully on the main track, and there is no negligence shown in that regard, nor does it appear that the men in charge of the switch engine were guilty of any negligence which contributed to the plaintiff's injury. There is some conflict whether or not the switch engine was brought to a stop before the collision occurred, but the plaintiff was not injured in the collision itself, but by reason of being compelled, for his own safety, to jump from the engine when he discovered the switch engine on the track and that the collision was imminent. Even if those in charge of the switch engine were negligent in failing to stop their engine in time to prevent the collision, that negligence did not contribute in any degree to the plaintiff's injury. Therefore, the only act of negligence which the testimony tended to establish, if any at

all, was the act of Mr. Brown, the yardmaster, in giving a signal to proceed which constituted, according to evidence adduced, an assurance to the plaintiff that the track ahead was clear. Now, with that issue decided in favor of the plaintiff, he was entitled to have the jury determine whether or not he was guilty of negligence in failing to keep his engine under control as he approached the curve. The other issue in the case is whether or not he was exceeding the ten mile limit of speed at the time.

(2-3) The rules of the company are unambiguous and call for no construction. It is contended that the testimony adduced by the plaintiff only tends to show the interpretation of those rules by the witnesses and is not sufficient to show an abrogation of the rules. While it is true that the rules are too plain to admit of any doubt about the proper construction, yet the testimony of the witnesses tends to show that there had been built up a custom in disregard of the rule, to the effect that whenever the yardmaster gave the signal to proceed, which amounted to an assurance that the track was clear ahead, then the engine was run without being kept under control. If this testimony was true, it amounted to an abrogation of the rule to that extent so as to permit an engine to be run otherwise than under control when the proper signal had been given by the yardmaster. This is not merely an interpretation of the rule by the witnesses, but it amounts to substantive proof that the rule had been habitually disregarded to that extent for a sufficient length of time to constitute a modification of the rule. The yardmaster had no authority to make or unmake those rules which had been promulgated by the company for the guidance of all of its servants, but it was his duty to enforce them or to report infraction thereof, and his continued acquiescence in the violation of one of the rules constituted *pro tanto*, an abrogation. *St. Louis, I. M. & S. Ry. Co.* v. *Caraway*, 77 Ark. 405. The testimony does not, however, warrant a conclusion that any custom had been built up in disregard of the rule which limited the

rate of speed through the yards to ten miles per hour. The testimony of the plaintiff himself and, possibly, that of another of the witnesses which he introduced, tends to show that the rule had been interpreted to mean that when the "high ball" signal was given by the yardmaster, the speed could exceed ten miles per hour, but there was not the slightest evidence that the rule had been habitually violated. An erroneous interpretation of this unambiguous rule by the employees who were in duty bound to obey it, would not constitute a modification or abrogation thereof, for it is only acquiescence in habitual violation of such rules that amounts to abrogation. So we think that there was enough testimony to justify a submission to the jury of the question whether the rules had to the extent indicated been abrogated, and whether or not the plaintiff was proceeding within the rules as thus modified when he was injured.

(4) The effect of a violation by an employee of the rules prescribed for his own protection is too well settled by decisions of this and other courts to call for citation of authorities. The cases are cited in the briefs of counsel. If the rule was violated by plaintiff, it constituted negligence *per se* which will prevent his recovery of damages except such as are allowed by the Federal Statute for the comparative proportion attributable to the negligence of the company.

The instructions given and refused are too long to admit of their being set out in full in this opinion, but we quote such as are essential to a proper consideration of the case. The court gave instruction No. 1, at the request of plaintiff, which reads as follows:

"1. The jury is instructed that if you believe from a preponderance of the evidence that plaintiff was engaged as engineer in running an engine and caboose from Pine Bluff to Argenta, Arkansas, and that while passing through East Little Rock yards of the defendant, on its main track, yardmaster Brown signalled him to proceed; and, if you find it was plaintiff's duty to obey said signal

and that plaintiff did so, and that Brown had the authority to give it, and obeying the same the engine upon which plaintiff was riding, while yet in the East Little Rock yards, collided with the switch engine of the defendant that was occupying said main line, and that plaintiff jumped from said engine before said collision and injured himself, and if you find that the defendant, in permitting said main line to be occupied with a switch engine and giving the plaintiff, through its yardmaster, a signal to proceed, if you find that said signal was so given, failed to exercise ordinary care for the reasonable safety of plaintiff, and that its act in permitting said main line to be occupied at said time and place by the switch engine, and in giving the signal, if any, to plaintiff to proceed was negligence and the proximate cause of the injury; and, if you find that plaintiff, at the time, was exercising ordinary care for his own safety and had not assumed the risk, you will find for the plaintiff and assess his damages at such a sum as you may find from the evidence will be a reasonable compensation for the injuries received, if any; provided, you further find that at the time the plaintiff jumped from the engine he, in good faith and without fault or negligence on his part to cause it, believed that he was in a perilous position and that he acted as a reasonably prudent person would have done under similar circumstances and conditions for his own safety."

The court also gave, at the request of the defendant, the following instruction:

"7. The court instructs you that the evidence in this case shows that the defendant company had certain rules regulating the operation of trains and switch engines in the yards in East Little Rock where plaintiff was injured, and that these rules were known to the plaintiff, that one of these rules gave switch engines switching within the yards in East Little Rock the right to use the main track upon the time of all trains except first class trains. The evidence further shows that the engine upon which plain-

tiff was riding and which he was operating was not a first class train and was subject to the rules giving the switch engine the right to be upon the main line upon the time of the engine being operated by plaintiff. The evidence also shows that there was a rule which required the plaintiff to operate his engine through the yards where he was injured so as to have it under control, so that if an engine or other obstruction should show upon the track of the main line, he could stop his engine before striking the same. You are instructed that if you believe from the evidence that the plaintiff was not operating his engine under control at the time of the accident and was operating it in violation of said rules, then the court tells you, as a matter of law, that the plaintiff himself was negligent, and if you believe that his injury was caused solely on account of his not operating his engine under control, or on account of his not keeping a proper lookout, or on account of his not taking due care in operating the same, then your verdict should be for the defendant although you may believe that previous to that time he had been highballed by the parties mentioned in his complaint."

(5) It is insisted that instruction No. 1 is erroneous in omitting all reference to the issue as to whether or not the plaintiff was acting in violation of the rules at the time the collision occurred. We think that contention is well taken. The instruction does in fact leave it open to the jury to determine whether or not it was the plaintiff's duty to obey the signal which was given by the yardmaster, but it does not make any reference to the other rules which require that an engine be kept under control and that the rate of speed should not exceed ten miles per hour. Instruction No. 7 is all that the defendant could have desired, so far as concerns the rule requiring the engine to be kept under control, but that instruction was in direct conflict with the one given at the instance of the plaintiff. The jury might have found, under the first instruction, that it was plaintiff's duty

to obey the signal, and that it meant for him to proceed, and the jury could have found in plaintiff's favor even though they concluded that he had violated the rule in failing to keep the engine under control. If there had been no conflict in the testimony concerning the partial abrogation of the rule by the custom said to have been built up with regard to the signal, then the effect of this instruction might have been different, but there was a serious conflict on that and there was enough testimony to warrant the jury in finding that there was no such custom in existence which amounted to a modification or abrogation of the rule to any extent. Therefore, it was erroneous to tell the jury that the plaintiff was entitled to recover if he was proceeding in obedience to the signal without also submitting the question whether or not the rule which required him to keep his engine absolutely under control had been abrogated. If the rule was in force, its observance was the measure of his care for his own safety and it was proper to leave it to the jury to determine whether or not he was exercising ordinary care. In addition to that, there was, as has already been pointed out, no testimony at all to the effect that the rule had been abrogated with respect to the ten mile limit of speed, and the instruction was certainly erroneous in ignoring that feature of the case. There was a sharp conflict as to whether or not the plaintiff was violating the maximum speed limit, and if the jury found that he was running more than ten miles an hour it constituted negligence on his part which would prevent full recovery.

Error is also assigned in the refusal of the court to give the following instruction, requested by defendant: "(A) You are instructed that the plaintiff admits in his evidence that there was a rule of the railroad company in force, at the time of his injury, that prohibited the running of a freight train over ten miles per hour, at any point in the yards where he was injured, so if you believe from the evidence in this case that the plaintiff was running his engine at a speed exceeding ten miles

per hour, at the time he discovered or was told that there was an engine ahead of him, then the court tells you as a matter of law that the plaintiff would be guilty of negligence."

That instruction should have been given, for, as we have already pointed out, there is no evidence whatever tending to show an abrogation of the rule mentioned in that instruction, and if the jury found that it had been violated it prevented full recovery. Defendant was entitled to have that issue specifically submitted to the jury, and it was error to refuse this instruction.

(6) Instruction No. B, which reads as follows, should also have been given: "(B) You are instructed that, although you may believe that the yardmaster, Brown, gave the plaintiff a "highball" and although you may believe this indicated that the track ahead was clear and indicated plaintiff could proceed, this did not give the plaintiff any authority to proceed with his train at any greater speed than the rules of the defendant permitted, if you find these rules were in force and known to the plaintiff." That instruction submitted to the jury the whole contention of plaintiff with respect to both rules, that fixing the maximum limit and the one requiring the engine to be kept under control. It told the jury that if those rules were in force and known to the plaintiff, a violation thereof by him would constitute negligence. It was a question for the jury to determine from the evidence adduced whether or not the rules were in force or whether they had been to any extent abrogated.

Another instruction, the refusal of which is assigned as error, reads as follows: "(F) You are instructed that since the rules of the company introduced in evidence, were made for the protection of the plaintiff and were known to him, any usage or practice either on the part of the plaintiff or other employees, or on the part of the railway company tending to mislead the plaintiff in violation of same, if you should find that he was misled, would not relieve the plaintiff of the consequences of his

negligence in violation of the rules if you find he was negligent and would not excuse him therefor, and unless you believe from the testimony that the rules were abrogated, the plaintiff was negligent if he violated the same."

That instruction seems to have been especially framed to meet the rule of law laid down by this court in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Steel,* 119 Ark. 349, where it was said: "If the rule was abrogated by proof of a custom of its long continued violation with the knowledge and acquiescence of the master, the violation of it by the deceased would not prevent a recovery for the injury, but since the rule was made for his protection and known to him, any usage and practice of the defendant tending to mislead him in the violation of it, short of its abrogation, would not relieve from the consequences of his negligence in violating it nor excuse him therefor." While the instruction follows closely the language of this court, we do not think that it was appropriate as an instruction to the jury for the reason that it was calculated to mislead. In laying down that rule of law, we were discussing the effect of the testimony and it was not intended as a statement of the law for use in an instruction to a jury. Of course, defendant was entitled to a submission of the question whether or not the rule was abrogated, but this instruction left no guide for the jury in determining to what extent violations of the rule would constitute an abrogation, and, therefore, we are of the opinion that this instruction was properly refused, not because it does not state correctly the law on the subject but that it is not such a statement as was calculated to place the issues clearly before the jury.

There are other assignments of error argued with respect to giving and refusing instructions, but it is believed that the foregoing discussion is sufficient to indicate our views of the law applicable to the case and will be sufficient guidance for the trial court when the case is again presented for trial.

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

HART, J., concurs on the sole ground that the trial court erred in refusing to give instruction "A."

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. CONARTY.

Opinion delivered June 12, 1916.

1. APPEAL AND ERROR—APPEAL TO UNITED STATES SUPREME COURT—REVERSAL OF JUDGMENT OF STATE COURT—PRACTICE.—It is not the practice of the Supreme Court of the United States, upon reversing the judgment of a State court, to dismiss the case or remand it with directions, except where the decision is for want of jurisdiction; whatever was before that court and disposed of is considered as finally settled, but the inferior court, upon the case being remanded, is justified in considering and deciding any question left open by the mandate and opinion, and may consult the opinion to ascertain exactly what was decided and settled.
2. APPEAL AND ERROR—REVERSAL BY SUPREME COURT OF THE UNITED STATES—FINALITY OF THE JUDGMENT.—Plaintiff brought an action against defendant railway company for damages caused by the wrongful death of her husband. The defendant appealed to the United States Supreme Court from a judgment of this court, affirming a judgment in favor of the plaintiff, and the latter court reversed the judgment of this court; *held*, the cause of action alleged by plaintiff was finally determined by the judgment of the Supreme Court of the United States, and that the same issues could not again be tried upon a remand of the cause.
3. APPEAL AND ERROR—APPEAL TO UNITED STATES SUPREME COURT—REVERSAL OF JUDGMENT—PRACTICE.—Where, on appeal to the Supreme Court of the United States from a judgment of this court, and the cause of action alleged was fully determined by the former court, upon receipt of the mandate reversing its judgment, this court might have dismissed the case or remanded it with such directions to the lower court, but when it does not do so, and upon a trial anew, no amendment is made to the pleadings, it is the duty of the trial court to direct a verdict in the defendant's favor.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; reversed.

STATEMENT BY THE COURT.

The judgment in this cause on the first appeal was affirmed. 106 Ark. 421. A writ of error was granted and the Supreme Court of the United States reversed the judgment. 238 U. S. 243. It was there said:

"The right of recovery being based upon the Employer's Liability Act" * * * "The only negligence charged in the complaint was a failure to have the car equipped at the end struck by the engine, with an automatic coupler and drawbar of standard height as required by the Safety Appliance Act" * * * "It is not claimed, nor could it be under the evidence, that the collision was approximately chargeable to a violation of those provisions, but only that had they been complied with, it would not have resulted in injury to the deceased" * * * "Nothing in either provision gives any warrant for saying that they are intended to provide a place for safety between colliding cars. On the contrary they affirmatively show that the principal purpose in their enactment was to obviate the necessity for men going between the ends of cars."

Our court, in 106 Ark., *supra,* said: "It is alleged that the car in question was being used in interstate commerce, and that decedent was employed by defendant, and was engaged at the time of his injury and death in handling cars in interstate commerce. The action was instituted under the Act of Congress known as the Employer's Liability Act, as amended by Act April 5, 1910, and is based upon the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, 3174)." * * * "The argument is that the injury resulted from the collision, which was in no way attributable to the absence of a properly equipped coupler * * * The evidence establishes the fact that the injury to deceased would not have occurred but for the absence of proper equipment. That was the direct cause of the injury, notwithstanding the collision."

Upon the return of the mandate the case was sent back by this court to the trial court, where, upon a new trial, the administratrix again recovered judgment against appellant railway company, from which this appeal is prosecuted.

When the case was called for trial the attorneys for plaintiff announced that they might want to amend their complaint, but did not state in what respect, and the pleadings were in no wise changed nor asked to be amended, and the defendant railway company objected to the introduction of any testimony on behalf of the plaintiff for the reason that no cause of action was stated in the complaint. The objection was overruled, however, and exceptions saved and the trial proceeded with.

The appellant objected to the introduction of all testimony adduced, tending to show negligence on its part not alleged as a ground for recovery in the complaint, and excepted to the court's adverse rulings thereon.

At the conclusion of the introduction of the testimony, appellant requested an instruction directing a verdict in its favor, which the court refused to give. It likewise objected to all the instructions of the court submitting any issues of negligence attempted to be raised by the testimony objected to, to the jury and from the judgment on the verdict prosecutes this appeal.

W. F. Evans and *B. R. Davidson,* for appellant.

1. The only issues in this case were finally concluded and determined against appellee's right to recover by the U. S. Supreme Court on error. The decision of this court in 106 Ark. 421 was reversed but the cause was not remanded. This is equivalent to a dismissal. 238 U. S. 243.

2. The complaint was not amended, although leave was asked to show a new cause of action and hence none of the testimony offered was admissible. A verdict should have been directed as all issues on the original complaint were finally settled by the decision of the Supreme Court of the United States. 83 Ark. 545; 149 Fed.

377; 160 U. S. 247; 166 *Id.* 263; 148 *Id.* 228; 109 Fed. 365; 17 Wall. 253, 260, 282; 238 U. S. 660, 491, etc. The judgment should be reversed and the cause dismissed.

Sam R. Chew and *Hill, Fitzhugh & Brizzolara,* for appellee.

1. The complaint was sufficient either under the Federal or State law. 225 U. S. 477; 233 *Id.* 473; 234 *Id.* 86; 79 Ark. 490; 96 *Id.* 568.

2. The proof sustained the allegations of the complaint. This case was not settled by the decision in 238 U. S. 243. The court merely reversed the decision of this court, and on filing the mandate this court remanded for a new trial. There was no error in the court's instructions, and none in the admission of testimony.

KIRBY, J., (after stating the facts). Appellant contends that the issues in this case were finally concluded and determined against the right of appellee to recover by the decision of the United States Supreme Court, and that the trial court erred in not so holding, and in permitting it to go to trial upon the same pleadings, and in refusing to direct a verdict in its favor at the conclusion of the introduction of testimony, and its contention must be sustained.

On the first appeal this court held that the cause of action was based upon the Employer's Liability Act, and the negligence alleged, a failure to comply with the Safety Appliance Act, as specified, that notwithstanding the argument that the injury resulted from the collision which was in no way attributable to the absence of a properly equipped coupler, the evidence established the fact that the injury to the deceased would not have occurred, but for the absence of proper equipment, which was the direct cause of the injury, notwithstanding the collision.

The Supreme Court of the United States, in its opinion, likewise said the only negligence charged in the complaint was a failure to have the car properly equipped under the Safety Appliance Act as specified; that it was

not claimed, nor could it be under the evidence, that the collision was proximately chargeable to a violation of those provisions, but only, that had they been complied with it would not have resulted in injury to deceased. The complaint not having been amended to allege any other negligence as a cause of action, and all the testimony tending to show any other negligent act on the part of the railroad company than that alleged in the complaint, and for which it might be liable, having been duly objected to, the complaint can not be considered amended to conform to the proof or to the issue attempted to be raised by such testimony if it was otherwise sufficient for the purpose and the court erred in refusing to direct a verdict in appellant's favor.

(1) It is not the practice of the Supreme Court of the United States, upon reversing the judgment of a State court, to dismiss the case or remand it with directions, except where the decision is for want of jurisdiction. *Atl. Coast Line Rd.* v. *Burnette,* 239 U. S. 199; *S. W. Tel. & Tel. Co.* v. *Danaher,* 238 U. S. 482; *American Seeding Machine Co.* v. *Kentucky,* 236 U. S. 660; *Sea Board Air Line* v. *Duvall,* 225 U. S. 477.

Whatever was before the court and disposed of is considered as finally settled, but the inferior court, upon the case being remanded is justified in considering and deciding any question left open by the mandate and opinion and may consult the opinion to ascertain exactly what was decided and settled. *Ex Parte Union Steamboat Co.,* 178 U. S. 317. In *Barney* v. *Winona & St. Peter Ry. Co.,* 117 U. S. 228, the court said: "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision." See also *U. S.* v. *Ill. Cent. R. R. Co.,* 170 Fed. 542; *Clark* v. *Hershy,* 52 Ark. 473.

(2) Appellee insists that the complaint fairly construed, states two causes of action, one under the Employer's Liability Act, for an injury negligently caused by the collision of the engine with the standing defective coal car, the other for an injury caused by the negligence of the railway company in failing to properly equip said coal car with a coupler in compliance with the Safety Appliance Act, and that she is only concluded by said court's decision upon the latter cause of action. We do not agree with the contention that two causes of action are alleged. The complaint states, "And plaintiff says that while her said intestate, W. G. Conarty, was so upon said footboard and in the discharge of his duty towards the defendant, and while said locomotive was being moved for the purpose of so distributing the said cars * * * he was by and through the carelessness, negligence, wrongful and unlawful management and conduct of the defendant, as hereinafter set forth and complained of, caused to be caught between the front end of said locomotive and an end of a certain coal car * * *. Then after allegations descriptive of the car, the nature and character of the injury to deceased and damages resulting, the following, "Plaintiff says that said negligence, carelessness, wrongful management and unlawful conduct of the defendant consisted in this, to-wit: That it negligently, wrongfully, carelessly and in violation of the laws and acts of the Congress of the United States," with the specific statement of the cause and manner of the injury from the defective coal car not equipped with a coupler according to the requirements of the safety appliance act, now conceded to be the negligence alleged as the basis of the cause of action finally determined by the Federal Supreme Court, followed by the allegation, "And plaintiff says that by reason of said negligence, carelessness, wrongful management and unlawful conduct of said defendant, as aforesaid, and while said coal car was so upon said main line track, the said locomotive upon which her said intestate was then and

there so upon, as aforesaid, ran into and collided with the said defective end of said coal car, thereby causing her said intestate to be caught between the said end of said coal car and said locomotive and injured as aforesaid."

There was no question of pleadings before the court for decision on the former appeal but only whether the injury resulting from acts complained of in failing to equip the defective coal car with the coupler in accordance with the requirements of the safety appliance act constituted a cause of action, and the statements in the opinions that the only negligence charged was a failure to have the car so equipped was not an adjudication, but only a recognition, of that fact. There is no allegation in the complaint from which it can reasonably be inferred that the collision was caused by or resulted from the negligence of the railroad company, and it was error to admit testimony in proof thereof over appellant's objection. *Western Union Tel Co.* v. *Webb,* 94 Ark. 350; *C., O. & G. Ry. Co.* v. *State,* 75 Ark. 369; *Patrick* v. *Whitely,* 75 Ark. 465.

(3) The cause of action alleged having been finally determined by the United States Supreme Court, this court could doubtless have, upon the receipt of the mandate reversing its judgment, dismissed the case or remanded it with such direction to the lower court, but not having done so and no amendment to the pleadings having been made, the trial court erred in not directing a verdict in appellant's favor. The judgment is accordingly reversed and the cause dismissed.

NEELY v. WILMORE.

Opinion delivered June 19, 1916.

COUNTERCLAIM—BREACH OF TRUST BY AGENT—IMPROPER PAYMENT OF FUNDS OF PRINCIPAL AS BASIS FOR COUNTERCLAIM.—In an action by an agent against his principal for wages due, the principal may set

up by way of counterclaim, a loss sustained by him by reason of the improper payment by the plaintiff of funds of the principal to another employee.

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

S. M. Neely, of Memphis, and *Bevens & Mundt,* for appellants.

1. The court erred in excluding from the jury all evidence of plaintiff's fraud, unfaithfulness and dishonesty in discharging the duties connected with the agency; and in refusing to instruct the jury that if proven it was a defense to the suit. Where an agent is guilty of fraud, dishonesty or unfaithfulness in the transaction of the agency, such conduct is a bar to the recovery of wages or compensation by him. 96 Ark. 451.

2. The court erred in excluding from the jury all evidence in support of defendant's counter-claim and in refusing instruction thereon. Kirby's Digest, § 6099; 64 Ark. 221; 69 S. W. 821; 12 L. R. A. 321; 101 N. Y. 631; 34 Cyc. 682; 34 *Id.* 706; 58 Ark. 238; 76 *Id.* 18; 25 S. E. 783, etc.

3. Hence it was error to direct a verdict.

Fink & Dinning and *Andrews & Burke,* for appellee.

1. Plaintiff did not employ Harrison, it was no part of his duty to pay him nor to keep the books, nor Harrison's account; he was a relative of defendants and their employee before plaintiff took charge. He did not know what his salary was, nor what his contract was. Hence the drafts and all testimony as to wrongful acts of Harrison were properly excluded. He was an employee of defendants and plaintiff was not responsible for his acts. Even if the court assigned a wrong reason for its ruling, that is no reason for reversal if the ruling can be sustained on other grounds. 3 Cyc. 222.

2. The drafts are not brought into the record nor made part of the record. Nor is the refusal to allow the written testimony of Dr. Leonhart, nor the testimony

itself, nor anything to show prejudice. 39 L. R. A. 833; 45 Ark. 485; 46 *Id.* 482; 140 S. W. 7; 142 *Id.* 1151; 111 Ark. 562.

3. The damage, if any, arising from the issuance of the drafts, did not arise out of the contract of employment nor connected with the subject of the action. 87 Ark. 168; 106 *Id.* 241, 247; Kirby's Digest, § § 6099, 6101; 120 Ark. 472; 57 Ark. 237, 241. No prejudicial error was committed.

SMITH, J. Appellee sued for a sum of money alleged to be due him as wages as plantation manager on a farm owned by appellants for the years 1912, 1913 and 1914 under an express contract. Appellants filed a counter-claim in which they alleged that appellee had wrongfully and without authority overpaid one R. E. Harrison for services as bookkeeper. The proof was that appellants themselves employed Harrison, who was their kinsman, and fixed his salary, and appellee testified that he did not know the amount of the salary. It was shown, however, that the salary was paid with drafts signed by appellee payable to the order of Harrison and drawn on Sternberg, Mallory & Company, of Memphis, Tennessee, and cashed at a bank at Friars Point, Mississippi, pursuant to an arrangement for appellee to thus procure money for plantation uses. Appellants offered evidence in support of their counter-claim, whereupon appellee's counsel objected and stated to the court: "Your Honor, they allege that Mr. Wilmore has been negligent in his duties as manager, and they are setting up a counter-claim in tort, as a counter-claim in a suit on a contract, and it is my idea that that can not be done. They charge that he was guilty of negligence in the management of the affairs, and that is a tort, and we will, therefore, resist any testimony going to the jury showing or tending to show the character of any claims arising out of a tort committed by Mr. Wilmore. This is a suit on contract and the counter-claim if considered in this case should arise out of the contract sued on in this case. and

they come into court and bring suit on a tort, an action for a tort, and attempt to set same up as a counter-claim to this action on contract."

The court adopted this view and excluded the evidence, whereupon the appellants offered to prove that "appellee drew drafts signed by himself, payable to the order of R. E. Harrison, on the Sternberg, Mallory & Company, at various times and on various dates as alleged in the answer in this case, said drafts showing on their face that they were for the purpose of paying the salary of R. E. Harrison, and that by reason of said over-drafts drawn by this plaintiff R. E. Harrison overdrew his salary account in the sum of $1,938.00, and offer the drafts in evidence. We also offer to introduce in evidence other drafts of the same description showing the amount of $4,200 paid to Mr. Harrison, for which there was no accounting. We offer this evidence, first, for the purpose of showing that the plaintiff was unfaithful in the discharge of his duties connected with his agency, and, second, for the purpose of showing that by reason of such conduct on the part of the plaintiff the defendant suffered a loss in the figures just named, and this loss grew out of the same transaction upon which this suit is brought."

Exceptions were duly saved to the action of the court in refusing appellants permission to make this proof. Thereupon, there being no dispute as to the amount of salary due appellee, the court directed a verdict for that amount, and this appeal questions the correctness of that action.

Appellee argues that the action of the court was correct because he testified, and there was no contradiction of his evidence, that he did not know what the amount of salary due Harrison was and he could not, therefore, have known whether his salary account was overdrawn, and the appellants should not have paid, nor permitted to be paid, any drafts which would result in making the account over-drawn.

A verdict having been directed against appellants we must view the evidence in the light most favorable to them, and must therefore, assume that appellee exceeded his authority in this respect. And it can be no answer for appellee to say that he did not know the amount due. Unless he had this information he should not have drawn the drafts.

Appellee argues that inasmuch as the drafts have not been copied into the bill of exceptions the judgment must be affirmed. But we cannot agree with him in this contention. The form of the drafts in immaterial and no question was made on that account. They merely evidenced the extent or amount to which appellee had permitted Harrison to overdraw his account, and the court excluded this evidence on the ground that it was not a proper subject of a counter-claim, and the correctness of this view presents the controlling question in the case.

In the case of *Doss* v. *Long Prairie Levee District,* 96 Ark. 451, a suit was brought by the assignee of a certificate of indebtedness issued by the levee district, which answered and admitted the execution of the certificate but alleged that its agent to whom it was issued had been guilty of fraud in the transaction of his agency. It was there said:

"The rule is well settled, both by the text-writers and the adjudicated cases, that where the agent is guilty of fraud, dishonesty or unfaithfulness in the transaction of his agency, such conduct is a bar to the recovery by him of wages or compensation. (Citing cases)."

In that case, as in this, the point was made that the defendant sought to set off unliquidated damages flowing from a tort by way of counter-claim, but, while it was not expressly decided, the opinion shows the view of the court to have been that such damages were the subject of a counter-claim.

Our statute on the subject of counter-claim is as follows: Kirby's Digest Section 6099. "The counter-claim mentioned in this chapter must be a cause of action in

favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action."

This section has frequently been before the court for construction, and one of the leading cases on the subject is that of *Dale* v. *Hall,* 64 Ark. 221. The syllabus in that case is as follows:

"Counter-claim—Connection with Subject of Action. —Where a tenant in common, having control of the renting of the premises held in common, is sued by his co-tenant for his share of the rents, he may counter-claim against the co-tenant damages sustained by him because the latter wrongfully induced lessees of such premises to leave before their leases expired, and thereby caused him to lose his share of the rents which would have accrued but for such interference." As illustrative of the causes of action which may be set up in a counter-claim see also, *Ramsey* v. *Capshaw,* 71 Ark. 408; *Daniel* v. *Gordy,* 84 Ark. 218; *Stevens Co.* v. *Whalen,* 95 Ark. 488; *Smith* v. *Price,* 102 Ark. 367; *Epstein* v. *Buckeye Cotton Oil Co.,* 106 Ark. 247; *Brunson* v. *Teague,* 123 Ark. 594.

Section 6099 of Kirby's Digest (which was section 5034 of Mansfield's Digest) was construed by the Court of Appeals of Indian Territory in the case of *Patterson* v. *Bradley,* 69 S. W. 821, the syllabus of that case being as follows:

"1. Under Mans. Dig., § 5034 (Ind. T. Ann. St. 1899, § 3239), providing that a counter-claim must be a cause of action in favor of the defendant against the plaintiff arising out of the contract or transaction set forth in the complaint, in an action to recover for threshing defendant's grain, his claim against plaintiff for damages for negligently setting fire to and burning other grain while doing such threshing may be set out in the answer as a counter-claim."

Appellants allege the loss they sustained grew out of appellee's unfaithful discharge of the contract on which he sues, and whether the loss thus sustained is considered as a tort or as a breach of the reciprocal and implied duties under the contract the cause of action arises out of transactions had under the contract sued on and are, therefore, the proper subject of counter-claim.

It follows, therefore, that the court erroneously excluded this evidence and, consequently, erred in directing a verdict, and the judgment of the court below must, therefore, be reversed.

LITTLE v. ARKANSAS TRUST & BANKING COMPANY.

Opinion delivered June 19, 1916.

1. ADMINISTRATION—WILL—APPOINTMENT OF TRUSTEES—PROBATE—STATUTE OF NONCLAIM.—Under deceased's will, certain parties were designated as trustees with power to discharge debts and distribute the estate. Letters of administration, however, were issued and a notice to creditors was published; *held*, thereupon, the statute of non-claim was set in motion, and continued to run against claims not probated as required by law, and the running of the statute would not be tolled by any proceedings before the trustees, for settlement under the powers granted them.
2. ADMINISTRATION—PRESENTATION OF CLAIM TO ADMINISTRATRIX.—*Held*, a claim was presented to the administratrix of the deceased debtor's estate within one year of the date of her letters, and that the claim was not barred by the statute of nonclaim.

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

Webber & Webber, for appellant.

1. The trustees had no standing under the law to administer the estate. Kirby's Digest, § § 1-12, 25, 54; 39 Cyc. 249, *et seq.*

2. If the trustees had any authority with respect to claims against the estate, they never exercised it. 39 Cyc. 307.

3. Whatever authority the trustees had was superseded by the appointment of the administratrix. 18 Cyc. 58; 89 Ark. 553; Act No. 438, Acts 1907.

4. Knowledge of the administratrix of the bank's claim did not dispense with the necessity of exhibiting the claim properly authenticated. 97 Ark. 546.

5. Part payment of the bank's claim by the trustees did not waive the formalities required by law, 65 Ark. 1.

6. The claim was barred by the statute of non-claim. Kirby's Digest, § 113; Acts 1907, Act 438; 73 Ark. 45; 80 *Id.* 107, 524; 84 *Id.* 238; 92 *Id.* 522; 94 *Id.* 60; 97 *Id.* 492; 97 *Id.* 546; 112 *Id.* 615.

7. The bank is estopped to question the appointment of the administratrix. The attack was collateral. 46 Ark. 453, 466-7; 86 *Id.* 186; 84 *Id.* 32; 83 *Id.* 417; 64 *Id.* 213; 46 *Id.* 373; 90 *Id.* 439; 16 Cyc. 801.

A. D. Dulaney, for appellee.

1. The findings of the court are amply supported by the evidence. The claim was duly authenticated, presented to and allowed by the trustees. This arrested the statute of non-claim. 21 Ark. 474; 29 *Id.* 243; 18 Cyc. 474; 124 Ala. 529; 4 *Id.* 493; 24 Cal. 490; 29 Fla. 285; 8 Tex. 235; 64 Miss. 340; 64 Ala. 438; 45 Miss. 424; Hill on Trustees, 516-541; 66 Ark. 331; 18 Cyc. 454.

2. The will created an express trust with absolute power over the entire estate and to adjust and allow any and all claims. 145 Wisc. 401; 136 N. W. 956; 137 N. W. 778; 133 Wis. 445; 113 N. W. 644; 118 Wis. 409; 62 L. R. A. 986; Am. Cas. 1914, C. 376. The appointment of administratrix did not supersede their powers.

3. The appointment of Mrs. Byrne was a mere formality. She had no legal power or authority—really her appointment was void. Kirby's Digest, § § 13, 6298; 41 Ark. 165; 8 Cranch. 9; 14 Peters, 33; 18 Cyc. 328.

4. Plea of limitation is not favored. 22 Ark. 290; 18 Cyc. 424; 108 Ark. 80.

SMITH., J. Judge L. A. Byrne died on March 4, 1914, leaving a will in which he designated W. H. Arnold, W. R. Grim and the Arkansas Trust & Banking Company as Trustees with authority and instructions to discharge his debts and distribute his estate to the various devisees and legatees therein named. The will was admitted to probate a few days after his death, but no letters testamentary issued at the time. The will devised the property to the trustees named and invested them with plenary power to adjust and audit claims against the estate and to make settlement of them and to finally distribute the residuum.

The language of the will was such that the court was fully warranted in a finding of fact which was made that the will created an express trust and authorized the trustees to allow and pay any claim which they regarded as just against the said estate.

After the will had been duly probated and the trustees had entered upon the discharge of their duties it was found that although the estate was valuable, the indebtedness was large, and that there were forty or fifty persons who had claims against the estate. The trustees made up a statement of the assets and liabilities, and then decided to have the widow take out letters of administration on the estate for the purpose of examining and allowing claims against the estate. The petition for the letters of administration recited the fact that the trustees had agreed to accept the trust and would have the control and management of the estate, but it recited that the petitioner would diligently inquire into and examine into the merits of all claims presented and would allow or disallow them according to their respective merits and would follow the requirements of the law in relation thereto if letters were issued. The petitioner prayed that inasmuch as she would have no duty or responsibility in connection with the estate except to pass upon the claims that she be not required to give bond, and it was further recited that the creditors had assented to

this arrangement. Pursuant to this petition letters of administration issued to Mrs. Byrne on April 21, 1914, and she caused a creditor's notice to be published on May 4, 1914.

A meeting of the trustees was held before the issuance of letters, at which meeting a Mr. Johnson, who was the president of the Trust Company, was present. Under the will he was named a trustee, as president of the Trust Company. Judge Byrne was a large stockholder in the Trust Company at the time of his death, and this company was his largest creditor, and the principal part of the indebtedness was represented by his notes payable to its order.

At one of the first meetings of the trustees Mr. Johnson produced and exhibited to his associates the originals of these notes for allowance, when Mr. Arnold stated to him, "You will have to prove up your claim." Thereafter Mr. Johnson caused the secretary and treasurer of the Trust Company to make out and authenticate a statement of the claim. This was delivered to Mr. Johnson and by him personally mailed to Mr. Arnold. Mr. Johnson testified that lists of these claims were made out and the Trust Company's claim was included in the list and was on the desk with the others, and that he discussed the claim with Mrs. Byrne in 1914, and its justness was not questioned. He further testified that in July or August of that year Mrs. Byrne applied to his bank for a loan and explained to him that she had been unable to get any money out of the estate; but when he explained that he already had a large claim against the estate upon which nothing had been paid she said, "That is true, but your claim has been allowed; you will get your money because the claim has been allowed." Mrs. Byrne denied that this conversation occurred.

A Mr. Barney testified that he was employed in Mr. Arnold's office and that a list of the claims was prepared and that this list was checked from the claims in the office, and the list so checked included appellee's claim,

and that on several occasions Mrs. Byrne had gone over the claims presented to Mr. Arnold in his presence, and this witness also testified that when it was discovered that the appellee's claim did not appear on the records in the probate clerk's office he called Mrs. Byrne over the telephone and asked her if the claim had not been recognized by her, and was told that it had been.

The trustees finally found that it would be impossible to execute the mandates of the will, whereupon they prepared an elaborate report of their proceedings and filed it with the clerk of the probate court on the 15th day of September, 1914. This report contained the list of all claims which had been approved by them, and included that of appellee. The trustees resigned on the day their report was filed, and Mrs. Byrne resigned as administratrix at the same time, whereupon appellant Little was appointed administrator, and has since continued to act in that capacity. Thereafter letters were written by Little to appellee on March 23 and April 9, 1915, in which appellee's demand was recognized as a valid one.

There is an agreed statement in the record to the effect that none of the claims filed and allowed in the probate court bear any endorsement showing that they were exhibited to and allowed by the trustees, but that all claims filed in the court prior to the resignation of said trustees bore the following endorsement: "Presented, examined and allowed by Lulie H. Byrne, as administratrix of the estate."

Mrs. Byrne denied that the claim had been presented to or allowed by her. She admitted, however, that she had conferred with Mr. Arnold about the claims and had gone over them with him at his office, and she admitted that she saw the claim of appellee on the list.

Mr. Arnold testified that he and the testator had long been friends, and that Mr. Byrne had spoken to him about the will before his death. Mr. Arnold further testified that although he was not employed as Mrs. Byrne's attorney, he had advised with her about the estate, and

the evidence makes it plain that while he was not acting as attorney for the administratrix in the sense that he would have had the right to charge a fee for his services, it also appears that he was acting in this capacity as a friend in connection with his duties as trustee. He testified that Mrs. Byrne, as administratrix, passed upon and allowed or disallowed all of the claims which were filed in the probate court, and while he does not testify specifically that she allowed appellee's claim, he does testify that this claim appeared on all the lists of claims which were ever prepared, and that he thought this claim had been filed with the probate court and that he would have declared it to be a positive fact that it had been so filed but for the fact that it was not on the clerk's docket with the other claims. All of the claims, however, were docketed except that of appellee and the claim of a Doctor Webster.

The court made a number of findings of fact and declarations of law, all of which were favorable to appellee's contention, and these various findings are discussed in the briefs, and counsel for appellee insists the judgment of the court below should be affirmed upon each of these findings. Among other findings made by the court, is one that the claim was not barred by the statute of nonclaim, and as we think the evidence supports this finding, we do not discuss the other questions raised in the briefs.

(1) It is true that creditors might have proceeded under the will for the satisfaction of their debts, but they were not required to do so. They were entitled, upon a proper showing, to have the estate administered upon, whereby their demands might be probated in the manner required by law. Here it is admitted letters of administration issued and a notice to creditors was published. Thereupon the statute of nonclaim was set in motion, and having been set in motion it continued to run against claims not probated as required by law, and the running of the statute would not be tolled by any proceedings before the trustees for settlement under the powers granted

them. Does the evidence support the findings that appellee's claim was not thereafter barred by this statute?

(2) Section 113 of Kirby's Digest provides the manner in which a claim may be exhibited to an administrator. It reads as follows:

"Sec. 113. Any person may exhibit his claim against any estate as follows: If the demand be founded on a judgment, note or written contract, by delivering to the executor or administrator a copy of such instrument, with the assignment and credits thereon, if any, exhibiting the original, and if the demand be founded on an account, by delivering a copy thereof, setting forth each item distinctly and the credits thereon, if any."

Section 114 provides for the verification of the demand.

And the provisions of these sections have been held to be mandatory.

A late case in which this subject was discussed is that of *Davenport* v. *Davenport,* 110 Ark. 222, and while it was again said in that case that the provisions of the statute in regard to the probate of claims against an estate were mandatory, yet it was said that a substantial compliance with their requirements was sufficient.

Here the proof shows without question that this demand was authenticated and was sent by Mr. Johnson to Mr. Arnold, and was received by Mr. Arnold long before the statute of nonclaim had run.

But does the evidence also show its presentation to the administratrix? We think the evidence warrants the finding that it was. It would put form above substance to hold otherwise. The claim was in the hands of Mr. Arnold, who was not only a trustee of the estate, but was, in effect, the attorney for the administratrix, and while she may never have had manual possession of this demand, it was there in her presence. It was among the other demands which had been exhibited to her and which bore an endorsement complying fully with the requirements of the statute. The demand was listed along with

other demands, and these lists were checked with the demands themselves, and Mrs. Byrne admits that she saw these lists. And we are constrained to hold that this proof is sufficient to show the exhibition of the claim to her.

We are not called upon to decide that the provisions of section 113 of Kirby's Digest may be complied with by the presentation of a claim to the attorney for an administrator. Such service may not be sufficient. But we think this proof shows a delivery in fact to her.

It may be said that the proof does not show that the claim was filed with the clerk. But it is not essential to support the finding of the court below that it should be so found. The statute does not require the filing of the claim with the clerk of the probate court within a year from the date of the publication of the notice to creditors. It is sufficient if the presentation is made to the administrator within one year of the date of his letters, and that having been done in this case the judgment of the court below will be affirmed.

SMITH, J., (on rehearing). It is urged by appellant in her motion for a rehearing that the opinion in this case is predicated upon a state of facts not found by the court below. It is pointed out that at appellant's request the court found the fact to be that the claim of appellee was never exhibited to her as administratrix nor allowed by her and was not filed in the probate court of Miller County at any time up to the filing of the petition of appellee asking that its claim be reinstated and allowed.

As has been said, the court made numerous findings and from a study of them we are constrained to believe that the court found that there had been no presentation to the administratrix because in his view of the law the facts set out did not constitute a presentation to the administratrix. It is not contended that the proof shows that the claim was filed with the clerk of the probate court, nor that it was allowed by the administratrix. It is only insisted that there was a presentation to her within

the time allowed by law. The statute of nonclaim was arrested upon its presentation to her, and we think the recitals in the court's findings of fact and declarations of law indicate that the court found a state of facts which constituted a presentation to the administratrix. The court expressly refused to make the following finding:

"5. That the said Arkansas Trust & Banking Company failed to exhibit its claim in the manner prescribed by law to either Mrs. Lulie H. Byrne, as administratrix, or A. B. Little, as administrator, within one year from the date that letters of administration issued on said estate, and for that reason its claim is barred by the statute of nonclaim."

The court made the following finding:

"5. That said claim, so presented (to Grimm, Arnold and the president of the trust company, as executors), has been lost or mislaid and should be restored, filed and allowed; that the amount thereof on September 14, 1915, the date of the filing of the petition in the probate court was $5,487.03, which should be allowed, with interest on the same at the rate of 10 per cent. per annum from that date and marshalled in the fourth class, and that a copy of the judgment herein should be certified to the probate court of Miller County, Arkansas, in accordance with law."

The court further found that these executors had advised and procured the appointment of Mrs. Byrne as administratrix of said estate for the purpose of examining and allowing claims against the estate. There is no intimation of any conflict of authority, or of decision, upon any claim between the executors and the administratrix. They co-operated in every respect. This claim was admittedly in the hands of the executors and was checked off as being in the allowed claims, of which fact the administratrix was advised, and although the court found the claim had not been manually presented to her, yet the facts set out constitute a presentation, and the motion for a rehearing will be overruled.

SPECIAL SCHOOL DISTRICT No. 33 *v.* HOWARD.

Opinion delivered June 19, 1916.

1. SCHOOL DISTRICTS—CHANGE IN BOUNDARIES—LAW APPLICABLE TO GREENE COUNTY.—Act 321, page 947, Acts of 1909, relating to the organization of special school districts, is repealed by Act 35, page 108, Acts of 1915, in so far as it relates to Greene County.
2. SCHOOL DISTRICTS—DISMEMBERMENT.—Under Act 35, page 108, Acts 1915, county courts are given authority to dismember school districts organized under Act 321, Acts of 1909.
3. SCHOOL DISTRICTS—FORMATION AND DISSOLUTION—POWER OF LEGISLATURE.—The power of the Legislature in enacting laws for the formation or dissolution of school districts, is plenary, provided contractual obligations are not impaired.

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

R. E. L. Johnson, for appellant.

The only power granted county courts was to change or alter the boundaries of *special* school districts, not *common* school districts. County courts have no power to change the boundaries of *common* school districts. The act is very ambiguous; its title and text are inconsistent and conflicting, and its different sections seem to conflict. It is a *special* act applicable to Greene County only. But the intention is clear and needs no construction. 76 Ark. 303; 65 *Id.* 521, 532; Black on Int. of Laws, p. 37. It should be strictly construed. 36 Cyc. 1190; 102 Ark. 401. The *intention* of the Legislature is plain and courts have nothing to do with the motives of the Legislature or the policy of the law. 36 Cyc. 1137; 66 Ark. 466; 38 Cyc. 1115; 177 Fed. 529.

M. P. Huddleston, Robert E. Fuhr and *J. M. Futrell,* for appellees.

The grant of power is plain and unambiguous. Where a specific power is granted all necessary means to successfully carry out such power are implied. Where the meaning is clear and definite, no question of construction arises. Power was given to change, etc., the boundaries of *all* school districts, whether special or common. 11

Ark. 44; 46 *Id.* 159; 46 *Id.* 37; 56 *Id.* 110; 65 *Id.* 521; 61 *Id.* 241. The *intention* of the Legislature is clearly expressed. 24 Ark. 487; 29 *Id.* 354; 63 *Id.* 576; 69 *Id.* 376; 76 *Id.* 303; Black on Int. Stat., p. 35. The means are necessarily implied. Black, Int. Stat., p. 62; Endlich, Int. Stat., § 418; 57 Barb. 593; Black, Stat. Const., p. 66; 54 Ark. 172.

SMITH, J. Appellees filed a petition in the county court of Greene County, in which they prayed the court to make an order changing the boundary lines of special School District No. 33 of that county by carving out certain portions thereof and adding the same to Common School Districts 12 and 39 of said county, said common school districts being adjoining districts thereto.

(1) The question in the case is whether the county court of that county has the authority to change the boundary lines of a special school district organized under Act No. 321 of the Acts of 1909, page 947, and the decision of the case is controlled by the construction given Act No. 35 of the Acts of 1915, page 108. The title of this act would indicate that it was intended to repeal Act No. 321 of the Acts of 1909; but a perusal of the entire act discloses the fact that the last enacted statute is a special act which applies only to Greene County. While the title of an act may be looked to to ascertain its meaning, it is still no part of the act and is not controlling in its construction. *Laprairie* v. *City of Hot Springs,* 124 Ark. 346.

(2) This special act is not entirely free from ambiguity, but a study of its provisions leads to two conclusions. The first of these conclusions is that Act 321 of the Acts of 1909 is repealed in so far as it applies to Greene County. Section 4 of this special act provides that sections 1, 2, 3 and 4 of Act 321 be repealed in so far as it applies to Greene County; but there are only four sections of that act, and its language should be read as if it said the entire act was repealed in so far as it related to Greene County. The second conclusion is that the Legislature intended to give the county court the author-

ity to dismember districts which had been organized under the prior act. Section 3 of this special act also provides that such order of dissolution shall not conflict with vested rights which have accrued. But that restriction does not diminish the power there conferred. This limitation would exist even in the absence of express legislative recognition.

(3) We have several times said that the power of the Legislature in enacting laws for the formation or dissolution of school districts was plenary, provided contractual obligations were not impaired.

The motion to dismiss and the demurrer to the petition, both of which question the validity of the special act, were properly overruled, and the judgment of the court is, therefore, affirmed.

WILSON v. STATE.

Opinion delivered June 19, 1916.

1. LIQUOR—PENALTIES FOR SALE—LIABILITY OF PURCHASER AS AN ACCOMPLICE.—The penalties of Act 30, page 98, Acts of 1915, are denounced against one who sells, and not against one who buys liquor, and one who assists the purchaser in procuring the liquor is not an accomplice of the seller.
2. LIQUOR—STATE-WIDE PROHIBITION STATUTE—FIXED PENALTY.—Act 30, page 98, Acts of 1915, prohibiting the sale of intoxicating liquor, is not unconstitutional because it provides a fixed punishment for a violation thereof, and does not prescribe a maximum and minimum punishment.
3. CONSTITUTIONAL LAW—STATE-WIDE PROHIBITION STATUTE—SUSPENSION OF SENTENCE UPON CONVICTION.—Act 30, page 98, Acts of 1915, is not void as abridging the powers of the judiciary in prohibiting the suspension of sentence upon conviction. There is no constitutional inhibition against this legislation.

Appeal from Lafayette Circuit Court; *Geo. R. Haynie,* Judge; affirmed.

D. L. King, for appellant.

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

1. Witness Morris was not an accomplice. The instruction on the question of accomplice is correct. 64 Ark. 253.

2. Our prohibition law is constitutional. 156 U. S. 1; 226 *Id.* 192; 152 *Id.* 133; 211 *Id.* 31; 232 *Id.* 138; 187 *Id.* 607; 225 *Id.* 623; 226 *Id.* 192; 69 So. 652; 210 Fed. 378; 33 Me. 558; 54 Am. Dec. 639; 205 U. S. 93; 68 So. 993; 179 Ala. 51; 177 *Id.* 149; 8 App. Ct. Rep. 386; 62 So. 365; 67 *Id.* 651; 82 Kan. 756; 109 Pac. 183; 140 *Id.* 49; 109 Ga. 373; 47 L. R. A. 36; 77 Am. St. 384; 83 S. W. 254.

SMITH, J. Appellant was twice indicted and convicted for a violation of Act No. 30 of the Acts of 1915, page 98. This is the act which prohibits the issuance of liquor license and makes the sale of intoxicating liquors a felony, punishable by imprisonment in the State penitentiary for a period of one year. The cases have been briefed and argued together, and as the issues are identical, we dispose of them as a single case.

Appellant questions, first, the sufficiency of the evidence. Upon this question it may be said that two witnesses, one named Arnold and another named Morris, testified in each case to a sale, and their evidence, if true, would leave no doubt of appellant's guilt.

Appellant says, secondly, there is no proof of his guilt except the evidence of Morris, and that the proof shows Morris was an accomplice and that, therefore, the evidence is insufficient for the want of legal corroboration. This could not be true unless the jury totally disregarded the evidence of Arnold, and it was within the province of the jury to pass upon his credibility.

(1) The contention that Morris was an accomplice is based upon his own evidence that he was interested in trying to break up blind tigers and had helped Arnold to buy the liquor for the purpose of prosecuting the person who made the sale, and upon the evidence of Arnold, who testified that when he and Morris met appellant in the room, where the liquor was delivered, Morris said, "Arnold is all right; he won't give you away." Upon this

question the court gave an instruction which directed the jury to find whether Morris was an accomplice, and instructed them, in accordance with the provisions of section 2384 of Kirby's Digest, that a conviction could not be had on this evidence unless they found Morris was corroborated as required by said section.

In the oral argument appellant contends that the purchaser is an accomplice of the seller and that a conviction can not, therefore, be had on his evidence without corroboration. We have held, however, that when the statute is directed against the sale, and not against the purchase, of whiskey, one who assists the purchaser in buying intoxicating liquor, and confines his participation in the transaction exclusively to the buying, and not to the selling, is not guilty of any offense. The penalties of this act are denounced against one who sells, and not against one who buys. See *Dale* v. *State,* 90 Ark. 579; *Fenix* v. *State,* 90 Ark. 589, and cases there cited. See, also, 12 Cyc. 447, and cases cited.

It is finally insisted that sections 2 and 3 of the act are unconstitutional, because any corporation which violates the act is made guilty of a felony, and because the act names a fixed punishment and does not leave to the court or jury any discretion in fixing the punishment, and because the court is denied the right to suspend sentence upon a conviction being had before the jury.

We need not consider here whether a corporation can violate this act. The Legislature evidently intended to prevent any one and everybody from selling liquors, and even though the provision as to corporations was void, that fact would not invalidate the remainder of the statute, as it is plainly manifest that the Legislature intended the penalty of the act to apply to any one who violated its provisions.

(2) We know of no constitutional requirement that varying degrees of punishment be provided for the violation of a statute. It is ordinarily true that a maximum and minimum punishment is prescribed, but this is done

that the court and jury may exercise a discretion in imposing the penalty, dependent upon varying circumstances which might appear to justify or require a heavier or a lighter sentence. Still the Legislature has the authority to define a fixed punishment, and has heretofore exercised this right in other cases, as, for instance, in fixing the fine for profanity at one dollar.

(3) Nor do we think the act is void as abridging the constitutional powers of the judiciary in prohibiting the suspension of sentence upon conviction. Several recent cases have held that the court may enter sentence upon a verdict or plea of guilty at a term subsequent to the one at which the conviction was had or the plea entered. These cases are based upon the authority of *Thurman* v. *State*, 54 Ark. 120, in which case it was held that the statute did not require that the sentence be pronounced and judgment entered at the same term at which the plea was entered. That case treated the subject as one for statutory regulation. There being no constitutional inhibition against this legislation, we must hold it valid.

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

BROWN v. MORROW.

Opinion delivered June 19, 1916.

CONTRACTS—PROMISE TO PAY DEBT DUE BY ANOTHER—VALUABLE CONSIDERATION FOR—ORIGINAL PROMISE.—One H. was under contract to do certain work for B., and in payment of certain sums due by him to one M., H. gave M. orders on B. B. represented to M. that he had money with which to pay him, and promised to do so provided M. would pursuade H. to complete his contract and would not sue H. and garnish B. This M. did. *Held*, M.'s promise to B. was of direct benefit to B., and was a sufficient consideration to support B.'s promise to pay H.'s debt to M., and that the promise was original and enforcible.

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

G. B. Oliver, for appellant.

A verdict should have been directed for defendant. The alleged contract or agreement is clearly within the statute of frauds. The court was of the opinion that what Brown said to him about suing Halford was sufficient consideration moving to Brown to bind him to pay Halford's debt, but this is not the law. 20 Cyc. 192 (3) and cases cited.

L. Hunter, for appellee.

This was not a collateral undertaking on the part of appellant, but an original one. 37 Ark. 286; 64 *Id.* 462; 76 *Id.* 292; 89 *Id.* 321. It is not within the statute of frauds. 2 Elliott on Contracts, 1233; 96 Ark. 46; 37 Vt. 391; 22 L. R. A. (N. S.) 1077 and note; 2 Ell. on Cont. 1228.

HART, J. M. V. Morrow sued W. R. Brown before a justice of the peace, to recover $198.62 alleged to be due for clearing the right-of-way and cutting and piling wood on the right-of-way in a drainage district. Morrow recovered judgment in the justice court and Brown appealed to the circuit court. There the jury returned a verdict in favor of Morrow for the amount sued for and Brown has appealed to this court.

The only assignment of error relied upon for a reversal of the judgment is that the court erred in refusing to direct a verdict for the defendant Brown. The facts are substantially as follows: The defendant Brown entered into a contract with a drainage district for constructing three lateral ditches. Brown then entered into a contract with George Halford to clear the right-of-way and cut and pile the wood on the right-of-way. He agreed to pay him $15 an acre for clearing the right-of-way, and $1.50 per cord for the wood cut and placed in piles. The plaintiff, Morrow, had a storehouse near by and paid off the men working for Halford and also sold them supplies. Halford would pay Morrow by giving him orders on Brown for amounts due him under his contract.

On the 1st day of September, 1914, Morrow presented to Brown an order given him by Halford. Brown paid Morrow $71.95 and that left a balance of $198.62. Brown told Morrow that he was holding back 10 per cent. of the monthly estimates and that when Halford finished work there would be more than enough to pay the claim and that he would pay it then. Subsequently, Morrow told Brown that he was going to sue Halford and have a writ of garnishment issued against Brown. Brown told Morrow not to do that, that Halford had been after him for some money, and that he had told him that he would not pay him any more until he completed the right-of-way and Morrow's debt was paid. Brown told Morrow that 10 per cent. of the monthly estimates were being held back and that if Morrow would use his influence with Mr. Halford to get him to complete his contract, that he would pay him when Halford finished his work. This conversation occurred September 20, 1914. Under this state of facts, it is contended by counsel for Brown that his promise to pay Morrow was a collateral agreement to answer for the debt of Halford, and was therefore within the statute of frauds. On the other hand, it is contended that the promise of Brown was an original promise and that the testimony was sufficient to warrant the verdict of the jury. In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and in determining such intention the words of the promise, the situation of the parties, and all of the conditions attending the transaction, should be taken into consideration. *Millsaps* v. *Nixon,* 102 Ark. 435. In the application of this rule, in *Robinson & Son Contracting Co.* v. *Twin City Bank,* 103 Ark. 219, the court held that a verbal promise by a principal contractor that he would reimburse a certain bank for money advanced to a subcontractor upon time checks issued by the subcontractor in completing the contract work is not within the statute of frauds. The reason given was that the principal contractor was the benefi-

ciary of the work done by the subcontractor, received pay for it, and in turn was liable to the subcontractor for the work done by him.

The principal contractor knew that the subcontractor could not do the work unless certain advances were made to him and knew that the bank made the advances with the expectation that such advances would be paid out of the money due the subcontractor by the principal contractor. The reasoning of the court in that case is directly applicable to the facts of this case. Brown represented to Morrow that he had money in his hands which would belong to Halford when there was a final settlement made with him and that he would pay Morrow if the latter would refrain from suing Halford and garnishing him (Brown) and would also use his influence with Halford to get him to complete his contract. Morrow agreed to this, and charged the account to Brown. The promise thus made by Morrow, at the request of Brown, was of direct benefit to the latter and was a sufficient consideration to support the promise of Brown to pay the debt of Halford and make the promise an original one.

Hence, the court did not err in refusing to direct a verdict for the defendant. No objection was made to the instructions given by the court, and, we think, in the application of the rule above stated, the jury was warranted in returning a verdict for the plaintiff. It is true, the testimony of the witnesses for the plaintiff was contradicted by the testimony of the defendant, but this conflict in the testimony was settled against the defendant, and there being evidence of a substantial character tending to support the verdict, the judgment will be affirmed.

MORGAN v. MAHONY.

Opinion delivered June 19, 1916.

MORTGAGES—MORTGAGEE IN POSSESSION—REPAIRS AND IMPROVEMENTS—LIEN EXISTS FOR WHAT PURPOSES—BOARD OF MORTGAGOR'S SONS.—The mortgagee of land assigned the note and mortgage to one Y., who went into possession of the land. *Held,* Y., had a lien on the

land for what remained due on the mortgage debt, that he was entitled to the cost of only ordinary repairs made by him while in possession, that he was chargeable with rents and profits in excess of the mortgage debt; but was not entitled to a lien for permanent improvements placed on the property by himself, nor could he recover for a sum claimed to be owing to him by the mortgagor for the board of the latter's sons.

Appeal from Union Chancery Court; *James M. Barker,* Chancellor; reversed.

Geo. M. LeCroy, Aylmer Fleniken and *Neil C. Marsh,* for appellant.

1. Only $41 was due on the mortgage debt, and this was settled by the collection of rents by a mortgagee in possession. Young had no lien by contract and no "other indebtedness" after-incurred could be tacked to the mortgage debt past due. If the mortgage debt had not been paid by the rents, then only $41 and interest was due, and the land could only be sold for that amount. Morgan's sons owed nothing for board. Young could have no lien for the sons' board. 25 Cyc. 675, § § 4, 664; 51 Ark. 358; 96 Ark. 98.

2. Under the law, credits are applied, if not otherwise appropriated, to the oldest items of an indebtedness. 57 Ark. 595; 91 *Id.* 458; 28 *Id.* 440. This was the mortgage debt.

3. There was no duty of Morgan to support the sons or pay board and maintenance, as they had voluntarily abandoned their home. 29 Cyc. 1610.

4. It was error to bar appellant's right of redemption. Kirby's Digest, § 5420.

5. If Young was entitled to the ten acres as claimed specific performance only should have been decreed.

Mahony & Mahony, for appellees; *W. E. Patterson,* of counsel.

1. The evidence fully proves the balance due on the mortgage; the repairs and the board and maintenance of the sons. The chancellor properly found after crediting $87 rents received a balance due of $162. No settlement

was proven nor surrender of the note or deed of trust. The decree is right.

2. Whether there was a contract for the sons' board and schooling is one of fact, and the evidence sustains the chancellor. The law sustains the finding as to the father's liability. 6 Ark. 50; 45 *Id.* 237; 29 Cyc. 1609-10.

3. The contract putting appellee in possession is proven as security for the sons' board and schooling, and this possession and contract created a lien. 42 Ark. 247; 79 *Id.* 102; 66 *Id.* 33; 91 *Id.* 280; 98 *Id.* 382. As to the lien for repairs or improvements, there is no question. 97 Ark. 397.

HART, J. On January 4, 1913, J. E. Morgan instituted this action in the chancery court against J. K. Mahony, trustee, and James Young to cancel a certain mortgage on real estate executed by him and to restrain J. K. Mahony, as substituted trustee, from proceeding further in the foreclosure of said mortgage or deed of trust. The material facts are as follows:

J. E. Morgan owned forty acres of land in Union County, Arkansas, and on the 4th day of January, 1907, executed to B. W. Reeves a deed of trust conveying said land to W. G. Pendleton as trustee to secure an indebtedness of $200 due Reeves on November 1, 1907. Morgan made payments from time to time until on the 4th day of January, 1909, the balance due amounted to $41, and on that date James Young purchased said note and mortgage from B. W. Reeves and had the same assigned to him. Young went into possession of the land and collected rents therefor in the sum of $87. He claims that he paid $70 of this to make needed improvements on the place. Morgan and Young were brothers-in-law. Young claims that Morgan left his two minor sons with him to be boarded by him for the sum of 50 cents each per day; that their father told him to take possession of the forty-acre tract in question, collect the rents and apply the same toward the board of the boys. Young states that

he did this, and that, after deducting the necessary repairs, there was only left the sum of $17, which he applied toward the payment of the board of the boys; that after deducting this amount, and the amount paid him by the boys themselves, that Morgan owed him a balance of about $334 on their board. Young claimed that he had a lien on the land for this amount, and in 1911 he appointed J. K. Mahony, as substituted trustee, to foreclose the mortgage under the power of sale contained therein to satisfy this sum and the $41 due on the mortgage debt. Mahony duly advertised the land for sale under the power contained in the mortgage and Young became the purchaser at the sale. As before stated, Morgan instituted this action to cancel the mortgage or deed of trust executed by himself to Reeves, and to restrain Mahony from executing a deed to Young in the foreclosure proceeding under the power of sale contained in the mortgage. He introduced evidence tending to show that the repairs made by Young on the place were worth only about $15 and at most $25. He denied that he had made any contract with Young to board his sons, and denied that he had authorized him to take possession of the rents of the mortgaged premises for the purpose of paying their board.

The chancellor found that Morgan owed $61 on the mortgage debt, that he owed Young for improvements on the land $68, and board bill for his sons, not barred by the statute of limitations of $120, making a total of $249; that Morgan is entitled to a credit of $87 for rents collected by Young, leaving him owing Young a balance of $162, for which judgment was rendered in favor of Young on his cross-complaint.

The chancellor found that Young had a lien upon the land described in the mortgage to secure the $61 balance found to be due on the mortgage debt, and that he was also entitled to a lien on the land to secure the payment of $101 with the accrued interest, being the amount found to be due for repairs and the board bill.

A decree was entered in favor of Young in accordance with the finding of the chancellor and the plaintiff Morgan has appealed.

The principles of law governing the case are simple. Of course, Young had a lien on the land by virtue of the mortgage for whatever remained due on the mortgage debt. When he went into possession of the land as mortgagee he could not recover for permanent improvements placed upon the property by him, but was entitled to the costs of any ordinary repairs made by him while he had possession and he was chargeable with rents and profits in excess of the mortgage debt. *Green* v. *Maddox*, 97 Ark. 397. He was not entitled to any lien on the land for any amount that might be owed him by Morgan for the board of his sons. It is contended by Young that Morgan placed his sons to board with him and told him to take his pay out of the rents of the land. Even if the testimony of Young, in this regard, be considered as true, he would not have any lien on the land for the payment of the board of the sons of Morgan. The most he could claim would be the right to apply the rents while he was in possession of the land toward the payment of the board of the boys. Hence, it will be seen that the chancellor's decree was based upon the wrong idea of the law as applied to the facts found by him. In other words, assuming the facts found by him to be correct, Young was only entitled to a foreclosure for the balance due him on the mortgage.

We are, also, of the opinion that the chancellor's finding of facts was against the clear preponderance of the evidence. Young admits that he collected rents to the amount of $87. He also testified that he made needed repairs costing him $70. Other witnesses, who lived in the neighborhood, testified that the only repairs made by him was to fix the fences. Several of the witnesses testified that these repairs were not worth more than $15 and the others placed them at $25 at the most. We think the sum of $25 was the highest amount which the chancellor should

have allowed for repairs. This left a balance of $62, which was more than the amount of principal and interest due on the mortgage debt.

In regard to the board bill claimed by Young, we think the clear preponderance of the evidence is against him. He testified that he purchased the mortgage from Reeves in January, 1909, and took possession the next year after that. He said that Claude Morgan began to board with him on August 15, 1908, and remained until August 15, 1910; that Tom came to board with him June 20, 1909, and boarded until October, 1910; that he sent the boys to school a little over four months or maybe not so much; that there is a balance due on the board bill of about $334.70. His daughter and son corroborated him in his statement that Morgan made a contract with their father to pay the board of his children and agreed to pay therefor 50 cents a day for each one. On the other hand, Morgan flatly contradicted this testimony and is corroborated by one of his sons. He said that he left there in 1907 and went to another county. In this respect he is not contradicted. He denied that he made any agreement whatever with Young to board his boys. He said that his boys were working for themselves and paid their own board; that he permitted them to collect their wages and did not interfere with them in the management of their own affairs. In this respect he is corroborated by the testimony of both of his sons. They testified that for the most of the time they boarded at their uncle's, they worked at mills in the neighborhood and received as wages $1.25 per day each. They said they paid their uncle $3 a week for their board out of their wages and that they did not owe him anything, either for board or for anything else. They said they knew their uncle had charge of the land and collected the rents during a part of the time they boarded with him, but stated that he told them that he had bought the land from their father and they believed him.

It will be noted that Morgan left the county in 1907, and left his sons there. They began to board around at different places, and named the people they boarded with after their father left. They gave the names of the persons for whom they worked and the wages they received. It would have been very easy for Young to have contradicted their testimony had it not been true. Several witnesses testified that both Morgan and Young had a bad reputation for truth and morality in the neighborhood where they lived.

Young exhibited an account book made out with a pencil, which he claimed that he kept during the time his nephews boarded with him. The original book is exhibited to us. It is torn in many places and shows that the accounts of the two boys were kept separately. It is the contention of Young that Morgan made a contract with him to board both his sons, yet the account book showed that he kept separate accounts. This in itself tends to corroborate the testimony of the boys to the effect that each made his own contract for board and paid it. Young himself admits that one of the boys did not begin to board with him until the 15th of January, 1908, and that the other did not come until June 30, 1909. Morgan left the county in 1907, and it is not likely that he would have made a contract so far in advance for the board of his sons. When Morgan left the county, his sons went to board with other persons and paid their own board. It was more than a year before they went to board with their uncle. This tends to show that the boys earned their own living and it was not necessary for their father to have made a contract for their board.

We have not attempted to set out all the testimony in detail, but we have considered it carefully, and are of the opinion that a clear preponderance of the evidence shows that the boys paid their own board and that Morgan did not owe Young anything on that account. From the views we have expressed it results that the chancellor erred in not granting the relief prayed for by the plaintiff, Mor-

gan, and for that error the decree will be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. v. ALTMAN.

Opinion delivered June 19, 1916.

1. CARRIERS—DELIVERY OF FREIGHT.—The liability of a carrier ceases upon delivery of a shipment of goods at the point of destination in accordance with the directions of the shipper, or according to the usage and custom of the trade, and an actual delivery is made when the possession is turned over to the consignee or to his duly authorized agent, and a reasonable time given him in which to remove the goods.
2. CARRIERS—FREIGHT—REFUSAL OF CONSIGNEE TO ACCEPT.—The refusal of the consignee to accept a shipment from the carrier does not discharge it from all liability and the carrier owes a duty to take care of the goods, and can not abandon them nor convert them to its own use.
3. CARRIERS—DELAY IN DELIVERY OF FREIGHT—REFUSAL OF CONSIGNEE TO ACCEPT—LIABILITY—QUESTION FOR JURY.—Where the consignee of goods shipped refused to accept the same, because of a delay in the shipment, but notified the carrier to hold the same until he communicated with the consignor, and the goods were thereafter lost, in an action by the consignee against the carrier for damages, it is a question for the jury to determine the carriers, liability, and it is error to direct a verdict for the consignee.

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

STATEMENT BY THE COURT.

Appellee brought this suit to recover the value of two cases of shoes which it was alleged the carrier failed to deliver. From the judgment against it in the justice court the railroad company appealed, and, upon trial, the circuit court directed a verdict against it, and from the judgment thereon this appeal is prosecuted.

It appears from the testimony that appellee ordered by telegraph two cases of shoes from Geo. E. Keith & Co. of St. Louis; that they did not arrive as soon as he expected them and he stated that he told the agent of appellant if they did come to notify him and keep them until

he could take the matter up with the house. "I told the agent to keep the goods, that I would take the matter up with the company." The transfer company, which was the agent of appellee, received the goods from the carrier and took them to the store of appellee, who refused to receive them and directed that they be taken back. Appellee stated that the agent afterward told him that the goods were at the warehouse and asked what he was going to do about it, and he again told him to hold them until he could make arrangements with the consignor about it. After some little correspondence with the seller he concluded that he would have to take the goods, and notified the agent and the transfer company that he would take them and to send them up. The shipment could not be found, and was not thereafter delivered to him.

Appellant had written instructions from appellee to deliver all shipments of goods for him to the transfer company, which was employed to deliver them to his store. The manager of the transfer company stated that after the shoes were returned to the station, he saw them in the warehouse and asked the agent why they were there and had not been delivered and was told they had been refused and returned by Mr. Altman. Said he did not make the delivery and knew nothing about it and "I saw the shoes after they were returned and was told by Mr. Davis that they had been refused and returned to the depot. We had been in the habit of returning refused shipments to the depot, but I had no contract with the railroad company to that effect and they had been accepting them upon their return."

The receipt for the goods executed by the transfer company was introduced in evidence by the appellant and the manager stated that they neglected to take it up when the shipment was returned; that it was the custom when a shipment was returned to erase the name of the agent on the receipt, but it had not been done in this case. He did not know whether his agent who returned the goods to the railroad company notified it that he had delivered

the goods back to them, but he did know that the railroad agent saw the goods in the warehouse after they were returned; that they were in a place in the warehouse where goods were frequently placed near the door. Admitted that Mr. Straub's name was over the place where he saw the goods. It was the practice of the transfer company to pay the railroad company the freight charges and execute a receipt for the goods upon delivery to it and this was done in this case.

The warehouse foreman stated that he had nothing to do with the delivery of goods to the consignee, but only checked them from the cars into the warehouse; that if this shipment was returned by the transfer company to the warehouse, it did not come under his notice; that if they were returned, it would come to the notice of the agent or others.

The court refused all the instructions asked by appellant and directed the jury to find for appellee the value of the claim.

Fink & Dinning, for appellant.

1. There is no evidence that two cases of *shoes* were ever delivered to the carrier. The action is in *tort,* and the burden was on plaintiff. 4 R. C. L. 916.

2. The goods were actually delivered to the consignee. The transfer company was the agent of the consignee for delivery of all goods. 150 S. W. 1028; 4 R. C. L. 763; 90 Ark. 70; 100 *Id.* 37; 67 *Id.* 402, 406; 27 R. I. 235, 61 Atl. 695. At most the railroad was a gratuitous bailee and only liable for gross negligence. 23 Ark. 63; 6 Cyc. 522. The act of taking back the goods did not render the company liable. 42 Ark. 204.

3. The negligence of the company was clearly one for a jury, and the court erred in directing a verdict. Hutchinson on Carriers, § 22.

Bevens & Mundt, for appellee.

1. Under the facts of this case, 90 Ark. 524 is the law settling the question. Delivery was proven by the bill of lading and invoice.

2. The transfer company was not the agent of appellee, for the carrier's agent was notified before the arrival of the goods that it would not be accepted and to keep it at the depot. The carrier was a bailee or warehouseman of some kind and liable. 6 Cyc. 460. The burden of showing negligence was not on plaintiff. Hutchinson on Carriers (2 ed.), § § 259, 355. At least a *prima facie* case of liability was shown, which was not overcome. 6 Cyc. 462; 7 L. R. A. 530; 5 A. & E. Enc. Law, 361; 17 Fed. 905; 62 Cal. 174.

3. There was no new contract when appellee refused the goods, the carrier's duty was merely reduced to that of warehouseman, and it was proper to sue on the contract of carriage. 94 Cal. 166; 17 L. R. A. 685; 6 Cyc. 462. On the burden of proof, see 37 Conn. 272; 9 Am. Rep. 347; 92 Ga. 801; 44 Am. St. 197; 37 Ala. 247; 79 Am. Dec. 49; 24 Ill. 466; 67 Am. Dec. 548, note.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the consignment of goods was delivered by the railway company to the transfer company, the agent of appellee, who was duly authorized to receive and receipt for all shipments to appellee, and also that upon their being taken to the store of appellee, he refused to take the goods from the transfer company, thinking he had the right to refuse to accept them from the seller because of their not arriving sooner.

Appellee stated, however, that upon the failure of the goods to arrive, within two or three days after they were ordered, he directed the agent of appellant not to deliver them but to hold the shipment until he could take the matter up with the consignor, that later when the goods were brought to his store by the transfer company, he refused to take them and directed that they be returned to the railway company. He likewise stated that the agent afterward called him up and asked him what was to be done about it and he told him to hold them until he could make some adjustment with the seller.

The manager of the transfer company stated that he had seen the consignment in the warehouse after they had been returned by direction of appellee, and not knowing that they had ever been taken out, asked why they were there and was told that they had been refused and returned by appellee.

This witness also stated that he knew the goods were in the warehouse and that the agent had taken charge of them because the agent told him that they should not have accepted them. To which witness replied: "I told him I would not bother, so long as the goods were worth the amount of the freight he had paid on them."

(1) There is no question but that the liability of the carrier ceases upon delivery of the goods at the point of destination in accordance with the directions of the shipper or according to the usage and custom of the trade, nor that an actual delivery is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time given him in which to remove the goods. *Arkadelphia Milling Co.* v. *Smoker Merchandise Co.,* 100 Ark. 37; *Hill* v. *St. L. S. W. Ry. Co.,* 67 Ark. 402; *Arkansas Midland Rd. Co.* v. *Moody,* 90 Ark. 70.

(2) It is equally true that the refusal of the consignee to accept a shipment from the carrier does not discharge it from all liability and that it owes a duty to take care of, and can not abandon the goods or convert them to its own use. *C., R. I. & P. Ry. Co.* v. *Pfeifer,* 90 Ark. 524; *L. R. Miss. R. & Tex. Railway Co.* v. *Glidewell,* 39 Ark. 487; 2 Hutchinson on Carriers, § 685.

(3) In this instance, although the possession of the goods was in fact turned over by the railroad company to the transfer company, which was appellee's agent generally authorized to receive all shipments, it can not be said that it constituted a delivery thereof, since appellee stated that he told the agent of the railroad company before the shipment arrived that he would not receive it because of the delay and to hold the goods until he could adjust the

matter with the consignor and refused to take the goods when they were brought to his store and directed that they be returned to the railroad company. The testimony also shows that the goods were in fact returned to the depot or warehouse of appellant company with the consent or knowledge of its agent in charge.

Neither can it be said that the undisputed testimony shows there was not a delivery of the shipment since it is shown there was, but for appellee's statement that he directed the railroad agent before its arrival to hold and not deliver it. Although this statement was not contradicted, it was made by one of the parties directly interested in the result of the suit and the inferences arising from the other testimony are not altogether in accord with it. *Skillern* v. *Baker*, 82 Ark. 89.

It was a question for the jury under the circumstances of the case, and the court erred in directing the verdict.

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

BREITZKE v. BANK OF GRAND PRAIRIE.

Opinion delivered June 19, 1916.

1. CORPORATIONS—FINANCIAL REPORT—DEFAULT OF OFFICERS—TIME WHEN LIABLE—CIVIL LIABILITY—CRIMINAL LIABILITY.—The civil liability imposed by statute upom the officers of a corporation for failure to file the annual statement, "for all debts of such corporation contracted during the period of any such neglect or refusal," includes only those debts which were contracted while the individuals were officers of the corporation. When the last of the optional dates for making the report specified in the statute has expired, these officers are also liable criminally for each day thereafter that they fail to make such report until they go out of office, but no longer.
2. CORPORATIONS—ANNUAL REPORT—LIABILITY OF NEWLY ELECTED OFFICERS.—The duties and responsibilities of the newly elected president and secretary begin when they take the places of the old officers; and it is their duty to file the annual statement, after the lapse of a reasonable time after their discovery that such statement has

not been filed. The dereliction attaches to the ones who hold the offices of president and secretary, and is a continuing dereliction so long as the statute is not complied with.

3. CORPORATIONS—ANNUAL STATEMENT—LIABILITY OF OUTGOING OFFICERS.—Outgoing officers of a corporation who have neglected to file the annual statement for the same, are not liable for debts contracted by the corporation, after they went out of office. But they may be liable, after going out of office for debts contracted, while they were yet in office.

4. CORPORATIONS—ANNUAL STATEMENT—NEWLY ELECTED OFFICERS.—It is the duty of the newly elected president and secretary of a corporation, to file the certificate required by statute, within a reasonable time after they assume the duties of their offices.

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

STATEMENT BY THE COURT.

This suit was instituted by the appellee against the Hazen Creamery Company, a corporation, and appellants, the president and secretary, respectively, of such corporation, to foreclose certain mortgages and to obtain a personal judgment against the appellants for certain sums amounting in the aggregate to $5,000, evidenced by a promissory note for that sum dated March 10, 1914. After setting out the different items of indebtedness that constituted the aggregate sum of $5,000, for which the note was executed by the creamery company to the appellee, giving the dates and amounts, it was alleged in the complaint that the appellants, as president and secretary of the corporation, neglected to comply with the statute requiring them to file a certificate showing the financial standing of the corporation of which they were officers in the years 1913 and 1914, and that the indebtedness sued on accrued during the period of such neglect.

Appellants denied that they had failed to comply with the statute as alleged, and denied that the indebtedness to the appellee was contracted during the period of any neglect or refusal on their part; and denied that they were indebted to the appellee in the sum sued for. They further set up that the note sued on was for indebtedness

of the creamery company to the appellee that existed before appellants became officers of the creamery company, and that said indebtedness was not contracted during any period of default on their part to file the certificate showing the condition of the financial affairs of the corporation of which they were officers. They further set up that the note in suit was executed by the appellants as president and secretary of the corporation only after the appellee had agreed with the appellants that it would not hold them personally liable for the debt or any part thereof; that but for such agreement they would not have signed the note sued on. They further set up that the creamery company was incorporated in April, 1912, and that default was made in filing the statement as required by the statute in August, 1913, by the then president and secretary of the company; that appellants were elected to their respective offices October 8, 1913, and that they were not required by law to file any certificate with the county clerk of Prairie County until August 15, 1914; that the debt for which the note was given was contracted prior to August 15, 1914; they further alleged that prior to February 15, 1914, the sum of $1,000 was already due the plaintiff, evidenced by a promissory note executed long prior to the time when the appellants became officers of the creamery company; that prior to February 15, 1914, the sum of $3,051.38 of the indebtedness evidenced by the note sued on was due the appellee in the form of an overdraft, and that only $948.62 of the note in suit was contracted after February 15, 1914. They alleged therefore that if they were liable at all under the law, their liability would only be for the sum of $948.62. They further set up that appellee was estopped by representations made by its officers at the time of the execution of the note in suit to the effect that they would not hold appellants liable as officers for the indebtedness sued on.

The testimony shows that appellants Breitzke and Kumpe were elected president and secretary, respectively, of the creamery company October 8, 1913. At that

time the company owed the bank the sum of $1,000, evidenced by a note, and the further sum of $1,476.06 in overdraft. After appellants became officers of the company its overdrafts on the bank varied, increasing and diminishing from time to time. Kumpe, the secretary, testified that "at lots of times the overdraft was cut down to practically nothing, but they made a new overdraft each month. The 20th of the month was pay day. On that day they would have the overdraft taken up—everything covered—and they would issue checks which would cause another overdraft. The checks would be issued for the pay roll of the month preceding the 20th. At times they would pay out on the 20th, and there would be times that there would be no overdraft until the pay roll came in and they would make a new overdraft. That occurred between October 8, 1913, and March, 1914."

It was shown that as early as October 20, 1913, after appellants became officers of the company, the overdrafts were reduced to as low a sum as $140.38. On February 15, 1914, the company owed the bank a note in the sum of $1,000 and an overdraft in the sum of $3,051.38, making a total indebtedness of $4,051.38, and interest, which had been contracted prior to that date. The sum of $491.03 was contracted after February 15, 1914, and prior to March 10, 1914, the date when the note in suit was executed. The note, as stated, covered all prior indebtedness of the company to the bank, with accrued interest as of that date. It was admitted that the note represented a valid indebtedness of the company to the appellee.

The court rendered judgment against the creamery company for the amount sued for, and also rendered a judgment against the appellants for the sum of $4,360, amount of principal and interest from March 1, 1914, to date of decree. Appellants seek by this appeal to reverse the judgment.

Richard M. Mann and *Price Shofner,* for appellants.

1. Appellants were not personally liable. The period of "neglect or refusal" to file the certificate re-

quired does not begin with the election of the president and secretary nor end with their resignation. Kirby's Digest, § § 848, 849; Acts 1909, p. 643; 68 Ark. 433; 75 *Id.* 107; 101 U. S. 188; 133 Pac. 681; 2 Morawetz on Priv. Corp. (2 ed.), § 908; 88 Ind. 254; 107 Fed. 188; 96 Ark. 268; 114 Fed. 290. This period did not begin until August 15, 1914.

2. Appellee is estopped by its agreement *not* to hold appellants personally liable.

Trimble & Williams, for appellee.

1. Appellants are clearly personally liable. The $4,000 was a new indebtedness contracted by overdrafts after they assumed their offices, and they failed to file the certificate required by law. The act is not penal, and hence strictly construed. 95 Ark. 330; 68 *Id.* 436; 2 Thompson on Corp. (2 ed.), § 1781; 96 Ark. 273; 75 *Id.* 111; 21 N. Y. 264.

2. No estoppel is shown.

WOOD, J., (after stating the facts). (1) The Hazen Creamery Company (hereafter, for convenience, called company) was incorporated March 16, 1912, under the provisions of chapter 31 of Kirby's Digest. Under the law it is the duty of the president and secretary of every business corporation, annually on or before the 15th day of the months of February or August, to file with the county clerk of the county in which the company transacts its business a certificate showing the condition of the financial affairs of the corporation on the first day of January or July next preceding, in the particulars specified in section 848 of Kirby's Digest. A failure or refusal upon the part of the president or secretary of a corporation to comply with the above provisions renders them jointly and severally liable for all debts of the corporation contracted during the period of any such neglect or refusal, and they are also guilty of a misdemeanor, punishable by a fine of $500, for each and every day that they neglect to comply with the above provisions. Act 222, Acts of 1909, page 643.

In *Griffin* v. *Long,* 96 Ark. 268-273, concerning this statute, we said: "The reason of the statute is to require corporations to make such public showing of their affairs as will enable those dealing with them to determine whether they can safely give them credit." And in *Beekman Lumber Co.* v. *Ahern,* 75 Ark. 111, speaking of this act, we said: "There is nothing in the act that requires an officer who has neglected to file the statement within the time named in the act to wait until after the first day of the next succeeding July or January before filing the statement. On the contrary, as the act declares that, upon the failure to file the statement, within the time named, the officer becomes liable for all debts of the corporation contracted during the period of such neglect, we are of the opinion that it was the intention of the law to make it to the interest of the officer to file the statement at as early a date as possible, when he discovers his oversight, and when he does file such statement, even though it be after the dates named in the act, that he is not liable for debts thereafter contracted by the corporation until he makes another default in the filing of another statement."

While the president and secretary are made individually liable, both civilly and criminally, for a failure to comply with the provisions of the above statute, yet the duty which the statute imposes attaches to them as officials of the corporation, and not as individuals. It is an official duty which these officers of corporations owe to those of the public who may have dealings with such corporations. The duty attaches to the individual only by virtue of the office he holds in the corporation. When there is a failure to comply with the statute the dereliction continues on the part of the individual only so long as he is an officer of the corporation. When his relation as such is severed he has no longer any duty to make and file the certificate required by the statute, and he has no power to do so.

The civil liability imposed upon these officers "for all debts of such corporation contracted during the period of any such neglect or refusal," therefore includes only those debts which were contracted while the individuals were officers of the corporation. When the last of the optional dates for making the report specified in the statute has expired, these officers are also liable criminally for each day thereafter that they fail to make such report until they go out of office, but no longer.

(2) The duties and responsibilities of the newly elected president and secretary begin when they take the place of the old. One of these duties would be to acquaint themselves with the financial affairs of the corporation and to know whether or not the statute requiring the filing of the annual certificate had been complied with by their predecessors. If it had not, then it would be the duty of the new officers to file the same as soon as they ascertained that fact, after a reasonable time has elapsed for making an investigation of the financial affairs of the corporation. The newly elected officers from that time, so to speak, step into the shoes of their predecessors in office, and their liability, both civil and criminal, for dereliction in failing to make the certificate is the same as their predecessors would have been had they continued in office. The dereliction, as we have seen, attaches to the ones who hold the offices of president and secretary and is a continuing dereliction so long as the statute is not complied with.

Unless the newly elected officers, succeeding old ones, were required to make the certificate within a reasonable time after assuming the duties of their offices there might be a long interval in which the financial standing of business corporations would not be made known to the public. To illustrate, if the first elected president and secretary of such corporation should let the 15th day of February or the 15th day of August go by without filing the certificate, and thus fail to comply with the statute, and if they then were immediately displaced by new officers,

these newly elected officers could wait until the next annual period before making the certificate required by law and there would be an interval of a year wherein no certificate was filed and debts could be contracted by the corporation and neither the old nor the new officers liable therefor. This would frustrate the salutary purpose of the law, which is to require business corporations, through their president and secretary, to advise the public by these annual certificates of their financial standing.

(3) But counsel for appellants contend that the outgoing president and secretary, having failed to comply with the statute while in office, would continue liable for debts of the corporation contracted until the next annual date for filing the certificate; that the period of "such neglect or refusal" continues till that time. To support this contention, they cite and quote at length from *Providence Steam Engine Co.* v. *Chas. Hubbard,* 101 U. S. 188, 25 L. Ed. 786. In that case it was held that where an outgoing president (under a statute fixing the same dates as ours for filing the certificate) failed to file the certificate while he was in office on the 15th of February, and retired without doing so, that the incoming president who was elected "less than two months prior" to the 15th of August—the next annual date—would not be liable for a debt of the corporation contracted before he took his office, nor during the short period of less than two months between the date of his election and August 15—the date when he had to file his certificate—that he was not liable for such debt even though his default continued after that date, because he was not in default during the period when the debt was contracted. While the statute under review in that case is similar to ours, the facts are quite different. Much that is said in the opinion is in harmony with the views we have expressed, and we do not regard the case as authority to support the contention of counsel. But even if it were, we could not follow it, for we could never hold, under our statute, that the retiring president and secretary who had failed to file the certifi-

cate would be liable for debts contracted by the corporation after they went out of office. They would be liable and could be sued after they went out of office for the debts contracted during the period of their default, which would continue until their retirement if they neglected till that time to file the certificate. If the civil liability could be continued for debts created thereafter, then the criminal liability would also continue, and thus individuals could be civilly liable for debts they did not contract, and had no power to prevent and could be severely punished criminally for an act they did not and could not do.

Corporations can only perform their duties to the public through their officers and agents, and as shown in *Griffin* v. *Long*, and *Beekman Lumber Co.* v. *Ahern, supra*, the intention of the Legislature was to impose a duty upon corporations to make these certificates showing the financial standing of the corporation, through their president and secretary; and to make sure that the duty was discharged, the Legislature made these officers individually liable for failing to perform such duty. Primarily the duty under the statute is one which the corporation owes the public, and one which the Legislature has designated must be performed by the president and secretary of such corporation. If it is a duty that inheres in the office under the statute, then it is one which these officers, upon assuming their offices, must perform as soon as they can reasonably do so where it has been neglected by their predecessors.

In this view of the statute, there is no difference in principle between this case and that of *Boughton* v. *Otis*, 21 N. Y. 261-264, where the court said: "A board of trustees guilty of default in January, and retiring from office, is liable for all antecedent debts and for those only; and that the successors, if they continue the default until the next January, and no longer, are liable for the debts afterward contracted during that year, and for no other. If the persons succeeding to office promptly obey the requirement of the act, they will escape all liability, and it

is plainly just that they should, because there is no failure of duty on their part. If they do not, they very properly incur the hazard of the debts which they themselves as trustees contract. This hazard they might be quite willing to incur; but there is neither principle nor policy in making them responsible for the acts and defaults of their predecessors. The general policy of the act is immunity from personal liability, but this is attended by certain conditions demanding the personal observance of the trustees."

(4) Applying the above doctrine to the facts of this record, it appears that the company was incorporated March 16, 1912; that its then president and secretary did not file any certificate as long as they were in office. The appellants were elected October 8, 1913; they filed no certificate until October, 1914. Thus it will be seen that appellants allowed about a year to elapse before filing the certificate. They contend that under the statute it was optional with them to file either on the 15th of February or the 15th of August succeeding their election, and that their period of delinquency therefore did not begin until August 15, 1914. But, as we have shown, this was not a correct view of the statute. It was the duty of appellants to file the certificate within a reasonable time after they assumed the duties of their offices, and the finding of the chancellor that the amount of the debts for which the decree was rendered were incurred during the period of their delinquency is not against the preponderance of the evidence. A clear preponderance of the evidence showed that the indebtedness for which the decree was rendered was in the shape of overdrafts on the bank which, with interest from March 1, 1914, up to the date of the decree, amount to the sum of $4,360, for which the decree was entered. Appellants waited too long to file the certificate and these overdrafts represented an indebtedness that accrued during the period of their default, for there is undisputed testimony in the record to the effect that at times when the pay rolls were completed

on the 20th of each month the overdrafts would amount to practically nothing.

There is nothing in the record to estop appellee from claiming judgment against the appellants. It is conceded that at the time appellee's cashier told appellants that they would not be held personally liable on the note of $5,000, that the parties did not have in mind the statutory liability of appellants. This is the correct view of the evidence, and appellee was therefore not estopped from maintaining this suit for the statutory liability.

The decree is affirmed.

KIRBY, J., dissenting.

AETNA INSURANCE COMPANY *v.* SHORT.

Opinion delivered June 19, 1916.

1. INSURANCE—PAROL—CONTRACT OF.—At common law contracts o insurance were not required to be in writing originally, and in the absence of any statutory prohibition a parol contract of that characterwill be valid.
2. INSURANCE—RENEWALS—AUTHORITY OF AGENT—PAROL AGREEMENT.—Where an agent has authority to renew premiums of insurance, a parol preliminary agreement to that effect, when it is to be consummated by filling out and delivering a policy pursuant thereto, is valid and binding, even though the premium is not paid.
3. INSURANCE—PAROL RENEWAL CONTRACT—BURDEN OF PROOF.—The burden is upon the plaintiff (the insured), to establish a parol contract of renewal, and this must be established by a preponderance of the evidence.
4. INSURANCE—RENEWAL—TERMS.—A renewal of a policy is, unless otherwise expressed, on the same terms and conditions as were contained in the original policy.
5. INSURANCE—FAILURE TO PAY—PENALTY AND ATTORNEY'S FEES.—Where defendant insurance company failed to pay a loss, accruing under a parol renewal, the company will not be liable for penalty and attorney's fees under the statute.

Appeal from Cleburne Circuit Court; *J. I. Worthington,* Judge; reversed in part, affirmed in part.

STATEMENT BY THE COURT.

W. J. Short sued the Aetna Insurance Company to recover upon a policy of fire insurance issued by it upon a stock of goods. The material facts are as follows:

W. J. Short was a merchant at Heber Springs, Arkansas, dealing in hardware, queensware, furniture, farming implements, wagons and machinery. Originally he had something like $8,000 insurance on his stock, including the policy in question. J. B. Higgason was the agent of the Aetna Insurance Company at Heber Springs and was authorized to issue policies of insurance for it. On October 7, 1912, he issued and delivered to Short a policy of insurance for $2,000 on his stock of goods. The policy was on the printed form of the company and was in the usual form of a standard insurance policy. On October 7, 1913, the policy was renewed to October 7, 1914, by J. B. Higgason. It is the contention of the insurance company that the policy was not again renewed. Short, however, claims that the policy was again renewed by Higgason in October, 1914, and he based his right to recover on that ground.

The original policy insured Short on his stock of merchandise consisting principally of furniture, hardware, queensware, farming implements, and machinery and such other merchandise not more hazardous than is usually kept for sale in a general store. Permission was granted for $8,000 other concurrent insurance. The policy was countersigned by J. B. Higgason, agent.

W. J. Short testified substantially as follows: In January, 1914, I sold my stock of goods, except farming implements, wagons and machinery. Higgason told me it was not necessary to make any change in my policies on that account. At that time I had about $8,000 insurance on my stock. Some of these policies would expire in the spring, and I told Higgason he need not rewrite them. I reminded him about my $2,000 policy which ran until fall, and told him I would keep that up. In October, 1914, this was the only policy I had left on my stock of goods.

It was the custom of Higgason to issue policies and to collect for them at the end of the next month. Sometimes when he issued a renewal policy, he would bring it right over, but sometimes he would wait until the end of the month. Somewhere from the 4th to the 6th of October, 1914, Higgason came into my store to collect the premium on a policy which he had issued on my storehouse. I paid the premium and he asked me to let him write some more insurance on my stock. I told him that I would not need any until my stock policy expired, and requested him to be sure and not forget to renew it. He promised to renew it. We talked about a raise in the rate because of a stable which was situated near the rear of my store. It was agreed between us that I should pay the increased rate and that later on I could obtain a reduction if the stable was removed.

W. F. Haywood testified that he was a brother-in-law of Short and heard the agent agree to renew the policy as stated by Mr. Short.

On the 20th of October, 1914, the storehouse of Short caught fire and his stock of goods was burned. It is agreed that Short, if entitled to recover at all, is entitled to recover the full amount of the policy sued on.

For the insurance company J. B. Higgason testified substantially as follows: On October 7, 1912, I issued to W. J. Short a policy of insurance for $2,000 on his stock of goods in the Aetna Insurance Company. On October 7, 1913, I renewed the policy for one year. A short time before the policy expired in 1914, I asked Mr. Short to again have the policy renewed. He declined to renew the policy and it expired on October 7, 1914. I had a book in which I kept the date of the expirations of insurance policies issued by me for companies represented by me. The book showed that W. J. Short had a policy of insurance with the Aetna Insurance Company, and that it expired on October 7, 1914. When Short declined to renew the policy I ran my pencil through the date of expi-

ration on the book. This was done to show that he declined to renew the policy.

W. D. Raywinkle purchased the insurance business of Higgason in the fall of 1914 and had charge of his books on the night of the fire. He testified that on that night he went into his office and took out the books to find out whether or not a policy on another customer had expired. In doing this, he noticed a pencil mark had been run through the date of the expiration of the policy in question.

The jury returned a verdict for the plaintiff, Short, for the amount of the policy less the unpaid premium. and the insurance company has appealed.

Ashley Cockrill and *H. M. Armistead,* for appellant.

1. A parol agreement must, in order to be binding as a contract of insurance, be one for present insurance and not an agreement to insure at some future time. 13 A. & E. Enc. 221; 121 Mass. 338; 8 Utah, 41; 47 Wis. 365; 53 Ga. 109; 134 N. Y. S. 105; 119 S. W. 984; 86 N. R. 787.

2. An oral contract to renew a policy must be established by a clear preponderance of the evidence. The evidence must be clear and convincing. 75 Oh. St. 312; 2 Clement, Fire Insurance, 47; 13 A. & E. Enc. 221; 106 Pac. 720; 55 *Id.* 435; 2 Dill. 156; 132 Pac. 590; 17 Cyc. 771, 773, 777-8.

3. Appellee was not entitled to a penalty or attorney's fee. 92 Ark. 387; 93 *Id.* 84.

M. E. Vinson and *Gus Seawell,* for appellee.

1. The evidence establishes an oral agreement to *renew* a policy then in force. This is settled by the verdict of the jury. No question is raised as to the amount of loss nor the authority of the agent, hence all other questions are waived. 91 Ark. 427.

2. A parol contract to renew a policy or for insurance is valid even though to be performed in future. 63 Ark. 204; 67 *Id.* 433, 438; 117 *Id.* 117; 113 *Id.* 15; 163 S. W. 1103; *Ib.* 216; 195 Mo. 290; 37 S. C. 56; 2 Dill. 156; 67

Tex. 325; 50 Ohio St. 549; 40 W. Va. 508; 20 Ore. 547; 130 N. Y. 537; 1 Joyce on Ins., § 525; Richards on Ins., § 41; 1 May on Ins. (4 ed.), § 23; 19 Cyc. 595 (3); 47 L. R. A. 641. There is a distinction between a parol contract *of* insurance and *for* insurance, or to *renew* a policy. 75 Oh. St. 312; 9 A. & E. Ann. Cas. 218, 219; 47 L. R. A. 641, 644.

3. Such a contract to renew need only be established by a preponderance of the evidence. 93 Ark. 548, 561; 115 *Id.* 413; 37 *Id.* 589; 52 Ark. 523; 77 *Id.* 137; 93 *Id.* 312; 19 Cyc. 629 (VII); 49 S. W. 260; 58 S. W. 837.

4. Appellant was liable for the penalty and attorney's fee. 102 Ark. 675; 103 *Id.* 1.

5. These cases and others show that there was no error in the court's instructions.

HART, J., (after stating the facts). (1-2) At common law, contracts of insurance were not required to be in writing originally, and in the absence of any statutory prohibition a parol contract of that character will be valid. This is conceded to be the law by counsel for the defendant. The record, however, shows that if any verbal agreement was made, it was entered into between the parties a few days before the old policy expired. It is the contention of counsel for defendant that a parol contract of insurance, in order to be enforceable, must not be executory but must take effect immediately on the making of the agreement. We do not deem it necessary to decide this question. The agent of the insurance company was authorized to issue policies and to take renewals thereof. He was not required to receive the premium in advance as a condition precedent to making a parol contract to renew the policy, but had the authority to make the renewal on a credit. Under our own decisions this authorized him to make a preliminary contract, binding upon the defendant, to be consummated by filling out and delivering a policy pursuant thereto. *King* v. *Cox,* 63 Ark. 204; *Phoenix Ins. Co.* v. *Hale,* 67 Ark. 433; *Cooksey* v. *Mut. L. Ins. Co.,* 73 Ark. 117; *Brickey* v. *Conti-*

nental Gin Co., 113 Ark. 15. In the case of *King* v. *Cox, supra,* the court said: "An oral contract for insurance is not within the statute of frauds, and if supported by a valuable consideration, and free from fraud, and made by competent parties, is binding, though the premium be not paid at the time, if credit be given, or it appears from the circumstances and the situation of the parties that payment of the premium at the time was not exacted." In the case of *McCabe* v. *The Aetna Insurance Co.*, 47 L. R. A. 641, the court said that it is well settled that an insurance company can, by a preliminary parol contract, bind itself to issue or to renew a policy in the future, and further held that prepayment of the premium for a renewal is not essential to the validity of such preliminary agreement to renew. Many cases are cited which sustain the opinion, and among them is the case of *King* v. *Cox,* 63 Ark. 204.

(3-4) It is next contended that the court erred in refusing to instruct the jury that the burden of proving that its agent renewed the insurance was upon the plaintiff and that before the jury could find for the plaintiff on that issue, the evidence must be clear and convincing. The court did instruct the jury that the burden was upon the plaintiff to establish the parol contract of renewal and that the plaintiff must establish that by a preponderance of the evidence.

Counsel for the defendant contended, however, that because such contracts are rarely made, the proof of such oral contract must be clear and convincing. We do not agree with them in that contention, however. As we have already seen, there is a distinction between an oral contract to renew a policy and an oral contract of insurance to take effect in the future. The alleged agreement in the instant case was not for new or original insurance, beginning then for the first time, but it was for a renewal of the old policy to take effect from the date of its expiration. A renewal of a policy is, unless otherwise expressed, on the same terms and conditions as were contained in the

original policy. *King* v. *Cox,* 63 Ark. 204. The renewal of the policy in question seems to have been fully authorized according to the testimony of the plaintiff, which was believed by the jury. The agent does not appear to have required any new warranty or representation other than those which were made when the policy was issued. The agent must have acted upon this, unless he acted upon the knowledge which he acquired from a personal view of the stock of goods at the time he agreed to the renewal. It will be remembered that the agent was in the store when the agreement was made. The terms of the policy are neither enlarged, restricted or changed by the renewal but the rights of both parties, no matter how often a policy of insurance may have been renewed, are still bound by the provisions of the policy as originally issued. *Witherell* v. *Maine Insurance Company,* 49 Maine, 200; *Aurora Fire & Marine Ins. Co.* v. *Kranich,* 36 Mich. 289; *Hartford Fire Ins. Co.* v. *Walsh,* 54 Ill. 164. Therefore, the court did not err in refusing to instruct the jury that the renewal contract must be established by clear and convincing testimony and that the burden was upon the plaintiff to establish that fact by clear preponderance of the evidence.

(5) The court allowed an attorney's fee of $200 and the 12 per cent. penalty provided by the statute and the action of the court in this respect is assigned as error by counsel for the defendant. We agree with them in this contention. The act in question provides that in all cases where loss occurs and the insurance company liable therefor shall fail to pay the same within the time specified in the policy, etc., that a reasonable attorney's fee, together with 12 per cent. damages upon the amount of the loss shall be taxed as part of the costs. Acts of 1905, pages 307-8. The statute in terms provides that a written policy must be issued before the attorney's fee and 12 per cent. penalty can be taxed as costs against the insurance company. Here no policy of insurance was issued by the company. There was only a preliminary

contract for renewal which had not been consummated by filling out and delivering a policy to the plaintiff. Therefore, the facts do not bring the plaintiff within the terms of the statute, and he can not avail himself of its provisions.

The judgment for the amount of the insurance sued for will be affirmed and the judgment for the 12 per cent. penalty and attorney's fees will be reversed and dismissed.

HIGHT v. MARSHALL.

Opinion delivered June 19, 1916.

1. REAL ESTATE BROKERS—ACTION FOR COMMISSIONS—PROOF BY SELLER OF LIST PRICE.—In an action by a real estate broker for his commissions, the defendant will not be permitted to prove by his own testimony and that of others, that he had listed the land with other real estate dealers at a certain price.
2. REAL ESTATE BROKERS—ACTION FOR COMMISSIONS—FIDELITY OF BROKER.—A real estate broker can not be held to have acted with infidelity to his principal, when he told a prospective purchaser that he would try to secure the land for him at something less than the list price, where he then took up with his principal the matter of reducing the price; such action by the broker is only to be considered by the jury in determining whether he acted in good faith.
3. REAL ESTATE BROKERS—COMMISSIONS—DIRECT SALE BY OWNER.—Where a real estate broker procures a sale to be made without notice of revocation of authority, he may recover a commission although the sale was made directly by the owner to a purchaser procured by the broker, and his right to recover commissions does not depend upon knowledge upon the part of the owner that he had brought about the sale.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

Sam R. Chew, for appellant.

1. The proof shows the relationship of principal and agent. This relationship established, the law requires the highest degree of candor, honesty, fidelity and absolute good faith. Cooley on Torts (2 ed.), p. 615; 82 S. E. 381; 142 Pac. 1029; 29 Ill. 75; 95 Am. Dec. 568.

Appellee by his conduct violated every principle of law and fidelity. He could not have bought for himself and could not deal except within his powers and instructions for his principal. 90 Ark. 301; 62 *Id.* 598; 103 *Id.* 484.

2. The evidence that the land had been placed in the hands of others for sale at a certain price was relevant and competent. Appellee was not given the exclusive privilege of selling the land, and appellant had the right to sell the land himself free of any liability to the agent for commission. 174 S. W. 531; 91 Ark. 212.

3. The court erred in giving instructions Nos. 1 and 2. 87 Ark. 506; 89 *Id.* 289. There is no proof that appellee ever brought Brett and appellant together. 55 Ark. 574. Appellant's own testimony was sufficient to authorize the giving of No. 4.

Geo. F. Youmans and *E. L. Matlock,* for appellee.

1. Where a broker has been employed to sell land and a sale is effected, even though it be through negotiations directly between the owner and purchaser, the broker is entitled to his commission if he has been the producing cause of the sale. 53 Ark. 49; 76 *Id.* 375; 84 *Id.* 462; 87 *Id.* 506; 89 *Id.* 289; *Ib.* 195; 97 *Id.* 23.

2. There is no error in the instructions. There is evidence that appellee procured the purchaser. 89 Ark. 195; 115 S. W. 1134.

3. There is no evidence of bad faith or disloyalty.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover commissions alleged to have been earned in the sale of certain real estate. Appellant resides at Mulberry, Crawford County, Arkansas, and owned a tract of 276 acres of land in Oklahoma, only a short distance from Fort Smith. Appellee is in the real estate business at Fort Smith. The lands were listed with appellee, and, according to the testimony, he made considerable efforts toward procuring a purchaser. He showed the land to numerous prospective buyers and finally showed it to W. L. Brett, who subsequently purchased the land directly from appellant.

Appellee alleged in his complaint that he was authorized by appellant to sell the lands for $13,000, and that he was to receive a commission of 5 per cent. of the purchase price. Appellant in his answer denies those allegations, but alleges on the contrary that he authorized appellee to sell the land for $50 per acre, or $13,800, and agreed to pay him the sum of $500 as commission if he made the sale at that price, but that appellee failed to make the sale and that he (appellant) sold the land himself to Brett. The case was tried before a jury and a verdict was rendered in appellee's favor for the recovery of the sum of $500.

Appellee testified that after appellant listed the land with him for sale at the price of $13,000, he showed the property to numerous parties, and that one day appellant approached him and urged him to make a sale and intimated that he might take less than the price he had already named; that shortly afterward he began negotiations with Brett and early one morning took Brett out to see the place, and that on the return he gave Brett, at the latter's request, the name and address of the owner. It seems that on the afternoon of that same day, Brett, without appellee's knowledge, drove over to Mulberry to see appellant and they verbally closed the trade at the price of $12,000, which was consummated two or three days later. The evidence does not show that appellant knew at the time he made the oral agreement with Brett that appellee had taken Brett out to see the land or had otherwise negotiated with him.

Appellee testified that the next day a man named Steward, who was appellant's tenant on the place, called at the hotel and left word for him not to take any further steps toward selling the land, and that he thereupon called appellant over the telephone and had a conversation with him about the matter. He undertakes to detail that conversation, and it appears that appellant made evasive statements and was endeavoring to conceal the fact that he was about to close the trade with Brett.

Appellee notified him, however, that he had taken Brett out to see the lands and that he would claim a commission. Brett testified that appellee did not give him the name of the owner, but that he ascertained the name of the owner from Steward, the tenant on the place, when he was looking at it. He also testified that on the return trip to Fort Smith, after he and appellee had been out to look at the place, he told appellee that he would not be willing to give $13,000 for the place, and that appellee made the following statement to him: "If you will let me work it for you, I might be able to buy it for a little less."

(1) Appellant offered to prove by his own testimony and that of other witnesses that he had listed the lands for sale with other real estate dealers at the price of $13,800. This testimony was offered in corroboration of appellant's contention that that was the price at which appellee was authorized to offer the land, and that he was not authorized to sell at a lower price. The court was correct in refusing to permit the testimony to be introduced, for it related to transactions between appellant and other parties and was without probative force in establishing the terms of the contract between the two parties to the present controversy.

(2) It is insisted very earnestly by counsel for appellant that appellee was guilty of infidelity to his principal, which ought to prevent him from recovering commission. It is claimed that his statement to Brett was a breach of his duty to appellant, in that it was his duty to secure the highest price he could get for the land, and that he had offered to serve the prospective purchaser in trying to get the price down as low as possible. We do not think, however, that if the testimony of Brett be accepted as true, it necessarily makes out a case of fraudulent conduct on the part of appellee. It must be borne in mind that according to appellee's testimony appellant had intimated to him that if they could not secure the price named ($13,000), he would be willing to consider a

lower price; and if appellee made the remarks to Brett accredited to him, it was perfectly consistent with good faith in taking up the matter again with appellant to ascertain whether or not he would take less than the sum named. The statement does not manifest a willingness on the part of appellee to neglect the interests of his principal and to turn to the service of the prospective purchaser.

The question of fraud on the part of appellee was, however, submitted in two instructions, one of which (No. 6) was given in the form requested by appellant, and the other (No. 2) was given with a modification.

Instruction No. 2, as requested by appellant, reads as follows: "The law requires that plaintiff as the agent or broker of the defendant shall act in absolute good faith toward the defendant, and if you believe from the evidence that plaintiff stated to the purchaser, Mr. Brett, that the lands could be bought for a less price than defendant had agreed with plaintiff to take; that if he, plaintiff, was given time he could procure the lands at a less price from defendant for Mr. Brett, in that event plaintiff's actions were, in law, fraudulent toward defendant, and your verdict must be for the defendant."

The court modified it by striking out the words "were in law fraudulent toward defendant, and your verdict must be for the defendant," and by adding the words "may be considered by you in determining whether he acted in good faith." The modification was correct, because, as we have already said, it was improper to tell the jury that if appellee made the statement to Brett attributed to him it would constitute fraud which would prevent recovery. It was only a circumstance to be considered by the jury in determining whether or not appellee had acted in good faith.

(3) It is contended also that appellee ought not, in any view of the testimony, to be permitted to recover for the reason that appellant sold the land in good faith to Brett without knowledge of appellee's previous negotia-

tions with Brett. The law on this subject is, however, settled by the decision of this court against appellant's contention, in *Stiewel* v. *Lally,* 89 Ark. 195, where we held that if real estate brokers procured a sale to be made without notice of revocation of authority, they were entitled to recover commission even though the sale was made directly by the owner to a purchaser procured by the brokers, and that their "right to recover commission did not depend upon knowledge upon the part of the owner that they had brought about the sale." The instructions of the court conform to the law stated by this court on the subject.

Appellant asked the court to instruct the jury to the effect that unless appellee produced a purchaser "ready, willing and able" to buy the lands on the terms and at the price which appellant had authorized appellee to accept, there could be no recovery; but the court modified the instruction so as to permit a recovery on the price and terms which appellant fixed in his direct trade with Brett. The evidence showed that the reduction of the price was voluntarily made by appellant. In other words, he sold to a purchaser procured by appellee, and at a price which was satisfactory to himself, and therefore he is liable for the commission. Appellee is, under those circumstances, deemed in law to have been the procuring cause and is entitled to the commission. *Stiewel* v. *Lally, supra.*

We are of the opinion that the case went to the jury upon conflicting evidence and upon correct instructions, and that the issues have been settled by the verdict of the jury. We find no prejudicial error in the record, and the judgment is therefore affirmed.

SOUTHERN WOODMEN *v.* DAVIS.

Opinion delivered June 19, 1916.

1. BENEFIT INSURANCE—TOTAL DISABILITY—IMPROPER DIAGNOSIS.—Plaintiff's right to recover from a fraternal order, for total disability will not be defeated because his physicain, in examining him, diagnosed his trouble as tuberculosis, when it later proved to be interstitial nephritis.
2. BENEFIT INSURANCE—TOTAL DISABILITY.—Plaintiff held a certificate in defendant order, entitling him to a certain sum in the event he became permanently disabled. *Held,* an instruction was proper, which told the jury that the plaintiff might recover if his condition was such that he was permanently unable to perform any substantial portion of the occupation or occupations which he had been accustomed to following, and that when such disability is permanent, then plaintiff was totally and permanently disabled under the policy.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; affirmed.

N. A. McDaniel, for appellant.

1. The proof of loss was not satisfactory as to total and permanent disability. Nor is there proof in the record of the fact. Besides appellee abandoned his first claim that he had tuberculosis and undertook to show that he had interstitial nephritis.

2. The verdict is contrary to the evidence. Total disability was not shown from any cause. The verdict is contrary to law also. The application and policy and the constitution and by-laws constituted the contract. 105 Ark. 140; 81 *Id.* 512. If plaintiff failed to comply with his contract he can not recover. 97 Ark. 425.

3. The court erred in instructions given and refused. They are conflicting. There was no evidence to sustain No. 2 given. Nos. 3 and 4 for plaintiff refer to the occupation which he had been accustomed to follow when they ought to say "the occupation named in the application and covenant." Instruction 2 asked by defendant and amended and given on the court's own motion, was no instruction at all, as it instructs the jury that if they find certain things, etc., but does not tell them what they must do if they so find.

Thos. E. Toler and *W. D. Brouse,* for appellee.

1. Proof of total and permanent disability was made. The member was entitled to recover upon being totally and permanently disabled *from any cause.* A mistake or wrong diagnosis does not matter as the jury found that he was permanently and totally *disabled.*

2. No error is shown in the instructions. Proof of loss was made on the blanks furnished by appellant. No further proofs were asked and hence waived. 79 Ark. 475. If an incomplete proof of loss is furnished in good faith and accepted by the company without objection, its silence is a waiver of any defects. 91 Ark. 43. The occupation mentioned in the covenant and application was "farmer," but all farmers do some hauling and the objections to 3 and 4 were properly overruled. 97 Ark. 425. But if error it was covered by No. 3, asked by appellant. 117 Ark. 524. If there was any ambiguity in the language of the contract making it susceptible of different constructions that should be adopted most favorable to the insured. 111 Ark. 167, 172. Defendant's instruction No. 2 was improper as asked and as given. It was not prejudicial. If incomplete, it was harmless. An acceptance of proof of loss made after thirty days, without objection, is a waiver. 61 Ark. 108.

McCULLOCH, C. J. The plaintiff, E. G. Davis, instituted this action against the Southern Woodmen, a fraternal insurance society, to recover on a benefit certificate which provides for the payment of a benefit in the case of death of a member or "guest" as he is termed in the contract, and also that "on satisfactory proof of total and permanent disability at any age, this guest shall receive the value of this covenant at the time of such disability." The amount to be recovered was, under the terms of the contract, graduated according to the length of continuous membership, and in this instance the amount to be recovered in case of total disability was the sum of $1,700. On trial of the case below, the plaintiff re-

covered judgment for the sum named and the defendant has appealed to this court.

The evidence shows that the plaintiff is fifty-five years of age, and was a farmer in Grant County, Arkansas, and was sometimes engaged in the logging business. He was entirely uneducated, being unable to read or write. He became ill and subsequently made application to the society, through the officers of the local organization of which he was a member, for the payment provided in case of total and permanent disability. Blanks were sent from the home office at Birmingham for proof of loss, and those blanks were filled out in due form and forwarded to the home office. The proof tended to show a total and permanent disability, but the ailment disclosed in the examination of the physician was shown in the affidavit of the physician to be tuberculosis. The society caused an examination to be made by another physician, who failed to find any indications of the disease named, and refused payment, whereupon this suit was commenced to recover the amount.

The proof adduced by the plaintiff tends to show not a case of tuberculosis but of interstitial nephritis or Bright's disease. The evidence was sufficient to establish the fact that the plaintiff is incurably afflicted with that disease and that he is totally and permanently incapacitated from any kind of manual labor, such as is necessary to carry on his business of farming or logging. Plaintiff introduced several physicians who examined him and testified in support of his claim of total disability. The evidence does not show that plaintiff is absolutely helpless, but it does show that he is unable to perform any manual labor pertaining to the duties of his occupation, or any of any other occupation as for that matter.

(1) The first and principal contention of the defendant is, on this appeal, that the plaintiff was not entitled to recover because he did not furnish satisfactory proof of loss. The contention is that plaintiff's case must fail because he sent in proof of disability on account

of tuberculosis and that he subsequently abandoned that and undertook to prove that he was suffering from another disease which caused his alleged total disability. We do not think there is any merit in defendant's contention, for it simply comes down to the point whether or not the plaintiff is bound by the diagnosis of the physician as to the cause of his disability. He furnished proof upon blank forms prescribed by the home office of the society, and those proofs tended to show that he was permanently and totally disabled, and his right to recover is not defeated because there was an error made by the physician in the diagnosis of his case. The point sought to be established by the proof of loss furnished was that he was disabled and the cause of the disability was merely an incident, and if there was an error in that respect it did not prevent recovery of the amount which the proof in the trial of the case shows that the plaintiff was entitled to. He was not, in other words, limited to the testimony set forth in the proof of loss in establishing the cause of his disability. *Eminent Household of Columbian Woodmen* v. *Hewitt,* 184 S. W. 52, 122 Ark. 480.

Defendant's erroneous contention runs through the instructions which were asked concerning the proof of loss, and what we have said disposes of the assignments of error in that regard.

(2) It is further contended that the court erred in giving plaintiff's instruction No. 3, which reads as follows: "You are instructed that if you find from a preponderance of the evidence that the plaintiff was totally and permanently disabled at the time of the institution of this suit, he is entitled to recover in this action; and if he was unable to do any substantial portion of the occupation or occupations which he had been accustomed to following, and that such inability is permanent, then he was totally and permanently disabled under the policy upon which this suit was instituted."

The court gave, at the request of the defendant, an instruction which we think is substantially the same as

the instruction just quoted, and we scarcely deem it necessary to discuss the correctness of those instructions for the reason that the giving of substantially the same instruction at defendant's request was an acquiescence in the one given by the plaintiff. There seems to be a conflict in the authorities as to whether or not under a policy providing for payment in case of total disability without reference to any particular occupation, it is sufficient merely to show disability concerning the particular occupation in which the disabled party was then engaged. We have several decisions of this court which throw some light on the question, but they are not entirely decisive of the particular question now suggested. *Maryland Casualty Co.* v. *Chew,* 92 Ark. 276; *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417; *Brotherhood of L. F. & E.* v. *Aday,* 97 Ark. 425.

Defendant specifically objected to the instruction No. 3 on the ground that it referred to the occupations which the plaintiff was accustomed to engaging in, instead of "the occupations named in plaintiff's application." Counsel for defendant have not abstracted the application, if, indeed, the application appears at all in the record, but we assume from the argument that the application stated the occupation of the plaintiff to be that of a farmer. We do not think, however, that the terms of the policy apply entirely to the particular occupation named in the application, unless the language is sufficient to constitute the statement as a warranty not only that the plaintiff is engaged in that work but will continue to do so. However, there is nothing in the instruction which excludes the idea that it covered the occupation mentioned in the application, for the instruction uses a broader term in referring to "occupation or occupations which he had been accustomed to following." The proof, if sufficient to establish a total and permanent disability at all, shows that plaintiff was disabled not only from the occupation mentioned but from all other pursuits.

The evidence adduced in the case, when considered as a whole, makes it very doubtful whether plaintiff was in fact permanently and totally disabled within the meaning of the policy, but there was evidence to sustain the plaintiff's cause of action, and the issue must be treated as settled by the verdict of the jury. We are of the opinion that the case was submitted to the jury upon correct instructions. That being true, it follows that the judgment must be affirmed. It is so ordered.

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

Opinion delivered June 19, 1916.

1. RAILROADS—INJURY TO PERSON ON TRACK—LOOKOUT.—Deceased while walking on defendant railway company's track, was struck by a train and killed. In an action by his administrator for damages, *held*, the evidence showed that he was seen or could have been seen, by the engineer and fireman, for a distance of half a mile before deceased was struck, and that he remained on the track until he was struck, and that it was a question for the jury whether his peril was discovered by the train operatives in time for them to have avoided the injury.
2. RAILROADS—DUTY TO TRESPASSER ON TRACK.—The operatives of a railway train owe no duty to trespassers upon the railway tracks, until they discover, or by the exercise of ordinary care could have discovered, that the trespasser was in peril.
3. RAILROADS—INJURY TO PERSON ON TRACK—NEGLIGENCE—QUESTION FOR JURY.—Where deceased, walking on defendant railway company's track was struck by a moving train and killed, *held*, under the evidence it was a question for the jury whether the deceased was unconscious of his danger, and whether the engine operatives could, by the exercise of ordinary care have discovered his peril, in time to have avoided injuring him.

Appeal from Perry Circuit Court; *Robt. J. Lea*, Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit instituted by the appellee as administrator of the estate of T. W. Edmondson, deceased, against the appellants to recover damages for the benefit

of the widow and next of kin for the alleged negligent killing of Edmondson.

The complaint alleged that Edmondson was walking on the track of appellant along a pathway which was a regular and customary pathway for pedestrians; that appellant's train was in charge of Michael Mann, as engineer, who suddenly and violently ran the train upon Edmondson, killing him; that the killing was the result of a failure of Mann and other employees on the train to keep a lookout as required by the statute; that if such lookout had been kept they could have discovered Edmondson's perilous situation on the track in time to have avoided killing him. The appellant denied the allegations of negligence and set up the defense of contributory negligence.

The testimony on behalf of the appellee tended to show that Edmondson, on the morning of the killing, was intoxicated; that he had his gun and shells, and in this condition was walking upon appellant's track going west from the town of Houston; that appellant's track west from the town of Houston was straight for about a mile. The attention of a witness was attracted by the blowing of the train whistle for the station before the train came in sight. Witness observed Edmondson walking on the track toward the west. The train was approaching him and got so close to him that it threw a shadow over Edmondson and witness could not see him, but almost immediately afterward he saw him go up in the air. Edmondson was on the mound between the rails just before he was struck. Witness had been watching him for some time before he was hit and did not see him step off of the track before he was struck. Edmondson was about a half mile west of the depot when he was hit, and the track was clear for half a mile beyond where Edmondson was. The track at that point was down grade toward Houston. Witness did not hear any ringing of a bell or any alarm whistle until the back-up whistle after the accident occurred. It was a little hazy that morning and the wind

was blowing, but witness could see the man on the track. The only whistle that witness heard was the station whistle. Witness did not observe any indications that Edmondson was aware of the approach of the train.

Another witness for the appellee testified that he was at the depot on the platform at Houston and witnessed the accident in which Edmondson was killed. He saw Edmondson walking up the track and as the train approached him witness watched him more closely and continued to watch him until he was hit. Edmondson was "walking along up the track with his head down." He never got out from between the rails from the time witness first saw him until he was struck. Witness heard the train whistle for the station before it came in sight. Witness could see something like three-quarters of a mile up the track. The train did not whistle after it whistled for the station until it sounded three back-up whistles after the accident occurred. Edmondson did not seem to be aware of the danger. Just before he was struck, or about the same instant, he seemed to get a little to the right. No bell was ringing. Witness watched Edmondson all the time after the train came in sight and he remained on the track until he was killed. Witness' attention was attracted to the "condition he (Edmondson) was walking." Witness "thought he was sick, or that something was the matter." Witness could not see "whether he had his hat pulled down over his eyes, but could see he had his head drooped."

It was shown that the people usually walked along the center of the track at this point; that such was the custom. They could walk along the side of the track if they wanted to. One witness testified that "west from the point where Edmondson was struck there is a straight unobstructed view for about half a mile. There is nothing to keep the engineer from seeing a man coming up the track. The track is straight for a mile west of the depot." There was testimony tending to show that

when Edmondson was struck he was carried from forty to forty-five feet.

The testimony of the engineer and fireman, who were on the train at the time Edmondson was killed, tended to show that they saw a man coming up the center of the track before the whistle was blown for the station. They got in about two telegraph poles from the man and started to blow the whistle when the man stepped off of the track. The engineer's view was then cut off by his engine; the engine had a large boiler.

In a second after the engineer lost sight of the man the fireman said to him, "Stop! that man started to walk over the engine." The engineer put on the emergency and stopped as quickly as he could. His train went about eight or nine hundred feet before it stopped. When he first saw the man on the track he was something like four telegraph poles ahead of the engine, and as the engine approached him he stepped off on the fireman's side and did not get back on the track until after the view of the engineer was cut off by his engine. The engineer did not know that he was struck until his fireman jumped down and threw up his hands. The man was walking toward the engine and there was nothing in his appearance to indicate that he would not get off and he did get off.

The fireman testified: "When we got about two pole lengths from him, or maybe three, he stepped out from between the rails and got down from the ends of the ties. When we got down closer he got over further to the bank, and just before we got to him he took two or three steps up toward the ties, and the pilot beam hit him. We were just two or three steps from him, right on him, when he stepped in front of the train. He had his face toward us, looking up the track."

The court instructed the jury: "If you find from the evidence that the deceased was walking on the track of the defendant railway company toward the train, and that he was unaware of its approach, or was incapable from any cause of caring for himself and avoiding the

danger, if any, and was in a perilous position, and if you find that the engineer in charge of the engine saw him on the track, and by keeping a constant lookout ahead should have discovered his perilous condition and danger in time, by the use of ordinary care and prudence, to have warned him of the approach, or, if necessary, to have stopped the train, and could have prevented the injury, and that he negligently and carelessly failed to do so, and that by reason thereof deceased was injured and death resulted, * * * the verdict will be for the plaintiff, even though you find the deceased was wrongfully on said track and guilty of negligence on his part."

And the court, at the request of appellant, instructed the jury to the effect that if Edmondson was walking on or near the railroad track toward the approaching train and apparently aware of its approach, there was no duty on the part of the operatives of the train to sound any alarm, nor to attempt to stop the train or cause it to slow down until such time as it became apparent that the deceased did not know that the train was coming, or knowing that, had determined upon putting himself in the way of the train for the purpose of letting it strike him, or was incapable from any cause of appreciating the danger and avoiding it.

And, further, that if Edmondson stepped off of the railroad track and was walking in a place where he would not be struck by the train as it passed him, and that just as the train reached the point where he was walking, he stumbled or stepped close enough to get struck by the engine, and thus was killed, neither the defendant Mann nor the railway company was liable, and their verdict should be in favor of both the defendants.

And, further, that neither the railway company nor Mann, the engineer, was liable if Mann acted as an ordinarily prudent person would have acted under the circumstaces after seeing Edmondson on the track coming toward the train.

And, further, "the mere fact that the deceased, Edmondson, was struck and killed does not entitle the plaintiff to a verdict at your hands; but before either of the defendants is held liable, the engineer must have been guilty of negligence as defined in these instructions."

The court refused to give appellants' prayer for a directed verdict in their favor. The court also refused appellants' prayers to the effect that appellant railway company's engineer and fireman were under no duty to stop the train or check its speed or sound the alarm because they discovered a person walking on or near the railroad track; that they had a right to presume that such person would get out of the way of the train without danger to himself, and to act on this assumption, and that the defendant would not be liable for any failure on the part of the operatives to stop the train or sound a warning unless such operatives discovered in time to have avoided the accident that the deceased did not know the train was coming or that knowing it he determined to put himself in the way of the train.

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

Thos. S. Buzbee and *H. T. Harrison,* for appellant.

1. Under plaintiff's version of this case, deceased either committed suicide or did just what a person would do who selected such a method of suicide. It does not present a case of negligence of defendant and contributory negligence on the part of deceased. It is a catastrophe deliberately brought about by the wilful and wanton acts of deceased or by conduct open to no other explanation. The court should have told the jury it was the folly and recklessness of the man, and not the negligence of the company which caused death. 3 App. Cas. 1155.

2. The rule of liability under the doctrine of discovered peril in case of trespassers is well settled. 62 Ark. 170; 47 *Id.* 497; 93 *Id.* 579; 83 *Id.* 300; 3 App. Cas. 1155.

3. No negligence whatever was proven, and the court erred in its instructions to the jury. 107 Ark. 202; 46 *Id.* 513.

T. N. Robertson and *E. H. Timmons,* for appellee.

1. The evidence shows the case of a man under the influence of strong drink, thereby rendered subconscious, unappreciative of danger and evidently incapable of taking care of himself. This was manifest if a lookout had been kept as the law requires. The track was straight for half a mile. No alarm was given nor effort made to check the train. Even if a trespasser, the company can not wantonly, recklessly or negligently kill him. The law of discovered peril and negligence is well settled in this State. 46 Ark. 513; 62 *Id.* 170; Acts 1911, p. 275.

2. There is no error in the court's charge. Cases, *supra.*

WOOD, J., (after stating the facts). The testimony of appellant's engineer and fireman show that they were keeping a lookout and that they saw Edmondson on the track but that he left the track and then again stepped upon it so suddenly that they did not have time, after doing all in their power to stop the train, to prevent the same from killing Edmondson. But the testimony on the part of appellee warranted the jury in finding that Edmondson did not leave the track from the time the whistle first blew for the station until he was struck by the train; that he was walking upon the track, with his head "drooped."

If Edmondson did not leave the track from the time appellee's witnesses discovered him walking on the same until he was struck by the train, then the engineer and fireman saw or could have seen his perilous situation in time, by the exercise of ordinary care, to have prevented injury to him, for the witnesses for appellee testified that their attention was drawn by the whistling of the train for the station, when they noticed that there was a man walking on the track approaching the train; that the whistle sounded before they could see the train, and that when

the train came in full view Edmondson was about half a mile from it. Therefore, if the testimony of the witnesses for the appellee was true, the engineer and fireman saw, or by the exercise of ordinary care, could have seen Edmondson upon the track in ample time to have avoided injuring him if he had remained on the track; yet they say that he left the track and returned to it so suddenly that it was impossible for them to have prevented killing him.

(1-2) It will thus be seen that there was a sharp conflict in the evidence as to whether Edmondson left the track at all after he was seen by the engineer and fireman, and the jury were warranted in finding that he did not leave the track. Therefore, giving the evidence its strongest probative force in favor of the appellee, it must be accepted as an established fact that Edmondson was seen, or could have been seen, by the engineer and fireman for a distance of half a mile walking upon appellant's track, and that he continued on the track until he was struck by the engine. Nevertheless, this fact alone would not render the appellant liable, for in walking upon appellant's track Edmondson, under the circumstances, was a trespasser and appellant owed him no duty until its employees discovered, or by the exercise of ordinary care could have discovered, that he was in a perilous situation.

Appellant's engineer and fireman testified that there was nothing in Edmondson's appearance to indicate that he would not get off of the track and that he did get off, and if this testimony was true, of course appellant's servants were not negligent in failing to sound the alarm, or slow down, or stop the train in order to have prevented the injury. But here again there was a sharp conflict in the evidence. The testimony of a witness on behalf of the appellee was that Edmondson was "walking along up the track with his head down;" that he had his head "drooped." Witness thought from this that he was sick or something was the matter.

(3) Counsel for the appellant contends that this testimony was contrary to the physical facts and should

not have been believed by the jury in contradiction of the testimony of appellant's witnesses to the effect that Edmondson was walking with his eyes open right in the face of the advancing train, and in contradiction of the testimony to the effect that he had good eyes and ears, and therefore must have been aware of his danger. But we can not say as a matter of law that it was impossible for the appellee's witness to have seen that Edmondson was walking with his head down. This was a question for the jury. Accepting the testimony of this witness on behalf of the appellee, the jury were warranted in concluding that Edmondson was oblivious of the rapidly approaching train and that the appellant's servants discovered or might have discovered his condition by the exercise of ordinary care in time to have prevented the injury. These were issues of fact, and they were submitted under instructions which correctly declared the law as announced in many decisions of this court. See *St. Louis, I. M. & S. Ry. Co.* v. *Wilkerson,* 46 Ark. 513; *Memphis, Dallas & Gulf Rd. Co.* v. *Buckley,* 99 Ark. 422, and cases cited; *St. Louis, I. M. & S. Ry. Co.* v. *Scott,* 102 Ark. 417-421; *St. L. & S. F. Ry. Co.* v. *Newman,* 105 Ark. 284-288-9; *St. Louis, I. M. & S. Ry. Co.* v. *Morgan,* 107 Ark. 202-218-219.

Appellant's prayers for instructions which the court refused were fully covered by those given.

The judgment is therefore correct and it is affirmed.

STATE NATIONAL BANK OF LITTLE ROCK *v.* FIRST NATIONAL BANK OF ATCHISON, KANSAS.*

Opinion delivered June 26, 1916.

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

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*Opinion reported on page 532 *infra* (Rep.)

DARRAGH COMPANY v. GOODMAN.

Opinion delivered June 26, 1916.

1. BANKS AND BANKING—DEPOSIT OF MONEY—TITLE—RELATION OF BANK TO CUSTOMER.—A general deposit of money in a bank passes the title immediately to the bank and establishes the relation of debtor and creditor between the bank and its customer, the depositor.
2. BANKS AND BANKING—DRAFT FOR COLLECTION—TITLE.—A bank receiving a draft for collection merely, is the agent of the remitter, drawer or forwarding bank, and takes no title to the paper, or the proceeds when collected, but holds the same in trust for remitting.
3. BANKS AND BANKING—DRAFTS FOR COLLECTION—RELATION BETWEEN DRAWER AND COLLECTING BANK.—Plaintiff bank drew drafts on D., and sent the same to defendant bank for collection. Defendant bank collected the drafts, and sent exchange on the C. bank to the drawer bank in payment. Before the drawer bank collected the same, the defendant bank failed, but at the time of failure had cash on hand sufficient to cover the amount due the drawer bank. *Held*, the funds collected from the D. Co. upon the drafts of the drawer, bank, did not become the property of the collecting bank, nor establish the relation of debtor and creditor for the amount thereof between it and the drawer bank, and that the relation of principal and agent continued and the collecting bank having failed before the payment of its check or the presentation thereof for payment in due course of business, the drawer bank was entitled to the proceeds of the collected drafts out of the defunct bank's cash going into the hands of the receiver in preference to general creditors.
4. PRINCIPAL AND AGENT—COLLECTION OF OBLIGATION DUE PRINCIPAL—BANKS.—An agent having for collection an obligation due to his principal, can receive only money in payment unless otherwise directed, and this rule applies to a bank holding a draft for collection.
5. BANKS ANS BANKING—PAYMENT OF DRAFT—PAYMENT BY CHECK.—The payment of a draft by the drawee by the delivery of his check therefor against his account in the collecting bank, and the charging of the amount against his account in the collecting bank, constitutes a payment in cash of the draft, the check being merely the vehicle of transfer of the cash.
6. BANKS AND BANKING—COLLECTION OF DRAFT—FAILURE OF COLLECTING BANK—RECOVERY BY DRAWER BANK.—The drawer bank may recover the amount of a draft collected by the collecting bank, as against creditors of the latter, where the collecting bank failed before turning over the amount collected to the drawer bank, where the collecting bank had more money on hand each day it continued business after the collection of the drafts, than the amount thereof, the same amounting to a sufficient identification of the proceeds of the collected draft.

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

STATEMENT BY THE COURT.

These appeals involve the correctness of the decrees of the Pulaski and Grant Chancery Courts, the one requiring the receiver of an insolvent bank to pay from the moneys on hand at the time of its failure the full amount of certain drafts collected by it shortly before its failure to the drawer bank, to the exclusion of the general creditors, and the other denying the drawer of the draft such right to the payment of the amount collected out of the cash assets of the defunct bank, and have been consolidated for hearing.

It appears from the agreed statement of facts that the First National Bank of Atchison, Kansas, sent drafts with bills of lading attached on F. J. Darragh Company of Little Rock, to the State National Bank for collection. This bank, of which the Darragh company were customers, presented the drafts on June 15, 1914, and they were paid by said company's check on the collecting bank which charged the checks against the account of the payer and sent its draft on the National Bank of Commerce of St. Louis to cover the collection. Immediately upon receipt of the exchange, the Kansas bank forwarded it to St. Louis for collection, but before it reached there the State National Bank had suspended business and payment of the draft was refused by the St. Louis bank because of the failure of the drawer.

During the day and at the close of business of said June 15, 1914, the State National Bank had on hand the sum of $32,429.54 in cash. When it closed its doors on June 19, it had cash on hand only to the amount of $7,052.77, which went into the hands of the receiver, who took charge of the assets of the bank. Said sum was the lowest amount of cash the defunct bank had on hand at any time after the collection of the drafts. It continued business regularly to the time of closing its doors on June 19, 1914.

The court held the collection constituted a trust fund and ordered it paid out of the cash going into the hands of the receiver to the exclusion of the general creditors of the bank.

In No. 4200, the Darragh company of Little Rock, on June 8, 1915, sent its draft on M. A. Davis of Leola, Ark., to the Bank of Leola for collection, with the direction contained in its circular letter, "Please collect this item for us on arrival of goods and remit proceeds in Little Rock exchange, with your usual promptness."

On the 13th day of January, the Bank of Leola collected the draft and issued its "cashier's check" payable to the order of the Darragh company for the amount, and mailed it to said company. On the next day, the Darragh company deposited the said cashier's check in the England National Bank of Little Rock for collection, but the Leola bank failed and its affairs were taken charge of by John M. Davis, State Bank Examiner, on June 15, before said cashier's check could in due course be collected. The defunct bank had more cash on hand at the time it was taken charge of by the examiner than the amount collected on the draft, and had not had a less amount since the collection.

Coleman & Lewis, for appellant; *H. M. Trieber,* of counsel.

1. Under the facts of this case, only the relation of debtor and creditor existed. 93 Tenn. 353; 27 S. W. 669; 25 L. R. A. 523. Where paper is deposited with a bank for collection, such bank is an agent until the proceeds are received by it. It may then credit the proceeds to the depositor and establish the relation of debtor and creditor. 14 S. Dak. 512; 86 Am. St. 769, and note 797-8; 3 R. C. L., § 262, p. 634. It is not essential that the forwarder be a depositor; the rule is the same where the proceeds are not to be deposited, but remitted to the customer by draft. 3 R. C. L., § 261, p. 633; 95 Tenn. 579; 49 Am. St. 940; 32 L. R. A. 715, and note.

2. The funds of the bank were not augmented by the collection of the drafts. Checks of third parties on a bank with which they are depositors, which are paid by crediting the bank and charging the drawers on its books, do not increase the cash in bank and present no basis for a preference to the depositor. 3 R. C. L., § 268, p. 639; 78 N. Y. 269; 34 Am. St. 532; 69 Miss. 759; 30 Am. St. Rep. 585; 56 Fed. 759; 64 Atl. 923; 53 N. W. 923; 71 S. W. 977; 86 Am. St. 769, and note, 804, 806, 807, etc.

3. A decision of this case involves the construction of the National Bank Act and should follow the construction of the act by the Federal courts. 194 Fed. 593; 8 C. C. A.; 1 Enc. U. S. Rep. 548; 73 U. S. 628; 172 *Id.* 425.

Hinton & Rogers and *Comer & Clayton,* for First National Bank and F. J. Darragh *et al.; G. F. Williams* and *Grover T. Owens,* for Darragh *et al.*

1. The draft was not deposited generally and treated as cash, but was sent for collection and remittance. The bank had no title; the intention of the parties will prevail as to ownership of the proceeds. 49 Neb. 786; 59 Am. St. 572; 14 S. D. 512; 86 Am. St. 769, and note, ¶¶ 2 and 3, p. 782 and ¶ 1, p. 786. The bank did not take title to the proceeds of the draft. 49 Neb. 786; 59 Am. St. 572; 86 *Id.* 769, and note. See 136 Fed. 90; 134 *Id.* 724; 145 Atl. 146; 118 Ill. App. 491.

Moore, Smith, Moore & Trieber, for appellee, in Darragh v. Goodman; *Coleman & Lewis,* of counsel.

In the absence of any agreement to the contrary, a collecting bank becomes the owner of the money collected, and is under obligation to pay or remit the amount; the relation of debtor and creditor is established. Here remittance was requested in Little Rock exchange, which authorized the Bank of Leola to substitute its own obligation, hence there was no trust. 93 Tenn. 353, 25 S. W. 669, 25 L. R. A. 523. This case is directly in point. See also 104 Ark. 560.

KIRBY, J., (after stating the facts). It is contended on the one hand that only the relation of principal and

agent existed between the collecting bank and the drawer of the drafts collected and that the amount collected remained the property of the drawer, a trust fund which the receiver could be required to account for to the exclusion of the general creditors, and on the other that only the relation of debtor and creditor was created by the transactions and the drawers of the drafts were not entitled to any preference payment out of the cash assets of the defunct bank.

(1) No principle of law is better established than that a general deposit of money in a bank passes the title immediately to the bank and establishes the relation of debtor and creditor between the bank and its customer, the depositor. *Covey* v. *Cannon,* 104 Ark. 550, 149 S. W. 514, 518; *Warren* v. *Nix,* 97 Ark. 374; *Steelman* v. *Atchley,* 135 S. W. 902, 98 Ark. 294; 3 R. C. L. 261; *Merchants' & Planters' Bank* v. *Meyer,* 56 Ark. 499, 20 S. W. 406; *Plano Mfg. Co.* v. *Auld,* 14 S. Dak. 512, 86 N. W. 21, 86 Am. Rep. 769, and note; *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, 63 S. W. 68.

(2) It is likewise well established that a bank receiving a draft for collection merely, is the agent of the remitter, drawer or forwarding bank, and takes no title to the paper or the proceeds when collected, but holds same in trust for remitting. *Second National Bank* v. *Bank of Alma,* 99 Ark. 386; *Okla. State Bank* v. *Bank of Central Arkansas,* 120 Ark. 369, 179 S. W. 509; 3 R. C. L., p. 633; 3 Am. Enc. of L., p. 815; 5 Cyc., p. 514; *Macy* v. *Roedenbeck,* 227 Fed. 346, 353, and other authorities cited on appellees' brief.

(3) There is no question in either of these cases but that the drafts were sent for collection only, with the expectation that the proceeds should be remitted immediately upon the receipt thereof by the collecting bank and nothing indicating that the parties intended that the drafts or proceeds should not remain the property of the owner. Such being the case, we hold that the deposit by the State National Bank of the funds collected from the Darragh company upon the drafts of the Kansas bank

did not become the property of the collecting bank nor establish the relation of debtor and creditor for the amount thereof between it and the drawer bank and that the relation of principal and agent continued and the bank having failed before the payment of its check or the presentation thereof in due course of business for payment, the drawer was entitled to the proceeds of the collected drafts out of the defunct bank's cash going into the hands of the receiver in preference to the general creditors.

It is true, as contended, that the collecting bank was instructed by the drawer of the draft in No. 4200 to remit the proceeds in Little Rock exchange, but we do not think this indicated an intention upon its part that the bank should take the title to the proceeds nor consent that the relation of debtor and creditor should arise, but the intention rather that no such relation should be created. The bank was making the collection merely and the direction to remit immediately in Little Rock exchange shows unmistakably that the draft was sent for collection and that there was no intention of the drawer to receive credit from the bank, but an expectation that the proceeds would be immediately forwarded, and the suggestion, remit in Little Rock exchange was only to facilitate the receipt of the money, the drawer of the draft living in the city where such exchange would be payable and relieve the necessity for forwarding the check or draft used as a medium of payment for collection.

It is contended further by appellant that even if it shall be held that the relation of debtor and creditor did not arise between the collecting bank and the owner sending the drafts for collection, that since the collections were made in fact by the receipt of a check from the drawee against its account in the collecting bank and the charge of the amount thereof against same, that no money in fact was received nor the cash assets of the bank thereby increased and that therefore the funds of the bank coming into the hands of the receiver could not be impressed with the trust for the payment of the proceeds

of the draft collected. We do not agree to this contention.

(4) It is uniformly held that an agent having for collection obligations due to his principal, can receive only money in payment unless otherwise directed, and these principles of course apply to banks holding drafts for collection. 1 Am. Enc. of L. 1037; 3 Am. Enc. of La. 804; 3 R. C. L. 616, 635 and 640; *Ward* v. *Smith,* 7 Wall. 447; *Fritz* v. *Stover,* 22 Wall. 208; *Briggs* v. *Collins,* 113 Ark. 190; *Groom* v. *Neff Harness Co.,* 79 Ark. 401; *Bradley Lumber Co.* v. *Bradley County Bank,* 206 Fed. 41.

Our court has held in its construction of the law prescribing a penalty against the officers of insolvent banks for receiving moneys on deposit when the bank is known to be insolvent, that the receipt by the officer of a check drawn by a customer against his account in the bank and depositing it to the credit of the account of the payee, another customer, was receiving money within the meaning of the law. *Cunningham* v. *State,* 115 Ark. 392; *Skarda* v. *State,* 118 Ark. 176.

In *Daniel* v. *St. Louis National Bank,* 67 Ark. 223, 54 S. W. 214, the court held that where a bank had sent a note to a correspondent bank for collection and the latter, which had the makers money on deposit with instructions to pay it on the note, charged the amount thereof to the maker and credited it to the sender of the note in the regular course of business, it constituted a payment of the note, notwithstanding the bank failed the next day and returned the note without endorsement or accounting for the collection.

In 3 R. C. L. 641, it is said: "And a collecting bank may, as between the payor and holder of paper, receive a check of the payor upon the bank or a certificate of deposit held by him in payment, since the payor should not be required to go through the idle ceremony of withdrawing the money from the bank and paying it back to the bank."

(5) The payment by the drawee of the draft of the amount thereof by the delivery of its check therefor

against his account in the collecting bank and the charging of the amount against his account, constituted to all intents and purposes a payment in cash of the drafts, the check being merely the vehicle of transfer of the cash.

Certainly there is no necessity for the drawee of the drafts to take its check to its bank, the collector, and present it and receive the money and hand it back to the bank in payment of the draft.

(6) The testimony shows that the bank had more money on hand each day it continued business after the collection of the drafts than the amount thereof and that the lowest amount it had on hand thereafter and which went into the hands of the receiver was more than $7,000, and under the rule announced by this court in *Covey* v. *Cannon,* 104 Ark. 550, this showing is a sufficient identification of the proceeds of the collected draft and tracing them to the possession of the receiver.

It follows that the decree of the Pulaski Chancery Court is correct and is affirmed and of the Grant Chancery Court is erroneous, and the same is reversed and the cause remanded with direction to enter a decree for the amount of the draft claimed by appellant.

THE J. R. WATKINS MEDICAL COMPANY v. WILLIAMS.

Opinion delivered June 26, 1916.

1. VENDOR AND PURCHASER—NATURE OF THE RELATIONSHIP—IMPOSITION OF TERMS BY THE VENDOR.—One may sell goods to whom he pleases, and the relation of the parties as vendor and vendee is not changed by restrictions as to the class of persons to whom sales will be made, nor by the exaction that fixed prices shall be charged, or or that other exactions shall be complied with.
2. PRINCIPAL AND AGENT—NATURE OF THE RELATIONSHIP—SALES OF GOODS.—Appellee was engaged in selling the medical goods of appellant in this State; *held,* under the facts and the nature of the agreement between the parties that they occupied the relation of principal and agent, and not that of vendor and purchaser.

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

R. P. Taylor, for appellant; *Tawney, Smith & Tawney,* of Winona, Minn., of counsel.

1. A similar contract was construed by this court in 115 Ark. 166. Williams was not appellant's agent, and the company was not engaged in business in Arkansas. The facts proven and the contract show a *sale* of the goods to appellee and not an agency. 181 S. W. 1183; 2 A. & E. Ann. Cas. 309; 161 Fed. 223; 18 L. R. A. (N. S.) 139, 140; 40 S. W. 393; 98 Tenn. 244. Names go for title; the contract really operates to transfer title and was a sale. Mechem on Sales, § § 41-49; 28 Am. St. 811; 70 N. W. 808; 180 S. W. 21, and many others.

2. Granting the truth of jury's finding that Williams was an agent, it is not conclusive of plaintiff's right nor of the question of interstate commerce. 115 Ark. 166; 156 Fed. 2; 141 U. S. 47; 187 *Id.* 632; 217 *Id.* 91, and others; 57 Ark. 24; 8 Wall. (U. S.) 168; 216 U. S. 56; 227 *Id.* 389; 156 *Id.* 296.

3. Incompetent evidence was admitted and the court's instructions were improper. 156 Fed. 2; 108 N. E. 791. The interpretation of contracts is one of law and not of fact for a jury. Jones on Ev. (2 ed.), § 175; 89 Ark. 239; 84 U. S. 123; 67 Mo. App. 591.

Burr, Stewart & Burr, for appellee.

1. Every question raised here was ruled against appellant's contention in 115 Ark. 166. The contracts are identical. 157 Ky. 570. The facts and contract show an agency and not the relation of vendor and vendee. 141 U. S. 627; 150 *Id.* 312; 100 S. W. 558; 151 *Id.* 211; 98 Tenn. 221; 74 C. C. A. 611; 115 Ark. 166.

2. The business done was not interstate commerce. 115 Ark. 166.

3. There is no error in the instructions; they correctly state the law.

SMITH, J. The parties to this litigation concede that the case presents substantially the same questions as those involved in the case of *Clark* v. *J. R. Watkins Medical Co.,* 115 Ark. 166. The appellant here was the ap-

pellee there, and the cause of action in both cases was founded upon the same agency contract. Appellant advertises itself as the largest medicine house in the world and does its business chiefly through persons who represent it in the same capacity appellee did. The proof shows that at one time it had as many as eighty such representatives in this State and something like two thousand in the United States and Canada, and apparently all of them operate under a contract similar to the one existing between the parties here.

The court below, at its own instance, gave a number of instructions which submitted to the jury for their decision the controlling question of fact, that is, the nature of the relationship between the parties. Other instructions which appellant requested were refused, some of which might very well have been given. Others were properly refused. But without setting out these instructions, it may be said that the ones given substantially declared the law as appellant requested in so far as its instructions were correct declarations of the law. The court told the jury, in effect, to find for appellant for the amount sued for by it, provided they found it had the right to maintain the suit; and the jury was further told, in substance, that appellant had this right unless appellee, who was the defendant there, was its agent in selling and delivering its products in the years 1910, 1911 and 1912, and that the contract sued on was made in this State. And the correctness of this instruction presents the real question in the case.

It is contended here, as it was on the appeal of the former case, cited above, that the contract between the parties was in writing and that it was the duty of the court below to interpret it, and that in the performance of this duty the court should have declared that appellant was not engaged in business in this State, but that all transactions between the parties contemplated under the contract were interstate commerce and that appellant, therefore, had the right to sue in the courts of this State without complying with the laws of this State regulating

the manner in which foreign corporations may do business in this State. The trial court took this view of the case on the former appeal and directed a verdict in favor of the plaintiff there; but we reversed that judgment for the reasons there stated. And in doing so, we announced the principles which in our judgment are controlling. We said there that in construing a contract we might take into consideration the construction which the parties themselves had placed upon it and the action which they had taken in executing its provisions; but that these rules of construction were not available where the contract was unambiguous, in which event it was the duty of the court to construe the contract and to declare its purport. We said, however, that the contract was ambiguous and that when it was considered in connection with the correspondence between the parties and their respective conduct in the performance of its terms, the facts were such that it could not be said, as a matter of law, that the contract was one for the sale of goods, and not one for the creation of the relation of principal and agent.

Under the instructions of the court, which conform to the law as announced in the opinion on the appeal of the former case, the jury has found that appellee was appellant's agent in the business which he did in this State. And there can be no question as to the character of the business which appellee was doing. The undisputed proof is, and from the very nature of appellee's business must have been, that appellee was engaged in intrastate business. The wares which the contract contemplated he should sell to the consumer were shipped to him at Marmaduke, Arkansas, from Memphis, Tennessee. The original packages were broken up at Marmaduke and such portions of the various packages as appellee thought he might be able to sell on any particular trip were loaded into his wagon and conveyed from house to house until a purchaser was found, when a delivery would be made.

The former opinion set out the contracts and the correspondence between the parties, and we have substantially the same evidence, and we refer to the former opin-

ion for a statement of the provisions of the contracts. Counsel for appellee summarize these provisions and the evidence here in the trial below as follows:

"These contracts required C. E. Williams to devote all his time and attention to selling Watkins' products; to canvass every farmhouse in his territory at least three times a year; to sell these goods at retail prices fixed by the company; to confine his canvassing to his own territory; to observe such instructions in regard to the conduct of the business as the company might give, to have no other occupation whatever and to sell and handle no other goods whatsoever; to work continuously at the business so far as weather and health will permit; to furnish team, wagon and outfit for the business; to pay freight on goods, to make regular and satisfactory weekly reports to the company; to pay for goods in one or the other ways provided therein; to return all goods by prepaid freight to the company when he quits business for credit on his account; to sell said goods at every farmhouse in his territory; to make written reports to the company when required to do so of all sales, collections, goods on hand and outstanding accounts; to sell only to actual consumers; and to keep a complete record of all goods disposed of in said territory. He was to pay for the goods by giving the company half the cash the agency produced each week or by paying cash for goods in ten days with 3 per cent. discount; when he quit work the company agreed to receive all undisposed of goods on hand (to be returned freight prepaid) and give him credit on his account at the original price it charged him for them, and when a balance was struck the party who owed the other should pay such balance due on demand."

We think this evidence presents sufficient indicia of agency to support the finding that this was the relationship which in fact existed.

We recognize the fact that one may sell his goods to whom he pleases, and that the relation of the parties as vendor and vendee is not changed by restrictions as to the class of persons to whom sales will be made, nor by the

exaction that fixed prices shall be charged, or that other exactions shall be complied with, without changing the character of the transaction as a sale. The vendor may exact in advance an agreement covering these matters and may refuse to sell to any except those who will agree so to be bound without changing the character of the transaction as a sale, and compliance with these terms by the vendee will not support a finding that the vendor who imposed them is engaged in business in the State where the conditions are performed. But we think the jury here was warranted in finding something more. These findings might have been made: That the consignee was not definitely and absolutely bound, at all events, to pay for the goods. That the consignee could fulfill his contract by accounting to the consignor for all goods sold and by returning to the consignor the unsold goods. That the consignee had the right, under any circumstances, to return any of the consigned goods. That no part of the purchase price for the goods became due the consignor except upon a sale made by the consignee. That the goods were not to be paid for as upon a sale to the consignee, but only upon a sale by the consignee. That the consignee was to render regular accounts and reports of the business, showing the amounts and prices of goods sold, whether sold for cash or credit, the amount of goods on hand and outstanding accounts. That there was no stipulation either to sell or to pay for the goods in a fixed time. That all unsold goods were to be returned to the consignor when the contract was terminated by either party.

Appellant was constantly endeavoring to increase the number of its agents or representatives, and in the literature which was furnished the acting representatives, inducements were held out to secure others. In this literature it was said: "No experience is necessary, and no investment is required. We furnish you the goods and teach you the business. Address, Agency Department the J. R. Watkins Medical Company, Winona, Minnesota." In a great many places in the contracts, corre-

spondence and advertising matter, appellee and others similarly employed are referred to as agents, yet, of course, that designation is not controlling. This was made plain to the jury in an instruction in which they were told that if it was the intention of the medical company and appellee that the property in the goods delivered to appellee was to pass to him for the price to be paid by him, the transaction was a sale, and their verdict should be for the medical company, and this would be true without regard to the name used by either of the parties in describing the transaction.

We think the evidence summarized above is legally sufficient to support the finding that the business out of which this litigation arose was appellant's and that appellee was but its agent. And inasmuch as appellant concedes it has not complied with Act No. 313 of the Acts of 1907, page 744, authorizing it to do business in this State, the judgment of the court below will be affirmed.

HORTON v. THOMPSON.

Opinion delivered June 26, 1916.

MORTGAGES—VERBAL RELEASE OF LIEN—SUFFICIENCY OF CONSIDERATION—The release of the lien in a deed of trust is based upon a valid consideration when the obligor, in consideration of the obligee's promise to release the lien, obtained further credit, and paid the sum so realized to the original obligee, who credited the payment upon his debt.

Appeal from Independence Circuit Court; *Dene H. Coleman,* Judge; affirmed.

Samuel M. Bone, for appellant.

1. The payment of $200 eleven months after the note was due was not a sufficient consideration for the alleged agreement of release. 96 Ark. 20; 26 *Id.* 160. The doing of that which a party is by law or contract obligated to do is no consideration whatever to support any new contract or obligation. 9 Cyc. 347; 6 R. C. L. 664; 1 Parsons on Cont. 437; 1 Page on Cont. 468; 96

Ark. 20; 30 *Id.* 50; 52 *Id.* 174; 54 *Id.* 151; 7 L. R. A. (N. S.) 175; 25 N. E. 862; 36 *Id.* 418; 52 L. R. A. (N. S.) 328; 78 S. W. 1125.

W. K. Ruddell, for appellee.

1. The question of *consideration* was not raised below and can not be raised here for the first time. 75 Ark. 76; 95 *Id.* 593; 89 *Id.* 300, 308; 82 *Id.* 260; 90 *Id.* 469; 64 *Id.* 253; 101 *Id.* 95.

2. Objections to instructions must be made below and exceptions saved. 70 Ark. 348; 74 *Id.* 557; 78 *Id.* 490; 94 *Id.* 254.

3. A sufficient consideration was shown. 60 Am. St. 521, 528; 112 Ark. 503; 29 *Id.* 591, 594. A release may be executed by parol agreement. 94 Ark. 165. Appellant is estopped—he did not return the check received. 94 Ark. 158; 46 *Id.* 217.

SMITH, J. This is an action in replevin by a substituted trustee to recover the possession of two horses and a wagon named in a deed of trust which was executed by appellee, for the purpose of subjecting them to sale in satisfaction of the debt there secured.

The defense offered was that in November, 1913, which was eleven months after the indebtedness there secured became due, Morris, the payee of the note and the beneficiary of the deed of trust, had released the horses and wagon from the deed of trust. In support of this contention appellee who was the defendant below testified that his indebtedness was due and he was unable to pay, whereupon Morris agreed that the deed of trust should be released upon the wagon and team to enable him to borrow $200 from one Slayden, to be applied on the indebtedness, and that pursuant to this agreement the lien was released verbally, and appellee executed a new deed of trust to Slayden on the wagon and team to secure the loan of $200 then made. That the loan then made was in the form of a check which appellee endorsed and delivered to Morris, who accepted the same and credited it on the note.

Appellant admitted receiving the check, but denied that he had released his lien, but admitted that he told appellee he could give a second mortgage on the property if he liked.

A witness named Huddleston, however, testified that appellant told him he had given permission to appellee to execute the new mortgage provided the money thus obtained was paid to him. Two other witnesses corroborated this statement.

Over appellant's objections and exceptions the court told the jury that—

"There is but one question for this jury to determine, and that is purely a question of fact; that is, whether or not the mortgagee, Jeff Morris, agreed at the time to let the mortgagor, Thompson, give a second mortgage on the mules and get the money, or whether at the time of the alleged trade that he agreed to release them entirely from the first mortgage. That is the whole point in the case."

Inasmuch as the evidence is clearly sufficient to support the jury's finding on the question of fact, the only question for decision is the correctness of this instruction.

Appellant insists that the payment made can not, and does not afford a sufficient consideration for the release of the lien of the deed of trust, although he admits that for a sufficient consideration a parol lease would be valid. *Fincher* v. *Bennett,* 94 Ark. 165. He insists this is true because the undisputed proof shows the entire debt was due and unpaid and the payment which was made was only about one-half of the debt. The team said to have been released was only a part of the property described in the deed of trust.

It is true the sum paid was due in any event; but we think it can not be said on that account the transaction had did not constitute a sufficient consideration to support the agreement by which the sum paid was raised to be applied to that purpose. While appellee was obligated to pay this sum in any event, he was under no obli-

gation to negotiate a new loan as was done here, and this action must be held to constitute a sufficient consideration to support appellant's agreement to release his lien *pro tanto*. *Dreyfus* v. *Roberts*, 75 Ark. 364; *Lamberton* v. *Harris*, 112 Ark. 503; *Feldman* v. *Fox*, 112 Ark. 223.

No error was committed in giving the instruction set out, and the judgment is, therefore affirmed.

STATE *ex rel.* McDANIEL, STATE TREASURER, *v.* GAUGHAN, EXECUTOR.

Opinion delivered June 26, 1916.

1. WILLS—DEVISE OF LIFE ESTATE—ENLARGEMENT—POWER OF DEVISEE TO ALIENATE.—When a life estate is expressly devised and the life tenant is given the power of disposition or appointment over the fee, this power does not enlarge the life estate into a fee.
2. WILLS—LIFE ESTATE—POWER OF DISPOSITION DURING LIFE—DISPOSITION BY WILL.—Property was willed to B. for life, with a power of disposition in B. to be exercised "during her natural life," *held*, B. therefore could not dispose of the property by will.
3. WILLS—DEVISE TO WIFE FOR LIFE WITH POWER OF APPOINTMENT—REMAINDER TO HEIRS OF TESTATOR AND OF WIFE.—B. devised land to his wife for life, with certain powers of appointment in her, with the provision that "all my property which my said wife may not dispose of as aforesaid, and all which may be undisposed of at her death, shall be divided equally in two parts. One part to go to my heirs, * * * and the other equal part to go to the heirs of my said beloved wife * * *." A codicil provided, "and in case my beloved wife should survive me and afterwards die, any portion of the property of my estate devised to her undisposed of, then that portion is to go equally to our heirs at law respectively." *Held*, under the will and codicil, that the wife took an estate for life (with power of appointment annexed); upon her death one moiety of the undisposed of estate to go in remainder to her heirs, the other moiety to pass in remainder to the heirs of the original testator.
4. INHERITANCE TAX—ESTATES LIABLE THEREFOR.—Under the facts set out in the next preceeding syllabus, the original will having been executed before the passage of the inheritance tax law, and the wife having died after its passage, *held*, that the interest taken by the heirs of the original testator was not subject to the tax, while that taken by the heirs of the wife was subject to the same.

Appeal from Ouachita Circuit Court; *C. W. Smith*, Judge; reversed.

Wallace Davis, Attorney General, and *A. N. Meek,* for appellant; *Wingo & Meek,* of counsel.

1. Martha Bross was seized in fee simple of the realty sought to be taxed. That was the plain intention of the will and devisor. 31 Cyc. 1091; 3 Kerr on Real Property, 1814; 20 Gratt (Va.) 692; 1 Underhill on Wills, 650.

2. The power of appointment conferred upon Mrs. Bross in the will of her husband authorized her to dispose of the devised estate by will. This she did, and therefore under the statute her executor is liable for the inheritance tax on all property passing under the will. 40 Cyc. 1830 *et seq.;* Castle's Supplement, § 6874 a and b.

3. The devise, under the rule in Shelley's Case, was an estate in fee simple in one-half of the realty remaining undisposed of at her death. 1 Co. 93; 2 Tho. Co. 143; Preston on Estates, 263; 58 Ark. 310; 67 *Id.* 517; 72 *Id.* 337; Kirby's Dig., § 735; 239 Ill. 462; 88 N. E. 189; 22 Am. & Eng. Enc. Law, p. 1098; 25 *Id.* 641; Washburn on Real Property, ¶ 1613; 40 Cyc. 1421 *et seq.*

Gaughan & Sifford, for appellee.

The beneficiaries take under the will of William Bross and the executor is not liable for the tax on the realty. Under his will, the wife took only a life estate in the real property. A grant by will is not a grant during the lifetime of the testator. The rule in Shelley's Case does not apply. Under the will and codicil the grant was only for life to Mrs. Bross, remainder to his and her heirs equally. Under the codicil the rule in Shelly's Case does not apply.

SMITH, J. This proceeding was brought by the State against the executor of the estate of Mrs. Martha Bross, for the purpose of collecting the inheritance tax alleged to be due on said estate. The executor admits his liability for the tax on all personalty passing under the will, but denies liability for any tax on the realty on the ground that, under the will of William Bross, the husband of Mrs. Bross, under which she claimed title to the

estate in question, she became vested with only a life estate in such realty and that, therefore, her will, in so far as it attempted to convey same, was inoperative, and that such property, upon her death, descended in remainder according to the provisions of the William Bross will, and not by devise or descent from Mrs. Bross. Mrs. Bross died testate August 1, 1915, and by her will undertook to devise one-half of the estate to her heirs, and the other half to the heirs of her husband.

The State contends (1) that, under the will of William Bross, his widow became vested with a fee simple estate in the devised property; (2) that, even if the William Bross will did not have the effect of vesting a fee simple in his widow, still it contained a power of disposition broad enough to permit her to dispose of the estate by will; and (3) that, under the William Bross will, his widow took a fee simple estate in at least one-half of the portion remaining undisposed of at her death by virtue of the operation of the rule in Shelley's Case.

William Bross died and his will was probated before the passage of the inheritance tax law. Mrs. Bross died and her will was probated subsequent to the passage of that law.

The trial court gave judgment only for the amount of the tax accruing on the personalty passing under Mrs. Bross' will, and the State has appealed.

The provisions of the William Bross will and of the codicil thereto under which these questions arise are as follows:

"*First.* I will and bequeath and devise all my property, real and personal, moneys, rights and credits, which I now possess or may die seized and possessed of, and entitled to, in law or equity, to my beloved wife, Martha Bross, to have and to hold, use and enjoy, for and during her natural life. Provided, nevertheless, that her ownership and estate in the same is limited to a life only, as to such as may be undisposed of by her at the date of her death, and that as to any such property which she may think proper and choose to dispose of in any manner dur-

ing her natural life, the same I do hereby will and bequeath and devise to her in fee simple and absolutely.

"That my said beloved wife shall have the power and authority to sell and in any other way or manner dispose of as she may choose, during her natural life, any and all of said property, and when so sold and disposed of she is authorized to make deeds of conveyance, bills of sale and delivery, for and of the same to the grantee or grantees, purchaser or purchasers, and donee or donees of the same, as the case may be, conveying and passing to such title in fee simple and absolute; and as to all such property so disposed of by her, the same is hereby willed, bequeathed and devised to her absolutely and in fee simple.

"That all of my said property which my said wife may not dispose of as aforesaid, and all which may be undisposed of at her death, shall be divided equally in two parts. One equal part to go to my heirs of the first *stirpes* under the laws of this State, and the other equal part to go to the heirs of my said beloved wife, of the first *stirpes*.

"That none of the heirs herein referred to shall in any wise interfere with my said beloved wife, either acting as executrix or individually, in the management, control or disposal of any or all of said property under any pretense whatever."

This will was dated April 2, 1877, and attached thereto was the following codicil of date June 29, 1888:

"Being still of sound mind and disposing memory, I make this, a codicil to the foregoing will, dated 2d of April, 1877; that is to say, in the case of my death it is my wish that my beloved wife, Martha Bross, the executrix named in the foregoing will, be permitted to administer on my estate without being required to give bond or other obligation, and the court having jurisdiction is asked to grant the necessary letters testamentary without her having given bond or other obligation, and in case my beloved wife should survive me and afterward die, any portion of the property of my estate devised to her,

undisposed of, then that portion is to go equally to our heirs at law, respectively."

(1) It is first contended that Mrs. Bross was seized in fee simple under the will of her husband of the lands there devised her. Attorneys for appellant concede, in the very excellent brief which they have filed, that, when a life estate is expressly devised and the life tenant is given the power of disposition or appointment over the fee, this power does not enlarge the life estate into a fee. This is the effect of our decision in the case of *Archer* v. *Palmer,* 112 Ark. 527. It is said, however, this will presents an exception to the rule because a fair construction of its provisions makes it appear that the application of the rule would defeat the intention of the testator, it being insisted that its entire language manifests the intention of the testator, for his wife to take a fee, although the phraseology employed literally creates only a life estate with the power of appointment attached, and that it should be construed to enlarge the apparent life estate into a fee.

The purpose of all rules for the construction of wills is to ascertain and effectuate the intention of the testator; but these rules are ordinarily resorted to only where there are ambiguous, inconsistent or repugnant clauses.

We think the provisions of this will in this respect are not inconsistent or ambiguous. Here the testator gave his wife a life estate with the power of disposition which she might exercise during her lifetime, and while Mrs. Bross was given the power to make any disposition she pleased of the land the right was one which she was required to exercise, if it was exercised at all, during her lifetime, and, therefore, her estate in the land was not enlarged.

(2) The second contention is that the will conferred upon Mrs. Bross the power of disposition under her will, and inasmuch as she disposed of it by her will, the property thereby passing is liable for the inheritance tax. We have just expressed, however, our dissent from this view. Coupled with the grant of the power of disposition is the

limitation that it shall be exercised "during her natural life." One can not dispose of property by will during natural life, for the will is effective from death, and the disposition is not effectuated until the testator is dead.

(3) It is finally insisted by counsel for the State that the devise of William Bross created an estate in fee simple in Mrs. Bross in an undivided one-half of the realty remaining undisposed of at her death by virtue of the operation of the rule in Shelley's case. And we agree with counsel in this respect. The body of the will contains the following provision:

"That all my property which my said wife may not dispose of as aforesaid, and all which may be undisposed of at her death, shall be divided equally in two parts. One part to go to my heirs of the *first stirpes* under the laws of the State and the other equal part to go to the heirs of my said beloved wife of the *first stirpes.*"

The codicil to the will, among other things, provides:

"And in case my beloved wife should survive me and afterwards die, any portion of the property of my estate devised to her undisposed of, then that portion is to go equally to our heirs at law respectively."

Appellee insists the rule in Shelley's Case does not have application because under the codicil the undisposed of portion of the estate "is to go equally to our heirs at law respectively." Mr. Bross and his wife had no common heirs. His heirs were his brothers and sisters and descendants of brothers and sisters, and the same thing was true of Mrs. Bross. Appellee argues that the language quoted does not mean that the estate is to be divided into two equal parts, one of which is to go to the heirs of the testator, and the other to the heirs of his wife; but that the language means that the estate as a whole is to go to the heirs of William Bross and Martha Bross, and, therefore, the rule does not apply because the estate granted to Mrs. Bross is not granted to her heirs; in other words, the estate granted to Mrs. Bross for life was not granted in remainder to her heirs, but to his

heirs and her heirs equally. We think, however, this is not the proper construction of the language employed.

The devise is not to his heirs and her heirs equally, but "is to go equally to our heirs at law respectively." And we attach some, though not controlling, importance to the use of the word "respectively." Webster's New International Dictionary defines the word "respectively" as follows: "As relating to each; in particular; as each belongs to each; each to each; as, let each man respectively perform his duty." And gives the word "distributively" as its synonym. And in defining the word "distributively" the distinction is drawn between the synonyms of that word, and it is there pointed out that "respectively distributes by particularizing."

We agree with appellant in his interpretation of the meaning of this codicil. It did not change the provision of the will which divided the property into two parts. The will contained a limitation both as to the testator's heirs and those of his wife "of the *first stirpes* under the laws of the State." We have been unable to find a definition of the term "*first stirpes,*" but evidently it is a term of restriction and is narrower than that employed in the codicil, the language of which is "heirs at law." We think the only purpose and effect of this change in the language employed is to enlarge the class of heirs who might inherit. If it does this, the rule applies. *Maynard* v. *Henderson,* 117 Ark. 24.

It is our duty to construe the codicil in connection with the will and harmonize its language with the will where there is no repugnancy, and when we do so we see no intention on the part of the testator to change the disposition plainly expressed in the will to divide his estate into equal moieties. We agree with appellant, therefore, that the operation of the will as amended by the codicil, is to make the following conveyance: An estate to Mrs. Bross for life (with power of appointment annexed); upon her death one moiety of the undisposed of estate to go in remainder to her heirs, the other moiety to pass in remainder to the heirs of William Bross. And as, there-

fore, all the requisites for the operation of this rule are present, we must hold that it applies.

(4) The will of Mrs. Bross undertakes to dispose of the entire estate, its manifest purpose being to dispose of the estate in accordance with the intentions of her husband. That is, that her heirs should take one-half of the property and those of her husband the other half. However, as the husband's heirs take the title under his will, that interest is not subject to the tax, but as the other half passes through Mrs. Bross and under her will, it is subject to the tax and it is therefore the duty of her executor to pay the tax on this half interest, and charge the same against the share of her heirs only, and the cause will be remanded with directions to assess the tax accordingly.

HARRISON v. WALKER.

Opinion delivered June 26, 1916.

1. BILLS AND NOTES—POSSESSION BY JOINT MAKER.—Possession of a promissory note by several of a number of joint makers, is *prima facie* evidence of payment thereof, by those in possession.
2. PARTNERSHIP—PURCHASE OF STALLION—JOINT OWNERSHIP.—An agreement for the joint purchase and ownership of a stallion, for which the joint notes of the purchasers were given, will not raise a presumption that a partnership was formed between the parties. A mere community interest by ownership, does not show a partnership.
3. FRAUD—EXECUTION OF NOTE—PURCHASE OF STALLION.—Defendants executed a note jointly with pliantiffs for the purchase of a stallion. *Held,* under the evidence, that defendant's signatures were not procured by fraud.
4. FRAUD—SIGNATURE TO INSTRUMENT—KNOWLEDGE OF CONTENTS.—The signatures to a contract whereby certain parties agreed jointly to purchase a stallion, held not to have been fraudulently obtained.
5. BILLS AND NOTES—JOINT MAKERS—PURCHASE OF STALLION—LIABILITY.—A note executed by plaintiffs and defendants jointly, for the purchase of a stallion, was paid by plaintiffs, who sued defendants for their pro rata share of the same. *Held,* a recovery could be had, and that when the parties had not acted upon the provisions of the contract, with respect to a breach of guaranty by the seller, that the defendants could not plead the same as a defense.

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

STATEMENT BY THE COURT.

Separate suits were instituted by the appellees against appellants to recover on two promissory notes, each for the sum of $800. The form of the notes was as follows:

"$800. Paola, Kan., Nov. 18, 1912.

"Eighteen months after date, for value received, we promise to pay J. M. Nolan, or order, the sum of eight hundred dollars, with interest from date at the rate of 6 per cent. per annum, payable annually at the Citizens State Bank, of Paola, Kansas. If not paid at maturity, to draw 10 per cent. from date."

The other note was of the same date and for the same amount, but was due thirty months from date.

The appellees, in their complaint, after setting out the notes sued on, alleged that the notes were executed jointly by the appellees and the appellants, and that when the notes became due appellants refused to pay any part of the same, and that appellees were forced to pay and did pay the notes in full, and alleged that appellants were jointly indebted to them for their *pro rata* amount.

The appellants answered, denying the material allegations of the complaint, and set up fraud in the procurement of their signatures to the notes by the agent of the vendor, and also by fraudulent statements of the president of the Center Hill Horse Company; and, further, that the notes were void because of the failure on the part of the vendor to comply with the written guaranty, and because of the failure on the part of the appellees to protect the interests of the Center Hill Horse Company; and alleged that the payments by the appellees were voluntary and not binding on appellants. They further set up that under the contract and agreement under which the horse was purchased, the appellees and appellants were constituted a partnership, and asked that the cause be transferred to equity for the purpose of an accounting and winding up of the affairs of the partner-

ship and readjustment of the equities between the parties.

The record does not show that the motion to transfer was ever ruled on by the court. The causes were, by consent, consolidated and tried together.

The testimony on behalf of the appellees tended to prove that appellees and appellants bought together from one J. M. Nolan, of Paola, Kansas, a certain stallion for which they executed their joint notes in the form set out above, and these notes were read to the jury. The appellees paid the notes, and upon the receipt of payment the payee, Nolan, executed a receipt which described the notes in suit, and recited that the balance on same had been paid by the appellees as joint makers, and that the appellants had refused and failed to pay any part of the same. It was shown that there was a balance of $200 due on each note.

The testimony shows that all the parties organized what they designated as the "Center Hill Horse Company." The agent who represented the owner of the horse circulated an agreement for a joint stock company, which appellees and appellants all signed. There was some question among them the first night, after the agreement was signed, as to whether they were bound by the contract to subscribe for stock in the horse company. Two of the appellees went to the town of Searcy to ascertain if they were liable, and all parties met on the next night and signed the notes. The agent of the owner of the horse stated, on the night the note was signed, that if the appellants did not sign the notes he would sue them on their contract.

The horse was bought on a written guaranty, which was executed the same night the notes were signed, in which the vendor, among other things, agreed that "if said horse should not prove himself an average foal getter, after a fair trial on breeding mares, the purchaser shall return him to the Joseph M. Nolan Horse Company of Paola, Kansas, and receive from them another horse

of equal value. This exchange must be made before April 1, 1915."

The contract of guaranty further specified that the sellers of the horse were not to be bound by the conditions of the guaranty unless the purchasers submitted to them a monthly report in writing showing the number of mares served, the number of mares tried and reserved each month from date of purchase.

It was shown that the appellants and appellee organized the Center Hill Horse Company, with a president and secretary. Appellees were notified of the meeting of the company by the secretary. There were forty mares served during the year 1913, and sixteen colts resulted. The number of colts was not reported to the Nolan Horse Company, but was reported to the secretary of their own company. Neither the secretary nor any member of the Center Hill Horse Company ever offered to exchange the stallion.

It was shown that before the notes in suit became due the appellants and the appellees signed another note to the Peoples Bank in order to get money to take up the notes in suit, but the bank refused to loan them the money. That was sometime in the winter after the purchase of the horse in November and before the notes in suit were due. The parties had a proposition from the vendor and payee to shave the notes, giving them a six per cent. reduction, and they got together and signed up another note for that purpose.

J. C. Harrison, for appellants, testified substantially as follows: He signed the notes in controversy. There were eight of them present at the Center Hill school house when the notes were signed, and also the agent of the Nolan Horse Company, the payee. Witness had signed a book that opened endways, and there was no writing at all on the page he signed. He did not know he was signing a contract. The agent asked witness if witness favored good stock, and upon witness answering that he did, the agent said he wanted witness' name. Witness told him he was not able to buy a horse, and

the agent said, "You favor good stock?" and witness told him "Yes." The agent took out his memorandum book and wanted witness' name, and witness asked him if there was anything binding about it and agent replied that there was not. Witness did not know that there was any contract until later. He found out when they told him to be out Monday night. Witness signed the note because he thought he was forced to. Welch and Walker, the president and secretary of the Center Hill Horse Company, saw a lawyer who said that they were all bound by a book they had signed to sign the notes. When witness signed the note he told the agent that he would not pay it. The witness never had any report from any of the parties as to what per cent. of the mares was foaled. He had nothing to do with letting out the horse. The other members of the Horse Company, as well as witness, were all members of that community. Witness could read and write. Witness signed the book on the top edge. He had the book in his hands when he signed it; did not see any writing or printing on it. He exhibited the way the book was turned down when he signed it. He further stated that no one kept him from looking at it and nothing prevented him from reading or seeing it. He signed the book on Saturday and on the following Tuesday he signed the note. Witness signed the note to the People's Bank in the winter, along with the other members of the Horse Company, to get the money to take up the first notes. He stated that the appellee represented to him that they would contest the payment of the note if witness would pay his part of the costs if they lost, and witness told them he would not do so. Witness had made up his mind that he would not pay the note unless he had to. He was notified several times of the meetings of the Horse Company and attended once. He signed the receipt for the horse, but did not read it. He did not read it for the reason that he did not intend to pay his part. He signed the book organizing the Horse Company.

Witness identified the writing which was signed by all the parties, which recited that all agreed to purchase the stallion in order to improve their stock, and that each share was of the value of $200. The capital stock and price of the horse was $1,600. The agreement further recited that the parties agreed with Nolan, the vendor, and with each other, that they would pay in cash the sum set opposite their names respectively when the horse was delivered to any of the subscribers; or, at their option, execute a note payable to Nolan, or bearer, secured to his satisfaction, payable one-half in eighteen months and one-half in thirty months, with interest at 6 per cent. This instrument was signed by the appellants and appellees and opposite each name was the figure "1" under the word "shares." The instrument was dated November 15, 1912, and recited that the sale was closed November 18, 1912. The same parties, on the same day, signed a receipt which specified, among other things, that the parties had received the horse in good condition and he was doing his work properly in stud, and they advertised to the public that the notes that they had given in payment for the same were the legal property of the payee to negotiate and transfer as it might elect and that the horse was value received for the notes.

R. L. Collins testified that he was one of the defendants. He signed the notes in suit. Saw the agent of the vendor company before he signed the notes. He wanted witness to sign some kind of a concern to get up a horse company; asked witness if he didn't want stock in the horse company and witness signed his name on the back of the book as favoring good stock. The book was turned back when presented to witness. He did not read the printing on the contract. Witness signed the notes because he had to and did not know any better. Witness stated that the agent took the little book out of his pocket and doubled it back with the backs together. He thought it was the agent's intention to hold some kind of a meeting and select the men who endorsed good stock. He did not know that there was any contract until that

meeting at the school house the next Monday night. At that time the little book was drawn on them, and they finally signed the notes. Witness signed the notes because they said he had it to do. Mr. Doty, the agent, said that every one that did not sign the notes would be sued the next morning. Witness had never had a lawsuit and did not want one. Witness never had any information as to what the stallion was doing, and none of the parties ever gave witness any notice of any kind concerning him. He never read the guaranty because he never saw it. Witness did not put the figure "1" on the contract after his name under the word "shares." Witness never intended to pay the notes because of the way they got him into it. However, he signed a note to the Peoples Bank about a month after the first notes were given. Witness received his stock in the company, which was delivered the same night the notes were signed. He exhibited this certificate, which recited that "R. L. Collins is the owner of one share of two hundred dollars in the Percheron Stallion, named Jupiter, No. 37892, transferable only on the books of the company in person or by attorney, on surrender of this certificate. (Signed) W. D. Welch, President. J. M. Walker, Secretary."

There was other testimony corroborating the testimony of these witnesses, to the effect that before the makers of the notes signed the same they agreed to seek legal advice as to whether they were bound by the contract in the book they had signed, that Walker and Welch went to make an investigation and came back the next night when the notes were signed, and reported that they had consulted a lawyer, Mr. Brundidge, who said that they were as much obligated as if the parties had signed the notes.

The appellants offered the contract book in evidence for the purpose of showing that it contained contracts duly signed by other people and not filled in. The court, over the objection of appellants, excluded this evidence, to which appellants duly excepted.

The court directed the jury to render a verdict in favor of the appellees in the sum of $406. Judgment was rendered for that sum, and this appeal has been duly prosecuted. Other facts stated in the opinion.

John E. Miller and *Rachels & Yarnell,* for appellants.

1. The verdict and judgment are not supported by the evidence. Plaintiffs only paid their share and no cause of action is shown.

2. No cause of action is stated and none proven. The notes were firm debts. Plaintiffs were a partnership with defendants. One partner cannot recover for contribution for advances or loans, nor for money paid on debts settled by him for the firm out of his private estate, apart from a general accounting and settlement. 58 Ark. 587; 72 *Id.* 470; 56 S. W. 810; 7 Ky. Law Rep. 527; 22 *Id.* 186; 30 Mich. 304; 55 Mo. 524; 101 N. W. 237; 54 S. W. 922; Cent. Dig. Partnership, Vol. 38, § § 155-157, 171. The partnership must be wound up and the accounts finally settled. 30 Cyc. 461-464, 681, 682, 692; 6 R. C. L. 1053, 1038; 30 Cyc. 453, 454, 700, 690-693.

3. The court erred in peremptorily instructing the jury to return a verdict for the plaintiffs. Where there is an instructed verdict, as here, it is the duty of this court to view the testimony most favorably to appellant and to give it its strongest probative force in deciding whether or not the court erred. Like all fraudulent transactions, a conspiracy to defraud may be inferred from the facts and circumstances shown. Smith, Law of Fraud., § 122. Here was a well-laid scheme of fraud.

Brundidge & Neelly, for appellees.

1. The verdict is supported by the evidence. Plaintiffs paid the notes in full as they fell due and defendants refused to pay their part.

2. There is no evidence of a partnership. It takes something more than joint ownership to create a partnership. 91 Ark. 28; 93 *Id.* 526; 97 *Id.* 390.

3. Plaintiffs, under the law of contribution, had the right to bring this suit. 73 Ark. 178; 49 *Id.* 105; 34 *Id.* 569; *Ib.* 580; 6 R. C. L. 1036, 1047.

4. Plaintiffs were *bona fide* holders and there was no fraud.

WOOD, J., (after stating the facts). (1) Appellants contend, first, that the credits endorsed on one of the notes showed that there had been paid the sum of $500, and that there was still due the sum of $300, and that the credits endorsed on the other note showed that the sum of $609 had been paid on it, and the fact that neither of the notes had been marked paid showed that the notes had not been paid, or if any amount had been paid it was no greater sum than appellees were liable for.

But the testimony of the appellees was to the effect that they had paid the notes in full. The receipt of November 23, 1915, although executed after the suit was brought, was introduced by the appellees without objection on the part of appellants and it showed that appellee had paid the sum of $354, principal, and interest on one of the notes. The appellees had possession of the notes, which was of itself *prima facie* evidence that same had been paid by them, and the fact that the endorsement of one of the credits was in the name of Walker, Watson and Hart and another in the name of J. W. Duncan does not tend to controvert the positive testimony on the part of the appellees that they paid the notes in full.

(2) The appellants contend that the transactions which gave rise to the execution of these notes, as evidenced by the notes and the contract for the purchase of the horse, constituted the appellants and the appellees partners. But this contention is not sound. The instrument which was signed by the appellants and the appellees, by which they agreed to purchase the horse and form a joint stock company, each agreeing to take a share of $200, to be paid to the vendor of the horse, which represented their *pro rata* part of the purchase money, did not constitute appellants and appellees part-

ners. This instrument and the testimony showing the circumstances under which it was executed did not tend to prove a partnership between appellants and appellees. The most that this testimony tended to prove was an agreement between the parties for a joint purchase of the horse for which the notes were executed. A mere community of interest by joint ownership falls far short of being a partnership.

As was said in *LaCotts* v. *Pike,* 91 Ark. 28, "In order to constitute a partnership it is necessary that there shall be something more than the joint ownership of property. A mere community interest by ownership is not sufficient. This creates a tenancy in common but not a partnership. * * * Between the parties themselves it is essential that they shall share in the profits before it can be said that an agreement of partnership has been entered into and exists." Citing authorities.

The testimony on the part of the appellees shows an agreement for the joint purchase and ownership of a horse and the notes evidence a joint liability, but a partnership could not be presumed from this testimony, and the appellants have wholly failed to adduce any evidence that tended to prove the essentials of a partnership. See *Roach* v. *Rector,* 93 Ark. 526; *Beebe* v. *Olentine,* 97 Ark. 390, where the subject is discussed.

(3) There was no testimony to warrant a finding that the appellees had perpetrated any fraud upon the appellants in the execution of the notes. The fact that appellees, or some of them, stated to the appellants that they had sought the advice of counsel as to whether or not the parties who had signed the contract would be liable the same as if they had executed a note and that the attorney had advised them that they would be, would not be sufficient to justify the jury in finding that this constituted a fraud upon appellants, even if they were induced by such representations to sign the notes. There was nothing in the record to show that such representations were untrue, even if appellants relied upon them and had the right to rely upon them.

(4) The evidence was not sufficient to warrant the court in submitting to the jury the question as to whether or not any fraud had been perpetrated upon the appellants, either in the signing of the contract by which they agreed to contribute so much for the purchase of the horse, designated as shares, or in the execution of the notes in suit. Appellants could not be heard to say, under their own evidence, that a fraud was perpetrated upon them, such as would avoid their contract, because of the fact that the agent of the vendor had presented to them a book representing that he was getting the names of those who were in favor of improving the stock of the community.

Appellants could read and write and the agent placed the book in their hands. There was nothing in the representations themselves that was fraudulent, and if appellants signed an instrument not knowing what it contained, the testimony shows that it was the result of their own carelessness.

(5) Even though the horse purchased may have failed to meet the requirements of the written guaranty, no advantage could be taken of this fact by the appellees or the appellants, for the guaranty expressly provided that the seller "of said horse shall not be bound by the conditions of this guaranty unless the purchaser submit them a monthly report in writing showing the condition of the horse, the number of mares served," etc. The undisputed evidence shows that this was not done. Therefore, appellants cannot avail themselves of a breach of a warranty on the part of the vendor and payee of the notes as a defense to the present suit. Furthermore, the contract provides that the remedy for the purchasers of the horse in case he proved to be unsound and unsatisfactory was a return of the horse by them on or before the first of April, 1915, and that the seller should give them in exchange another horse of equal value. This remedy, under the contract, was exclusive. *Crouch & Son* v. *Lake,* 108 Ark. 322; *Highsmith*

Bros. v. *Hammonds,* 99 Ark. 400; *Walters* v. *Akers,* 101 S. W. (Ky.) 1179.

As there was no defense to the notes, the appellants were jointly liable with the appellees, and as appellees had paid the notes appellants were liable to them for their *pro rata* share.

The judgment is therefore affirmed.

SIMMONS v. STATE.

Opinion delivered June 26, 1916.

1. APPEAL AND ERROR—REFUSAL TO HEAR TESTIMONY—RECORD.—Where error is assigned in the refusal of the trial court to hear testimony of a witness, the record must disclose the substance of the offered testimony so that it may be determined whether or not its rejection was prejudicial.
2. CRIMINAL LAW—INSTRUCTION ON ISSUE OF DEFENDANT'S PUNISHMENT.—An instruction in a criminal trial, that the jury might, among other things, consider the fact that a conviction would mean the incarceration of the defendant in the penetentiary held not to be prejudicial.

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

W. S. Coblentz, for appellant.

1. The court erred in refusing the defendant permission to prove, or attempt to prove, that the prosecutrix had a lover, and that the charge was made in order to shield that lover. The motives of the prosecuting witness may be shown. 2 Enc. Ev. 246; 33 Cyc. 1455; 125 S. W. 921; 116 *Id.* 872; 58 Ark. 353; 49 *Id.* 439. The exclusion was highly prejudicial.

2. It is error to single out testimony of accused and stress it in the charge to the jury. It is not the province of the court to charge the jury upon the effect or weight of the evidence. 114 Ga. 449; 49 Ark. 439; 58 *Id.* 353; 52 Fla. 57; 84 Neb. 76; 101 Okla. 509; 51 Ark. 147; 17 Cal. 146; 34 *Id.* 663.

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

1. The evidence as to a lover was immaterial. 72 Ark. 409; 84 *Id.* 16; 90 *Id.* 435; 103 *Id.* 123.

2. There was no error in the instructions. 78 Ark. 36; 62 *Id.* 543; 61 *Id.* 88; 58 *Id.* 353. The evidence is clear that the girl was below 16 years of age. Kirby's Dig. § 2008.

HART, J. Columbus Simmons was indicted under section 2008 of Kirby's Digest for carnally knowing a female person under the age of sixteen years. It was shown that the prosecuting witness was a female under the age of sixteen years at the time she testified that the crime was committed. She testified that the defendant had sexual intercourse with her on the night of November 22, 1915, in Pike County, Arkansas. She was unmarried at the time and said a child was born unto her as the result of such intercourse. Several other witnesses testified that the defendant admitted to them that he had had intercourse with a young girl on the night testified to by her.

The defendant testified in his own behalf and in positive terms denied his guilt. Other circumstances were introduced tending to corroborate his testimony.

The jury returned a verdict of guilty and from the judgment of conviction, the defendant has appealed.

The principal witnesses in the case were the prosecuting witness and the defendant himself. Other evidence was introduced tending to corroborate the testimony of the principal witness on each side. The jury by its verdict has said that it believed the testimony of the witnesses for the State. The verdict was warranted by the evidence and we are not at liberty to disturb it on appeal.

Counsel for the defendant assigns as error the action of the court in refusing to admit certain testimony.

A young companion of the prosecuting witness was asked if about the time the crime is charged to have been committed, she did not have a conversation with the prosecuting witness with regard to a lover. She first stated she did not understand the question and the prosecuting attorney also objected to it. The court permitted the question to be repeated to her and she answered, no. Again she was asked if the prosecuting witness had not stated that she loved some man. The court sustained an objection of the prosecuting attorney to this question and the witness was not permitted to answer it.

(1) Where error is assigned in the refusal of the trial court to hear testimony of a witness, the record must disclose the substance of the offered testimony so that it may be determined whether or not its rejection was prejudicial. *Latourette* v. *State,* 91 Ark. 65; *Jones* v. *State,* 101 Ark. 439. In urging that the question was a proper one to ask the witness, counsel for the defendant stated to the court that he thought it was a material question because the prosecuting witness might have a lover and try to shield him. This falls short of stating to the court what the answer of the witness would have been. So far as the record discloses, the witness might have answered no. She probably would have so answered because she had already answered no to a question as to whether or not she had had a conversation with the prosecuting witness with regard to a lover.

Moreover, if the witness had answered yes, the question and answer would have been of a matter of such general character that it would not even have shed any light on the credibility of the defendant as a witness. *Peters* v. *State,* 103 Ark. 123.

(2) It is next insisted that the court erred in an instruction as to the accused's credibility as a witness. It is unnecessary to set out this instruction. The court first instructed the jury as to the credibility and weight to be given to the testimony of the witnesses generally

and then instructed the jury as to the credibility to be given to the testimony of the defendant in substantially the same language as the instruction on that subject in *Jones* v. *State,* 61 Ark. 88. See, also, *Hamilton* v. *State,* 62 Ark. 543; *Weatherford* v. *State,* 78 Ark. 36. The particular language objected to in the instruction is that the court told the jury that they might consider, among other things, the fact that a conviction in the case would mean the incarceration of the defendant in the penitentiary. They claim that this is open to the objection of singling out the defendant and also singling out facts to be called to the attention of the jury. As said in *Hamilton* v. *State, supra,* a defendant on trial is already singled out by the indictment and the fact that he is on trial and directly interested in the results. Moreover, the court in its instructions would necessarily tell the jury what the punishment was if they should find the defendant guilty. Hence, the jury was bound to know that a verdict of guilty would mean confinement in the penitentiary to the defendant. While we do not think the clause in question in the instruction is erroneous, we think that the giving of the instruction in the language of that given on the subject in *Jones* v. *State,* 61 Ark. 88, was sufficient to call the attention of the jury to the manner in which the defendant would be affected by a verdict of guilty and the court might have well left out the clause objected to as tending to be argumentative.

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

DREW COUNTY TIMBER COMPANY *v.* BOARD OF EQUALIZATION OF CLEVELAND COUNTY.

Opinion delivered June 26, 1916.

1. TAXATION—REMEDY FOR OVER-VALUATION—TRIAL BY JURY.—A taxpayer, aggrieved at the action of the Board of Equalization may apply to the county court for relief, and in turn appeal to the circuit court, but he has no right to a trial by jury.

2. TAXATION—FIXING VALUATION—DISCRIMINATION—TIMBER LANDS.—*Held,* the Board of Equalization of Cleveland County was discriminatory and arbitrary under the evidence in the assessment of the value of appellants' timber lands for purposes of taxation.

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

Williamson & Williamson, for appellants.

1. The rule of uniformity and equality in taxation was violated. There was discrimination; the assessment was arbitrary and not according to value. Cooley, Const. Lim. (4 ed.) 616; Kirby's Dig., § 7008; 5 Ark. 204; 19 *Id.* 360; 25 *Id.* 295; 32 *Id.* 37-42; 49 *Id.* 336-349; 49 *Id.* 518, 522, 530; 62 *Id.* 461-465; 1 Wash. St. 46; 70 *Id.* 48; 68 *Id.* 623; 77 *Id.* 315; 88 Fed. 350; 210 *Id.* 867; 62 *Id.* 548; 101 U. S. 153, and many other decisions. Discrimination was proven. 37 Wis. 75.

2. The assessment is violative of the State Constitution and that of the United States, and their statutes. 17 Ark. 419; 114 Fed. 557; 207 U. S. 20-36; 85 Fed. 302; 209 Fed. 380, 452.

3. The general rule is that the value of property is to be determined by what it can be bought and sold for. 214 Fed. 180, 183; 102 Tex. 545; 27 Ill. 64.

Wallace Davis, Attorney General; *Hamilton Moses,* Assistant, and *E. L. Compere,* Prosecuting Attorney, for appellees.

1. The board honestly endeavored to fix values fairly and without any discrimination, basing all assessments upon the comparative market values of the lands under consideration. If the board erred the burden was on appellants to show it. 49 Ark. 518-534; Kirby's Dig., § 6974. The market value is not the price asked, but the price the property will bring. 49 Ark. 381; 177 S. W. 1151; 163 *Id.* 697; 172 *Id.* 1024.

2. The findings of facts by the court sitting as a jury will not be reversed if there is any substantial evidence to support it. 68 Ark. 83; 182 S. W. 262; 183 *Id.* 745.

3. Questions not raised below can not be raised here for the first time. 80 Ark. 476; 74 *Id.* 72; 149 S. W. 662.

4. The presumption is that only competent evidence was considered. 86 Ark. 309; 77 *Id.* 258. The burden was on appellants to show discrimination and they have failed.

HART, J. Appellants own 5,741 acres of timber land in Cleveland County, Arkansas. The board of equalization raised the assessment on their lands to $5 per acre. Appellants applied to the county court for a reduction to $3 per acre. Their application was denied by the county court and they appealed to the circuit court. The circuit court denied them relief and they have appealed to this court.

(1) They first contend that the circuit court erred in refusing them a trial by jury. There is no merit in this contention. The statutory right of trial by jury is confined to cases which at common law were so triable before the adoption of the Constitution. *State* v. *Churchill,* 48 Ark. 426; *Wheat* v. *Smith,* 50 Ark. 266. Boards of equalization are creatures of the statute and they can perform no act except such as they are specially authorized to do. The taxpayer aggrieved at the action of the board of equalization may apply to the county court for relief and in turn appeal to the circuit court, but he has no right to a trial by jury. *Clay County* v. *Brown Lumber Co.,* 90 Ark. 413; *Pulaski County Board of Equalization Cases,* 49 Ark. 518.

It is next contended by counsel for appellants that the board of equalization acted on a fundamentally wrong principle in valuing their lands and that the values placed upon them were arbitrary and capricious as compared with the average valuation of the other real property situated in the county or in the townships where their lands are situated. Article 16, section 5 of our Constitution provides that all property subject to taxation shall be taxed according to its value and that no one species of property shall be taxed higher than another species of

property of equal value. The section provides that the value shall be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. Section 7008 of Kirby's Digest provides that the County Board of Equalization shall raise the valuation of such tracts of real property, as in the opinion of the board have been returned below their true value, to such price as may be deemed to be the true value thereof, agreeably to the requirements of the statute in regard to the valuation of real property. The section also provides that the board may reduce the valuation of such tracts as in the opinion of the board have been returned above their value as compared with the average valuation of the real property of such county, having due regard to the relative situation, quality of soil, improvements and natural and artificial advantages.

It is the contention of counsel for appellants that the undisputed evidence shows that the board discriminated against their lands within the meaning of the rule laid down in *Ex parte Fort Smith & Van Buren Bridge Co.*, 62 Ark. 461, and *Am. Bauxite Co.* v. *Board of Equalization of Saline County,* 119 Ark. 362, 177 S. W. 1151, construing the section of the Constitution and statutes above referred to. Appellants own timber lands in three townships in the county. Their holdings comprise 5,741 acres. Bradley County Lumber Company owns 3,016 acres; Warren Vehicle Stock Company owns 837 acres; Southern Lumber Company owns 281 acres and the Gates Lumber Company owns 160 acres. All these lands are timber lands and are of the same general character. Most of these timber lands were assessed at $5 an acre. Appellants endeavored to have their lands assessed at $3 an acre but the board of equalization placed the assessment at $5, except 184 acres, which they raised to $4 an acre. All the other lands in the three townships were assessed at a uniform value of $2.25 per acre. The appellants and the other companies above mentioned were the only owners of extensive tracts of timber lands in the county. The other lands were agricultural lands and

the three townships in which appellant's timber lands are situated are thickly settled. The board in placing a value upon the timber lands took into consideration the logging conditions and everything else that would tend to affect the value of timber lands. This was right. It was shown that large tracts of timber lands situated in a body and owned by the same persons were of much greater value than smaller tracts owned by separate persons and which do not lie in a body. The reason is that the only practical way to log the lands is to build tram roads into the timber and this can only be successfully done when one person or corporation owns a large body of land. It may be stated here that the evidence shows that all the lands were assessed at less than their market value. Our statutes provide that the board may actually enter upon and view the property when they are not fully satisfied of its true value, but the board is not required to make the valuation from actual view. The board, however, is required, in making the valuation to have due regard to the relative situation, quality of soil, improvements and natural or artificial advantages. In short it must consider the advantages or disadvantages of location, the quality of soil, the quantity and quality of standing timber as well as all other elements which enter into and constitute the value of the land. These are the plainly expressed rules and principles upon which our Constitution and statutes contemplate that the valuation shall be made.

(2) The undisputed evidence shows these principles were ignored and disregarded and an arbitrary classification was applied to timber lands as compared to the average valuation of the real property of the county. A valuation is essential to laying the foundation for taxing land and the board has no authority to discriminate against one tract and favor all other property of the same kind in the county. The members of the board attempted to fix the value of all the timber lands on the same basis but they adopted a wholly different basis of value for agricultural land. It is true, one of the members of the

board testified that cut-over lands were not worth more than $2.25 per acre, as compared with timber land, but on cross examination it developed that what he meant was that land from which all merchantable timber had been cut and removed and which were not susceptible of cultivation or which had not been put in cultivation, were not worth more than $2.25 per acre. The undisputed evidence, however, shows that the three townships in which the timber lands of appellants were situated were thickly settled and that a greater majority of the lands therein were agricultural lands. The undisputed evidence is that the agricultural lands were worth as much or more than the timber lands. The board therefore placed a valuation upon the timber lands which would necessarily operate unjustly and unequally. Real estate must be valued in the manner and upon the principles prescribed by our Constitution and statutes. While all the lands were assessed at a value lower than their true market value, still in our opinion the undisputed evidence shows that the lands of appellant were returned above their true value as compared with the average valuation of the real property of the county.

The assessor and board had no right to make discrimination in the assessment and equalization of values of real estate.

It follows that the judgment will be reversed and the cause remanded with directions to the circuit court to make the reduction asked for by appellants.

HAMPTON STAVE COMPANY v. ELLIOTT.

Opinion delivered June 26, 1916.

TIMBER—RIGHT OF REMOVAL—SALE OF LAND—REASONABLE TIME.—Appellant deeded certain land to one M., reserving the oak timber thereon with the right to remove the same, but without fixing the time for the removal thereof. *Held*, the appellant was entitled to no more than a reasonable time in which to remove the said timber.

Appeal from Cleveland Chancery Court; *John M. Elliott,* Chancellor; modified and affirmed.

STATEMENT BY THE COURT.

This controversy arose over the right to cut timber from certain lands in Cleveland County. Appellant brought suit, claiming to be the owner of the white and cow oak on the lands, suitable for stave bolts, and prayed an injunction against the defendant to prevent his further cutting timber therefrom.

The defendant answered, denying the ownership of plaintiff of the timber, and alleged that he was the owner thereof, having purchased the land; prayed judgment against the plaintiff for the value of timber cut by it and an injunction to prevent its further cutting timber from the lands.

The appellant was the owner of the lands from which the timber was taken, having purchased same on May 17, 1905, in order to supply its plant with stave bolts, and its policy in the operation of its plant was to buy all the timber that could be purchased and only to cut its timber from its own land when it was necessary to do so in order to continue operations. On August 13, 1907, the stave company sold and conveyed the lands from which the timber was taken to one McCartney, reciting in its deed of conveyance a reservation of the timber as follows: "In conveying this land, the Hampton Stave Company reserves the white oak and cow oak stave bolt timber on all the above lands, with necessary right-of-way privileges to remove same." He immediately conveyed the lands to the Grant Lumber Company, which by a warranty deed on March 31, 1914, conveyed them to appellee. The appellant cut stave bolt timber from the lands in controversy in 1910 and again in 1912, some of the witnesses stating that it cut all the timber therefrom suitable for stave bolts in that year. They also said that they worked it close and a great deal of the timber cut in 1912 was too small to be used for stave bolts in 1907. One witness stated that Mr. Hampton, the manager of appellant company, told him in 1912 that when the timber was cut he wanted it all worked over so that they could quit the land

and turn it back to the purchasers. This witness stated that he finished the cutting in the latter part of that year, and wrote to the stave company that he had cut it just as close as it could be cut. Some of the timber cut in 1912 was good timber that had been left in the sloughs and creeks at the former cuttings, because of the difficulty in getting to it.

The appellant company went on the lands again in the fall of 1914, after they had been purchased by appellee and cut, according to its admission, ninety-one cords of stave bolts, which the testimony showed were of the value of $3 per cord. There was some testimony on appellee's part tending to show that a great deal of the timber cut was suitable for manufacture into lumber and some for manufacture into veneers, the value of which would have been from $20 to $36 per thousand feet. This witness made an estimate of the timber cut and the kinds of trees from the stumps and the tree tops upon the land.

The chancellor found that appellant had no right to the timber on account of not having taken it from the lands within a reasonable time, and rendered a decree for the highest value the testimony showed the timber could have been worth, from which this appeal is prosecuted.

Crawford & Hooker and *T. D. Wynne,* for appellant.

1. The title to the timber was reserved in the plaintiff—the title to the lumber never passed to the grantee, as it was excepted and reserved in the grant. There was no forfeiture of plaintiff's right, and plaintiff had a reasonable time, at least, to remove the timber as expressly reserved in the deed. 116 Pac. 645; 120 N. W. 827; 121 S. W. 629; 27 N. W. 697; 6 A. & E. Ann. Cas. 249; 179 S. W. 410; 77 Ark. 115.

2. If the "reasonable time" principle as announced by this court in 99 Ark. 112, 78 *Id.* 143, 93 *Id.* 11, and 178 S. W. 304, applies in this case, it does not control here. All the cases hold that the facts and circumstances surrounding the parties and the contract shall be taken into consideration in fixing the time. The chancellor did not

do this. 77 Ark. 115; 99 *Id.* 112; 78 *Id.* 413; 93 *Id.* 11; 178 S. W. 304; 121 *Id.* 629; 142 *Id.* 394; 116 Pac. 645; 120 N. W. 827; 179 S. W. 410.

3. The subsequent acts of the parties showing acquiescence and the construction put upon the agreement are entitled to great weight in determining the intention of the parties. No protest was made by the Grant Lumber Company or Elliott, or McCartney, until shortly before this suit. The language used in the deed was an absolute reservation of the timber, plain and unambiguous.

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

1. Where no time limit is mentioned in a deed "reserving" or "excepting" the timber, the well established rule is that only a reasonable time is allowed. 28 Am. Rep. 776; 58 W. Va. 645; 35 Mich. 89; 43 S. W. 733; 77 Ark. 115; 164 Pa. St. 234; 91 S. W. 53; 28 Am. Rep. 779. In the light of these authorities the reasonable time had expired.

2. The chancellor's finding as to the value of the timber is fully sustained by the evidence.

KIRBY, J., (after stating the facts). Appellant contends that the clause in its deed to McCartney reserving the oak timber upon the lands conveyed, with the right to remove same, was in effect an exception thereof from the grant entitling it to remove said timber at any time thereafter. There was no time fixed for the removal of the timber nor any testimony showing the intention of the parties in that regard, except the stave company's president's statement of its policy of preserving its timber on its own lands as long as possible and supplying it for the operation of its plant only when other timber could not be purchased therefor, and that he declined to fix a limit for its removal in the making of the deed of conveyance upon the suggestion of the grantee that it should be done. The court is of opinion that under said clause of reservation in the deed, the stave bolt company was entitled to no more than a reasonable time for the removal of the standing timber and had no more right to remove

same than would have resulted had it conveyed the lands without such reservation and the grantee conveyed the timber back to it without mention of any time for its removal.

In *Liston* v. *Chapman & Dewey Lumber Co.,* it was held under a deed conveying the merchantable standing timber of a certain description which specified no time for its removal, that the right to remove existed only for a reasonable time in the absence of anything in the conveyance or in the proof *aliunde* showing a contrary intention. *Earl* v. *Harris,* 99 Ark. 112; *Hall* v. *Wellman Lumber Co.,* 78 Ark. 408; *Fletcher* v. *Lyon,* 93 Ark. 10; *Burbridge* v. *Ark. Lumber Co.,* 118 Ark. 94, 178 S. W. 304; *Newton* v. *Warren Vehicle Stock Co.,* 116 Ark. 393.

We see no reason why such a reservation of timber from a grant of the land fixing and indicating no time for its removal, should be construed to give the grantor a longer time for the removal thereof, than it would have had had it purchased the standing timber conveyed to it by a deed in which no time was fixed for the removal and hold under the circumstances of this case, that appellant had no more than a reasonable time for the removal of the timber, under the terms of its deed conveying the lands, within the doctrine already announced by former decisions of this court. See also *Heflin* v. *Bingham,* 28 Am. Rep. 776; *Adkins* v. *Huff,* 58 W. Va. 645; *Morris* v. *Sanders,* 43 S. W. 733.

The lands were twice cut over by appellant company after their grant to McCartney, the last time before the cutting complained about herein, in the year 1912, when it was thought by those who cut the timber that all was taken that could be profitably used for the purpose for which the timber was required. There was no reason shown why the timber could not have been sooner cut and removed, and unquestionably it could have been during the more than seven years from the reservation of the title thereto in the deed to McCartney in August, 1907, to the last cutting in September, 1914, the land having been cut over twice during such time as already stated.

No error was committed in the chancellor's holding that appellant's right to remove the timber had ceased at the time of the cutting thereof and that it should respond in damages for its value.

We are of the opinion, however, that the chancellor's finding as to the amount of damages is not supported by the testimony, being clearly against the preponderance of it and that the judgment should not have been for a greater amount than $3 per cord for the ninety-one cords of stave bolts taken by appellant company, since it acted under the belief that it had the right to remove the timber by reason of the reservation in its said conveyance of the lands. *Bunch* v. *Pittman,* 123 Ark. 127, 184 S. W. (Ark.) 850.

The decree is accordingly modified, and as modified will be affirmed. It is so ordered.

WEATHERTON v. TAYLOR.

Opinion delivered June 26, 1916.

1. APPEAL AND ERROR—CUSTODY OF CHILD—ORDER CHANGING CUSTODY TRIAL ORDER.—An order of the chancery court temporarily transferring the custody of a child, from the custody of one parent to that of another, the parents being divorced, and permitting the removal of the child beyond the jurisdiction of the court, is a final order from which an appeal may be prosecuted.
2. APPEAL AND ERROR—CUSTODY OF CHILD—FINALITY OF ORDER.—An appeal will lie from an order of the chancery court with respect to the custody of a child of divorced parents.
3. EQUITY JURISDICTION—CUSTODY OF CHILD OF DIVORCED PARENTS—PETITION TO CHANGE CUSTODY—DUTY OF COURT TO HEAR TESTIMONY.—The original decree granting a divorce and awarding the custody of the child to the father is a final adjudication that the father, and not the mother, is the proper custodian of the child, and before an order can be made changing the custody of the child, there must be proof taken on the subject which will show a justification of the same. *Semble.* If the court finds that the mother is a proper person, under the facts, to have possession of the child, and that she will comply with the orders of the court, it may permit her to have the custody of the child in another jurisdiction, for a stated period.

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

Manning, Emerson & Morris, for appellant.

1. The decree is a final order within the meaning of our statute. 52 Ark. 224; 88 *Id.* 590; 100 *Id.* 496; 25 *Id.* 420; 28 *Id.* 92; 44 *Id.* 46; 30 *Id.* 73; 79 *Id.* 473; 28 *Id.* 92; Kirby's Dig., § 1188.

2. The decree was erroneous because (1) the court was without authority to make the order after term time touching the custody of children. Kirby's Dig., § 2681; *Ib.* 2683; 40 S. E. 335; (2) because there is no evidence of change of conditions. 38 Ark. 119; 98 *Id.* 193; 45 Ark. Law Rep. (No. 11) 594; 95 Ark. 355; 66 S. W. 414; 65 Pac. 546; 82 *Id.* 177; 8 Ohio Ct. Rep. 87; 74 Ia. 681, 39 N. W. 102; 50 W. Va. 113, 40 S. E. 335; 68 S. W. 753; 39 N. W. 102.

3. If not a final order, the decree should be quashed as one made without authority. Kirby's Dig., § 1186; 101 Ill. App. 187; 11 Ill. (11 Peck) 43; 70 Ill. App. 572; 15 How. Pr. 167; 151 S. W. 786. The precise question was involved in 86 Ark. 64.

Grover T. Owens, for appellee.

1. The order was merely interlocutory—not final. Kirby's Dig., § 1188; 8 Wend. (N. Y.) 219; 93 Md. 97; 9 W. Va. 26; 52 Ark. 224; 113 *Id.* 185; 92 *Id.* 174; 100 *Id.* 496; 45 A. L. R. 11; 142 Pac. 918.

2. The court had authority to make the order. 82 S. E. 119. No abuse of discretion is shown. 9 R. C. L. 286, 291.

3. If the order can not be appealed from it should not be quashed as on *certiorari.*

McCULLOCH, C. J. Appellant and appellee were formerly husband and wife, but in the year 1912 were divorced by a decree of the chancery court of Pulaski County. There is a child, the issue of said intermarriage, a girl, who was about three years of age at the time the divorce was granted, and the chancery court in its decree awarded the custody of the child to appellant, the father. There was a clause in the decree reciting that the court retained jurisdiction over the custody of the child for the

purpose of making further orders from time to time as might be considered proper upon consideration of the circumstances. Appellant has continued to reside in the city of Little Rock, and resides here now. Appellee removed to Dallas, Texas, and is living there now.

Each of the parties has married again, and appellee filed a petition in the chancery court of Pulaski County on May 25, 1916, asking that the custody of the child be awarded to her during the summer vacation and that she be permitted to take the child with her to her home in Dallas. It is alleged in the petition that appellee has been married for the past four years and has a comfortable home in Dallas, and that she and her husband are capable of taking proper care of the child. Appellant filed an answer, denying that appellee has a suitable home in Dallas, or that she is a suitable person or is of sufficient financial ability to take proper care of the child. Without hearing any testimony, and over objections of appellant, the court rendered a decree awarding the custody of the child to appellee "until the further orders of this court, but not later than one week before the opening of the public schools in the city of Little Rock, Arkansas, in the fall of 1916." The decree further specified that appellee could take the child with her to Dallas, but she was required to execute a bond in the sum of one thousand dollars, conditioned that she would return the child to the custody of appellant when ordered by the court, not later than one week before the opening of the public schools. An appeal has been duly prosecuted to this court, and an order was made by one of the judges of the court superseding the decree of the chancery court. Said order of supersedeas has been extended by this court until the cause can be heard on its merits.

(1-2) The first question presented is whether or not the order of the chancery court temporarily transferring the custody of the child from appellant to appellee, and permitting the latter to remove the child beyond the jurisdiction of the court, is a final order so as to be appealable. We are of the opinion that the order is final in the sense

that the complaining party has a right to prosecute an appeal to this court. The chancery court has a continuing power with respect to the custody of the child, even without a reservation in the decree, and any order which the court may from time to time make can be subsequently changed on sufficient showing of a change in the circumstances. An order of the chancery court with respect to the custody of a child is never final in the sense that it is unchangeable, but any change in the custody of the child deprives the parent who has the custody of a substantial right and the order may be appealed from.

When only property rights are involved in litigation, the court under some circumstances may impound the subject-matter of the litigation for the purpose of preserving it, and an order of that kind is interlocutory; but not so when the order concerns the custody of a child, for it is not the child itself that is the subject of the controversy, in a property sense, but the right to enjoy the privilege of having it in custody. When one is deprived of that right for any appreciable length of time, it is a final adjudication of the rights of the parties to that extent and an appeal may be prosecuted. An interlocutory order may be made relating solely to the right to visit a child without depriving the parent of the custody, and that sort of an order would not be final and appealable. But an order which deprives a parent of the custody of the child for any length of time is, as before stated, different in effect and constitutes a final order.

(3) The only remaining question is whether or not the court erred in ordering the change in the custody without hearing proof on the issues presented in the pleadings. The contention of appellant is that the court committed error in making such an order without proof, and we are of the opinion that that contention is sound. While chancery courts possess a continuing power over the matter of custody of a child which has been awarded to one of the parents, it does not follow that an order changing the status can be made without proof showing a change in circumstances from those which existed at the

time the original order was made. The original decree constituted a final adjudication that appellant, and not appellee, was the proper one to have the child, and before an order can be made changing the status there must be proof on the subject justifying the change.

The following statement of the law on the subject is found in 9 Ruling Case Law, page 476: "A decree made at the time of the divorce can not anticipate the changes which may occur in the condition of the parents, or in their habits and character, and their fitness to have the custody and care of the children. The parent having the custody of the children may marry; may become poor and unable properly to maintain and educate them; may become vicious and morally unfit to have the control of children. These changes, and other sufficient causes, may make it necessary for the good of the children that their custody should be changed. * * * Moreover, a delinquent parent may, in the course of time, become entirely fit to have and retain the custody of his or her child. And so it has been held that the presumption of unfitness on the part of a father for the custody of his child, raised by refusal of the court to award it to him upon granting a decree of divorce against him, is overcome by evidence of an exemplary life for many months after the passing of the decree. A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterward unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child."

There has been no decision of this court on the precise point, but several decisions clearly recognize the correctness of the above stated rule. Thus it was said in *Meffert* v. *Meffert,* 118 Ark. 582, that an order of the chancery court awarding custody of the child to one of the parents "is not a final one, and that it may be changed at any future time by the chancellor for cause." In the recent case of *O'Kane* v. *Lyle,* 123 Ark. 242, we held that it was error for the chancery

court to change an order concerning an allowance for the support of a child without taking proof to show a change in the circumstances. It was held, in other words, that the original decree was a bar to any further order until there was shown a change in the circumstances of the parties. The same principle applies with respect to the change of the custody of the child. Several cases cited by appellant on the brief support this view.

In *Koontz* v. *Koontz* (Wash.), 65 Pac. 546, the court said: "A decree of the superior court, which determines the custody of infant children, from which no appeal has been taken, is conclusive upon the court which rendered the decree and upon all other courts, in the absence of a material change in the condition and fitness of the parties, or the requirements for the welfare of the child."

The order is defended on the ground that the chancellor had personal knowledge of the parties and their fitness, respectively, to care for the child. It is suggested in the argument of counsel for the appellee that the chancellor often had the parties before him and conferred with them. That, however, is not sufficient basis for a decree adjudicating the rights of the parties. The personal knowledge of the chancellor is not judicial knowledge of the court, for there is no way of testing the accuracy of knowledge which rests entirely within the breast of the court.

It is also argued that the court erred in permitting the child to be taken beyond the jurisdiction of the court, but that question can only be decided when proof is taken establishing the circumstances of the parties. We do not hold that it is beyond the power of a court to make such an order, for if the established facts justify the conclusion that the mother of the child is capable of giving proper care to the child, and that she will comply with the orders of the court, it would not be beyond the power of the court to permit her to take the child to her home in another State.

For the error in entering a decree in the absence of proof, the decree is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

SCOGGIN v. CITY OF MORRILTON.

Opinion delivered June 26, 1916.

1. SALES—DEFINITION.—A sale is a contract for the transfer of property from one person to another for a valuable consideration.
2. SALES—PROOF OF.—A sale may be proved by circumstances as well as by affirmative evidence; but the circumstances must warrant the inference that there was a seller and a purchaser, a thing to be sold, and compensation in some form passing from the purchaser to the seller.
3. LIQUOR—ILLEGAL SALE—INSUFFICIENT PROOF.—Under an indictment charging the illegal sale of liquor, the evidence held insufficient to show that any sale had been made by the defendant.

Appeal from Conway Circuit Court; *A. B. Priddy,* Judge; reversed.

J. A. Eades, for appellant.

1. There is not one word of testimony to sustain the verdict. Appellant was charged with *selling*—not buying—whiskey, and there is no testimony that he sold any. This court never adopted the *scintilla* rule; there must be a preponderance. 118 Ark. 352. There was no "sale." 23 Cyc. 284. The verdict should have been set aside. 106 S. W. 1125; *Ib.* 23; 207 Mo. 619.

2. The jury disregarded the court's instructions. 18 Pick. (Mass.), 13; 54 Ia. 628. The verdict is wholly unwarranted by the evidence. 20 Ark. 454; 21 *Id.* 302; 7 *Id.* 435; 29 Cyc. 832; 65 Ark. 279; 56 S. E. 292. When clearly against the weight of the evidence, the verdict should be set aside. 47 Ark. 567; 94 *Id.* 568. Or where the evidence is not legally sufficient to sustain it. 94 Ark. 569; 98 *Id.* 336; 20 *Id.* 225.

3. Defendant was not tried under "the blind tiger" act. Kirby's Dig., § 5140, but under section 5093, as amended. Acts 1911, § 100, p. 64; 110 Ark. 47.

Edward Gordon, for appellee.

1. No objections were made, nor exceptions saved, to the instructions or evidence. 79 Ark. 470. The only question is, therefore, does the evidence support the verdict? The verdict is conclusive. 103 Ark. 4; 95 *Id.* 321; 104 *Id.* 162; 95 *Id.* 172; 100 *Id.* 330; 103 *Id.* 260; 92 *Id.* 120.

2. The evidence shows that appellant was either a "bootlegger" or a "silo." 94 Ark. 94. In less than three months appellant purchased $171.75 worth of booze, and started an egg and hide house in a dark alley. "Guilty."

WOOD, J. Upon an affidavit charging him with the unlawful sale of intoxicating liquor in the city of Morrilton on or about November 15, 1915, appellant was convicted and he appeals to this court.

The only question for our consideration is whether the evidence is sufficient to sustain the verdict.

Giving the evidence its strongest probative force in favor of the appellee, it shows that appellant left at the express office in the city of Morrilton, Arkansas, a key to an old house that opened into a back alley, and instructed a delivery man of the express company to deliver packages for appellant at this old house. The old house was a place where Carl Meyer kept eggs and hides. It was very dark of nights in the alley on which this old house was located. It was shown that between the 7th of October and the 29th of December, appellant had bought money orders payable to Sandefur, Julian & Co. and Lasker Bros., liquor dealers of Little Rock, amounting to $171.75. It was proved that a large quantity of empty cartons was found in the old house. The delivery man took two packages in one day to this house. Each package contained pint bottles of whiskey. The second package was captured by the city marshal and it contained twenty-four pints of whiskey. The second package was not shipped in appellant's name, but in the name of McBurke. McBurke testified that the whiskey in the second package belonged to him and he introduced an express bill which contained his name. The express bill,

however, did not show the destination of the package. McBurke, who testified that the whiskey belonged to him, did not make affidavit to that effect before the mayor, and permitted the whiskey to be destroyed without claiming it. He testified that was the only express bill or receipt that he had ever seen although he had ordered whiskey a number of times.

It devolved on the State to prove appellant guilty beyond a reasonable doubt. Every presumption is in favor of innocence, and the proof necessary to establish guilt can not be supplied by mere inference from facts that do not necessarily imply guilt. The evidence is not legally sufficient to prove that appellant made a sale of liquor to any one. "A sale is a contract for the transfer of property from one person to another for a valuable consideration." 7 Words & Phrases, "Sale," p. 6291-92. "To constitute a sale of liquor in violation of the law there must be the assent of two parties. There must be a vendor and vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the law, can avail them if in fact such sale is found to have taken place." *Commonwealth* v. *Thayer,* 49 Mass. (8 Met.) 525-26. See also *Cunningham* v. *State,* 31 S. E. 585-86, 105 Ga. 676.

A sale may be proved by circumstances as well as by affirmative evidence. But where it is sought to prove a sale by circumstances, they must warrant the inference that there was a seller and a purchaser, a thing to be sold and compensation in some form from the purchaser to the seller for the article sold. The most that can be said of the evidence here is that it was sufficient to arouse a strong suspicion that appellant was making illegal sales of liquor, but suspicion is not proof and can not take its place. The evidence falls short of that substantial proof necessary to convict.

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

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

Opinion delivered June 26, 1916.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.—Such dangers as are normally and necessarily incident to the employment are assumed by the employee, but such risks as arise out of the failure of the employer to exercise due care to provide a safe place of work and safe appliances for employees, are not assumed by an employee, unless he is aware of the defect and risk, or unless such defect and danger was plainly observable.
2. MASTER AND SERVANT—INJURY TO SERVANT—USE OF APPLIANCES—NEGLIGENCE—QUESTION FOR JURY.—Plaintiff, a locomotive fireman, was injured by the slipping of the apron, connecting the floor of the engine cab, with the floor of the tender. *Held,* it was a question for the jury whether the defendant railway company was guilty of negligence in using a cotter key to fasten the apron, instead of a bolt, and whether defendant was negligent in the manner in which the cotter key was used. *Held,* also, it was for the jury to determine whether the manner in which the cotter key was used, was an obvious defect, which the plaintiff was bound to observe.
3. MASTER AND SERVANT—INJURY TO LOCOMOTIVE FIREMAN—DEFECTIVE APPLIANCES—DUTY OF INSPECTION.—Plaintiff, a locomotive fireman, was injured by the slipping of an apron connecting the floors of the engine cab, with the floor of the tender. Under the rules of the defendant railway company, a locomotive had to be in good working order before leaving the engine house, *held,* it was the duty of the fireman to exercise ordinary care for his own safety, that he was not required to make an inspection of the engine to see if the same was in good repair, or in a safe condition; no affirmative duty rested on the plaintiff to discover defects and dangers, but if such defects and dangers did exist, that a man of ordinary prudence and care in the performance of his duties would have discovered, then these would be defects and dangers, plainly observable to plaintiff, and if he failed to observe them, he would be held to have assumed the risk.
4. MASTER AND SERVANT—KNOWLEDGE OF DEFECTS—PRESUMPTION.—Knowledge of defects will not be presumed, unless the defects are plainly observable.
5. MASTER AND SERVANT—INJURY TO SERVANT—CONDITION OF WORKING PLACE—LIGHTS.—Where a locomotive fireman was injured by the slipping of an apron connecting the floors of the engine cab and tender, evidence of the condition of the lights on the engine and tender, is admissible.

Appeal from Lonoke Circuit Court; *T. C. Trimble,* Judge; affirmed.

STATEMENT BY THE COURT.

In October, 1914, appellee was in the employ of the appellant as fireman on one of its engines. Appellee, while engaged in his work on one of the engines that had been sent to help clear the track of a derailed train, was sitting on his seatbox watching for signals that the engineer was unable to see on his side of the engine because of a curve at that point in the track. The engine had gotten behind the cars and was pushing them up in the yards. The fire was low and appellee stepped back toward the tank. As he went to lift his right foot it hung in something that threw him, and as he grabbed it turned his back out, injuring him. Appellee was discovered lying within a few inches of the track in an unconscious condition. He did not remember anything after he started to fall. When he raised his foot it hung and he fell forward. Appellee supposed that his foot went down between the tender and the engine. There was a sheet steel apron there covering the space between the tender and the engine. Some engines have a wider space than others. On some of the engines there was a space about twelve inches that the apron covered. Appellee had frequently to cross this apron in the discharge of his duties. He never went more than thirty minutes without crossing over the apron in putting in coal. On the night of the injury, not long before appellee was discovered in his unconscious condition, a witness had seen him at work on his engine. Shortly thereafter they examined his engine and found that one fastening of the apron on the left side had become loose and the apron had worked back, leaving an open space between the engine and the tender of about eight or ten inches.

The apron to this engine was fastened with a cotter key in the place in which a bolt was usually employed to make the connection. Fastening by a bolt was the safer method. The cotter key used to fasten the apron was out of the side next to the cab. When the cotter keys are used the ends are spread to keep them from coming out of the

hole through which they are placed to make the fastening. Witnesses demonstrated before the jury the way in which the apron was fastened by a model or small cut representing the manner in which the apron was fastened to the engine with the bolts and the cotter keys. One witness stated that the cotter key was just slipped in. "It was barely long enough to reach through." Another witness stated that he took the cotter key and without any effort inserted it in the place where it was before.

There was a rule of the company providing that the engine house foreman must be sure that each locomotive, before leaving the house for service on the road, is in good working order and is fully supplied with signals and all other requisites, including an ample supply of fuel and water.

The engines were supposed to have electric lights. On the night of the injury there was one light to the steam gauge and one for the water gauge. There were no back lights. Appellee was not able to see the condition of the cotter key with the lights he had. He stated that he did not think he could have seen it if he had taken special pains to look. The engine was supposed to be in first-class running order and safe condition when it was turned over to the enginemen. The company had an inspector to report anything that an engineer does not see. It was no part of the appellee's duty to look after the apron.

When the enginemen were switching the fireman was supposed to put in all of his time watching for signals and different things, and if the steam got low it was his duty to get down and put in a fire. When the train was running, the scoop was back in the tank and when he stepped down off of his seatbox he was facing the tank. The seatbox was some ten inches higher, and when he stepped off of that he stepped off to one side and the next step would land him on the open space or on the apron.

The appellee sued the appellant for damages resulting from his personal injuries, alleging that "instead of securely fastening the apron to the left side of the engine with a bolt and nut, or in some other way safely securing

and fastening the same," appellant "negligently and carelessly fastened the same by merely inserting a cotter key in such way as that the same worked or pulled out, thus leaving the left side of the apron unfastened and in such shape that it did not cover, but left wholly unprotected the open space of about eight or ten inches between the engine and tender;" that it was the duty of appellant "to have used a bolt and nut in fastening the apron, or at least, if it saw fit to use a cotter key, to have the same spread open after inserting the same in the space left from the bolt, so that it would not work or pull out by the jarring of the engine; that when said cotter key was put in place on this engine it was not spread open, nor was anything done to prevent its coming out; that on account of there being little or no light in the cab of the engine, appellee's injury having occurred in the night time, between 8:30 and 9 o'clock, when it was quite dark, he was unable to see that the apron had worked loose, and therefore had no knowledge thereof; that while engaged in his duty as fireman he undertook to step in the tender while the engine and train were in motion, and on account of the negligence and carelessness of the defendant as set forth he fell into the open space and was hurled with great force to the ground below, thereby receiving great and permanent injuries."

The appellant denied the material allegations of the complaint, and set up that appellee at the time of his injury was engaged in running a train which was pulling interstate commerce within the terms of the Federal Employer's Liability Act of 1908, under which appellee assumed the risk incident to the employment, and that the injury complained of was one of the ordinary and usual risks of the employment. The appellant also set up the defense of contributory negligence.

The court granted appellant's prayer for instruction No. 2, as follows:

"2. I charge you that before the plaintiff can recover at your hands that the burden is upon him to establish (a) that his fall from the engine was caused by rea-

son of the sheet or steel or apron being loose, and (b) that such condition was the result of actual carelessness or negligence upon the part of the defendant. And in determining these questions, the jury will not be permitted to guess, conjecture or surmise that his fall was caused by the loosened condition of the apron, or that such condition was the result of negligence or carelessness, but these facts must be established by competent testimony."

In appellee's fourth prayer, after pointing out the distinction between contributory negligence and assumption of risk, the court told the jury that "such dangers as are normally and necessarily incident to the occupation are assumed by the employee whether he is aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work, and safe and suitable appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are plainly observable and knowledge of the defect is not to be presumed." And also instructed the jury, in effect, that if they found that there was a defect which caused appellee's injury, and that such defect was not one of the risks ordinarily incident to the employment in which he was engaged, but resulted from the negligence of the appellant, its agents or employees, it would be the duty of the jury to find for the appellee, unless they found that the appellee was aware of the defect and the risk arising from it, or that the defect and risk were plainly observable to him.

Appellee's fifth prayer was as follows:

"5. You are instructed that the defendant is not a guarantor of the safety of the place in which the plaintiff was required to do his work, or of the appliances of the work, but it was its duty to see that ordinary care and prudence were exercised in this respect, to the end that the place in which the work was to be performed and the appliances of the work should be safe for the plaintiff,

while engaged in his work. And you are further instructed that the plaintiff had the right to assume that it had performed such duties, and no duty devolved on him to make search for such defects, if any there were."

The appellant made a general objection to the rulings of the court in granting each of the above prayers.

The appellant requested the court, among others, to grant the following prayers for instructions:

"5. The defendant is not an insurer of the safety of its employees, and is not liable for an accidental injury to one of them; so in this case, if the fall of the plaintiff was an accident, and not attributable to carelessness or negligence upon the part of the defendant, then plaintiff can not recover, and your verdict will be for the defendant."

"6. I charge you that the fact that plaintiff fell constitutes no evidence of negligence, and should not be considered by the jury as even a circumstance tending to show any carelessness or negligence."

"7. I charge you that the plaintiff in entering the employment of the defendant is held to have assumed the usual risks attending the performance of his duty in the customary way, and he also assumes the risks due to the negligence of the employer when aware of the defect and of the risk arising from it, or when such defects and risks are so open and obvious that an ordinarily prudent person would have observed and appreciated them."

The court refused to give appellant's prayers 5 and 6, and modified prayer No. 7 by striking therefrom the last clause, *i. e.*, "or when such defects and risks are so open and obvious that an ordinarily prudent person would have observed and appreciated them," and by adding in lieu thereof the words, "or when the same is plainly observable to him," and giving the prayer as thus modified. To these rulings of the court the appellant duly excepted.

The jury returned a verdict in favor of the appellee in the sum of $7,500. Judgment was entered in appellee's favor for that sum, and this appeal was taken.

Troy Pace, for appellant.

1. It was error to give plaintiff's second instruction. The master is not an insurer of safety. The key was not structurally defective nor was it shown that it was negligence to use a cotter key, instead of a bolt and nut.

2. The court erred in giving plaintiff's fourth and in refusing defendant's seventh instruction. 233 U. S. 492, 504.

3. It was error to give plaintiff's fifth request; in refusing defendant's fifth and sixth. There is no presumption of negligence on the master's part from the fact that an employee engaged in running a train is injured. 79 Ark. 76; 100 *Id.* 467; *Ib.* 422. This case is governed by the Federal act, which has not changed the law.

4. The court erred in permitting plaintiff to testify as to the character of lights on the engine. 46 Ark. 96.

5. No causal connection between the alleged defect and the injury was shown.

W. H. Pemberton, for appellee.

1. There is no error in the instructions. An employee does not assume the risks caused by the negligence of the employer. 191 U. S. 68; 170 *Id.* 671, 674. The employee has the right to rest on the assumption that the appliances furnished are free from defects discoverable by proper inspection, and there was no necessity for him to search for defects. 191 U. S. 68-9; 170 *Id.* 171. No contributory negligence was proven. 89 Ark. 424; 28 L. R. A. (N. S.) 250, 1255.

2. No error is shown in other instructions given or refused, nor in the testimony admitted. The judgment is not excessive. There is nothing in this appeal.

WOOD, J., (after stating the facts). (1) Appellant contends that appellee's fourth prayer for instruction made appellant an insurer of the safety of the appellee, but such was not the effect of the instruction. In the first part of the instruction the court correctly defined the distinction between contributory negligence and the as-

sumption of risk, and correctly told the jury that such dangers as were normally and necessarily incident to the employment are assumed by the employee, but that such risks as arose out of the failure of the employer to exercise due care to provide a safe place of work and safe appliances for his employees was not a risk assumed by the employee unless he was aware of the defect and risk, or unless such defect and danger were plainly observable; that knowledge of such defect and danger were not to be presumed.

The court then submitted to the jury to determine from the evidence as to whether or not appellee's injury was caused by a defect in the appliances, the danger from the use of which was one ordinarily incident to the employment, or whether it was one that resulted from the negligence of the appellant, and also as to whether or not appellee was aware of the defects, and whether or not they were plainly observable to the appellee.

(2) The evidence was amply sufficient to warrant the court in submitting to the jury the issue as to whether or not appellant was negligent under the circumstances in using the cotter key instead of a bolt to fasten the apron that covered the space between the engine and the tender, and whether or not the appellant was also negligent in the manner in which the cotter key was used. The jury had before them a representation of the manner in which the apron was fastened, and there was exhibited before them a cotter key which they had a right to find was the one used in making the fastening. It was also an issue for the jury as to whether the defect, if one existed, by the use of the cotter key instead of a bolt, and by the manner in which it was used, was an obvious defect, that is one that appellee, in the exercise of ordinary care for his own safety while performing his duties, was bound to observe.

As we view the instruction, it did not assume the existence of a defect that caused the injury, nor did it assume that appellant was negligent in causing the defect, if there was one, nor that the injury was the result of the

negligence of appellant in the manner of the use of the cotter key. It submitted to the jury to determine whether or not the defect, if it existed and caused the injury, was one of the ordinary risks incident to the employment, and plainly told them that if it was, then it was their duty to find in favor of the appellant. It also told them that it was their duty to find in favor of the appellant if the defect was plainly observable.

It must not be overlooked that in the first part of the instruction the court had told the jury that contributory negligence was a "failure to use such care for his safety as ordinarily prudent employees under similar circumstances would use." The instruction must be taken as a whole, and when the words "unless you should find that the plaintiff knew of such defect or the same was plainly observable to him" are construed in connection with the definition of contributory negligence in the first part of the instruction it is obvious that the court correctly instructed the jury on the issue of the assumption of risk. The instruction, as a whole, correctly declared the law in conformity with the decisions of this court and of the Supreme Court of the United States. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 503-504; *C., O. & G. Ry. Co.* v. *McDade,* 191 U. S. 68-69; *Tex. & Pac. Ry. Co.* v. *Archibald,* 170 U. S. 671, 672.

(3-4) While it was the duty of the appellee to exercise ordinary care for his own safety in the use of the appliances furnished him, yet that did not require him to make an inspection of the engine to see whether or not the same was in good repair or in a safe condition. The undisputed evidence shows that under the rules of the company the locomotive, before leaving the engine house for service on the road, had to be in good working order. No affirmative duty therefore was imposed upon appellee to discover defects and dangers. However, if there were such defects and dangers that a man of ordinary prudence and care in the performance of his duties would have discovered, then these would be defects and dangers "plainly observable" to the appellee, and if he failed to observe

them he would be held to have assumed the risk. *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 424, 28 L. R. A. (N. S.) 1250. In a note to the above case the editor says: "The doctrine as laid down by the United States Supreme Court is that the servant assumes the risk of those dangers due to the master's negligence which are known to him or which are plainly observable by him, but that he is not obliged to use even ordinary care in ascertaining or discovering the defects. In other words, knowledge of the defects will not be presumed unless the defects were plainly observable."

This is the doctrine enunciated in the instruction, in such way as to leave it to the jury to determine the issue of fact. There was testimony to warrant the court in submitting the issue to the jury as to whether or not the manner of making the fastening with the cotter key was an obvious defect and danger. What we have said in this connection makes it unnecessary to discuss the objections raised to the rulings of the court in refusing appellant's prayer No. 7, and also in giving appellee's prayer No. 5. It follows from what we have already said that there was no error in these rulings.

The court did not err in refusing appellant's prayers for instructions Nos. 5 and 6. The instructions were not correct declarations of law, applicable to the evidence adduced, and the idea intended to be conveyed by them was fully covered by correct instructions which the court gave at appellant's request. Prayer No. 6 was argumentative, and, under the evidence, clearly calculated to mislead the jury.

(5) The court did not err in permitting appellee to testify as to the character of the lights upon his engine. There were allegations in the complaint which justified the court in permitting this testimony. The evidence was amply sufficient to warrant the jury in finding that the proximate cause of appellee's injury was the negligence of appellant as alleged in the complaint; that the injury was the direct result of such negligence.

There are no reversible errors in the record, and the judgment is therefore affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

City of Little Rock *v.* Holden; appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed May 8, 1916, *per* Smith, J.

Crigler *v.* Sloss; appeal from Crawford Circuit Court; James Cochran, Judge; affirmed May 8, 1916, *per* Kirby, J.

St. Louis, I. M. & S. Ry. Co. *v.* Stevens; appeal from White Circuit Court; J. M. Jackson, Judge; affirmed May 8, 1916, *per* Kirby, J.

Miller, Admr. *v.* Summers; appeal from Sebastian Circuit Court, Greenwood District; Paul Little, Judge; affirmed May 15, 1916, *per* Kirby, J.

Haglin *v.* Haglin; appeal from Sebastian Chancery Court, Fort Smith District; Wm. A. Falconer, Chancellor; affirmed May 29, 1916, *per* Hart, J.

Williams *v.* Krantz; appeal from Cross Circuit Court; J. F. Gautney, Judge; affirmed May 29, 1916, *per* Kirby, J.

Merritt *v.* Kutler; appeal from Garland Chancery Court; J. P. Henderson, Chancellor; affirmed May 22, 1916, *per* McCulloch, C. J.

Beloate *v.* Beloate; appeal from Clay Chancery Court, Western District; Charles D. Frierson, Chancellor; reversed in part and affirmed in part May 22, 1916, *per* McCulloch, C. J.

A. L. Clark Lumber Co. *v.* Hurst; appeal from Pike Circuit Court; Jefferson T. Cowling, Judge; affirmed May 22, 1916, *per* Kirby, J.

Norman *v.* Bertig Bros.; appeal from Greene Circuit Court; W. J. Driver, Judge; affirmed May 15, 1916, *per* Hart, J.

Braunick *v.* Van Wagener; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed May 15, 1916, *per* McCulloch, C. J.

Davie *v.* Sifford; appeal from White Circuit Court; J. M. Jackson, Judge; affirmed May 15, 1916, *per* McCulloch, C. J.

Valentine *v.* Edwards; appeal from Lonoke Circuit Court; Thomas C. Trimble, Judge; affirmed June 5, 1916, *per* Smith, J.

Nix *v.* State; appeal from Lafayette Circuit Court; George R. Haynie, Judge; affirmed June 5, 1916, *per* Smith, J.

Lusk, *et al*, Receivers St. Louis & San Francisco Rd. Co. *v.* Craft; appeal from Lawrence Circuit Court, Eastern district; Dene H. Coleman, Judge; affirmed June 12, 1916, *per* Smith, J.

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M. J. Murphy and H. M. Westcott *v.* B. W. Haffner; Jackson Circuit Court; Dene H. Coleman, Judge; affirmed under rule seven, April 17, 1916; *per curiam.*

Lee Hawkins *v.* A. R. Nichols; Saline Circuit Court; W. H. Evans, Judge; appeal dismissed on appellant's motion, April 17, 1916; *per curiam.*

J. F. M. Brown *v.* The State of Arkansas; Bradley Circuit Court; Turner Butler, Judge; appeal stricken from the docket because of the death of the appellant, April 17, 1916; *per curiam.*

J. W. McGehee, E. W. Gentry and W. F. Gentry *v.* J. R. Cope; Sebastian Circuit Court, Paul Little, Judge; appeal dismissed, not having been taken within the time prescribed by statute, April 24, 1916; *per curiam.*

W. T. Berry, *et ux*, and W. T. Berry, Executor, *v.* Joella Rawlings; Logan Chancery Court, Southern District; W. A. Falconer, Chancellor; appeal dismissed for non-compliance with rule nine, April 24, 1916; *per curiam.*

Moline Lumber Company *v.* Fred Brodnax; Ouachita Circuit Court; C. W. Smith, Judge; settled, and appeal dismissed by consent, May 1, 1916; *per curiam.*

Jeff Russell and D. L. Malone *v.* A. V. Walker; Hempstead Circuit Court; George R. Haynie, Judge; settled and appeal dismissed by consent, May 1, 1916; *per curiam.*

Memphis, Dallas & Gulf Railroad Company *v.* R. L. Myers; Little River Circuit Court; J. T. Cowling, Judge; affirmed under rule seven, May 15, 1916; *per curiam.*

J. H. Maddox *v.* The State of Arkasnas; Franklin Circuit Court James Cochran, Judge; appellant having been pardoned, the appeal was dismissed, May 15, 1916; *per curiam.*

Henry Brooks *v.* The State of Arkansas; Desha Circuit Court; James Knox, Special Judge; appeal dismissed, May 22, 1916, on appellee's motion, for failure of appellant to lodge transcript in Supreme Court within the time limited by statute; *per curiam.*

Joe Hong *v.* The State of Arkansas; Desha Circuit Court; James Knox, Special Judge; appeal dismissed, May 22, 1916, for reason stated in Brooks *v.* State; *per curiam.*

G. Wall *v.* The State of Arkansas; Desha Circuit Court; James Knox, Special Judge; appeal dismissed, May 22, 1916, for reason stated in *Brooks v. State; per curiam.*

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Otto Brucker *v.* The State of Arkansas; Scott Circuit Court; Paul Little, Judge; appeal dismissed June 12, 1916, for failure of appellant to lodge transcript in Supreme Court within the time limited by statute; *per curiam.*

Jonesboro, Lake City & Eastern Railroad Company *v.* The State of Arkansas; Craighead Circuit Court, Jonesboro District; Basil Baker, Judge; appeal dismissed pursuant to stipulations of parties, June 19, 1916; *per curiam.*

T. S. Osborne *v.* Koller-McKim Plumbing Company; Sebastian Chancery Court, Fort Smith District; W. A. Falconer, Chancellor; appeal dismissed for failure to perfect same within the time allowed by statute, July 10, 1916; *per curiam.*

G. E. Cheatham *v.* Edgar Lumber Company; Columbia Chancery Court; R. L. Searcy, Special Chancellor; settled and appeal dismissed on appellant's motion, July 10, 1916; *per curiam.*

Roy Selman *v.* The State of Arkansas; Sevier Circuit Court; Jefferson T. Cowling, Judge; appeal dismissed on appellee's motion, July 10, 1916, for failure of appellant to lodge transcript in Supreme Court within time limited by statute, *per curiam.*

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