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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

THIBAULT *v.* MCHANEY, RECEIVER.

Opinion delivered January 8, 1917.

1. APPEAL AND ERROR—REVERSAL AND REMAND OF CAUSE—PRACTICE—DUTY OF CHANCELLOR—IMPROVEMENT DISTRICTS—PRELIMINARY EXPENSES.—On a former appeal it was held that damages suffered by certain land owners was not an expense incurred for preliminary work in the construction of an improvement, and a decree in their favor was reversed and remanded. The reversal of the decree annulled that part of the decree which was in favor of these land owners, and the remand of the cause opened it for further investigation. *Held*, thereafter the chancery court was correct in taking up the subject anew, and there being no other proof supporting the validity of the claims or showing that they constituted expenses for preliminary work, the court was correct in disallowing them.
2. ATTORNEY'S FEES—RESISTING CLAIMS AGAINST AN IMPROVEMENT DISTRICT—PROCURING REPEAL OF ACT.—Attorneys who brought about the repeal of Act 420, Acts 1907, as amended by Act of 1909, p. 304, by the enactment of Act 127, Acts 1913, and attorneys who resisted claims presented against the district after the passage of the repealing act, will not be allowed fees for their services, in the absence of an express provision in the statute providing for the payment of the same.
3. IMPROVEMENT DISTRICTS—REPEAL OF STATUTE CREATING—PRELIMINARY EXPENSES.—Claims to be allowed against the Fourche Drainage District, the acts creating which were repealed by Act 127, Acts 1913, are limited to those for expenses preliminary to the ascertainment of the cost of the improvements and the amount of benefits. There is no authority in the statute for those in control of the affairs of the district to incur any liability at all except that which leads up to and precedes the ascertainment of the feasibility of the project, that is to say, the cost of the improvement and the amount of benefits to be derived from the construction of the improvement.
4. IMPROVEMENT DISTRICTS—PRELIMINARY WORK DONE BY ENGINEERS—COMPENSATION.—The compensation to certain engineers for services rendered the Fourche Drainage District in preliminary work, fixed at $18,000.00.
5. IMPROVEMENT DISTRICTS—ORGANIZATION—PRELIMINARY WORK—FEES DUE ATTORNEYS FOR THE DISTRICT.—The compensation to be

allowed attorneys for the Fourche Drainage District after the repeal of the statutes creating the same, is limited to services rendered in determining the feasibility of the project, including the conduct of litigation involving the existence of the district.

6. FOURCHE DRAINAGE DISTRICT—CLAIM OF CONSULTING ENGINEER ALLOWED.—The claim of the consulting engineer for services on preliminary work, allowed.

7. FOURCHE DRAINAGE DISTRICT—CLAIMS OF DIRECTORS AND OFFICERS.—Amounts due officers and directors fixed.

8. FOURCHE DRAINAGE DISTRICT—CLAIMS OF ASSESSORS.—Claims of assessors disallowed.

9. FOURCHE DRAINAGE DISTRICT—CORRECTNESS OF ASSESSMENTS.—The statute repealing the organization of the Fourche Drainage District, constituted a legislative determination of the correctness of the assessment of benefits made, and is conclusive, and that question is beyond judicial review in the absence of a showing that the assessment was improperly made, or that no benefit could possibly accrue to the property to be taxed. See *Fellows* v. *McHaney*, 113 Ark. 363.

10. FOURCHE DRAINAGE DISTRICT—REFUND OF EXCESSIVE PAYMENT MADE BY PROPERTY OWNERS.—The order of the chancellor ordering a refund to taxpayers in excess of the amount necessary to pay the legal claims against the district, upheld.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; reversed in part and affirmed in part.

Marshall & Coffman, for Joe Asher and B. F. Dreher.

Bradshaw, Rhoton & Helm, for Braddock Land & Granite Co., *et al.*, and *Ratcliffe & Ratcliffe*, for J. K. Thibault, Ratcliffe & Ratcliffe, *et al.*

1. The phrase "preliminary expenses" negatives the idea of completed work. The engineer's claim was excessive, the allowance being excessive. The allowance is greatly in excess of what properly can be considered a preliminary expense under the opinion on the former appeal.

2. This applies also to the claims of the attorneys. Of the other claims, those of Dickinson, Lenon, Morris, Watkins *et al.*, as secretary and directors, should not have been allowed. Nor should the claims of the trust companies for amounts paid engineers, Lund & Hill, excess over $5,000.00; Peyton Johnson, Democrat Co.,

Lenon, Secretary; Kavanaugh, President; Gazette Publishing Co.; Manufacturers' Record; Randolph, etc., have been allowed. The claims of the Southern Trust Co. for Lund & Hill, Peyton Johnson, Beach Abstract Co., Kavanaugh, director, Central and Reporter and for contract notices should have been also disallowed. All questions as to preliminary expenses were largely settled in 50 Ark. 146; 119 *Id.* 198.

3. The claims for lands taken or damaged were reduced to judgments and became final, as there was no appeal. 128 Ill. 510; 21 N. E. 628; 191 U. S. 499.

4. As to allowance of expenses and attorneys fees, 105 U. S. 527, is the leading case. They were entitled to reimbursement out of the fund or by proportionate contributions from those who receive the benefits. 113 U. S. 122; 144 *Id.* 457; 16 Fed. 21; 38 *Id.* 282; 53 Ark. 545, 569; 76 *Id.* 501; 95 *Id.* 389, and others. See also 117 U. S. 582; 57 Fed. 70, 98; 98 *Id.* 779; 113 Ga. 207; 102 Fed. 31; 28 U. S. (L. Ed.) 918.

The petitioners should be allowed the expenses incurred by them and the counsel such a fee as is reasonable under the circumstances.

Frank H. Dodge and *J. W. Blackwood*, for E. L. McHaney, the Receiver.

1. All questions as to the assessments have been settled in 113 Ark. 363 and 119 *Id.* 198. The claims for lands taken or damaged are not *res judicata.* On the reversal of the case on former appeal these interventions were governed by the opinion in that case. They were part and parcel of the case and of the decree therein. 119 Ark. 203, 211.

2. Attorneys fees were properly disallowed. Gluck & Becker on Receivers of Corp., page 296; 91 N. Y. 57; 31 Hun. (N. Y.) 623; 122 Mass. 421. The attorneys only represented their own clients. 76 Ark. 504, 505; 95 *Id.* 398; 105 *Id.* 443; 105 U. S. 527.

3. The claims of attorneys and engineers were excessive. Where a district is dismembered this court has laid down the rule. 107 Ark. 290; 112 *Id.* 357;

185 S. W. 285; 119 Ark. 200; 86 Ark. 8. See also *Sain* v. *Bogle*, 122 Ark. 14; 115 Ark. 437. This applies also to many of the claims allowed by the special master. This court should determine the allowances and settle whether they are excessive or not.

4 The taxpayers who paid in full should be reimbursed, thus placing all *in statu quo*. They were not voluntary payments. 96 Ark. 153; 72 *Id.* 555; 37 Cyc. 1181.

J. W. & J. W. House, Jr., for Lund & Hill.

1. The claim is for preliminary expenses, and 2½ per cent. is not excessive. 119 Ark. 188 is conclusive of their claim. The doctrine is well settled. 44 Ark. 383; 92 *Id.* 484; 92 *Id.* 554; 97 *Id.* 147; 99 *Id* 218; 63 N. W. 957.

The cases of *Sain* v. *Bogel*, 122 Ark. 14, and *Ayers* v. *Crittenden Co.*, 123 Ark. 246, do not militate against our contention.

2. Lund & Hill paid out in cash $15,000.00 for work, without including their time or salary. This was a matter of contract and legal and binding.

Bradshaw, Rhoton & Helm, for Braddock Land & Granite Co. and Nettie K. Riffle.

1. The persons who voluntarily paid in full are not entitled to have same returned. 119 Ark. 119; 107 *Id.* 24; 65 *Id.* 155; 46 *Id.* 358; 97 U. S. 181; 98 *Id.* 541; 37 Cyc. 1178-80.

2. Attorneys' fees and costs should have been allowed the interveners. The allowance of $5,000.00 to the attorneys of the district is excessive.

3. The court erred in overruling the exceptions to the report of the master. 119 Ark. 198-9.

4. The court erred in overruling the protest of interveners. Art. 2, § 22, and Art. 8, § 8, Const. Ark., and Art. 14, § 1, Const. of U. S.

Moore, Smith, Moore & Trieber and *Rose, Hemingway, Cantrell, Loughborough & Miles*, for the Union, Mercantile and German Trust Companies.

The attack upon the allowances is without merit. Their claims were advances for preliminary expenses.

Carmichael, Brooks, Powers & Rector, for Southern Trust Co.

1. No appeal was taken from the allowance on the former appeal. The allowances were for preliminary expenses. *Sain* v. *Bogle*, 122 Ark. 14; 115 Ark. 445.

2. There is no merit in the claim of Ratcliffe & Ratcliffe for attorneys' fees. See the brief for the receiver.

MCCULLOCH, C. J. This is the second appeal in this case, which was instituted in the Pulaski Chancery Court for the purpose of winding up an improvement district known as the Fourche Drainage District. The district was created by a special Act of the General Assembly of 1907 (Act. No. 420, page 1112) and the amendatory Act of 1909 (page 304); and the General Assembly of 1913 repealed the statutes creating the district (Act. No. 127, page 534) and provided for proceedings in the Pulaski Chancery Court to wind up the affairs of said district.

In the opinion of this court disposing of the case on the former appeal we held that the chancery court had erred in failing to observe the distinction between claims based upon preliminary or initial expenses incurred and those based on expenses of constructing the improvement, and in allowing claims other than those for preliminary expenses. In the opinion the character of claims to be allowed were defined in the following statement: "Under the terms 'preliminary expenses' would be included the cost incurred in litigation to determine whether or not the act creating the district was valid, and attorney's fees as counsel to the board in the preliminary work of organization, etc.; such costs as expenses for maps, plats, surveys of land and for engineering expenses in preparing the plans and specifications. In other words, all expenses incident to the investigation by which it is sought to

determine whether the value of the benefits to the lands by the improvements contemplated would exceed the cost of such improvement and thereby warrant its completion." 119 Ark. 188.

The decree was reversed and the cause was remanded with directions "to ascertain from this record, and other testimony if necessary, the claims for preliminary expenses, and to allow these claims; and also to allow the claims of the trust companies or others whose money was furnished to pay the claims for preliminary expenses to the extent and for the amounts only of such preliminary expenses; and to disallow and dismiss all claims for permanent work, and for such other and further proceedings looking to the adjustment and payment of the claims allowed as may be necessary and not inconsistent with this opinion."

When the cause was remanded, certain other issues were introduced. Appellant, J. K. Thibault, and his attorneys, Messrs. Ratcliffe & Ratcliffe, filed an intervention in which claim was made for fees of the attorneys for services rendered in procuring the passage of the Act of 1913 repealing the Act organizing the district, and also fees in prosecuting the former appeal to this court. There was a prayer for the allowance to the attorneys of a fee in the sum of $15,000.00. Messrs. Bradshaw, Rhoton & Helm, who were solicitors for the Braddock Land & Granite Company and certain other appellants on the former appeal, filed their petition in which they asked for fees for services rendered in prosecuting the former appeal. The petition also asked for allowance of court costs expended on the former appeal, but as those items have been paid no further reference need be made to them. The petitioners ask that a fee of $950.00 be allowed as compensation for services of the attorneys. The Braddock Land & Granite Company and certain other property owners filed an intervention protesting against the amount of the assessments against their lands, and alleged that the lands would have received no benefit from the improvement but would have been damaged

if the improvement had been constructed. They also alleged that the assessments against their lands were exorbitant and discriminatory.

Further proof was taken concerning the amount of the claims against the district, and there was a reference to a master, who made his report to the court, setting out the amounts which were found to be justly due to the several claimants. Among the claimants was Mr. George C. Pye and certain other land owners, whose property had been damaged in constructing the improvement, which, as shown in the former opinion of this court, had been begun before the work was stopped by the passage of the Act of 1913. In the first decree those damages were allowed, but the master, under instructions from the court, disallowed those claims because they did not fall within the definition of preliminary expenses. Those claimants filed exceptions to the report on the ground that there had been no appeal from that part of the former decree which allowed their claims, and that the former decree was, therefore, *res judicata* and could not be ignored by the court in its final order for the payment of the claims against the district. There were a great many items in the master's report about which there is no controversy, and they need not be set out in detail. Only those will be mentioned which are controverted, as shown by the exceptions filed to the report of the master. Exceptions were filed to the allowance of the following items in the report:

No. 48. W. W. Dickinson, service as director	$ 220.00
No. 49. W. E. Lenon, services as secretary to board	730.00
No. 51. J. B. Morris, services as member of board	155.00
No. 52. J. A. Watkins, services as member of board	95.00
No. 53. Harry Keatts, services as member of board	110.00

No. 59. W. S. Holt, services as member of board	$ 145.00
No. 60. Max Heiman, services as member of board	145.00
Coleman & Lewis, attorneys' fee	5,000.00
Lund & Hill, engineers for the district	22,642.48
Joint claims of the trust companies:	
Lund & Hill	7,293.05
W. E. Lenon, salary as secretary	200.00
W. M. Kavanaugh, salary as president	300.00
Arkansas Democrat, publishing contract notices	44.00
Gazette Publishing Co., publishing contractors' notices	44.00
Manufacturers' Record, contract notices	11.20
Democrat Print. & Litho. Co., specifications, blank deeds and briefs	49.50
Southern Trust Company, for loans subsequent to August 7, 1912:	
Lund & Hill, engineers	500.00
Beach Abstract Co., certificates of ownership	25.00
W. M. Kavanaugh, salary as member of board	525.00
Central States Contract Reporter, contract notices	32.94
Engineering and Contracting contract notices	18.00
Manufacturers' Record, contract notices	24.80
Engineering Record	34.80

Money had been advanced by certain banks and trust companies, and some of the items set forth above are for allowances to those companies in reimbursement of the amounts so paid. Further exceptions were filed to the allowance of the following items:

C. B. Meyers, for services as equalizer	$500.00
W. M. Moore, for services as equalizer	500.00
R. W. Polk, for services as equalizer	500.00
Peyton Johnson, for finding out value of right of way	250.00

Peyton Johnson, for estimating cost of right of way..... $ 100.00
Isom Randolph, services as consulting engineer. 1,365.85

The last two items were embraced in the allowances to the trust companies, it appearing that those concerns having advanced the money to the district for those payments. The court overruled all of the exceptions and entered a decree approving the master's report so far as concerned the disputed items set forth above, and entered a decree allowing the claims. The court also in its decree denied the prayer of appellants for the allowance of fees for the services of their attorneys. The court also overruled the plea of *res judicata* of appellants Pye and other land owners, and entered a decree disallowing their claims for damages to land. The total amount of claims allowed under the last decree was about $38,000.00 less than under the former decree, which was reversed by this court, and it became necessary to change the order with respect to the amount of money to be raised by assessments to pay those claims. In the former decree the court estimated the amount it would require to pay off the claims and levied assessments payable in five annual installments.

It was shown to the court that many of the property owners had, prior to the entry of the last decree, paid all the annual installments, whilst many had not paid them all and some had not paid any at all. An order was therefore made directing the receiver to refund to the tax payers the proportionate amount left after the collections were made over and above the amount necessary to discharge the claims and the expenses of winding up the affairs of the district. The Braddock Land & Granite Company and certain other property owners, who it appears had not paid their assessments, but were resisting the payment thereof, filed an intervention in which it is shown that the payments made by tax payers were purely voluntary and had brought into the hands of the receiver funds nearly sufficient in amount to pay off the claims without exacting payment from those who had not paid, and

asked that no order be made refunding the excess to those who had paid the full five annual installments. It was asked that the decree ordering the refund be modified, but the court overruled this prayer. Appeals have been duly prosecuted to this court.

(1) The sole point raised by the appeal of Mr. Pye and others whose lands were damaged by the construction of the improvement is that there was no appeal from the former decree allowing their claims, and that that decree was a final adjudication of their rights which could not be disturbed in the subsequent proceedings. Those appellants are mistaken, we think, in assuming that there was no appeal from the former decree. We said in the former opinion that the whole proceedings must be treated as a unit, and the appeal necessarily brought up for review the right of the owners of damaged lands to recover on their claims, and the decision of this court was against those claimants on their right to recover. We expressly held that damages resulting from the construction of the improvement did not constitute preliminary expenses and could not be allowed as a part of the claims against the district. The reversal of the decree, of course, annulled that part of the decree which was in favor of those appellants, and the remand of the cause opened the case for further investigation. The court was correct in taking up that subject anew, and there being no other proof supporting the validity of the claims or showing that they constituted expenses of preliminary work, the court was correct in disallowing them. That portion of the decree is therefore affirmed.

(2) Appellants contend that allowances should be made to their attorneys for services performed, which should be taxed against the fund raised by assessments levied on the property of the district, and they invoke the rule recognized in some quarters that where the services of an attorney for one person interested in common with others in the creation or preservation of a fund inures to the benefit of all, compensation should be made for said services out of the fund so

created or preserved. This court has had something to say on that subject in cases cited on the briefs, and has placed restrictions upon that doctrine as announced by other courts, but it is sufficient to say in the present case that the doctrine has no application, for the reason that there has been no creation or preservation of common funds or other property. The controversy has been over the allowance of claims against the district, and there has been no pursuit of common property for distribution among those interested in it, such as was the case in the instances where this doctrine has been applied. No case has been brought to our attention where the doctrine has been applied in a case like this, where the litigation in which the services rendered constituted merely a resistance of claims against the tax payers. In a case like this every tax payer defends for himself, and the fact that the decisions concerning his rights affect the rights of others is no reason why they should be taxed with the payment of the attorney's fees.

There is another all-sufficient reason why the doctrine should not be applied in this particular case, and it is that the statute contains no authority for the allowance of such a claim against the funds of the district. In the recent case of *Sain* v. *Bogle*, 122 Ark. 14, we said, concerning the right of attorneys to recover fees against an improvement district, that "like all other cases, the attorneys must look for pay for their services to those who employ them unless there is some special provision of the statute for their payment otherwise." The statute under which this proceeding was conducted provides only for the payment of claims against the district, which we construed to mean claims for strictly preliminary work. There is no authority whatever for allowing a claim for attorneys' fees in bringing about the legislation which dissolved the district, nor for resisting the claims presented against the defendant. The district embraced the whole city of Little Rock, and a large area of adjoining territory—thousands of property owners, in

fact—and the law makers doubtless had it in mind that out of the numerous claimants against the distract, and still more numerous property owners, there would be sufficient conflict of interest to enable the court to determine the rights of the parties without taxing the property owners with the fees of attorneys whom some of the property owners might see fit to employ to represent them in the litigation. The statute therefore leaves no opening for the application of the equitable doctrine which has been invoked for the allowance of an attorney's fee for the protection of common interests. The statute must be strictly construed for the reason that whatever is taken from the property owners is absolutely without return in benefits, and no burden ought to be imposed upon them which is not strictly authorized by the statute itself.

The largest and most important of the controverted claims is that of the engineers, Lund & Hill, who made the surveys and prepared the plans and specifications. The court allowed the sum of $22,116.69, which included the sum of $7,293.05 and the further sum of $500.00 paid to the engineers out of the funds advanced by the trust companies. The testimony bearing upon this claim is somewhat voluminous. It appears that the engineers were engaged for a considerable length of time in making the surveys and working out the plans, and that they kept a considerable force of men at work. The evidence shows that their actual expenses amounted to about $15,000.00. They made complete plans for carrying out the drainage project, which included clearing right of way, dredging the canals and lateral sections, putting in culverts and flood gates, pumping stations and a complete levee system for creeks. The evidence establishes the reasonableness of the charge for the whole of the services rendered by the engineers, but the conflict in the testimony over this item arises over the question as to what part of the work done by them comes within the designation of preliminary expenses.

The engineers had a contract with the board of

directors to prepare the plans and specifications and let the contract and supervise the work, and to receive as compensation five per centum of the total cost of the construction. The engineers made complete plans, and, in fact, advertised for bids and superintended the letting of the contract. Their present claim is based upon the contention that one-half of the total compensation should be allowed for the preliminary work, and that they are therefore entitled to two and one-half per cent. of the estimated cost of the improvement. This is the amount of the claim, and the court allowed it in full. Mr. Lund, one of the engineers, testified at length in the case, and gives a very satisfactory explanation of the necessity for doing the work in order to determine the cost of the improvement and the feasibility of the plan, and his testimony is very convincing that the compensation claimed for the whole service is not exorbitant, but it is also very clear from his testimoney that he has not an accurate idea as to the precise line between purely preliminary work and permanent work, and he is evidently laboring under some confusion as to the distinction between work that is preliminary to the beginning of actual construction and that which is preliminary merely to the ascertainment of the cost of the improvement.

(3) There is no ground to mistake the meaning of the rule we laid down in our former decision, that claims against the district must be limited to those for expenses preliminary to the ascertainment of the cost of the improvements and the amount of benefits. There is no authority in the statute for those in control of the affairs of the district to incur any liability at all except that which leads up to and precedes the ascertainment of the feasibility of the project, that is to say the cost of the improvement and the amount of benefits to be derived from the construction of the improvement. A careful perusal of the testimony of Mr. Lund leaves the impression that in the estimate of two and one-half per cent. of the cost of the improvement as a proper fee for compensation for preliminary work, he has in

mind all the work that was performed prior to the beginning of the construction work. This is supported by the fact that the firm of engineers superintended the advertisements for bids and the letting of contracts, which, of course, preceded the actual construction.

(4) There were three other engineers who testified as expert witnesses in this case, and two of them estimated the compensation for the preliminary work at $10,000.00. The other testified that the allowance for purely preliminary work should not exceed two per cent. of the total cost of the improvement. According to the statement of the last-named witness, the claim would amount to just a little over $18,000.00 It should be added that the two witnesses who fixed the compensation at $10,000.00 do not show the same degree of familiarity with projects of this magnitude as do the other two witnesses, including Mr. Lund. It is difficult for a court to find an exact standard for fixing fees of this character, but we have reached the conclusion that the most definite statement is that of the witness Miller, who fixes the fee for preliminary work at two per cent., and we have concluded to base the finding upon his evidence and to fix the claim of Lund & Hill at the sum of $18,000.00. We are thoroughly convinced that the amount allowed by the court is excessive, and that the sum named above is the maximum amount which can be allowed under the testimony in this case. This, of course, includes the sums paid by the trust companies, which should be deducted, and the allowance to that extent in favor of the trust companies will be affirmed.

(5) The next one of the claims in size and importance is that of the attorneys for the district. In the first decree the court allowed $5,500.00, and in the last decree allowed $5,000.00, after having deducted the estimated fee for preparing contracts for construction work which the court allowed in the former decree. We have no doubt that the compensation allowed to the attorneys was very reasonable if all the services rendered by them could be considered, but it is

evident that services were embraced in fixing this compensation which are not chargeable against the district. The evidence in support of the claim covers the whole period from the passage of the original Act creating the district in the year 1907 up to the passage of the repeal bill in 1913. Mr. Coleman, one of the attorneys, testified in detail as to services performed by his firm for the district. He shows that nearly two weeks' time was given to the preparation of the original bill, and he explains the many difficulties which grew out of the necessity of combining the city property with country property into one district. He shows that he spent much time in presenting the bill to the Legislature, appearing several times before the committees of the Legislature. He says that he was very frequently called to meet with the board of directors for conferences and advice concerning the progress of the affairs of the district, and that they represented the district in two test cases which were brought to determine the validity of the statutes. One of the suits arose out of the original statute, and the other under the Act of 1909 striking out the requirement for obtaining consent of the majority of the property owners. The attorneys gave attention to the examination of titles of right of way, and negotiated purchases of right of way and preparing deeds; they were consulted by the engineers and directors about the preparation of contracts, and were constantly in communication with various parties who contemplated bidding on the work. Many other things are mentioned by Mr. Coleman, matters which constantly taxed the time and patience of the attorneys as the representatives of the district. Finally, when the effort was successfully made by opponents of the scheme to secure a dissolution of the district by a special Act of the Legislature, the attorneys, under directions from the board, appeared before the various legislative committees, and also before mass meetings of tax payers, in resistance of the effort to repeal the law.

Now, all of these matters, it appears, were taken into consideration in fixing the compensation of the

attorneys, and when we get back to the rule laid down by this court it is clear that a great many of them are improper matters of consideration. It must be remembered that under our former decision the compensation to be allowed narrows down to expenses which were necessary to ascertain the feasibility of the plan. Of course, it was proper to have the services of attorneys in the proceedings to that extent, but no compensation could be claimed for services which related to the completion of the improvements for which the organization of the district was designed. The work of preparing the original bill and presenting it to the Legislature, and urging it before the committees of that body, was not service which was chargeable against the district. *Sain* v. *Bogle*, *supra*. Neither were the services performed in opposition to the effort of tax payers to secure the dissolution of the district chargeable against the district. The services thus performed by the attorneys for and against the scheme were in the interest of the individuals who were favoring or opposing the creation or continuation of the district, and not of the district itself. In other words, those services were performed in promoting the scheme and not in carrying out the purposes of the organization itself. Of course, the fees for conducting the litigation which involved the very life of the district should properly be allowed as a claim against the district, as we held in the former opinion; so would any other service performed looking to the ascertainment of the feasibility of the plan. But it is plain, we think, that much of the services of the attorneys were performed in matters which really did not involve legal services, and much that involved the permanent work in the construction of the improvement. So much of the services detailed by Mr. Coleman being for matters which could not be charged against the district, we cannot escape the conclusion that the fee allowed by the court is excessive. This again presents a difficult matter for our determination, as there is no exact standard by which we can measure the amount of the

fee which should be allowed. We have concluded, however, that when the magnitude of the plan of this organization is considered, and the importance of the services performed by the attorneys, they are entitled to a very substantial amount, and we think that the sum of $3,000.00 will not be excessive, and the amount of the allowance will be fixed at that sum.

(6) The item in the account of one of the trust companies for the sum of $1,365.00 advanced and paid to Isom Randolph is not very seriously attacked in the briefs before us, but it has given us serious consideration. A majority of the court are of the opinion that the allowance was not improper, as the evidence shows that it was necessary to have the services of a consulting engineer in order to determine the feasibility of the plan and that the charge is not excessive. There is nothing in the statute limiting the power of the board of directors to the employment of a single engineer or one firm of engineers. It authorizes the board to elect a chief engineer (Sec. 5), which does not appear to have been done, but the consulting engineer was employed to pass finally on the feasibility of the plan. The decree as to that item will therefore be affirmed.

(7) The next items for consideration relate to the claims of directors and the president and secretary of the district, some of the claims having been paid by the trust companies in the amounts involved in their claims which were allowed. The claims aggregate $2,705.00, which represents the expenses in the way of fees of the officers of the district in providing for the preliminary work. In other words, it is found that they claimed fees in that amount for services performed in having the survey made and plans formed and the assessments for betterments. The highest fee charged by any one of the directors is $220.00, which indicates forty-four days of actual services, as the statute fixes the fees of the directors at "the sum of $5.00 *per diem* for the time actually engaged in their duties as such." The statute also provides that the board of directors shall "elect a treasurer, chief engineer and such other

officers as may be necessary to carry out the purposes of this Act, and said board shall prescribe the duties and fix the pay of said officers, and their terms of office shall be at the pleasure of said board."

There is no testimony in the record, as abstracted, showing the amount of services actually performed by these officers. When it is considered that their duties were confined to having the preliminary work done, and excluding anything that might have been done in the way of issuing bonds, letting contracts and carrying forward the work, we fail to discover any grounds for allowing the officers the amount claimed. It is inconceivable that at the sum of $5.00 a day "for the time actually engaged" they could have been in the actual service of the district that length of time merely to employ engineers and arrange for the assessment of benefits. The statute authorizes them to select three land owners as assessors, and the board had nothing to do with the assessment of benefits. The duties of the board were, as before stated, confined to an ascertainment of the cost of the improvement and the amount of benefits, and they had no right to devote any other time or attention at the expense of the district until those results were ascertained. Nor could they impose upon the district the burden of fixed salaries of officers until there was something for the officers to do. There is nothing in the record to base the finding on as to the amount of services performed by these directors and officers, but we have concluded that an allowance of the statutory *per diem* for ten days would be sufficient compensation for the services performed. That would be the sum of $50.00 for each of them, including the president and secretary.

(8) The next items are those embracing the claims of C. B. Meyers, W. M. Moore and R. W. Polk, the three members of the board of assessors "as equalizers." The statute does not create the office of equalizer separately, but provides that three land owners shall be employed as assessors, that after the assessment is completed notice should be given and a date set for

hearing the complaints of the assessed land owners, and that any person or corporation aggrieved by the action of the board in fixing the assessments "shall have the right for twenty days from the date of the adjustment of the said board of assessors, sitting as a board of equalization as aforesaid, to appeal to any court of competent jurisdiction to set aside said assessment list." The three assessors each presented claims for $500.00 for services as an assessor, and $500.00 "for service as equalizer." One of them also included in his claim an item of $200.00 for clerk of the board. The claim was allowed in full by the master, and also by the court, and the claims are challenged only to the extent of the item of $500.00 for "services as equalizer."*

The directors employed J. C. Morrison to make out the assessment books, and a claim was allowed in Morrison's favor in the sum of a thousand dollars for that service. The correctness of that claim has not been challenged, and it is not brought before us for review, and it is only mentioned as minimizing the work of the assessors themselves as it shows that the assessors were not required to make out the lists and descriptions of the property, but were called on merely to fix the benefits. The board of assessors was also allowed the services of a secretary, the claim for services in that respect not being questioned. There is nothing in the record, as abstracted, to show the number of days that these assessors were engaged, but the claim appears to be arbitrarily divided at half-and-half between the original assessment of benefits and the hearing of complaints of land owners. It is possible that enough time and attention was given to the last mentioned service to justify a charge of this sort, but it is not shown and we cannot assume that that much was earned by the assessors in performing that part of their duties. The item of $500.00 allowed to each of those parties is

*It was subsequently shown to the court that no appeal had been perfected as to the respective claims of C. B. Meyers, R. W. Polk and W. M. Moore, and the judgment of this court reversing the chancellor's decree as to these items was set aside.—Reporter.

therefore disapproved, and the decree of the chancellor is to that extent reversed.

There are no other items which are attacked in the briefs, and what we have said disposes of this branch of the case.

(9) The Braddock Land & Granite Company and certain other property owners filed a protest against the correctness of the assessments, claiming that the same were arbitrary and without just foundation. The court refused to disturb the assessments and sustained a demurrer to the intervention and dismissed it for want of equity, and an appeal has been prosecuted from that feature of the decree. The question is concluded by the decision of this court in *Fellows* v. *McHaney*, 113 Ark. 363, where we held that the repealing statute constituted a legislative determination of the correctness of the assessment of benefits and was conclusive, and that the question was beyond judicial review "in the absence of a showing that the assessment was improperly made, or that no benefit could possibly accrue to the property to be taxed." The intervention does not set out any facts, but merely pleads the conclusion that the assessments are arbitrary and that no benefit would result. We think the court properly sustained the demurrer.

(10) The last question presented in the case arises upon the contention of appellants with respect to the order of the court refunding to tax payers the excessive amount paid over to the receiver, over and above the amount necessary to discharge the claims against the district. The contention, as we understand it, is that because a large number of tax payers voluntarily paid the five assessments ordered by the court, they should not be allowed to receive any of it back, and that the whole amount so paid should be used in discharge of the claims, even in reduction of the amount to be paid by those who have wholly failed to comply with the order of the court. Appellants invoke the well-established rule that there can be no recovery of money voluntarily paid in discharge of an illegal

claim. This rule was recognized in the recent case of *Brunson* v. *Board of Directors*, 107 Ark. 24, where we held that a land owner who had knowingly and voluntarily paid assessments, which had been improperly levied, could not recover the same. The question of right to recover voluntary payments has no application whatever to this case. The other property owners are not seeking to recover funds illegally exacted, but the question arises solely as to their right to have money refunded which has been paid in excess of the amount actually needed for discharging the obligations for which the assessments were imposed.

The ascertainment by the court of the amount necessary to assess against the property was a mere estimate, and the payment by the property owners was upon the implied assurance that the amount in excess of what was required to discharge the obligations of the district would be refunded *pro rata* to the property owners. Now these recalcitrant tax payers say that they should be permitted to profit by the fact that they held back and refused to pay until the other property owners paid substantially enough to discharge the joint obligations. The position is wholly untenable, and the doctrine invoked has no application, which is based entirely upon the theory of estoppel—that one who pays money voluntarily, and with full knowledge of the facts, will not be heard to assert the right to recover it back. In this instance the property owners undoubtedly paid voluntarily with knowledge of the facts, but, as already stated, they paid upon the implied assurance that all of the tax payers would be required to respond in like proportion, and that any sum in excess of the amount required to discharge the obligations would be refunded.

The decree of the chancellor is reversed so far as it relates to the reduction of the several claims as indicated in this opinion, and in other respects the decree will be affirmed. The cause will be remanded with directions to enter a decree fixing the amount of the claims in accordance with this opinion.

HART, J., dissents.

HAYES v. HARGUS.

Opinion delivered January 1, 1917.

1. APPEAL AND ERROR—ABSENCE OF BILL OF EXCEPTIONS—ORAL TESTIMONY—PRESUMPTION.—Where a cause was heard upon oral testimony, and there is no bill of exceptions in the record, it will be presumed that the judgment is sustained by the oral testimony.
2. ADMINISTRATION—REPORT OF ADMINISTRATOR—APPEAL—ABSENCE OF BILL OF EXCEPTIONS.—Where exceptions were made to the report of an administrator, and where oral testimony heard in the circuit court was not brought up by way of bill of exceptions, the judgment of the circuit court will be affirmed.
3. ADMINISTRATION—ACTS OF ADMINISTRATOR—ABSENCE OF BILL OF EXCEPTIONS.—In the absence of a bill of exceptions, it will be presumed on appeal, that an administrator complied with the orders of the probate and circuit courts.

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

STATEMENT BY THE COURT.

On the 20th day of June, 1911, Mrs. Catherine Hargus died leaving two sets of children, three by her husband, Hargus, and several children by her former husband Hayes. She owned a valuable estate consisting of real estate and personal property. Frank Hargus was appointed administrator of her estate. He moved out of the State without administering the estate of which he was appointed administrator. The Hayes heirs filed their petition in the probate court making the Hargus children defendants, setting up that Frank Hargus had moved out of the State without filing an inventory or settling with the estate, and asking that his letters of administration be revoked and that another person be appointed administrator; that Frank Hargus be required to file a complete inventory, and to make proper showing to the administrator succeeding him.

The probate court finding the facts set up in the petition to be true revoked the letters of Frank Hargus and ordered G. M. Caruthers, the sheriff of Fulton county, as public administrator to take possession of the entire estate and to render a full and complete inventory

of same at the next term of court. At the next term of the court the record of the probate court shows that "the first and final account current" of Frank Hargus, administrator, was presented and was continued for exceptions till the next term. The record also shows that at this same term "was presented to the court for examination the inventory of the estate of Catherine Hargus, deceased," and that too "was continued for exception until the next term." At the next term exceptions were filed to the report of the public administrator setting up that he had not taken charge of certain personal property and real estate belonging to the estate of Catherine Hargus. The court found that the administrator had "failed to get possession and accounting of" certain property real and personal, designating and describing it. The court at this term sustained the exceptions to the report and ordered the administrator to "proceed to take charge of all the aforesaid property and to make report of same at the next regular term." At the next term among other orders made was one directing Frank Hargus within twenty days to file with the public administrator an itemized list of all property he took possession of and showing what disposition he had made thereof, and other orders directing the public administrator to make distribution of certain sums in his hands. The order concluded by directing him not to attempt in any way to take possession of any real estate. The next term shows the filing of what is termed the first and final account current of Frank Hargus, administrator, in which he charges himself with amount of inventory $1,965.68 and credits himself with various amounts paid out for the estate showing after a restatement by the court of the amount of credits entered by order of the court, $1,736.72, leaving a balance of $228.96 which he paid over to the administrator in succession, taking his receipt therefor, and the first and final account as thus stated was continued for exceptions. The next term the petitioners filed exceptions to this so-called account current of Frank Hargus, setting out at length and specifically wherein the peti-

tioners claimed it was defective and incomplete and concluding with a prayer asking a rule on Frank Hargus to make a "full and complete showing of every item of the estate and the disposition of the same in the same sense and to the same end as if the estate had been properly administered." The record of the next term shows that the court heard the exceptions to the "first and final settlement of Frank Hargus as administrator of the estate of Catherine Hargus, deceased," and "after hearing the evidence of witnesses adduced orally at the bar of the court" found that the account should be restated, and that the account after being restated showed a balance of $228.96 in the hands of Frank Hargus; that the account as thus restated was approved, and the administrator Frank Hargus was to be discharged from further liability as administrator after he had paid the above sum to his successor in administration. The record of this term also shows that Caruthers presented an inventory and first account current showing that after charging himself with the amount received of the estate of Catherine Hargus and crediting himself with the amounts paid out, he had a balance in his hands of $612.17. Exceptions were filed to this account current and it was continued till the next term.

After this Caruthers filed his final account current which by the judgment of the probate court was confirmed and approved, and on appeal the circuit court rendered the judgment from which this appeal comes, which recites in part as follows: "On this day this cause coming on to be heard and by leave of the court granted, the plaintiff filed exceptions to the account current herein." Then follows a recital showing that certain motions were made and overruled. Then the record continues as follows: "Whereupon the cause was submitted upon the account current of Frank Hargus, a former administrator of the estate of Catherine Hargus, deceased, plaintiffs exceptions thereto, and the vouchers exhibited to the said account current and the record and evidence as to their validity and correctness." Then follows recitals of particulars in which the

court corrected the account current, amounting in the aggregate to the sum of $14.50. The court approved and confirmed the account current with this exception, and rendered judgment in favor of the estate against Frank and Abner Hargus for such amount. The appellants, the Hayes heirs, excepted and prosecute this appeal.

J. M. Burrow, for appellants.

1. No inventory was filed by Hargus. The claims were not authenticated as the law requires. Kirby's Digest, § 114; 66 Ark. 327; 69 *Id.* 62. No advertisement was made. The orders of court were not complied with. The property is gone and no showing except as $1,347.49 in the public administrator.

2. Reviews the evidence and upon the facts contends that judgment should have been rendered for at least $3,313.14.

Lehman Kay, for appellees.

1. There is no motion for a new trial nor bill of exceptions. 22 Ark. 517; 53 *Id.* 204; 36 *Id.* 461; 58 *Id.* 399; 35 *Id.* 438; 25 *Id.* 503; 47 *Id.* 230.

2. On the facts the judgment is right.

WOOD, J. (after stating the facts). There was no motion for new trial and no bill of exceptions. The cause "was submitted upon the account current of Frank Hargus, plaintiffs' exceptions thereto, and the vouchers exhibited to said account current, and the record and evidence as to their validity and correctness.'

(1) In *London* v. *McGehee, Trustee*, 26 Ark. 469, we said: "The uniform holding of this court is that where the record shows that the cause was heard upon oral testimony and that testimony has not been brought into the record by bill of exceptions, this court will presume, on appeal, in favor of the finding and judgment of the trial court, that every fact necessary to sustain the judgment was proved where evidence adduced at the proper time would have justified the court's ruling." See also *Bassham* v. *Railway Co.*, 58 Ark. 399-401, and cases cited.

Where there is no motion for new trial, we can only correct such errors as appear in the record proper or judgment roll. *Williams* v. *State*, 47 Ark. 230; *Percifull and Wife* v. *Platt*, 36 Ark. 456-61. Any error apparent upon the face of this record, considering the entire proceedings of the probate court as part of the judgment roll or record proper, could have been cured by evidence introduced at the proper time.

(2-3) The probate court had jurisdiction of the subject matter and of the parties here sought to be made liable for the alleged irregular and illegal administration of the estate of Catherine Hargus, and had power to enter such orders and judgments after hearing the evidence introduced as would fully protect the interests of those in the estate. The record shows that the probate court heard the exceptions to the "first and final account current of Frank Hargus, and after hearing the evidence of witnesses adduced orally at the bar of the court" found a certain balance due by him to the estate. The circuit court on appeal likewise heard the exceptions on the record and evidence and rendered its judgment. Appellants contend that no inventory was ever filed by Frank Hargus, but the record shows that an "inventory of the estate of Catherine Hargus was presented to the court for examination," and the record further shows that Frank Hargus charged himself in his account current "to amount of inventory $1,965.68." These record entries taken together were sufficient to show that the inventory was filed by Hargus, but if not, it would be presumed that the court found from the oral evidence that such inventory was filed by Hargus, and that the court before rendering final judgment became possessed of all the facts showing what the inventory contained or should have contained, and based its judgment upon such facts. Another contention of appellants is that the claims against the estate were not authenticated as the law requires. But again the probate court and the circuit court having heard the evidence pertaining to these claims must be presumed to have found that such of them as they approved in the

account current of Hargus were just and correct, presented for probate in apt time and should have been allowed and paid even though they had not been duly authenticated in the first instance. The record shows that the circuit court remanded the cause to the probate court to have Frank Hargus restate his account and to submit affidavits from the parties whose claims against the estate he had paid, and the record of the probate court recites that "Frank Hargus has complied with the said order of the circuit court" and the record of the circuit court recites that "Frank Hargus did procure and attach to all of said vouchers the required affidavit and presented the same to the probate court" except for the amount wherein it entered judgment against him. Appellants say that the affidavits brought before the probate court and the circuit court on appeal showed that he had only furnished affidavits covering $455.28, whereas he should under the order of the circuit court have furnished affidavits covering the entire amount of $1,214.25 that had been found by the circuit court to be due by Hargus to the estate when it first ordered the cause remanded for restatement of his account. But here again the findings of the probate and circuit courts that Hargus had complied with the orders of the court cannot be overcome by the mere absence of some of the affidavits from the record. The presumption must be indulged that the finding of the court that Hargus had complied with its order is correct, in the absence of a bill of exceptions or a recital in the judgment itself showing that only the affidavits set forth in the transcript were considered. The other contentions of appellant cannot be sustained for the same reason.

The appellants have not shown by the record lodged in this court any errors for which the judgment of the circuit court should be reversed and it is therefore affirmed.

COFFMAN v. McKEE

Opinion delivered January 1, 1917.

1. CONTRACTS—COMPROMISE OF DISPUTED CLAIM.—The compromise of a disputed claim is a sufficient consideration to uphold the terms thereof.
2. CONTRACTS—COMPROMISE OF DISPUTED CLAIM—AGREEMENT BETWEEN PROMOTERS AND SUBSCRIBERS TO STOCK.—Certain persons held an option to purchase certain coal lands, and secured certain other persons, H. and G., to assist in the purchase and the organization of a corporation. The appellees were induced to purchase stock in the corporation, for cash, before the lands were purchased under the option. The cash subscribers became dissatisfied, and the option holders and H. and G. addressed to them a circular letter, stating a certain compromise agreement, which was accepted by the dissatisfied cash subscribers. *Held*, the option holders and H. and G. were bound by the terms of the circular letter.
3. CORPORATIONS—DEBTS—LIABILITY OF ORGANIZERS.—The holders of options to purchase certain coal lands, the promoters of the organization of a corporation and the sale of the stock, and the cash purchasers of stock therein, *held*, liable for the debts of the corporation in proportion to their several interests therein.

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

STATEMENT BY THE COURT.

Appellees instituted this action against appellants in the chancery court to have certain shares in the Arkansas Anthracite Mining Company, a domestic corporation, declared to be preferred over the stock in that corporation held by appellants. The material facts are as follows:

In the early part of 1905 and for some time prior thereto the business of mining coal was in a very prosperous condition in the State of Arkansas. This was especially true as to the Spadra Coal Fields on the north side of the Arkansas river in Johnson county, Arkansas, and which were situated on and near the Little Rock & Fort Smith Railroad. The coal fields extended across the river opposite the Spadra coal fields. There was no railroad on the south side of the river and coal lands could not be mined successfully unless they were near to

a railroad. They were practically valueless unless so situated. In anticipation of a railroad being constructed on the south side of the Arkansas river through these coal fields in Logan county, Arkansas, J. W. Coffman, G. O. Patterson, Jas. P. Hoye, William Brooks and J. E. Nichols secured options on between twenty-five and thirty thousand acres of land underlaid with coal. They endeavored to interest eastern capitalists in their venture, their intention being to organize a corporation and sell the coal lands to it for a stipulated price. They intended to secure enough money from the sale of stock in the proposed corporation to pay for the lands on which they had options and which they proposed to sell to the corporation to be organized to develop them. They intended to sell the lands to the corporation at a profit and receive in payment therefor stock in the corporation. At first they did not succeed in interesting any capitalists in the enterprise. In the early part of 1905, William Brooks approached H. L. Remmel about organizing a corporation to purchase and develop the coal lands. Mr. Remmel consulted Geo. B. Rose, an attorney, about the matter and succeeded in getting him interested in the proposition. Coffman and his associates had secured options to purchase the lands at an average price of $10.00 per acre. After some negotiations the option holders entered into a contract with Messrs. Remmel and Rose whereby the latter were to organize a corporation which would purchase the lands from them at $35.00 per acre and that the money received from subscribers for stock in the proposed corporation should be used in paying for the lands. The option holders were to receive shares of stock to the amount of the difference between ten and thirty-five dollars per acre on the number of acres sold to the corporation, this being the profit they would make in the transaction without deducting the expenses they had been out in securing the options. They agreed to transfer to Messrs. Remmel and Rose, $50,000.00 of their stock for their services in promoting and organizing the corporation. Messrs. Remmel and Rose accepted

their proposition and immediately proceeded to organize the corporation. Mr. Remmel subscribed for $10,000 of the stock to be paid in cash and Mr. Rose for $15,000 to be paid in cash. Remmel succeeded in securing the friends of himself and of Mr. Rose to subscribe for a large amount of stock for cash. The proposed corporation was the Arkansas Anthracite Coal Company. In order that the corporation might have consistent policies until the coal lands had been developed and in order that the rights of minority stockholders might be protected, what was called a stock subscription contract was prepared and executed. This contract provided that all stock of the company was to be issued to J. W. Coffman, H. L. Remmel and Geo. B. Rose as trustees. These trustees were to hold and vote all the stock of the company, save the qualifying shares of the directors, for the period of fifteen years. All stock certificates held in trust were to be kept in safe deposit vaults in the Mercantile Trust Company of Little Rock in a box specially provided for that purpose. The trustees issued certificates to the stockholders for the amount of shares of stock to which each shareholder was entitled. After securing a large number of subscribers to stock in the city of Little Rock, Mr. Remmel went to several eastern cities to secure additional cash subscribers for stock. When he returned early in June, 1905, he found that a number of the subscribers for stock had become dissatisfied and threatened to withdraw from the corporation unless certain demands were acceded to by the option holders and Messrs. Remmel and Rose. Their action in this respect threatened to prevent the organization of the corporation until the options on the land had expired, or at least to throw serious obstacles in the way of its organization. Hence a meeting was called of all the interested parties which was held in Little Rock, Ark., for the purpose of adjusting the differences between the cash subscribers of the stock and the option holders and Messrs. Remmel and Rose. Various propositions were made at the meeting looking to an adjustment of their differences but no

agreement was reached between the parties. In a day or two thereafter, viz., on June 15, 1905, a circular letter signed by H. L. Remmel and Geo. B. Rose was addressed to the cash subscribers to the stock of the Arkansas Anthracite Coal Company and mailed to each of them. We quote from the beginning of the letter the following:

"We are glad to tell you that we have been able to procure from the holders of options the following concessions:

"June 12, 1905. To the cash subscribers to the stock of the Arkansas Anthracite Company:

"It has been suggested that if the 10,000 acres which you contemplate acquiring should be sold for less than $350,000, we would still make something while you would lose money.

"To show our confidence in the enterprise we agree that if you will go on and acquire 9,000 or more acres of the land under our options and said lands should sell for less than $35.00 per acre, you may first be repaid all the money that you pay in on your subscription, leaving only the residue to us."

We also quote from the circular letter as follows:

"It has been suggested that if the property were sold at less than $35.00 per acre, we would still make a profit on our investment, by reason of the stock which is given us by the option holders in payment for our services. Such an idea had not occurred to us; but as it has occurred to others, we will say that if the property is sold for less than $35 an acre, you will first be repaid out of the proceeds of the sale the sums paid in by you before anything is paid us on the stock received by us from the option holders for our services aforesaid."

The circular letter had the effect of satisfying most of the subscribers of the stock who had already signed the subscription contract and it also succeeded in inducing many others to subscribe.

Mr. Rose went to Logan county where the lands were situated and spent the greater part of the summer of 1905 in examining the titles to the lands on which the

options had been secured and did a great deal of work in perfecting defective titles. Deeds were finally secured to about 15,000 acres of land underlaid with coal from three to five feet thick. The fields were examined by a competent mining engineer, who estimated the amount of coal at 98,000,000 tons. By May, 1913, the company became indebted in the sum of near $100,000 for taxes, interest and money spent in developing the property. The trustees sent out a circular letter calling upon all the stock holders to pay an assessment to take care of current expenses, such as interest and taxes. The stockholders became dissatisfied and a meeting was called and held in Little Rock on July 8, 1913, for the purpose of discussing the condition of the corporation. At this meeting the cash stockholders learned that the option holders and Messrs. Remmel and Rose were denying them any rights under the circular letter already referred to. This suit was filed by Chas. McKee for himself and all other cash stockholders asking for an accounting and the recognition and enforcement of their rights under the circular letter above referred to. The defendants answered and denied liability under the terms of the circular letter. Before the decree was entered of record, all the stockholders were notified of the pendency of the action and became parties thereto. On June 5, 1916, a decree was entered in which the court finds:

"That the defendants, H. L. Remmel and Geo. B. Rose, were employed by the other defendants to raise money for the purchase of the coal rights in the lands now owned by the defendant, Arkansas Anthracite Coal Company, by the sale of stock in said company, which employment was accepted and said stock sold to plaintiffs and others upon the representations that the stockholders of said company who paid their money for the stock purchased by them, and who are known as cash stockholders in contradistinction to the defendants, who are known as option stockholders, should be entitled to receive from the proceeds of the property of the company the amount of money paid in by them in

payment of stock before there is any distribution of the assets of the company among the other stockholders; that plaintiffs and the interveners hereinafter named paid for their stock upon the representation and understanding that their stock would be preferred as aforesaid; that all the stock of said company was issued to three trustees, who issued to the plaintiffs, defendants, interveners and others, trustees' certificates evidencing the amount of stock in said company to which each of them is entitled, and that no difference was made in the form of said trustees' certificates issued to the so-called cash stockholders and the so-called option stockholders."

* * * * *

"It is further ordered, adjudged and decreed that the foregoing plaintiffs and interveners upon payment by them of their respective share of court costs and of said solicitors' fee to be fixed by the court, and their surrendering their trustees' certificates to be stamped as hereinafter described, shall have and recover the amount set opposite their names in this decree from the proceeds of the property of said company before there is any distribution of the assets of the company among the other stockholders; that after the said amounts paid in by said cash stockholders have been repaid to them, they shall receive nothing further from the proceeds of said company until the par value of all the stock has been paid to the holders of all other trustees' certificates, and any surplus shall be distributed ratably among all the stockholders."

J. W. Coffman and the other option holders alone have appealed, no appeal having been taken by Messrs. Remmel and Rose.

G. O. Patterson and *Sellers & Sellers*, for appellants.

1. No cause of action is stated. It is not charged that the stock is not worth all they paid for it. No fraud is charged. The cause is barred on its face and the claim is stale. They were not influenced by the circular of Remmel and Rose. It was proper and legal

to pay for stock in property or labor. Const. Ark. 12, § 8. The only limitation is that full value be paid.

The business of a corporation is to be managed by a board of directors and not by a minority of stockholders. Kirby's Digest, § 841. The action is either barred or prematurely brought and no case of estoppel is made.

2. The promise of Remmel and Rose, if made, was without consideration and void. 2 Clark & Marshall on Corp., p. 1409. The subscription cannot be varied by parol. 92 Ark. 504-7; 1 Cook Corp. 81; 1 Morawitz Corp. 77; 2 Beach Priv. Corp. 531; 68 N. W. 15; 82 *Id.* 811; 93 *Id.* 669; 2 Clark & M. Corp., p. 1430.

3. Defendants owed plaintiffs no duty but traded at arm's length. There was no fraud. The rule as to the trust relation is well stated in 71 Ark. 280. There is no trust where property is bought after the corporation is perfected for the purpose of a sale to it, that is as the agent of the corporation. Where one buys as agent he does not acquire the property at all. If he takes title, he merely holds the naked legal title in trust for the principal. 1 Thomps. Corp., § 108.

4. No such circular as alleged was published, but it only stated that Remmel and Rose would not be paid for their services. The circular was not a contract. The offer was never accepted. There could be no specific performance of the circular letter as it was never a contract. 12 Ark. 551; 23 *Id.* 704; 85 *Id.* 1.

5. The claim is barred by limitation, staleness and laches. *Smith* v. *Clay*, Ambl. 645; Wood on Limitation 151; 35 Ark. 141; 41 *Id.* 303; 64 *Id.* 345; Buswell on Lim., § 18; 12 Metc. (Mass.) 405, 411; 14 Ark. 21; 43 *Id.* 483; 58 *Id.* 589; 33 Fed. 447; 28 Fed. 285.

6. Remmel and Rose were never the agents of appellants. They represented the cash stockholders.

Miles & Wade, for appellees.

1. Appellants authorized the preference. The authority of the agent is immaterial. Cook on Corp.,

§ 140. Rose and Remmel were the agents of appellants in making the proposition.

2. Appellees accepted the preference proposition. Appellants cannot receive the benefits without the burdens. 1 Cook Corp., § 140; 70 N. J. L. 274; 78 N. Y. 159.

3. The contract is upon consideration and valid.

4. The agreement does not contravene the parol evidence rule. Fraud may be proven by parol evidence in any written contract. 1 Cook on Corp., § 140; 31 N. Y. 273.

5. There was no corporate action and none was necessary. The creditors are not affected. This priority or preference has been repeatedly upheld. Thompson on Corp., §§ 3598, 5269, 5314; 78 N. Y. 159; 70 N. J. L. 274; 78 Fed. 664; 95 *Id.* 197; 1 Cook on Corp. 764-5; 10 Cyc. 574-5, 577. 4 Thomps. on Corp., § 3604.

6. The preference can be enforced. Cases *supra* and 16 S. C. 524; 10 Cyc. 434.

7. This suit was seasonably brought. 4 Thomps. on Corp., § 3604.

8. The corporation cannot keep the benefits of fraud whether made by agent or under contract, or not. 1 Cook on Corp., § 140; 90 N. Y. App. 109. The suit was brought by all the cash stockholders as a class. 10 Cyc. 577. The findings of the chancellor are sustained by the preponderance of the testimony and should not be disturbed.

Rose, Hemingway, Cantrell, Loughborough & Miles, for Remmel and Rose.

HART, J. (after stating the facts). It was charged and is now claimed by appellees that Remmel was guilty of making false representations to induce appellees to sign their subscription contracts for stock in the company and that Rose allowed his name to be used in connection therewith. On the other hand it is insisted by appellants that there is no testimony in the record sufficient to sustain the charges of fraud and that there was no consideration for the circular letter sent

to the stockholders by Messrs. Remmel and Rose and that this circular letter did not create a binding obligation upon appellants when it was received and the terms thereof accepted by appellees. It is true there is no evidence in the record to show that either Remmel or Rose or the option holders were guilty of fraud; but it by no means follows that the circular letter did not create a binding obligation on the part of the option holders and Messrs. Remmel and Rose. The evidence shows that in June, 1905, serious differences arose between the cash subscribers of stock on the one hand and the option holders and Messrs. Remmel and Rose on the other. The dissensions aroused by their disagreements jeopardized the formation of the corporation, and in order to adjust these differences the circular letter referred to was mailed to each one of the cash subscribers for stock by Messrs. Remmel and Rose and was received and acted upon by the cash subscribers. The terms of the letter were accepted by the cash subscribers for stock. It will be noted that the cash subscribers to stock had charged appellants and Messrs. Remmel and Rose with fraud and were claiming that they were released from any further obligations to pay their subscriptions for stock. This circular letter was sent out in an effort to compromise their differences and to induce other parties to subscribe for stock, and did accomplish that purpose.

(1) In *Gardner* v. *Ward*, 99 Ark. 588, this court held that the compromise of a disputed claim is a sufficient consideration to uphold the terms thereof, even though the claim be without merit. So, too, in *Fender* v. *Helterbrandt*, 101 Ark. 335, the court held that the compromise of a disputed claim is a sufficient consideration to support an express promise although there may have been no merit or foundation for such claim.

(2) Again in *S. H. Kress Co.* v. *Moscowitz*, 105 Ark. 638, it was held that a compromise of a disputed claim furnished sufficient consideration to uphold the terms of a contract. Therefore we are of the opinion that the circular letter when received, its terms accepted and

acted upon by the subscribers of stock, created a binding obligation on the part of the option holders and Messrs. Remmel and Rose.

(3) Again it is contended that Messrs. Remmel and Rose had no authority to send out the circular letter and to bind the option holders by its terms. We think the record warranted the chancellor in finding that they did have such authority. At least it clearly shows that their action was within the apparent scope of their authority and this was sufficient to bind appellants. The decree of the chancellor is right to the extent that it recognized the circular letter and the acceptance of its terms as imposing a binding obligation upon appellants, but we think the court erred in entering a decree against appellants in favor of appellees for specific sums set opposite the names of the respective appellees regardless of the debts of the company. To illustrate, there is a large indebtedness against the corporation and all its assets are charged with its payment. The corporation has something over 15,000 acres of coal lands and its indebtedness amounts to nearly $100,000.00. If the lands should be sold for $40.00 per acre, the proceeds of sale would have to be applied first to the payment of the debts of the corporation and this would absorb something more than $5.00 per acre of all the lands owned by the company and the remainder amounting to about $35.00 per acre on all the lands of the company would be required to pay the cash subscribers of stock; and there would be nothing left for the option holders. This would be inequitable and contrary to the terms of the agreement. The agreement contemplated that if the lands should be sold for more than $35.00 per acre that the option holders and Messrs. Remmel and Rose should be entitled to share ratably in the distribution of the assets of the company. The decree of the chancellor makes the shares of stock held by the option holders and by Messrs. Remmel and Rose under their agreement with the option holders, bear the whole indebtedness of the corporation. This was error. The shares of stock owned by the cash subscribers and the shares issued to

the option holders and to Messrs. Remmel and Rose under their agreement with the option holders, should bear ratably the debts of the company, and the balance should be distributed ratably between them if the lands are sold for more than $35.00 per acre. For instance, if the debts of the company amount to $100,000.00 and the coal lands of the company comprising some 15,000 acres are sold for $40.00 per acre, and the option holders and Messrs. Remmel and Rose under their contract with them, should own 51 per cent. of the shares of stock and the cash subscribers should own 49 per cent., the debts would have to be paid before any distribution of assets could be made, and of the remainder, the option holders and Messrs. Remmel and Rose under their contract with them would be entitled to 51 per cent. and the cash subscribers to 49 per cent. In this way, the obligation imposed by the terms of the circular letter would be upheld, and the assets distributed according to the intention of the parties as expressed by the terms of the circular letter.

From the views we have expressed, it follows that the decree should be reversed with directions to the chancellor to render a decree in accordance with this opinion.

It is so ordered.

PIERCE OIL CORPORATION v. CITY OF HOPE.

Opinion delivered January 1, 1917.

1. MUNICIPAL CORPORATIONS—EXERCISE OF POLICE POWER—REGULATION BY COURTS.—The exercise of the police power exercised by a municipal corporation under the authority of Kirby's Digest, § § 5438 and 5439, will not be disturbed by the courts, unless the corporation council has acted in an arbitrary and unreasonable manner.
2. MUNICIPAL CORPORATIONS—LOCATION OF GASOLINE STORAGE TANKS—POLICE POWER.—An ordinance prohibiting the keeping of gasoline, or any other of the products of petroleum, or any other inflammable or explosive oil, gas or substance, within 300 feet of any dwelling house, store room, or other like structure, within the corporate limits of the said city, in a quantity greater than sixty gallons at one time, with a proviso that underground tanks would be permitted to carry not

to exceed 600 gallons at one time, and providing penalties for violation, *held,* a valid exercise of the police power of the city under the authority of Kirby's Digest, § § 5438, 5439.

3. MUNICIPAL CORPORATIONS—EXERCISE OF POLICE POWER.—Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community.

Appeal from Hempstead Chancery Court; *James D. Shaver*, Chancellor; affirmed.

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

1. The ordinance evidences a wrongful exercise of the police power of the city. It is arbitrary, unnecessary and unreasonable and no authority for its enactment is conferred by law. It violates the 14th Amendment of Const. U. S. and the Constitution of Arkansas. While the ordinance is presumed to be legal until the contrary is shown, the contrary is alleged in the bill. No such authority is conferred by §§ 5438, 5439, 5461, Kirby's Digest. See 94 Ark. 27; 86 *Id.* 412; 195 U. S. 223; 77 Pac. 180; 16 Wall. 36; 164 U. S. 578; 169 *Id.* 366; 198 *Id.* 59; 107 Ark. 174; 237 U. S. 171; 113 Ark. 395; 82 Fed. 626; 82 Pac. 241; Dillon on Mun. Corp. 1061; 92 Ark. 546; 17 So. 343, etc.

O. A. Graves, for appellee.

1. Ample authority for the ordinance is found in Kirby's Digest, §§ 5438-9 and 5461. The presumption is in favor of its reasonableness. A reasonable discretion is also presumed to have been exercised. 169 U. S. 397; 64 N. E. 1110; 59 Am. Rep. 694; 237 U. S. 171. See also Ann. Cas. 1914 A. 130.

2. The demurrer was properly sustained. The ordinance is valid under the police powers of the city. There is only one point upon which evidence could be introduced and that is as to whether there is any danger. There is always danger of fire or explosion from a large tank of gasoline. 17 So. 343; 108 Am. St. 353, and note.

Our court has sustained such ordinances. 101 Ark. 223; 64 *Id.* 152. See also 105 Wisc. 651. Less hazardous businesses have been regulated by ordinance. 107 Ark. 174; 52 *Id.* 301; 98 *Id.* 543; 88 *Id.* 263.

SMITH, J. This is a suit in equity brought by appellant to enjoin the enforcement of an ordinance of the city of Hope, it being contended by appellant that the ordinance evidences a wrongful exercise of the police powers of that municipality. A general demurrer to the complaint was sustained, and this appeal questions the sufficiency of said complaint.

The material allegations of the complaint are as follows: That appellant is a business corporation engaged in selling gasoline and oil, and for a great many years has owned and used storage tanks in the town of Hope in connection with the sale of its products. That the tanks were once moved at the request of the town authorities and "their location was fixed to meet the wishes of the city officials and the people of the town generally." That the tanks are so constructed with dome vents for the escape of gas that an explosion is impossible and that in case of fire "the only combustion would be the gas which escaped from them and such fire would not be sufficient to spread to any buildings that are now in the neighborhood of or adjacent to the tanks," and that the presence of these tanks in no way endangers any other building or structures in the city of Hope, and that in transferring the products from the railroad cars to the tanks such products pass through valves and pipes and are never exposed. That said tanks are a necessary adjunct to the conduct of appellant's business in selling petroleum products in Hope and vicinity, and that appellant knows of no available location within the city of Hope at which tanks could be erected and oil stored without violating the terms of said ordinance, and if said ordinance is enforced appellant will be compelled to move its tanks at a cost of $800 and suffer a severe loss in the daily sale of its products as well as lose a most valuable lease which it

now has for a nominal sum. There was also an allegation that the ordinance was violative of the Constitution of this State and in contravention of the 14th Amendment to the Constitution of the United States, and that its enforcement would deprive it of its property without due process of law.

The ordinance so sought to be enjoined prohibited the keeping of gasoline or any of the other products of petroleum, or any other inflammable or explosive oil, gas or substance, within 300 feet of any dwelling house, store room, or other like structure, within the corporate limits of said city, in a quantity greater than 60 gallons at one time, with a proviso that underground tanks would be permitted to carry not to exceed 600 gallons at one time. The violation of the ordinance was made a misdemeanor, and a fine of not less than $25 nor more than $500 was prescribed for each violation of its provisions.

It is argued for the reversal of the decree below that the ordinance is arbitrary, unnecessary and unreasonable, and that no authority for its enactment has been conferred, or could be conferred, by the Legislature upon the councils of the cities and towns of the State. The allegation that the tanks were once moved at the request of the town authorities and "their location was fixed to meet the wishes of the city officials and the people of the town generally" is not clear as to the manner in which the town authorities made the request for the removal of the tanks. But, assuming even that it was done by ordinance, that fact would not estop the city from passing the ordinance here under consideration if the city otherwise has the power to do so. In the case of *Davenport* v. *City of Richmond*, 81 Va. 636, the Supreme Court of that State, held that an ordinance, requiring the removal of powder magazines from a city, is valid, although the city had sold the sites to the owners for the purpose of erecting such magazines. In this case it was said:

"However difficult it may be if it is possible at all, to exactly define the limits of that power (the police

power), there is no doubt that it extends to the protection of the lives, health, morals and safety of all persons in the community, and that it cannot, by contract or otherwise, be parted with by a municipal corporation to which it may be delegated."

In support of its decision that a municipal corporation cannot, by contract, abridge its legislative powers, the court quoted with approval from the case of *Presbyterian Church* v. *Mayor, etc. of New York*, 5 Cow. 538, the following statement of the law:

"The defendants are a corporation. * * * They are considered a person in law within the scope of their corporate powers and are subject to the same liabilities and entitled to the same remedies for the violation of contracts as natural persons. They are also clothed with legislative powers and, in the capacity of a local legislature, are particularly charged with the care of public morals and the public health within their own jurisdiction.

"In ascertaining their rights and liabilities as a corporation, or as an individual, we must not consider their legislative character. They had no power as a party to make a contract which should control or embarrass their legislative powers and duties. Their enactments in their legislative capacity are to have the same effect upon their individual acts as upon those of any other person or the public at large, and no other effect.

"The liability of the defendants, therefore, upon the covenant in question must be the same as if it had been entered into by an individual, and the effect of the by-laws upon it the same as if that by-law had been an Act of the State Legislature. It is expressly authorized by the Legislature, and whether it be their Act or the Act of the local Legislature makes no difference."

Section 5438 of Kirby's Digest confers authority upon municipal corporations "to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive or unhealthy" and "to regulate the keeping and transportation of gunpowder,

dynamite, and other combustibles, and to provide or license magazines for the same."

Section 5439 gives power "to make regulations for the purpose of guarding against accidents by fire."

We think these sections afford authority for the ordinance in question.

(1-2) It must be, and is, conceded that the action of the council in passing ordinances of this character is presumed to be legal until the contrary is made to appear, and while the action of the council is subject to judicial review, yet in so far as a discretion abides as to the manner and extent of the use of the power conferred by the statute, that discretion is to be exercised by the council to which the power is conferred, and not by the court which reviews its action, and the courts may set aside the action of the council only when they can say that the council has acted in an arbitrary or unreasonable manner.

It may be true that appellant has provided the facilities which, if properly and carefully used, will render their tanks harmless; but this is also probably true of any other explosive or inflammable substance. But it is a matter of which we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have ever been offered. The unexpected happens. Some simple precaution was omitted. The city has the right to enact proper ordinances to control such contingencies.

In the case of *Standard Oil Co.* v. *City of Danville*, 64 N. E. 1110, the Supreme Court of Illinois sustained an ordinance of the city of Danville prohibiting the keeping of explosive oils within 1,000 feet of any dwelling, storeroom, etc., or other like structure, in a quantity greater than 5 barrels of 50 gallons each. It was contended there, as here, that the plant was harmless; that the houses within the prohibited distance had been erected after the plant itself had been erected, and that the ordinance was unreasonable and void. Disposing of these contentions the Supreme Court of Illinois said:

"The fact that the greater number of residences, business houses, etc., now within 1,000 feet of the plant of the appellant company were built after the plant had been located at its present site, does not entitle the appellant company to insist that it has become vested with the right to continue to operate its plant and keep on storage the inflammable, explosive and offensive oils, liquids and substances specified in the ordinance. The health, safety and comfort of the people are the controlling considerations, and prescriptive rights to endanger either cannot be acquired. As the limits of the inhabitable parts of cities extend, establishments that endanger health, safety or comfort of the population of such extended portion of the city and become nuisances, may be required to be removed to other localities. *Laflin-Rand Powder Co.* v. *Tearney*, 131 Ill. 322, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 34." See also *In re McIntosh*, 211 N. Y. 265, 105 N. E. 414.

(3) Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community. *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Dreyfus* v. *Boone*, 88 Ark. 360. And when this is done with the ordinance in question we are unable to pronounce it void, and the decree of the court below sustaining the demurrer is, therefore, affirmed.

SHEPARD v. MENDENHALL.

Opinion delivered January 15, 1917.

1. EVIDENCE—PRIVILEGED COMMUNICATIONS—DRAWING A DEED—ATTORNEY ACTING AS SCRIVENER.—Communications to an attorney employed to draft a deed, where no legal problems are expressly brought forward, are not privileged.
2. APPEAL AND ERROR—EXCLUSION OF TESTIMONY ON GROUND THAT WITNESS IS INCOMPETENT.—Where a witness is not permitted to tes-

tify on the ground that he is not a competent witness, in order to save the point, it is not necessary for the complaining party to show what the excluded testimony would have been.

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

J. L. Taylor and *C. T. Bloodworth*, for appellant.

1. Bloodworth's testimony was not privileged. He was not acting as attorney for either party, but merely as a scrivener and notary public. 9 Ark. 307; 24 *Id.* 355; 22 A. & E. Ann. Cases, 834 and note, p. 839; 40 Cyc. 2365.

T. J. Crowder, for appellee.

The court properly excluded C. T. Bloodworth's testimony. His information was obtained through professional relations to his client. It was privileged. Kirby's Digest, § 3095, subd. 5; 24 Ark. 345; 33 *Id.* 771; 78 *Id.* 71; 40 Cyc. 2361-5, 2370. The exclusion was not prejudicial.

SMITH, J. Appellee executed and delivered to appellant a deed to a tract of land. The consideration was there recited to be $150.00 cash in hand paid. In her complaint appellee alleged the consideration to have been in fact $2,000.00, and she seeks by this suit to recover judgment for the unpaid portion thereof. Both parties agree that the sum of $150.00 was not paid and that this was not the consideration in fact, but they sharply differ in their testimony as to what the real consideration was. Appellee recovered judgment for the amount of the consideration which she says appellant agreed to pay, and this appeal has been prosecuted to reverse that judgment.

Upon the trial of this cause one C. T. Bloodworth was sworn as a witness, and appellant offered to show that the parties called upon Bloodworth in the capacity of a notary public and scrivener to prepare the deed, and, in order that he might do so, stated to him the agreement between themselves. Objection was made to this evidence upon the ground that it was privileged,

whereupon Bloodworth stated to the court: "Mr. Bloodworth: I want to state further that I was consulted by neither of them at that time in a legal capacity, but was only asked to draw up and acknowledge this deed for them."

The court sustained the objection to this evidence, and this action is assigned as error.

By Section 3095 of Kirby's Digest, an attorney is prohibited from testifying concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent; and the court below took the view that this statute was applicable to the facts of this case. We think this was error. The witness was offering to testify that neither party consulted him in a legal capacity, and that the relation of attorney and client was not constituted.

In 40 Cyc., pp. 2363-2365, it is said: "In order that the rule of privilege may apply, the relation of attorney and client must actually exist between the parties at the time when the communication is made or the information acquired, or at least the party making the communication must have believed that such relation existed, and so there is no privilege as to a communication by one party to his adversary's attorney. An attorney who acted as a mere scrivener in preparing a deed, will, or other instrument in accordance with instructions given to him, may testify as to the transaction; and an attorney who acts merely as a notary in taking the acknowledgment of a deed or other instrument may testify as to communications made to him at the time or the attending circumstances. * * * But where an attorney is employed in his professional capacity, he cannot testify as to communications in regard to a deed or other instrument, which he prepared for his client in the course of such employment." A number of cases on the subject are cited in the note to the text quoted above.

(1) We think, however, a more accurate statement of the law is found in Volume 4 of Wigmore on Evidence, § 2297, where it is said:

"A deed or other conveyance is drafted sometimes by the parties, sometimes by a real estate broker, sometimes (as on the Continent, and formerly in England) by a notary or scrivener, and sometimes by an attorney at law. Though it necessarily affects rights and obligations, there is not necessarily a contribution of legal advice in its preparation. It is conceivable, therefore, that an attorney may be asked to draft a deed of a certain tenor, without any express reference to his knowledge of the law. On the other hand, he will undoubtedly use that knowledge, and his employer impliedly requests him to use it, in phrasing the instrument. The question thus arises whether the communications then made by his employer, although they may not in terms concern legal aspects of the transaction, are to be regarded as communications made in the course of an employment for legal advice.

"This question has naturally received conflicting answers. The tendency at first in England was to make a sharp distinction between services as a conveyancer and services as an attorney at law. But this was probably due in part to the original limitation of the privilege to communications for the purpose of litigation (*ante*, § 2294); and since this limitation disappeared, the inclination has been to take the larger view of the privilege in the present respect also. In the United States, the drafting of a *will* has almost always been assumed (and naturally) to bring the testator's communications within the privilege. But for *deeds* and other instruments the privilege has been strictly construed, and where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of the instrument have commonly been admitted. The circumstances of each case must affect the result; but in general a strict construction is the proper one, especially in those cases where attorneys combine the occupation of real estate and insurance brokers or act also as executive officers of a corporate business."

(2) The witness did not at the time offer to testify what the directions to him were, but as the evidence was excluded on the ground that the witness was incompetent this is immaterial, the rule in such cases being that the complaining party need not show, to secure a reversal, what the evidence of the excluded witness would have been. This is true because it must be presumed the court would have excluded the evidence, however material it may have been. *Miles* v. *St. L. I. M. & S. Ry. Co.*, 90 Ark. 485; *Rickerstricker* v. *State*, 31 Ark. 208.

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

LAUNIUS v. DRAKE.

Opinion delivered January 15, 1917.

EXEMPTIONS—FAILURE TO APPEAL—WAIVER.—The defendant in an action before a justice, filed a schedule of exemptions, but failed to appeal within the statutory period, from a judgment of the justice refusing to allow the schedule. *Held*, defendant will be treated as having waived his exemptions, and can not thereafter file a second schedule.

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

Powell & Smead, for appellant.

1. Where a debtor's right to exemption has once been adjudicated, he cannot file a schedule again under the same attachment. The principle of *res adjudicata* applies. 55 Ark. 55; 65 *Id.* 232.

2. By failure to appeal Drake waived his exemptions. 43 Ark. 17; 47 *Id.* 400.

3. The circuit court had no authority to order the justice to allow the second schedule. Justices of the peace are judicial officers and mandamus does not lie to control their discretion. 43 Ark. 17; 42 *Id.* 410; 34 *Id.* 394.

T. D. Wynne, for appellee.

1. Appellee did not waive his exemptions by failing to appeal from the action of the justice denying his

claim of exemptions. 28 Ark. 486-492; 55 *Id.* 58. He had the right to file a second schedule. 65 Ark. 232.

2. It was the duty of the justice to allow the second schedule and issue a supersedeas. This was purely a ministerial act and mandamus was the proper remedy.

HUMPHREYS, J. G. L. Sorrells recovered judgment for $290.52 against J. S. Drake before C. E. Launius, a justice of the peace for Holly Springs Township, Dallas county, Arkansas, who is the appellant herein. An attachment had been levied upon two mules, a wagon and harness, the property of J. S. Drake, in said suit and was sustained at the time of the rendition of judgment and the property was ordered sold under said attachment proceedings. J. S. Drake, the appellee herein, gave notice in accordance with law and filed a schedule claiming his exemptions, including this property, with the justice of the peace. Both Drake and Sorrells were present on the trial of the issue in the exemption proceedings and the justice of the peace declined to issue a supersedeas. Drake gave notice that he would take an appeal to the circuit court but failed to file the affidavit for appeal required by law. A short time before the day fixed for the sale under the attachment, Drake gave Sorrells notice that he would file another schedule claiming said property as exempt. The justice of the peace declined Drake a second hearing on the issue of exemptions and he then applied to the circuit court of Dallas county for a writ of mandamus to compel the justice of the peace to hear his second application.

The petition for writ of mandamus set out all the facts leading up to the refusal of the justice to hear his second application for exemptions, to which an answer was filed by the appellant herein. In addition to other matters the answer contained four paragraphs numbered 6, 7, 8 and 9 to which a demurrer was filed by Drake. Sections 6, 7, 8 and 9 are as follows:

"6. Further answering defendant stated that on the 13th day of January, 1916, G. L. Sorrells filed before

this defendant as justice of the peace for Holly Springs Township, a suit against the plaintiff herein, for the sum of $290.52; that on the 13th day of January, 1916, the said G. L. Sorrells filed proper papers before this defendant for an order of general attachment against the goods and chattels of the plaintiff herein; that on the 22nd day of January, 1916, an order of general attachment was issued by this defendant as justice of the peace, and delivered to the constable of Holly Springs Township, commanding the said constable to attach and safely keep the property of the said J. S. Drake in Dallas county, or so much thereof as would satisfy the claim of the said G. L. Sorrells for the sum of $290.52 and $20.00 as cost of said suit. That on the —— day of January, 1916, under said attachment, the said constable levied upon two mules and one wagon and harness, the property of the said J. S. Drake; that on the —— day of ————, 1916, the said G. L. Sorrells obtained judgment against the said J. S. Drake in the court of this defendant for the sum of $290.53, and the attachment aforesaid was by the court sustained and said property ordered sold for the purpose of satisfying said judgment; that there was never an execution issued upon said judgment but that said property was condemned for sale under said attachment and that the only sale of said property which the said constable attempted to make was in pursuance of said condemnation.

"7. Defendant further states that on the —— day of ————, 1916, J. S. Drake, the plaintiff herein, after having given five days notice, as required by statute, to the said G. L. Sorrells, filed before this defendant as justice of the peace, a schedule of his personal property, in which schedule was included the said property attached as aforesaid, and claiming said attached property as exempt from sale under attachment. That the value of all the property contained in said schedule amounted to the sum of $410.00. That upon a hearing of said schedule of exemptions, the same was by this defendant as justice of the peace, denied and a supersedeas refused. Whereupon, the said J. S. Drake made

motion to this defendant as justice of the peace for an appeal to the circuit court of Dallas county, from the order of this defendant, denying his claim of exemptions and refusing supersedeas as aforesaid, which motion was granted. That the said J. S. Drake further, in open court, gave the said G. L. Sorrells notice that he would appeal from the action of this defendant denying his claim of exemptions and refusing said supersedeas. That the said J. S. Drake has not filed with this defendant as justice of the peace, an affidavit required by the laws of Arkansas in all cases appealed from a justice court, and that more than 30 days have expired since said judgment was rendered and said motion made. That no appeal, therefore, was taken by the said J. S. Drake from the judgment of this defendant, denying his claim of exemptions and refusing supersedeas as aforesaid, and that by failure to so appeal the said J. S. Drake has waived his exemptions under the laws of Arkansas, if he ever had any.

"8. Plaintiff further states that after the right of the said J. S. Drake to appeal from said order of this defendant, denying his claim of exemptions and refusing supersedeas, had expired, the said J. S. Drake gave the said G. L. Sorrells five days notice as required by statute, and offered to file with this defendant a schedule of exemptions in the same matter exactly like the one which had been already passed on as aforesaid. That this defendant refused to grant to said J. S. Drake a hearing on said second schedule of exemptions, for the reason that the matter presented by said second schedule had already been adjudicated by this defendant as aforesaid.

"9. Wherefore, having fully answered, defendant asks that the prayer of plaintiff's petition be denied; that defendant have judgment for his costs, and other relief."

The demurrer was sustained to these sections. The appellant Launius refused to plead further and the circuit court ordered a writ of mandamus commanding Launius, as justice of the peace, to grant Drake a

hearing on his second schedule and that he allow same and issue supersedeas.

From the judgment ordering the writ of mandamus an appeal has been taken to this court.

The sole question involved in this case on appeal is, may a judgment debtor file a second schedule in the same attachment proceeding if that issue has once been adjudicated?

It was said in the case of *Cason* v. *Bone et al.*, 43 Ark. 17, that "Cason's remedy on the refusal of the justice to issue the supersedeas was to appeal to the circuit court. By failing to appeal he waived his exemption." In the case of *Chambers et al.* v. *Perry*, 47 Ark. 400, Justice Smith, rendering the opinion of the court, said: "The debtor must claim his exemption. The mere filing of a schedule is not enough. He must see to it that a supersedeas issue. If the officer refuses or neglects to do his duty mandamus or an appeal lies, according to the fact whether he is a ministerial or judicial officer. And the failure to prosecute the remedy is a waiver of the right." In the case of *Robinson* v. *Swearingen*, 55 Ark. 55, Justice Hemingway, in delivering the opinion of the court in that case took occasion to say: "There is nothing in the record by which it appears that the court inquired into or adjudged the defendant's claim of homestead in the order of sale, and we can indulge no presumptions to that effect. There being no adjudication of this right, the defendant was at liberty to assert it in a manner provided by statute at any time before sale, whereupon it becomes the duty of the clerk to issue the supersedeas." The clear inference in the case of *Robinson* v. *Swearingen*, *supra*, is that had the issue of exemptions been determined in the first proceeding a second schedule could not have been filed.

It is insisted by appellee that the court decided otherwise in the case of *Taylor* v. *Tomlinson*, 65 Ark. 232. The appellee contends that three schedules were permitted in that case. We cannot agree with learned counsel in this regard. Only two schedules

were presented in *Taylor* v. *Tomlinson*, *supra*. Two requests for a supersedeas at different times were made on the second schedule presented.

Learned counsel for appellee strenuously contends that this court in the last case referred to upheld the right in the judgment debtor to dismiss an appeal wherein the right of exemption was adjudicated and then to prosecute a second application for exemptions. The court did not so decide in that case. It is true the judgment debtor took an appeal from the justice of the peace wherein the issue of exemptions was involved and dismissed his appeal, but no notice had been given the judgment creditor by the judgment debtor of his intention to file a schedule and claim the property levied on as exempt. The justice court has no jurisdiction of the person of the judgment creditor at the time it passed upon the issue in that case. Not having jurisdiction over the person of the judgment creditor, the judgment of the justice refusing the first supersedeas was not an adjudication of appellee's claim for exemptions.

The case before us now is quite different. The issue of the right of exemptions was tried by the court having jurisdiction of both the subject matter and person, and the judgment debtor having failed to appeal lost his right to claim exemptions in a second proceeding instituted by himself. If the law were otherwise, a judgment debtor might file many schedules between the time his property was levied upon and the date of sale, and obtain many hearings.

The judgment is reversed with directions to the circuit court to overrule the demurrer filed by the plaintiff to paragraphs 6, 7, 8 and 9 of the defendant's answer.

JACKSON v. WOLFE.

Opinion delivered January 22, 1917.

1. DEVISE OF LANDS—ESTATE TAIL.—A devise of land to the testator's wife "and the heirs of her body lawfully begotten," creates an estate tail, which under the statutes constitutes a life estate with remainder over.
2. WILLS—DEVISE OF LAND—EXTRINSIC EVIDENCE—INTENTION.—Where the testator failed to mention a certain tract of land owned by him, in his will, extrinsic evidence will not be admitted to show that he had intended to describe the omitted tract when he described another, where the plaintiff was laying claim to the former tract under the will.

Appeal from Desha Circuit Court; *W. B. Sorrells*, Judge; affirmed.

R. W. Wilson, for appellant.

1. The demurrer should have been overruled. The court should have heard the evidence. Adair intended to describe the *north* half, and it was a mistake of the scrivener in inserting the *south* half. The complaint, as amended, stated a good cause of action. The will has been construed and appellant was held a remainderman and entitled to the property at her mother's death. 116 Ark. 233. She was a tenant in common with appellees who are wrongfully in possession. 53 Ark. 449; 79 *Id.* 532.

If she can show by proof that the donor's intention to devise the *north* half, and not omit the home place entirely she has the right to do so. 116 Ark. 328; *Ib.* 565; 92 N. E. 605. The erroneous description should be corrected. 116 Ark. 577, 233.

2. The amendment certainly stated a good cause of action and the case should have been transferred. Kirby's Digest, § 5991; 85 Ark. 208; 87 *Id.* 206, 211; 107 *Id.* 70; 108 *Id.* 283, 291.

Knox & Knox, for appellee.

1. The complaint was insufficient and the demurrer properly sustained. No muniments of title were set out, the will making no reference to the property involved. 53 Ark. 449; 79 *Id.* 532. The amendment does not strengthen the complaint. Kirby's

Digest, § 3654, pars. 3, 4, 5 and 6. Chancery had no jurisdiction to construe a will where only the legal title was involved. 70 Ark. 432; 3 Pomeroy Eq. Jur., § 1115. Chancery courts only reform instruments where the proof is clear, unequivocal and certain that a mistake had been made. 71 Ark. 614; 83 *Id.* 131; 89 *Id.* 309, 612; 80 *Id.* 458.

2. The circuit court had no jurisdiction. The intention of the testator must be gathered from the will itself and extrinsic evidence cannot be introduced except where the will is ambiguous and then only to show the meaning of the words used. 116 Ark. 577; 117 U. S. 210; 104 Ark. 439; 98 *Id.* 561; 185 S. W. 1117; 175 *Id.* 45; 173 *Id.* 395; 181 *Id.* 297.

McCULLOCH, C. J. (1) This suit involves a controversy concerning the title to a tract of land in Desha county described as the north half of the northwest quarter of Section 21, in Township 11 south, Range 3 west, and was originally owned by Isaac Adair, now deceased, and through him the plaintiff claims title. The tract of land in controversy constituted the homestead of Isaac Adair, and he owned other lands besides that tract. He died about the year 1887, leaving a last will and testament, which failed to describe the lands in controversy but by which he devised the south half of the northwest quarter of said section to his wife, Nancy J. Adair, "and the heirs of her body lawfully begotten." Other lands were devised by the same instrument, and this court decided in another case that an estate tail was created, which, under the statutes of this State, constituted a life estate with remainder over. *Rogers* v. *Ogburn*, 116 Ark. 233.

(2) The plaintiff, Ida M. Jackson, was one of the two children of Nancy J. Adair, who died in the year 1911, and the other child was J. J. Rogers. In the year 1889 Nancy J. Adair conveyed the lands in controversy to her son, J. J. Rogers, and in the year 1899 Nancy J. Adair and J. J. Rogers joined in a conveyance to T. F. Tillar. This suit was instituted against the adminis-

trator and heirs of Tillar, who occupied the lands under said conveyance up to the time of his death. The suit was instituted in the chancery court of Desha county, and the complaint alleged that there was an erroneous description in the will of Isaac Adair in that the land was described as the south half of the northwest quarter of said section, whereas it was intended to describe the tract of land in controversy, the north half of the northwest quarter, and the prayer of the complaint was that the will be reformed so as to correctly describe the tract of land in controversy according to the intention of the testator, and that the plaintiff recover her undivided half interest in this tract.

Defendants answered the complaint, and then the cause was, on motion of the plaintiff, transferred to the circuit court. Later the plaintiff filed an amended complaint, asking that the cause be sent back to the chancery court, and the court overruled that motion and sustained a demurrer to the complaint and entered judgment dismissing the same. It is alleged in the amended complaint that the tract of land in controversy constituted the homestead of Isaac Adair, and that he entered into an agreement with his wife, Nancy J., to the effect that if she would join him in the conveyance of certain other lands to his favored nephew, he would make his will devising to her the homestead tract and certain other lands, and that Nancy J. Adair joined her husband in said conveyance in consideration of the promise. This is the ground upon which the reformation of the will is sought.

Counsel for plaintiff insist that the case comes within the rule of this court announced in *Eagle* v. *Oldham*, 116 Ark. 565, and that under the rule there announced the will of Isaac Adair ought to be construed as devising the north half of the northwest quarter of Section 21, instead of the south half of the northwest quarter of said section, as set forth in the will. The doctrine of the case relied on is stated in the opinion as follows: "But while we may feel sure of the testator's intention, we must gather that intention from the will

itself. This idea has been expressed in a variety of ways by all the courts. But extrinsic evidence is generally held admissible in the interpretation of wills, not to show what the testator meant, as distinguished from what his words express, but for the purpose of showing the meaning of the words used."

There were circumstances in that case surrounding the execution of the will which enabled the court to correct what was deemed by the majority of the judges to be an obvious error, but the rule stated above was adhered to. In the present case we find no circumstances whatever which would justify this court in declaring that the testator meant by the description used, to convey a tract other than the one which was specifically described. This tract was the homestead of the testator, and his wife had a life estate in it by operation of law, and that may have been the reason why the testator omitted it from the devise to her. To hold with the plaintiff in this case would be purely a reformation of the instrument, which in all the cases on that point this court has held could not be done.

The plaintiff has attempted to bring her case within the operation of the rule allowing reformation of wills by stating that the will was made pursuant to a contract between Isaac Adair, the testator, and his wife, Nancy J., whereby he agreed to devise to her the lands in controversy. If it be conceded that the language of the complaint is sufficient to set forth a contract, a specific performance of which ought to be required by a reformation of the will, the answer to the contention is that the devisee, Nancy J. Adair, has, by her own conveyance parted with all interest in this particular tract, and that neither she nor her privies can be heard to ask for relief which would defeat the operation of her own conveyance. So far as concerned the rights of the plaintiff as the beneficiary under the devise, if this land had been described so as to create an estate tail, the devise being purely voluntary, there could be no reformation of the will under well established rules. It is not alleged that plaintiff was a party to the con-

tract between Adair and his wife, and in no view of the matter could she be treated as being in position to ask for specific performance of the alleged contract. Her relation to the whole matter, conceding the allegations of the complaint to be true, is that of a mere beneficiary to the voluntary devise of Adair. The complaint fails to show that the plaintiff had any other claim of title to the land, and the court was correct in sustaining the demurrer.

Affirmed.

BUELL v. WILLIAMS.

Opinion delivered January 22, 1917.

1. APPEAL AND ERROR—DUTY OF APPELLANT TO REQUEST A RULING IN THE COURT BELOW.—This court will not reverse a judgment for an error which might have been corrected on motion in the court below, unless a motion has been made there and overruled.
2. APPEAL AND ERROR—TRIAL BEFORE COURT—FAILURE TO MAKE WRITTEN FINDING OF FACT.—Where a cause is tried before the circuit judge, it is the duty of the appellant, if he wishes to save the point, to request the court to make a written finding of fact, and to object to his failure to do so.

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

H. C. Mechem, for appellant.

1. The judgment should be reversed, because the court failed to file written findings of fact and conclusions of law, as *imperatively* required by law, but refused to do so when its attention was called to the omission. 34 Ark. 524; 42 *Id.* 41; Kirby's Digest, § 6213; 24 Pac. 1055; 17 Mo. 550; 57 Atl. 837; 20 App. Div. (N. Y.) 304; 19 Pac. 123; 51 N. W. 867; 20 La. Ann. 27; 29 Pac. 1005; 31 *Id.* 766; 51 Cal. 276; 71 *Id.* 380; 46 S. W. 448; 59 Ark. 178; 23 Mich. 337. Courts cannot deliberately disobey the law. 95 U. S. 397; 102 *Id.* 641. "*Shall*" is imperative and mandatory. *Ita lex Scripta est.*

G. C. & Joe Hardin, for appellee.

1. Conclusions of fact and law may both be included in the judgment entry. 59 Ark. 178; 46 *Id.* 17. Here the court made its conclusions of fact in writing in general which is sufficient. 65 Ark. 18. The case of *Nathan* v. *Sloan*, 34 Ark. 524, is conclusive. 27 Ark. 619; *Ib.* 624; 28 *Id.* 75; 30 *Id.* 356; 33 *Id.* 645, 650. No request was made of the court by appellant at the trial or afterwards to comply with the statute. 33 Ark. 645.

2. The evidence taken appears of record in the bill of exceptions; its province is to bring into the record the facts proven and declarations of law made by the court. 36 Ark. 495; 46 *Id.* 17; 86 *Id.* 73; 38 *Id.* 586; 65 *Id.* 17.

A judgment *shall not* be reversed for an error which can be corrected on motion below made and overruled. *This* is imperative. Kirby's Digest, § 1233. A request should have been made. 28 Ark. 410; 33 *Id.* 180; 68 *Id.* 71; 93 *Id.* 290; 95 U. S. 397; 99 Ark. 436; 33 *Id.* 218.

McCULLOCH, C. J. Appellant instituted this action before a justice of the peace to recover on a note in the sum of $50.00 executed by appellee, and after judgment there the case was appealed to the circuit court where it was tried *de novo*. Appellant failed to appear at the trial in the circuit court, and the case was, in his absence, tried before the court sitting as a jury. The court found in favor of the defendant and entered judgment accordingly. The findings of the court, as recited in the judgment, were as follows: "That the defendant is not indebted to the plaintiff in any sum whatever, and that the plaintiff's demand against the defendant should be denied." Appellant appeared later during the term and filed a motion for a new trial, assigning as grounds therefor, "first, that the judgment of the court is contrary to the law; second, the judgment is not sustained by the facts; third, the court did not make and file written findings of facts."

Appellant's motion was overruled and he appeals to this court.

There was no request made by appellant to the court for special findings of fact. The only contention here, as grounds for reversal, is that the court erred in failing to make findings of fact in accordance with the statute, which provides that "upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusions of law".

The case is ruled by the decision of this court in *Nathan* v. *Sloan*, 34 Ark. 524, where the record was similar to the record now before us, and the court said: "There may be some question whether the finding in this case was a special or a general one; but we have no occasion to consider it, for, if not special, or such as the law requires, the defendants, if they had wished, could have required it to be made such; and this court will not reverse a judgment for an error which might have been corrected on motion in the court below, unless motion has been made there and overruled."

In that case, as in this, there was a motion for a new trial assigning as error the failure of the court to state in writing its conclusion of fact. It has never been decided by this court whether or not it constitutes error for the trial court to refuse to make findings of fact after the conclusion of the trial and entry of the judgment, where the complaining party has absented himself from the trial, or, being present, has failed to make a request for such finding, and we do not deem it necessary to enter upon a discussion of that question now. This court has held that the findings of fact may be reduced to writing after the trial (*Apperson* v. *Stewart*, 27 Ark. 619; *Nathan* v. *Sloan*, *supra*), but it has not held that the court is required to do so. The motion for a new trial was an assignment of the error alleged to have been committed, and was not a request that the findings of the court be then reduced to writing and filed.

Affirmed.

McDANIEL v. JONESBORO TRUST COMPANY.

Opinion delivered January 22, 1917.

APPEALS FROM JUSTICE COURT—PLEADING SET-OFF IN CIRCUIT COURT.—Kirby's Digest, § 4682, expressly excludes the right to present either a counterclaim or set-off in the circuit court on appeal, when none was presented before the justice of the peace from whose judgment the appeal comes.

Appeal from Craighead Circuit Court, Jonesboro District; *Gordon Frierson*, Special Judge; affirmed.

H. M. Mayes, for appellant.

Appellant was a married woman. She did not purchase the property. The contract was not for her separate estate, business or services. She signed merely as surety for her husband and is not bound. 103 Ark. 246; 146 S. W. 499; 66 Ark. 117; 49 S. W. 491; 108 Ark. 151; 156 S. W. 1023.

Basil Baker and *Horace Sloan*, for appellee.

1. No set-off or counterclaim was filed in the justice's court. Kirby's Digest, § 4682; 44 Ark. 376; 77 *Id.* 237.

2. Rosa McDaniel was the maker of the note and Whipple the surety. 92 Ark. 604. The jury found that she purchased the property. The evidence was conflicting, and this court will not disturb it.

McCULLOCH, C. J. This action was instituted before a justice of the peace of Craighead county to recover on a promissory note in the sum of $269.78, executed by the defendants to the plaintiff. There was a judgment rendered by the justice in favor of the plaintiff, and Mrs. Rosa McDaniel, who is the appellant here, took an appeal to the circuit court, where the case was tried *de novo* before a jury, and a verdict was returned against her and judgment was rendered accordingly.

The note was executed by Mrs. Rosa McDaniel and her husband, George McDaniel, and also by J. H. Whipple, as surety. The note was in renewal of another note formerly executed by the same parties

in the same capacity to the Bank of Jonesboro, and assigned by the payee to the plaintiff, Jonesboro Trust Company. At or about the time of the execution of the original note, a lot of personal property was purchased from Whipple by Mrs. McDaniel, as the evidence adduced by the plaintiff tends to show, and the note was executed for borrowed money which was used in paying Whipple for the price of the said property so purchased.

The appellant, Mrs. McDaniel, pleads her coverture and alleges that the purchase of the property from Whipple was made by her husband and that she signed the note only as surety. The evidence is conflicting on that point, and the court correctly submitted that issue to the jury in conformity with the decisions of this court. *Vandeventer* v. *Davis*, 92 Ark. 604. Appellant and her husband executed a mortgage to Whipple on other property to idemnify him against loss as surety, but that mortgage is not involved in the present suit. There was sufficient evidence to sustain the finding that appellant was the purchaser of the property and the principal maker of the note, and that issue must be treated as settled by the verdict of the jury.

On the trial of the case in the circuit court, the defendants offered to introduce evidence in support of a set-off in favor of Mrs. McDaniel, but the court refused to allow the evidence on the ground that neither a set-off nor a counterclaim was pleaded in the justice court. The record shows, as was found by the trial court, that there had been no counterclaim nor set-off pleaded before the justice. Therefore the court was correct in refusing to permit such an issue to be introduced in the case and testimony to be adduced in support thereof. The statute on that subject, regulating appeals from justices of the peace to the circuit court, provides: "The same cause of action, and no other, that was tried before the justice shall be tried in the circuit court upon the appeal, and no set-off shall be pleaded that was not pleaded before the justice, if the

summons was served on the person of the defendant." Kirby's Digest, § 4682. The statute just quoted expressly excludes the right to present either a counterclaim or set-off in the circuit court on appeal when none has been presented before the justice of the peace. Therefore the trial court was correct in its ruling.

There are other reasons urged in the brief of appellees in support of the court's rulings, but it is unnecessary to discuss them.

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

THE CITIZENS' BANK v. FAIRWEATHER.

Opinion delivered January 22, 1917.

1. NEGLIGENCE—INJURY TO PASSENGER IN ELEVATOR.—Plaintiff, a boy of 14 or 15 years, was injured in a passenger elevator, when his foot, which protruded over the floor of the elevator, struck the beams of the second floor as the elevator ascended. *Held*, under the evidence adduced, that, considering the plaintiff's years, he was not guilty of contributory negligence, nor did he assume the risk of injury by entering the elevator, and that the evidence warranted a finding that the operator of the elevator was guilty of negligence in not warning him of the danger of letting his foot protrude over the floor of the car.
2. EVIDENCE—PERSONAL INJURY ACTION—CONSTRUCTION OF APPLIANCE—NON-EXPERT TESTIMONY.—Plaintiff, a boy of 14 or 15 years, was injured when his foot, which he permitted to protrude over the edge of the floor of a passenger elevator in which he was riding, struck the beams of the second floor of the building as the elevator ascended. *Held*, testimony of the father of plaintiff, although a non-expert, as to how the elevator and building might have been constructed so as to avoid such injuries as this one, was admissible, and that the jury were entitled to consider it for what it was worth.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; affirmed.

Bridges and Wooldridge for appellant.

1. Fairweather was a non-expert witness and his testimony should have been excluded. 57 Ark. 387.

2. The court erred in its instructions as to contributory negligence and assumed risk. The error was not cured in other instructions. 99 Ark. 384-5; 122 Ark. 272; 123 Ark. 594.

3. The court erred in refusing the peremptory instruction for defendant. It is always improper and dangerous to extend the foot beyond the floor of an elevator. The danger is apparent to any one of reasonable intelligence, discretion and experience. 143 Fed. 937; 119 Ark. 540. A minor can be guilty of contributory negligence if of sufficient intelligence and discretion to understand and appreciate the danger. 98 Ark. 222; 100 *Id.* 76; 157 N. W. 811, 814-15.

A. H. Rowell for appellee.

1. Negligence in the construction and maintenance of the elevator was shown. It was proven that the operator was negligent. The boy was a minor, 15 years old, and the danger was hidden; known only to defendant and its employee. 93 Ark. 397; 6 Cyc. 596; 138 Am. St. Rep. 477; 127 N. W. 118; 1 Thompson on Negligence, 980-1; 52 L. R. A. 930. No warning was given and the boy was not of such age and intelligence as to know and appreciate the danger.

2. Fairweather's testimony was not prejudicial. No expert knowledge was necessary. 121 Ark. 387. His testimony was corroborated.

3. There is no error in the instructions, reading them together. 83 Ark. 61.

4. The same degree of care is required as in the case of railroads and other carriers of passengers. 93 Ark. 397; 6 Cyc. 596. 138 Am. St. 477; 127 N. W. 118. It was appellant's duty to provide experienced and skillful servants. 1 Thompson on Negl. 980-1; 52 L. R. A. 930.

MCCULLOCH, C. J. Laurie Fairweather, a lad between 14 and 15 years of age, while ascending in an elevator to one of the upper floors of a building owned by the defendant, the Citizens Bank, in the city of Pine Bluff, received personal injuries, and through his

guardian instituted this action to recover compensation. His father also sued for damages on account of the loss of services, etc., of his son, but afterwards dismissed the action and the case proceeded to a trial on the complaint of the injured boy.

The defendant owned an office building in the city of Pine Bluff, and operated a passenger elevator for the convenience of the occupants of the building and those who came there on business. Laurie Fairweather was a messenger boy for a telegraph company, and went to the building for the purpose of delivering a message to one of the occupants on an upper floor. He entered the elevator and was the only passenger, and stood in front of the door by the side of the elevator operator as the elevator ascended. He placed his foot so as to extend it over the floor of the elevator a slight distance, and as the elevator ascended his foot struck against the beam of the second floor and his foot was severely injured. Negligence of the defendant is charged in so constructing the elevator that the projecting beam could strike an object extending over the edge of the floor of the elevator, and also in failing to warn the boy of the danger of extending his foot over the edge of the elevator floor. There was an answer filed, denying each of the allegations of negligence and pleading contributory negligence and assumption of risk on the part of the plaintiff himself. There was a trial of the cause before a jury, and a verdict in favor of the plaintiff, assessing damages.

(1.) The case went to the jury solely on the question of negligence of the operator of the elevator in failing to warn the plaintiff of the danger of placing his foot so that his toes would extend over the edge of the elevator floor. It will be unnecessary, therefore, to discuss the question whether there was any negligence in the construction of the elevator. The proof adduced by the defendant tends to show that the elevator cage and shaft were constructed in the same manner as in all other modern buildings of the country,

and that there was no way in which an accident of this sort could be provided against, it being necessary for the edge of the elevator cage to pass in close proximity to the beams of the floors of the building. The evidence shows that the plaintiff stood near the side of the operator, and that there were no other passengers in the elevator at the time, and this state of facts authorized the jury in drawing the inference of negligence on the part of the operator in failing to warn the boy of the danger of his situation.

It is earnestly contended, however, that the undisputed evidence shows that the boy was intelligent and was in a position where he could observe the danger, and that he did appreciate it and must be deemed as a matter of law to have assumed the risk. After careful consideration of the testimony we are of the opinion that it should not be said that it was an assumption of risk or that the plaintiff was guilty of contributory negligence. In reaching this conclusion, of course, the immature age of the plaintiff must be considered, for the situation was such that a person of mature years would be deemed to have assumed the risk. Plaintiff had equal opportunity with the operator of observing the danger, and if he had been on an equality with the operator in point of intelligence it should be said that that which constituted negligence on the part of one was necessarily negligence on the part of the other, but they were not equal in intelligence, at least the jury could have so found, and we cannot say as a matter of law that the plaintiff was guilty of negligence or that he assumed the risk. He states in his testimony that there was enough light for him to see and that if he had looked he could have seen that his foot would strike the beams of the floors, but we think it was a question for the jury under all the circumstances to determine whether the boy was of sufficient discretion and intelligence to appreciate the danger so as to be held to have assumed the risk.

Counsel for defendant rely upon a decision of the Supreme Court of North Dakota (*Derringer* v. *Tatley*,

157 N. W. 811) where that court held that a boy 14 years of age, who had been injured by thrusting his head through an opening in a passenger elevator, could not recover on account of his own contributory negligence. The doctrine of that case may be sound without necessarily controlling the one now before us, for the character of the alleged negligent act was totally different. It might well be said that for a passenger in an elevator to thrust his head through an opening was so obviously dangerous that a child of immature age and discretion would be bound to know that it was dangerous, and to know and appreciate the danger; but it would be different in testing his conduct with reference to a less glaring danger, such as allowing his toes to extend over the edge of the elevator floor. The conclusion is reached that the court properly left it to the jury to determine whether or not the plaintiff was guilty of contributory negligence or whether he assumed the risk of the danger.

Defendant objects to certain instructions of the court in submitting to the jury the question of negligence of the defendant in failing to warn the boy of the danger, and permitting the plaintiff to recover regardless of his own contributory negligence. Two instructions were objected to on that ground, but one of them very plainly submitted the question of contributory negligence, and when the two instructions are considered together it cannot be said that they ignored that question. *St. L., I. M. & S. Ry. Co.* v. *Rogers*, 93 Ark. 564.

(2) The only other assignment of error argued in the brief relates to the ruling of the court in permitting the plaintiff's father to testify concerning the construction of the elevator. The ground of the exception is that the witness was not shown to be an expert on the subject. It is not objected to on the ground that the subject matter did not call for expert testimony. The witness explained in his testimony a method whereby the floor beams could be constructed so as to shove the foot back when it came into con-

tact with the floor beams. This was a matter which addressed itself to the sound discretion of the jury to determine the weight of the evidence, and the plaintiff was entitled to have the testimony go to the jury for what it was worth, even though the witness was not an expert builder or architect. His suggestion was so simple that it could readily be understood by the jury, so that if found reasonable they could accept it in determining whether or not there was negligent construction. However, the charge of negligent construction was abandoned when it came to the submission of the case to the jury, which, as before stated, was solely upon the question of negligence of the elevator man in failing to warn the plaintiff of his danger.

The case presents a close question on the facts as to contributory negligence and assumption of risk on the part of the plaintiff, but having reached the conclusion that there was enough testimony to justify a submission of those questions to the jury, we think that the record is free from error and that the judgment should be affirmed. It is so ordered.

MORRIS v. COLLINS.

Opinion delivered January 22, 1917.

1. WILLS—PROOF OF MENTAL CAPACITY.—To enable the jury to determine the testator's capacity to make a will, a wide range of inquiry is permissible into facts and circumstances, both before and after the time of making the will.
2. WILLS—MENTAL CAPACITY—INSTRUCTION—"REASON."—An instruction that "if you find from the evidence and the circumstances of the case that the testatrix, at the time of signing the will, was unable to make a disposition of her property for the want of understanding and *reason*, the said will is invalid and must be rejected;" *held*, not improper, and while the word *reason* was unnecessary, that when considered in the connection in which it was used, that it could not have misled or confused the jury.
3. APPEAL AND ERROR—INSTRUCTIONS—MISLEADING WORDS—SPECIFIC OBJECTION.—Where appellant objects to a word used in an instruction given at appellee's request, it is his duty to ask the court specifically to explain these words or else to strike them from the instruction.

4. WILLS—UNDUE INFLUENCE.—Undue influence, such as to invalidate a will, is such influence as results from fear, coercion or other cause that deprives the testator of his free agency in the disposition of his property.

5. APPEAL AND ERROR—IMPROPER INSTRUCTION—WAIVER OF OBJECTION. —The granting of a correct prayer for instruction on behalf of appellant, held to constitute a waiver of his objection to an incorrect instruction on the same issue given at the request of the appellee.

6. WILLS—FRAUD AND UNDUE INFLUENCE.—Fraud and undue influence may be established by circumstantial evidence, and it is necessary that there be proof of facts and circumstances justifying an inference of fraud and undue influence, before the jury will be authorized to find that there was such fraud and undue influence.

7. WILLS—UNDUE INFLUENCE.—A testatrix, an old negro woman, by will left all her property, except a small sum of money to certain members of her family, to a white man—a wealthy planter. The will was contested, and *held*, the finding of the jury that the will was induced by the undue influence of the principal devisee, and that the same was invalid, was supported by the evidence.

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

STATEMENT BY THE COURT.

Elmyra Gatlin, an aged negress, on March 12, 1910, executed her will, in which she gave to her two nieces, Myrohn Morris and Sarah Pyburn, and a nephew, Frank Collins, the sum of $50.00 each, and her household goods to be divided equally between them. She provided for the payment of her debts and funeral expenses.

The third clause of the will is as follows: "I give, bequeath and devise all the residue of my estate to W. N. Morris, of Keo, Ark." The fourth clause reads: "I appoint W. N. Morris executor of this my last will."

At the time the will was executed she owned forty acres of land and two head of horses. Some months later she borrowed of the Colonial Mortgage Company the sum of $500.00 and executed a mortgage on the land to secure the same. She turned the horses and a part of the money over to appellant. About three years after executing the will Elmyra Gatlin died. The

appellant filed the will for probate, and appellees contested the will, charging that the testatrix did not have sufficient mental capacity to make the same, and that appellant exercised undue influence over her.

The will was admitted to probate, and on appeal to the circuit court the issues as to whether or not the testatrix had mental capacity to make the will, and as to whether appellant exercised undue influence over her in causing the will to be executed, were submitted to the jury, and the jury found against the will.

Judgment was rendered declaring the will void, and appellant seeks by this appeal to reverse that judgment.

Miles & Wade, for appellant.

1. There is no evidence to support the verdict. (1) The will is not an unnatural one; (2) it was not procured by undue influence; (3) the testatrix was sane; (4) the relations existing make the will a natural one. The verdict should have been set aside. 49 Ark. 367; 87 *Id.* 148; 93 *Id.* 66; 94 *Id.* 176. The burden was on appellees to prove lack of testamentary capacity. They failed. 40 Cyc. 1011-12. Evidence of sanity is abundant.

2. It was error to admit statements of testatrix that she wanted Frank Collins to have part of her estate. 60 Ark. 301; 40 Cyc. 1312, note 12.

3. The court erred in its instructions. 40 Cyc. 1007; 38 Mich. 238; 230 Ill. 572; 227 *Id.* 183; 132 *Id.* 385; 75 Fed. 480; 153 Mo. 223; 157 Cal. 301; 81 Col. 167; 99 Ark. 45; 99 *Id.* 45; 110 *Id.* 354; 100 *Id.* 316; 100 *Id.* 316; 88 *Id.* 7; 93 *Id.* 548; 49 *Id.* 448. There was no sufficient evidence of insanity, undue influence, fraud, etc.

Cases *supra*. They do not declare the law as to testamentary capacity, influence, dominion, mental faculties, discretion, mental ability, undue persuasion or advice or entreaty, fraud, artifice, etc. *Supra*. The appellees' instructions are fatally defective; they invade the province of the jury; submit foreign issues

and authorize the jury to find against the will, if any under influence "by any means" is shown, etc.

W. C. Adamson, for appellees.

1. The evidence is sufficient. The will is an unnatural one. There was undue influence. The testatrix was not of sound mind. She lacked mental capacity. 29 Ark. 156.

2. No incompetent testimony was admitted. Her declarations were admissible. 74 Ark. 212.

3. There is no error in the instructions. 19 Ark. 556; 40 Cyc. 1153; 29 Ark. 156; 40 Cyc. 1164; 28 Col. 167; 72 Wisc. 22; 72 Md. 300; 153 Mo. 223. Undue influence is a species of fraud. Reading all the instructions together there is no error. 93 Ark. 590; *Ib.* 564. The case on the whole was properly submitted to the jury and the verdict should not be disturbed.

WOOD, J. (after stating the facts). Appellant contends that the evidence was not sufficient to sustain the verdict.

One of the witnesses, a brother-in-law to the testatrix, and who lived in the same neighborhood, and who had known her for many years, testified in part as follows: "I have noticed her very frequently about four or five years before she died. Why, she would have peculiar ways. She would be talking to herself, and sometimes would be sitting while she was in your company talking, and she would be sitting with her head off from her like she had done forgotten there was anybody in the house but herself, and be wringing her hands and going on like that, and sometimes she would turn around and say: 'Where is my baby?' She would have her pipe in her mouth and ask for her pipe." The witness further detailed, at some length, the peculiarities of Elmyra Gatlin. He stated that at one time she went to the cow pump to milk, and went to open the gate and put her hand up on the post and a pain struck her in the hand and she lost the use of her hand. She said that something that they put on the post told her that she had a hoodoo,

and sometime after that she said that there was something put in the back of her chimney, and that consequently she suffered a great deal from that. She stated that she had gone to Little Rock and found a lady who understood such things and had carried her down to her home and that the lady cut it right out of the back of her chimney. She stated that she suffered awful misery in her head continuously, and her back was apparently broken in two; that she suffered awful with it on account of the hoodoo. She was very nervous and excitable. She would be talking and all of a sudden break off and go to crying.

Witness further stated that she would be sitting down and someone would speak and she would jump up and say to them, "What are you doing making all that fuss?" She seemed to be frightened over the least little noise.

Another witness, a sister of the testatrix, stated that during the last few years of her sister's life she seemed like she was losing her mind. She would just get down on her knees and groan about her head. She would put her hands on her head and groan, and witness would sit in the room all night with her. She stated that the doctor said that she was going into Bright's disease; had caught it from Sylvia, her sister, who died of Bright's disease. She would complain about suffering a great deal with her back and head. She stated that she suffered so bad with her mind that she had no mind. At one time witness had a conversation with her when she was going on so, saying that she was crazy. Witness told her that she had land and stock and was doing better than witness, whereupon the testatrix replied, "Sister, you don't know what I have gone through with at home. Of course my husband, he's gone, and Mr. Morris, he cuts down all my fruit trees and takes them up." Witness asked her if she was afraid to tell it, and she replied: "Yes, he come down here, and I am all alone by myself, and they killed a man and his wife at my place and that makes me scared all the time." And witness asked her why,

and she said, "You don't know what I go through with. Mr. Morris bothers me so." She told witness that Mr. Morris scared her.

Another witness stated that he had "seen her act sort of frenzy mind—waiver in her talking," and heard her say the "niggers were trying to work her out of her property." Had seen her cry, and said she didn't have a child to cry for bread, and heard her halloo and tell people to get away from her pecan trees where there was no one about the trees.

Another witness stated that at one time the testatrix had complained of the hoodoo and marked the place where they took the hoodoo out of the fireplace. She paid the negro woman, who lived in Little Rock, $10.00 for taking it out. She said it affected her stomach. She said she thought some negroes living in one of her houses had done it. That was about six years before her death. This witness stated that testatrix had lost a sister in 1907 and that she "liked to have died" when she lost her sister. She stated that she did not have any more hope. She took her sister's death very hard.

The testimony of appellant and several witnesses, among them the physician who attended the testatrix in her last illness, tended to show that the testatrix had mental capacity to make the will; that she was a negress of unusual intelligence and industry, and managed her own property and made money and saved it.

It is unnecessary to set out in detail all this testimony relating to the mental capacity of the testatrix at the time of the execution of the will. Testimony was introduced on behalf of the appellees tending to show her idiosyncrasies and the condition of her mind and body several years prior to and at the time of the making of the will and until she died.

(1) In *Taylor* v. *McClintock*, 87 Ark. 243, 275, it is said: "Hence, it is that, in order to determine the capacity of the testator's mind and its true action at the time the will is made, a wide range of inquiry is

permissible into facts and circumstances, whether before or after the time of making the will, the better to enable the jury to determine the probable state of his mind, and the extent and force of the restraint at the time the will was executed."

In that case we quoted from *Tobin* v. *Jenkins*, 29 Ark. 151, as follows: "The contents of the will, the manner in which it was written and executed, the nature and extent of the testator's estate, his family and connections, their condition and relative situation to him, the terms upon which he stood with them, the claims of particular individuals, the situation of the testator himself and the circumstances under which the will was made, are all proper to be shown to the jury, and often afford important evidence in the decision of the question of the testator's capacity to make the will."

In testing the question as to whether or not the evidence is sufficient to sustain the verdict we must give the testimony its strongest probative force in favor of the appellees, and we have set out enough of it to show that it was a question of fact, under the evidence, as to whether or not the testatrix, at the time of the alleged execution of the will, had sufficient mental capacity to thus dispose of her property.

In *St. Joseph's Convent* v. *Garner*, 66 Ark. 623, witnesses testified that the testatrix whose will was under review in that case was "weak minded," that she "was not bright," that she was "not as intelligent as other girls," etc., and we held (quoting syllabus): "The fact that a testator was of weak mind and not 'bright,' or that she was not as intelligent as the average girl, does not show that she did not have sufficient testamentary capacity to execute a will."

But in the case at bar facts are detailed by the witnesses which made it clearly a question for the jury to say whether or not the testatrix had sufficient mental capacity to make the will. On this issue the court, at the request of the appellees, instructed the jury as follows:

(2) "If you find from the evidence and the circumstances of the case that Elmyra Gatlin, at the time of signing the will, was unable to make a disposition of her property for the want of understanding and reason, the said will is invalid and must be rejected."

And at the request of appellant as follows:

"The court instructs the jury that in order to make a valid will it is necessary that the decedent be of sound mind at the time of making the will; that is to say that she was capable of comprehending her property interests and determining what disposition she desired to make of them, and of making such disposition; that unless you believe from the evidence that Elmyra Gatlin did not have this degree of comprehension, you will find that she was possessed of a sound mind, though you may believe that she did not possess the intellectual vigor of youth, or that usually enjoyed by her while in perfect health."

The appellant criticizes the use of the word "reason" in the above instruction given at the request of appellees, contending that the use of this word is unnecessary and confusing. One of the definitions of the word reason is, "The faculties that enable one to distinguish between the true and the false, in the degree possessed by all sane persons; the normal exercise of the rational faculties." Funk & Wagnall's New Standard Dictionary, word "Reason." It is manifest that the word "reason" is used in this sense in the instruction, and was intended to be synonymous with the word "understanding." While it was unnecessary to use the word *reason*, yet when the connection in which it was used is considered, it could not have confused or misled the jury. Instruction one, for the appellees, and three, given at the request of appellant, while subject to criticism as to their verbiage, were intended to and did substantially conform to the rule announed in *McCulloch* v. *Campbell*, 49 Ark. 367; *St. Joseph's Convent* v. *Garner*, 66 Ark. 623, 628, and *Taylor* v. *McClintock*, 87 Ark. 243, 273.

(3) There was no specific objection to any particular words in the instruction, and the instruction was not inherently defective, and if appellant conceived that certain words of which he now complains were of doubtful meaning and might be misconstrued by the jury, it was the duty of his counsel to ask the court specifically to explain these words, or else to strike them from the instruction. *St. L., I. M. & S. R. Co.* v. *Barnett*, 65 Ark. 255; *St. L., I. M. & S. R. Co.* v. *Sparks*, 81 Ark. 187, 191, and cases cited; *St. L., I. M. & S. R. Co.* v. *Richardson*, 87 Ark. 602, 607; *Aluminum Co. of N. A.* v. *Ramsey*, 89 Ark. 522, 527.

Appellant contends that there was no evidence to show that the will was executed through undue influence exercised by him over the testatrix. It is the theory of the appellant that the testatrix gave him all of her property, except the $150.00 mentioned in the will which was given to the nieces and nephew of the testatrix, because she was worried a good deal by her husband and by her folks, too.

Appellant's testimony tended to show that she stated to him that she wanted to get her property in condition that they would not get the benefit of it. She wanted to make a will and she gave appellant directions how to dispose of her property, just like they are in the will. Appellant had a lawyer at Little Rock prepare the will. He then showed it to the testatrix. She then came over to appellant's house and said she wanted to sign it up and did not want anybody to know anything about it; didn't want her folks to know anything about it at all. She had stated years before that she wanted to give appellant what she had. Appellant did not care anything about it. It was fixed in that way to satisfy her. Appellant had known the testatrix all of his life. She was his nurse when he was a child and claimed appellant as her boy, and appellant claimed her as his "old black mammy." She stuck to appellant as long as she lived.

It was shown that the value of the property of the testatrix at the time of her death was between $2,000.00

and $2,500.00. The appellant got all of this property, under the will, except the $150.00 specifically bequeathed to her nieces and nephew. Testatrix had an only sister, who was also an aged negress. To this sister the testatrix left nothing. There was some testimony on behalf of appellant tending to show that the testatrix had become estranged from this sister, which appellant contends was the reason why the testatrix disinherited her. But the appellees, on the other hand, contend that this estrangement was brought about through the influence of appellant over the testatrix, and that even if the estrangement afforded a reason for disinheriting this sister, it did not afford any reason why she should leave practically all of her property to the appellant and disinherit them; that they were on terms of closest intimacy and affection with the testatrix.

There was testimony on behalf of the appellees tending to prove that the appellant was a wealthy man, a merchant and planter. The testatrix, at the time of the making of the will, was an aged negress. Before that time and afterwards she was shown to have been afflicted, and to have had strange aberrations. One witness testified that appellant had great influence over her; that once when he was in the city hospital she came to inquire about him. He had that influence over her all the way along.

Another colored witness, a niece of the testatrix, testified that Morris would come to her house with the testatrix. He would sit down in the front room and sometimes talk to her for an hour or longer. "He had much influence over her; never saw her refuse him anything."

Another witness testified that he visited the testatrix often; that she borrowed money on her place and that the appellant had control of the money. She would go to his house at least once or twice a year, and he was at her house every month or so.

It could serve no useful purpose to set out further in detail the evidence bearing on the issue of undue

influence. The court on this issue permitted the testimony to take a wide range. It suffices to say that there was testimony to warrant the court in submitting to the jury the issue as to whether the appellant exercised undue influence over the testatrix in inducing her to make the will in his behalf.

The court, among other instructions, told the jury "that if Morris had acquired such dominion or influence over the testatrix as to prevent the exercise of her own discretion in the making of her will, then the will would not be valid." He further instructed the jury that undue influence "is any means employed upon or with the testatrix which, under the circumstances and conditions by which she was surrounded, she could not well resist and which controlled her volition and acts and induced her to do what otherwise would not have been done;" that "it was not necessary that the mind of the testatrix should have acted under influence brought to bear at the time the will was made, or then employed, but they may be such as have at a previous time been so fixed and impressed as to retain their controlling influence at the time the will was executed, and have been the procuring cause of the execution of the will."

The court told the jury that "it was not necessary that the testatrix's will be restrained by force or intimidation, but that if her mind acted by force of long training to submission, so that the will of another is adopted for her own, and without reflection, then the will was invalid."

In another instruction, No. 6, the court told the jury "that fraud and undue influence are rarely susceptible of direct proof, and such proof is not required; all that is necessary to establish these issues is that there be affirmative evidence of facts and circumstances from which their existence and exercise may be reasonably inferred."

The court further told the jury that "if the will was executed by the artifice, fraud or imposition of

appellant, and that the testatrix was of such weak mind as to be unable to resist him, that the will was invalid."

There was a general objection to the above instructions on behalf of the appellees. And at the request of the appellant the court gave, among other instructions, the following:

That "undue influence which avoids a will is not the influence that springs from natural affection, but such as results from fear, coercion, or any other cause that deprives the testatrix of her free agency in the disposition of her property;" that "if Morris possessed an influence over the testatrix they should not consider it in determining their verdict unless they found that he exercised this influence over her in procuring her to execute the will in his favor, and that said influence so exerted was the procuring cause of her executing said will."

In *McCulloch* v. *Campbell*, *supra*, we said: "The influence which the law condemns is not the legitimate influence which springs from natural affection, but malign influence which results from fear, coercion, or any other cause which deprives the testator of his free agency in the disposition of his property."

(4) The court, at the instance of the appellant himself, correctly defined what is meant by "undue influence" in invalidating a will; that is, such influence as results "from fear, coercion, or other cause that deprives the testatrix of her free agency in the disposition of her property."

(5) When the instructions are taken as a whole, it is evident that the court used the words "artifice," "fraud" or "imposition," in the instructions given at the instance of appellees as synonymous with "undue influence." If there was undue influence brought about by fear or coercion, such undue influence would also be tantamount to a fraud perpetrated upon the testatrix. If appellant desired to have these words stricken from the instruction he should have specifically requested it. Instead of doing so, he asked an instruction which told the jury that undue influence resulting

from fear or coercion, or any other cause, that deprived the testatrix of her free agency would avoid the will. The asking of an instruction to this effect by the appellant himself was equivalent to waiving the objection as to the submission of the issue of artifice, fraud or imposition. The complaint did not, in specific terms, charge that the will was executed through artifice, fraud or imposition. If the appellant had specifically objected to these words being employed, he might have had the same eliminated, but in the absence of such objection, and in view of the instruction asked by him which virtually submitted the issue of fraud, the appellant is in no attitude to complain because the court included these words.

(6) Instruction No. 6, given at the instance of the appellees, was not aptly phrased, but when carefully analyzed it cannot be said that it was an instruction on the weight of the evidence before the jury. The effect of the instructions, taken as a whole, was to tell the jury that fraud and undue influence could be established by circumstantial evidence, and that it was necessary that there be proof of facts and circumstances justifying an inference of fraud and undue influence before the jury were authorized to find that there was such fraud and undue influence. In other words, the jury were not authorized, under the instruction, to presume fraud and undue influence, without proof of same; but they were authorized to find the fact that there was fraud and undue influence upon circumstantial evidence, provided the facts and circumstances were such as to warrant a reasonable inference of fraud.

(7) In *Clough* v. *Clough*, 10 Colo. App. 443, it is said: "A charge of undue influence is substantially that of fraud, and it can seldom be shown by direct and positive evidence. While it is true that it must be proved and not presumed, yet it can be and most generally is proven by evidence of facts and circumstances which as to themselves may admit of little dispute, but which are calculated to establish it and from which

it may reasonably and naturally be inferred." *Blackman* v. *Edsall*, 17 Colo. Appeals, 429, 435; see also *Saunder's Appeal*, 54 Conn. 108, 116; *Effie Hoffman, Ex.* v. *Harris Hoffman, et al.*, 192 Mass. 416, 419; *In re Shephards' Estate*, 161 Mich. 441, 463; *Lindsey* v. *Stephens*, 229 Mo. 600, 618; 40 Cyc. 1164.

The instructions upon the issue of undue influence, upon the whole, were in accord with the principles announced in the above authorities. See especially *Lindsey* v. *Stephens*, *supra*.

The court, in instruction No. 1, given at the instance of the appellant, told the jury that the burden of proving incapacity and undue influence was upon the appellees, and in instruction No. 5 it told the jury that the testatrix had a right to execute whatever will she may have desired and to make whomsoever she saw fit her beneficiaries. While instructions numbered 6 and 8, on behalf of appellees, are not to be approved as precedents, yet when these are considered in connection with the instruction given at the instance of the appellant, and all the other instructions in the case, it cannot be said that the jury was confused or misled by the instructions. The charge as a whole correctly applied the principles of law to the evidence adduced.

The words "any means employed" in the third instruction given at the request of the appellees should have been met by specific objection. When taken in connection with all the instructions it is manifest that the court meant any means employed that brought the will of the testatrix under the domination of the appellant, causing her to make a will that was not the exercise of her own volition, but was by reason of the undue influence brought to bear upon the testatrix by the appellant. When taken in connection with the other parts of the charge, this language could not have confused or misled the jury.

We find no errors in the rulings of the court in admitting or rejecting testimony. The record upon the whole is free from errors prejudicial to the appellant and the judgment is therefore affirmed.

Chicago, Rock Island & Pacific Railway Company v. Blundell.

Opinion delivered January 22, 1917.

1. Carriers—rules—exhibition of ticket before entering train.—Where the rules of a carrier require a passenger to exhibit his ticket to an employee of the carrier before he is permitted to board the train the conductor, or person in charge of the train, will be held to have notice of the fact that the passenger wishes to debark at the destination noted on his ticket, and knowledge of the employee to whom passengers must exhibit their tickets before entering upon their journey will be imputed to the company.
2. Carriers—destination of passenger—liability of carrier—exhibition of ticket.—A carrier will be liable in damages for carrying a passenger past his destination when the passenger has complied with a regulation of the carrier requiring him to exhibit his ticket to an employee of the carrier before being permitted to board the train.
3. Carriers—carrying passenger past station—damages.—Where defendant carrier negligently carried plaintiff, a female passenger, past her station, requiring her to walk back three and a half to four and a half miles, *held*, under the facts, damages in the sum of $100 were adequate; and that damages in the sum of $25 to another appellee, a man, were proper.

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

STATEMENT BY THE COURT.

Separate suits were instituted by Hartsell Blundell and Rosey Blundell, his wife, against the appellant to recover damages for the alleged negligent failure of appellant's agent to put them off at their destination, and the alleged negligence of appellant's agents in carrying appellees by the destination to which they had purchased tickets. The appellant denied all the allegations of the complaint. The suits were consolidated for trial.

Appellee Hartsell Blundell testified substantially as follows: On the 16th of June, 1915, he purchased tickets for himself and wife from appellant's agent at Leola for passage on appellant's train from that station to Sims. They boarded the appellant's passenger train

at Leola, and changed cars at Haskell to go to Sims, the place of their destination. Sims was a flag station. The train stopped there when it was flagged and when it had passengers who wished to get off there. When Blundell and his wife got on the train after changing cars at Haskell they sat down on the first seat in the front of the coach. When the conductor came in he passed by them and went out at the door. When the train whistled for Sims, Blundell got up and went through the train, but did not see the conductor. When the conductor first came through the train Blundell reached up into his coat to get the tickets, but the conductor went right on by him. Appellees were put off at Butterfield. It is four or five miles from Butterfield to Sims. Blundell and his wife were on a visit to Mr. Wade's, his wife's father. They purchased their tickets to Sims, and it was about a mile and a half from Sims to Mr. Wade's. It is about five miles from Butterfield, where they were put off, back to Mr. Wade's. Blundell said that the walk did him harm. He had to carry two big suit cases. Soon after leaving Haskell the conductor came through the train taking up tickets. Blundell had his tickets in his coat pocket. The tickets were not punched between Haskell and Sims. The conductor kept going right on through. When he got to the door he turned his head towards Blundell, but did not stop. Blundell did not pay any attention to whether the conductor took up tickets from other passengers or not. He thought it was the conductor's business to do that. He knew that the conductor had overlooked him and his wife and had not taken up their tickets. Blundell had the tickets ready for him, but did not think it was his business to run the conductor down to give him the tickets. Blundell did not know whether the train would stop at Sims or not. It most always stopped there. When the train whistled to go through Sims he decided that he had better look up the conductor, and undertook to do so, but by the time he had gone through the coach the train had passed Sims. Butterfield was the next

stop. At Butterfield Blundell told the conductor that he had tickets for Sims, and showed them to him, but did not give them to him. Sometimes they have an auditor on the train to take up the tickets and the conductor has nothing to do with collecting the fares. The conductor sometimes works right around the passengers without taking up the tickets. Blundell did not know whether they had an auditor on the train that day or not. There was nobody at Sims to meet them if they had debarked there. There was a train going back to Sims from Butterfield the same evening at 8:30. Blundell and his wife did not wait for that train, because they did not have any money and the conductor did not say anything about a pass back.

Appellee, Mrs. Rosey Blundell, corroborated substantially the testimony of her husband. She stated that they were in the front of the car, with their backs towards the way the train was going, When the conductor came by she called her husband's attention to him and her husband reached up to get the tickets, but the conductor walked on. The train stopped at Franzway, where two girls got on, when the conductor came through again and she told her husband to give him the tickets, but the conductor went on by. The conductor took up the tickets of the two young ladies that got on at Franzway. There were a good many passengers on the coach and she saw the conductor take up tickets from the other passengers. When the conductor passed witness and her husband he "kinder checked up and looked around." Her husband pulled out the tickets, but the conductor did not take them. Neither she nor her husband said anything to the conductor and he did not say anything to them. The walk that night made her awful sore. She was sick in bed all the next week.

The conductor of appellant testified that he was the conductor on the train when Blundell and his wife were carried by Sims and put off at Butterfield. He had been on that run for a year, and he took up the tickets on that train. The train did not stop at Sims

unless it was flagged, or there were passengers to debark. When his train arrived at Benton four or five people got on the train at that station and he took up their fares before the train arrived at Haskell. When the train arrived at Haskell he had to register there, and he did notice Blundell and his wife get on. When the train started out from Haskell the parties that got on at Benton had scattered through the car and Blundell and his wife had taken their seats next to the front door. When he went through collecting fares he simply overlooked the couple, thinking they belonged to the party that got on at Benton. He collected the tickets out of Haskell and Franzway and then told the porter that they did not have anybody on board for Sims and so did not stop there that night. In going through the car he stopped and looked at Blundell, but mistook him for another party. If Blundell had offered him his ticket he would have taken it and put him off at Sims. When the train reached Butterfield, witness asked Blundell why he had not given him his tickets and Blundell replied, "Because you did not ask for them." Witness told Blundell that he would give him passes back to Sims and he could go back to Sims in an hour, but Blundell refused to take the passes. Witness' duties were to run the train—get orders, take up fares and run the train. When witness had a passenger for a certain station it was his duty to stop the train and let the passenger off. There was no auditor on that train. At a small station witness could check up the number of passengers that got on and off. Passengers are supposed to show their tickets when getting on at ticket stations.

The court, among others, granted the following prayer of the appellees for instruction:

"You are instructed that if you find from the evidence in this case, that the plaintiffs had tickets entitling them to passage on defendant's train from Haskell to Sims station, and that they were required by the defendant's agent or agents to produce and show their tickets at Haskell, before permitting them to get

aboard the train, this would be notice to the agents or servants of the defendant company that the plaintiffs were passengers on said train and that their destination was Sims, and it was the duty of those in charge of said train to stop it at Sims station a sufficient length of time to allow plaintiffs to alight from said train, and if the agents or servants of said train failed to do so, then they were guilty of negligence, and if you find that the plaintiffs were in any way injured by reason of the negligence of the defendant, you will assess in their favor whatever amount the evidence shows they are entitled to."

The court refused appellant's prayer for instruction No. 5, but modified the same and gave it as modified (the modification made by the court being indicated by the words italicized) as follows:

"You are instructed that if you find from the testimony that the conductor in charge of defendant's train did not know that the plaintiffs' destination was Sims, and that in passing through the coach where they were seated, he had overlooked them and by reason thereof had failed to ask them for their tickets, *and if his acts were such as to lead them as reasonably prudent people to believe that he would not call for their tickets and stop the train at Sims and allow them to alight therefrom*, and the plaintiffs had a reasonable opportunity, *after learning that the conductor had overlooked them and not taken up their tickets, and that the train might not stop at Sims*, to call his attention to the fact that he had overlooked them or had not taken up their tickets, and the plaintiffs knew the station of their destination was a flag station and that the train might not stop there unless it was flagged by some one or unless there was some one on the train who had notified the conductor by paying fare or giving up a ticket, or otherwise, that he wanted to get off there, and plaintiffs failed to call the attention of the conductor to the fact that they wanted to get off at Sims, they were guilty of such negligence as will prevent them from

recovering in this case, and your verdict will be for the defendant."

Exceptions were duly saved to the rulings of the court on the instructions. The jury returned a verdict in favor of appellee Rosey Blundell for $200.00, and in favor of Hartsell Blundell in the sum of $25.00. From judgments in favor of the appellees respectively in these sums these appeals were taken.

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

1. The law of this case is laid down in 32 S. E. 873. On the authority of that case, the court erred in refusing defendant's instructions 3 and 5, and in giving for plaintiffs Nos. 1, 2 and 1½.

2. The verdicts are excessive. There is no evidence at all, of any injury, expense or loss of time. 122 Ark. 477; 67 Ark. 123; 101 Ark. 90.

H. B. Means, for appellee.

1. This case is in no respect like 32 S. E. 873. The question whether or not the company was to blame was fairly submitted to the jury and the verdict is final.

2. The damages are not excessive. 103 Ark. 558.

WOOD, J. (after stating the facts). In *Rock Island Ark. & La. Rd. Co.* v. *Stevens*, 84 Ark. 436, we held (quoting syllabus) that "The fact that a passenger purchased a ticket from a station agent entitling her to be carried to a flag station is not notice to the conductor of a train that she desires to debark at that station."

We also held in that case that where a passenger sees that the train is crowded and that the conductor is necessarily detained elsewhere, or where the distance is so short, or there are other indications that the conductor or other person in charge of the train would not obtain notice in time to stop the train, the passenger must give him notice or else he cannot complain if he is carried beyond his destination.

In *Railway* v. *Stevens*, *supra*, we quoted from *Central of Ga. Ry. Co.* v. *Dorsey*, 106 Ga. 826, as fol-

lows: "We think it is the duty of the conductor of a passenger train, when the company has sold tickets to passengers, to go through the train and ascertain the station at which the passengers wish to alight; but we also think that, in a case like the present, there is a corresponding duty upon the part of a passenger, when he sees that the conductor has failed to call for and take up his ticket, and is ignorant of his presence on the train and of his destination, to notify the conductor of his presence and destination, especially when the ride is a short one, and the passenger knows that the train will not stop at his station unless the conductor has notice that there is on board a passenger for that station."

Counsel for plaintiff rely upon this doctrine of the Georgia case, which is but the rule that was approved by us in *Railway Co.* v. *Stevens*, *supra.*

In the case of *St. L. & S. F. Rd. Co.* v. *Dyer*, 115 Ark. 262, 266, we said: "A railroad company has the right to require all persons to purchase tickets before becoming passengers. As a means of enforcing this regulation it has the right to require the exhibition of their ticket before entering the train." See also, *St. L. S. W. Ry. Co.* v. *Branch*, 106 Ark. 269, 272; *S. L. S. W. Ry. Co.* v. *Hammett*, 98 Ark. 418; *St. L. S. W. Ry. Co.* v. *Blythe*, 94 Ark. 153.

(1) In *Rock Island, Ark. & La. Ry. Co.* v. *Stevens*, *supra*, we held that the purchase of a ticket from a station agent entitling a passenger to be carried to a flag station is not notice to the conductor that she had such ticket and wished to disembark at a certain station. But where railway companies require passengers before entering the train to exhibit their tickets to their servants and agents having charge of the particular train upon which passengers intend to embark before entering such train, this is notice to the conductor having charge of the running of the train that the passengers who are required to exhibit their tickets before entering the train have such tickets. Having such notice, it is the duty of the conductor, or

whatever agent the company designates for that purpose, to take up these tickets and to see that the passengers are transported according to their contract. It would be manifestly unfair to the passenger to compel him to exhibit his ticket before entering the train and then permit the company to say in the next breath that it had no notice of such ticket, and that its agent could be excused, under certain circumstances, for a failure to take up the ticket and to carry and deliver the passenger according to the contract of carriage.

(2) Knowledge of the agent to whom passengers must exhibit their tickets before entering upon their journey will be imputed to the company. Where the passenger has complied with the reasonable regulations of the company in regard to purchasing his ticket and exhibiting the same before entering the car the company will be liable in damages for failure of the carrier to transport him and to allow him to debark at his destination. The passenger having exhibited his ticket and thus notified the company that he has a contract of carriage, has done all that he is required to do to establish the relation of passenger and carrier, and it thereafter devolves upon the carrier to perform its contract according to the terms thereof, and a failure to do so is a breach of contract for which the carrier is liable in damages to the passenger thus injured.

Where the passenger is not required to exhibit his ticket at the station where he embarks upon his journey then the carrier has no notice of such ticket until same is exhibited to the conductor or auditor, as the case may be, whose duty it is to lift or check such tickets. In such cases, under certain circumstances, it can readily be seen that the company might not have any notice of the passenger's ticket and of its contractual obligations thereunder until it was too late, in the exercise of ordinary care, to carry out its contract as evidenced by the ticket. For example, one might purchase a ticket to a flag station a short distance

away, the train upon which he embarked might be crowded with passengers and it might be impossible for the officer whose duty it was to check up the tickets, in the exercise of reasonable diligence, to do so before reaching the flag station where the passenger was to debark. In such case it can readily be seen that it would become the duty of the passenger to notify the conductor of the flag station where he wished to debark; otherwise the company, although exercising ordinary care in the premises, would have no notice, and the failure to put the passenger off at his station would be the result of his own negligence. Such indeed were substantially the facts upon which the ruling in *Railway* v. *Stevens* and *Railway* v. *Dorsett*, *supra*, was predicated. But such a rule, as we have already stated, can have no application to a case like the one at bar, where the servants of the carrier in charge of the train have notice, by the exhibition of a ticket before the passenger embarked upon his journey, of the fact that he was a passenger and the station to which he was to be carried. Every requirement of the law is fully met when the passenger has complied with the reasonable regulations of the carrier designed to bring to its notice the presence of the passenger on the train, and of his destination.

It follows that there was no prejudicial error to appellant in the rulings of the court on the instructions. These rulings, in fact, were more favorable to appellant, under the law as above announced, than it was entitled to.

(3) It is contended that the verdicts were excessive, and we are convinced that this is true as to Mrs. Blundell. Appellee, Rosey Blundell, had to walk a distance of from 3½ to 4½ miles further than she would have had to walk if the train had stopped at Sims; and she testified that this walk made her sore, and that she was sick in bed all the next week. According to the testimony abstracted, she does not say that her sickness was caused by the walk. But even conceding that such was the legitimate inference to be

drawn from the testimony, the sum of $100.00 will afford ample compensation for all possible injury that she could have sustained by reason of appellant's breach of contract.

Appellees, so far as the proof shows, were not subjected to any indignities and suffered no mental anguish. The only injury they sustained was the mere physical inconvenience of having to walk a distance of five or six miles, whereas, if they had been put off at their destination they would have had only a distance of a mile and a half to walk.

While it is most difficult to determine the measure of damages in such cases, yet here there are no circumstances of aggravation attending the breach of contract and the jurors in such cases should not indulge in speculations and award imaginary damages but should assess the amount at what they believe under the evidence to be actual compensation for the injuries sustained.

Appellee Hartsell Blundell testified that the walk did him harm, as he had to carry two large suit cases. While it appears to us that a verdict of $25.00 would be quite liberal compensation for his injuries, we do not see our way clear to reduce it below that sum, and the judgment as to him will be affirmed.

In the case of the appellee, Mrs. Rosey Blundell, the judgment will be modified and reduced to the sum of $100.00, and as thus modified affirmed.

WESTERN COAL & MINING COMPANY v. HARRISON.

Opinion delivered January 22, 1917.

MASTER AND SERVANT—INJURY TO SERVANT—PROMISE TO REPAIR.—Plaintiff, an employee, was injured while working in defendant's coal mine. Plaintiff had notified the pit boss of the defective condition of one of the appliances, and the latter had promised to have it repaired. *Held*, plaintiff had a right to rely, for a reasonable length of time, on the promise to repair, and the court properly submitted to the jury the question of whether a reasonable time for making the repairs had expired.

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

T. B. Pryor, for appellant.

1. This is the second appeal in this case. On the second trial there was no change in the evidence. 122 Ark. 125. It is undisputed that the apparatus in use was standard equipment in general use and that more or less coal would fall; that appellee knew this, as he had been injured before. There was no way to prevent it. Appellant assumed the risk and the peremptory instruction for defendant should have been given. No negligence of defendant was shown, nor any defect in machinery. 37 S. E. 683; 94 Mich. 35; 115 S. W. 890; 48 Me. 296; 43 Mich. 41; 32 N. W. 240; 179 U. S. 658; 48 S. E. 508; 25 C. C. A. 247; 47 Minn. 384. The doctrine of *res ipsa loquitur* can not be applied.

2. The testimony is not sufficient to sustain the verdict. Plaintiff had long experience at such work and knew the danger. 96 Ark. 206; 126 Fed. 495.

3. The instructions are conflicting and misleading. Those given for plaintiff are erroneous. 89 Ark. 211. The doctrine of a reasonably safe place to work is not involved. The place of work was *reasonably* safe. The complaint relied on a defect in machinery. The instructions made defendant an insurer of safety.

4. A jury can not guess at the cause of injury. 109 Ark. 215; 76 *Id.* 436.

G. O. Patterson, for appellee.

1. The evidence does not show that the apparatus was standard equipment in general use; but does show that the dumping blocks were too low and that this defect caused the injury. This was submitted to the jury and they found for plaintiff. This and where the coal came from were questions of fact and the court instructed the jury that the burden was on plaintiff to show that the injury was caused by the defect.

2. The authorities cited by appellant do not apply. Here the evidence shows that the negligence of the company was the cause of the injury. There is no

error in the instructions. 4 Labatt on Master & Servant, § 1603; 48 S. E. 508.

3. The master, after notice, promised to repair the blocks and had a reasonable time. 4 Labatt M. & S., § 1353; 81 N. J. L. 712; 43 Iowa 662; 40 Ill. App. 644; 86 Ark. 516.

4. It was defendant's duty to furnish plaintiff a reasonably safe place in which to work, using ordinary care. The court so instructed the jury. There is no reversible error.

HART, J. This is the second appeal in this case. The opinion in the former appeal is in 122 Ark. 125, under the style of *Western Coal & Mining Co.* v. *Harrison.*

Appellant operated a coal mine and appellee was employed by it to load cars of coal on a cage or elevator to be hoisted out of the mine through a shaft. While engaged in putting a car of coal on the cage, a large lump of coal fell down the shaft on top of the car, and one piece flew off and struck appellee. He was severely injured and sued appellant to recover damages for his injury. The court in the opinion on the former appeal, said: "If the apparatus in use was standard equipment in general use in such coal mines, as the evidence tended to show and the instruction told the jury, the injury to the appellee by the falling of coal down the shaft in the unloading of it was but an ordinary risk of his employment which he assumed in working as he did at the bottom of the shaft at the sump, knowing that the coal would fall. He necessarily knew the danger from the falling coal, it being obvious to any one of ordinary intelligence, and the testimony shows that he had been injured a few weeks previous to this injury for which this action was brought, while engaged in his work at the bottom of the shaft."

The judgment was reversed because the court refused to give an instruction requested by appellant based upon substantially this statement of the law. Upon a re-trial of the case, the instruction was given

and the jury again returned a verdict for appellee in the sum of $550. The case is here on appeal.

The appellant was injured in the course of his employment. Therefore the burden was on him to show that his injury was caused by the negligence of appellant. It is earnestly insisted by counsel for appellant that there is no evidence from which the jury might reasonably and properly conclude that there was negligence on the part of appellant. Counsel claims that at most, the verdict of the jury could only rest on conjecture, and that the evidence was therefore not legally sufficient to support it. We can not agree with counsel in this contention.

According to the testimony of appellant, self-dumping cars are in general use in coal mines throughout the United States. It is impossible to prevent coal from falling down the shaft during the operation of such cages. Miners ordinarily load cars above the level of the bed of the car, and the motion and shaking of the cage in hoisting as well as the movement in dumping causes pieces of coal to roll off and fall down the shaft. There is no way to prevent this. If the dumping block is in position so that the cars will dump, the position as to their being 8 or ten inches too low will have no effect. In the ordinary operation of cages, pieces of coal fall off the cars and lodge on the buntons and the motion or vibration of the operation of the cages dislodges them and they fall down. The liability of the cager and of the person working at the bottom to be hit with the falling coal can not be prevented, and is one of the ordinary risks of the work.

This evidence, if undisputed, or if believed by the jury, would absolve appellant from liability. The evidence on the part of appellee, which will now be stated, tended to contradict it.

Kelley Harrison was assistant cager and was engaged in the performance of his duties at the time he was injured. The tipple had burned down about a year before appellee was injured. When the new tipple was erected, and the new self-dumping cages were installed,

it was found that the dumping blocks were 8 or 10 inches too low. This made some of the coal lodge on the edge of the chute. When the cage would dump itself, the coal would hang on the edge and when the cage would swing back, it would knock the coal into the shaft. Much more coal would fall back in that way than when the dumping blocks were properly adjusted. Before the new tipple was erected, it had been only necessary to clean up the sump about once every four days. After the new tipple was erected, so much coal fell down the shaft that it was necessary to clean up the sump two or three times a day. Some coal will fall down the shaft, even if the dumping blocks are properly adjusted. This is caused by the vibration of the cage as it is being hoisted up. In such cases the coal that falls is mostly slack. There are also some small pieces. Large lumps of coal will not lodge or catch on the buntons.

Appellee complained to the pit boss about the condition of the cages about a week before the injury. The pit boss promised that he would see about it, meaning that he would have it repaired. One of the servants of the company heard appellee make this complaint. The foreman admitted that the complaint was made to him about the dumping blocks, a short time before the injury. He told the superintendent that there was some complaint about coal falling down and that the dumping blocks were probably too low. The pit boss worked there before the old tipple was destroyed by fire, and did not notice as much coal falling then as when the new tipple was constructed. He admitted that he might have promised to repair the dumping blocks and that there was more coal falling than was usual at the time appellee was hurt. The shaft was 165 feet deep. When one cage goes up, the other comes down. As the cage going up reaches the dumping place at the top, the cage going down settles on the bottom and the coal that falls at this time must fall from the top of the shaft. When a cage is going up, if the car is overloaded, the coal will fall down the shaft to the bottom, but this will happen before you attempt to

put another car in the cage. The descending car had settled on the bottom and appellee had it about half loaded when he was struck by the piece of coal. He had sent up a car and was putting another car on the east cage when a chunk of coal fell down into the shaft, broke on top of the bonnet and struck him on the right breast. He was knocked senseless and was severely injured. The piece of coal which struck appellee was about the size of a man's fist and it was estimated that the large lump which struck the bonnet and broke into pieces was about the size of a man's head.

It is the contention of counsel for appellant that it does not appear from the testimony whether appellee was struck by a piece of coal that jolted off of the cage as it was being hauled up the shaft or whether the piece of coal fell from the top of the shaft as the result of the dumping blocks being too low. Hence he insists that the verdict was the result of surmise or conjecture. This is true according to the evidence adduced by appellant, but we think the evidence adduced by appellee tended to show negligence on the part of appellant. According to the evidence adduced by appellee the descending car would settle on the bottom of the shaft just as the ascending one would reach the top. The cagers knew that coal was likely to be jolted off of the cage while it was being hoisted to the top, and for that reason stood out of the way until the descending cage reached the bottom. Then they would commence to load a car into that cage because they knew there was no further danger of coal falling from the ascending cage, as it had reached the top. Appellee was not injured until he had commenced to load a car into the cage and the jury was justified in finding that he was not injured by coal falling from an ascending cage. Then, too, the evidence of appellee tended to show that the coal which fell from an ascending cage was mostly slack and the rest small lumps of coal, while the lump of coal which fell and caused the injury to appellee was as large as a man's head. The evidence on the part of appellee tended to show that because the dumping

blocks were too low, the coal would lodge on the edge of the chute, and that the cage, as it was drawn back, would knock this coal down the shaft. For the reason that the injury did not occur until after appellee had begun to load the cage which had reached the bottom of the shaft, the jury was justified in finding the appellee was injured by a lump of coal which had lodged on the edge of the chute and which was knocked down the shaft by the cage as it was drawn back after dumping itself. So there was evidence legally sufficient to warrant the jury in returning a verdict for appellee.

In the case of *A. L. Clark Lumber Co.* v. *Johns*, 98 Ark. 211, the court held that, where a servant, on discovering a defect in the place in which he was employed to work, notified the master to make repairs, which the master promised to do as soon as the mill shut down, and the servant was injured on the following day, an instruction to the effect that the servant had a right to continue at work in reliance upon the master's promise was not so defective in that it failed to limit the right to rely upon such promise to a reasonable time that the defect could be reached by a general objection.

In the instant case the testimony on the part of the appellant tended to show that the promise to repair, if made, was made two weeks prior to the injury, and the court did not err in submitting to the jury the question of whether or not the time for compliance with the promise had expired. The pit boss testified that the promise was made a short time before the injury and another witness for appellee testified that he heard the pit boss make the promise a week before the injury. Appellee had a right to rely for a reasonable length of time on the promise to repair and we do not think under the circumstances that the court erred in submitting to the jury the question of whether or not a reasonable time for making the repairs had expired.

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

ARBAUGH v. WEST.

Opinion delivered January 22, 1917.

1. DOWER—SUIT BY WIDOW—SERVICE.—Where a widow filed a supplemental complaint, asking dower in lands which had been omitted from her original complaint, she in effect files a new suit as to these lands, and she is not entitled to a decree allotting her dower until service of summons is had upon the defendants, the heirs at law.
2. DOWER—SUIT BY WIDOW—DECREE—DESCRIPTION.—Where a widow has brought an action to have dower set aside to her in certain lands, and commissioners are appointed to do the same, the description of the lands in the report of the commissioners and in the prayer and in the decree must be the same, and a variance in the description is material.
3. DOWER—ASSIGNMENT—NEW ACQUISITION.—Where the deceased husband's lands were a new acquisition, and he died leaving no children, under Kirby's Digest, § 2709, the court should decree to the widow as dower, one-third of the husband's real estate in fee simple.
4. DOWER—QUANTITY AND QUALITY.—In determining the proportion of the lands which should be assigned to the widow for her dower, the quantity and quality should both be considered.
5. DOWER—CHOICE BY WIDOW—RIGHTS OF HER HEIRS AND ALIENEES.—When dower is allotted to the widow under Kirby's Digest, § 2709, she may exercise the privilege given her by Kirby's Digest, § 2706, but the privilege being personal to her does not extend to her alienees or to her heirs.

Appeal from Johnson Chancery Court; *Jordan Sellers*, Chancellor; reversed.

STATEMENT BY THE COURT.

This is an action by the widow against the heirs at law for the assignment of dower in certain lands belonging to the estate of her deceased husband. The material facts are as follows:

W. H. West died in Johnson County, Arkansas, on April 10, 1913, owning the lands which are the subject matter of this litigation. The lands involved in this suit were a new acquisition, and not an ancestral estate. The estate of W. H. West, deceased, is insolvent. W. H. West left surviving him the plaintiff, Alta West, as his widow, and Leona Arbaugh and the other defendants as his sole heirs at law. He did not leave any children, but only left collateral heirs. The

complaint was filed on July 22, 1915, and the return of the sheriff shows that service of summons was had upon the defendants on the 4th day of August, 1915. On the 18th day of August, 1915, the court rendered a decree in favor of the plaintiff for dower in the lands described in the complaint and the facts above stated are recited in the decree.

Commissioners were appointed by the court, and the decree directs them to view the lands and allot dower therein to the plaintiff, Alta West. The commissioners are directed to lay off for dower one-third in value thereof on any part of the lands described in the decree, if the same can be done without essential injury to the estate. The decree also recites that the defendants were served with summons, but that neither of them appeared in court or filed any plea, answer or demurrer.

On January 19, 1916, the plaintiff filed what she calls a supplemental complaint. In it she stated that since the decree was entered of record, that she had discovered certain errors in the description of the lands belonging to the estate, which was contained in the original complaint and in the decree ordering dower to be allotted to her. These mistakes are specifically pointed out in the supplemental complaint. The supplemental complaint also contains an allegation that certain lands belonging to the estate were omitted from the first complaint and the decree based on it. These omitted lands are specifically described in the supplemental complaint and plaintiff prays that dower be allotted to her in these lands. No summons was issued and served upon the defendants on the supplemental complaint.

On the 19th day of January, 1916, also appeared the commissioners and filed their report setting forth in detail their action in the premises and describing the lands which they had allotted to the plaintiff as dower. They state that the selection they made for the widow was one-third of the value of the lands belonging to the estate and that the allotment does no

injury to the estate. On the same day a decree was entered approving and confirming the report of the commissioners.

It was further decreed that the plaintiff recover and own, in fee simple, the lands set off and assigned to her as dower, and the lands are described by metes and bounds in the decree.

The record shows that the defendants did not appear in any of these proceedings. It also shows that the report of the commissioners does not include all the lands described in the first complaint and also includes land not described in either the first or supplemental complaints. The decree of confirmation contains lands not mentioned in the report of the commissioners.

The defendants have appealed.

Winchester & Martin, for appellants.

1. The decree by default was entered prematurely. Acts 1915, p. 1081.

2. The directions to the commissioners to view and lay off as dower one-third in *value* of the lands was error. There is no such provision in our law; the statute says, "one-third part of all the lands," etc. Kirby's Digest, § § 2687-9; 116 Ark. 400; Kirby's Digest, § § 2726, 5780.

3. The decree was not entered by consent and there was no notice nor service on defendants. 36 Ark. 217, 221. If the supplemental complaint be treated as an amendment, it sets up an entirely distinct cause of action and summons was necessary. 97 Ark. 19.

4. Dower can not be assigned in lands not described in the petition. 55 Ark. 562. On direct attack no presumption of notice can be indulged. 83 Ark. 367.

5. The decree was not final. Acts 1915, 194; 39 Ark. 82; 52 *Id.* 224; 83 *Id.* 186; 88 *Id.* 590; 92 *Id.* 607. No appeal would lie.

6. The report of the commissioners does not include all the lands. This leaves the title to much of the lands in confusion and gives the widow more than she is entitled to under the law. Appellee usurped

the functions of the commissioners and *selected* her own dower.

W. E. Atkinson, for appellee.

1. The decree was not premature. Interlocutory decrees are provisional and re-examinable. 17 Wall. 530; 10 Ark. 333; 6 How. 206-9. If the first decree was not interlocutory, the appeal was too late—more than twelve months thereafter. Rendering judgment before day fixed is clerical misprision merely. Kirby's Digest § § 4429-31.

2. No other basis than "value" can be had. Certainly one-third *in quantity* can not be considered. 14 Cyc. 998, par. 3.

3. The widow had the right to *select*. Kirby's Digest, § 2706; 58 Ark. 301.

4. The supplemental complaint was not a new suit nor cause of action. No additional service was necessary. Defendants were in court.

5. All the lands were included in the complaint and report; there was merely an error in description. But this was appellee's loss. Value is the only basis. 40 Ark. 74.

6. Appellee was entitled to dower in fee simple—there being no children. Kirby's Digest, § 2709. The defendants are not prejudiced. The estate was insolvent and they are not interested nor prejudiced. 26 Ark. 493; 92 *Id.* 534; Kirby's Digest, § 2709.

HART, J., (after stating the facts). Section 2717 of Kirby's Digest provides that 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 is practicable after the death of the husband of such widow.

In *Jameson* v. *Davis*, 124 Ark. 399, the court held that the heirs of deceased are necessary parties to a suit to have dower set aside to the widow. In that case the court also held that a widow takes a half-interest in fee in the lands of her deceased husband, where he died without children, but she takes such es-

tate by way of dower, and not inheritance; for that reason it held that the probate court had jurisdiction to allot her dower by setting apart to the widow a one-half interest in the lands of her deceased husband. The jurisdiction of chancery over the claim of dower has been definitely established in this State. In the present case the heirs at law failed to assign dower to the widow and she instituted this action in the chancery court to have dower allotted to her.

The return of the sheriff shows service of summons on the defendants on the 4th day of August, 1915. A decree allotting dower to the widow was entered of record on August 18, 1915. This decree was prematurely entered as will be readily seen by reading our practice act which became effective from and after June 1, 1915. See Acts of 1915, p. 1081. The defendants did not enter their appearance to the action.

(1) On the 19th day of January, 1916, the plaintiff filed what she called a supplemental complaint, and in it asks that dower be allotted to her in certain lands which were omitted from her first complaint. The report of the commissioners was also filed on the same day. The filing of the supplemental complaint asking for dower in lands which had been omitted from the original complaint was in effect the institution of a new action as to these lands and the plaintiff was not entitled to a decree allotting her dower until service of summons was had upon the defendants. It was the duty of the plaintiff to describe the premises with sufficient definiteness that the defendants might know to what lands her demand for dower referred. *Ford* v. *Erskine*, 45 Me. 484; *Atwood* v. *Atwood*, 22 Pick. (Mass.) 283. See, also, *Ferguson* v. *Carr*, 85 Ark. 246.

(2) The record also shows there was a variance in the description of the land in the report of the commissioners, and that of the several tracts described in the two complaints and in the decree. This variance was material as the description in the report should be the same as that in the complaint and in the decree.

The record shows that the court ordered the commissioners to lay off for dower one-third in value of any part of the lands belonging to the estate. This was error.

(3-4) Under section 2709 of Kirby's Digest, as applied to the facts of this case, the court should have decreed that the plaintiff should be endowed with one-third of the real estate in fee simple belonging to the estate. At common law a widow was entitled to have dower assigned to her out of each separate tract of land belonging to her husband's estate. Scribner on Dower (2 ed.), vol. 2, page 587; 14 Cyc. pages 1001 and 1002; 4 Kent Comm., p. 63; *Scott* v. *Scott*, 1 Am. Dec. 625; *Schnebly* v. *Schnebly*, 26 Ill. 116. In determining the proportion of the lands which should be assigned to the widow for her dower, the quantity and quality should both be considered. 14 Cyc. 998.

In the case of *Pike* v. *Underhill*, 24 Ark. 124, it was held that where it would be detrimental to the interests of the parties to assign the widow her dower specifically in certain of her husband's lands, the court will direct them to be sold. The trend of all modern decisions in equity is to permit dower to be assigned in one parcel rather than out of each separate tract where it is for the best interest of all concerned.

It is contended on the one hand that the common law rule that dower must be specifically assigned out of each parcel or tract of land wherever it may be situated is abrogated by section 2706 of Kirby's Digest, which, in effect, provides that the commissioners shall at the request of the widow, lay off dower on any part of the lands of the deceased, whether the same shall include the usual dwelling of the husband and family or not, provided it can be done without essential injury to the estate. In support of their contention they cite the case of *Horton* v. *Hilliard*, 58 Ark. 298, where the court said that the widow was deprived of the benefit of this statute by the action of the commissioners in proceeding without notifying her and giving her the privilege of selecting her dower. On the other hand, it

is contended that the privilege given the widow by section 2706 does not apply when the widow takes dower, as in this case, under the provisions of section 2709 of Kirby's Digest, because the latter section impliedly repeals the former.

Dower at the common law exists where a man seized of an estate of inheritance, dies in the lifetime of his wife, in which case she is entitled to be endowed, during her natural life, of one-third part of all his lands and tenements, whereof he was seized at any time during the coverture, and which any issue she might have had could by possibility have inherited. *Hill's Admrs.* v. *Mitchell et al.*, 5 Ark. 608. Our Legislature, in the beginning, enlarged the common law definition of dower and made it embrace shares and personal estate, and gave the widow a life estate in one-half of her husband's lands in case of no issue. By the act of March 24, 1891, section 2709 of Kirby's Digest, in case of no issue, where the estate is a new acquisition, the widow is entitled to one-half as against collateral heirs and one-third as against creditors. This section of the statute came up for construction in *Barton* v. *Wilson*, 116 Ark. 400. It was contended that tenancy in dower no longer existed in this State under it, and that the widow took as heir. The court held that the statute did not abolish dower and create a new right in the widow as a part of our intestate laws, but that the surviving wife still derives her right by virtue of her marriage, and that the statute merely enlarges her common law right of dower.

It is true that in *Barton* v. *Wilson*, 116 Ark. 400, the court said that the dower interest of a widow under Kirby's Digest, section 2709, vests in her immediately upon her husband's death, whether the same is ever assigned to her or not, and upon her death will descend to her heirs, whether lineal or collateral; but we do not think the effect of this decision is to hold that the widow takes her estate in severalty as soon as her husband dies, and that on this account her dower interest is to be governed by the usual rules relative to the partition

of estates between tenants in common. Such a course of reasoning would lead to the conclusion that the widow takes as heir under the statute, and not as widow. The purpose of the statute was to enlarge the widow's dower by the substitution of a fee simple estate for an estate for life. At the common law there was no dower in personal estate, but by statute the widow is entitled as part of her dower absolutely to one-third part of the personal estate whereof the husband died seized or possessed. Kirby's Digest, section 2708. His estate becomes vested in her immediately on her husband's death, but it does not vest in severalty until it is assigned to her.

But it is said that the privilege granted by section 2706 does not apply when the widow takes dower under section 2709 for the reason that she can dispose of her dower interest before it is assigned and descends to her heirs if she dies before it is assigned. In such case, the privilege would not go to her grantee or heirs, because it is a privilege. The widow may assign or transfer her dower in the personal estate and it descends to her heirs in case of her death before assignment, but, as already stated, it does not become vested in severalty until it is assigned. For this reason, the administrator is entitled to the possession of the personal property until dower is assigned. Where a widow takes a life estate as dower, it has been held that a conveyance by her of her dower in land before it has been assigned to her will be upheld in a court of equity, and her dower interest may be recovered by her alienee, *Weaver* v. *Rush*, 62 Ark. 51, but he would not be entitled to exercise the privilege given the widow by section 2706. The reason is that the privilege is so far personal to the widow that it can not be transferred to another and does not descend to her heirs. Therefore, we are of the opinion that the privilege granted to the widow by section 2706 extends to the provisions of section 2709, and is not inconsistent therewith. This view is borne out by the decision in *Jameson* v. *Davis*, 124 Ark. 399. It is true the question for decision there was as to

whether or not the probate court had jurisdiction to allot dower to the widow by setting apart to her a one-half interest in the lands of her husband under section 2709 of Kirby's Digest, but in reaching the conclusion that the probate court had jurisdiction, the court, as a part of its reasoning said that 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.

It follows that when dower is allotted to the widow under section 2709, she may exercise the privilege given her by section 2706, but the privilege being personal to her does not extend to her alienees or to her heirs. The court, however, in making an order for the allotment of dower, should not direct the commissioners to consider alone the cash or intrinsic value of the land. Quantity and quality as well as intrinsic value are to be considered. The statute in question merely changes the common law rule as to the allotment of dower, and allows her to choose that part of the land on which her dower is to be laid off when that can be done without essential injury to the estate.

For the errors indicated in the opinion, the decree will be reversed and the cause remanded for further proceedings in accordance with law, and not inconsistent with this opinion.

LEWIS v. ARNN.

Opinion delivered January 22, 1917.

ACCORD AND SATISFACTION—ACCORD WITHOUT SATISFACTION.—An accord without satisfaction does not bar the original cause of action.

Appeal from Sharp Circuit Court, Southern District; *J. B. Baker*, Judge; reversed.

S. M. Bone and *McCaleb, Reeder & McCaleb*, for appellant.

1. The court erred in giving instruction No. 2. There was no evidence to support it. An accord with-

out satisfaction is not a bar. 78 Ark. 304; 88 *Id.* 473; 115 *Id.* 339.

Bledsoe & Ashley, for appellees.

1. Instruction No. 2 was not erroneous. There was sufficient evidence on which to submit to the jury the question of whether or not there had been a settlement and an accord and satisfaction. 1 Corpus Juris. 567; 2 Ark. 226; 50 Oregon, 559; 4 J. J. Marsh (Ky.) 449; 110 N. Y. S. 391; 64 S. W. 746; 209 Pa. 368; 122 Ala. 269; 56 Me. 26; 7 Md. 259.

SMITH, J. Appellant was the plaintiff below and sued to recover judgment for the value of two cows which appellees had bought from one Conyers. After purchasing the cows appellees shipped them to St. Louis, where they were sold.

Upon the trial in the court below it was insisted, first, that the cattle belonged to Conyers and that he had the right to sell them. It was also insisted that appellant and Conyers had adjusted their differences. Conyers was arrested for the larceny of the cattle, but that case was never tried. Conyers testified that all differences between himself and appellant were adjusted. That he made an affidavit that he would give appellant notes for the agreed price of the cattle, but he admits that the notes were never given to nor accepted by appellant. Appellant admits that he agreed to take three notes, of $100.00 each, payable one each year, in satisfaction of his demand, and that Conyers agreed to execute notes therefor, but he testified the notes were never executed.

Over appellant's objection the court charged the jury as follows:

"No. 2. You are instructed that if you believe from the evidence in this case that the plaintiff, J. J. Lewis, had a settlement with Mordy Conyers after the cattle in controversy were sold to the defendants, in which it was agreed by and between the said Lewis and Conyers that Conyers was to pay, or execute notes to the said Lewis, the sum of three hundred dollars in

consideration of full settlement of all claims or demands held by plaintiff against him (Conyers) to that date, then your verdict should be for the defendant."

This appeal questions only the correctness of this instruction, and we think error was committed in giving it. The agreement to accept Conyers' notes was an accord; but there was no satisfaction, as the notes were never executed. An accord without satisfaction does not bar the original cause of action. *St. L. S. W. Ry. Co.* v. *Mitchell*, 115 Ark. 339, and cases there cited. *West* v. *Carolina Life Ins. Co.*, 31 Ark. 476.

For the error indicated the judgment is reversed and the cause remanded.

SCOGGIN *v.* CITY OF MORRILTON.

Opinion delivered January 22, 1917.

LIQUOR—ILLEGAL SALE—SUFFICIENCY OF THE EVIDENCE.—The evidence held sufficient to warrant a conviction for the crime of selling whiskey illegally.

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; affirmed.

J. Allen Eades, for appellant.

1. This is the second appeal in this case. 124 Ark. 585. Our contention again is that the evidence is not sufficient to sustain the verdict. The law also was not properly declared. 20 Ark. 454; 7 *Id.* 435; 65 *Id.* 279; 29 Cyc. 832; 56 N. E. 292; 47 Ark. 567; 94 *Id.* 568; 118 *Id.* 352; 218 U. S. 245; 134 Pac. 77. The ordinance is void, being inconsistent with the law, Kirby's Digest, §§ 5093-4.

Edward Gordon, for appellee.

1. No exceptions were saved to the instructions. 104 Ark. 255; 91 *Id.* 43; 89 *Id.* 24; 78 *Id.* 490.

2. The evidence is sufficient to sustain the verdict. 103 Ark. 4; 104 *Id.* 162; 100 *Id.* 330; 103 *Id.* 260; 92 *Id.* 120.

SMITH, J. This is the second appeal of this case, a former conviction having been reversed by us because of the insufficiency of the evidence to sustain the verdict of the jury. *Scoggin* v. *City of Morrilton,* 124 Ark. 585. The opinion in that case sets out the evidence which we then held insufficient to sustain the conviction. Upon the remand of the cause the same evidence was offered at the second trial, but, in addition, the city offered the testimony of one Tarry Webb. This witness testified that he loaned one Gene West fifty cents with which to buy a pint of whisky from appellant, and that West bought the whisky from appellant in his presence, and that he and West drank the whisky.

It is conceded that this testimony, if true, is legally sufficient to support the conviction; but it is earnestly insisted that the circumstances attending its introduction are such that the jury should not have credited it and that it should be disregarded by us, and that if this is done nothing remains except the testimony which we have already held insufficient. Various circumstances are called to our attention which tend to discredit the testimony of this witness and it is said that the witness was induced so to testify by the marshal of the city of Morrilton under the expectation, if not under the agreement, that such testimony, when so given, would secure to the witness immunity from prosecution upon a similar charge pending against him. It is denied, however, that there was any such agreement on the part of the marshal or expectation on the part of the witness.

These are all questions of fact which address themselves peculiarly to the consideration of the jury. The witness testified in the presence of the jurors and they heard and have considered the evidence which tended to impeach him. There is no question about the competency of this testimony, and as it is legally sufficient to sustain the verdict we must affirm the judgment of the court pronounced upon the verdict of the jury finding appellant guilty of the offense charged. It is so ordered.

CARSWELL v. HAMMOCK.

Opinion delivered January 22, 1917.

1. CERTIORARI—REVIEW OF ACTION OF CITY COUNCIL REMOVING IMPROVEMENT DISTRICT COMMISSIONERS.—The action of a city council in ordering the removal of certain commissioners of certain improvement districts is subject to review on certiorari in the circuit court.
2. MUNICIPAL CORPORATIONS—REMOVAL OF COMMISSIONERS OF BOARDS OF IMPROVEMENT DISTRICTS—"CAUSE."—Commissioners of boards of improvement districts may be removed by a city council for cause; *held*, "cause" or "sufficient cause" means "legal cause," and not any cause which the council may think sufficient; the cause must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.
3. CERTIORARI—REMOVAL OF COMMISSIONERS OF BOARD OF IMPROVEMENT.—The question to be determined, when the action of a city council in removing certain commissioners of a board of improvement is under review on certiorari, is whether or not the council acted arbitrarily, and without legally sufficient evidence to support its action.
4. IMPROVEMENT DISTRICTS—REMOVAL OF COMMISSIONERS—SUFFICIENT EVIDENCE.—Certain charges were made against the commissioners of the boards of certain improvement districts. *Held*, the charges were sufficient to warrant the city council in removing the commissioners from office, and that the evidence before the council furnished a substantial basis for its action, and that its action was based upon legal cause.

Appeal from Cleburne Circuit Court; *J. I. Worthington*, Judge; reversed.

M. E. Vinson, for appellants.

1. The council had authority to remove the commissioners. Act No. 81, March 23, 1909. A hearing was had and cause shown. 39 Ark. 211; 29 Cyc. 1371; 136 Ga. 376; Am. Ann. Cases, 1912 C, 372; 71 Ark. 4; 94 Ark. 49; Kirby's Digest, §§ 5670, 5667.

2. The charges were sufficient. 39 Ark. 211; 29 Cyc. 1410 and note 31; 113 Mo. 202; 21 Ga. 280; 55 Ark. 148; Throop Publ. Officers, §§ 304, 354, 394-6; Kirby's Digest, §§ 6636, etc.; 29 Cyc. 1410; 9 Enc. of Ev. 193-6.

3. The motion to quash the writ should have been sustained. Certiorari did not lie. 73 Ark. 606; 18 *Id.* 382; 35 *Id.* 180.

W. L. Thompson and *Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellees.

1. Certiorari does not lie to review the judicial action of the council in the removal of officers. 62 Ark. 106; 109 *Id.* 101. Cause must be shown. Act 81, Acts 1909.

2. The charges must be sustained by legal evidence. 23 Am. & E. Enc. Law, 450; 23 N. E. 1061; 37 *Id.* 117; 59 N. J. L. 412; 28 Atl. 311; 48 *Id.* 767; 68 Pac. 507; 28 N. Y. App. Div. 73; 35 *Id.* 430; 51 *Id.* 173; 57 *Id.* 281; 89 *Id.* 296; 92 *Id.* 243; 53 Minn. 238; 55 N. W. 118.

3. Mere mistakes of judgment will not justify the dismissal of an officer. 43 Kans. 330; 23 Pac. 479; 7 Idaho 581; 65 Pac. 434; 80 Mich. 287; 45 N. W. 78; 64 Oh. St. 532; 60 N. E. 627; 16 So. 655; 96 N. Y. 672. Not even a technical violation of the law is shown. 55 Ark. 148 and cases *supra*. The charges are trifling and frivolous—no cause of removal was shown.

SMITH, J. Appellees are the commissioners of Waterworks Improvement District No. 1, and of Sewer Improvement District No. 1, of the Incorporated Town of Heber Springs, and were engaged in the performance of their duties as such when, on January 5, 1916, resident property owners within such districts filed with the common council of said town sworn charges in writing against them, wherein it was prayed that said charges be investigated and, if found true, that the said commissioners be removed from office. Due notice of these charges was given, and the hearing thereof was appointed for January 18, 1916. No action was taken at that date and the council adjourned the hearing until January 19th, when a further adjournment was taken to January 21st. It is said these adjournments were taken in order that the commissioners might make any explanation they desired and to have time to right the alleged wrongs complained of. At the meeting on January 21st these charges were formally presented in writing, and may be summarized

as follows: That the commissioners let the contract to an unknown engineer privately and refused to permit other engineers to submit preliminary plans and specifications for the proposed improvements, and that the plans of this engineer were wholly unsuited to the purpose for which they were designed. That these plans and specifications were approved without having been submitted to either the Actuarial Bureau or to the State Board of Health, but after said plans had been paid for and the contracts for the construction of the improvements had been let, they were then submitted to said bureau and board and disapproved by each of them. That other changes in the plans which had been approved by the council were made by the commissioners to the material injury of the taxpayers. That the contract for the construction of the improvements was let privately and at an excessive and exorbitant figure, and bonds were not exacted of the contractors as required by law. That a contract was made with James Gould, to whom the bonds were sold, by which Gould reserved the right to name the depositary for the proceeds of the bonds, and reserved in his own hands $10,000.00 of the proceeds thereof with the agreement that this sum should not be used by the districts until after all other funds had been exhausted, and that the contract for the sale of the bonds to Gould was contingent and conditional upon the letting of the contract for the construction of the improvements to a contractor satisfactory to him, and that pursuant to this agreement an improvident contract was let; nor was any proper bond required for the performance of this contract.

The council had before it all the records and papers of the districts and heard the charges upon the affidavits of the complaining property owners. These affidavits gave substantial support to all the charges. It was shown that affidavits were presented in order that the proof might be in writing, but it was also shown that affiants were present at the meeting and offered then to be sworn and to be cross-examined by the commis-

sioners, but this was not done. After the hearing of these charges the council, by a unanimous vote, ordered the removal of the commissioners.

Thereafter this proceeding by certiorari was begun to review the action of the council and to quash the order of removal, and upon the hearing in the court below that action was taken and the order of the council quashed, and the commissioners were restored to their offices, and this appeal has been duly prosecuted to reverse that action.

(1) It is first insisted by respondents that certiorari will not lie to review their action in ordering the removal of the commissioners. But we do not agree with them in this contention. In making the order of removal, respondents were acting in a quasi-judicial capacity, and their action was, therefore, subject to review on certiorari. *Pine Bluff Water & Light Co.* v. *City of Pine Bluff*, 62 Ark. 196; *State ex rel. Attorney General* v. *Railroad Commission of Arkansas*, 109 Ark. 101.

(2) It is admitted that the council has authority under Act. No. 81 of the Acts of 1909, page 224, to remove the commissioners of boards of improvement districts; but only for cause, and after a hearing, and upon due notice.

As defining the right of removal, appellees cite the very able opinion of Judge Mitchell in the case of *State ex rel. Hart et al.* v. *Common Council of the City of Duluth et al.*, 53 Minn. 238, 55 N. W. 118. This has become a leading case on this subject, and, in discussing the right of removal, it was there held that, where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature and may be reviewed on certiorari. And in a discussion of the cause which is sufficient to justify removal, it was there said:

" 'Cause,' or 'sufficient cause,' means 'legal cause,' and not any cause which the council may think sufficient. The cause must be one which specially relates

to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public."

And in the discussion of the practice in such cases it was there said that the appellate court will inspect the record to see whether the body ordering the removal of the officer had jurisdiction, and kept within this jurisdiction, and whether the charges preferred were sufficient in law; but that the court would examine the evidence, not for the purpose of weighing it, but only to ascertain whether it furnished any legal and sufficient basis for the removal.

We had occasion in the recent case of *Hall* v. *Bledsoe*, 126 Ark. 1, to consider the law applicable to the issues of this case. We there said:

"But it does not follow that the court, on hearing the writ, proceeds *de novo* and tries the case as if it had never been heard in the inferior court. This is true, because as we have already seen, the office of the writ, which has not been enlarged by statute, is merely to review for errors of law, one of which may be the legal insufficiency of the evidence, and for the purpose of testing out that question the circuit court is, by the statute, empowered to hear evidence *de hors* the record in order to ascertain what evidence was heard by the inferior tribunal, and to determine whether or not the evidence was legally sufficient to sustain the judgment of that tribunal. That question is one of law, which is subject to review like all other errors of law. *Catlett* v. *Railway Co.*, 57 Ark. 461."

(3) In this last cited case we also said that the real question to be determined by the reviewing court is whether or not the board or council whose action is under review acted arbitrarily and without legally sufficient evidence to support its action, "since we find the law to be that the court cannot, in this proceeding, review merely for errors of judgment upon legally sufficient evidence, we proceed to an analysis of the testimony for the purpose of determining whether or not

there was evidence of a substantial nature which justified the action of the board, or whether the order of removal was arbitrarily done and without any justification in fact."

(4) The court below declined to make a declaration of law that the charges preferred were legally sufficient to warrant the council's action, but held that said charges were insufficient. The sufficiency of the charges to warrant the action of the council being a question of law, we hold said charges to be legally sufficient to support that action.

As was said by Judge Mitchell in the Minnesota case, *supra*, and in our own opinion in the case of *Hall* v. *Bledsoe*, we will examine the evidence, not for the purpose of weighing it, but for the purpose of ascertaining whether it furnished any legal and substantial basis for the removal of the officers.

It remains, therefore, only to determine whether the evidence furnished the council any legal and substantial basis for its action in removing the respondents. This evidence was substantially to the following effect: That the commissioners refused to permit other engineers to submit preliminary plans or to make bids for the supervision of the work, but employed an engineer who was unknown to any of the commissioners, and that this engineer prepared plans which were insufficient and unsuitable. That the council employed an engineer to advise with the commissioners, but they refused to consult with him and denied him the privilege of examining the preliminary plans. That the commissioners were urged to submit their preliminary plans to the Actuarial Bureau and to the State Board of Health before letting the contract for the construction of the improvements, but refused so to do. That after letting the contract and after the contractors had commenced shipping material to begin the work, the plans were so submitted, and were disapproved by both the Actuarial Bureau and the State Board of Health, and material changes were then required in the plans to conform to the recommendations of these boards. That one of

the commissioners had stated to the council that more than a mile of each system had been eliminated from the plans without his knowledge or consent. That the commissioners refused to receive competitive bids for the construction of the improvements, although there were contractors who were desirous of bidding on the work. But the work was let privately at what the council regarded as an excessive and exorbitant price. That after the contracts were so let the commissioners failed and refused to require a bond to be given as provided by Sections 5719 and 6366 of Kirby's Digest. The bond approved by the commissioners was signed by the "Inland Construction Company" (the contractor) by H. M. Johnson, its president, and F. P. Johnson, by H. M. Johnson, his attorney-in-fact. The body of the bond shows that H. M. Johnson is a resident of Chandler, Oklahoma, and F. P. Johnson is a resident of Oklahoma City, Oklahoma. It does not appear whether the Inland Construction Company is a corporation, or a co-partnership, but it does appear that its situs is Chandler, Oklahoma, and its sureties are nonresidents of the State, and they were not required to qualify as to their solvency. That the commissioners issued bonds in the sum of $90,000.00 and permitted the bond buyer to designate the depositary for the proceeds of the sale thereof, and that two banks were designated by the bond buyer for that purpose, one of which was without the State, and that no bond was required of either of these depositaries. In addition, it was agreed that the bond buyer should reserve in his own hands $10,000.00, which should not be used by the commissioners for any purpose until all other funds had been exhausted. That the proposition for the purchase of the bonds was conditioned upon the fact that the contract for the construction of the improvements should be let to a contractor satisfactory to the bond buyer. That this proposition was dated October 25, 1915, and was accepted and acted upon on October 26th, and that the bid of the successful contractor was received that night, and the contract was let on the following day.

The home of the contractor is that of the engineer. At that time the plans had not been submitted to either the Actuarial Bureau or the State Board of Health and no opportunity was offered to other contractors to bid on the work.

The commissioners testified, in extenuation and justification of their action, that it was not customary to employ engineers upon competitive bidding and that a reputable engineer could not be so employed and that they employed an engineer of good reputation. That they were not required by the law to submit their plans to either the Actuarial Bureau or the State Board of Health. That they had authority to let the contract privately and did so to prevent a combination on the part of the contractors to compel a higher price for the work. That they exercised their best judgment in the selection of depositaries and that the ones so selected were, and are, entirely solvent. That they regarded the provision that the contractor be satisfactory to the bond buyer a salutary one, as the purchaser of the bonds is vitally interested in the character and responsibility of the contractor, and this interest inures to the benefit of the districts. That the changes made in the plans were made to meet the suggestions of the Actuarial Bureau and the State Board of Health, and that it is inconsistent in the council to demand that this action be taken and then to complain that the advice of that bureau and board was followed. That they regarded it as proper that a contracting company residing in the same town with the engineer be selected, as the engineer was personally acquainted with that company and knew its ability to perform its contracts, and that there was no evidence that the engineer was connected in any way with the company. That although the commissioners made a mistake in taking from the contractors a bond signed by non-resident sureties, they had acted in good faith in so doing under the belief that solvent non-resident bondsmen would suffice. They admit that in the final plans a line of sewers and water mains which appeared on the first plans was omitted, but that this

was a mistake of the engineer, and as soon as his attention was called to the mistake he remedied it, and that they should not be removed for a mistake on the part of the engineer for which they were in no way responsible.

It will be borne in mind that we are not passing upon the sufficiency of this evidence *de novo*. Our province is only to see whether it furnished a substantial basis for the action of the council. Nor are we required to say whether the proof upon any one of these charges furnished this basis. The council had the right to consider the proof as a whole, to decide upon its sufficiency as a whole and was not required to vote upon each separate charge without reference to the proof upon the other charges. Viewing this evidence in this manner, we are constrained to hold that the action of the council was authorized under the law. We do not decide that these plans should have been submitted to either the Actuarial Bureau or the State Board of Health. Of necessity, the Actuarial Bureau, which fixes the insurance rates upon property in this State, and the Board of Health both have large experience in such matters. One is interested in the prevention of fires, and the other in the suppression of disease, and these are two of the prime objects of the improvement districts themselves. And if these plans are to be so submitted, the wisdom of submitting them for suggestion before letting the contract, rather than afterwards, is obvious. The board was under no legal obligation to submit their plans for the examination of the engineer employed by the council, but no reason is assigned for their refusal so to do. The council might have concluded that the error in the plans which was later discovered might have been avoided had this been done.

The commissioners had the authority to let the contracts privately, but the council may have concluded that it was unwise and improvident to have done so. Certainly, the work should have been let at the lowest possible price, and it is contended that competent contractors would have contracted for the

construction of these improvements at a lower price had that opportunity been afforded.

The council might have concluded that there was not an entire identity of interest between the bond buyer and the districts and that although no law was violated as the result of the conditions imposed by the bond buyer, yet such restrictions tended to suppress competition and may have been responsible for what the council regarded as an exorbitant price for the contract.

There was a positive failure to observe the mandate of the statute in the matter of the bond, and while the explanation of the commissioners might be accepted as exculpating them from ulterior motives, yet such conduct, in connection with all the other evidence in the case, tended to show that inefficiency and gross negligence in office which constitutes the legal cause, which warrants and supports the action of the council in removing the commissioners.

It follows that there was sufficient evidence to justify the action of the council and that the circuit court erred in quashing its order. The judgment is therefore, reversed and the writ of certiorari dismissed.

WOOD and HART, JJ., dissent.

BEENE v. GREEN.

Opinion delivered January 22, 1917.

1. TIMBER—RESERVATION OF TIMBER IN DEED—TIME FOR REMOVAL.—Appellee deeded certain land reserving certain timber thereon. *Held*, he had only a reasonable time in which to cut and remove the same, and when he failed to do so for a period of fifteen years, it is the duty of the court to declare as a matter of law, that a reasonable time had elapsed.
2. FORFEITURES—WAIVER.—A forfeiture may be waived by conduct; but the party asserting the waiver must show that he relied upon it; or that he was misled to his injury; or that he changed his position to his damage; or that he paid a consideration for the waiver.
3. TIMBER—DAMAGES FOR CUTTING AND REMOVING.—Where timber is wrongfully cut and removed, but under a *bona fide* belief of ownership, the measure of damages is the stumpage value of the timber cut.

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

Stevens & Stevens, for appellant.

1. There was a forfeiture on the part of Green to his right to cut the timber within a reasonable time after the date of reservation. 77 Ark. 116; 111 *Id.* 253; 69 S. W. 320; 91 *Id.* 53; 46 S. E. 26; 43 S. W. 733; 83 Am. St. 661; 55 L. R. A. 513.

2. There was no waiver of the forfeiture by Beene or any one else who held title. 69 L. R. A. 833; 43 C. C. A. 278; 48 Ark. 445; 72 *Id.* 529; 40 Cyc. 269; 13 Enc. of Ev. 1020; 40 Cyc. 261-2.

3. There is error in amending the first instruction asked by plaintiff. The question of a reasonable time was not a question of fact for the jury, but of law for the court. 77 Ark. 120; 111 *Id.* 253; 69 S. W. 320; 91 *Id.* 53; 38 S. E. 26; 46 *Id.* 24.

4. One cannot waive a matter not known or not in his mind. 105 U. S. 359; 48 Ark. 445; 40 Cyc. 259, 260-1.

5. Plaintiff was entitled to recover the value of the timber on the skidway—not the stumpage value.

C. W. McKay, for appellee.

1. The deed reserves *all* the pine timber. No time for removal was mentioned. Beene only claimed the growth of the timber. The reasonable time was waived. 77 Ark. 118; 98 *Id.* 328.

2. Forfeitures are not favored in the law and slight circumstances will often be seized upon to prevent such. Any conduct inducing the other party to believe that the forfeiture will not be insisted on is treated as a waiver. 102 Ark. 451; 51 *Id.* 491; 59 *Id.* 405; 77 *Id.* 168.

3. Appellant did not ask the court to declare as matter of law that a reasonable time had expired for the removal of the timber and his failure estops him. There are no reversible errors.

HUMPHREYS, J. The appellant, R. O. Beene, brought suit in replevin against W. D. Green, appellee,

in the Columbia circuit court on the 9th day of September, 1915, to recover a lot of pine timber severed by appellee from the following described real estate, to-wit: N. W. ¼, N. W. ¼, Sec. 36, Tp. 19 S., R. 22 W., in Columbia county, Arkansas.

Appellant claimed title to said timber by virtue of a warranty deed executed by R. W. Jones and Maud Jones, his wife, to him dated March 20, 1912, describing said real estate. R. W. Jones had obtained his title to said real estate in the year 1905 from Mrs. Effie P. Jordan and T. S. M. Jordan, her husband. Mrs. Effie P. Jordan had obtained title to said real estate from W. D. Green and Lillian C. Green, his wife, on January 1, 1900.

In the deed executed by W. D. Green and wife for said real estate to Mrs. Effie P. Jordan a reservation was made of all pine timber on said premises measuring over twelve inches at the base.

The appellee denied that appellant owned the timber or was entitled to the possession thereof. The controlling question raised by the pleadings in the case is the title and right to the possession of said timber, the amount removed and the value thereof.

The undisputed evidence in the case disclosed the fact that appellee removed a portion of the timber from this tract at the request of the Jordans about two years after Green executed the deed to them; that he had a saw mill within hauling distance of this timber for a number of years; that he could have removed this timber long before he did; in fact, the record is entirely silent as to any excuse for not removing it; no time was fixed in the instrument or deed itself in which appellant might remove the timber.

In deeds of this character our court is committed to the construction that the timber must be removed by the grantor within a reasonable time after the execution of the deed. It was said in the case of *Liston* v. *Chapman Dewey Land Co.*, 77 Ark. 116, that "When all the circumstances are considered, and the facts are determined, the law will declare whether reasonable

time has expired for cutting and removing the timber conveyed. No fixed rule can be established for ascertaining a reasonable time. The facts and circumstances of each particular case must determine this."

(1) No sufficient excuse appearing in the record as to why appellee did not remove this timber, and nearly fifteen years having elapsed since the execution of the deed in which he reserved the pine timber, the court should have said as a matter of law in this particular case that a reasonable time had elapsed for cutting and removing the timber. It is contended by appellee that appellant should have asked an instruction stating this to be the law if he desired the court to so advise the jury. Instruction No. 1 asked by appellant was clearly based upon this theory of the law and should have been given in the form asked, but the court modified instruction No. 1 by adding thereto the following clause: "*Unless the defendant had had reasonable time in which to cut and remove the timber* or plaintiff and his grantors had waived his right of forfeiture." In this particular case the court should not have submitted the question to the jury of whether the appellee had removed the timber within a reasonable time. The court should have declared under all the circumstances and facts in this case that appellee had failed to remove the timber within a reasonable time.

The submission of this question to the jury was not harmless error for it may be that the jury came to the conclusion that appellee had a right to remove this timber under the reservation in his deed.

(2) We are also of the opinion that there is not sufficient evidence in this record to show that appellant waived his right to insist that appellee should have removed the timber sooner than he did. It is true that appellant claimed the growth of the timber only; but it it likewise true that Green did not cut this timber on account of anything said or done by the appellant herein. This record discloses the fact that Green, for his right to cut and remove the timber, relied wholly

and entirely upon the reservation of the pine timber in the deed made by himself to the Jordans. Forfeitures are odious to the law and the party having the right to insist on a forfeiture may be held to have waived that right by his conduct. One may impliedly waive his right to insist upon a forfeiture, yet the party claiming the waiver must show that he relied upon his conduct; or that he was misled to his injury; or that he changed his position to his damage or that he paid a consideration for the waiver. In the instant case it is very clear that the appellee cut and removed the timber because of the reservation of the pine timber in the deed he made and not because of anything the appellant said or did. Under the record made there is no substantial evidence to support a waiver insisted upon.

The evidence is conflicting as to the amount and value of timber cut and removed from this tract of land by appellant and was, therefore, a question for the jury. That question of fact should go to the jury under proper instructions.

(3) The record in this case discloses the fact that Green, the appellee, cut and removed the timber in good faith, believing that he was the owner thereof under the reservation in his deed. The measure of damages in cases of this character has been laid down in the case of *Bunch* v. *Pittman*, 123 Ark. 127. The court held in that case that the stumpage value of the timber cut was the measure of damages where a party removing the timber did so in good faith.

This cause, therefore, on account of the erroneous instructions, and insufficiency of the evidence, must be reversed and remanded for a new trial.

SCULLIN *et al.*, RECEIVERS, MO. & NORTH ARK. RD. CO. v. VINING.

Opinion delivered January 22, 1917.

1. RAILROADS—NEGLIGENT INJURY TO PASSENGER ON FREIGHT TRAIN—SUFFICIENCY OF EVIDENCE.—Plaintiff, a passenger on a local freight train, was injured by a sudden jerk of the same. *Held*, the evidence adduced was legally sufficient to warrant a verdict in his favor for damages.
2. EVIDENCE—PERSONAL INJURY ACTION—SEVERE JERK OF TRAIN—STATEMENTS OF PASSENGERS.—Plaintiff was injured by a severe jerk of a local freight train upon which he was a passenger. *Held*, testimony of fellow passengers as to the severity of the jerk was admissible.
3. EVIDENCE—HYPOTHETICAL QUESTION—OMISSION OF UNDISPUTED FACTS.—Plaintiff sued a railway company for damages resulting to him from the rough handling of a freight train upon which he was a passenger. There was testimony to the fact that plaintiff was under the influence of liquor when he claimed to have been injured, but this was disputed, there also being testimony that he was sober at the time of the accident. *Held*, a hypothetical question propounded to physicians, would not, under these facts, be held defective, because it omitted to mention the issue of plaintiff's drunkenness, that not being an undisputed fact shown by the evidence.
4. EVIDENCE—CROSS-EXAMINATION OF EXPERTS—STANDARD AUTHORITIES.—When a witness is testifying as an expert, it is competent to test his knowledge on cross-examination by reading to him extracts from standard authorities upon the subject matter involved, and then to ask him whether he agrees or disagrees with the authorities.
5. EVIDENCE—PERSONAL INJURIES—PHYSICAL EXAMINATION—SECOND TRIAL.—Upon the first trial of an action for damages for personal injuries, at defendant's request, the court ordered the plaintiff to submit to a physical examination. The physicians, after such examination, testified that in their opinion, plaintiff was only feigning injury. Upon a second trial, when these same physicians testified that from the former examination they were satisfied that plaintiff was simulating, it will be held that the court did not err in refusing to require plaintiff to submit to another medical examination.
6. RAILROADS—INJURY TO PASSENGER—OPERATION OF TRAIN.—Under Kirby's Digest, § 6773, responsibility is placed upon railroads where injury is done to persons or property by the running of trains, and proof of injury makes out a *prima facie* case of negligence. *Held*, a case in which plaintiff, a passenger on a local freight train, was injured by a sudden jerk of the same, is within the rule as set out.
7. DAMAGES—PERSONAL INJURIES—FUTURE PAIN AND SUFFERING.—In an action for damages resulting from personal injuries, the jury may take into consideration future as well as past physical pain and suffering, but it must be reasonably certain that such future pain

and suffering are inevitable, and if they be only probable or uncertain, they can not be taken into the estimate.

8. APPEAL AND ERROR—MISCONDUCT OF JURY—REMARKS IN JURY ROOM. —Where, during the deliberations of the jury in a personal injury action, it is brought to the attention of defendant's counsel that a juror has, in the jury room, made observations showing his prejudice against the defendant, it is the duty of defendant, if he wishes to urge the point, to immediately bring the same to the attention of the court, and it is too late if he waits until after the verdict is rendered.

Appeal from Searcy Circuit Court; *J. I. Worthington*, Judge; affirmed.

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

1. The peremptory instruction requested by defendant should have been given. This was a mixed train. The jerk and injury were due solely to running the slack out of the train and unavoidable. The verdict is contrary to all the legal evidence. 10 Ark. 309; 118 *Id.* 352. The verdict is contrary to the physical facts. 71 Ark. 590; 83 *Id.* 22; 90 *Id.* 497; 4 Elliott on Railroads, § 1629. Negligence must be determined by the facts in every case. 7 Mo. App. 359; 55 Me. 444; 31 Ala. 508; 50 Ill. 65; 107 Mass. 496; 3 Allen (Mass.) 410.

Where the verdict is so shocking as to shock one's sense of justice this court will reverse. 10 Ark. 492; 34 *Id.* 639; 70 *Id.* 385; 26 *Id.* 309. The testimony of witnesses for plaintiff is incompetent—that of Clayton is uncontradicted but reasonable and consistent. 101 Ark. 532; 96 *Id.* 504; 80 *Id.* 396. The jerk was not a negligent one. Taking into consideration all the facts there was no negligence. 1 S. W. 140; 15 *Id.* 141; 79 Ark. 608. To entitle plaintiff to recover he must prove that defendant's negligence *caused* the injury. 75 Pac. 1047; 119 Fed. 572; 185 S. W. 768-773.

2. The testimony as to the jerk of the train being negligent was incompetent. They simply stated their opinions as conclusions of facts. 117 Mass. 137.

3. Excerpts from medical books were not admissible in evidence. 106 Ark. 100; 36 Kans. 17;

8 Me. 56; 12 Cush. 194; 59 Am. Dec. 178; 3 Chamb. Mod. Law of Ev., § 2528; Am. Ann. Cas. 1916-A. 793 and note; 106 N. E. 828; 59 Am. Dec. 178; 265 Ill. 338; 129 Pac. 258; 85 N. W. 1002; 212 Mass. 139; 69 Ark. 653.

4. The hypothetical questions propounded were contrary to the rule as laid down by this court. 100 Ark. 518; 87 *Id.* 242;

5. A physical examination should have been granted. The cases 46 Ark. 275; 66 *Id.* 481, and 93 *Id.* 589, tend to the effect that this is discretionary with the court; the court here abused its discretion. 47 Iowa 375; 46 Ark. 275; 148 N. W. 309.

6. The court erred in its charge to the jury. 99 Ark. 385; 93 *Id.* 564; 72 *Id.* 559; 87 *Id.* 321.

7. As to the assessment of damages, see 97 Ark. 358; 46 Am. Rep. 849; 30 L. R. A. 507; 106 Ark. 186; 87 *Id.* 243; 72 *Id.* 559; 82 *Id.* 424, 431. The instructions were erroneous. 90 Ark. 284; 13 Cyc. 144; 3 Hutch. on Car. 805; 61 N. W. 771. It must appear that the disability is permanent. "*Probable*" suffering or injury is not recoverable. 97 Ark. 365; 46 Am. St. 849; 46 Neb. 907; 106 Ark. 186; 87 Ark. 243.

8. The verdict should be set aside for misconduct of the jury. Affidavits were admissible. 34 Neb. 30; 51 N. W. 290; 40 *Id.* 317; 87 *Id.* 34; 55 Me. 568; 1 Swan, 61; 97 Tenn. 206; 36 S. W. 930; 40 *Id.* 1085; 53 S. W. 731; 75 N. W. 537-8; 26 S. E. 413.

9. Conclusion. This was no case for a jury; but if so, it should be reversed for the errors stated. 114 Fed. 465; 73 *Id.* 774; 69 Ark. 653; 111 *Id.* 134, and others.

Williams & Seawel, for appellee.

1. A *prima facie* case of negligence was established by proving an injury from the operation of a train. 34 Ark. 624; 73 *Id.*; 81 *Id.* 275; *Ib.* 579; 83 *Id.* 217; 84 *Id.* 81; 87 *Id.* 308; *Ib.* 581; 90 *Id.* 485; 105 *Id.* 22. The issue was settled by the jury and the decision is binding. 73 Ark. 377; 86 *Id.* 145; 89 *Id.* 321.

2. There was no error in the admission of testimony as to the character and extent of the jerk. The effect was a question for the jury. 62 Ark. 254-8-9; 93 *Id.* 124.

3. There was no error in the reading of extracts from standard medical authorities. It is true the authorities are conflicting, but the correct rule is laid down in 16 A. & E. Ann. Cases, 819. This case is ruled by 122 Ind. 225, 7 L. R. A. 90. The opinion of a witness may be tested by reading from medical works. 2 Best on Ev. 882-4; 131 S. W. 831. But if error, it was invited. 66 Ark. 292; 67 *Id.* 47; 75 *Id.* 251; 88 *Id.* 484.

4. The court did not err in permitting counsel to ask the hypothetical questions assigned as error. 58 Ark. 381.

5. There was no error in the instructions. 83 Ark. 217; 94 *Id.* 75; 123 *Id.* 428.

6. There was no error in the refusal to compel appellee to submit to further examination. No abuse of discretion is shown.

7. No act or language of any juror was sufficient to warrant a reversal. No objections were made to the statements of Barnett. The case was fairly tried and fully developed; the physical facts made a case for the jury and their finding should be conclusive.

HART, J. Appellee sued appellant to recover damages for personal injuries sustained by him by being thrown from his seat by a sudden, unusual and violent jerk of the train, while riding as a passenger on one of appellant's freight trains. The jury returned a verdict for appellee in the sum of $1,000.00 and the case is here on appeal.

(1) It is insisted by counsel for appellant that the evidence is not legally sufficient to support the verdict. It is admitted that appellee was thrown from his seat while riding as a passenger in the caboose of one of appellant's local freight trains, but it is claimed that, if he was injured in consequence of being thrown from his seat, that there was no negligence on the part of the appellant. It was shown by witnesses introduced by

appellant that the movement of the train at the time of the injury complained of was accompanied by only such jerks and jars as are incidental to the ordinarily careful operation of mixed trains. We need not set out this evidence for the reason that the legal sufficiency of the evidence must be tested in the view of appellee's evidence most favorable to him.

Several witnesses testified that they were present in the caboose at the time appellee was thrown from his seat and injured; and that they were in the habit of riding on freight trains and were accustomed to the usual jerks and jars of freight trains. One of the witnesses testified that he had ridden on freight trains about five thousand miles; that he had never seen any other jolt or jar of a freight train that was as hard as this one; that he counted it an extremely hard jolt; that he was thrown from his seat and was slightly injured thereby; that he had never been thrown around before and never before hurt by the jolt or jar of a freight train in which he was riding; that the train in question was a long train and that he knew the noise ordinarily made by a train of that length when it took up slack; that on the day in question the train slowed down and nearly came to a full stop; that without any warning it started up suddenly and the movement of the train threw appellee from his seat and severely injured him. Several witnesses testified to substantially the same state of facts. Appellee himself stated that he had paid his fare to the conductor when he boarded the train at Gilbert, Arkansas, and was going to Leslie, Arkansas, on a local freight train of appellant; that he had not ridden very far when the train slowed down and he thought it was going to stop; that he thought probably there would be a little jar when the train increased its speed and began to brace himself in his seat; that at that time the train started up with a jerk and he was thrown from his seat against the stove with great violence; that he had been engaged in railroading both as a brakeman and conductor and heard no signal of any kind when the train started up again; that the jerk

which injured him was out of the ordinary and was unnecessary under the conditions of the train at that time. This testimony was legally sufficient to warrant the verdict in favor of appellee.

(2) It is also insisted that this testimony was incompetent. We have carefully examined the testimony of each of these witnesses and think it was competent. Each witness testified that he was accustomed to riding on freight trains and showed that he knew the usual and ordinary jolts and jars in the operation of them. It may fairly be inferred from the testimony of each of them that the jolt in question was an unusual one and one that was not incident to the ordinary operation of a mixed train. It may be true that people who travel more on such trains might be better and more accurate judges than the witnesses in question, still the difference is only in degree, and the subject matter being one of more or less common knowledge, we think the testimony was competent. *St. L. & S. F. R. Co.* v. *Brown*, 62 Ark. 254; *St. L., I. M. & S. R. Co.* v. *Richardson*, 87 Ark. 101; *St. L., I. M. & S. R. Co.* v. *Brabbzson*, 87 Ark. 109; *St. L. Sw. Ry. Co.* v. *Jackson*, 93 Ark. 119.

(3) It was the contention of appellee that his spine was injured and it was the contention of appellant that appellee was not injured but was simulating. On this branch of the case it is contended by counsel for appellant that the hypothetical questions propounded to two of the physicians by counsel for appellee were contrary to the rule governing such questions as laid down by the court in *Taylor* v. *McClintock*, 87 Ark. 243, and *Ford* v. *Ford*, 100 Ark. 518. In those cases the court held that a hypothetical question must embrace all essential undisputed facts which bear upon the question, and must not embrace any statement or fact which there is no testimony tending to establish. The court further stated that a party has the right to take the opinionof a witness upon the undisputed essential facts and on every state of facts which he claims the evidence tends to establish. It is contended by counsel for appellant that the hypothetical question in the present

case offends against this rule because it wholly omits the fact that appellee had been drinking an excessive amount of whisky on the morning of the accident. It is true the evidence adduced by appellant tended to show that appellee had taken several drinks of whisky that morning and was under its influence, but the testimony adduced in favor of appellee tended to show that he had not done so and that he was sober at the time of the accident. Therefore the hypothetical questions did not omit undisputed facts shown by the evidence.

(4) On cross-examination of the medical experts, counsel for appellee were permitted to read to the jury excerpts from acknowledged standard medical authorities treating of the subject testified to by the experts.

Error calling for a reversal of the judgment is predicated upon the action of the court in permitting this to be done. There is a decided conflict in the authorities as to whether it is proper, in cases where an expert does not base his opinion upon a particular authority, to read an excerpt from a scientific authority and ask the expert on cross-examination as to his views concerning such excerpt. Case note to 16 A. & E. Cas., p. 819. In the cases cited below it is held that when a witness is testifying as an expert, it is competent to test his knowledge on cross-examination by reading to him extracts from standard authorities upon the subject matter involved and then ask him whether he agrees or disagrees with the authorities. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of. The purpose of the testimony sought to be elicited is to test the knowledge of the expert and to ascertain the weight of his testimony. We think that no better way could be devised for doing this than to take the accepted authorities upon the subject and to see how his knowledge of the matter corresponds with that of such authorities. *Hess* v. *Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90; *Williams* v. *Nally*, 45 S. W. (Ky.) 874; *Egan* v. *Dry Dock, etc., R. Co.*, 12 App. Div. (N. Y.) 556; *Sale* v. *Eichberg*, 105 Tenn. 333,

59 S. W. 1020, 52 L. R. A. 894; *Gulf, etc., R. Co.* v. *Farmer*, 115 S. W. (Tex.) 260, and *Fisher* v. *So. Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894.

(5) It is next insisted by counsel for appellant that the court erred in refusing to make an order upon appellee to submit to a physical examination at the hands of physicians. This was the second trial of the case. Upon the first trial of the case the court required appellee to submit to a physical examination at the hands of physicians selected by appellant. These physicians testified at the trial that appellee was not injured at all and was simulating. These same witnesses testified at the present trial and said they were satisfied from the examination made by themselves at the former trial that appellee was only feigning to be injured. Another examination could not have added anything to their knowledge of appellee's physical condition. Therefore, the court did not err in refusing to require appellee to submit to another medical examination.

(6) It is insisted by counsel for appellant that the court erred in giving instruction number 1. This instruction was an exact copy of instruction number 1 as set out in the abstract in the case of *Kansas City Sou. Ry. Co.* v. *Davis*, 83 Ark. 217. In that case it was held that section 6773 of Kirby's Digest places responsibility upon railroads where injury is done to persons or property by the running of trains, and a *prima facie* case of negligence is made out against the company operating the train by the proof of injury. The injury in question was caused by the running of a train and the court did not err in giving the instruction.

(7) It is insisted that the court erred in giving instruction number 2. This instruction was an exact copy of instruction number 3 set out in the opinion in *Arkansas Southwestern Rd. Co.* v. *Wingfield*, 94 Ark. 75. The court approved the instruction in that case and what was said there applies with equal force here.

(8) It also contended that the court erred in giving instruction number 5 upon the measure of damages. There was no error in giving this instruction. In the

case of *St. L., I. M. & S. R. Co.* v. *Bird*, 106 Ark. 177, the court held that the jury may take into consideration future as well as past physical pain and suffering, but to justify them in doing so it must be reasonably certain that such future pain and suffering are inevitable and if they be only probable or uncertain they cannot be taken into the estimate. See also *St. L., I. M. & S. R. Co.* v. *Armbrust*, 121 Ark. 351. The testimony in the present case on the part of appellee tended to show that he would necessarily suffer pain for some period of time in the future and the instruction only went to the extent of submitting this issue of facts to the jury. The question of permanent injuries was not submitted to the jury in the instruction. It only submitted to them the question of the suffering he would necessarily endure in the future resulting from his injury. The court did not err in giving the instruction. We do not deem it necessary to set out the instruction as it is in the exact language of one approved in a similar case by the court in *Ark. Southwestern R. Co.* v. *Wingfield*, 94 Ark. 75.

(9) Error calling for a reversal of the judgment is predicated upon the alleged misconduct of the jury in deliberating upon their verdict. The jury were put in charge of a deputy sheriff and sent to the jury room to consider the verdict. The deputy sheriff while out in the hall near the jury room heard one of the jurors state to the others that his wife had rescued a deaf and dumb child of one of the employees of the railroad and saved it from being run over by an approaching train; that his wife suffered a miscarriage as the result of her exertion and all that he had ever gotten out of it was a "cussing" from the section foreman because he had borrowed a plank from the railroad to clean a hog on. We do not think this alleged error calls for a reversal of the judgment. The deliberations of the jury are made in secret. As a rule they are not skilled in law and their illustrations used in weighing the testimony must necessarily take a wide range. Moreover the record shows that the claim agent of the railroad was out in the hall standing by the deputy sheriff and heard the remarks of the juror.

He informed the attorneys of the railroad company about the remarks before the verdict of the jury was returned into the court. If counsel thought the remarks would improperly influence the jury in arriving at its verdict they should have reported the matter to the court at once and not waited until after the verdict was returned. They should not be allowed to speculate upon the result of the verdict and then assign the remarks as error calling for a reversal of the judgment.

The testimony adduced on the part of appellee tended to show that he sustained very serious injuries. The jury returned a verdict for $1,000.00, and if the jury believed the testimony of the witnesses for appellee, the verdict was a very moderate one and cannot in any sense be said to be excessive.

The judgment will be affirmed.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF ARKANSAS *v.* DAVIDSON.

Opinion delivered January 22, 1917.

FRATERNAL INSURANCE—WAIVER OF FORFEITURE—KNOWLEDGE OF SUPREME OFFICERS.—Deceased held a certificate in appellant order; by the laws of the order and by the terms of his application, the certificate would become void if the holder engaged in the retail of intoxicating liquors. When the certificate was written, deceased was a locomotive engineer, but he left that occupation and entered the retail liquor business. This was known to the supreme officers of the lodge, who, however, continued to accept payment of his dues. Deceased was fully paid up at the time of his death. *Held*, the appellant order was estopped from pleading the breach of the rules of the order by accepting dues and otherwise treating deceased as a member in good standing, after it discovered that deceased was engaged in the retail liquor business contrary to the contract.

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

R. C. Powers, for appellant.

1. The laws of the order were made a part of the contract and prohibited applicant from engaging in the business of selling, by retail, any intoxicating liquors.

This provision is valid. 80 Ark. 419; 81 *Id.* 512; 105 *Id.* 140; 52 *Id.* 202; 55 *Id.* 210; 98 *Id.* 421; 109 *Id.* 400; 87 N. W. 293; 16 Hun. 494.

2. There was no waiver. 104 Ark. 538, 544; 22 Mo. App. 127. Officers cannot disregard the laws of the order. 105 Ark. 140-3; 16 Hun. 494.

3. Where the means of knowledge are equal, there is no estoppel; nor should estoppel exist without some act of the party estopped misleading the other to his disadvantage. 153 Ky. 636; 156 S. W. 132; 45 L. R. A. 1148. The doctrine cannot be invoked here. Waiver is but the principle of estoppel and cannot be invoked unless the conduct of the insurer has been such as to induce action or inaction in reliance thereon and where it would operate to mislead a party to his injury. 106 Mich. 23; 108 Wisc. 490; 87 N. W. 293.

4. Under the evidence Davidson wilfully disregarded the laws and rules of the order and there can be no recovery on the policy. 231 Ill. 134; 83 N. E. 127; 14 L. R. A. (N. S.) 540; Bacon on Ben. Soc. (3 Ed.), par. 81; May on Ins. Vol. 2, par. 552. The policy was not voidable but absolutely void. 3 Hill 508; 25 L. R. A. (N. S.) 78 and note; 101 N. Y. Supp. 168, and cases in 25 L. R. A. (N. S.) 78; 36 Mont. 325; 92 Pac. 971; 2 Bac. Ben. Soc. (3 Ed.), par. 434, A.

5. Appellant is not estopped by receiving dues, after knowledge, under the contract. The presumption is that the assured will not violate his contract.

T. N. Robertson, for appellee.

1. By continuing to accept dues, after notice, the forfeiture was waived. 53 Ark. 499; 82 *Id.* 163; 94 *Id.* 232; 111 *Id.* 435-6, 446; 25 Ind. 637; 57 N. E. 203; 83 Iowa 23; 48 N. W. 1069; 81 N. Y. 410; 119 Ill. 329; 61 N. E. 915; 29 Cyc. 185-6. These authorities clearly show that if the order with notice that the assured was engaged in the retail liquor business, continued to accept dues and treat him as a member, it waived its right to claim a forfeiture.

2. As to notice, see 29 Cyc. 1113; Black's Law Dictionary, *verbum;* 70 Iowa 455.

3. The order retained the dues after knowledge that he was in the saloon business and never offered to refund. It is clearly liable. 102 Ark. 151; 59 N. E. 37; 60 S. W. 37; 72 N. W. 74; 82 N. W. 441; 94 Wisc. 253; 111 Ind. 531; 11 N. E. 477. Forfeitures are not favored by the courts and the doctrine of waiver and estoppel is well recognized. Cases *supra.*

HUMPHREYS, J. Appellant is a fraternal, benevolent association, incorporated under the laws of the State of Arkansas. Mrs. Lillie Davidson, appellee, is the widow of Chas. O. Davidson who held a beneficiary certificate payable to his wife, the appellee herein, for the sum of $1,000 in said order. Chas. O. Davidson died on the ..... day of December, 1914, a member in good standing of said order, having paid all his dues in said order on said certificate of insurance. In his application for membership he agreed "That if I should enter into the business or occupation of selling, by retail, intoxicating liquors, as a beverage, I shall stand suspended from any and all rights to participate in the beneficiary fund of the order, and my beneficiary certificate shall become null and void from and after the date of my so engaging in said occupation, and no action of the lodge of which I am a member, or of the Grand Lodge, or any officer thereof, shall be necessary or a condition precedent to any such suspension. In case any assessment shall be received from me while so engaged in such occupation, receipt thereof shall not continue my beneficiary certificate in force, nor shall it be a waiver of my so engaging in such occupation."

In so far as the payment of claims is concerned the Grand Lodge of the Ancient Order of United Workmen, of Arkansas, is a jurisdiction unto itself. It is an Arkansas corporation. The Supreme Lodge of this order has no jurisdiction or control over the Grand Lodge of Arkansas with reference to the payment of claims. In other words, the Grand Lodge of Arkansas of the

A. O. U. W. is supreme with reference to the insurance feature of the order. It has a board of directors consisting of the Grand Master Workman, who is president, the Grand Recorder, who is secretary, the Grand Receiver, who is treasurer, and the chairman of the law committee. In this board is vested the general management and control of the entire business matters of the Grand Lodge and they exercise all the powers and functions of the Grand Lodge when the same is not in session; save and except the power to amend the charter, constitution and general laws of the Order, said management to be according to the laws of the Order.

No person is permitted to become a beneficiary member in the order who is engaged in the sale, by retail, of intoxicating liquors as a beverage.

By the laws of the Order no member who shall engage in the retail sale of intoxicating liquor as a beverage after August 1, 1898, shall participate in the beneficiary fund of the Order, and his beneficiary certificate shall become null and void from and after the date of so engaging in said occupation; and it is also provided that no action of the lodge of which he is a member, or of the Grand Lodge or any officer thereof, shall be necessary or a condition precedent to any suspension for said cause; and it is also provided that a receipt for the payment of any assessment after said date shall not continue the beneficiary certificate of such member in force, nor shall be a waiver of his so engaging in such liquor business.

When the certificate of insurance sued on in this case was first issued, Chas. O. Davidson was a member of the Batesville Lodge of the A. O. U. W.; that lodge became defunct and in 1911 he was transferred to the Grand Lodge at Little Rock and paid his dues to the Grand Recorder William Murray. Later he was transferred out of the Grand Lodge into Home Lodge No. 5 of Little Rock by the officers of the Grand Lodge. At the time the beneficiary certificate was issued to him he was a locomotive engineer on the St. Louis, Iron Mountain & Sou. Ry. Co. He received an injury, and

in 1907 he engaged in the retail sale of whisky in Memphis and in the following year engaged in the same business in Little Rock. He then moved to St. Louis and continued in the business in both St. Louis and East St. Louis up to the date of his death. He was killed by a footpad in the place of his business. While a member of the Grand Lodge in Little Rock he paid his dues to William Murray who was Grand Recorder. John R. Frazier was at the same time Grand Master Workman of the Order, and at the time of the introduction of this suit still occupied that position. William Murray, Grand Recorder, was a member and secretary of the board of directors of the appellant, and John R. Frazier, Grand Master Workman, was a member and president of said board. They both knew at the time Davidson was paying his dues into the order that Davidson was engaged in the retail liquor business and that he had been engaged in it for several years. When appellee made proof of the death of her husband and applied for the insurance, the Grand Recorder H. L. Cross, wrote her the following letter:

"Little Rock, Arkansas,
2-24-1915.

"Mrs. C. O. Davidson,
City.

"Dear Mrs. Davidson:

"The death proof of your husband, C. O. Davidson, formerly a member of Home Lodge No. 5, was submitted to the Financial Committee and on investigation they have decided it not a legal claim.

"Owing to the fact that he had entered the saloon business and had been in the business over four years, as per statement of the death papers, this is a notice to you of the refusal of the Grand Lodge to pay said claim.

"Fraternally yours,
"H. L. CROSS, Grand Recorder."

The position assumed by appellant in this letter caused appellee to bring suit upon the beneficiary certificate against appellant in the Pulaski Circuit

Court, Third Division, wherein she recovered a judgment of $1,000 and interest. Proper proceedings were had and this cause is here on appeal.

Under the terms of the application and beneficiary certificate, the application and the constitution and by-laws of the Order became a part of the contract. It was the duty of the insured to live up to it. Having breached the contract by engaging in the liquor traffic contrary to its provisions, no right could accrue to the beneficiary, appellee herein, unless appellant is estopped from pleading the breach by accepting dues and otherwise treating insured as a member in good standing after it discovered the fact that the insured was engaged in the liquor business contrary to the contract.

The insured in this case ran a saloon openly and above board for more than four years before he was killed, with knowledge of two of the Supreme officers of the A. O. U. W.

Appellant strenuously insists that this case is controlled by the several declarations of law made by this court in the case of *Woodmen of the World* v. *Hall*, 104 Ark. 538. The case at bar is distinguishable from that case. In rendering the opinion in that case Justice Frauenthal said that the appellant or its Supreme officer had no knowledge of the facts set up in the defenses. In that case the beneficiary certificate was obtained by a misrepresentation, Hall stating in his application that he was a farmer, when in fact he was in the liquor business and had been for several years. It was held in that case that the officers and subordinate lodges of a mutual benefit society had no authority to waive the provisions of its by-laws and constitution which relate to the substance of the contract between an applicant and the association; having reference to the case in hand where a misstatement had been made in the procurement of the contract, and not to such a case as the case at bar.

In the case of *German Ins. Co.* v. *Gibson*, 53 Ark. 499, Mr. Justice Battle quoted approvingly from Mr. Justice Bradley who said, "We have recently (referring

to the Supreme Court of the United States) in the case of *Insurance Company* v. *Norton*, shown that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture *though it might be claimed under the express letter of the contract.* The company is thereby estopped from enforcing the forfeiture."

Provisions of this character in certificates or policies are regarded in the law as conditions for the protection and benefit of the association or insurance company. The insurer can take charge of them and declare forfeitures in case of a breach of the contract but the association itself acting by its Supreme officers can waive the breach. There is no difference between this contract and any other contract. Individuals and business corporations can waive favorable provisions in their contracts and there is no reason why fraternal organizations should not be permitted to waive forfeitures in their contracts.

In the case of *Peebles* v. *Eminent Household of Columbian Woodmen*, 111 Ark. 435, this court said, "As stated in the case of *Masonic Life Association* v. *Lizzie P. Robinson*, 149 Ky. 80, when an insurance company has information of facts that would avoid a policy of insurance, in justice to the insured and in the honest conduct of its business, it ought to at once notify the insured of the facts in its possession and advise him that his policy is cancelled, or take such action as may be necessary and proper to inform the insured of the condition of this policy and his relation to the company. The court further said that it would be manifestly unfair to permit an insurance company with full posses-

sion of facts that it intended to rely on to defeat the collection of the policy whenever it matured, to continue to demand and receive from the insured premiums, as if his policy was a valid and binding contract that it intended to perform when the time of performance came." This doctrine is in accord with the weight of authority. *Supreme Tent K. M. W.* v. *Volkert*, 25 Ind. App. 627; *Ind. Order of Foresters* v. *Cunningham*, 156 S. W. 193; *Thomas* v. *Modern Brotherhood of America*, 127 N. W. 572; *Pringle* v. *Modern Woodmen*, 76 Neb. 384; *Warnebold* v. *Grand Lodge*, 83 Iowa 23; *Titus* v. *Glens Falls Insurance Co.*, 81 N. Y. 410; *Mary A. Taylor* v. *American Patriots*, 152 Ill. App. 578; *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190.

We think the law as stated by Judge Frauenthal in the case of *Woodmen of the World* v. *Hall*, 104 Ark. 539, in no way conflicts with the opinion in this case. That case deals with the powers of subordinate officers and lodges to waive the provisions of the by-laws and constitution of the association which relate to the substance of the contract between the applicant and the association, and as heretofore stated Judge Frauenthal took particular pains to say that in that case it did not appear either that the appellant or its Supreme officers had any knowledge of the facts set up in the defenses. In the case at bar the appellant through its Supreme officer did know that Chas. O. Davidson had been openly engaged in the retail sale of liquors for several years and during that time received him into the Grand Lodge of Little Rock out of the Batesville Lodge and afterward transferred him out of the Grand Lodge into a local lodge in Little Rock, and while in the Grand Lodge at Little Rock received his dues directly for several years.

Under our view of the law the findings and declarations of the circuit court are in all things correct and the judgment is affirmed.

THE ALLEMANIA FIRE INSURANCE COMPANY v. ZWENG, TRUSTEE.

Opinion delivered January 8, 1917.

1. INSURANCE—CANCELLATION OF POLICIES—AUTHORITY OF GENERAL AGENCY TO ACT FOR BOTH PARTIES.—A general insurance agency, representing several companies with authority to act upon applications and to issue policies, as well as to cancel the same, may also act as the agent of the insured in waiving notice of cancellation, and in accepting a delivery of a new policy when substituted for the one cancelled.
2. INSURANCE—PRIVATE INSTRUCTIONS TO AGENT.—Where an insurance agent has authority to issue and deliver policies of insurance for the defendant company, the company can not limit that authority by private instructions; where an agent does anything within the real or apparent scope of his authority, it is as much the act of the principal as if done by the principal himself.
3. INSURANCE—IMPROPER INSTRUCTION—CURE BY REMITTITUR.—The error resulting in an improper award of damages in an action on a policy of fire insurance, will not call for a reversal, where the error can be cured by a remittitur.

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

J. I. Alley, of Mena, Ark., and *Thompson, Knight, Baker & Harris*, *G. S. Wright* and *Will C. Thompson*, of Dallas, Tex., for appellee.

1. A verdict should have been instructed for the defendant, because prior to the fire there was no contract of insurance with the assured. An insurance agent representing several insurance companies cannot without the knowledge, consent and approval of the assured had and obtained before notice of loss, cancel a policy in one of his companies and substitute for it another and thereby create contractual relations between the assured and the substitute company. 156 S. W. 445.

2. The agreement to keep insured did not constitute the local agents the general agent of the insured to accept notice of cancellation for him. A person cannot act as agent for both parties to a contract. 40 Pac. 147; 34 N. E. 200; 17 So. 282; 110 N. W. 593; 180 S. W. 999; 30 S. E. 962; 35 *Id.* 305; 19 S. W. 274.

3. A policy written by a joint agent as a substitute for a policy in another company, but not delivered and of which the insured had no knowledge until after the fire, is not valid, even though the second policy be accepted and the agent's action ratified after the fire. 68 N. H. 65; 5 N. E. 818; 16 Ins. Law Journ. 309; 32 *Id.* 512; 125 Mass. 111; 70 Ill. App. 615; 100 N. Y. 411; 86 Ky. 230. An agent for an insurance company is without authority to cancel a policy he has written and substitute another company without the knowledge and consent of the assured. 89 Me. 73; 138 N. W. 504; 117 Fed. 442; 128 Mass. 111; 113 Ky. 624; 68 S. W. 653; 6 Atl. 43; 63 N. E. 610; 79 S. W. 720 and 100 other citations from different States. See also 116 S. W. (Ark.) 894; 73 *Id.* 307; 32 So. 836.

4. The verdict is contrary to the law and the evidence. It is also excessive at least in the sum of $150, if not more under the instructions of the court. No interest, damages or attorneys' fees could be recovered. The verdict is excessive on its face. 123 S. W. 334; 108 *Id.* 216. There was no insurance on the building at all.

5. The courts of this State are inclined to the opinion that delivery of a policy is necessary. 165 S. W. 958. There is error also in the instructions. See cases *supra.*

Pole McPhetridge, *Wright Prickett* and *Kimpel & Daily*, for appellee.

1. The precise question presented, and on an identical state of facts, was decided adversely to appellants' contentions in 76 Ark. 182. The stipulation as to notice was for the benefit of the assured and could be waived. 62 Ark. 382 and cases cited. 108 Ark. 130 is not in point. Assured's only policy was cancelled without notice. This was for the jury; the burden was on appellant and the verdict was against the company.

2. Insurance companies cannot give an agent policies in blank and authorize him to issue such policies and after he has written them rely on secret instructions

to the agent as to the class of insurance to write. 79 Ark. 325; 97 *Id.* 567.

3. There was evidence as to the value of the stock. The excess in the verdict for $150.00 on the building can be cured by a remittitur. The question of interest cannot be raised here for the first time. A remittitur is entered for the $150 and the penalty and attorneys' fees. This will cure all errors.

HART, J. Horace E. Chambers brought suit in the circuit court against the Allemania Fire Insurance Company upon a fire insurance policy. Chas. A. Zweng, trustee in bankruptcy for the estate of Horace E. Chambers, upon motion, was substituted as plaintiff in the case. The material facts are as follows:

J. S. Kelly was a member of a firm of general insurance agents located at Mena in Polk county, Arkansas. The agents represented some twenty-five insurance companies, among them the defendant company, and had the authority to issue and deliver policies. H. E. Chambers carried on a general mercantile business at Ink, Polk county, Arkansas. He made an arrangement with J. S. Kelly whereby his firm was to keep his stock of goods insured to an amount not exceeding $2,500.00. The arrangement was that Kelly should select the companies and keep the stock of goods insured for that amount at all times. In the early part of January, 1914, Kelly issued to Chambers an insurance policy in the Insurance Company of North America. This policy expired in the early part of 1915, and Kelly renewed it in the same company. The company notified Kelly that they had decided to accept no further business off of the line of railroad and directed him to cancel the policy on that account. The town of Ink was not situated on the line of any railroad. Kelly then cancelled the policy and made a notation to that effect on his insurance register. He rewrote the policy in the Georgia Home Insurance Company and soon afterward that company also notified him that they declined to write any further business off the line of

railroad and instructed him to cancel the policy. Kelly made a notation of the cancellation of the Georgia Home policy on his insurance register. On the same day he immediately issued a policy to Chambers in the Allemania Fire Insurance Company in the sum of $2,350.00 on the stock of goods and $150.00 on the furniture and fixtures. That night the store house and contents of Chambers were destroyed by fire set by burglars who had entered his store. Both the Georgia Home policy and the Allemania policy contained a clause authorizing cancellation, so much of which as is pertinent to the issues raised by appeal reads as follows:

"This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days notice of such cancellation."

About ten days before the issuance of the policy sued on, Kelly passed by Chambers' store and stopped there. Chambers reminded him that his policy of insurance would soon expire and asked him to renew it in some company to be selected by Kelly. Kelly agreed to do this and the policy in question was issued under their agreement that Kelly was to renew or rewrite the policy of insurance for Chambers as soon as it expired, in a company to be selected by Kelly. The jury returned a verdict in favor of the plaintiff and the defendant has appealed.

(1) It is insisted that the court should have instructed the jury to return a verdict for the defendant on the ground that prior to the fire there was no contract of insurance between the defendant and the assured. It will be remembered that the policy in the Georgia Home Company as well as the policy in the defendant company contained a clause permitting the policy to be cancelled by the company by giving five days' notice of such cancellation. Kelly cancelled the Georgia Home policy without giving this notice to the assured and immediately rewrote the risk with the defendant company. Counsel claim that Kelly could not, without the knowledge and consent of Chambers, cancel a policy in one of his companies and substitute for it a policy in

another company. They contend that the general rule is that the same person may not act as agent for the insurer and the insured in procuring a policy of fire insurance, the reason being that such double agency imposes upon the agent inconsistent duties, a condition of affairs not permitted by law as being against public policy. Many authorities are cited to sustain the rule but we need not stop to review these decisions, for the reason this court has already taken a contrary position on the question. In *Phoenix Insurance Company* v. *State*, 76 Ark. 180, the court held that a stipulation in a policy of fire insurance for five days' notice to the insured is made for the benefit of the assured and may be waived by him. The court further held that where a property owner constitutes the agent of fire insurance companies as his agent to keep the property insured and empowers him to select the insurer or insurers, the agent has power to cancel a policy without notice to the insured and to substitute therefor a policy in another company, and an agent for insurance companies may be the agent of the insured for these purposes. But it is contended that this decision has been overruled or modified by the case of the *Commercial Union Fire Insurance Co.* v. *King*, 108 Ark. 130. We do not agree with counsel in this contention but on the contrary think that the case last cited is in harmony with our first mentioned case on the subject. In the latter case the court held that the giving of the notice as required by the policy was a condition precedent to cancellation. The court held in effect that where a policy of insurance provides that it may be cancelled upon notice to the insured, notice by the company to its own agent to cancel the policy is ineffective as a cancellation in the absence of authority to the agent, from the insured to act for him in receiving notice of cancellation and in procuring other insurance. Thus it will be seen that the case is directly in line with the first mentioned case. Other cases than those cited in *Phoenix Ins. Co.* v. *State*, *supra*, sustaining the rule that a general insurance agency, representing several companies with authority

to act upon applications and issue policies, as well as cancel the same, may also act as the agent of the insured in waiving notice of cancellation, and in accepting a delivery of a new policy when substituted for the one cancelled, are *Hamm Realty Co.* v. *New Hampshire Fire Ins. Co.* (Minn.), 83 N. W. 41, and cases cited and *Johnson* v. *North British & Mercantile Ins. Co.* (Ohio), 63 N. E. 610, and cases cited.

It is said that such a business arrangement is in many cases adopted by firms and corporations in towns and cities, and is beneficial both to the underwriters and the parties insured, adding to the business of the one and relieving the other from anxiety regarding the expiration and replacement of risks. It follows, therefore, that the court did not err in refusing to instruct a verdict for the defendant.

(2-3) It is also insisted that the judgment should be reversed because the defendant had written to the firm of which Kelly was a member notifying them not to issue any more policies in towns off of a line of railroad. As we have already seen Kelly's firm had authority to issue and deliver policies of insurance for the defendant and the defendant could not send its agents forth with authority to issue policies and deliver them to applicants for insurance and at the same time limit their authority by private instructions. Where an agent does anything within the real or apparent scope of his authority it is as much the act of the principal as if done by the principal himself. *Peoples Fire Ins. Assn. of Ark.* v. *Goyne*, 79 Ark. 315, and *New Hampshire Fire Ins. Co.* v. *Blakely*, 97 Ark. 567. It is also contended that the judgment should be reversed because the judgment was for a greater amount than that warranted by the evidence. It will be remembered that the insurance on the stock of goods was $2,350.00 and that on the office furniture and fixtures was $150.00. The court by its first instruction, authorized the jury to find for the plaintiff in the sum of $150.00 on the building. This was error because this insurance was on the office furniture and fixtures and not on the building. This error, however, does not call

for a reversal of the judgment because it can be cured by a remittitur. It is conceded by counsel for plaintiff that this should be done and that the attorney's fee and penalty provided for by the statute should not be recovered because of this error. A remittitur is ordered entered for the amount of $150.00 and the penalty and attorney's fees amounting to $550.00. The undisputed proof shows that the fire occurred without any fault on the part of the insured and that a three-fourths valuation of the goods destroyed, amounted to the face of the policy. So judgment will be entered here for the face of the policy and accumulated interest which will amount to $2,483.75.

It is so ordered.

LOY v. STONE.

Opinion delivered January 15, 1917.

APPEAL AND ERROR—CHANCERY APPEAL—FAILURE TO BRING UP ORAL EVIDENCE—PRESUMPTION.—When a chancery case is heard upon written and oral testimony, and the latter is not brought up on appeal, a conclusive presumption prevails that the evidence sustains the decree, unless the decree is without the issues, or the complaint fails to state a cause of action.

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

Gustave Jones and *Blackwood & Newman*, for appellant.

Appellee is barred by the separation agreement. The property was evenly divided and fairly, and there was nothing but good faith and fair dealing. These separation agreements are valid and enforceable. The appellee has neither homestead nor dower right. 1 Woerner on Adm. (1 Ed.) 253; 12 L. R. A. (N. S.) 848; 53 Ark. 281; 104 N. Y. 418; 67 Ark. 15; 31 *Id.* 678; 97 *Id.* 217; 9 *Id.* 501-4; 92 *Id.* 66; 7 *Id.* 519.

The appellee *pro se*.

1. Oral evidence was heard below and no bill of exceptions was filed. This court will presume that

the decree is correct. 35 Ark. 225; 45 *Id.* 240; 43 *Id.* 425; 83 *Id.* 77; 81 *Id.* 428.

2. A wife cannot relinquish dower and homestead to her husband. Kirby's Digest, § 741; 31 Ark. 678; 30 *Id.* 17; 67 *Id.* 15. She did not sign the deed nor join in the execution thereof. Kirby's Digest, § 3901; 57 Ark. 242; 60 *Id.* 270.

3. The deed to John T. Stone was not her voluntary act. It was procured by fraud and duress and void. 76 Ark. 15; 31 *Id.* 678; 14 Cyc. 123.

4. The findings are not clearly contrary to the weight of the evidence and this court will presume they are correct. 84 Ark. 429; 63 *Id.* 513; 4 *Id.* 251.

HART, J. Mrs. John T. Stone instituted this action in the chancery court against Marion Loy to recover possession of a certain tract of land. In her complaint she alleges that John T. Stone, her husband, died intestate, owning said lands as his homestead; that he left surviving him the plaintiff as his widow and several children, all adults; that the defendant had acquired his interest in the land by mesne conveyances from John T. Stone; that plaintiff did not join in any of these conveyances and did not relinquish her right of homestead to said land.

The defendant answered and denied that plaintiff had a life estate in said land. He alleged that John T. Stone and his wife, the plaintiff in this action, separated and made an agreement of separation and a division of the property; that by the terms of said separation agreement, the plaintiff relinquished her interest in the lands involved in this suit. The plaintiff contended that the separation agreement was procured by fraud and coercion and for that reason should be set aside. She further alleges that the defendant and his grantors were not innocent purchasers of the land.

Evidence was introduced by each party to maintain his theory of the case. The chancellor found in favor of the plaintiff and a decree was entered in her favor granting the relief prayed for in her complaint

and setting aside the separation deed from herself to her said husband. The defendant has appealed.

The decree contains a recital that both parties appeared in person and by attorneys, and that the cause was heard on the complaint, exhibits and depositions of the plaintiff herself and the answer, cross-complaint exhibits and depositions of M. C. Polston, J. H. Polston, G. A. Reaves, Scott Henderson and Marion Loy, defendant, and the oral testimony of numerous witnesses. The oral testimony was not brought into the record by bill of exceptions or otherwise. Where a chancery case is heard upon written and oral evidence and the latter is not brought up on appeal, a conclusive presumption prevails that the evidence sustains the decree, unless the decree is without the issues, or the complaint fails to state a cause of action. In this case the complaint stated a cause of action and the decree was within the issues. This being true, the presumption is that the decree of the chancellor is correct. *Rowe* v. *Allison*, 87 Ark. 206; *East* v. *Key*, 84 Ark. 429; *Bloomer* v. *Cone*, 92 Ark. 622; *Senter* v. *Greer*, 100 Ark. 589; *Bradley Lumber Co.* v. *Hamilton*, 109 Ark. 1.

Therefore the decree will be affirmed.

ARKANSAS NATIONAL BANK *v.* GUNTHER.

Opinion delivered January 15, 1917.

BILLS, NOTES AND CHECKS—STOPPED CHECK—PAYMENT TO PERSON ENDORSING SAME.—A draft was drawn by G. on appellant bank, but before its presentment, G. stopped payment. Thereafter the draft came into the possession of A., who presented the same to the appellant bank. The bank paid the draft, first requiring A., however, to endorse the same. The draft was charged to G.'s account, but upon G.'s protest, it was then charged to A.'s account. A. brought suit, but *held*, under the facts, A.'s endorsement on the draft amounted to a contract to indemnify the bank in case G. failed to pay the same, and that A. could not recover from the bank.

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

Rector & Sawyer, for appellant.

Appellant had the right to charge back the check to Gunther. The endorsement required of appellee under the circumstances was a guarantee that there was absolutely nothing wrong with the draft; that it was given for a valuable consideration and that previous endorsements were genuine. Bigelow on Estoppel (4 Ed.), p. 516; 15 N. Y. 575. The bank was not estopped. See also Morse on Banks & B. (1 Ed.), p. 309.

C. Floyd Huff, for appellee.

The bank is estopped. Gunther is an innocent party. The bank having failed to speak when it was its duty to do so, will not be heard now. The bank had notice that it was a gambling debt and payment stopped by the drawer. The bank was negligent and is liable.

HUMPHREYS, J. The appellee, A. J. Gunther, instituted this suit against the Arkansas National Bank, appellant, in Hot Springs township, Garland county, before a justice of the peace, alleging in substance that the Arkansas National Bank had charged a check of $100.00 against his account therein without authority in fact or law. W. H. Greene filed an interplea in the suit styled "Answer and Cross-Complaint," charging in substance that the Arkansas National Bank had charged the same check against his account without authority in fact or law. The Arkansas National Bank filed its answer admitting that when the check in question was presented it was first charged against the account of W. H. Greene but upon its attention being called by W. H. Greene to the fact that he had notified it not to pay the check, the bank had then charged the check against the account of A. J. Gunther who had endorsed the check when presented by him for payment; that the charge against the account of A. J. Gunther was justified under the facts and law. On trial in the justice of peace court, a judgment was rendered against the appellant, Arkansas National Bank for $100.00 in favor of A. J. Gunther and for the same amount in favor of W. H. Greene. The case was ap-

pealed to the circuit court and there tried by the court sitting as a jury under the same pleadings and an agreed statement of facts. The substance of the agreed statement of facts set out in appellant's abstract and brief, unchallenged by appellee, is as follows:

"That on June 9, 1915, Greene executed and delivered to Snapp a draft on appellant for $100.00 in payment of a gambling debt. Greene at that time having on deposit with appellant sufficient funds to meet the draft and discovering bad faith upon the part of Snapp, notified appellant before presentation of the draft not to pay same, that is notified the certificate teller, Groom, who in turn notified Neill, cashier, stating that the draft was in payment of a gambling debt. A month afterwards Snapp sent the draft endorsed in blank to appellee by letter, who presented it to Sisney, exchange teller of appellant, asking therefor Little Rock exchange payable to Snapp. Sisney executed the exchange as requested, but demanded appellee's endorsement as a condition for delivery, which appellee did. Sisney knew of previous similar drafts and checks presented by appellee and that the president of appellant company had required appellee to guarantee before paying. The draft was turned over to the bookkeeper during the usual course of business and charged to Greene's account and at the end of the month his book having been balanced this charge appearing Greene immediately notified appellant that he had previously given them notice not to pay this draft and that he would hold appellant responsible. Appellant on receiving this notice from Greene charged appellee with the $100.00, appellee at that time having an account with the bank in which he had a credit exceeding $100.00. Appellee protested against this action and brought suit to recover the $100.00.

"Sisney had no personal notice that payment had been stopped. Appellee had previously acted as the agent or representative of Snapp, collecting checks of Greene's on appellant and in the case at bar appellee had no interest in the check and the proceeds thereof

but forwarded the exchange to Snapp to Little Rock who cashed it. At the time of presenting the draft in question Sisney knew that Rix, appellant's president, had required appellee to especially guarantee a similar draft and that Rix had refused to honor the draft on Snapp's blank endorsement alone. The draft had never been previously presented. Appellee had no knowledge or information that the draft was given for a gambling consideration.

"It is appellant's custom to require persons who present a check for payment to endorse the same for the purpose of holding them for the draft or check."

The circuit court rendered judgment against the Arkansas National Bank in favor of W. H. Greene for $100.00 from which no appeal was taken, and also rendered a judgment against the Arkansas National Bank in favor of A. J. Gunther for $100.00 from which judgment this appeal is prosecuted.

The undisputed evidence in this case is to the effect that the president of the Arkansas National Bank would not cash this draft bearing the blank endorsement of C. A. Snapp; that the president of the bank in a transaction of this kind had required A. J. Gunther to specially guarantee the payment of a similar draft, one previous to this; that Sisney, the paying teller, had knowledge of this fact at the time the check was presented by Gunther for payment and required Gunther to endorse the check before he delivered Little Rock exchange in payment thereof to him. He also knew that the president of the bank had required Gunther to specially guarantee a check presented by him for his friend Snapp. It is also undisputed and conceded that it was a custom of this particular bank to require every person who presented a check for payment to sign his name on the back for the purpose of holding him for the draft or check.

Under the peculiar facts in this case, the court is of the opinion that the endorsement of A. J. Gunther on this check amounted to a contract to indemnify the bank in case Greene failed to pay the check.

The bank had a right in the law under the undisputed facts in this case to charge the check back to the account of the appellee. The judgment is, therefore, reversed and dismissed at the cost of the appellee.

DE YAMPERT v. MANLEY.

Opinion delivered January 29, 1917.

1. APPEAL AND ERROR—DECREE OF CHANCELLOR—REASONS THEREFOR.—If the result attained by the chancellor's decree is correct, the decree will be affirmed on appeal, even though the grounds upon which he based it are untenable.
2. JUDICIAL SALES—DEATH OF DEFENDANT—NECESSITY FOR REVIVOR.—A confirmation of a judicial sale is a final decree from which an appeal may be prosecuted, and in the case of the death of the defendant in the decree, an order of revivor is essential to constitute a valid order of confirmation.
3. JUDICIAL SALES—FORECLOSURE—DEATH OF DEFENDANT.—Where the original defendant, in a foreclosure proceeding, is severed from the cause by death, his successors to the title by inheritance or otherwise, must be brought in by an order of revivor before their rights can be foreclosed.
4. JUDICIAL SALES—CONFIRMATION—DEATH OF DEFENDANT.—Kirby's Digest, § 6322, has no application to a question of revivor after the death of the defendant in a foreclosure proceeding, and before confirmation.
5. JUDICIAL SALES—CREDIT—TIME.—The maximum period of credit in foreclosure sales is prescribed by the statute (Kirby's Digest, § 6236), and where the decree is silent on that point, it will be construed with reference to the statute.
6. JUDICIAL SALES—FAILURE TO CONFORM TO STATUTE—CONFIRMATION.—A judicial sale under foreclosure proceedings, when not in conformity with the direct terms of the statute, can not be confirmed.
7. JUDICIAL SALES—INVALIDITY—LIMITATIONS.—Where a judicial sale is invalid, its invalidity may be asserted at any time before the running of the statute bar.
8. JUDICIAL SALES—INVALIDITY—RENTS.—One who takes possession prematurely of land, under an invalid foreclosure sale, is liable for the rent of the same.

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

G. P. George, Thos. Compere, Coleman & Lewis and *T. D. Crawford*, for appellant.

1. The chancellor erred in treating the complaint as amended to set up an entirely new cause of action. Bliss on Code Pleading, § 429; 71 Ark. 222; 43 *Id.* 243; 59 *Id.* 441; 51 Ark. Law Rep. 203; 58 Ark. 504; 76 *Id.* 146; 55 *Id.* 562; 7 *Id.* 516; 29 *Id.* 637; 49 *Id.* 94.

2. The chancellor erred in holding that a trust relation existed between de Yampert and Manley. 50 Ark. 71; 41 *Id.* 400; 95 *Id.* 496; 108 *Id.* 282. A mere verbal promise and its breach is not sufficient; there must be some element of fraud. 114 *Id.* 138.

3. The evidence is not sufficient. 114 Ark. 136.

4. As to the four objections made by plaintiff's pleadings. (1) That the court was without authority to order a sale for cash. The decree was by consent. Manley is estopped and this was a mere irregularity cured by confirmation. 90 Ark. 170. (2) Manley knew that Aaron Robertson died before final orders and that no order of revivor was made. No fraud is alleged nor injury shown. 54 Ark. 541; 74 *Id.* 323; Kirby's Digest, § 6322; 10 U. S. L. Ed. 33. The right of revivor did not exist after a decree declaring lien and ordering sale. 18 Ark. 414.

(3) While the lien of the judgment did expire in three years, the lien of the mortgage did not expire until ten years after the decree. 69 Ark. 205-8. No revivor was necessary. 10 Ark. 380. A judicial sale is not void for want of notice. 47 *Id.* 413.

Henry & Harris, for appellee.

1. The chancellor committed no error in considering the complaint as amended to conform to the proof. 42 Ark. 59; Kirby's Digest, §§ 6140-5, 6148; 100 Ark. 216; 40 *Id.* 352; 54 *Id.* 441; 64 *Id.* 451; 80 *Id.* 330. No exceptions were saved. 64 *Id.* 450.

2. The evidence supports the decree that the trust relation existed. It is a fraud in a purchaser who obtains property at a price greatly below its market value, by means of a verbal agreement, to keep it in violation of the agreement. 19 Ark. 39; 41 *Id.* 264;

187 S. W. 1057. The facts of this case show fraud. 2 Pom. Eq. 1055; 28 Ark. 290; 26 *Id.* 445.

3. The decree of March 12, 1912, was wholly void. Robertson had died and there was no revivor and the lands were sold for cash. There is no estoppel by laches. 81 Ark. 320; 83 *Id.* 160; 102 *Id.* 61; 92 *Id.* 500; 94 *Id.* 226; 97 *Id.* 43.

4. A sale for cash is not a mere irregularity cured by confirmation. Kirby's Digest, § 6236. It was void on its face. 27 Ark. 292; 34 *Id.* 63; 37 *Id.* 125. Appellant was not an innocent purchaser. 81 Ark. 457-464; 71 *Id.* 311; 58 *Id.* 168.

5. An action can proceed no further, after the death of a party, until properly revived. 76 Ark. 123; 105 *Id.* 222; 31 *Id.* 319; 103 *Id.* 608; 1 Cyc. 84. The law was not complied with. 66 Ark. 376; 90 *Id.* 166; 38 S. W. 687; 28 Ark. 71; 45 *Id.* 267; 1 Ky. Law Rep. 348; 6 *Id.* 517; 41 S. W. 27. The decree is right upon the whole case.

McCULLOCH, C. J. J. B. Gabe owned a tract of land in Ashley county, Arkansas, described as the north fractional half of the northeast quarter of section ten (10), township nineteen (19) south, range five (5) west, and mortgaged the same to the American Freehold Mortgage Company to secure indebtedness evidenced by notes which were assigned by the mortgagee to William Gaines, and the latter instituted proceedings in the chancery court of Ashley county to foreclose the mortgage. A consent decree was entered by the chancery court on December 15, 1906, and said lands were condemned for sale by a commissioner of the court, the sale being ordered for cash. By agreement between the respective parties to the decree, the sale was deferred, and in the year 1907 Aaron Robertson filed his intervention in the cause alleging that he had purchased the south half of said tract from one Moats, who was the owner at the time, and received a title bond and was put in possession. Robertson claimed title to the last mentioned portion of the

mortgaged land, but a decree was rendered which in effect adjudicated his title to be superior to that of Gabe but subordinate to the mortgage upon which the original foreclosure decree had been rendered.

The decree of the court was that, "as against the plaintiffs, Benjamin Graham, trustee, and William Gaines, assignee, that under the decree heretofore rendered in their favor v. J. B. Gabe and wife, they shall first have sold the north half of said land, and if same is not sufficient to satisfy said decree that he then have sold the south half. That as between Gabe and Robertson, Robertson has paid for the south half of said land and has held the same for more than twenty years, claiming the same absolutely as his own against the world, and has valid title thereto as against said Gabe." The decree then proceeded to divest the title to the south half of said tract out of Gabe and vest the same in the said Aaron Robertson. The last mentioned decree was rendered November 24, 1908.

Robertson died in December, 1910, in possession of the land and leaving his last will and testament devising the land to appellee Manley. On March 12, 1912, there having been no sale under the decree, the court on motion of the original plaintiff, made an order discharging the commissioner theretofore appointed, on account of removal from the State, and appointed another commissioner in his stead and ordered him to sell the whole of the tract mentioned in the decree "in the manner prescribed in the decree of this court" rendered in the year 1906. That order was made without revivor of the cause and without the appellee having been brought into the cause in any manner. The commissioner last appointed proceeded at once to sell the land in accordance with the terms of the original decree, that is to say for cash, and sold at public sale to appellant, W. B. de Yampert, and made his report at the November term, 1911, of the court, and the report was confirmed, still without revivor and without the appearance of appellee. The price paid by appellant was $895.00 for the north half of said tract, which was

known as the Gabe land, and $300.00 for the south half of the tract, known as the Robertson land. The commissioner executed a deed to appellant pursuant to the order of the court, which deed was duly approved by the court, and appellant has been in possession of the land under the commissioner's deed since that time.

On May 11, 1915, appellee instituted the present proceeding by filing a complaint which he termed a "bill to review and set aside the former orders of the Ashley chancery court," and appellant was made defendant. The prayer of the complaint was that "the order of sale, decree of foreclosure, order of revivorship, sale and commissioner's deed be set aside, cancelled and held for naught as a cloud on plaintiff's title insofar as same affect the south half of the fractional north half of the northeast quarter of section ten (10)" etc., and that his title to the land under the last will and testament of Robertson be quieted as against the defendant, W. B. de Yampert. The former proceedings were set forth in the complaint, and it was alleged that the commissioner's sale and deed thereunder were void for the reason that there had been no order of revivor after the death of Robertson, that the commissioner made the sale prematurely without awaiting the time prescribed in the original decree, and for the further reason that the sale was made for cash contrary to the terms of the statute. Appellee also alleged that appellant had been in possession of the land and receiving the rents and profits thereof to the amount of $200 per annum, which was more than sufficient to reimburse appellant for the amount he had paid for this portion of the land.

Appellant answered the complaint, denying the allegations with reference to the ownership of the land by appellee, and pleading estoppel and laches on the part of appellant by standing by without objection and permitting appellant to purchase the land at the sale. The cause was heard by the court upon the record of the original proceedings and the depositions

of witnesses. The court found that appellee was the owner of the land under the devise from Robertson, that appellant had purchased the land at the sale for appellee, Manley, and should be treated as the holder of the legal title in trust for the latter and should account for the rents and profits as a credit against the purchase price. It was decreed that "the defendant be credited with the purchase price of said lands, $300 and interest thereon at ten per cent. per annum from date of purchase and be charged with rent from the time he went into possession until January 1, 1917, with interest, said purchase price and interest being exactly equal to said rentals for said five years and interest," and that appellee pay to appellant all the taxes previously paid by him, with interest, and that upon the payment of same the title to the south half of said tract be divested out of appellant and vested in appellee. An appeal to this court has been duly prosecuted.

It is insisted on behalf of appellant that there was no allegation in the complaint upon the issue decided by the court in favor of appellee, and that there is no proof to sustain the finding of the court to the effect that appellant had agreed to purchase the land for appellee, and that the court erred in treating the pleadings as amended to conform to the proof on which the court based its finding and decree in favor of appellee. We agree with appellant that there is not sufficient proof in the record to justify a finding in appellee's favor on that issue. There is no proof at all that appellant agreed before the sale to purchase the land for appellee so as to bring the case within the decision of this court holding that a trust is, under those circumstances, created. *Strasner* v. *Carroll*, 125 Ark. 34, 187 S. W. 1057.

(1-3) However, counsel for appellee defend the decree on another ground, which we will proceed to consider, for if the chancellor reached the correct result the decree should be affirmed, even though the grounds upon which it is based are untenable. The

contention is that the sale by the commissioner for cash, instead of on a credit as prescribed by statute, renders the sale void or voidable, and that there has been no valid confirmation for the reason that the cause was not revived after the death of Robertson. We are of the opinion that the ground thus stated is well taken, and that for that reason the decree of the chancellor reached the correct result. It has been decided by this court that a confirmation of a judicial sale is a final decree from which an appeal may be prosecuted. *Bank of Pine Bluff* v. *Levi*, 90 Ark. 166. It necessarily follows, therefore, that an order of revivor in case of the death of the defendant in the decree is essential to a valid order of confirmation. In other words, when the original defendant is severed from the cause by death, his successors to the title by inheritance or otherwise must be brought in by an order of revivor before their rights can be foreclosed. This follows as a necessary consequence, because the sale is not complete until the order of confirmation is rendered, which is a judicial act.

The authorities on this subject outside of this State are not altogether in harmony on the question, but our decisions as far as they go tend to support that view. *Cunningham* v. *Burk*, 45 Ark. 267; *Anglin* v. *Cravens*, 76 Ark. 122. The Kentucky Court of Appeals has expressly held in several cases that an order of confirmation made after the death of the defendant, and without revivor as against the heirs, was void and that no rights were acquired under the confirmed sale. *Murphy* v. *Fryer*, 1 Ky. Law Rep. 348; *Wheatley* v. *Hay's Heirs*, 6 Ky. Law Rep. 517; *Forst* v. *Davis*, 101 Ky. 343, 41 S. W. 27. The last case cited above is directly in point, and the court there said: "Where a defendant whose land has been sold under decree dies before the sale is confirmed, an order of confirmation entered upon an order of revivor against the widow and heirs, entered within six months after the death of the defendant, is void, and the commissioner's deed passes no title."

(4) Appellant relies upon the following statute of this State in support of the contention that an order of revivor is unnecessary: "After a conveyance is ordered or adjudged, if any of the parties shall die, it shall not be necessary to revive the action, but the conveyance, in pursuance of the judgment or order, shall be effectual to pass the title, notwithstanding the death of any of the parties." Kirby's Digest, § 6322. This statute, it will be observed, applies only to a case where a conveyance has been ordered, and it has no application to a question of revivor before confirmation. Our conclusion, therefore, is that in view of the effect of an order of confirmation, it is necessary that the parties in interest be before the court, and that if the original defendant die before the confirmation it is necessary to revive the action in the name of the successors to the title, and bring them in so as to give them an opportunity to be heard.

(5) It is also contended in behalf of appellant that the second decree rendered in the lifetime of Robertson was in fact in accordance with the terms of the original decree, and ordered a sale for cash, and that that irregularity cannot be taken advantage of, as there was no appeal by Robertson from that decree. It must be said, however, in answer to that contention, that counsel for appellant are mistaken, we think, as to the effect of that decree. It is true the decree ordered a sale of the land "under the decree heretofore rendered," but it did not specify the terms of the sale, and Robertson was not bound by the erroneous direction in the former decree as to the terms of the sale. The effect of the decree was not to make it a consent decree, as contended by appellant, nor was Robertson bound to appeal from it. If he had done so he could not have secured a reversal on the ground that it ordered a sale upon terms in conflict with the direction of the statute, as the decree did not make such a direction. The statute itself (Kirby's Digest, § 6236) prescribes the minimum period of credit on foreclosure

sales, and the decree being silent as to the terms must be construed with reference to the statute.

(6) A valid confirmation would have cured the irregularity, but a sale in direct conflict with the terms of the statute in this respect should not be confirmed. It was the duty of the court to disapprove the report and reject the sale when it was shown that it had not been made in compliance with the express directions of the statute. We must treat the sale, therefore, as unconfirmed, there having been no valid order of confirmation, and it follows that the court was correct in setting aside the sale, but the decree should be based upon the fact that the sale had not been made in conformity with the directions of the statute.

(7) Appellee is not estopped to assert the invalidity of the order of confirmation. He did not, according to the proof, consent to the sale or encourage appellant to purchase the land. All that occurred between the parties, according to the proof, was after the sale was made, and appellee has done nothing upon which the doctrine of estoppel may be invoked. He merely waited a time not sufficient for the statute of limitations to bar his rights.

(8) The chancellor was also correct in charging appellant with rents and profits, as he took possession prematurely and there has been no valid confirmation of the sale. The finding of the chancellor as to the amount of the rents is not against the preponderance of the testimony.

We say nothing about the form of the proceedings in which the remedy is sought by appellee, nor the forum chosen, for the reason that no question is raised here concerning those matters.

Decree affirmed.

EADES v. SIMPSON.

Opinion delivered January 29, 1917.

1. CHATTEL MORTGAGES—MORTGAGE OF CROP—DESCRIPTION.—A mortgage on a certain crop described the property as a crop of corn and cotton "amounting to twelve acres to be grown on the farm of Bob Earl in Craig township." It appeared that the field called the "Bob Earl field" embraced a portion of land belonging to the United States which had recently been homesteaded by one M. *Held*, the description was sufficient to put a purchaser of the crop from the mortgagor upon notice of the mortgage.
2. CHATTEL MORTGAGES—DESCRIPTION—GROWING CROPS.—In a chattel mortgage on growing crops it is not necessary that the property should be so described as to be capable of identification by the written recital or by the name used to designate it in the mortgage. A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient, and parol testimony is admissible to show that a particular article is included within the general words of a description.

Appeal from Van Buren Circuit Court; *John I. Worthington*, Judge; affirmed.

J. A. Eades, for appellant.

1. All the instructions given for plaintiff were erroneous; those refused for defendant correctly state the law. The mortgage was indefinite in terms and could not be explained by oral testimony. The cotton was grown on Government land and no occupant has a right of property in the crop. 14 Ark. 282.

2. The cotton described in the mortgage and that in controversy are entirely different. 54 Ark. 91. Appellant was an innocent purchaser. 41 *Id.* 74. Parol evidence was not admissible. 43 Ark. 352; 80 N. W. 813; 47 *Id.* 127; 10 R. C. L. 215-240; 50 Ark. 393; 64 *Id.* 650; 30 N. E. 346. The mortgage was not sufficient to put appellant even on inquiry.

S. W. Woods, for appellee.

1. Description in the mortgage, taken in connection with the relations of the parties and the familiarity of the appellant with the property and its conditions, were sufficient to put him on notice of the mortgage. 14 Ark. 282 has no application and has been overruled.

5 R. C. L. 401, § 24, and p. 422, § 53; 39 Ark. 394; 109 *Id.* 552; 51 *Id.* 410; 54 *Id.* 158; 52 *Id.* 278, 371; 51 *Id.* 218. It was grown on the Bob Earl land and in the Bob Earl field.

2. The evidence supports the verdict. 53 Ark. 75, 327; 70 *Id.* 136. Substantial justice has been done. 34 Ark. 93; 64 *Id.* 238.

McCULLOCH, C. J. This is a suit in replevin to recover possession of a small quantity of cotton. The plaintiff Simpson claims title to the cotton in controversy under a mortgage from one Hightower, who cultivated the crop and gathered it. Defendant Eades purchased the cotton from Hightower and claims that the crop from which it was gathered was not described in the mortgage to Simpson. Hightower's mortgage to Simpson described the property as a crop of corn and cotton "amounting to twelve acres to be grown on the farm of Bob Earl in Craig Township," in Van Buren County. Hightower was a tenant on the Bob Earl farm, and, as before stated, raised and gathered the cotton in controversy.

The evidence shows that the crop was raised within an inclosure known as the Bob Earl field, but that this particular portion of the crop was raised on land the title to which turns out to be in the United States Government. The Government tract is adjoining the Earl land and was entered as a homestead by one Marchbanks in May, 1915, a few weeks after the execution of the Hightower mortgage to Simpson. Marchbanks caused the line of the tract to be surveyed in September, 1915, and it was discovered from the survey that the line ran through the Earl field so as to cut off five or six acres of the cultivated land which had been occupied as the Earl farm. The possession of Hightower was not, however, disturbed, and he gathered the crop and sold it. The line between Craig Township and Liberty Township runs along the boundary between the Earl tract and the Marchbanks tract, so the new survey shows the land occupied by Hightower to be partly in Liberty

Township, instead of Craig Township as described in the mortgage.

It is contended that under this state of the case, the description in the mortgage was insufficient to cover the portion of Hightower's crop which was raised on the Marchbanks land, and that the purchaser of the crop is not chargeable with notice of the mortgage. The following rule, stated by this court many years ago, has been steadily adhered to: "It is not necessary that the property should be so described as to be capable of identification by the written recital, or by the name used to designate it in the mortgage. A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient; and parol evidence is admissible to show that a particular article is included within the general words of a description." *Gurley* v. *Davis*, 39 Ark. 394.

Applying the test just announced to the facts of the present case, it is evident that the description was sufficient to charge purchasers from the mortgagor with notice of the fact that the crop raised by Hightower on the Bob Earl land, or the whole of the inclosure which was commonly understood to be the Bob Earl field, was included in the mortgage. This does not constitute an extension of the terms of the mortgage, or a variance of the written instrument by parol testimony, but it is a mere identification of the mortgaged property to fit the descriptive language used in the instrument itself. In other words, the language of the instrument affords the means of identification, and the parol testimony merely supplies that which is necessary to complete it.

It is further contended that Hightower had no title to the crop raised on that portion of the land which turned out to be owned by the Government, and that his mortgage to the plaintiff therefore conveyed no title. This contention is based on the decision of this court in the case of *Floyd* v. *Ricks*, 14 Ark. 286, but the doctrine of that case has, we think, no application to the present

one. In fact, this point is ruled against the defendant by the recent case of *Bethea* v. *Jeffres*, 126 Ark. 194, where we held that "one who raises a crop upon land which he holds adversely, the crop being the result wholly of his own labor or that of his tenant, and where he has severed and removed the crop from the premises while still in possession, the title to the crop is in him, and the only remedy of the owner of the land is an action for mesne profits."

The evidence is sufficient to sustain the verdict. In fact, the testimony relating to the situation, which fully identifies the crop as a part of that described in the mortgage to plaintiff, is undisputed, and the verdict could not have been otherwise under the evidence.

The judgment is therefore affirmed.

GIBSON *v.* THE LOWER RUNNING WATER DRAINAGE DISTRICT.

Opinion delivered January 29, 1917.

1. IMPROVEMENT DISTRICTS—ORGANIZATION—NOTICE AND DATE OF HEARING.—Where a district is attempted to be organized under Act of 1909, p. 829, as amended by Act of 1911, p. 193, in order for the county court to acquire jurisdiction, it is necessary that the county court fix the day for the hearing before the publication of the notice to the property owners.
2. IMPROVEMENT DISTRICTS—ORGANIZATION—JURISDICTION OF COUNTY COURT.—Where proceedings looking to the organization of an improvement district are special and out of the course of the common law, no presumption can be indulged with respect to jurisdictional matters, and the question of jurisdiction may be inquired into either directly or collaterally.
3. IMPROVEMENT DISTRICTS—ORGANIZATION—ORDERS BY "COURT."—Under Act 1909, p. 829, as amended by Act 1911, p. 193, the direction to the county "court" to order the publication of a certain notice, *held*, to mean the county court, and not the county judge, in vacation.

Appeal from Lawrence Chancery Court; *Geo. T. Humphries*, Chancellor; reversed.

The appellant *pro se*.

1. The pretended formation of the district and all proceedings thereunder are void for the reason that

no order of the county court was made fixing the day for the hearing of the preliminary report of the engineer. Act 221, Acts 1911; 115 Ark. 165; 48 *Id.* 238; 51 *Id.* 34; 61 *Id.* 259; 55 *Id.* 30; 56 *Id.* 419; 14 *Id.* 408; 25 *Id.* 541; 30 *Id.* 719.

W. A. Cunningham, for appellees.

Notice was given and published by the clerk as required by law. This was sufficient. The intention of the Legislature was thus given due effect. 36 Cyc. 1107; 86 Ark. 304. The *court* is not required to have anything to do with the notice until after the publication. An order or direction of the judge is sufficient. The cases cited by appellant are not in point. Here the law has been complied with.

W. E. Beloate and *Jno. W. and Jos. M. Stayton, amici curiae.*

The county court must fix the day. 71 Ark. 226; 75 *Id.* 420; 86 *Id.* 596; 89 *Id.* 36; 103 *Id.* 571. Giving notice is a condition precedent. 113 *Id.* 568; 124 *Id.* 234; 123 *Id.* 383; 116 *Id.* 361.

McCULLOCH, C. J. Appellant is the owner of land within the boundaries of a drainage district in Lawrence County known as the Lower Running Water Drainage District, and he instituted this action in the chancery court of Lawrence County to prevent the imposition of assessments on his land. The district was organized in the year 1915, pursuant to the terms of the act of May 27, 1909 (Acts of 1909, p. 829), as amended by the act of April 28, 1911 (Acts of 1911, p. 193). It is contended that the county court never acquired jurisdiction because the publication of the notice to property owners was not based on an order of the county court fixing a day for the hearing.

(1) The act of 1911 provides that "when three or more owners of real property within a proposed district shall petition the county court to establish a drainage district to embrace their property, describing generally the region which it is intended shall be embraced within the district, * * * it shall be the duty of the

county court to enter upon its records an order appointing an engineer to be selected by the petitioners;" that "said engineer shall forthwith proceed to make a survey and ascertain the limits of the region which would be benefited by the proposed system of drainage; and such engineer shall file with the county clerk a report showing the territory which will be benefited by the proposed improvement, and giving a general idea of its character and expense, and making such suggestions as to the size of the drainage ditches, and their location as he may deem advisable." The statute then further provides as follows: "The county clerk shall thereupon give notice by publication for two weeks in some newspaper published and having a general circulation in the county, calling upon all persons owning property within said district to appear before the court on some day to be fixed by the court, to show cause in favor or against the establishment of said district. At the time named in said notice, said county court shall meet and hear all property owners within the proposed district who wish to appear and advocate or resist the establishment of the district, and if it deems it to the best interest of the owners of real property within said district that the same shall become a drainage district, under the terms of this Act, it shall make an order upon its records establishing the same as a drainage district subject to all the terms and provisions of this act."

It is undisputed that the clerk of the county court gave the notice prescribed in the statute just quoted, and that the court convened on the day named in the notice and made an order establishing the district, but it is also undisputed that the county court did not make an order fixing the day for the hearing. It is contended on behalf of appellant that the notice must be given on the day previously fixed by the county court, and that the jurisdiction of the court to make an order organizing the district is dependent upon such previous order of the court fixing the day of hearing and the notice published pursuant to that order.

We are of the opinion that the argument of appellant is well founded, and that the order of the county court establishing the district was void for lack of jurisdiction. It will be observed upon a consideration of the statute that the proceedings are entirly *ex parte* until the notice is published and the owners of property in the district are thus given an opportunity to be heard. The order of the court fixing the day and the publication of the notice is necessary in order to give jurisdiction to hear and determine the question of advisability of the organization of the district. It is perfectly clear from the language of the statute that the day for the hearing must be fixed before the clerk is authorized to publish the notice, because the notice specifying the particular day for the hearing can not be given until that day has been fixed, and it is equally clear that the date of hearing can only be fixed by the court. The statute says that in so many words. It provides that the notice shall call upon all persons owning property in the district to appear on a day "to be fixed by the court," and that at the time named in the notice "said county court shall meet and hear all property owners," etc.

(2) Since we conclude that the statute requires fixing the date before the clerk can publish the notice, it necessarily follows that a notice published without the fixing of the day is void, because, as before stated, the foundation of the notice is the order of the court. The order of the court being the basis of the notice, property owners have a right to disregard the notice unless the order of court has first been made. *Gregory* v. *Bartlett*, 55 Ark. 30. The proceedings authorized under the statute are special and out of the course of common law proceedings, and no presumption can be indulged with respect to jurisdictional matters, and the question of jurisdiction may be inquired into either directly or collaterally. *St. Louis, I. M. & S. Ry. Co.* v. *Dudgeon*, 64 Ark. 108. The giving of the notice prescribed by the statute, and the order of the county court authorizing it, are essential to the acquisition of jurisdiction

over the property owners. *Drainage District* v. *Terry*, 126 Ark. 518.

(3) It was proved in the hearing below that the county judge in vacation gave an oral direction to the clerk to publish the notice, and it is argued that the word "court" in the statute means judge, and that the order made by the judge in vacation was sufficient. It is true that under some circumstances, when the will of the law-makers is definitely indicated in other ways the peculiar phraseology in which it is expressed may be disregarded, and it has been held by this court that the word "court" may some times be understood as meaning judge. *Robertson* v. *Derrick*, 113 Ark. 40. There is nothing in the context which would indicate that the law-makers used the word "court" in any sense other than its technical meaning. There is no indication in the statute that it was meant to confer upon the judge in vacation the authority to make the order fixing the day for the hearing, for it speaks of the "court" hearing the matter in the same connection with the use of the word "court" with reference to fixing the day of notice, thus indicating that the same word was used both times in the same sense, for the law-makers could not be understood to have meant that the judge in vacation should hear the petition.

It is earnestly argued that the inconvenience of waiting for a convening of the court, after the filing of the engineer's report, leads to the conclusion that the law-makers did not intend to require that delay, and that it was intended that the clerk might give the notice without waiting for the order of the county court to fix the day. County courts meet quarterly in regular session, and the delay from one term to another is not so great as would compel the conclusion that the law-makers necessarily intended to avoid that much delay. At any rate, it does not present a situation which necessarily indicates that by the use of the word "court" it was intended to authorize the judge in vacation to make an order.

The jurisdictional requirements not having been complied with, it follows that the judgment of the county court establishing the district is void. The decree is therefore reversed, and the cause is remanded with directions to enter an order in accordance with the prayer of appellant's complaint.

LUSK *et al.*, RECEIVERS, ST. LOUIS & S. F. RD. CO. *v.* OSBORN.

Opinion delivered January 29, 1917.

1. REMOVAL OF CAUSES—FEDERAL EMPLOYER'S LIABILITY ACT.—A cause may not be removed to the Federal Court, when brought under the Federal Employer's Liability Act, where the action is for personal injuries received by an employee of a railway company, a foreign corporation, and upon a train engaged in interstate commerce.
2. NEGLIGENCE—LIABILITY OF FELLOW EMPLOYEE.—Where two servants are employed by the same master, the one may be liable to the other in damages for his negligent act which causes the injury to the fellow-servant.
3. MASTER AND SERVANT—INJURY TO SERVANT BY NEGLIGENT ACT OF FELLOW-SERVANT—JOINDER OF ACTIONS.—Where an employee has been injured by the negligence of a fellow-servant, he may bring an action against both the master and his fellow-servant.
4. MASTER AND SERVANT—PERSONAL INJURY TO EMPLOYEE ON INTERSTATE TRAIN—DEFENDANT A NON-RESIDENT CORPORATION—JOINDER OF ACTION AGAINST FIREMAN AND ENGINEER—REMOVAL.—Plaintiff's intestate was a brakeman working on a freight train engaged in interstate commerce, and operated by the receivers of the railway company, who were non-residents, and was injured by the operation of the train. Plaintiff brought an action against the receivers for damages, and in a second paragraph in his complaint sued both the receivers, and the engineer and fireman who were operating the train, asking judgment against them jointly. Defendant receivers asked a removal to the Federal Court, setting out that no cause of action was stated against the engineer and fireman, and stating that they were fraudulently joined in orders to prevent a removal. *Held*, the engineer and fireman were not improperly joined, and that the court properly refused to order a removal.
5. MASTER AND SERVANT—INJURY TO RAILWAY BRAKEMAN.—Plaintiff's intestate was "swing" brakeman on a freight train, charged with the duty of determining when it was proper for the train to proceed; at the time of the accident he was not in a position to see ahead and the duty to signal the engineer to move the train fell upon the rear brakeman, who did give the signal. A collision resulted. *Held*, it was a

question for the jury whether plaintiff's intestate was guilty of any negligence which would bar a recovery.

6. MASTER AND SERVANT—INJURY—INTERPRETATION OF RULES.—Plaintiff's intestate was injured while riding on the pilot of an engine doing switching, the engine being provided with a place for employees to stand when engaged in switching and yard work. *Held*, a rule prohibiting employees from riding on engine pilots had no application to engines engaged in switching and yard work.

7. MASTER AND SERVANT—RAILWAY BRAKEMAN—CONTRIBUTORY NEGLIGENCE.—Plaintiff's intestate, a brakeman, was riding on the pilot of the engine, and behind a box car; he was charged with directing the operation of the train, and sustained fatal injuries when a collision with an approaching train occurred. *Held*, it was for the jury to determine whether the act of riding on the pilot behind the box car constituted an act of negligence, which was the sole cause of the injury, barring a recovery.

8. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—In an action for damages resulting from an accident which caused the death of plaintiff's intestate, the burden is upon the defendant to establish contributory negligence on the part of plaintiff's intestate.

9. TRIAL—PERSONAL INJURY ACTION—ARGUMENT CONCERNING VIOLATION OF INAPPLICABLE RULE.—Argument of counsel is not improper which refers to the practiced violation of an alleged rule of the defendant in a personal injury action, where the rule is inapplicable to the facts in the case, and was not violated.

10. TRIAL—ARGUMENT OF COUNSEL—LIMITATIONS.—An attorney may argue a case in his own way provided he does not misstate the testimony or undertake to state facts which are not in the record, or indulge in other comments which unfairly prejudice the rights of his adversary, and a judgment will not be reversed merely because counsel's argument falls without the range of the proprieties.

11. DAMAGES—PERSONAL INJURY ACTION—AMOUNT.—Plaintiff's intestate, a railway brakeman, was killed by the negligent operation of a train. Suit was brought under the Federal Employer's Liability Act; *held*, considering the testimony with respect to the habits and earning capacity of the deceased, and the average amount of his contributions to those who are designated as the beneficiaries under the Federal statute, that a verdict for $15,000 was not excessive.

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

W. F. Evans and *B. R. Davidson*, for appellants.

1. The facts of this case were recently before this court. 123 Ark. 94; 184 S. W. 65.

There were two counts in the complaint, one alleging a cause of action under the Employer's Liability Act, and the second under the State statute. The cause was removable to the Federal Court. 229 Fed. 319; 220 *Id.* 731; 203 *Id.* 1021; 167 *Id.* 675. The filing of the petition and bond deprived the court of jurisdiction. 50 Ark. 388; 87 *Id.* 136; 75 *Id.* 116; 81 Fed. 518; 81 *Id.* 977; 176 *Id.* 872; 183 *Id.* 133; 204 U. S. 176; 215 *Id.* 437.

2. The peremptory instruction requested should have been given. The conductor was absent and Howle had charge of the crew; he was riding on the pilot in violation of the rules. 156 Fed. 234; 95 U. S. 439; 141 Fed. 919; 87 S. W. 163; 156 Fed. 234; 41 Ark. 542; 40 *Id.* 298; 70 *Id.* 603. He was guilty of recklessness and can not recover. 18 Fed. 229; 136 *Id.* 164; 141 *Id.* 919; 118 *Id.* 223; 156 *Id.* 234; 95 U. S. 439; 163 *Id.* 93.

3. The violation of the rules is negligence *per se.* 84 Ark. 377; 85 *Id.* 237; 60 Fed. 370; 63 *Id.* 228; 118 *Id.* 223; 157 *Id.* 347.

4. No act of negligence is shown on behalf of the company. His own conduct was the proximate cause. 63 Ark. 177; 50 Fed. 725; 63 *Id.* 228; 128 *Id.* 529; 57 *Id.* 921.

5. He assumed the risk under the liability act. 141 Fed. 913; Adv. Sheets U. S. Sup. Ct. 588, May 22, 1916; 144 Fed. 668; 122 U. S. 189; 233 *Id.* 492; 239 *Id.* 595; 58 Ark. 234; 239 U. S. 576.

6. The concluding argument of counsel was objectionable and prejudicial. 61 Ark. 130; 70 *Id.* 179, 305; 71 *Id.* 415; 72 *Id.* 461; 75 *Id.* 577; 77 *Id.* 238; 81 *Id.* 87; 95 *Id.* 233.

7. The damages are excessive. 172 Fed. 684; 26 *Id.* 22; 40 *Id.* 95; 138 *Id.* 867.

8. The instructions given for plaintiff are clearly erroneous. 27 S. W. 622; 19 A. & E. R. R. Cases 261; 49 Pac. 83; 45 *Id.* 581; 57 Atl. 529. The instructions refused clearly state the law. The lookout statute has no application to the protection of employees operating a train. 77 Ark. 1-10; cases *supra.* The evidence does not warrant a recovery.

Covington & Grant, for appellee.

1. The first count is based entirely upon the Federal act and an action based upon that act can not be removed to the Federal Court. 112 Ark. 305; 238 U. S. 599. The fact that there were two counts, one based on the Federal act and the other on the "State statute," does not make the case removable. There was no diverse citizenship. 232 U. S. 146. Here was a case of joint operation, control and liability. Plaintiff could sue one, or all. 62 Ark. 354; 6 Thomps. Negl., p. 475, § 7437; 33 Sup. Ct. Rep. 250.

The case was not removable because the receivers were appointed by a Federal Court. 25 Stat. at Large, 436; 177 U. S. 584; 151 *Id.* 81; 145 *Id.* 593; 141 *Id.* 327; 93 Fed. 52; 179 U. S. 335.

2. The court properly refused the peremptory instruction. The evidence does not show that the death of Howle was caused solely by his own negligence, or that he assumed the risk. A recovery could be had if there was any negligence on the part of defendants or servants that contributed in whole or in part, to the injury. Negligence was shown by the testimony and the case properly submitted to a jury. 107 Ark. 170; 97 *Id.* 422; 99 *Id.* 69; 90 *Id.* 131; 93 *Id.* 631; 232 U. S. 248.

3. Howle was not guilty of contributory negligence, nor recklessness in riding upon the pilot in violation of the rules. But if guilty of contributory negligence only, this does not preclude a recovery under the Federal act. 156 Fed. 234; 128 *Id.* 536; 114 *Id.* 870; 95 U. S. 439; 237 *Id.* 499; 229 *Id.* 114; 223 *Id.* 1; 91 Ark. 86; 88 *Id.* 20; 187 S. W. 920.

4. Nor did he assume the risk. 197 Fed. 94; 207 *Id.* 281; 235 U. S. 375; 233 *Id.* 572; 238 *Id.* 507.

5. If the remarks of counsel were improper, they were not prejudicial. 74 Ark. 256; 93 *Id.* 564; 100 *Id.* 437; 104 *Id.* 340; 95 *Id.* 238.

6. The verdict is not excessive. 115 Ark. 483; 237 U. S. 648.

7. The jury were not misled by the instructions. Similar ones have been approved by the courts. 118

Ga. 535; 110 *Id.* 309; 49 Law Rep. 231. Negligence was shown. Counsel desiring instructions on points not covered should request them. 115 Ark. 101; 117 *Id.* 579; 70 *Id.* 136; 95 *Id.* 593; 78 *Id.* 455; 75 *Id.* 251. Instruction No. 5 given is a literal copy from 104 Ark. 340. The same rule is announced in 238 U. S. 507; 228 *Id.* 434. Tested by the rule in 197 Fed. 94 and 207 *Id.* 281 and 235 U. S. 376, there was no assumed risk. 207 Fed. 281, etc.; 96 Ark. 387.

As to the lookout statute see *Seaboard Air Line* v. *Beauregard*, adv. ops., 1915, 126.

The law and the evidence justify the verdict and the judgment should be affirmed.

McCULLOCH, C. J. The plaintiff's intestate, T. M. Howle, was a brakeman serving on a freight train operated by the receivers of the St. Louis & San Francisco Railroad Company, a foreign corporation, and received injuries, which proved fatal, while assisting in the operation of a train engaged in interstate commerce. This is an action instituted by the administrator under the Federal Employer's Liability Act to recover damages for the benefit of the next of kin. The injury occurred on May 5, 1914. In the second paragraph of the complaint, charges of negligence were made against the receivers of the company. and also against the engineer and fireman who were engaged in operating the train, and judgment is asked against them jointly.

The receivers filed a petition for removal of the cause to the Federal Court on the ground of diversity of citizenship of the plaintiff and those defendants, and also on the ground that defendants J. A. Campbell and I. N. Barton, respectively engineer and fireman, had been "fraudulently made defendants in this action to prevent a removal to the United States court." The trial court denied the petition for removal and refused to surrender jurisdiction, to which ruling exceptions were duly saved. Thereafter, the plaintiff dismissed the cause of action set forth in the second paragraph, and the case proceeded to trial upon the first paragraph,

seeking recovery under the Federal Employer's Liability Act, and the trial resulted in a verdict in the plaintiff's favor, assessing damages against the defendants in the total sum of $15,000. An answer was filed presenting an issue upon each of the allegations of the complaint.

The circumstances of the injury have already been reviewed and set forth in detail by this court in an opinion rendered in the case of *Chicago, R. I. & P. Ry. Co.* v. *Scott*, 123 Ark. 94, but the facts necessary for a proper understanding of the issues involved will be again set forth. At the town of Mansfield, Arkansas, where the injury occurred, the St. Louis & San Francisco Railroad (commonly known as the Frisco) connects with the line of the Chicago, Rock Island & Pacific Railway Company, and the two companies maintain and use a joint station. The Rock Island runs nearly east and west through the town, and the Frisco comes in from the north and curves toward the west. The connecting point of the two roads is about 1,200 feet east of the depot. The Frisco trains, in order to reach the depot, leave the main line of that road at the point of connecnection with the Rock Island and back up to the depot over what is called the "run-around track," which is used by both roads for switching purposes. Howle, the plaintiff's intestate, was swing or middle brakeman on the freight train, and when his train came into Mansfield, it was backed into the station over the track just indicated, and the switch was left open, with the red target as a danger signal exposed, thus giving notice that the track was occupied by that train. The train was stopped at the station, where freight was unloaded. There was only a caboose attached to the engine in the rear, but there was a box car of extra width, called an automobile car, attached to the engine in front, which was to be put on a side track before the train pulled out on the return trip to Jensen, the other end of the local run.

When the work of unloading was complete, and the train was ready to proceed, Scott, the rear brakeman, gave the signal to move forward, and the train

was started, and after it was moved seven or eight car-lengths, it collided with the Rock Island train which had come in from the west and entered upon this track regardless of the danger signal. The track curved to the left west of the station, so that the engineer could not have seen the approaching engine from his side of the cab, but there was evidence to the effect that the fireman could have seen the Rock Island train if he had been keeping a lookout. Howle had taken a place on the pilot of the engine and behind the automobile car, where he could not see forward, and Scott was either on the right-hand side of the pilot or hanging on to the end of the automobile car, and when the collision occurred, the automobile car was forced off of its trucks and telescoped the pilot of the engine, thus crushing both of the brakemen between the end of the car and the front of the engine. Howle's legs were mangled, one foot was caught in the box car, and he was dragged for some distance, and he suffered great pain before he died in the hospital.

There was introduced in evidence, the following rule of the company: "Employees are forbidden to ride on the pilot of any locomotive. Employees are forbidden to go between cars while coupling or uncoupling the cars." The contention of the defendants is that there was a violation of this rule which was the proximate cause of the injury and which operated as a defense, and also that the deceased assumed the risk by occupying a place of danger on the pilot. This phase of the case will be discussed later with reference to the assignments of error. The acts of negligence set forth in the complaint are: (1) That the fireman and engineer failed to keep a lookout as required by the rules of the company so as to discover the presence of the approaching Rock Island train, as they might have done; (2) that the defendants failed to adopt and enforce rules and regulations with respect to the movement and control of trains on the track used by both companies; (3) that the engineer failed to direct the fireman to keep a lookout as required by the rules; (4) that

"the defendants and their superintending officers, servants and employees," with knowledge of the presence of Howle in a position on the pilot of the engine where he could not see ahead, negligently failed to warn him of the approach of the Rock Island train; and (5) that the conductor, engineer and fireman "so handled and moved the train as to negligently and carelessly collide with the Rock Island train."

It is also alleged that if the proper lookout had been kept, as required by the rules of the company, or if the servants operating the train and directing the movement thereof had exercised ordinary care in the operation and movement of the train, or in warning deceased of the approach of the Rock Island train, the injury would not have occurred. There is another charge in the complaint, to which no testimony was introduced and which may be treated as having been abandoned at the trial. It is to the effect that the train dispatcher and conductor in charge of the train "negligently ordered and permitted the train upon which plaintiff's intestate was employed, to proceed from Mansfield to Huntington without warning the deceased or the engineer or fireman that the train of the Chicago, Rock Island & Pacific Railway Company was upon the track which defendants' train would have to pass over."

(1) The first assignment of error argued before us is that which relates to the ruling of the court in refusing to surrender jurisdiction and to remove the cause into the Federal Court. The right of removal as to the cause of action stated in the first paragraph on the grounds of diversity of citizenship and the involvement of a Federal question, is settled by the language of the Federal act as already construed by this court, and by the Supreme Court of the United States. *Kansas City Southern Ry. Co.* v. *Leslie*, 112 Ark. 305, 238 U. S. 599. Counsel insist, however, on the right of removal as to the second paragraph, which is not based on the Federal statute, and the contention is that the right of removal is established by the allegations in the petition to the effect that the engineer and fireman were

joined as defendants for the fraudulent purpose of defeating removal. Counsel rely on decisions of some of the Federal courts holding that where there are two counts or paragraphs in a complaint, one under the Federal statute, and the other under the common law or a State statute, the cause is removable on the grounds of diversity of citizenship. *Flas* v. *Illinois Central R. R. Co.*, 229 Fed. 319; *Strother* v. *Union Pacific Ry. Co.*, 220 Fed. 731; *Patterson* v. *Bucknall Steamship Lines*, 203 Fed. 1021.

(2-3) Without passing on that identical question, we can dispose of the present case by determining whether or not the petition states a case of fraudulent misjoinder for the purpose of defeating removal. The whole of the allegation on that subject is that "no cause of action exists as against J. A. Campbell or I. N. Barton, or either of them, and they are fraudulently made defendants in this action to prevent removal to the United States court." The second paragraph of the complaint contains the specific charge that the engineer and fireman were guilty of negligence in failing to keep a lookout, and that if such lookout had been kept, they could have discovered the other train in time to have avoided the collision. This states a cause of action against the engineer and fireman, not under the lookout statute, but under the general principles of the law regulating the conduct of individuals cooperating together in the same work. The lookout statute undertakes only to create responsibility on the part of the railway company and it had no application in the case of an injured employee who assists in the operation of the train; but independently of that statute or any other, a person is liable in damages for a negligent act of his own which causes injury to his fellow servant. In such a case the failure to keep a lookout pursuant to the requirements of the statute may not constitute negligence as a matter of law, but it may justify a finding of negligence under the circumstances of a given case. The charge of negligence in this respect therefore constitutes a cause of action against the em-

ployee who committed the negligent act, which may be joined with an action against the superior who is in law responsible for it.

(4) Now, the petition does not attempt to traverse the allegations of the complaint, further than to state that "no cause of action exists against J. A. Campbell or I. N. Barton." That constituted no denial of the material allegations of the complaint, for it neither denied the charge that those defendants were operating the engine or that they failed to exercise ordinary care in the operation thereof. The case is expressly ruled on that point by the decision of the Supreme Court of the United States in *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146. In discussing statements of the petition similar to those set forth in the petition in the present case, the court said:

"Putting out of view, as must be done, the epithets and mere legal conclusions in the petition for removal, it may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, but it did not show a fraudulent joinder of the engineer and fireman. With the allegation that they were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved as to the engineer or fireman. As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them."

(5) It is next contended that the undisputed evidence shows that there is no liability under the Fed-

eral statute, and that the court erred in refusing to give a peremptory instruction in favor of the defendants. Several reasons are urged why the evidence shows affirmatively that there is no liability on the part of the defendants. In the first place it is urged that Howle had charge of the train crew and was directing and controlling the movements of the train, and that for that reason his own negligent omission to discover the presence of the approaching Rock Island train was the sole cause of the injury. The evidence shows that the swing brakeman (the position which Howle occupied in the service) controlled the movements of the train in the absence of the conductor, and that in this instance the conductor was temporarily absent at the time the signal was given for the train to move. The testimony on that subject is that the trainmen had been shown the orders for the movements of the train, but that at the particular time that the signal was given, the work of unloading was complete, the train was then ready to move according to orders, and the conductor was in the station but that he came out as the train moved and boarded the caboose.

Now, it is not proved in the case that Howle gave a specific direction to Scott, the rear brakeman, to give the signal at that time, or that he gave any orders at all. That is a mere inference, if it may be considered to be in the case at all. The witnesses all testify that Scott gave the signal and that it was customary for the rear brakeman to do so. We do not understand from the testimony that it was the duty of the swing brakeman to give the signal in the absence of the conductor or to be responsible for giving it at the proper time. The only evidence on that subject is that he was to control the movement of the train, that is, he was to determine when the train was to proceed, and that it was the duty of the other brakeman to give the signal and to look out ahead to see whether there were obstacles on the track ahead that would prevent the movement. The conductor himself might give the order to proceed while he was in some position in or about the train that

he was unable to discover whether or not there was anything ahead to prevent, and it would be left to the trainmen who started the movement by signal to look ahead to discover whether or not there was anything in view to create danger. In other words, we understand the testimony to be that the conductor, or in his absence his substitute, the swing brakeman, was to determine when the time had come for the train to proceed on its journey, and that the signal brakeman, who was Scott, the rear brakeman, was under duty to give the signal, which necessarily implied the duty, when there were obstacles ahead of the engine, to determine whether or not it was safe to proceed. The evidence establishes the fact that Howle was not in a position to look ahead, and that duty was necessarily entrusted to the other brakeman, who gave the signal. It was, therefore, a question for the jury to determine whether or not Howle himself was guilty of negligence which barred the right of recovery or diminished the sum to be recovered.

(6) Again, it is urged that the evidence shows beyond dispute that Howle was riding on the pilot of the engine in violation of the rules of the company, and that for that reason there can be no recovery. There was a rule on the subject, which is hereinbefore quoted, but the evidence warrants the inference that this rule was not applicable to engines while engaged in switching, and only applied to road engines while out on the road. The witnesses testified that switch engines had a running board in front and a place where men may sit down. It necessarily follows from that testimony that the rule was not to be applicable to switch engines or to a road engine while used in switching in the yards, for if the rule excludes a regular switch engine from its operation there is no reason for applying it to a road engine while engaged in similar service. Rules of this kind must be given a reasonable application, and when this one is considered it is manifest that it was intended to prevent unnecessary exposure by riding on the pilot of an en-

gine while out on the road, and not in the service of switching in the yards.

(7) It is argued that as the pilot of an engine is not intended for the use of passengers, or for employees to ride on, it is necessarily negligence for one to be found there. This might be true as a matter of law under some circumstances, but it does not necessarily follow that this view of the matter brings the case within the operation of the rule referred to, but leaves it as a question for the jury to determine whether or not the act of Howle in riding on the pilot constituted negligence. Counsel confidently rely on the decision of the Supreme Court of the United States in *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, in which it was held that the act of a brakeman in failing to flag an approaching train was the sole cause of the collision which caused his injury and that he could not recover. That case is entirely different, we think, from the present one, in that the act of the brakeman in failing to flag a train approaching in the rear was indeed the sole cause of the collision, whereas it was a question for the jury in the present case to determine whether or not the act of riding on the pilot behind the automobile car constituted an act of negligence which was the sole cause of the injury. We are of the opinion, therefore, that the court was correct in refusing to give the peremptory instruction and properly submitted the issues to the jury.

Error of the court is assigned in giving instruction No. 1, requested by the plaintiff, which reads as follows:

"If you find by a preponderance of the evidence that the train of the defendants Lusk, Biddle and Nixon, as receivers of the St. Louis & San Francisco Railroad Company, upon which the deceased was employed, collided with the train of the Chicago, Rock Island & Pacific Railway Company, and that such collision was caused by the negligence of the agents and employees of the defendants in failing to exercise ordinary care to prevent the same as set forth in the complaint and amendment thereto, and that the deceased Howle was

injured and killed in said collision, and that his injury and death was caused in whole or in part by the negligence of the agents and employees of the said defendants as stated in these instructions and as alleged in the complaint and amendment thereto, then your verdict should be for the plaintiff, unless he assumed the risk."

The objection urged against this instruction is that it permits the jury to find negligence on the part of the defendants, or their servants, in either of the particulars mentioned in the complaint irrespective of the absence of proof to sustain it. We do not think that this instruction was susceptible of that interpretation, for it was intended merely to submit generally the question of negligence on the part of the defendants, and was not directed toward any particular alleged act of negligence or necessarily to all of them.

The court gave instructions, at the instance of the defendants, withdrawing from the jury the consideration of the charges of negligence against the engineer or fireman with respect to keeping a lookout, and also charged the jury that there was no evidence sufficient to warrant a finding that either the engineer or the fireman knew of the position of the deceased in the place of danger. We think the instruction withdrawing the question of the fireman's negligence was more favorable to the defendants than they were entitled to, for there was sufficient evidence to justify a finding that the fireman was guilty of negligence in that respect. However, the defendants can not complain of a ruling which was too favorable to them. If the defendants desired the express exclusion of other charges of negligence from the consideration of the jury on the ground that there was no evidence to support the same, they ought to have made request therefor, and in the absence of such request they are not in position to complain, since it is found that the general instruction, No. 1, did not necessarily submit to the jury each and every charge of negligence in the complaint.

The instructions, when taken as a whole, submitted the case to the jury on the charge of negligence against

Scott in giving the signal to proceed when the Rock Island train was approaching on the same track, and this is the charge of negligence on which the verdict of the jury is manifestly based.

The objection to the third instruction is trivial, for the contention is that it permits a recovery by the plaintiff for the negligence of the intestate himself, but that is obviously not the meaning of the instruction.

(8) Objection is also urged to the fifth instruction requested by the plaintiff, which reads as follows:

"The defendants contend that the deceased Howle was guilty of contributory negligence which contributed to the injury and death of the said deceased. The law presumes that the deceased was in the exercise of ordinary care and caution for his own safety at the time of his alleged injury, and the burden of proving that he was guilty of contributory negligence is upon the defendants, unless it sufficiently appears from the evidence of the plaintiff.

"By contributory negligence is meant such a want of care on the part of the plaintiff's intestate, for his own safety, as an ordinarily prudent and careful person would have exercised under the circumstances existing at the time, and which caused or contributed to the injury sued for in this action."

The effect of this instruction was merely to place the burden of proof on the defendant to establish contributory negligence on the part of plaintiff's intestate, which was correct. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507.

There are many other assignments of error in regard to rulings of the court in giving and refusing instructions, but we are unable to discover any merit in those assignments, and the grounds of objection thereto are not sufficient to call for a discussion.

(9-10) It is earnestly insisted that the cause should be reversed because of alleged improper argument of one of the attorneys for the plaintiff, as shown by the following excerpt: "You could go into Mansfield this afternoon and see some one riding on the pilot of

an engine before sundown." And also the following: "God speed the time when the railroad men of this country will change their views of swearing or attempting to swear out of court those who come in with a just and meritorious cause. May the time soon come, gentlemen, when men will give the real facts concerning a wreck of this magnitude and character, in which men have lost their lives, families have lost their support, children have lost their fathers and women their husbands. May the time come when they will tell the absolute truth about it."

The first statement of counsel relates to the question of the force of the rule forbidding employees from riding on the pilot of an engine. This was mere argument that the testimony warranted the inference that the rule did not apply, and that trainmen were permitted to ride on engines while engaged in switching. We have already seen that there was evidence sufficient to justify the inference that the rule did not apply, and the argument was not, therefore, improper.

The second paragraph of the argument which is objected to was a method of presenting the conflicts in the testimony with respect to material facts in the case. There were sharp conflicts in the testimony, and counsel had the right to argue to the jury that some of the witnesses, who were all railroad men, had not told the truth. It was, of course, a style of argument which is not to be commended in any view of the matter, but we do not feel justified in reversing the judgment merely because the argument falls outside the range of proprieties. An attorney has the right to argue a case in his own way, provided he does not misstate the testimony or undertake to state facts which are not in the record, or indulge in other comments which unfairly prejudice the rights of his adversary. Our conclusion is that the argument was not prejudicial and does not call for a reversal of the judgment.

(11) Finally, it is contended that the amount of the verdict is not warranted by the testimony. Considering the testimony with respect to the habits and

earning capacity of the decedent, and the average amount of his contributions to those who are designated as the beneficiaries under the Federal statute, we are of the opinion that the verdict is not excessive.

The judgment is therefore affirmed.

SIMS v. STOVALL.

Opinion delivered January 29, 1917.

1. MARRIAGE AND DIVORCE—EFFECT OF SUBSEQUENT BIGAMOUS MARRIAGES OF BOTH PARTIES.—Where parties have been legally married, and have never been divorced, the contracting by both of them subsequently, of bigamous marriages, does not affect their relationship of husband and wife, and their property rights *inter se*.
2. ATTORNEY AND CLIENT—FEE—DEED TO LAND—FAILURE OF CONSIDERATION.—Appellants, having an interest in certain lands, contracted with appellees, who were lawyers, to bring legal proceedings to recover the lands for them, and executed to appellees a deed to a one-half interest in whatever lands were recovered, which was to be the fee paid appellees for their services. Appellees permitted nine months to elapse without taking any action, looking toward a recovery of the land. *Held*, the chancellor should have set aside the deed from appellants to appellees because of the failure of the consideration therefor, and that it was no defense on appellee's behalf, that appellants failed and refused to assist them in the prosecution of the claim.
3. DESCENT AND DISTRIBUTION—ASSIGNMENT OF DOWER—DUTY OF HEIRS.—It is the duty of the heirs, upon the death of the intestate, upon whom the inheritance is cast, to have dower laid off and set aside to the widow.
4. FRAUDULENT CONVEYANCES—UNDUE INFLUENCE—INADEQUATE CONSIDERATION.—A deed, executed by three ignorant negro women, to land valued at $10,000 for a consideration of $200, held invalid.

Appeal from St. Francis Chancery Court; *Edward D. Robertson*, Chancellor; reversed.

STATEMENT BY THE COURT.

This suit was instituted by appellants against the appellees to set aside a sale made by appellants to appellees, A. T. Stovall and Walter Gorman, of certain lands and personal property described in the complaint. Also to set aside deeds made by Stovall and Gorman to John W. Aven to the lands mentioned

in the complaint. Appellants sought in the same complaint to recover of Lucy Sims, and of Walter Gorman as administrator of the estate of Emmet Sims, certain personal property and rents alleged to have been received by them, same being personal property belonging to the estate of Emmet Sims, deceased.

As ground for setting aside the conveyance to Stovall and Gorman, appellants allege failure and inadequacy of consideration and fraudulent representations; also that Gorman was administrator of the estate of Emmet Sims at the time the conveyance was executed to him as grounds for setting aside their deed to John W. Aven, appellants fraudulent representations which induced them to make the deed.

After the institution of the suit John W. Aven died and the cause was revived in the name of his administrator, and his widow and two children, his only heirs at law, were made parties defendant.

The allegations of inadequacy of consideration and of fraud set up in the complaint were specifically denied by the appellees in joint and separate answers.

The facts concerning the conveyance from appellants to Stovall and Gorman are substantially as follows:

Emmet Sims, a negro, died June 6, 1912. At the time of his death he lived in St. Francis county, Arkansas. He owned an estate, consisting of personal property and lands, of the value of something over $11,000. The lands alone were worth more than $10,000. It appears that Sims, at the time of his death, was living with a negress with whom he had contracted a bigamous marriage. This negress, Lucy Sims, had two children, who were both living, and she claimed to be the legitimate wife of Emmet Sims and took possession of his real estate and personal property. Sims, before his bigamous marriage with Lucy, had married a negress by the name of Alice, who also had two daughters by Emmet Sims. These daughters were grown and married.

Alice, the widow, was 53 years old at the time of the death of Emmet Sims. She was living with and cooking for a family of white people at Okolona, Mis-

sissippi. One daughter, Henrietta Franklin, also lived near Okolona. She was working a share crop. The other daughter, Mattie Gladney, was engaged in making a share crop near Widener, in St. Francis county. After hearing of the death of her husband, Alice Sims consulted A. T. Stovall, an attorney at Okolona, Miss., concerning her interest in her husband's estate. She did not know whether she had been legally married or legally divorced. Stovall wrote to Walter Gorman, an attorney at Forrest City, Arkansas, to ascertain what the prospects were for Alice recovering the property. Gorman replied that Emmet, who had died, had a wife and several children in Arkansas. Stovall communicated this information to Alice, and agreed to take her case provided Gorman would cooperate with him on a contingent fee. Gorman agreed to take the case if the parties would convey a one-half interest in the property. On the 12th of August, 1912, Alice Sims signed a contract for herself and her two children by which she agreed, for herself and them, to give Stovall and Gorman one-half of the property that might be recovered for them. Afterwards Gorman prepared the deed in suit, in which Alice Sims and her two daughters conveyed to Walter Gorman and A. T. Stovall one-half of the lands and personal property that might be recovered of the estate of Emmet Sims. The deed recited a consideration of $10.00 paid by Stovall and Gorman, and the further consideration from them "of the services heretofore rendered and to be hereafter rendered in recovering from the estate of said Emmet Sims, deceased, whatever share or shares of said estate may be due us," etc. The deed was sent to Stovall and he procured the signatures of Alice Sims and Henrietta Franklin to same, returned it to Gorman, and Gorman procured the signature of Mattie Gladney.

Gorman stated that he treated the deed as a contract between the appellants and himself and Stovall as a fee for legal services. The deed was dated September 9, 1912, and Gorman filed the same for record

June 5, 1913. Gorman stated that he examined the marriage records in St. Francis county and found the record of a marriage between Emmet Sims and Lucy Sims in the year 1891 or 1892. Stovall examined the records in Mississippi, where Emmet Sims married Alice, and where he had formerly resided, and there was no record of any divorce having been obtained from Alice. Nor was there any such divorce shown in Arkansas.

Seven days after the contract was entered into between Alice Sims for herself and her children and Stovall and Gorman, Gorman was appointed administrator of the estate of Emmet Sims, and this appointment was approved September 2, 1912, seven days before the deed in controversy was executed.

Concerning the work that was done by Gorman and Stovall under the contract and deed, Gorman testified that as soon as the deed was executed he began at once to urge upon Alice Sims to come to Arkansas and remain long enough to prove that she was the lawful wife of Emmet Sims, and that her two children were the heirs of Sims, in order that he might recover from Lucy Sims the possession of the property. Finally, after much persuasion, Alice Sims came to Arkansas, and he fully explained to her all of her rights, if she would remain here and co-operate with him in proving that she was the lawful wife of Emmet Sims at the time of his death. This she promised to do, and on April 28, 1913, he drew up a petition to be filed in the probate court, praying an order for the administrator to pay over to her the statutory allowance as widow. This petition was signed and sworn to by her on that date. He supposed Lucy Sims would resist the petition and thus start the fight as to who was the lawful widow of Sims. Some two or three weeks after signing the petition Alice Sims appeared in witness' office a second time, and on that occasion seemed to be very much dissatisfied and anxious to return to Mississippi. She said people were telling her that if she ever won the suit the lawyers would beat her out of it and ad-

vised her to sell her share for anything she could get. She said she had a cash offer and would rather have the money and go back home than to stay in Arkansas. Witness stated that he explained to her that the estate was worth from five to six thousand dollars, and that she would share the homestead with the minor children, besides getting one-third of the personal property and a life estate in one-third of the lands. She promised that before making any sales she and her daughters would advise with witness, but none of them came about him any more. Witness inquired as to the cause of their remaining away and received information that they were about to sell their interests, and then witness had the deed in suit filed for record, to protect the interests of himself and Stovall.

Further on in his testimony he states that as soon as he was employed he went to see Lucy Sims and found her in possession of the personal property. He demanded possession, which she refused, claiming that Sims had given her the property and saying that she would not give up anything without a lawsuit. Witness made several attempts to rent out the lands and get the rent notes, but the tenants on the land all seemed to be under her control and rented from her. Witness saw no way to get possession of the property without litigation, and saw no way to prevail in litigation without the co-operation of his clients, which he failed to obtain. He further testified as follows: "Neither Stovall nor myself ever filed any suit to recover the property from Lucy Sims. I never asked Mattie Gladney, as an individual, nor Henrietta Franklin, as an individual, or jointly, to sue for the property, without joining the mother, Alice Sims, for the reason that neither Stovall nor myself had undertaken to bring such a suit. I knew without the co-operation of Alice Sims such a suit would fail. I never saw either Alice Sims nor Henrietta Franklin, nor communicated with either of them prior to the execution of the deed to me and Stovall. They were both in Mississippi and all my letters were addressed to Stovall in all matters

pertaining to them and all matters pertaining to the property."

The testimony of Stovall was to the effect that he never made any representations to the negroes to get them to sign the deed. He testified that Alice and her daughter in Mississippi were above the average negro in intelligence. Witness never represented to them that if they did not sign the deed they would not get anything. Witness, at that time, did not know whether they were going to get anything or not. After witness was employed he made an investigation of the records in Mississippi and ascertained that Emmet and Alice Sims had been married, and that there was no record of divorce. After the contract was entered into witness prevailed on Alice Sims to go to Arkansas to see Mr. Gorman. She went, but became dissatisfied and came back and represented to witness that she would rather live in Mississippi on bread and butter than to own a plantation in Arkansas. She stated that she did not like Arkansas, and, furthermore, that she was apprehensive of some harm to her from the other Sims claimants for the property. Witness rather insisted on her going back. She then insisted on selling her interest in the property to witness, but witness would not buy it. Witness did not know anything about her selling out to Aven until the deed was made. Witness reprimanded her for it, and she replied that all she wanted was money; that she did not want any land in Arkansas if she could get it, and that the money she got was "worth more to her than all the State of Arkansas." Witness stated that before Alice Sims and Henrietta Franklin seemed thoroughly satisfied with the sale they had made, and they gave witness the name of the man to whom they sold. After Alice Sims sold out witness began to negotiate with the party to whom she sold to sell, and did sell.

The testimony of the appellants shows that neither Gorman nor Stovall paid them anything as a consideration for signing the deed. Alice Sims stated that she did not know what she was signing. The testi-

mony of Henrietta Franklin was to the effect that she did not know the amount of real estate nor the amount of personal property, nor the value of either, that was owned by her father at the time of his death. She knew that he owned one place, but had never seen it. She and her mother and sister executed the deed to Stovall and Gorman about the 9th of September, 1912. Stovall said it was a copy they were signing to work for one-half. Witness did not know that it was a deed. It was not read over to her, and Stovall did not explain to her at the time as to the property mentioned in the deed or give her any idea as to the value of the property. "He told us he would work for one-half."

Mattie Gladney testified, in substance, that Gorman came to her house and asked her to come to his office to sign that paper. She went, and the paper was not read to her. Gorman did not explain to her what the paper was. She did not know that he was administrator of her father's estate until Gorman told her. She signed the paper because her sister had signed it. She did not know that it was a deed to half of her father's land and personal property. No legal services had ever been rendered for her on account of her father's estate by Gorman and Stovall. No money or personal property of her father's estate had been delivered to her by Gorman or Stovall, or any other person, and no money had been paid to her by Gorman or Stovall. Neither had they rendered or offered to render any legal services other than the deed they wrote and had appellants sign, conveying one-half of the real estate and personal property to them.

The facts concerning the execution of the quitclaim deed by the appellants to John W. Aven are as follows: The testimony of T. A. Buford, one of the witnesses for the appellees, is substantially as follows: He was a merchant at Forrest City, and was present when the deed was executed by Mattie Gladney and Alice Sims. He went there with Aven, saw some people and saw Aven give them some money. Aven met Alice Sims and Mattie Gladney before they signed the deed at the

house of Albert Gladney, the husband of Mattie Gladney. The subject of the trade was not discussed before they went in to sign the deed. Aven told them he came to make them an offer for it; that he didn't intend paying them the value of it for he didn't know what he was getting. Witness was not in the house three minutes. He was where he could hear any conversation that Aven had with these darkies, but all that was said by witness to Mattie Gladney and Alice Sims was about Mr. Gorman. Witness asked Alice Sims about her taxes, and she replied that Gorman was her attorney and would attend to it. After they signed the papers Aven asked witness where they could get a notary public, and witness told him that he (witness) would get 'Squire White, who did not live far away.' Witness continuing said: "We come to the negroes' front door where Mr. Aven and the negroes were; neither Mr. Aven nor I said anything to the women to induce them to execute the deed; the deed had been signed when Squire White came. He read it over to them and asked them if they knew and acknowledged that they had signed it, and they said 'Yes.' When Mr. Aven told Squire White to read the deed to them he did it." Witness denied that he or Aven said anything in the presence of the women, or in the presence of a man by the name of House, to make them take less than the value of the property. When Gladney's wife signed the deed Gladney was around the house. I told him that Aven wanted to see him. Neither witness nor Aven said anything to frighten them or make them believe that they would get nothing unless they traded with Aven. "I don't know anything else that is material to either party only that the old woman and the girl Mattie, seemed more anxious to sell the land than Aven did to buy it. The old woman said that she had been staying in town since Christmas trying to get something out of the land."

On cross-examination witness stated that Aven's wife was an aunt of witness' wife. Witness further stated: "I think I heard all that was said about it

between Aven and these women. They signed the deed before Squire White got there. I asked the old woman if the taxes had been paid, and she said the land sold for the taxes just a day or two prior to that."

Witness was asked the following question: "Did not Mr. Aven tell those negroes that it (the property) was in a lawsuit?" And answered, "He did. He told them if he won out he was going to give Sims' other wife some of it; that she was entitled to it."

Witness further states: "We were not there over fifteen minutes all together. It seemed that Aven had an appointment with them. I heard him say that he didn't come to give them the full value of it, for he didn't know what he was getting, but that he had come to make them an offer. He told them that it was in litigation, and that it had been for about two months. I don't know whether he talked to them prior to that time or not."

Frank House, a witness for the appellants, testified as follows: "I was present at the time the deed was executed by Alice Sims and Mattie Gladney to John W. Aven. When I got there they were sitting down talking over some land, and I heard Mr. Aven say to Mattie Gladney and her mother, 'I have got $200.00 in my pocket, and I will give you that for your right, and I am giving you that at the risk of a lawsuit. If I miss getting it I just lost $200.00. I thought it would be better for you to take that than to get nothing. It would be fourteen years before you could ever have anything to do or say about this land in any way. He (Mr. Aven) asked me to go to Squire White's and have him meet him at my house to take the acknowledgment to the paper. I did that and Mattie Gladney asked me what did I think about them taking $200.00 for the place. That was just before she signed it. I told her I didn't know, that it was just up to them about that, but I thought that might beat nothing. Mr. Aven said that Mr. Gorman had already beat them out of one-half of it and he thought he would get the other half; that's why he offered them $200.00.

Mr. Aven said if he won the lawsuit he would make something, and if he got beat that was just $200.00 he lost. Just as we started away Mr. Aven told Mattie's mother to meet him at the train the next day; that he wanted her to go with him over to see the other girl, and he would keep her part of the money himself. Mr. Aven had the cash with him to pay Aunt Alice and Mattie except 40 cents. I am not related to any of the parties; have no interest in the lawsuit."

Witness White testified as follows: "I am a justice of the peace, and was such on June 9, 1913. I know Alice Sims and Mattie Gladney and took their acknowledgment to a deed from them to John W. Aven. The persons present were Mr. Aven, T. A. Buford, Frank House, Alice Sims and Mattie Gladney. I heard a conversation between Mr. Aven and Alice Sims and Mattie Gladney on that occasion. Mr. Aven had the deed and asked them to sign it; said he would pay them $200.00, and told them that if they did not take that they were liable not to get anything; that he was doing this to keep Gorman from beating them out of the whole thing. The old woman, Alice, seemed to sign it willingly, but Mattie seemed reluctant. She asked me what I thought of it. I told her I did not know the nature or the shape they had the business in. She said she was afraid she was doing wrong in signing it. Frank House told her it was better to sign it and get that as they were sure of that much. Aven told her it was in a lawsuit and the probability was that she would be beat out of the whole thing, and that she was sure of that much. Mr. Aven seemed to be in a great hurry to get it signed. The deed I think was written by a typewriter. It was a printed form. I did not read the deed to see if Aven or anyone placed the consideration in the deed or that it was filled in when it was sent out. I did not read the deed to them, not all of it; I just read the acknowledgment. I thought they were acquainted with it. I had a conversation with Mr. Aven at the time I took the acknowledgment and he told me that old man Gorman had beat him out

of about $5,000.00, but that he had the deadwood on this; that Gorman had just beaten him to it. Mr. Aven told me in the presence of these darkies, at the time the acknowledgment to the deed was taken, that if he hadn't done this they would have been beat out of all their land, but that this much was just the same as a gift to them. Mr. Aven handed me the deed. I don't remember whether he told me to read it, but it don't seem to me that he did. I won't be positive, but I don't believe I read that part of the deed that speaks of granting the land, conveying it to Aven, the price to be paid and the land to be conveyed to him. I inquired of them if they were acquainted with the contents of the deed, and asked them if they had executed the same for the consideration freely and voluntarily. Alice said that she did. I don't think Mattie said anything. At the time I took the acknowledgment I thought I had done all that was necessary to be done in taking the acknowledgment and thought I had complied with the law."

The notary public who took Henrietta Franklin's acknowledgment to the deed testified as follows: "I don't remember of Mr. Aven saying anything to Henrietta Franklin as to the amount he was paying her, compared with the value of the property. Mr. Aven paid Henrietta Franklin the money in my presence. I heard no representations made by Mr. Aven to induce Henrietta Franklin to execute the deed. I have no knowledge of what occurred between him and the plaintiff, Henrietta Franklin, or between him and Alice Sims. My recollection is Mr. Aven requested me to read the deed to Henrietta Franklin and I read it to her. I did not make any further explanation to her touching the transaction. Alice Sims was present at the time the deed was acknowledged. The acknowledgment was taken at the home of Henrietta Franklin, about six miles south of Okolona. We went out in an open surrey from the stable. I think Alice Sims and Mr. Aven came together from Arkansas, either the day or the night before. The date written in the acknowl-

edgment is the true date on which it was taken. Mr. Aven paid Henrietta Franklin $67.00. I don't remember the exact language used by Mr. Aven."

The court excluded the testimony of Henrietta Franklin, Mattie Gladney, and of her husband, Albert Gladney, and also the testimony of Alice Sims, as to transactions with and statements made by Aven to the appellants in regard to the sale of the land in controversy and their deed to him. The appellants asked the court to consider the testimony of each of the appellants, not in their own cases, but as applicable to the cases of each other. The court refused to consider the testimony of any of the appellants as applicable to the cases of the other appellants.

The court, after hearing the evidence, found that there was no equity in the appellants' complaint, and entered a decree dismissing the same, from which this appeal was taken.

C. W. Norton for appellants.

1. The court erred in dismissing the complaint. The deed to Stovall and Gorman was void. They paid no consideration and the legal services which they agreed to render were never rendered. No suit was brought and no steps taken by them to recover the property the widow and heirs of Sims were entitled to. The last marriage of Sims was bigamous and his last wife was entitled to no part of the estate and this Stovall and Gordon knew.

Three ignorant and illiterate negro women were overreached and legally, at least, defrauded. They never explained to them their rights and they did not know what they were signing. It was their duty to have made a full investigation and fully explain same to and advise these ignorant parties of all their rights. The utmost good faith is required. 23 L. R. A. (N. S.) 679; 3 McCray, 76; 78 Ark. 115; Perry on Trusts, § 195; 61 S. E. 806; 11 Paige, 538; 42 N. Y. Supp. 834; 3 A. & E. Enc. L. (2 Ed.) 332; 4 Cyc. 960; 70 Ark. 509; 84 *Id.* 575; 73 *Id.* 575; 66 *Id.* 190; 33 *Id.* 575.

2. Alice Sims, Henrietta Franklin and Mattie Gladney were competent witnesses for each other and Albert Gladney was a competent witness for Alice and Henrietta. Their evidence should not have been excluded. 80 Ark. 277; 83 *Id.* 210; 79 *Id.* 136, 414; 31 *Id.* 264; 37 *Id.* 195; 46 *Id.* 306, 378; 63 *Id.* 556; 70 *Id.* 141; 122 Ark. 227; 40 Cyc. 1190; 106 Ark. 421, 491. Lucy Sims had no interest. Kirby's Digest, § 2640; 114 Ark. 84. The badges of fraud and misrepresentation appear in every move made.

3. The deed to Aven was fraudulent and void. The consideration was grossly inadequate and Aven took undue advantage of their ignorance and the bargain was unconscionable. 101 Ark. 558; Pom. Eq. Jur. (3 Ed.) §§ 926, 928; 11 Ark. 66; 17 *Id.* 498; 74 *Id.* 259; 94 *Id.* 621; 60 Minn. 262; 107 Tenn. 572 and cases, *supra.*

4. The alleged champertous contract cannot avail appellees. 60 Ark. 277; 6 Cyc. 880; 5 Am. & E. Enc. L. (2 Ed) 830-2; 40 Kans. 195; 2 Beach Mod. Law of Conv. §§ 1541-2 and notes; 117 U. S. 582; 49 Ob. St. 1; 35 L. R. A. (N. S.) 512; 137 Ill. 652; 211 Ill. 652; 53 Iowa, 582 and many others.

5. The objections to the excluded testimony were not specific. 113 Ark. 296; 112 *Id.* 592; 86 *Id.* 138; 110 *Id.* 379; 74 *Id.* 579; 75 *Id.* 423; 98 *Id.* 352; 115 *Id.* 448; 80 *Id.* 277, and many others.

6. Gorman was the administrator of Sims' estate and a trustee and could neither buy nor sell for his own profit or advantage. 78 Ark. 115; 84 *Id.* 575; 73 *Id.* 575; 66 *Id.* 190; 33 *Id.* 575; Perry on Trusts, §§ 195, 203, etc.

R. J. Williams for appellees.

1. No fraud nor imposition was shown in the contract with Stovall and Gorman. Nor is any bad faith proven. The contract in view of all the facts and circumstances was only for a reasonable compensation for services to be rendered. 35 Ark. 247; 66 *Id.* 190. The utmost good faith is shown. While they were

preparing the case, appellants, without the knowledge or advice of their counsel, sold their interest to J. W. Aven.

2. Where one party to a contract renders the performance thereof impossible, performance by the other ceases to be a material element in the right of said other party for recovery on the contract; in the eye of the law in such case performance is excused. 85 Ark. 596; 102 *Id.* 152; 7 *Id.* 123.

3. As to Aven, mere inadequacy of price is not sufficient, unaccompanied by fraud or misrepresentation. 95 Ark. 523. Moreover, such fraudulent misrepresentations must be material, and with intent to have the other party act on them to his injury, and such must have been their effect. 79 Ark. 265. Mere expressions of opinion are not sufficient. 68 Ark. 98.

4. Aven owed no duty to plaintiffs and no confidential relations existed. The means of information were equally accessible to all parties. 31 Ark. 107. To avoid the contract plaintiffs must have been deceived by representations they had a right to rely upon and they must have been false and material. 26 Ark. 28; 38 *Id.* 428; 31 *Id.* 107.

5. The contract was not champertous nor against public policy. Nor did Stovall and Gorman overreach their clients. The bargain was not unconscionable and inequitable. At common law such contracts were void, but the rule has been modified. 21 Ark. 539; 17 *Id.* 608.

WOOD, J. (after stating the facts.)

(1-3) I. The court erred in dismissing appellants' complaint. The court should have cancelled the deed executed by the appellants to the appellees, Stovall and Gorman. Stovall and Gorman did not pay any money consideration for the deed, and the legal services which they agreed to render the appellants in consideration of the deed were never rendered.

The deed from appellants to Stovall and Gorman was executed on the 9th day of September, 1912.

The deed from appellants to John W. Aven was executed on the 9th day of June, 1913. It thus appears that a period of nine months elapsed after the deed of appellants to Stovall and Gorman was executed before appellants sold their interests in the land to Aven. During all this time the appellees, Stovall and Gorman, failed to institute suit or to take any steps looking to the recovery of the property belonging to the estate of Emmet Sims, which the appellants as the widow and heirs of Sims were justly entitled to.

Counsel for appellees Stovall and Gorman contend that the failure on their part to institute suit and take the other necessary steps to recover the property of the estate of Emmet Sims for the appellants was because of the failure on the part of the appellants to give appellees Gorman and Stovall their active co-operation. While appellee Gorman testified that the reason they did not institute suit to recover the property was because their clients would not co-operate with them, yet his undisputed testimony further shows that he never asked either Mattie Gladney or Henrietta Franklin, as individuals or jointly, as heirs of Emmet Sims, to sue for the property. Now, the record shows that Gorman and Stovall had made investigations to enable them to ascertain whether the appellants were entitled to the possession of the property. The negress, Lucy Sims, who was living with Emmet Sims at the time of his death, and who remained in possession of the property thereafter, had no interest whatever therein. The testimony shows that Alice Sims was the legitimate wife of Emmet Sims, and that the appellants were his children. Emmet Sims was married to Alice Sims, and although he separated from her and afterwards married Lucy Sims, this latter marriage was bigamous; for it appears that he was never divorced from Alice. After being lawfully married, and never having been divorced, even though Emmet Sims and his wife Alice separated and each thereafter contracted bigamous marriages, Emmet and Alice, nevertheless, were husband and wife at the time of Emmet's death.

In *Evatt* v. *Miller*, 114 Ark. 84, we held: "Where a man and a woman are legally married, the woman continues to be the man's wife, although she subsequently contracts a bigamous marriage with another man, and upon the death of her lawful husband, the wife is entitled to her rights as his widow. Where a man is already lawfully married and subsequently contracts a bigamous marriage with another woman, upon his death the latter has no rights in, and cannot share, in his estate."

Having ascertained that Lucy Sims had no interest whatever in the estate of Emmet Sims, it was incumbent upon the appellees Stovall and Gorman to take some steps looking to the recovery of the property for the appellants. It is no justification for a failure to carry out their contract that they claim not to have had the co-operation of their clients when the undisputed evidence shows that so far as the appellants, Henrietta Franklin and Mattie Gladney, were concerned, they did not ask for their co-operation. Even though the widow, Alice Sims, may have failed and refused to co-operate with Gorman and Stovall in an effort to recover the property, this would not justify the latter in failing to make an effort to recover the same on behalf of the children and heirs of Emmet Sims.

Upon the death of Emmet Sims the inheritance was cast upon his heirs. It was their duty to have the dower of the widow laid off and set aside. Kirby's Digest, sec. 2717.

Stovall and Gorman could have brought suit in the name of the heirs for the recovery of the possession of the property. They do not pretend that they even consulted with the heirs about it. On the contrary, their undisputed evidence shows that they did not do so. Appellants having shown that the deed was executed in consideration of services to be rendered them and that Stovall and Gorman failed to render these services, the burden was cast upon Stovall and Gorman to allege and prove facts that would show that appellants were estopped from claiming such failure of

consideration in avoidance of their deed. Appellees Stovall and Gorman have not set up estoppel against the appellants, and their own undisputed testimony shows that they have wholly failed to render the services which constituted the only consideration for which the deed was executed.

II. So far as the deed to J. W. Aven is concerned, but little need be said. The deed on its face shows that for a consideration of $200.00 appellants conveyed 158.23 acres of land and five town lots. The testimony shows that this real estate was worth, at the time of the conveyance, about $10,000.00.

The facts discovered by the testimony warrant the conclusion that Aven had ascertained that Alice Sims was exceedingly anxious to dispose of her interest in the estate of Emmet Sims. These negresses, although they could read and write a little, were nevertheless densely ignorant of their legal rights in the estate of Emmet Sims and of the value of their property. The facts warrant the conclusion that Aven took advantage of this ignorance and induced them to sell their interest to him for a grossly inadequate consideration. It is unbelieveable that appellants, if they had had full knowledge of the fact that they were the owners of the land conveyed by their deed and of its real value, would have ever consented to sell even a half interest in same to Aven for $200.00. The evidence warrants the conclusion that Aven was fully advised of the rights that they had in the property. Their title was not complicated in the least. Aven had the deed prepared and had provided himself with the exact amount which he intended to pay, and which he evidently believed the appellants would accept, before he even discussed the matter of the sale with them.

Without going into detail, it suffices to say that we are convinced, after considering only the competent evidence in the record that Aven, who was an intelligent white man, took advantage of the lack of knowledge on the part of these negresses of their property rights and of the value of their estate to drive upon

them a hard and unconscionable bargain. He imposed upon their credulity by making false representations to the effect that "if he had not done this they would have been beat out of all their land; that this much was just the same as a gift to them; that Mr. Gorman had already beat them out of one-half of it, that the property was in a lawsuit and had been for about two months, and that he was doing this to keep Gorman from beating them out of all of it," etc.

(4) This record warrants the conclusion that these ignorant and gullible negro women, when brought under the influence of a shrewd speculator and manipulator would be like "clay in the hands of the potter." Aven adroitly used them to consummate his avaricious purpose. The results could not have been otherwise attained. It may be said generally concerning the transactions between appellants and appellees Stovall and Gorman and John W. Aven that there is evidence tending to prove that after Alice Sims came to Arkansas to assist her attorneys to recover the property, the friends of Lucy Sims were threatening to send Alice to the penitentiary for alleged bigamous marriage. These threats had so wrought upon her mind that it was doubtless true, as she told her attorney, that "she would rather live in Mississippi on bread and butter than to own a plantation in Arkansas." This fact made it difficult, if not impossible, to keep Alice in Arkansas long enough for her to give her attorneys any assistance in any effort to recover the property, but it furnished no excuse, much less justification, to them for not instituting a suit for that purpose. Because, as we have seen, she was not a necessary party to such a suit, and her presence was not essential to the preservation of her own rights and the rights of the heirs. After the attorneys had ascertained the rights of their clients, they should have been only the more persistent and diligent in protecting same, in view of the demorilization of Alice Sims. The terrorized state of Alice Sims was such as to make her an easy and shining mark for the cupidity of any one who

had a covetous eye on these town lots and rich bottom lands. But for any one to take advantage of her mental attitude to deprive this illiterate negro cook and her children of their property for a mere pittance, is a fraud which a court of chancery should promptly rectify.

III. Since Stovall and Gorman had no rights in the property which they could convey to Aven, it follows that their deeds to him were invalid and should be cancelled. The alleged champertous contract between appellants and one Walker can not avail appellees as a defense to this suit. *Prosky, et al.* v. *Clark, et al.*, 32 Nev. 441, 109 Pac. 793, 35 L. R. A. (N. S.) 512, case note; see *Burnes* v. *Scott*, 117 U. S. 582; *Courtright* v. *Burnes*, 3 McCrary C. C. 60; Anson on Con. star page 186, note; *Pennslyvania Company* v. *Lombardo*, 49 Ohio St. 1.

IV. The decree is therefore reversed and the cause will be remanded with directions to the chancery court to cancel and set aside the conveyances of appellants to Gorman and Stovall, and Gorman and Stovall to John W. Aven, and also the conveyance of the appellants to John W. Aven, upon reimbursing his estate in the sum of $200.00 with interest at 6% from date of deed, and for such other and further proceedings as may be had according to law and not inconsistent with this opinion.

FINN v. STATE.

Opinion delivered January 29, 1917.

1. FORGERY—INDICTMENT—AUTHORITY OF ACCUSED.—When an indictment for forgery alleges that the check was forged and counterfeited, it in effect, alleges that it was made without the authority of the person whose name was signed thereto.
2. FORGERY—SUFFICIENCY OF INDICTMENT.—An indictment charging forgery, *held* valid.
3. FORGERY OF CHECK—ENDORSEMENT—SUFFICIENCY OF INDICTMENT.—Where defendant was indicted for the forgery of a check, but not for the forgery of an endorsement thereon, the endorsement on the

check does not constitute in law a part of it, and need not be set out in an indictment for forgery of the check.

4. CONFESSIONS—EXTRAJUDICIAL CONFESSION.—A defendant can not be convicted on an extrajudicial confession, unless there is proof tending to show that the crime was committed by some one.

5. CONFESSION—FORGERY—CONFESSION—SUFFICIENCY OF CORROBORATION.—In a prosecution for forgery, evidence was introduced of the accused's confession of guilt to certain parties outside court. *Held*, there was other testimony introduced at the trial, sufficient to corroborate these confessions, and that the evidence was sufficient to warrant a conviction.

6. CONFESSIONS—VOLUNTARY CONFESSION—FORGERY.—In a prosecution for forgery, a confession of guilt by accused was introduced; *held*, the same was voluntarily made, and admissible.

7. CONFESSIONS—REDUCTION TO WRITING—BEST EVIDENCE RULE.—Where a confession has been committed to writing, the writing must be produced at the trial, under the best evidence rule, or its absence accounted for, and it is error, under the rule, to admit oral testimony to prove the written confession.

8. CONFESSIONS—WRITTEN AND ORAL—PROOF.—Although a confession has been reduced to writing, oral testimony of a confession not committed to writing is admissible.

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

Duty & Duty, for appellant.

1. There is no proof that the check was forged. The burden was on the State to show that the instrument was a forgery and that the defendant uttered same knowing at the time that same was in fact a forgery. 91 Ark. 485; 90 *Id.* 123; 47 *Id.* 572.

2. The court should have sustained the demurrer to the indictment because it does not allege that the instrument was made without the authority of the person whose name was signed thereto; and further, because it does not specifically state the real party intended to be defrauded. 19 Cyc. 1405 (B); 27 S. W. 816; 3 L. R. A. 220; 19 Cyc. 1408; 31 S. W. 678.

3. The court erred in admitting in evidence the check. It had not been proven a forgery and there was a fatal variance in the check offered and that set out in the indictment, in that the endorsement on the back

was not shown. 58 Ark. 242; 77 *Id.* 537; 86 *Id.* 126; 96 *Id.* 101; 94 *Id.* 400.

4. The confession was not voluntary. 50 Ark. 501; 28 *Id.* 531; 70 *Id.* 24; 110 U. S. 574; 12 Cyc. 464 (H); 168 U. S. 532.

5. Where the confession is in writing, oral proof is inadmissible. 12 Cyc 479 (P); 50 Miss. 332; 103 Fed. 938; 2 Enc. of Ev. 282.

6. Defendant's instruction No. 4 should have been given, as to the weight to be given a confession made by the defendant prior to arrest. 63 Ark. 527; 94 *Id.* 207; Wharton on Cr. Ev. 638; 50 Ala. 104; 23 Am. St. 525.

John D. Arbuckle, Attorney General, and *T. W Campbell*, Assistant, for Appellee.

1. The proof of forgery is ample and that defendant knew it when he cashed it.

2. The indictment is sufficient. The language of the statute is used. Kirby's Digest, § 1715; 86 Ark. 126; 71 *Id.* 403; 62 *Id.* 517.

3. There is no variance. The endorsement on the back is no part of the check, in law. 77 Ark. 537, 543.

4. The confession was voluntary and admissible as evidence. 93 Ark. 156; 73 *Id.* 495. The burden was on appellant to show that it was involuntary. 25 Oh. St. 464; 60 Mich. 277; 126 Mass. 464; 99 Mo. 107; 19 Tex. App. 276; 148 Ind. 238; 113 Iowa 416; 13 Fla. 636; 38 Md. 140.

This was a matter of discretion for the trial court, and this court will not interfere unless an abuse of discretion is shown. 63 Ark. 527; 74 *Id.* 397.

5. Parol evidence as to the confessions was admissible. 109 Ark. 138; 76 *Id.* 518; 99 *Id.* 471; 120 C. A. L. 253. It was not prejudicial and was not objected to. 83 Ark. 331, 374; 32 *Id.* 346; 20 *Id.* 216.

6. The question as to whether or not the confessions were free and voluntary was for the court and not the jury to decide. 63 Ark. 527.

HART, J. Charley Finn was indicted, tried and convicted before a jury for the crime of forgery and his punishment fixed at two years in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court. The body of the indictment is as follows:

The grand jury of Benton county, in the name and by the authority of the State of Arkansas, accuse Charley Finn of the crime of uttering a forged instrument committed as follows, to-wit:

"The said Charley Finn in the said county of Benton in the State of Arkansas, on the 15th day of January, 1916, fraudulently and feloniously did utter and publish as true to W. H. Cowan, cashier of the First National Bank of Rogers, Arkansas, a corporation doing business under the laws of the State of Arkansas, a certain forged and counterfeited writing on paper, purporting to be a check on a bank, which said writing on paper is in words and figures as follows, to-wit:

Rogers, Ark., 191..

"No.....The First National Bank, Rogers, Ark. Pay to G. C. Webb, or bearer, $15.00, Fifteen .....Dollars.

Finn & Allred.

"With intent then and there fraudulently and feloniously to obtain possession of the money and property of the First National Bank of Rogers, Arkansas, the said Charley Finn, well knowing at the time he uttered said writing on paper that the same was forged, counterfeited and not genuine, against the peace and dignity of the State of Arkansas."

(1-2) It is contended by counsel for the defendant that the demurrer to the indictment should have been sustained because the indictment does not allege that the instrument was made without the authority of the person whose name was signed thereto. A comparison of the indictment with Section 1715 of Kirby's Digest under which the indictment was framed, will show that

the indictment uses the language of the statute and contains every allegation required by the statute. When the indictment alleges that the check was forged and counterfeited, it, in effect, alleges that it was made without the authority of the person whose name was signed thereto. It is also contended that the indictment is deficient in that it does not specifically state the real party, person or corporation intended to be defrauded. The indictment alleges that the First National Bank of Rogers is a corporation doing business under the laws of the State of Arkansas and charges that the forgery was done with the felonious intent to obtain possession of the money of the First National Bank of Rogers, Arkansas. The indictment followed the language of the statute and was not demurrable. *Teague* v. *State*, 86 Ark. 126.

(3) It is next contended that the court erred in admitting the check in evidence on the ground that there is a fatal variance between the check introduced in evidence and the check set out in the indictment in that the endorsement on the back of the check was not set out in the indictment. The forgery charged was of the check and the defendant was not indicted for the forgery of the endorsement and in such cases the endorsement on the check does not constitute in law a part of it and need not be set out in an indictment for forgery of such note or check. *Crossland* v. *State*, 77 Ark. 537.

(4-5) It is insisted that there is no evidence legally sufficient to warrant the verdict. This court has held that a defendant cannot be convicted on an extrajudicial confession unless there is proof tending to show that the crime was committed by some one. *Dewein* v. *State*, 114 Ark. 472; *Greenwood* v. *State*, 107 Ark. 568; *Harshaw* v. *State*, 94 Ark. 343. The defendant made a confession of his guilt to a constable and to two employees of the bank. He first admitted to one of the employees of the bank that he knew that the instrument had been forged when he presented it to the bank and had it cashed. Subsequently on the

same day he confessed in the presence of other persons that he was guilty of uttering the forged instrument and knew that it was forged at the time he presented it for payment. It is earnestly insisted by counsel for the defendant that there is no other evidence tending to connect him with the crime or to show that the check was forged. We do not agree with counsel in this contention.

Mr. Allred testified that he did not sign the check and could not swear for certain that the check had not been signed by his partner who was the father of the defendant but he stated that he was familiar with his partner's signature and that the signature to the check did not look like that of his partner. In another portion of his testimony he stated that it was not his partner's signature unless he had changed it.

An employee of the bank stated that he was familiar with the signature of both of the partners whose names are signed to the check and that neither one of them had signed it. He stated that the check was a forgery.

Mr. G. C. Webb, to whom the check was made payable, stated that Finn and Allred had not given the check to him. It was also proved that the First National Bank of Rogers, Arkansas, is a corporation doing business under the laws of the State of Arkansas at the town of Rogers, Arkansas. This testimony was sufficient to corroborate the testimony of the defendant and establish his guilt.

(6) It is also contended that the confession was not voluntary within the rule announced by the decisions cited above and other decisions of this court. We do not agree with counsel in this contention. It is true the defendant was only 16 years of age at the time he made the confession, but under the circumstances attending it, we do not think the circuit court abused its discretion in not excluding it from the jury. According to the witnesses for the State the defendant had left home after having cashed the check and was absent for several months. After the bank discovered

that the check was a forgery, its officers suspected the defendant and the constable was informed of the crime. On the day that the defendant returned home the constable got with him and went to the bank. When they got there and began to talk about the matter, the deputy prosecuting attorney was present, but soon left. The defendant at first denied his guilt and an employee of the bank told him that it was a serious offense and that if he was guilty it would be better that he should tell it. Both he and the constable stated that no threats were made against the defendant and no hope of reward or benefit held out to him to induce him to make the confession. Later on another employee of the bank came in and the defendant again confessed his guilt and his statement was reduced to writing. This confession was also voluntary. The defendant was not arrested until after he had made the confessions and left the bank.

(7) It is next contended that the court erred in admitting oral evidence of the confession which was reduced to writing. In this contention we think counsel is correct. Where the confession has been committed to writing the writing must be produced as the best evidence, unless its absence is accounted for. 12 Cyc. 479. In 2 Encyclopedia of Evidence, 281, it is stated that the rule is that the best evidence of the contents of every private writing is the writing itself and that the writing be produced for that purpose except in certain enumerated cases.

(8) It is further stated that the application of this rule is not affected by the character of the writing but that it applies with equal force to all kinds of writings whether as mere instruments of evidence whose contents are a relevant fact to be proved, as for example written declarations, written confessions, etc. The rule is also recognized in a note to paragraph 215, Vol. 1, of the 15th Ed. of Greenleaf on Evidence. It cannot be a sound proposition of law however, that because the confession which one witness stated was reduced to writing that other confessions made by the

defendant which were not reduced to writing cannot be proved by parol. *People* v. *Cokahnour*, 120 Cal. 253. Hence the court did not err in the admission of the testimony of the witnesses who heard the oral confession of the defendant.

For the error in receiving oral testimony of the written confession, the judgment must be reversed and the cause remanded for a new trial.

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

Opinion delivered January 29, 1917.

1. RELEASE—ABSENCE OF FRAUD.—A release or settlement agreement executed by plaintiff, releasing a railway company from further liability resulting from the negligent killing of plaintiff's husband, *held*, not to have been procured by fraud.
2. MASTER AND SERVANT—INJURY TO SERVANT—CAUSE ARISING UNDER FEDERAL EMPLOYER'S LIABILITY ACT.—Where deceased, at the time he was injured, was engaged in repairing the track of a railroad company, which was engaged in interstate commerce, he will be held to be employed in interstate commerce, and his cause of action against the railway company arises under the terms of the Federal Employer's Liability Act, and the deceased having been killed, the right of action was in his personal representatives, and no one else could maintain the action.
3. MASTER AND SERVANT—WHO MAY SUE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.—Where deceased was killed and a right of action accrued under the Federal Employer's Liability Act, only his personal representative is vested with authority to sue. The personal representative also has the power to effect a compromise and settlement.
4. SETTLEMENT OF CLAIM—AUTHORITY OF ADMINISTRATOR.—An administrator may compromise and accept settlement of an unliquidated claim for damages without special authority from the probate court. Where the personal representative acts in good faith, those who would impeach his conduct must show fraud or mistake or such gross negligence as would amount to fraud.

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

STATEMENT BY THE COURT.

This was an action commenced by Jessie Treadway in her own right and as next friend to Marie Treadway, Thelma Treadway, and Daisy Treadway, minors, against the St. Louis, Iron Mountain & Southern Railway Company to set aside a judgment rendered in the same court in favor of Jessie Treadway, administratrix of the estate of Robert H. Treadway, deceased, against the St. Louis, Iron Mountain & Southern Railway Company, for the sum of $5,500. The material facts are as follows:

The St. Louis, Iron Mountain & Southern Railway Company is a railroad corporation running through the State of Arkansas into the State of Missouri and is engaged in interstate commerce. On the 14th day of January, 1914, Robert H. Treadway was employed by said railroad company as a section hand in Independence County, Arkansas. He was injured by being thrown from a hand car under circumstances which tended to show negligence on the part of the company and died as the result of his injuries about sixteen days thereafter. He was engaged in repairing the tracks at the time of his injuries and was being carried on a hand car from one point to another in discharge of his duties. He was about thirty-five years old and in good health, and was earning the sum of $40 per month, which he contributed to his family. He suffered excruciating pain from the time he received his injuries until the date of his death. He left surviving him Jessie Treadway, his widow, and three minor children. After his death his widow took out letters of administration upon his estate for the purpose of entering suit against the railroad company to recover damages. Negotiations were opened between her and the defendants' claim agent and the nearest station agent came to her and offered her $3,000 in settlement of her claim and both advised her to settle for that sum. She lived at Sulphur Rock in Independence County,

Arkansas, and in about a week the claim agent returned and offered her $5,000, which she refused.

The claim agent went to Newport and called her up again and offered her $5,000. He told her that was as much as the railroad ever gave for injuring or killing anybody, and was as much as the road ever paid. She declined to accept that amount but at the suggestion of the claim agent, went to Newport for the purpose of going with him to Little Rock to see the other claim agents of the road. After they reached Little Rock, she agreed to accept $5,500 and said they offered in addition to pay the funeral expenses of her husband and the expenses incident to his last illness, which amounted to nearly $500. Mrs. Treadway had been demanding $6,000 for her settlement. After they reached Little Rock, she agreed to take the $5,500 and it was agreed that the money should be paid through a friendly suit to be instituted by her in the circuit court there. In pursuance of this agreement the defendant company furnished her an attorney who prepared a complaint and filed it in the circuit court. The court being regularly in session inquired of her whether the settlement was satisfactory, and she stated that it was and that she desired to have judgment entered accordingly. A jury was waived and by consent of the parties, judgment was rendered in her favor as administratrix of her husband's estate against the railroad company. This was the version of the matter testified to by Mrs. Treadway. She stated further that they had refused to pay her the funeral expenses and the expenses of the last illness of her husband as they had agreed to do, and that they had failed to explain to her all of the elements of damages she was entitled to recover.

On the other hand, it was shown by the claim agent and the attorney whom he selected to represent her, that the whole matter was explained in detail to her, and that she voluntarily agreed to accept the $5,500. The claim agent, in addition stated that she knew from the beginning that he was a claim agent of the railroad, and that when he offered her the $5,000, he told her that he

had no authority to offer her any greater sum; that when he later offered her $5,500, he told her that he had no authority to offer that sum, but that he thought the proper officials would ratify his agreement when they reached Little Rock and the matter was submitted to them; that they did so, and that she understood the whole matter, and that the friendly suit was instituted because it was deemed a valid way to carry out their agreement.

The cause was submitted to the court sitting without a jury and the court found the issues for the defendant company. A judgment was rendered dismissing the complaint of the plaintiffs and to reverse that judgment, plaintiffs have prosecuted this appeal.

Hal L. Norwood and *W. K. Ruddell*, for appellants.

1. The conduct of the agents of the appellee was a fraud upon the rights of the appellants. 101 Ark. 95; 47 *Id.* 335; 89 *Id.* 321; 128 Am. St. 195, 200.

2. It was error to render a compromise judgment without looking into the merits to determine whether it was for the best interests of those whom the appellant represented. An administratrix has no more right to make concessions where the interest of children were involved than a guardian would have. 71 Ark. 172; 42 *Id.* 222; 39 *Id.* 235. No administrator can compromise unless for the best interests of the estate, and it must be free from fraud, negligence, or misconduct. 49 Ark. 235; 48 Am. Dec. 760; 30 Ark. 198; Kirby's Digest, § 86.

The burden is on the railway company to show that the compromise was for the best interest of the estate and that it was free from fraud, negligence or misconduct. 30 Ark. 198; 19 S. E. 926; 5 Enc. of Ev. 442.

Administrators are trustees and are bound to know the extent of their authority. 6 Ark. 388; 34 *Id.* 144, 151. See, also, Kirby's Digest, § § 86, 6024. An attorney can not represent both sides of a case. 73 Ark. 575; 3 Am. & Eng. Enc. 299. In the absence of a stat-

ute no debt of a deceased person can be collected by suit, except by an administrator. 51 Ark. 401, 408.

3. Appellant should not be required to refund the amount received. A release procured by fraud may be rescinded without the return of the consideration. 73 Ark. 41; 87 *Id.* 625; 82 *Id.* 105.

E. B. Kinsworthy and *W. G. Riddick*, for appellee.

1. An administratrix may settle claims for the benefit of the estate and next of kin, without authority of the probate court. 18 Cyc. 226, 228; 49 Ark. 235,-6; 12 *Id.* 746; 93 *Id.* 353; 98 *Id.* 394; 65 N. E. 1034. The leading cases hold that administrators have the power to compromise all claims. 14 L. R. A. 414; 81 Minn. 495; 52 Ore. 348. Under the Employer's Liability Act (Acts 1911, 55) and the Federal Employers' Liability Act, the personal representatives only can sue in case of death by wrongful act. 81 Minn. 495; 128 Am. St. 195, 200.

2. Plaintiff must return the $5,500 received under the judgment before she can maintain this suit. 67 Ark. 347; 62 *Id.* 274; 117 Mass. 479; 111 Ind. 544; 61 Fed. 54; 85 N. Y. 75; 59 Ark. 259; 17 *Id.* 240; 19 How. 211, 222; 102 U. S. 564, 570; 100 Ky. 153; 71 Fed. 21, and many others.

3. No fraud was shown in procuring the release and judgment. 85 Ark. 592; 102 *Id.* 616; 77 *Id.* 56; 75 *Id.* 266; 100 *Id.* 565. The burden was on plaintiff. Cases *supra*; 116 Fed. 913; 99 Ark. 442; 98 *Id.* 48; 97 *Id.* 268.

4. Appellee was not liable for the death of Robert Treadway. He assumed risks.

HART, J., (after stating the facts). It is contended by counsel for the plaintiffs that the judgment first entered in the circuit court in favor of Jessie Treadway, as administratrix of the estate of Robert H. Treadway, deceased, for $5,500 amounted to no more than a compromise or settlement of her claim for unliquidated damages against the railroad company.

Counsel for the defendant have agreed with counsel for the plaintiffs in their contention in this respect, and on that account for the purposes of this decision, we will treat that judgment as a compromise or settlement of an unliquidated claim for damages against the railroad company.

(1) Counsel for the plaintiffs first attack the release or settlement on the ground that it was procured by fraud. In our statement of facts, we have set out the testimony introduced by both parties on this branch of the case. If the testimony of the witnesses for the defendant is to be believed, it is manifest that there was no fraud in procuring the settlement upon which the judgment was based or upon which the release (as the parties term it) was executed. Reference is made to the statement of facts for this testimony and we do not deem it necessary to repeat it here.

(2) Again it is contended that Mrs. Treadway, as administratrix of the estate of Robert H. Treadway, deceased, did not have the authority to settle an unliquidated claim for damages without especial authority from the probate court, and this we consider to be the principal question in the case. In the case of *Pederson* v. *Delaware, Lackawana & West. Rd. Co.*, 229 U. S. 146, Ann. Cas. 1914-C 153, the court held that an employee of an interstate railway carrier, 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, was employed in interstate commerce within the meaning of the Employer's Liability Act of April 22, 1908, giving a right of recovery against the carrier for the death of the employee while so employed. This decision on this question is binding upon this court. Robert H. Treadway at the time he was injured was engaged in repairing the track of a railroad company which was engaged in interstate commerce. Hence, under the decision of the Supreme Court of the United States just referred to, he was employed in interstate commerce and his cause of action arose under the terms of the Federal Employer's Lia-

bility Act. The Federal statute vests the right of action in such cases in the deceased's "personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." So the Federal statute being applicable, the right of recovery, if any, was in the personal representative of the deceased and no one else could maintain the action. *St. Louis, S. F. & Texas Ry. Co.* v. *Seale*, 229 U. S. 156, Ann. Cas. 1914-C, 156; *American Railroad Company* v. *Birch*, 224 U. S. 547; *Mo. Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, Ann. Cas. 1914-B, 134.

(3) It will be noted that under the Federal statutes, neither the surviving widow nor husband and children of such employee are entitled to maintain the action. It can only be brought by the personal representative for their benefit. There can be no parties to the suit except the personal representative of the deceased employee and the railroad company. The minor, neither by guardian or next friend, has anything to do with bringing the suit or making a settlement of the claim. Of course, if the settlement is made, the widow and the minor children are affected. Still the statute does not give them any right to bring an action. The personal representative of the deceased alone is vested with this authority. The personal representative is the trustee of the parties to be benefited for the purpose of bringing the suit and conducting it. It is his duty to select counsel to collect evidence and to incur the expenses of a trial. He alone must determine the advisability of accepting a verdict as final. Again, if the nature of the evidence and the circumstances of the case should lead the personal representative to the conclusion that a recovery was doubtful, or that a compromise would be to the best interest of the parties to be benefited, without commencing the action, he has the authority to affect a settlement. The statute contemplates that the entire matter of enforcing the claim and of collecting the money shall be in the personal

representative, not only for the protection of the defendant, but also in order that there may be a responsible party to take charge of the interests of those to be benefited. This has been the construction given similar State statutes by the courts of last resort of several States. *Foot* v. *The Great Northern Ry. Co.*, 81 Minn. 493; *Parker* v. *Providence & Stonington Steamship Co.* (R. I.), 14 L. R. A. 414; *Olston* v. *Oregon Water Power Co.*, 52 Oregon 348; *The Pittsburg, Etc., R. Co.* v. *Gipe* (Ind.), 65 N. E. 1034.

This court has recognized the power of the administrator to compromise claims of the estate when done in good faith. In the case of *Wilks* v. *Slaughter*, 49 Ark. 235, the court said that an administrator may compromise the debts due the estate of his intestate notwithstanding that section of the Digest of the laws of Arkansas which provides for the approval of such compromise by the probate court.

(4) Therefore, we are of the opinion that an administrator may compromise and accept settlement of an unliquidated claim for damages without special authority from the probate court. Where the personal representative acts in good faith, those who would impeach his conduct must show fraud or mistake or such gross negligence as would amount to fraud.

It follows that the judgment will be affirmed.

SMITH v. STATE.

Opinion delivered January 29, 1917.

1. LARCENY—STEALING TIMBER—VARIANCE.—In a prosecution for stealing timber the jury's verdict read: "We, the jury, find the defendant guilty of grand larceny (stealing timber) as charged in the indictment * * *." *Held*, there was no variance between the indictment and verdict.
2. LARCENY—STEALING TIMBER—INTENT.—Under Kirby's Digest, § 1902, it is not necessary to show that the trespasser appropriated the timber alleged to be stolen to his own use; it is sufficient if the proof show that he entered upon the land, without lawful authority, and wilfully and knowingly cut down or destroyed standing or growing trees of the value of more than ten dollars.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley*, Special Judge; affirmed.

D. F. Taylor, for appellant.

1. The indictment is at variance with the verdict. Appellant was indicted for cutting timber under Kirby's Digest, § 1902, but was tried for and convicted of *grand larceny*. 25 Ark. 184; 10 *Id.* 618; 34 *Id.* 433; 24 L. R. A. (N. S.), 1244; 107 L. R. A. 298; 12 Cyc. 767.

2. There is no evidence to support the verdict and the court erred in its instructions.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. There is no variance between the verdict and the indictment. The verdict is a general one and responsive to the issues. 12 Cyc. 689, 690e.; 141 Ind. 357; 28 A. & E. Enc. Law 404; 1 Tex. App. 327; 4 Tex. 38; 48 Cal. 557; 47 Mo. 295. But if defective, no objection to the form of the verdict was made in the trial court. 55 Ark. 342; 56 *Id.* 444; 79 *Id.* 293; 50 Ill. 199; 14 Cal. 170.

2. The evidence is sufficient to prove the crime as charged. Kirby's Digest, § 1902. Defendant admitted taking the timber as charged in the indictment.

3. No objection was made to instruction No. 11. If erroneous it was too favorable to defendant. It is too late to object here for the first time. 103 Ark. 505.

4. No. 2 was properly refused. There is no prejudicial error.

SMITH, J. Appellant has prosecuted this appeal to secure a reversal of a judgment sentencing him to a term of one year in the penitentiary upon a conviction for stealing timber.

(1) It is insisted that there is a variance between the indictment and the verdict. The prosecution was had for a violation of section 1902 of Kirby's Digest, and the verdict of the jury was in the following language:

"We, the jury, find the defendant guilty of grand larceny (stealing timber) as charged in the indictment,

and fix his punishment at imprisonment in the State Penitentiary at one year."

There is said to be a variance in that the verdict finds the defendant guilty of *grand larceny*. Such is the verdict. But it also recited, parenthetically, that the larceny was stealing timber *as charged in the indictment*. We think that it cannot, by any possibility, be said that appellant had been found guilty of a crime not charged in the indictment.

It is said the evidence does not support the verdict in that it fails to show that appellant stole the "10 ash trees" he is charged in the indictment with having cut and removed, or that he converted said trees to his own use; and that error was committed in giving, over appellant's objection, an instruction numbered 11, which reads as follows:

"11. On a charge of larceny, such as contained in this indictment, the material allegations are, that in this district of this county, and within three years prior to the 18th day of October, 1916, the date of the indictment, that the defendant stole the timber in question, and converted it to his own use, intending thereby to convert same to his own use; and that the value of said timber exceeded in value the sum of ten dollars."

It is argued that as there was much testimony tending to show that appellant and others had from time to time stolen timber from the land described in the indictment the jury might have found him guilty of stealing timber other than that charged in the indictment.

(2) To sustain a conviction under section 1902 of Kirby's Digest, it is not essential that the proof show that the timber was appropriated to the use of the trespasser. It is sufficient if the proof show that he entered upon the land, without lawful authority, and wilfully and knowingly cut down or destroyed standing or growing trees, of the value of more than ten dollars. The instruction set out was more favorable to appellant than he was entitled to ask in that it permitted the jury to find him guilty only if he "stole the timber in ques-

tion, and converted it to his own use, intending thereby to convert same to his own use."

There was no failure of proof here, for, to the question, "You tell the jury that you did take timber from the lands as charged in this indictment?" appellant answered, "Yes, sir." Inasmuch as appellant admitted cutting the timber charged in the indictment, as well as other timber at another time, no prejudice could have resulted from the admission of the evidence, if it was otherwise incompetent.

About the only real question of fact in the case was that of appellant's authority to cut the timber. Appellant says he was authorized so to do by one Wilmoth, who represented himself as the agent of the owner of the land. This Wilmoth denies. Appellant testified that Wilmoth said, "Go ahead and cut it, and if we get into it, we can pay a small stumpage."

The jury might have found appellant guilty on this statement if they understood therefrom that Wilmoth was, with appellant's knowledge, exceeding his authority and was giving a permission to cut timber for which no compensation should be charged, unless the crime of cutting it was discovered, in which event only a small compensation should be paid. A finding by the jury that this was the understanding would not have excused appellant, but would have made Wilmoth himself guilty under that portion of section 1902 which provides that "Any person who shall induce, assist, aid, or abet any other person so to do (that is, without lawful authority, to knowingly and wilfully enter upon the lands of another, and cut down or destroy timber, of a value exceeding ten dollars,) shall be deemed guilty of a felony."

We find no prejudicial error, and the judgment is affirmed.

HENDRIX v. MORRIS.

Opinion delivered January 29, 1917.

1. SCHOOLS—EMPLOYMENT OF TEACHERS RELATED TO DIRECTORS.—Act 206, p. 855, Acts 1913, providing that a teacher related to a director may be employed only upon a two-thirds petition of the patrons of the school. The act does not provide a manner for ascertaining the number of patrons, and in the absence of a showing to the contrary, the directors will be presumed to exercise an honest judgment in ascertaining the facts.
2. SCHOOLS—TRANSPORTATION OF CHILDREN TO SCHOOL.—The directors of a school district are without authority to expend money in the transportation of children to and from school.
3. SCHOOLS—TRANSPORTATION OF CHILDREN TO SCHOOL.—The provisions of section 15, Act 116, p. 81, Public Acts of 1911, permitting the transportation of children to school at the expense of the district, *held*, to apply only to such school districts as become consolidated school districts in the manner and under the terms of that act.

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

Powell Clayton and *J. A. Comer*, for appellant.

1. A special school district cannot employ teachers who are related to any of the members of the board in the absence of a petition signed by two-thirds of the patrons of the school. The burden was on the board to prove that the petitions contained the requisite number of signatures. Kirby's Digest, § 7616 as amended by Acts 1913, 85; 71 Ark. 87.

2. No power or authority to expend the funds of the district for an automobile and the maintenance of same is given by law. 56 Ark. 205; 95 *Id.* 26; 94 *Id.* 583; 38 L. R. A. (N. S.) 710; 154 Ill. App. 119. In the absence of a statute allowing it school authorities cannot use school funds for the transportation of pupils. 35 Cyc. 1001; 67 Kans. 609, 73 Pac. 927; 168 Ind. 384, 81 N. E. 62; 38 L. R. A. 710-711. In this case the school district of England was extended so as to include Greenwood township and a tax levied but no authority to spend funds for transportation of pupils was given. Kirby's Digest, §§ 7613, 7614-15.

Morris & Morris and *Jas. B. Gray*, for appellees.

1. Appellant has entirely failed to show that the teachers were elected before a petition was filed as required by law. The law presumes the directors acted honestly and fulfilled their duties legally. 96 Ark. 477; 110 Ark. 511. The evidence shows and the court found that the necessary petitions were filed. 107 Ark. 462.

2. The automobile had been bought and paid for prior to this suit. An injunction would be ineffectual. 126 Tenn. 427; 22 Cyc. 781; Ann. Cases, 1913, D. 967; 31 Okla. 49.

As a special school district it had the power and authority to purchase, maintain and operate, for school purposes, an automobile and trailer. Act 77, Acts 1915; Act 116, Acts 1911; 95 Ark. 26. It was "necessary." Serious injury will result if the injunction is granted. 22 Cyc. 748.

SMITH, J. Appellant brought this suit as a resident and taxpayer of England Special School District against the Directors thereof and the treasurer of Lonoke county to enjoin the directors from issuing, and the treasurer from paying, warrants of said district, given in payment of the expenses of operating an automobile in said district, and in payment of the salary of certain teachers. It was alleged, and is admitted, that all the teachers mentioned were related within the prohibited degrees of consanguinity or affinity to some one of the directors; but it is said that the teachers were only employed after petitions containing the signatures of two-thirds of the patrons of the school had been filed praying that said teachers be employed.

Only one witness testified upon this subject. This witness was James B. Gray, who stated that he was the secretary of the school board, and that he kept the minutes of the board, which were offered in evidence. These minutes showed that each of the teachers had filed a petition with the board signed by the requisite number of patrons of the school prior to their election as teachers. These minutes showed that at one meeting

the board determined that two of the teachers in whose behalf petitions had been filed had petitions containing the requisite number of signers, and an adjournment for ten days was taken to afford the remaining teacher who was under disqualification an opportunity to comply with the law, by obtaining the requisite number of signers. These petitions were not preserved by the secretary, who explained their loss by saying the board had acted in good faith and had not anticipated that the legality of their action would be questioned. He testified, however, that the petitions were examined by each member of the board, and while no census was taken they estimated the number of families in the district and figured that the petitions contained the requisite number of signers, and in answer to the question, "So you don't know whether there were two-thirds of the patrons of the school signed these petitions or not, do you?" answered, "I think there was or we would not have passed it that way."

It was shown that the England Special School District embraced originally only the corporate limits of the incorporated town of England, but that by Act 77 of the Acts of 1915, page 260, said district was extended to include Common School District No. 18, and that as thus enlarged the district included all of Gum Woods township.

It was also shown that after the consolidation of the district, the directors purchased an automobile and a truck or trailer for the purpose of conveying the children living in the country to the school in the town, and that the school which had formerly been taught in the rural part of the district was suspended. It was shown that operation of this automobile involved a considerable expense, but it resulted in a greatly increased attendance upon the school.

The court found the fact to be that proper petitions had been filed which authorized the employment of the teachers, and sustained a demurrer to that portion of the complaint which sought to enjoin the payment of the warrants for the operation of the automobile, it

being admitted that the automobile and tractor had been paid for some time before the institution of this suit.

While directors are prohibited, by Act 206, Acts of 1913, page 855, which amends section 7616 of Kirby's Digest, from employing any person related to any of the directors within the fourth degree of consanguinity or affinity, yet they are permitted to do so upon the petition of two-thirds of the patrons of said school.

(1) No provision is made by the law for the manner in which this fact may be ascertained and we cannot, therefore, say that a census must be taken. It was no doubt contemplated by the Legislature that the directors would have access to the school records kept by the teachers and of the annual enumeration of the pupils within the district and would have from this and other sources a general idea of the total number of patrons of the school and would exercise an honest judgment in the determination of the controlling question of fact. There is no proof that this was not done by the directors here. The presumption that the officers did their duty is sustained by the testimony of the only witness in the case and we, therefore, affirm the action of the chancellor in respect to the salaries of the teachers.

The statute prescribes the purposes for which local school taxes may be expended. Sections 7613, 7614 and 7615 of Kirby's Digest. While the directions of the statute are in general terms, we find no language authorizing the expenditures of the school funds which is susceptible of a construction which would authorize the purchase or operation of automobiles for the purpose of conveying the pupils to the school, and, so far as we are advised, no statute similar to ours has been so construed. Upon the contrary, there are several cases involving this right where statutes equally as broad as our own have been construed as being insufficient to confer this right on the directors.

(2) Cases on this subject are collected in a note to the case of *Shanklin* v. *Boyd,* 38 L. R. A. (N. S.) 710. In the case cited the Supreme Court of Kentucky held

that a vote of the tax "for local school purposes" did not authorize the school directors, who were operating under a school law not materially different from our own as far as the powers of the directors are concerned, to expend money for the purpose of conveying children to the schools of the district. The court expressly stated that it did not hold the Legislature might not provide for the levying of a tax for this purpose, but that it did hold that the revenues could not be so employed in the absence of a statute authorizing it. We think the reasoning of that case is applicable to the facts of this. The Legislature has enumerated the purposes for which the revenues may be spent, and as no authority is given to expend money in the transportation of children, we must hold that no such authority exists.

(3) It is urged, however, that authority has been given by Act 116 of Public Acts of 1911, page 81, to transport pupils as was done by the directors here. Section 15 of this Act provides "That the board of directors shall have power to provide such transportation for the pupils of the district as the board may deem advisable, and may purchase, rent or hire conveyances for this purpose, or the board of directors may enter into contracts with others for transportation service," etc., and that "the cost of this transportation shall be paid out of the school funds to the credit of the Consolidated School District."

The majority of the court, however, are of the opinion that the provisions of this section apply only to such school districts as become consolidated school districts in the manner and under the terms of the Act itself. This Act is entitled "An Act to provide for the consolidation of adjacent school districts and prescribing the powers and duties of such consolidated districts," and it defines the procedure by which adjacent districts may avail themselves of the provisions of the Act by becoming consolidated districts.

The England School District was not organized under the provisions of this Act, but by the special Act of the Legislature mentioned above, and the majority of

the court are, therefore, of the opinion that the Act of 1911 is not applicable to it.

It follows, therefore, that the court should have enjoined the issuance or payment of any warrant covering the operation of the automobile as prayed by appellant.

The decree of the court will, therefore, be reversed in this particular and the cause remanded with directions to enter a decree accordingly.

SCULLIN *et al.*, RECEIVERS, MO. & NORTH ARK. RD. CO., *v.* NEWMAN.

Opinion delivered January 29, 1917.

RELEASE—CONSIDERATION—PROOF OF AGREEMENT TO EMPLOY.—Plaintiff, an employee of a railroad company, sustained an injury, and executed in writing a release of the company from liability, "for the sole consideration of $121.20, to me this day in hand paid * * *." Held, the release was valid and binding upon the plaintiff, and that proof of an additional oral promise by the defendant to employ plaintiff in the future, was not sufficient to show fraud in the execution of the release, the same not being a part of the written contract, and that the written agreement, under these facts was not invalidated where it appeared that plaintiff was not offered the employment.

Appeal from Boone Circuit Court; *John I. Worthington*, Judge; reversed.

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

1. Under the undisputed testimony it is clear that the original injury was the result of a risk assumed by him, and the court should have peremptorily instructed a verdict for defendants. Act No. 88, Acts 1911, does not eliminate the doctrine of assumed risk as a defense. 119 Ark. 477; 82 Ark. 11; 53 *Id.* 117; 54 *Id.* 389; 89 *Id.* 427; 93 *Id.* 564; 104 *Id.* 489; 101 *Id.* 537. The case in 228 Fed. 872-5, is peculiarly applicable to the facts in this case.

2. Future promises of employment do not constitute such fraudulent misrepresentation as will authorize the setting aside of a contract on the ground of fraud. Here there was a completed contract, settling

all differences a valid consideration, and on its face it constituted the entire contract. No fraud was proven. 109 Ark. 82; 32 Atl. 165; 107 Ark. 202; 116 *Ib.* 529; Bigelow on Estoppel, 481; Kerr on Fraud & Misrepresentation, 88. The alleged fraudulent misrepresentation must be of a fact and not merely a false promise. Cases *supra;* 91 Ark. 324-7; 48 Pac. 963; 111 S. W. 20; 89 N. E. 651; 36 *Id.* 269; 60 Fed. 880; 73 Pac. 113.

3. Assuming that the promise does constitute actionable fraud, yet, there was no evidence that the promise was made with no intention at the time to fulfill it; and the case should not have been submitted to the jury. 107 Ark. 202; 115 *Id.* 529.

The case being fully developed, the judgment should be reversed and the action dismissed.

WOOD, J. This suit was instituted by the appellee, a car repairer in the employ of the appellants, for damages on account of personal injuries alleged to have been sustained by him October 9, 1915. Appellee alleges that he, in company with a fellow workman, was ordered by his foreman to repair a car sill which was about 40 feet long and weighed about 700 pounds; that for the purpose of stripping it and removing the irons it was necessary to move the sill on to blocks; that while moving the same the sill fell and a stirrup on the same caught appellee's leg under it, severing the muscle on the front part of the same between the knee and the hip, causing appellee permanent injuries and great pain and suffering.

Appellee alleged that the sill was too heavy for two men to handle, and that the job required four men, which number it was the custom of the appellant to furnish; that it was also the duty of appellants to have furnished trestles or horses upon which to place the sill in order to hold the same in a permanent and safe position; that the failure to furnish these trestles made it necessary for the appellee and his fellow workman to use blocks instead, which were insecure and

unsafe for the purpose; that the negligence of appellants in these respects caused appellee's injury. Appellee further set up that appellants fraudulently procured from appellee, while he was weak from the physical pain and mental suffering caused by his injury, a release for the consideration of $121.20 paid to him, and also for the further consideration that they would give him future permanent employment, and the further promise that his employment for thirty or sixty days from the date of the execution of the release should be of a lighter character than it had been; that appellee accepted the money and executed the release in consideration of these promises; that on November 8th appellee reported to appellant for work, but that appellants, through their general car foreman, repudiated these promises and refused to give him work.

Appellants answered, denying the allegations of negligence, and set up the affirmative defenses of assumed risk and contributory negligence. They also denied the allegations of fraud in the settlement with appellee, and set up the release executed by appellee in full discharge of any damages that he may have sustained.

The first question to be considered on this appeal is whether or not there was a valid contract between the appellants and the appellee for a release of all claims for damages on account of the injury sustained by the appellee.

The release, after reciting the appellee's employment and his injury and claim for damages, and the fact that appellants denied liability therefor, continues as follows:

"And whereas, I, the undersigned, desire to compromise and settle the entire matter; now, therefore, for the sole consideration of one hundred twenty-one and 20/100 dollars, to me this day in hand paid by the aforesaid Missouri & North Arkansas Railroad Company, and John Scullin, Jesse McDonald and W. S. Holt, receivers, the receipt of which is hereby acknowledged, I do hereby compromise and settle the

aforesaid claim and do release and forever discharge the said Missouri & North Arkansas Railroad Company, and John Scullin, Jesse McDonald and W. S. Holt, Receivers, from any and all liability whatever, and for all claims, all injuries, present and future, including those that may hereafter develop, as well as those now apparent, and do also release and forever discharge the said Missouri & North Arkansas Railroad, and John Scullin, Jesse McDonald and W. S. Holt, Receivers, from all actions, causes of action and claims for injury and damages which I may now have, or might hereafter have or claim, arising out of the aforesaid injuries of whatsoever nature, either to my person or property; and do hereby acknowledge full satisfaction for such liability, claims for damages and causes of action for injuries and damages.

"I do further represent that at the time of receiving said payment and signing and sealing this release I am of lawful age and fully competent to execute it, and that before signing and sealing the same I was fully informed of and acquainted with its contents and executed it with full knowledge and appreciation thereof."

Appellee was injured on the 9th day of October, and executed the release on the 30th.

There was testimony on behalf of the appellee tending to prove that appellant's claim agent promised appellee before the release was executed that he would be retained in the service of the railway company. There was testimony on behalf of appellants tending to prove that the claim agent made no such promise, and there was also testimony tending to prove that if appellants' claim agent made the promise, it was the intention of appellants to fulfill same by giving appellee employment.

The court, at the instance of the appellee, instructed the jury, in effect, that if before or at the time the release was executed the claim agent of the appellants who procured the same, as an inducement to obtain the signature of the appellee thereto, represented

to appellee or led appellee to believe that he would be retained in the employ of the appellants if he would accept the consideration paid and execute the release, that appellee would not be bound by such release if the appellants thereafter refused to retain appellee in their employ.

The appellants prayed for instructions directing the jury, in effect, that though they might believe from the evidence that the appellee was promised future permanent employment by the appellants, and that without just cause the appellants refused to give him such employment, still the jury could not find for the appellee unless they further believed from the evidence that the promise for future employment was made to the appellee with the fraudulent purpose of obtaining the release, and without an intention on the part of appellants at the time of making the promise to live up to the same.

The court refused to grant appellants' prayers, and to these rulings upon the instructions the appellants duly excepted.

The effect of the court's ruling is that, where a claim agent procures a release to be signed by an injured employee of all damages from the injury for a cash consideration recited in the instrument and upon the further promise of the claim agent that such employee will be retained and given future employment, although such latter promise is not recited in the instrument, that the release will not be binding on the employee unless the company fulfills the promise made by its claim agent by retaining the injured employee in its service. In other words, the ruling is tantamount to a holding that such a promise for future employment unperformed on the part of the railroad company is a fraud that invalidates the release, notwithstanding the recitals of the release show that there is a compromise and settlement of the entire matter in dispute "for the sole consideration" of a designated sum in money which the releasor acknowledges has been paid him. This is not the law.

Fraud cannot be predicated upon a promise of future employment unfulfilled that is not recited in the instrument which constitutes the contract of release. The instrument of release under review is unambiguous in its recitals, and the recital of the consideration received constitutes something more than the mere acknowledgment of a receipt of the amount of money specified.

The contract shows that the amount of money paid the appellee was the sole consideration for the settlement of a disputed claim for damages. The principle controlling here was announced by this court in *Conoway* v. *Newman,* 91 Ark. 324. The facts in that case were that the Newman Mill & Lumber Company executed a mortgage in favor of one H. Greenwald to secure the individual debt of R. L. Newman, one of the partners. During the course of business the Newman Company become indebted to various creditors, among whom was the plaintiff, Goldman & Co., who subsequently brought an attachment against the Newman Company, in which a receiver was appointed, and in which it was alleged that the mortgage to Greenwald was procured by fraud. It was shown at the time the mortgage was executed that the Newman Company was indebted to Newman in the sum of $1,600.00, and that to induce them to sign the mortgage Greenwald told them that Newman would draw out of the firm if they did not execute the mortgage, but if they did execute it he would advance the firm more money. Newman afterwards denied that he had made the promise and refused to make further advances. In that case, speaking of the alleged false representation, we said: "This was not a false statement upon which fraud may be predicated; such fraud must be of existing facts or facts which previously existed, and cannot consist of mere promises as to future acts, although such promises are subsequently broken. * * * The representations here complained of relate solely to promises as to matters in the future."

The instruction of the trial court was predicated upon a mere naked verbal promise of the claim agent of appellants that appellee would be retained in their service as an inducement for appellee's signing the contract of release. This promise related entirely to acts to be done in the future.

In *St. L. & S. F. R. Co.* v. *Dearborn,* 60 Fed. 880, the court, speaking concerning a similar state of facts, said: "There is a distinction between a representation of an existing fact which is untrue, and a promise to do or not to do, something in the future. In order to avoid a contract, the former must be relied on. The plaintiff does not pretend that there was any representation of an existing fact which was untrue, but the claim is that there was a promise to do something in the future."

In the recent case of *Kansas City Southern Railway Co.* v *Armstrong,* 115 Ark. 123, speaking of a release, we said: "This is not a case where the plaintiff is shown to have been mentally incapacitated from entering into the contract; nor is it a case where there were fraudulent representations as to the contents of the written instrument, or any trick or subterfuge whereby the papers were substituted so as to induce the contracting party to execute it; neither is this a case where the injured person executed the release in reliance upon the superior knowledge of the physician or surgeon of the company as to the extent of the injuries. The parties having deliberately contracted with each other for a settlement of the unliquidated claim, they are both bound by the contract." See, also, *Atchison, T. & S. F. Ry. Co.* v. *Ostrand,* 73 Pac. 114.

Since a mere naked promise for future employment is not sufficient to show fraud in the execution of the release, and as such promise if made was not brought into the written contract, proof of such promise can not avail appellee to alter and destroy the effect of his written contract.

We must assume that the prayer for instruction granted at the request of the appellee announced the law from the appellee's viewpoint applicable to the

facts, giving them their strongest probative value in appellee's favor. Appellee did not request prayers for instructions to the effect that if the promise was made by appellants to retain him in their service, and that at the time such promise was made it was not intended by the appellants to perform the same, that such promise would constitute such a fraud in the execution of the contract as to render the same void. We conclude, therefore, that appellee conceded that the evidence was not sufficient to justify the submission of such an issue to the jury, and we do not decide the question as to what would have been the effect on the release of a promise for future employment made with the intention at the time it was made of not fulfilling it.

It follows that the release under review was not void, but, on the contrary, it showed a complete settlement of the damages which appellee sustained by reason of his injuries and is a complete defense to his cause of action. The judgment, for the errors in the court's instruction will be reversed and the cause will be dismissed.

HART and HUMPHREYS, JJ., dissent.

ARNOLD v. WOOD.

Opinion delivered January 29, 1917.

1. BILLS AND NOTES—ALTERATION—LIABILITY OF MAKER.—Under § 124 of the Negotiable Instruments Act,* when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment according to the original tenor.
2. BILLS AND NOTES—ALTERATION—BURDEN OF PROOF.—Where the alleged alteration is not apparent on the face of the instrument by the use of ordinary care in inspecting it, the burden is on the party alleging the alteration to prove it.

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

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*Act 81, p. 260, Acts 1913.—(Rep.)

STATEMENT BY THE COURT.

Appellee sued appellants upon a promissory note alleging the balance due to be $1,275.00. On January 22, 1914, at Alicia, Arkansas, appellants executed a promissory note payable to the order of Earle Gibbons Company for $1,725.00, due 12 months after date. The defense of appellants to the action was that there was a material alteration of the note apparent on its face. The note was introduced in evidence before the jury and has been brought into the record here by proper stipulation.

Appellee, Robert Wood, was a dealer in horses and mules and carried some to Alicia, Arkansas, to sell them. While there he met Earle Gibbons and traded to him some of his stock for the note in question. Wood testified that he had never met Gibbons until the day he exchanged his stock for the note in question; that there were no alterations in the note when he received it and that he acquired the note in good faith paying value for it before it was due. Other evidence was adduced by him tending to corroborate his testimony, and especially that portion of it tending to show that the note did not appear on its face to have been altered. The cashier of the bank to whom Wood showed the note testified that it did not bear any appearance of having been altered. On the part of the appellants it was shown that R. E. Allison and H. K. Gibson both signed the note and that there were 19 persons who signed the note when it was executed. Both Gibson and Allison testified that they did not intend to sign a promissory note. They stated that Gibbons represented to them that he was organizing a corporation for the purpose of dealing in horses and other stock, and submitted to them, what they thought was a blank piece of paper to be signed by them as prospective subscribers to stock in the corporation to be organized; that they signed the paper in question on the faith of his representations and did not know that they had signed a promissory note; that when they

found out that they had signed a promissory note they went to Gibbons and demanded that their names be taken off of the note; that in response to their demand Gibbons took a pen and marked a black line through their names. The two names in question do not now appear upon the note, but evidence was adduced by the appellants tending to show that they had been erased therefrom, and that the note still bears evidence of such erasures. The evidence on behalf of appellant also tends to show that the note was submitted by Gibbons to an attorney who told him that the alteration of the note by running the pen through the two names rendered it void. The jury returned a verdict in favor of appellee and the case is here on appeal.

W. P. Smith, G. M. Gibson and *H. L. Ponder* for appellants.

1. There was an apparent alteration of the note, that was apparent on its face, and this made it void not only in the hands of Gibson, but of the appellee. Acts 1913, 302; 35 Ark. 146; 30 *Id.* 285; Crawford's Annotated Neg. Inst. Law, p. 206, and cases cited. Since the enactment of this statute the burden of explaining an apparent alteration is upon the party producing the paper. *Ib.* and cases cited; 20 Fla. 501, 512.

2. The proof shows clearly that two names had been erased and there can be no recovery.

3. A verdict should have been directed for defendants. The court erred in refusing the instructions requested by appellants. They were fair statements of the law.

A. S. Irby for appellee.

1. Appellee had no knowledge before or at the time he traded for the note that the names of Gibson and Allison were erased from the note nor was he a party to the alteration. The testimony was conflicting, but the jury, under proper instructions found for the appellee.

2. No evidence of erasure, or alteration, was apparent on the face of the instrument—nothing to arouse suspicion. The case of *Harris* v. *Bank, etc.,* 20 Fla. 501, settles the law in this case.

3. There is no error in the instructions. Appellee was an innocent purchaser, for value and without notice. Acts 1913, p. 302, § 124. The verdict is right and will not be disturbed.

HART, J., (after stating the facts). (1) The law of this case is stated in the case of *Jones* v. *Bank of Horatio,* 102 Ark. 302, where the court said: "The original checks have not been brought up with the record. From the testimony it appears that there is a conflict as to whether or not the alleged alterations were apparent on the face of the checks. It has been settled by this court that the alteration of a check duly signed and delivered, without the knowledge or consent of the drawer, 'although done in such manner as to leave no mark or identification of an alteration observable by a man of ordinary prudence, avoids the check as to the drawer, even in the hands of one to whom it is negotiated before maturity for a valuable consideration and without notice of the forgery.' *Fordyce* v. *Kosminski,* 49 Ark. 40, but whether or not a check has been altered is a question of fact to be determined by a jury from the evidence adduced upon the trial of the case." Section 124 of the Negotiable Instrument Act, Acts 1913, Act 81, page 260, reads as follows: "When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized and assented to the alteration. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment according to its original tenor."

Objection is made by counsel for appellants to the refusal of the court to give certain instructions asked by them. The instructions refused were covered by

instructions given by the court. The instructions of the court were in accordance with the principles of law laid down above and we do not deem it necessary to set them out.

(2) The principal contention of appellants is that the law enforces upon the party claiming under a note the burden of explaining an alleged alteration and assign as error the action of the court in refusing to so instruct the jury. This is the rule where the alteration appears on the face of the instrument; but in the case at bar according to the proof adduced by appellee, there is not upon the face of the note anything indicating an alteration or casting any serious suspicion upon its validity. In the case of an alleged alteration which is not apparent on the face of the instrument by the use of ordinary care in inspecting it, the burden is on the party alleging it, to prove it. *United States* v. *Linn*, 1 How. (U. S.) 104; Case note 39 L. R. A. (N. S.) at page 115; 1 Ruling Case Law, par. 73, page 1041.

It follows that the judgment should be affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* FORT SMITH & VAN BUREN RAILWAY COMPANY.

Opinion delivered January 29, 1917.

1. CARRIERS—SWITCHING SERVICE—RATE—INTERSTATE COMMERCE.—Certain cars of material constituting an interstate shipment, were delivered by the K. Ry. Co. in the city of Ft. Smith to appellant Ry. Co. with the request that they be switched to a certain point in the said city. *Held*, the service was for switching only, entirely within the city limits, and that the rate set out in the certificate of the secretary of the Interstate Commerce Commission, not Item 66, was applicable.
2. CARRIERS—INTERSTATE COMMERCE—APPLICATION OF RATE.—The State courts have jurisdiction to determine the applicability of one of two rates, covering switching charges on a shipment of interstate freight done entirely within the limits of one city.

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

Thos. B. Pryor for appellant.

1. This was an interstate shipment and the subject matter is one that is beyond the jurisdiction of a State court. 68 S. E. 107; 204 U. S. 559; 162 *Id.* 184. The shipper's only remedy is to file complaint with the Interstate Commerce Commission. 204 U. S. 553; 202 *Id.* 242; 67 W. Va. 448.

2. The point to which the shipper demanded that the cars be delivered was on a spur track, or industrial track, constructed to serve the crushed stone company. Neither the consignor nor consignee had an industry located on an industrial track within the city. This question also comes under the jurisdiction of the I. C. C. Watkins on shippers and Carriers, p. 314, p. 193. Industrial tracks are for the handling of carload freight from and to the industry they are constructed to serve. *R. R. Co. of Ark.* v. *St. L., I. M. & So. Ry. Co.*, Int. Com. Com., No. 3390.

3. There was no overcharge; the $2.00 charge is the charge for handling cars between industries on the tracks of the carrier and connections of other lines, when both are within the switching limits of the same station, and when point of origin, or destination, is beyond the limits of the connecting line. The charge was properly made for *transportation* service at the rate prescribed by the Interstate Commerce Commission. 110 Ga. 173.

James B. McDonough for appellee.

1. The distance involved is less than two miles and the distance determined the tariff—$2.00 per car.

2. The undisputed evidence shows that the track was an industrial track and not a team track. 24 I. C. C. 292.

3. It is conceded that this was an interstate shipment, but the State court had jurisdiction. The only question was whether the "switching" or 'line-haul transportation" rate of the Interstate Commerce Commission applies—not the reasonableness of the rates established. 62 Atl. 141; 119 Pac. 413; 117 S.

W. 794; 102 Ark. 20; 99 *Id.* 105; 128 S. W. 1194; 82 S. E. 644; 215 Fed. 1004; 115 S. W. 107; 172 Fed. 478; 24 I. C. C. 292.

Smith, J. The Kansas City Southern Railway Company sold to the Fort Smith & Van Buren Railway Company seven cars of material which were shipped from points in Oklahoma and Arkansas, through the State of Oklahoma, to Fort Smith, Arkansas. Upon the arrival of the cars in Fort Smith they were tendered to the St. Louis, Iron Mountain & Southern Railway Company with the request that it switch same from the interchange track in the southern part of the City of Fort Smith to a point on the industrial track leading to the plant of the Crushed Stone Company in the northern part of the city. Neither the consignor nor the consignee had an industry located on this track, but merely desired the delivery to such point because of the convenience in unloading the cars, such point being near the place where the consignee desired to use the material. The shipper offered to pay a switching charge of $14.00 for this service, while the carrier demanded payment of the regular line-haul rate for an interstate shipment which it claims is the only charge it could have lawfully made. No question was made however of the right of the consignee to have the cars placed on this industrial track; the controversy was not over the track upon which the cars should be placed, but it was over the charge to be made for moving them at all. The rate demanded, amounting to $232.61, was paid under protest, and this suit was brought to recover the alleged overcharge amounting to $218.61. The defendant railroad company filed a demurrer, which was not passed upon, and the cause proceeded to trial upon an answer which it also filed. By consent the cause was heard by the court sitting as a jury, and at its conclusion the defendant asked the court to make a finding in its favor, which request was refused, and a finding was made in favor of the plaintiff companies, and a judgment was

pronounced thereon, from which this appeal has been duly prosecuted.

It is alleged, and admitted, that the cars in question constituted an interstate shipment and it is, therefore, urged by the appellant that this court is without jurisdiction to determine this case, as its decision involves a consideration of the reasonableness of the rate charged, a question which this court may not inquire into. Upon the other hand, it is insisted that this question is not involved, but that the cause was submitted and tried upon the issue as to which one of two rates applied, and not upon the reasonableness of any rate. The appellant says the consignee could have unloaded the cars from the team tracks of the Kansas City Southern Railway Company, but that, instead, the consignee caused the cars to be delivered at a point on a switch track serving the Fort Smith rock crusher, and that the consignee of this shipment did not have any industry located on it, "that the shipment was to be, and was, delivered at a point a quarter of a mile, or more, this side of the rock crusher, and that the switching rate on an interstate shipment is applied when it is to be delivered to an industry located on the tracks; that an industry is a plant doing business, having a plant that is located adjacent to the tracks or the track serving that plant," and that the applicable rate for such service is the one charged.

Appellees say the cars were tendered to the appellant to be switched by it from the interchange track in the southern part of the city to a point on the switch track of the defendant in the northern part of the city, and the plaintiffs state that the applicable charge for such service was $2.00 per car, and they sued for the excess charged. Two tariffs were offered in evidence which prescribe the authorized rates for the services which they cover, and the decision of this case turns upon the determination of the applicable rate.

It was alleged in the complaint, and is not denied in the answer, that the distance that said cars were to be switched was less than two miles and the plaintiffs, therefore, say the wrong rate was applied. Plaintiffs introduced in evidence the certificate of the Secretary of the Interstate Commerce Commission, Item 66, of which is as follows: "Item No. 66. Carload freight between connections of other lines and industries located on tracks of this Company will be as follows: 2 miles, and under, $2.00; 3 miles, and over 2 miles, $3.00; 5 miles, and over 3 miles, $3.50; 7 miles, and over 5 miles, $4.00."

Notwithstanding the distance was less than 2 miles, if the applicable rate is the "line-haul rate between stations," the charge which the appellant company made is the proper one.

We are cited to many cases which define the word station, but these definitions were applicable to the issues there involved, and none of them afford a definition which is decisive of the facts of this case. It is probably true that for the rate for which appellant insists to become applicable, it is not essential that the proof show a haul from one town to another, or from one depot to another, but it must be something more than a mere switching service, and we think the service here charged for was a mere switching service performed entirely within the limits of the City of Fort Smith, and that the rate set out above as Item No. 66 is the one which applies to the facts of this case.

Before reaching any conclusion on this question, it was, of course, necessary for us to determine our jurisdiction to consider the question. This we have done, and we have been unable to agree with learned counsel for appellant that we are without jurisdiction. We have here an overcharge resulting from the application of the wrong rate, and as we have found it necessary only to consider the question as to which of two rates applied, without reference to the reasonableness of either of them, we have concluded the case was one within our jurisdiction. *Kansas City Southern Ry. Co.*

v. *Tonn.*, 102 Ark. 20; *C. R. I. & P. Ry. Co.* v. *Lena Lumber Co.* 99 Ark. 105; *St. L., S. F. & T. Ry. Co.* v. *Roff Oil & Cotton Co.*, 128 S. W. 1194; *Western & A. R. Co.* v. *White Provision Co.*, 82 S. E. 644.

The judgment of the court below is, therefore, affirmed.

JOHNSON *v.* PLUNKETT-JARRELL GROCER COMPANY.

Opinion delivered January 29, 1917.

1. MASTER AND SERVANT—ASSUMED RISK.—A servant does not assume the risk of injury caused by the negligent act of a fellow servant until he obtains knowledge of, and appreciates the danger incident to a continuation of his services.
2. NEGLIGENCE—PERSONAL INJURY—NEGLIGENCE OF PLAINTIFF IN CARING FOR THE INJURY.—Where an injury received by plaintiff, due to defendant's negligence, is aggrevated through plaintiff's own neglect of the same, the defendant is not responsible for the enlarged injury.

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

L. L. Campbell for appellant.

1. The court erred in submitting the question of assumed risk to the jury. The law is now settled that a servant does not assume the risk of injury due to the negligence of a fellow servant. Acts 1907, March 8, § 1; 103 Ark. 509; 90 *Id.* 543; 98 *Id.* 145; 100 *Id.* 462. This error embodied in instruction No. 2 was prejudicial. 67 Ark. 604; 69 *Id.* 139; 71 *Id.* 372. It does not affirmatively appear that the error was harmless. 104 U. S. 630; 17 Wall. 639; 51 *Id.* 177.

2. It was error to give instruction No. 7. 128 La. 1050; 125 Mo. App. 159; 105 Tenn. 29; 33 S. W. 693; 60 Ill. App. 440; 50 Ill App. 351; 73 *Id.* 572; 23 Ohio C. C. 268. No such issue was raised by the pleadings and it singles out the evidence as to prompt medical attendance to the injured hand. There is no evidence of negligence by plaintiff in the treatment of the wound. 33 S. W. 693; 60 Ill. App. 440., etc., *supra.*

Otis W. Scarborough and *M. M. Stuckey,* for appellee.

1. The court did not err in submitting the question of assumed risk to the jury. It was not abolished by the Act of March 8, 1907, nor any other act and it need not be proven by direct evidence, but may be established by circumstances. 123 Ark. 119; 122 *Id.* 127; *Ib.* 125; 121 *Id.* 556; 119 *Id.* 477; 188 *Id.* 304; 116 *Id.* 284; 116 *Id.* 56; 113 *Id.* 359; 110 *Id.* 456; 109 *Id.* 288; 108 *Id.* 483; 107 *Id.* 564; 106 *Id.* 575; *Ib.* 436.

2. The court did not err in giving instruction No. 7. The jury found that defendant was guilty of no negligence and this instruction becomes an abstract issue. However, it is correct. If plaintiff, by his own failure to use reasonable care in the treatment of a slight wound caused the injury to be greatly enhanced or aggravated, defendant would not be liable for the aggravation caused by his own negligence. 67 Ark. 371; 78 *Id.* 366; 92 *Id.* 276; 96 *Id.* 78; 102 *Id.* 246; 79 *Id.* 484.

HUMPHREYS, J. The appellant, Manuel Johnson, brought suit against appellee, Plunkett-Jarrell Grocer Co., in the Jackson circuit court to recover damages for an injury to his hand inflicted by the negligent act of a fellow servant, LeRoy Thomas, in the following manner:

They were engaged in opening a meat crate hooped by wire bands and while he was untying the wires at one end, LeRoy Thomas pulled the wires off the other end and negligently lifted the lid, thereby springing the wire into the hand of appellant, which caused his right hand to become paralyzed, atrophied and ankylosed.

In addition to denying all the allegations of the complaint, appellee set up as a defense contributory negligence and assumed risk on the part of appellant. The trial resulted in a verdict for appellee and the case is here on appeal.

Two alleged errors are insisted upon for reversal. The first is that the court submitted the question of assumed risk to the jury. The weight of the evidence establishes the fact that Manuel Johnson and LeRoy Thomas were fellow servants in the employ of appellee. Appellant's testimony tends to prove that appellant received an injury to his hand while unraveling the wire on one end of a meat crate, through the negligent act of LeRoy Thomas in suddenly lifting the other end of the lid to the crate and springing the wire into appellant's right hand. Appellee's testimony tended to prove that appellant was working on the crate alone, and cut his own hand on the wire.

(1) A servant does not assume the risk of injury caused by the negligent act of a fellow servant until he obtains knowledge of it and appreciates the danger incident to a continuation of his services. *Mo. & N. A. Rd. Co.* v. *Van Zant,* 100 Ark. 462; *C., R. I. & P. Ry. Co.* v. *Harris,* 103 Ark. 509.

When requested by appellant, the court should have eliminated from instruction No. 2 the following clause: *"Unless you find from the evidence that the plaintiff assumed the risk of thus being injured."*

(2) The second alleged error urged for reversal is the giving of Instruction No. 7 by the court. The instruction is as follows:

"You are instructed that the plaintiff makes no allegations in his complaint that the defendant owed him any duty or was under any obligation to furnish him medical attention for the cut on his hand alleged to have been inflicted by LeRoy Thomas; now, if you find from the evidence that the condition of plaintiff's hand as alleged in his complaint is due to his negligence in not having the cut thereon promptly given proper medical treatment, or is the result of an infection due to his negligence in failing to have the alleged cut given proper medical treatment, and yet you believe from a preponderance of the evidence that plaintiff is entitled to recover under the instructions in this case, then your verdict should be for only such damages as

are the result of the original injury, if any; in other words, the plaintiff can only recover, if at all, damages occasioned by the negligence of LeRoy Thomas, which was the proximate cause of the present injury."

Appellee's testimony tended to prove that the permanent injury to the hand, described as atrophied and ankylosed, was the result of negligence on the part of appellant in not caring for the slight injury received in the first instance; and that his failure and refusal to follow instructions of the physician in charge of the case, extended and enlarged the injury.

If the injury was enhanced or aggravated through the negligence of appellant, it would be improper to mulct appellee in damages for the enlarged injury. On this phase of the case appellee was entitled to instruction No. 7 as given.

For the error pointed out in instruction No. 2 given by the court, the judgment is reversed and the cause remanded for a new trial.

Chicago, Rock Island & Pacific Railway Company v. Cunningham Commission Company.

Opinion delivered February 5, 1917.

1. Carriers—delay in transportation of freight.—In an action for damages for failure by defendant carrier to transport and deliver shipments of grain promptly, *held*, the evidence was sufficient to establish negligent delay on the part of the railroad company.
2. Carriers—delay in delivering freight—measure of damages.—The measure of damages for negligent delay in the transportation of freight by a common carrier is the difference between the value of the freight at the time it was delivered and its value at the time it should have been delivered, unless the carrier had notice that special damages, or more than ordinary damages, would result from a failure to deliver in time.
3. Carriers—delay in delivering freight—"loss or damage"—provision in a bill of lading.—A bill of lading, covering a shipment of freight, provided that the amount of any loss or damage for which the carrier may be liable, shall be computed in a basis of the value of the property at the time of shipment. *Held*, the words "loss or damage" refer only to cases where the goods are lost in transit, or are physically injured while in transit, and do not refer to damages resulting from a delay in the transportation and delivery of the same.

4. CARRIERS—FUNCTION OF BILL OF LADING.—The bill of lading covering a shipment of freight, *held*, to be both an acknowledgment of the receipt of the goods for carriage and a contract to carry safely and to deliver in a reasonable time.

5. CARRIERS—DELIVERY OF FREIGHT—REASONABLE TIME.—A contract to transport freight implies an agreement to transport and deliver in a reasonable time. Although a bill of lading does not fix the time in which the freight shall be delivered, the law implies that it shall be delivered within a reasonable time.

6. CARRIERS—DELAY IN DELIVERY OF FREIGHT—LIMITATIONS.—A shipper of freight may recover damages for delay in the transportation and delivery of freight, in an action founded on contract, and the five-year statute applies to a claim founded on such a contract.

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

Thomas S. Buzbee and *Geo. B. Pugh* for appellant.

1. There is no evidence that appellee lost anything on these grain shipments, even if it be conceded that they were unreasonably delayed. It was error for appellee to assume that if a car was delayed in transit it had a right to decline to receive it and compel appellant to take it and dispose of it and pay appellee the invoice price. 99 Ark. 568.

2. In a great majority of cases and cars there was no unreasonable delay. Seven days is not a long enough time and it was improper to count the day of the signing of the bill of lading. Acts 1907, p. 453.

3. The measure of damages should be based on the market price of the grain at the point of shipment. The shipments are interstate and the damages are fixed by the bill of lading. The State laws must give way to the Federal laws. 108 Ark. 115; 226 U. S. 491. Interstate Com. Act, June 29, 1906, 34 Stat. 584, 595; 227 U. S. 657; 108 Ark. 115; 31 I. C. C. 693.

4. Eight of the shipments were by other carriers as the initial shippers who were liable under the federal law.

5. The claims arising prior to Aug. 8, 1911, were barred by the three year statute of limitations.

Geo. A. McConnell for appellee.

1. Plaintiff was damaged by the delay of the grain and the court so found. It is conceded that the defendant was not bound to take the car and dispose of the grain, but after refusal to do so it must pay the damages.

2. The cars were unreasonably delayed. Seven days was proven a reasonable time and the court so found upon the evidence. This is as final as the verdict of a jury. 90 Ark. 512, 102 *Id.* 203. The day of the signing of the bill of lading was not included. The market price at point of shipment is not the criterion as to price.

3. The measure of damages as fixed by the bill of lading does not apply. The rule is the difference between the market value of the goods at the time and place when and where they should have been delivered and their value when delivered with interest. 73 Ark. 112; 115 *Id.* 20; 81 S. E. 741; 116 S. W. 1122; 75 S. W. 786; 123 *Id.* 1034.

4. There is a written contract and the five year statute of limitations applies. 100 Ark. 269, 279.

Hart, J. Appellee is a corporation dealing in grain in the City of Little Rock and appellant is a railroad corporation engaged in interstate commerce.

On August 8, 1914, appellee filed before a justice of the peace fifty separate claims against appellant to recover damages for grain lost in transit and for negligent delay in transporting and delivering grain. The earliest claim bore the date of August 10, 1910, and the latest, of July 6, 1914. None of the claims exceeded the jurisdiction of the justice of the peace and were in various amounts from $2.65 to $138.75.

Judgment was rendered in favor of appellee before the justice of the peace and appellant appealed to the circuit court. There the cases were tried before the court sitting as a jury and the court found for appellee in the sum of $1,939.97 and rendered judgment for it against appellant for that sum. The case is here on appeal.

Appellee does a grain business in the City of Little Rock, receiving, shipping, grinding, sacking, mixing and manufacturing chops, corn and other products of grain and different sorts of feed. Ninety-eight per cent of its business is buying and selling in car loads. It handles approximately from two to four thousand cars of grain per year. Seventy or eighty per cent. of its grain is bought at Omaha, Council Bluffs, and Davenport. The experience of officers of the company extending over a period of twenty or twenty-five years, shows that the length of time necessary for grain to reach Little Rock from the above named points is six, seven or eight days.

In making the claims in the present case seven days after the day the grain was shipped is made the basis; that is to say, seven days is allowed for the grain to reach Little Rock, not including the day on which the grain was delivered to the railroad company at the point of shipment and the day when the car reaches any point in the yards of the railroad at Little Rock is counted as the day of arrival.

Appellee had been in the grain business for more than twenty years and stays out of the gambling part of the business. It buys sufficient grain each day to meet the sales made on that day. For instance, if it should sell 10,000 bushels of grain to be delivered ten days from date it would buy that much grain on the same day and it would be shipped in time to reach the point of destination in the ordinary course of travel at the time it was due to be delivered to its customers. If the grain failed to reach Little Rock in time to be sent out and delivered to the customer, appellee would have to buy another car of grain in the city of Little Rock in order to fulfill its orders and would have to pay the market price therefor. In all cases where grain was delayed appellee would buy grain to fill its orders and put in a claim to appellant for the difference between the invoice price of the grain and the market price at Little Rock on the day that the shipment was due to arrive there. Of course when the market

price had fallen no claim would be put in. The claim would only be put in when the market price had risen. Appellee offered to permit appellant to take the delayed cars and handle them in its own way but appellant refused to do this. Appellee then took the cars to its own elevator and handled them to the best advantage possible. Frequently this resulted in a much greater loss than that for which the claim was put in to appellant but appellee has in no case put in a claim for this additional amount as damages.

The evidence adduced in favor of appellee tended to establish the above facts.

On the other hand appellant adduced evidence tending to show that six, seven or eight days was too short a time for the grain to reach Little Rock from the point of shipment; that the usual time was ten days or more. Counsel for appellant concedes that there was sufficient testimony upon which to base the finding of the court that appellant was liable for the grain lost or damaged in transit and that issue is not involved in this appeal. Counsel earnestly insists, however, that as to the great majority of the cars, that there was no unreasonable delay in delivering them. They insist that appellee's testimony is insufficient to prove that seven days is long enough time to allow for transporting a carload of grain from Davenport, Omaha and Council Bluffs to Little Rock and that it is improper to take the date of the bill of lading and count it as one of the seven days. Of course it might be that the grain would not be delivered to the carrier until late in the day on which the bill of lading is dated but a careful reading of the testimony in this case leads us to the conclusion that the day of the date of the bill of lading was not counted and the shipment was considered to arrive at Little Rock when it reached any point in the yards of the company even though it should require another day for it to be placed upon the proper side-track.

The testimony to the effect that seven days was a reasonable time for a shipment to arrive from the points

above named, to Little Rock, was given by officers and agents of appellee and by agents of other grain companies who were accustomed to handling many car loads of grain from the points named. Their testimony was based upon an experience extending over many years and they testified that from their experience most of the grain shipped from those points reached Little Rock seven days after the date of shipments.

(1) Their testimony was sufficient to establish negligent delay on the part of the railroad company in carrying and delivering the grain to appellee. It is true that the officers and agents of appellee stated at the trial that they could not remember each shipment at that time, but they stated that their testimony was given from records made at the time each shipment was delayed and a claim was put in for the damages occassioned by the delay.

(2) Again it is contended that the court erred in its declaration of law to the effect that appellee's measure of damages on the claims for delay was the difference between the market price of the grain at Little Rock on the date the grain should have arrived there and the market price thereof at the same place on the dates the grain did arrive. The measure of damages for negligent delay in the transportation of freight by a common carrier is the difference between the value of the freight at the time it was delivered and its value at the time it should have been delivered, unless the carrier had notice that special damages or more than ordinary damages would result from a failure to deliver in time. *C. R. I. & P. Ry. Co.* v. *Newhouse Mill & Lbr. Co.*, 90 Ark. 452, and cases cited; and *K. C. & Memphis Ry. Co.* v. *Oakley*, 115 Ark. 20.

(3) Counsel for appellant concede that this is the general rule, but they contend that the rule is changed by the bill of lading under which each shipment was moved in the present case.

Section 3 of the bill of lading provides that no carrier is bound to transport the property by any par-

ticular train or vessel, or in time for any particular market or otherwise than by reasonable dispatch, unless by specific agreement endorsed on the back of the bill of lading. It also provides that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of value of the property (being the *bona fide* invoice price, if any, to the consignee, including freight charge, if prepaid) at the place and time of shipment, under this bill of lading, unless a lower value has been represented in writing by the shipper.

We do not think the words "loss or damage" as used in the bill of lading refer to delay in transportation or delivery as contended for by counsel for appellant. We think the circuit court correctly held that these words were only applicable to cases where the goods were lost or damaged while in transit and that they did not refer to cases of negligent delay in transportation or delivery. It can be readily seen how they could apply to cases where the goods were lost or injured in transit. If the goods were lost the measure of damages to the shipper would be their invoice price. If the goods were injured the measure of damages would be the difference between the market value of the goods in their damaged condition and their invoice price. It is not apparent to us how this rule could be applied in the case of negligent delay in transportation like the present case. The effect of appellant's contention would be to deny the shipper damages in cases like the present where the goods were bought for re-sale and the shipper was unable to carry out his contract because of the negligent delay in transporting and delivering the goods by the carrier. We think the evident meaning of the word "loss or damage" as above stated refers to cases where the goods themselves are lost in transit or are physically injured while in transit.

(5) Finally it is insisted that some of the claims are barred by the three-year statute of limitations. We do not agree with counsel in this contention. The bill of lading issued by the railroad company is not only

an acknowledgment of the receipt of the goods for carriage but it is also a contract to carry safely and deliver the goods in a reasonable time. *St. L., I. M. & S. R. Co.* v. *Pape,* 100 Ark. 269. An action for damages resulting from a delay from which the carrier is liable may be founded on contract, even though the contract of shipment does not specify any time within which the transportation is to be completed, for a contract to transport will be deemed to imply transportation within a reasonable time. 6 Cyc. 448.

In the case of *C., R. I. & P. Ry. Co.* v. *Planters Gin & Oil Co.,* 88 Ark. 77, the court held that where a bill of lading does not fix the time within which freight is to be transported, the law implies that the delivery shall be made within a reasonable time, in view of the circumstances, taking into account the mode of conveyance, the nature of the goods, the season of the year, and the ordinary facilities for transportation under the control of the carrier.

(6) In the case of the *St. L., I. M. & S. R. Co.* v. *Mudford*, 44 Ark. 439, the court recognized that the shipper could recover damages for delay of freight in an action founded on contract.

Again in *C., R. I. & P. R. Co.* v. *Pfeifer,* 90 Ark. 524, the court said, that the falure to deliver the goods within a reasonable time by the carrier is only a breach of the contract of carriage, and the carrier is liable for the damages incurred by reason of the delay; but the owner cannot refuse to accept the goods on account of the unreasonable delay in the carriage and sue for conversion.

It follows that the five-year statute of limitation applies and that none of appellee's claims were barred by the statute of limitations.

The judgment will be affirmed.

REIFF v. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION OF DES MOINES, IOWA.

Opinion delivered February 5, 1917.

1. EVIDENCE—CONFLICTING EXPERT TESTIMONY.—Where the testimony of expert witnesses introduced in a cause is conflicting, it is within the province of the jury to choose between these experts, or to discard the evidence of all of them, provided the jury does not act arbitrarily.
2. APPEAL AND ERROR—STATEMENTS OF JUROR AFTER DISCHARGE.—Considerations of public policy in the orderly administration of justice forbid the reception of evidence on the part of a juror, after the discharge of the jury and the separation of the jurors, that the particular juror did not understand and appreciate the effect of the verdict.
3. APPEAL AND ERROR—SURPRISE—TESTIMONY OF WITNESS—PREJUDICE.—Appellant is not prejudiced by surprise, where an expert physician, to whom his counsel had talked, testified differently at the trial, on behalf of the appellee, where the verdict of the jury on the issue there involved, was directly in appellant's favor.
4. APPEAL AND ERROR—RESPONSIVENESS OF VERDICT TO EVIDENCE—ACCIDENT POLICY.—Appellant sued to recover on an accident policy, and claimed a total disability for a period of sixty-six weeks. The jury returned a verdict, showing that appellant's injury was caused by conditions coming within the policy but allowed a recovery for only sixty weeks. *Held*, the verdict would not be disturbed since there was evidence to the effect that some part of appellant's disability was due to other causes.

Appeal from Lonoke Circuit Court; *W. H. Pemberton*, Special Judge; affirmed.

T. C. Trimble, Jr., and *J. W. House, Jr.*, for appellant.

1. The finding of the jury is inconsistent. The evidence shows plaintiff was totally disabled from work. The jury found that his disability was not from syphilis. A new trial should have been granted. Kirby's Digest, § 6208; 84 Ark. 359.

2. The verdict is contrary to the evidence. Every witness testified that plaintiff was totally incapacitated from the date of the injury to the date of the trial from performing any of the duties of bank cashier. The jury found that he was not suffering from syphilis or any nervous disease. He was entitled to recover for the full period of his disability. This find-

ing was probably based on instruction No. 2 given for defendant. There was absolutely no evidence upon which to base this instruction. The verdict was against all the legal evidence. 10 Ark. 309; 24 *Id.* 224; 34 *Id.* 632, 639, 640; 26 *Id.* 309; 102 *Id.* 137; 82 *Id.* 372; 70 *Id.* 385; 70 *Id.* 441; 96 *Id.* 614; 63 *Id.* 567-9; 79 *Id.* 375; 87 *Id.* 471; 88 *Id.* 454; *Ib.* 20, 25; 105 *Id.* 278; 89 *Id.* 279; 90 *Ib.* 104; 67 *Id.* 594; 69 *Id.* 134; 71 *Id.* 367.

3. A new trial should be granted on the ground of surprise and newly discovered evidence. 41 Ark. 229; 66 *Id.* 612, 620; 76 *Id.* 515, 519.

4. Where a soliciting agent writes false answers in the application, he prevents the company from taking advantage of the warranties in the policy. 65 Ark. 581; 25 S. E. 333; 36 Atl. 389; 98 Am. St. 532; 25 So. 869; 75 S. W. 180. It was error to refuse Mr. Reiff's testimony in rebuttal.

R. M. Haines of Iowa, General Counsel, *Charles Jacobson* and *C. A. Walls* for appellee.

1. There is no inconsistency in the verdict of the jury. The jury were not bound by mere opinion evidence. 21 Ark. 355. The burden was on appellant to establish both the injury and disability for the time, in weeks, sued for. This was a question of fact for the jury.

2. The jury allowed appellant more than the evidence justified and he has no ground of complaint. But the finding of the jury, under our decisions, is conclusive, although the jury is not bound by the opinion of experts. 21 Ark. 355; 61 L. R. A. 462.

3. There was evidence to support the theory that disease, caused or contributed to the disability during a part of the period for which a recovery was asked. The burden was on appellant to show total and continuous disability. The instruction on that question states the law. The evidence sustains it.

4. Appellant announced ready for trial though advised of the claim of appellee that he was suffering from syphilis and there was no surprise.

5. The verdict cannot be impeached by affidavits of the jurors.

6. No issue as to waiver or estoppel was raised. 12 Ark. 769. The finding of the jury cures any error in the ruling. On the whole record the jury were permitted to determine the extent of the liability of defendant and its finding is conclusive.

SMITH, J. Appellant had a policy of accident insurance with the appellee insurance company, which contains the standard provision of such policies with reference to total disability. On October 1, 1914, while the policy was in effect, he was knocked down and run over by an automobile, and in his suit against appellee, which was based upon his policy, he alleged that he had not since been able to attend to his occupation as a bank cashier and was permanently disabled. The policy provided for liability for a period of not exceeding 200 weeks, and in his suit appellant sought to recover this compensation for a period of 66 weeks.

Several issues were raised by the pleadings which we need not now consider. Appellant's disability is conceded, but the cause of this disability is the decisive question in the case. Appellant claims that he is suffering from traumatic neurasthenia resulting from his injury; while appellee claims that appellant is suffering from syphilis which is the sole cause of his trouble.

Special interrogatories were submitted to the jury to which the following answers were made:

"1. Do you find that the plaintiff, prior to the date of his application, has suffered from mental or nervous trouble or syphilis? Answer: 'No.'

2. Do you find that the plaintiff at the date of his application was in sound health? Answer: 'Yes.'

3. How many weeks of total disability was sustained by plaintiff, due solely to the result of the injury sustained by him on October 1, 1914? Answer: '60 weeks.' "

Notwithstanding the fact that judgment was pronounced in appellant's favor for the indemnity provided by the policy for a period of 60 weeks, he has appealed from that judgment and asks the reversal of the judgment for the following reasons:

First: That the verdict of the jury is inconsistent, and is contrary to the evidence; that error was committed in giving instruction numbered 2; and that the jury did not comprehend the effect of their verdict, and did not intend to return the verdict rendered; and that a new trial should have been granted on account of surprise.

It is pointed out that appellee admits appellant's total disability, and that this condition has continued for a period of more than 60 weeks, and that appellant attributed his condition to his accident, while appellee says it results from syphilis, and it is argued that, as the jury has found that appellant did not have syphilis, he should have had judgment for the full period of disability and that a finding for a shorter period is contrary to the evidence. We cannot agree, however, that this conclusion must necessarily follow from the jury's verdict. It was alleged in the answer that appellant had entirely recovered from all the effects of his injury and that appellant's then condition was due to other causes. A Dr. Callahan testified that appellant was suffering from a disease which results in the hardening of the arteries and that the effect of this disease did not immediately appear, but came on gradually, growing constantly worse. We quote in part from his testimony the following statement:

"A. I examined the heart, the wrist and the stomach.

Q. Any sign of injury to the heart?

A. No sir; the arteries were in a sclerotic condition.

Q. What is that?

A. It is a hardening.

Q. Is it akin to a disease known as atheroma?

A. Yes sir.

Q. It is the condition of the arteries becoming hard and losing their elasticity of movement?

Q. And you found the arteries in the body of this man to be hardened, did you?

A. Some, not much.

Q. Was that a general condition of all of the system?

A. As far as I could perceive.

Q. This is not caused by injury is it?

A. No sir.

Q. That would result in very serious loss of strength to that man?

A. Yes sir.

Q. Are you familiar with the vertebral arteries?

A. Somewhat.

Q. If the vertebral arteries were sclerosed what would be the effect on the brain?

A. You would have a diminished blood supply.

Q. What would be the effect?

A. The mind would not be as active and possibly the co-ordination of the different muscles would be impaired.

Q. By the word inco-ordination you mean inability to control muscular movements?

A. Yes sir.

Q. In other words he would be unable to put his foot where he wanted to?

A. He would have trouble, probably, loss of control.

Q. Would it result, or be likely to result, in a shambling gait?

A. If he had loss of co-ordination it possibly would?"

This and other testimony of a similar nature furnishes some substantial basis for the finding that, while appellant's injury was the cause of his disability for the period of 60 weeks for which judgment was awarded, yet thereafter the disease, and not the injury, was responsible for the disability.

(1) It is true the evidence of the experts who testified in the case tends to show that appellant's condition was due either to his injury or to syphilis. But the sharp and irreconcilable difference of opinion which is usually found in the testimony of expert witnesses is apparent here, and it was within the province of the jury to choose between these experts, or to discard the evidence of all of them, provided they do not act arbitrarily in so doing. *Tatum* v. *Mohr*, 21 Ark. 355; *Green* v. *State*, 64 Ark. 523; *Ark. S. W. Ry. Co.* v. *Wingfield*, 94 Ark. 75.

Out of the conflicting evidence the jury has found that appellant sustained an injury which was responsible for his disability for a period of 60 weeks, and that although the disability continued for a longer period, the injury was not responsible for it.

(2) Appellant offered in evidence the affidavits of three jurors that they did not understand the effect of their verdict and that they did not intend to find for plaintiff for a shorter time than the time sued for, nor that his disability for the whole period of time for which he sued was not caused by his injury. Jurors are not permitted to thus impeach their verdicts. Considerations of public policy in the orderly administration of justice forbid the reception of evidence on the part of a juror, after the discharge of the jury and the separation of the jurors, that the particular juror did not understand and appreciate the effect of the verdict. Sec. 2423 Kirby's Digest; *St. L., I. M. & S. R. Co.* v. *Cantrell*, 37 Ark. 519; *Capps* v. *State*, 109 Ark. 193; *Griffith* v. *Mosley*, 70 Ark. 244.

(3) Appellant pleads surprise by saying that his attorney had had a conversation over the telephone with one of the expert witnesses who testified in behalf of the insurance company, in which this witness then stated that he was not sure that appellant was suffering from syphilis, whereas, at the trial, the expert swore positively and definitely that appellant was suffering from syphilis, and that this disease was the cause of the trouble. This attorney testified that he thereafter

caused exhaustive tests to be made by another expert which demonstrated that appellant did not have syphilis.

The cause of appellant's trouble was the principal issue in the case, and there were several expert witnesses who testified in support of each theory and, as has been said, in direct conflict with each other. Assuming, however, that there was surprise in the testimony of the expert mentioned, and that had the attorney been correctly informed in advance as to what this expert would testify, other evidence, cumulative to that which appellant did in fact offer, would, and could, have been secured, yet we think no prejudice could have resulted on this account, because the jury expressly found the fact to be that appellant did not have syphilis.

(4) Appellant argues that the court erred in giving an instruction numbered 2 on the ground that it was abstract. This instruction related to the amount of the recovery or the time for which a recovery might be had, and it is said that it is abstract because a recovery should have been had for the whole time sued for if a recovery was permitted to stand at all. We have stated, however, that we do not accept this view of the evidence, and we cannot say that in limiting the recovery to a period of 60 weeks the jury has returned a verdict unsupported by the evidence.

Appellee strongly insists that the evidence does not sustain the finding for the 60 weeks, but it filed no motion for a new trial and has not prosecuted any cross-appeal, and this question is not, therefore, before us for our determination.

Finding no prejudicial error the judgment of the court below is affirmed.

LUSK *et al.*, RECEIVERS ST. LOUIS & S. F. RD. CO., *v.* LONG.

Opinion delivered February 5, 1917.

1. CARRIERS—DAMAGE TO FREIGHT IN TRANSIT—NOTICE TO CARRIER—DEATH OF ANIMAL WHILE IN CARRIER'S POSSESSION.—A carrier may make a rule that notice of any damage to freight must be given to it within a reasonable time after delivery, but the rule is inapplicable in the case of livestock which have died while in the carrier's possession.
2. CARRIERS—INJURY TO FREIGHT—LIMITED LIABILITY.—In consideration of a reduction of rates, a carrier may limit its liability for damages to freight in transit, except on account of its own negligence or carelessness, provided the limitations are reasonable.

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

W. F. Evans and *B. R. Davidson* for appellants.

1. The contract was based upon the consideration of a lower rate, and such contracts have been upheld by this court. 63 Ark. 331; 82 *Id.* 353.

2. A witness was allowed to estimate the damages, without any knowledge of the facts. There was no evidence of negligence whatever. 47 Ark. 497; 71 *Id.* 302; 67 *Id.* 371; 40 *Id.* 375; 44 *Id.* 209.

3. No notice was given of damages, within thirty hours. The burden was on plaintiff to prove notice. 82 Ark. 353, 357. These were interstate shipments, and our courts are bound by the construction placed on contracts of this character by the U. S. Supreme Court. The notice must be given and the burden was on plaintiff to prove it and also negligence and damage. Cases *supra*. A verdict should have been directed for defendant.

W. N. Ivie for appellee.

1. No abstract was filed as required by Rule 9 of this court. 80 Ark. 59; 101 *Id.* 207.

2. These were interstate shipments and under the Federal laws and defendant was clearly liable for the losses and damages. 177 S. W. 400; 100 Ark. 269; 226 U. S. 491; 241 *Id.* 87; *Ib.* 190; Comp. Stat. U. S. 1913, §§ 8563, 8592; 46 U. S. Sup. Ct. Reporter, 555.

3. The provisions in the contract as to notice are unreasonable. 179 S. W. 663; 90 Ark. 308. Under Sec. 20, U. S. Comp. Stat. 1913, the Carmack Amendment it is expressly proved "that no contract, receipt, rule or regulation shall exempt such Common Carrier * * * from liability. Appellant was liable regardless of whether there was negligence or not, or notice. Cases *supra.*

HUMPHREYS, J. Appellee, T. G. Long, brought two suits against appellants, Jas. W. Lusk, *et al.*, Receivers, St. Louis & San Francisco Rd. Co., one in the Madison circuit court and one before Pete Cooper, a justice of the peace in Mill Creek township, seeking to recover damages from appellant on account of its negligence pertaining to stock shipments over its railroad. The suit begun in the circuit court contained four counts, and the one begun in the justice of peace court, three counts. The suit before the justice of the peace was appealed to the circuit court and by consent consolidated with the circuit court case and tried as a consolidated case. The jury returned a verdict on each count, except the second count in the justice of the peace case, for $50.00 in favor of appellee, and found for appellant on the second count. Judgment was rendered on the several verdicts in accordance therewith. A motion for a new trial was filed and overruled and this cause is here on appeal.

All shipments were interstate shipments and made under reduced rate contracts limiting the liability of appellant.

The contract recites that the shipper had the election to ship livestock under the contract at a lower rate, or not under the contract, but at the carrier's risk, at a higher rate.

Section 17 of the contract is as follows: "The shipper acknowledges that he has had the option of shipping the live stock at carrier's risk, at a higher rate, or under this contract, at a lower rate, and that he has

elected to make this contract and accept the lower rate."

Section 13 of said contract is as follows: "As a condition precedent to recovery of damages for any death, loss, injury or delay of the live stock, the shipper shall give notice, in writing, of his claim, to some general officer of the company, or the nearest station agent, or the agent at destination, and before the live stock is mingled with other live stock, and within one day after its delivery at destination, so that the claim may be promptly and fully investigated, and a failure to comply with this condition shall be a bar to the recovery of any damages for such death, loss, injury or delay."

The answer to each count denied the material allegations thereof and specially pleaded the contract requirement of written notice to appellant in case the stock were injured, lost or damaged, by appellee.

The evidence as abstracted fails to disclose that such notice was given to or waived by appellant. On suggestion of counsel for appellee that the abstract was deficient and that the evidence omitted was material to the issues, we explored the transcript but failed to find any evidence tending to show that such a notice was given.

Appellant asked a peremptory instruction finding for it on each count, which was refused; also an instruction on each count directing the jury to find for it unless the notice required by the contract had been given within one day and before the stock had been mingled with other stock. This was asking a peremptory instruction in another form and amounted to an insistence that the notice clause in the contract be applied.

(1) These are interstate shipments and our courts are bound by the construction placed upon contracts of this character by the Supreme Court of the United States. That court has held that a notice of this kind is a proper subject for contract in interstate shipments, and enforcible in the courts. *Northern*

Pacific Ry. Co. v. *Wall*, 241 U. S. 87; *Georgia, Florida & Alabama Ry. Co.* v. *Bliss Milling Co.*, 241 U. S. 190.

Our own court has uniformly held that provisions of this character in a contract are reasonable and just in so far as they apply to *injury* to stock. *Kansas & Ark. Valley Rd. Co.* v. *Ayers*, 63 Ark. 331; *St. L., I. M. & S. R. Co.* v. *Jacobs*, 70 Ark. 401; *Cumbie* v. *St. L., I. M. & S. R. Co.*, 105 Ark. 406; *St. L. & S. F. Rd. Co.* v. *Pearce*, 82 Ark. 353; *St. L. & S. F. Rd. Co.* v. *Keller*, 90 Ark. 308.

The reasons assigned for upholding such provisions in contracts are that it gives the carrier an opportunity to investigate the facts occasioning the injury while the truth can be ascertained; that if the stock are permitted to be sold and mingled with other stock, it deprives the carrier of the right to make an actual inspection in order to learn the nature and extent of the injury.

Reasoning after this fashion, the courts have said that carriers may protect themselves by contracts requiring the shipper to notify them in writing in case the stock is injured, as a condition precedent to recovery. In the case of *Kansas City & Ark. Valley Rd. Co.* v. *Ayers*, *supra*, the court held that a provision of this kind in a shipping contract was reasonable, but in construing the contract, took occasion to say: "The cattle that were dead in the car before the stock were removed and mingled with other cattle are not within this provision of this contract as to notice. The object in requiring the notice of the shipper of his intention to claim damages to be given before the cattle were removed and mingled with other cattle was to afford the railroad company a fair opportunity to examine the cattle before they are removed and mingled with other cattle. As to these that were dead, the company had all the opportunity it could have to examine them."

The doctrine on this point announced in that case has been consistently adhered to in later cases. Where the stock or cattle have died in the actual possession of the carrier a notice could serve no purpose. It can

make all the investigation necessary to ascertain the cause of the injury that it could make if written notice were given, and to require written notice would be an unreasonable provision of the contract. Our construction of this contract is that cattle, sheep or hogs which died in the possession of appellant are not within the reasonable and valid provisions of the contract in reference to the giving of written notice.

It is impossible for us to ascertain from this record whether the verdicts rendered on the several counts in these consolidated cases covered damages to stock which died while in the possession of appellant. The items of damage claimed cover shrinkage, difference in the market value on the day the stock were supposed to arrive at its destination, and the day it did arrive, hogs lost enroute, expenses of reloading, extra freight charges, crippled hogs, sheep and cattle, time lost, etc.

It may be these verdicts included damages on account of other items, so we cannot say they were rendered wholly and entirely on account of dead stock.

(2) No evidence appearing in the record to support the finding that the notice was given, which under the contract is a prerequisite to recovery, except for hogs, sheep and cattle which died enroute, and no certainty existing as to what item or items of damage the verdicts included, it becomes necessary to reverse and remand this case for a new trial. In order to simplify the matter on another trial, we will say in passing, that in consideration of the reduction of rates, a carrier can limit its liability in contracts of this character except on account of its own carelessness or negligence, provided the limitations are reasonable.

On account of errors indicated, the judgment is reversed and the cause remanded for a new trial.

WARD v. WILSON.

Opinion delivered February 5, 1917.

1. STATUTES—CONSTRUCTION—REPEAL.—A general affirmative statute does not repeal a prior particular statute or particular provision of a prior statute upon the same subject, unless there is an invincible repugnancy between the two.
2. APPEALS—FROM COUNTY COURT IN ROAD MATTERS—HOW OBTAINED.—Kirby's Digest, § 3006, regulating appeals from county courts in road matters, was not repealed by the Kirby's Digest, § 1487, the general statute on appeal from county courts.

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

J. T. Coston, for appellant.

1. The affidavit for appeal was fatally defective. (1) It does not state that appellants are aggrieved by the decision. (2) It fails to state that the appeal is not taken for vexation. Kirby's Digest, § 1487; 44 Ind. 440; 80 S. W. 337; 152 *Id.* 308; 95 Ark. 148; 92 *Id.* 151; 93 *Id.* 265; 5 Okla. 736; 46 Conn. 528; 54 Atl. 755; 51 Mo. 440; 102 S. W. 1104, etc.

Virgil Greene, for appellee.

1. No motion to dismiss the appeal was made. 99 Ark. 56. No affidavit for appeal was necessary. Kirby's Digest, § 3006. Section 1487 does not apply.

McCULLOCH, C. J. This appeal is from a judgment of the circuit court rendered in a proceeding which originated in the county court concerning the opening of a public road. The sole question involved now relates to the correctness of a ruling of the circuit court in refusing to dismiss the appeal from the county court on the ground of alleged insufficiency of the affidavit for appeal. The contention of appellants is that the question is controlled by the provisions of Kirby's Digest, section 1487, which regulates, generally, appeals from county courts and provides that an appeal may be granted "by the party aggrieved filing an affidavit, and prayer for an appeal with the clerk of the court in which the appeal is taken," and that the "party ag-

grieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him." The general statute just referred to is a part of the act of February 20, 1883. See Acts 1883, p. 48. Appellee contends that the statute just referred to has no application, but that an appeal from the judgment of a county court in a matter relating to the opening, vacating or altering of a public road, is regulated by the provisions of Kirby's Digest, section 3006, which is a part of the act of March 23, 1871. The last named statute does not require the filing of an affidavit. It merely requires that notice of the appeal be given during the term at which the decision is made, and that "the appellant shall within ten days thereafter enter into bond, with good and sufficient security, to be approved by the clerk of the county court, for the payment of all costs and expenses arising from such appeal."

The question is ruled against appellants by the decisions of this court in *Baugher* v. *Rudd*, 53 Ark. 417, and *Nemier* v. *Bramlett*, 103 Ark. 209, where the court announced the application of the rule that "a general affirmative statute does not repeal a prior particular statute or particular provisions of a prior statute upon the same subject, unless there is an invincible repugnancy between the two," and that in accordance with that rule the Act of 1871 regulating appeals from county courts in road matters, was not repealed by the later act of 1883 regulating generally appeals from county courts.

Affirmed.

FISHER v. CITY OF PARAGOULD.

Opinion delivered February 12, 1917.

1. MUNICIPAL CORPORATIONS—SUPPRESSION OF BAWDY HOUSES.—The Legislature has delegated to municipalities the power over the general subject of the control of the keeping of bawdy houses, with authority to define the exact elements of the offense, and it is a proper exercise of that authority for a municipality to define the offense as a house of ill-fame kept or used for the purpose of sexual prostitution and lewdness, whether kept and frequented by one female or more.
2. MUNICIPAL CORPORATIONS—SUPPRESSION OF BAWDY HOUSES.—A municipal corporation has the authority to completely suppress bawdy houses or houses of ill-fame, and has the authority to prohibit men from entering them, as well as prohibiting women from being inmates thereof.

Appeal from Greene Circuit Court; *R. H. Dudley*, Judge; affirmed.

Huddleston, Fuhr & Futrell, for appellant.

This appeal presents but one question, viz.: Is a house occupied by its owner as a residence, who lives alone, and to which no other females resort for immoral purposes, but to which men of lewd and lascivious character resort for the sole purpose of unlawful sexual intercourse with said owner, who is a woman, and where no other improper or immoral conduct is suffered or permitted, a bawdy house? The ordinance was not violated and appellant was not guilty under the agreed statement of facts. 14 Cyc. 484; 1 Idaho 689; 45 N. W. 545; 20 Am. St. 401; 1 Bishop New Cr. Law, 655; 38 Ark. 637. The house was not a bawdy house under the ordinance.

J. C. Shane, for appellee.

Under the ordinance and agreed statement of facts the house of Annie Clark was a bawdy house, or house of ill-fame. 45 N.W. 545; 80 Iowa 75; 84 Am. Dec. 175; 38 Ark. 638; 9 Pac. 508; 14 Cyc. 484; 96 Iowa 262; 48 Ark. 60.

McCULLOCH, C. J. Appellant was convicted of violating an ordinance of the City of Paragould en-

acted for the purpose of suppressing bawdy houses. The ordinance in question makes it unlawful for any person to keep a bawdy house or to be an inmate thereof, or to frequent such a place, and defines a bawdy house to be a "house of ill-fame kept or used for the purpose of sexual prostitution and lewdness, whether kept or frequented by one female or more." The case was tried in the circuit court on an agreed statement of facts to the effect that appellant frequented the house of one Annie Clark, who was a prostitute, and who kept and used the house for her residence and for the purpose of sexual intercourse; that Annie Clark was the sole female inmate of the house and no other females resorted thereto for immoral purposes, but that "said house was at that time the resort of men of lewd and lascivious character, visiting said house for the sole purpose of unlawful sexual intercourse with said Annie Clark, and that no other immoral or improper conduct was therein suffered or permitted except as herein stated."

The contention of appellant is that the conviction is erroneous for the reason that, according to the undisputed facts, the house kept by Annie Clark being the place of her residence, and containing no other female inmate, was not a bawdy house within the correct definition of that term.

The municipality derived its sole authority to enact the ordinance from the statute which authorizes municipal corporations "to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation." Kirby's Digest, section 5438. The statute itself does not define the terms bawdy house or houses of ill-fame or assignation, but those terms are used interchangeably as meaning substantially the same thing. A bawdy house, according to the common law definition, is "a house of ill-fame kept for the resort and convenience of lewd people of both sexes." *State v. Porter*, 38 Ark. 637. Another definition is stated as follows: "A bawdy house, or house of ill-fame, is a house kept for the shelter and convenience of persons desiring unlawful sexual

intercourse and in which such intercourse is practiced." 14 Cyc. 484. The authorities do not, we think, bear out the contention of appellant that a house kept by a prostitute for purposes of prostitution does not come within the definition of a bawdy house merely because it has no other female inmate. On the contrary, we think that all of the elements of the offense may be complete, even though the prostitution is carried on by one woman who is the keeper of the house. It does not follow, however, that the house can be classed as a bawdy house merely because one prostitute lives therein and has intercourse habitually, or frequently, with one or more men, but if the woman living alone there keeps the house for the purpose of having sexual intercourse with any men who desire to resort to the place then it is a bawdy house within the strict definition of the term. That view is supported by the following authorities: *State* v. *Young*, 96 Ia. 262; *People* v. *Slater*, 119 Cal. 620; *People* v. *Buchanan*, 1 Idaho 681; *Ramey* v. *State*, (Texas Cr. App.), 45 S. W. 489.

In *State* v. *Young*, *supra*, the Iowa court held that a house in which a man kept his wife for general purposes of prostitution was a bawdy house or a house of ill-fame, and sustained a judgment of conviction against him for that offense. We are further of the opinion that even though the offense was not completely within the common law definition, the Legislature has delegated to municipalities power over the general subject and with authority to define the exact elements of the offense, and it was a proper exercise of that authority for the municipality in this instance to define the offense in the language of the ordinance as "a house of ill-fame kept or used for the purpose of sexual prostitution and lewdness, whether kept and frequented by one female or more." The power of complete suppression being delegated to the municipality, it included the authority to prohibit men from frequenting such places, as well as prohibiting women from being inmates thereof.

The agreed statement sets forth facts which bring appellant's conduct strictly within the terms of the ordinance and the judgment of conviction was correct, and the same is affirmed.

BOLLIN v. STATE.

Opinion delivered February 5, 1917.

SEDUCTION—REFUSAL OF DEFENDANT TO MARRY THE PROSECUTING WITNESS—SUBSEQUENT OFFERS OF MARRIAGE.—Defendant, under promise of marriage, had sexual intercourse with the prosecuting witness and then refused to fulfill his promise; *held*, he was properly convicted of the crime of seduction, although, at a subsequent time he renewed his proposal to marry the prosecuting witness, and that she then refused to marry him.

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

John Mayes, for appellant.

1. The prosecutrix was either a woman of unchaste character or a female of easy virtue. 40 Ark. 486-7.

2. She broke the engagement. Defendant offered to marry her and she declined. Her parents also objected. 113 Ark. 527; 22 L. R. A. 840.

3. The verdict is not supported by the evidence, and is contrary to law. 113 Ark. 527.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The presumption is that the woman was chaste. It was not necessary for the State to allege or prove chastity. Appellant having alleged her previous unchastity, the burden was on him to prove it. 73 Ark. 139; 77 *Id.* 23; 84 *Id.* 67. The testimony as to chastity was at least conflicting, and the jury believed the prosecutrix. This is conclusive. 95 Ark. 175; 92 *Id.* 120; 50 *Id.* 511; 104 *Id.* 162; 101 *Id.* 51, 330.

2. As to whether the prosecutrix broke the promise of marriage or the appellant, the evidence also conflicts. The question is not as to the weight of the evidence, but whether it is legally sufficient to support

the verdict, and this court will consider it in its aspect most favorable to appellee. 92 Ark. 586; 97 *Id.* 486; 87 *Id.* 109; *Ib.* 438. The prosecutrix testified that it was he, and not she, who broke the promise of marriage, and that, if believed by the jury, was sufficient, without any corroboration. 86 Ark. 30; 77 *Id.* 468.

3. The jury found the woman's testimony that the intercourse was obtained by false promise of marriage. There was evidence to sustain the finding.

4. There is no error in the instructions. 16 S. W. 816; 61 Ark. 88; 77 *Id.* 334; 69 *Id.* 558; 58 *Id.* 353. It is too late to object to instructions here for the first time. 80 Ark. 345; 101 *Id.* 120.

McCULLOCH, C. J. Defendant, Otto Bollin, appeals from a judgment of conviction in the circuit court of Washington county of the crime of seduction, induced by a false, express promise of marriage. The wronged female is Naomi Castile, who resided near Prairie Grove, in Washington county, at the time the alleged unlawful act of intercourse was committed. The principal contention on the part of the defendant is that the evidence is insufficient to sustain the verdict of conviction, and that it shows that the woman in question was unchaste, and fails to show that the defendant broke the alleged contract of marriage. The acts of sexual intercourse charged are admitted, and there is no dispute at all in the testimony about that. The testimony also establishes beyond dispute the fact that there was a marriage engagement, and warrants the inference that illicit acts of intercourse were induced by defendant's promise of marriage. The only real issues in the trial below were those stated above; namely, whether Naomi Castile was a chaste woman at the time her acts of sexual intercourse with the defendant began, and whether the contract was broken by him or by her.

It is shown by the testimony that the two parties became acquainted with each other in February, 1913, and an engagement to marry was entered into about

June, 1913, the first act of sexual intercourse occurring, according to the undisputed evidence, on August 7, 1913. Shortly after the first act of intercourse occurred, the girl went to Iowa to attend school there and later to Oklahoma and entered a hospital there for the purpose of preparing herself as a nurse. This was done with the consent, and perhaps at the suggestion, of the defendant himself, and there is in the record considerable correspondence between the parties while the girl was in Iowa and in Oklahoma. She returned to Prairie Grove and the illicit relations of the parties were resumed, and were continued from time to time up to a date in July, 1915. The girl became pregnant and gave birth to a child the following May.

The evidence is sufficient to sustain the verdict on each of the issues. Defendant attempted to show that Naomi Castile was unchaste before he had intercourse with her, and he adduced testimony tending to establish his contention on that score, but it can not be said that the testimony is undisputed. He says that she admitted to him that she had had sexual intercourse with two other young men in the neighborhood before his intercourse with her began. She denies that, and there being a conflict, we must treat the issue as settled against the contention of the defendant.

The most serious issue of fact in the case is whether or not the evidence is sufficient to show that the marriage agreement was broken by the defendant, and not by the girl. The written correspondence between them is quite voluminous, much of it having little, if any, bearing upon the question of complying with the marriage agreement. But there is undoubtedly evidence of a very substantial nature in the letters written by the defendant, as well as oral statements to the girl, as testified to by her, to the effect that he refused to marry her. Many of the statements in the letters are sufficient to show evasive postponements of the marriage and groundless excuses, which warranted the inference that they were intended as a breach of the agreement to marry.

It is true that the evidence shows that the girl herself was not always willing for the marriage engagement to be carried out, and that her parents interposed objections to the marriage on the ground of defendant's habits of dissipation. It is perhaps undisputed that there were times when the girl was unwilling to marry the defendant, but this was after the jury could have found, and doubtless did find, that he had broken the promise himself, and she was not bound at all times to hold herself in readiness to accept his once broken promise and to agree again to marry him. After her suffering, the humiliation and disgrace of his broken promise, he can not escape the consequences of his crime by showing that he had at times renewed his promises, and that they were rejected by her. *Carrens* v. *State*, 77 Ark. 16.

Upon the whole we are convinced that there was enough to warrant the submission of those issues to the jury, and that the verdict is supported by the testimony.

The instructions objected to and assigned as error were in language that has frequently received the approval of this court, and a discussion thereof is unnecessary.

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

STATE *use, etc. v.* LEATHERWOOD.

Opinion delivered February 12, 1917.

APPEAL AND ERROR—FAILURE TO PRESERVE ORAL TESTIMONY IN CHANCERY TRIAL.—Where, in a trial in chancery, the cause is heard, in whole or in part, upon either depositions or oral testimony or both, the cause will not be reversed upon appeal, where any of said testimony is not properly brought up, and this rule obtains even though there is a certificate of the chancellor as to what the last or missing depositions contained, and even though the oral testimony is contained in the transcript, but is not duly authenticated as the testimony that was heard by the trial court.

Appeal from Poinsett Chancery Court; *E. D. Robertson*, Chancellor; affirmed.

H. P. Maddox, for appellant.

Contends that the sales were fraudulent and void, citing many authorities, but as the court does not go into the merits of the controversy, it is useless to state the points and authorities cited in the able and elaborate briefs of counsel.

Connett & Currie, Lamb, Turney & Sloan and *W. W. Hughes*, for appellees.

1. This cause was heard upon the pleadings, depositions and *oral* evidence. The oral evidence is not in the record. This court will presume that the evidence sustains the decree. 87 Ark. 232; 90 *Id.* 214; 95 *Id.* 379; 83 *Id.* 424; 80 *Id.* 579; 109 *Id.* 1; 38 *Id.* 477; 84 *Id.* 100.

2. Argue the merits citing many authorities.

WOOD, J. The appellant, State of Arkansas, by its Attorney General, for the use and benefit of Bay Village and other Special School Districts instituted this suit against the appellees to set aside the sale of section 16, township 10 north, range 5 east, and section 16, township 11 north, range 5 east. The cases were almost identical and were consolidated under the statute for trial.

The complaints alleged in substance, that J. A. Bradsher, J. R. Wigginton, N. J. Hazel, W. M. Hazel, L. C. Going and Benjamin Harris entered into a conspiracy to defraud the appellant of the lands, and that through various acts of fraud, which are set forth specifically in the complaints, the sales were made by the collector of Poinsett county, contrary to the statutes in such cases made and provided, and that through fraud perpetrated upon the county court by a concealment of the real facts from the court these sales were confirmed; that deeds were made to the immediate purchasers by the Commissioner of State Lands, and that these purchasers sold to the others of the appellees, who, it is alleged, had notice of the fraud perpetrated.

The appellant prayed that the sales of the lands be set aside; that all the deeds made as a result of and

growing out of the sales be set aside and cancelled as clouds on appellant's title. There was an alternative prayer that in the event the land could not be recovered from those having immediate possession thereof and judgment for damages rendered against them, that appellant have judgment against appellees, J. R. Wigginton, N. J. Hazel, M. W. Hazel, J. A. Bradsher, L. C. Going and Benj. Harris for damages by reason of their alleged fraudulent acts resulting to appellant, in both cases, in the aggregate sum of $36,440.

The allegations of fraud were specifically denied, and it was set up in defense that all the requirements of the statute in regard to the sale of sixteenth section lands were fulfilled, and if not, that none of these irregularities were frauds that vitiated the sales, and that all of the alleged irregularities were cured by the act of the Legislature approved May 25, 1911. Acts 1911, No. 274, p. 267.

Certain of the appellees who were the last purchasers and in possession of the land set up that they purchased the same without any notice of the alleged frauds, and for a valuable consideration, and that they were therefore innocent purchasers.

The court found that there was "no equity in plaintiff's complaint, and that same should be dismissed for want of equity," and entered a decree to that effect, and quieting title in the appellees E. A. Morse and the Poinsett Lumber & Manufacturing Company to the lands respectively purchased by them.

The decree, among other things, recites that the causes were submitted upon the pleadings, the depositions of witnesses (naming them) "and the oral evidence of Gordon Frierson taken in open court." The oral testimony of Gordon Frierson has not been brought into the record by any of the established methods of preserving for this court the oral testimony that was heard at the trial.

Chancery causes in this court are heard *de novo*, but upon the same record that was before the trial court. It is the uniform practice of this court, established by

a long line of its decisions, that where a cause is heard upon written and oral testimony, as shown by the record, not to reverse the decision of the trial court in chancery upon an issue of fact unless all of the testimony that was heard by the chancery court has been brought into the record on appeal. Where the recitals of the decree show that the cause was heard upon depositions and oral testimony, if any of the depositions are omitted or any of the oral testimony that was heard by the trial judge is not duly authenticated and brought into the record by the familiar methods for bringing such testimony before this court, it will be presumed that the missing evidence sustains the decree.

In one of the most recent cases upon the subject, we said: "The issues in the case could not have been determined except upon a consideration of all the testimony in the case; and whether or not the chancery court erred in its findings and decree can only be determined by a consideration of all of the evidence. Since some of the testimony that was before the chancellor has not been brought into this record, we must assume that every question of fact essential under the pleadings to sustain the decree was established by the absent evidence." *Bradley Lumber Co.* v. *Hamilton*, 109 Ark. 1, 4, and cases there cited.

The rule obtains even though there is a certificate of the chancellor as to what the lost or missing deposition contained, and even though the oral testimony is contained in the transcript, but not duly authenticated as the testimony that was heard by the trial court. *Bradley Lumber Co.* v. *Hamilton*, 109 Ark. 1-4.

The decree of the court is therefore affirmed.

FARMERS STATE BANK *v.* SOUTHERN COTTON OIL CO.

Opinion delivered February 12, 1917.

1. EXECUTIONS—STOCK IN A CORPORATION.—When plaintiff in execution desires to reach stock owned by defendant in a corporation, he should follow the provisions of Kirby's Digest, § § 3235, 3236, and bringing garnishment proceedings against the corporation is improper.
2. APPEAL AND ERROR—ORDER TO MAKE ANSWER MORE SPECIFIC—GARNISHMENT—REASONABLE TIME.—Where the garnishee is ordered by the court to make its answer more specific, it is error to render judgment against the garnishee, before it has had a reasonable time in which to obey the order of the court.

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

Geo. M. Chapline, for appellant.

1. The court erred in rendering judgment by default against the garnishee. Kirby's Digest, § 3700; 96 Ark. 568; 23 *Id.* 18; 25 *Id.* 622.

2. The method of procedure to subject corporate stock to the payment of a debt is pointed out by Kirby's Digest, § § 3235-6. Time should have been given to make the answer more specific.

HART, J. The Southern Cotton Oil Company obtained judgment in the circuit court against C. C. Bailey for the sum of $274. Subsequently it sued out and obtained a writ of garnishment against the Farmers State Bank. The bank filed an answer in which it stated that the defendant, C. C. Bailey, had no money, goods or chattels in its hands except $500 of stock of the bank, and that the bank had a lien on said stock to secure a loan of.....dollars. The answer of the bank was duly verified by its president.

The Southern Cotton Oil Company filed a motion to make the answer more specific. The motion was sustained by the court and the bank ordered to make its answer more specific. On the same day judgment by default was rendered against the garnishee for the sum of $274 and the accrued interest. To reverse that judgment the bank prosecutes this appeal.

Sections 3235 and 3236 of Kirby's Digest provide how an execution may be levied on shares of stock in corporations and the plaintiff in execution should have followed the proceedings provided by those sections instead of suing out a writ of garnishment. Moreover, if garnishment had been the proper remedy, the court abused its discretion by rendering a judgment by default against the bank without giving it time to make its answer more specific as required by the order of the court.

It follows that the judgment must be reversed and the cause remanded for further proceedings in accordance with this opinion.

TEMPLE v. WALKER.

Opinion delivered February 12, 1917.

1. AUTOMOBILES—COLLISION WITH BUGGY—CONTROL OF TRAFFIC BY CITY.—A city ordinance provided traffic regulations for horse drawn vehicles and automobiles; in making a turn to go into another street, defendant, who was driving an automobile, struck a horse, which plaintiff was driving to her buggy, resulting in an injury to plaintiff. In an action for damages by plaintiff, it appeared that defendant had violated the ordinance in making the turn to go into the other street. *Held*, in instructing the jury, it was error for the court to charge that defendant would be liable if he violated the ordinance, and that such act was the proximate cause of plaintiff's injury, irrespective of whether he was guilty of negligence or not, in driving his automobile as he did.
2. MUNICIPAL CORPORATIONS—ESTABLISHING RIGHTS AND LIABILITIES BETWEEN CITIZENS BY ORDINANCE—AUTOMOBILES.—A municipal corporation has not the power to create a right of action between third persons, nor to enlarge the common or statutory liability of citizens among themselves.

Appeal from Miller Circuit Court; *Geo. R. Haynie*, Judge; reversed.

Webber & Webber, for appellant.

1. The court erred in giving the second instruction. It is abstract and assumes that the ordinance was violated and that appellant *must* go to the center of the street under all circumstances and at all hazards.

A violation of the ordinance would not *per se* constitute negligence. The question of negligence was for the jury. 90 Neb. 200; 41 L. R. A. (N. S.) 337; 66 N. W. 671; 109 Mich. 37; 63 L. R. A. 668, 670; 100 N. Y. Supp. 208; 103 *Id.* 578. Negligence is the gist of the action. Without it there can be no recovery.

This instruction put the burden on appellant to show that he *actually went* to the center of the street. It is in conflict with all the other instructions given at defendant's request, which correctly state the law. It is error to give conflicting instructions, and the giving of an erroneous one is not cured by a correct one where the two are conflicting. 79 Ark. 12; 83 *Id.* 202; 87 *Id.* 364; 88 *Id.* 550; 94 *Id.* 311; 99 *Id.* 387; 104 *Id.* 67.

2. The violation of an ordinance is not determinative of the question of negligence. Negligence must be proven as the proximate cause of the injury, and before one can be held liable, it must be shown that the injury was one a person of ordinary foresight and prudence would have anticipated. 66 Ark. 68; 69 *Id.* 402; 97 *Id.* 160.

3. The preponderance of the evidence is with the defendant and the verdict would have been for him, except for the error of the court.

John N. Cook, for appellee.

1. Only a general objection was made to instruction No. 2. 87 Ark. 396.

2. It is hypothetical and places the burden on appellee and clearly states the law applicable to the facts. 86 Ark. 553; 41 L. R. A. (N. S.) 346.

3. Under the circumstances the verdict and judgment are right without reference to the instructions. 89 Ark. 154; 107 *Id.* 130; 92 *Id.* 490.

SMITH, J. Appellee recovered judgment against appellant to compensate an injury sustained by her as the result of a collision between a buggy in which she was riding, with an automobile driven by appellant.

No error prejudicial to appellant appears to have been committed except in the giving of an instruction numbered 2, which reads as follows:

"If you find from a preponderance of the evidence that the plaintiff was traveling south on the right side of Hazel Street, and that the defendant was traveling north on the right side of said Hazel Street, and that the defendant without going to the center of said Hazel Street, negligently turned his automobile west and attempted or started to turn on the left side of Fifth Street near the curb of the left corner of Fifth Street, and thereby struck and injured the plaintiff and that his failure to go to the center of said Hazel Street before attempting to turn into Fifth Street was the proximate cause of said injury, your verdict should be for the plaintiff."

There was introduced in evidence a traffic ordinance of the city of Texarkana, where the collision occurred, which reads as follows:

"Section 1. That the term vehicle as used in this ordinance shall include all buggies, wagons and things of like nature, automobiles, locomobiles, motor cycles and things of like nature.

"Section 2. That all persons driving or propelling vehicles upon the streets of this city shall drive on the right side of any and all streets as close to the curb as possible, and when intending to drive into any cross street, shall proceed to the center of such street before turning into same.

"Section 3. All drivers of vehicles on said streets who may desire to cross from one side to the other, shall drive to the intersection of any two streets before turning to reach such other side of the street. In passing a vehicle going in the same direction, all drivers shall pass to the left of such vehicle as nearly as possible to the center of the street.

"Section 4. All persons driving vehicles on streets congested or crowded with other vehicles and pedestrians, shall drive very slowly and if driving a motor vehicle, shall change to a lower gear and move very

carefully, and, if necessary, come to a full stop to allow such vehicles and pedestrians to clear the way."

It will be observed that the instruction quoted required the observance of this traffic ordinance by imposing upon appellant the duty of going to the center of the street down which he was driving before turning into another, and tells the jury that if "his failure to go to the center of said Hazel Street before attempting to turn into Fifth Street was the proximate cause of said injury, your verdict should be for the plaintiff." The instruction does not permit the jury to say whether the failure of appellant to go to the center of the street was a negligent act or not, but assumes that it was and directs a verdict accordingly if it be found to be the proximate cause of the injury.

This it should not have done. The jury should have been allowed to say, notwithstanding the existence of the ordinance, whether the act of appellant was a negligent one.

Appellant testified that he went to "about" the center of the street before turning, and while he evidently, to some extent, at least, "cut the corner," he says he did so in order to comply with section 3 of the ordinance which required him to pass the buggy by driving to its left, and that he would have passed the buggy safely without striking it but for the fact that the horse was unexpectedly turned to the left, thereby placing the buggy near the curb and on the wrong side of the street, causing him to strike the horse and buggy before he could stop his car, notwithstanding the fact that it was running at a very low rate of speed.

In the recent case of *Bain* v. *Fort Smith Light & Traction Co.*, 116 Ark. 125, we had occasion to consider the question of negligence as predicated upon a violation of a city ordinance regulating traffic in its streets, and the leading cases upon the subject are cited there. It was there held that such ordinances are admissible in evidence to be considered in the determination of the question of negligence resulting in an injury which would have been averted had the ordinance been ob-

served; but that the observance or non-observance of the ordinance is not determinative of the question of negligence. It was there said that "it is not within any of the general or special powers conferred upon municipal corporations in this State to create a right of action between third persons, nor to enlarge the common law or statutory liability of citizens among themselves."

A later case upon the subject and one which approves the rule announced in *Bain* v. *Fort Smith Light & Traction Co.*, *supra*, is that of *Pankey* v. *Little Rock Ry. & Elec. Co.*, 117 Ark. 337.

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

J. H. HAMLEN & SON CO. v. GRANT COUNTY.

Opinion delivered February 5, 1917.

1. ROADS—CUTTING TIMBER ON PRIVATE PROPERTY—LIABILITY OF COUNTY.—A county is not liable in damages for the act of its road overseer in cutting timber from private property, along a road, where no order of the county court directed him to cut the timber.
2. COUNTY COURTS—JURISDICTION—SUIT AGAINST COUNTY JUDGE AND ROAD OVERSEER.—An action cannot be maintained in the county court against the county judge and road overseer for damages for the wrongful cutting of timber from plaintiff's land by the latter, in the widening of a public road.

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

W. D. Brouse, for appellant.

1. This was a public road by prescription and had been for many years and under section 7258, Kirby's Digest, the overseer had authority to cut any timber necessary, but under sections 7259-60, it would have been necessary, in the absence of consent of owners, to have had the damages appraised, etc. Elliott, Roads & Streets (3 ed.), § 876; 2 A. & E. Am. Cas. 594, and note. Trespass was not the only remedy. 6 Pick. (Mass.) 57; 116 Mo. 375; 12 Wend. (N. Y.) 98; 71 Ind. 547; 15 L. R. A. 553, and note; 34 Mich. 86; 88

Am. Rep. 246; 15 A. & E. Enc. Law (2 ed.) 416, 418, 499. The cutting having been done by the overseer in his official capacity and under the general policy of the county judge the county was liable.

2. The court erred in its instructions. Kirby's Digest, § § 2998, 7223-4-5; Acts 1859, February 18, July, 1868, and March 23, 1871. This was a road of the first class. 1 Elliott Roads & Streets (3 ed.), § 193, p. 222; 2 A. & E. Am. Cases, 972, and notes.

3. The proof shows that the trees were cut to benefit the road and the county adopted and ratified the wrongful acts of its agents, and is not exempt from liability for torts. 7 A. & E. Enc. Law (2 ed.), 953, and cases cited; 70 N. W. 6.

D. D. Glover, for appellee.

The county was not liable. No order was ever given by the county court or judge to cut the trees. The judge was not personally liable, and if the overseer or judge was liable, suit could not be brought in the county court. This was a first-class county road by prescription and no timber was cut outside of the thirty foot limit. Under our statutes, trees may be cut as obstructions to a public highway, and they can not be opened and drained unless obstructions, like trees, are removed. The timber was not removed or used. There was no liability, at least, in the county court. 102 Ark. 553; 84 *Id.* 29; Act 422, Acts 1911; Kirby's Digest, § 7328.

SMITH, J. This suit is based upon an account filed by appellants against Grant county for the value of certain trees cut off of their lands by the overseer of Road District No. 2, along the Sheridan & Jenkins Ferry public road. The timber was cut in 1912, and in December of that year the account was filed with the county court for allowance, and by that court disallowed, whereupon an appeal was duly prosecuted to the circuit court, and before the final submission of the cause there the county judge and the road overseer were made parties defendant. These new defendants

filed demurrers, which were sustained, and the cause dismissed as to them, exceptions being duly saved. Thereupon the cause proceeded to trial against the county, the original defendant, and there was a finding and judgment in favor of the county, and this appeal has been duly prosecuted to reverse that judgment.

The proof tended to show that the road had been used by the public for many years, and had become a public road by prescription, and the timber had been cut in and along this road in widening it to the width of a road of the first class, which this road was said to be. The timber was cut under the direction of the overseer, but there appears to have been no order of the county court directing that action, although the county judge testified that, while he had given no orders with reference to this timber, his general policy was to order the road overseers to cut out and open up the roads to the width prescribed by law to the end that they might dry out. But there was never any order of the court directing the overseer to widen the road or cut the trees.

The demurrer was properly sustained to the complaint against the county judge and overseer. They could not have been sued in the county court, and the circuit court, upon appeal, could only render such judgment as the county court should have rendered. The appeal to the circuit court did not operate to enlarge the jurisdiction. *Price* v. *Madison County Bank*, 90 Ark. 195.

We think the court below properly found that there was no liability against the county. The action of the overseer, if wrongful, constituted a trespass for which the county was not liable in the absence of some order of its court directing that action. *Dickerson* v. *Okolona*, 98 Ark. 206; *Gregg* v. *Hatcher*, 94 Ark. 54; *Browne* v. *City of Bentonville*, 94 Ark. 80.

The judgment of the court below is therefore affirmed.

THE NATIONAL LIFE & ACCIDENT INS. CO. v. HENDERSON.

Opinion delivered February 12, 1917.

1. APPEAL AND ERROR—DISPUTED QUESTION OF FACT.—On material issues, a disputed question of fact must always go to the jury.
2. ACCIDENT INSURANCE—EXTENT OF DISABILITY—QUESTION FOR JURY.—Plaintiff had an accident policy in defendant company, providing for the payment of certain sums in the event of total disability for a certain time, and other sums in the event of partial disability. *Held*, where the evidence was disputed as to plaintiff's total disability, that a peremptory instruction, directing a verdict in his favor on the ground that he was totally disabled for a certain time, was erroneous.

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

Geo. F. Youmans, for appellant.

1. It was error to give a peremptory instruction. The question of total or partial disability should have been submitted to the jury under proper instructions. The judgment should be reversed. 91 Ark. 340; 91 Ark. 337; 97 *Id.* 438; 103 *Id.* 401; 111 *Id.* 607; 97 Ark. 442.

2. Plaintiff was insured as a manager of a cigar store and should not have been permitted to prove disability as to any other business.

J. Sam Wood, for appellee.

1. Under the evidence plaintiff was wholly disabled within the terms of the policy. The object in construing policies of this character is to arrive at the intention of the parties. The object is indemnity for loss of time by reason of accident to the assured, which disables him, substantially, to perform his duties. 94 Ark. 417, 430; 4 Det. L. N. 777; 80 Me. 244.

2. The proof shows disability to attend to his business. 164 (Ark.) S. W. 750; 41 Atl. 182; 79 Pac. 176. Plaintiff was entitled to a verdict. Disability was shown. 92 Ark. 284.

3. It was the duty of the court to instruct a verdict. 97 Ark. 442; 89 *Id.* 24; 97 *Id.* 425; 56 N. E. 808; 97 Ark. 417.

HUMPHREYS, J. Appellee, Allen B. Henderson, brought suit before a magistrate in the Fort Smith District of Sebastian county and obtained judgment against appellant, The National Life & Accident Insurance Co., for $60.00, 12% damages, $15.00 attorney's fee and costs, under an insurance contract, on account of an accidental injury to his finger received while lowering a window in a passenger coach. The case was appealed to the circuit court and by peremptory instruction, appellee was given a judgment for $68.10 including the statutory penalty, $25.00 attorney's fee and costs. The necessary steps were taken and the case is here on appeal.

Appellee claims for total loss of time for three weeks at the rate of $20.00 per week under section "B" of the policy of insurance which is as follows:

"The company will pay indemnity at the rate of the weekly indemnity for each whole day, not exceeding two years, immediately and continuously following the accident, that the assured is wholly disabled and prevented solely by such injury from performing any and every duty pertaining to his business or occupation and is not engaged in or performing the duties of any other business or occupation for wages or profit and is under the regular treatment of a licensed physician.

"Or, if the total continuous disability of the assured does not immediately follow the accident, but begins within thirty days thereafter and is as otherwise defined and limited in the foregoing paragraph, the company will pay for each whole day of such total continuous disability, not exceeding two years, indemnity at the rate of one-half the weekly indemnity.

"Or, if the total continuous disability of the assured, whether it immediately follows the accident or begins within thirty days thereafter, is not the result of such injury, but is the direct result of a bodily injury effected accidentally and independently of all other causes and through means other than external and violent and is as otherwise defined and limited in the first paragraph of this section, the company will pay

for each whole day of such total continuous disability, not exceeding two years, indemnity at the rate of one-half the weekly indemnity."

Appellant admits liability for partial loss of time for three weeks at the rate of $10.00 per week under section "C" of the policy which is as follows:

"The company will pay indemnity at the rate of one-half the weekly indemnity for each whole day, not exceeding six months, immediately and continuously following the accident or total disability, that the assured is partially disabled and prevented solely by such injury from performing important daily duties essential to his business or occupation and is under the regular treatment of a licensed physician."

In the application for insurance, appellant stated that he was "Manager of cigar store, office and counter duties only; and the kind of business conducted is cigars and soft drinks."

It will be observed that under section "B" of the contract, appellee is insured against any injury which prevented him from performing any and every duty pertaining to his business or occupation; and under section "C" of the contract is insured against any injury which prevented him from performing important daily duties essential to his business or occupation.

Appellant contends that the circuit court committed error in refusing to submit the questions of total or partial disability to the jury under proper instructions.

The court instructed a verdict for the plaintiff on the theory that the undisputed evidence showed a total disability of the appellant for three weeks on account of the accidental injury. A peremptory instruction could be justified on condition only that the undisputed evidence disclosed the fact that the injury prevented appellee from performing any and every duty pertaining to his business or occupation. The injury to his finger caused him much suffering and pain and there is evidence tending to show that he was totally incapacitated from transacting business during the period of three weeks immediately following the accident. There is,

however, some substantial evidence in the record tending to show a partial disability only, during this period of time.

Appellee was never confined to his bed. He was able to go to town every day and was actually in his place of business for a period of time almost every day after the injury occurred. He was able to and did drive his own automobile.

The record in this case presents a disputed question of fact as to whether appellee was totally or partially incapacitated from attending to his business during the period of three weeks immediately subsequent to receiving the injury.

On material issues, a disputed question of fact must always go to the jury.

The court committed error in giving the peremptory instruction complained of and excepted to under the record in this case. The judgment is reversed and the cause remanded for a new trial.

MASON v. STATE.

Opinion delivered February 5, 1917.

1. APPEAL AND ERROR—REPEATING INSTRUCTIONS.—It is not error for the trial court to refuse to grant a requested instruction which is covered by one given orally by the court.
2. LIQUOR—ILLEGAL SALE—EVIDENCE OF OTHER SALES.—In a prosecution for the illegal sale of liquor, it is not improper to admit testimony showing other sales by defendant within a year of the finding of the indictment, and of a search and seizure of liquors on the defendant's premises near the time of the alleged sale.
3. EVIDENCE—ILLEGAL SALE OF LIQUOR.—Defendant was indicted for the illegal sale of liquor to one F. F. testified to the facts of the sale to him; *held*, it was proper to permit one H., a deputy sheriff, to testify that F. went into the house, procured the whiskey and brought it back to him, H. having given F. the money with which to buy the liquor. The testimony of one witness may be corroborated in part or in whole by that of another.
4. TRIAL—IMPROPER REMARKS OF TRIAL JUDGE—PROSECUTION FOR ILLEGAL SALE OF LIQUOR.—In a prosecution for the illegal sale of liquor, the testimony showed that a deputy sheriff had procured one F. to make the purchase from the plaintiff, which was the subject of

the prosecution. In instructing the jury, it was error for the trial judge to discuss the evidence and express his opinion as to the weight that the jury should give thereto. The jury is the sole judge of the weight to be attached to the evidence without suggestion from the court either directly or indirectly.

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea*, Judge; reversed.

McNemer & McNemer, for appellant.

1. The court erred in refusing instructions 2 and 3 asked by defendant. 124 Ark. 20; 114 Ark. 391.

2. Evidence of other sales was clearly inadmissible. Black on Intox. Liquors, par. 505; Woolen & Thornton on Intox. Liquors, par 931, and cases cited; 23 Cyc. 269, (3) and notes 73, 74; 68 So. 673; 69 *Id.* 227; 7 Enc. Ev. 753; 120 Ark. 157.

3. The testimony of J. J. Hawkins was erroneously admitted. It was highly prejudicial. It was wrongful corroboration.

4. The remarks of the court were highly prejudicial. By indirection they express the opinion of the court on the weight of the evidence that defendant was guilty.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Instructions 2 and 3 were properly refused. Each contains a statement that is clearly not the law; all that portion of each correctly stating the law was given in No. 5. Act 30, Acts of 1915, § 2.

2. The evidence fully supports the verdict. The testimony of Jackson shows a sale.

3. It was not error to admit evidence of more than one sale. 23 Cyc. 269, 262; 48 Ark. 34; 43 *Id.* 68; 72 *Id.* 419.

4. J. J. Hawkins' testimony was admissible as corroborating Floyd's. 16 Cyc. 1119; 128 Ala. 662; 72 Vt. 295.

5. The remarks of the court were neither improper nor prejudicial.

HUMPHREYS, J. Mattie Mason, appellant, was indicted, tried and convicted in the first division of the Pulaski Circuit Court for unlawfully and feloniously selling and giving away one quart of alcoholic, vinous, malt, fermented and spirituous liquor, and being unlawfully and feloniously interested in the sale and giving away of said alcoholic, vinous, malt, fermented and spirituous liquors. After conviction, proper proceedings were had and the cause appealed to this court. Appellant requested five instructions, three of which were refused and two given by the court.

Instruction No. 2, asked and refused, requested the court to say to the jury that if appellant acted as agent of a purchaser she would not be guilty under the indictment.

Instruction No. 3, asked and refused by the court, requested the court to say to the jury that appellant would not be guilty under the indictment, if she simply told the purchaser where he could procure liquor, and that before she could be convicted she must either sell or be interested, directly or indirectly, in the sale of said liquor to the prosecuting witness.

(1) We have compared these instructions with the instructions of the court and find that he completely covered the points contended for in these instructions in the oral instructions given to the jury. Both instructions being fully covered by the general instructions of the court, no error was committed in refusing to give those asked by appellant.

(2) It is contended that the trial court committed prejudicial error because he permitted the introduction of evidence of other sales within a year of the finding of the indictment; and of a search and seizure of liquors on the premises of appellant near the time of the alleged sale. Our court has decided otherwise. *State* v. *Nunnelly*, 43 Ark. 68; *State* v. *Blahut*, 48 Ark. 34; *Bryant* v. *State*, 72 Ark. 419.

(3) One J. J. Hawkins, a deputy sheriff, gave Jackson Floyd, the prosecuting witness, money to buy the liquor from appellant. Hawkins was permitted to

testify that Floyd went into the house, procured the whiskey and brought it back to him. Floyd had testified to these facts and it is contended that the deputy sheriff's testimony had the effect of enlarging Floyd's testimony in the estimation of the jury. It is perfectly proper to corroborate the evidence of one witness in part or in whole by another witness. No authority is cited in support of the exclusion of this character of evidence and we have no such authority in mind. Of course, Mr. Hawkins did not see Floyd buy the liquor but he sent him in with the money for that purpose and saw him come out of the house in a short time with the liquor. It could in no sense be termed "wrongful and prejudicial corroboration," as contended by appellant. It was testimony tending to prove that Floyd purchased the liquor from appellant's home. The fact that liquor could be procured in appellant's home was a circumstance tending to prove that she was selling liquor, or aiding others in the sale thereof, and the proof was admissible.

(4) While instructing the jury, the court referred to the fact that the deputy sheriff had furnished Floyd money to buy the liquor in the following manner: "You find in the enforcement of all laws, where a party is suspected, sometimes the only way to detect it is to get some one to make that kind of purchase. Now, for instance, I can illustrate; suppose a man in the Government service is embezzling money from the mails. It is legitimate to send decoy letters to catch the man who is embezzling the money. Sometimes that is the only way you do it."

Some men are inclined to give less weight to this character of evidence than others. An illustration of this kind made by a distinguished jurist is apt to influence. It partakes of the nature of argument rather than declaration of law.

Again the court said: "Sometimes it happens that decrepit people are put up to violations of the law on account of the effect their presence might have with the jury, when the real party hides behind it. I do not say

that's true in this case, but it sometimes happens. What you want to do is to look into the whole transaction." The jury is the sole judge of the weight to be attached to the evidence without suggestion from the court, either directly or indirectly. This part of the court's instruction partakes of the nature of the expression of an opinion on the weight of the evidence.

Our attention is called to other parts of the court's instructions which appellant contends were expressions by the court of the weight to be attached to different parts of the evidence. It is unnecessary to repeat them all in this opinion. The expressions set out above in the court's charge, together with others of like tenor and effect, constitute prejudicial error in the opinion of this court; therefore, the judgment is reversed and the cause remanded for a new trial.

ELKINS v. MOORE.

Opinion delivered February 5, 1917.

1. APPEAL AND ERROR—DUTY TO EXCEPT TO RULINGS OF TRIAL COURT.—It is the duty of the party aggrieved to except to the rulings of the trial court in admitting or excluding evidence or in giving or refusing instructions.
2. BILLS AND NOTES—VALIDITY—SUFFICIENCY OF PROOF.—In an action on a promissory note, *held*, the evidence warranted a recovery thereon, the same being supported by a valid consideration.

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

E. M. Ross, for appellant.

1. The note was a conditional one with an express agreement and understanding which was in parol. The note was not the entire contract and parol evidence to show what the contract was should have been admitted. 55 Ark. 112; 88 S. W. 899; 99 Ark. 223; 71 *Id.* 408; 91 *Id.* 383; 90 *Id.* 426; 100 *Id.* 360.

2. The note was non-negotiable. The court erred in giving the peremptory instruction.

The appellee *pro se.*

1. No objections were made nor exceptions saved to the instructions or admission of evidence. 81 Ark. 200; 88 *Id.* 505; 85 *Id.* 495.

2. But if so oral testimony was not admissible. 55 Ark. 112; 100 *Id.* 360; 99 *Id.* 218; 40 *Id.* 120.

3. The evidence supports the verdict. The note was not a conditional one. 94 Ark. 160; 103 Wis. 87; 3 Wigmore on Ev. 2153. The peremptory instruction was proper.

HUMPHREYS, J. This suit originated in the court of a justice of the peace in Grant county. It was a suit on a plain note of hand in the sum of $250 brought by appellee against appellant. No defense was made in the J. P. Court. From the judgment by default in favor of appellee, an appeal was prosecuted to the Grant Circuit Court. An answer was filed, in substance, to the effect that the note was executed to indemnify appellee for any loss he might sustain on the sale of stock in the Arkansas Farm Loan & Trust Co. which appellant, through an agent, had sold appellee; that no loss was sustained and that the note had been fully paid. A reply was filed to the answer. The cause was tried on the pleadings and evidence and a verdict rendered in response to a peremptory instruction of the court for $207.50 with six per cent. interest, and judgment rendered accordingly. Appellee asked two instructions, Nos. 1 and 2, each being refused. A motion for a new trial was filed and, omitting caption, prayer and signatures, is as follows:

"Comes the defendant, M. W. Elkins, and moves the court to set aside the verdict of the jury and judgment rendered in this action and grant him a new trial herein, and for cause alleges:

1. That the court erred in giving plaintiff's instruction No. 1 to the jury, over the objections of the defendant.

2. That the court erred in refusing to give defendant's Instruction No. 1 to the jury.

3. That the court erred in refusing to give defendant's Instruction No. 2 to the jury.

4. That the court erred in allowing the witness J. B. Moore to state over the objections of the defendant that his stock in the Arkansas Abstract Company was not worth fifty cents on the dollar, and that since he had acquired the same offered to sell it at a discount and had offered the defendant twenty-five cents on the dollar to sell the same for him, and in refusing to admonish the jury on the request of the defendant not to consider such testimony.

5. That the verdict is contrary to law.

6. That the verdict is contrary to the evidence.

7. That the verdict is contrary to both the law and the evidence."

The motion for a new trial was overruled and this cause is here on appeal.

No exceptions were saved to the giving of the peremptory instruction nor to the refusal to give instructions Nos. 1 and 2 asked by appellant, nor to the admission of the evidence set out in the fourth ground of the motion for a new trial.

(1) The necessity for saving exceptions to the action of the court in admitting or excluding evidence, or in the giving or refusal of instructions, has become an established rule of practice and must be adhered to. *White River Ry. Co.* v. *B. & W. Tel. Co.*, 81 Ark. 200; *Cammack* v. *Southwestern Fire Ins. Co.*, 88 Ark. 505; *Plumlee* v. *St. Louis Southwestern Ry. Co.*, 85 Ark. 495; *Mitchell* v. *State*, 86 Ark. 486.

(2) The only remaining question is whether the verdict is contrary to the law or facts. There is ample evidence of a substantial nature to support the judgment. There was proof of a substantial nature to establish the fact that the note was given in full settlement of all matters in dispute between the parties. There was also sufficient proof to establish that the correct balance due on the note is reflected in the verdict and judgment.

The judgment is in all things affirmed.

MORRIS-MORTON DRUG CO. *v.* GLENWOOD DRUG CO.

Opinion delivered February 12, 1917.

1. BULK SALES LAW—CLAIMS OF CREDITORS.—Appellant purchased the entire stock of merchandise used in the business of one W., without complying with certain terms of the Bulk Sales Law; *held,* creditors of W. would not thereafter be estopped from proceeding against appellant, because they had been guilty of some delay in first attempting to make collections out of W.
2. BULK SALES LAW—LIABILITY OF PURCHASER.—The purchaser of a stock of goods who failed to comply with the terms of the bulk sales law, will be liable for costs incurred by creditors of his vendor in attempting, at his request, to collect their claims from the vendor; provided, the total aggregate of the debts is less than the value of the stock of goods purchased.

Appeal from Pike Chancery Court, *Jas. D. Shaver,* Chancellor; affirmed.

McMillan & McMillan, for appellants.

1. Defendant was not liable for double costs, much less for plaintiff's claims. If the Bulk Sales Law was not complied with, plaintiff had a right to go against the stock of goods sold for the amount due them, and if suit was necessary for the purpose to sue appellant and judgment for costs in such a suit would be proper, but certainly it was not liable for the costs in the suit against West to prove their claims.

2. There is no proof that West owed five of the plaintiffs anything.

3. Plaintiffs are estopped by their conduct, silence and negligence in not collecting their claims out of West when they had the opportunity. 35 Ark. 365, 377; 99 *Id.* 263; 2 Pom. Eq. Jur., § § 802-4, p. 261-2; 96 W. S. 720; 33 Ark. 468. The contract provided that West was to pay all claims and plaintiffs were duly notified to proceed against him. They waited too long, until West became insolvent and are estopped.

A. L. Barber and *S. W. Rogers,* for appellees.

1. Defendant is liable for all costs. The claims were all reduced to judgment against West on the advice of appellant's attorney. 123 Ark. 285.

2. The Bulk Sales Law was violated and appellant is liable for all claims. 123 Ark. 285; Acts 1913, Act No. 88, § 3; 181 Mich. 225, 629; 148 N. W. 256, 356.

3. Plaintiffs are not estopped. Pomeroy Eq. Jur., p. 262, § 803. But defendant is.

4. Appellant did not comply with Act 88, Acts 1913, and is liable. 179 S. W. 257; 123 Ark. 285.

McCULLOCH, C. J. Appellant purchased a stock of drugs, on January 30, 1914, from J. T. West, who was engaged in business at Glenwood, Arkansas, and appellees, who were creditors of West, sue to recover the amount of their respective claims, asserting liability under Act 88 of the General Assembly of 1913, known as the Bulk Sales Law. It is conceded that appellant failed to comply with the statute in question, in that it neglected to demand of the vendor a list of his creditors verified under oath, and the evidence adduced in the trial below establishes the respective claims of appellees. The principal contention on behalf of appellant against being held responsible for the debts of West is that each of the appellees was estopped by his conduct from asserting liability against appellant under the statute. It appears that West, immediately after the sale of the stock of goods to appellant, moved to Conway, Arkansas, and entered in the drug business at that place and was engaged in an apparently prosperous business for about a year. Soon after the sale of the stock of goods by West to appellant occurred, claims began to come in and appellant advised the creditors of the fact that West was in business at Conway and requested, or at least suggested, that the claims be sent to attorneys at Conway for collection from West. Appellant's attorney, with whom he advised, and who took charge of the matter, corresponded with the attorneys who now represent the appellees and who are practicing law at Conway, telling them that the claims against West would probably be sent to them and requesting them to proceed against West and endeavor to collect the claims by judgment and execution. The claims were in fact

sent to those attorneys and the suits were instituted against West, but before anything was realized West suffered loss of his stock of merchandise by fire and certain creditors to whom he had become indebted for purchases made in connection with the business at Conway, brought suit and intercepted the collection of his insurance by writs of garnishment and West thus became insolvent.

(1) Now, the contention on behalf of appellant is that the attorneys for appellees did not prosecute their suits against West with proper diligence and that they are estopped by their conduct in failing to do so. We do not think there is evidence to justify the conclusion that appellees, through their attorneys, assumed the attitude of collecting the money from West in a way that was calculated to mislead appellant. The error of appellant's contention is in assuming that there was no primary liability on the part of appellant to the extent of the value of the stock of goods purchased and that such liability was dependent upon the failure of the creditors to recover the amount of their debts from West. The statute provides that any purchaser who fails to conform to the provisions of the law shall "become a receiver and be held accountable as such to creditors for all goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment." A creditor is not required to proceed against the original debtor, but the statute makes the purchaser liable as receiver in the first instance. It was, therefore, only a matter of grace on the part of appellees that they first proceeded against West, and we think there was nothing in their conduct to justify the court in holding that they were estopped to thereafter assert liability against appellant.

(2) The next contention is that appellant is not responsible for the cost of obtaining judgment against West, but the case in that respect is in effect ruled against appellant by the case of *Stuart* v. *Elkhorn Bank & Trust Co.*, 123 Ark. 285. The costs in the several actions against West were incurred at appellant's

request and followed the liability of the principal and must be treated as the indebtedness of West within the statutory liability of the purchaser.

We are of the opinion that the court was correct in holding appellant liable for the amount of the debts due by West to appellees, the total aggregate of those debts being less than the value of the stock of good purchased.

Decree affirmed.

BLAKE *v.* TROUT.

Opinion delivered February 12, 1917.

MUNICIPAL CORPORATIONS—ELECTION OF MAYOR OF INCORPORATED TOWN —VACANCY.—The mayor of an incorporated town resigned; *held,* his successor was properly elected under the provisions of the statute.

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

F. G. Lindsey, for appellant.

1. Rozar was the acting, duly elected and commissioned mayor and his authority to act cannot be collaterally attacked. 4 Ark. 582; 25 *Id.* 336; 38 *Id.* 150; 49 *Id.* 439; 52 *Id.* 356. The mayor was not a party. 25 Ark. 336.

2. He was at least *de facto* mayor and habeas corpus was not the remedy, but appeal. 48 Ark. 439; 70 *Id.* 12; 48 *Id.* 283.

The appellees *pro se.*

1. Appellant's proper remedy was certiorari. 99 Ark. 412; 105 *Id.* 1.

2. The abstract is not sufficient. 101 Ark. 207; 80 *Id.* 259.

3. This is a collateral attack. 73 S. W. 811. It is the election and not the commission that gives title. 48 Ark. 82.

4. The commission is void. Kirby's Digest, §§ 5612, 5433; 92 Ark. 67. The Governor cannot appoint a mayor. 92 *Id.* 67.

5. If the council had power to elect, it must be at a regular meeting, or one specially called for the purpose. Kirby's Digest, § § 5433, 5474, 5582; 40 Ark. 105; 102 *Id.* 12; 28 Cyc. 334.

STATEMENT BY THE COURT.

This is an appeal from the decree of the Benton chancery court ordering the appellee discharged from the custody of T. T. Blake, sheriff and jailor of Benton county. On petition of the appellee the chancery court issued a writ of habeas corpus directed to the appellant as sheriff and jailor, to have the appellee brought before the court and requiring the appellant to show by what authority he held the appellee. The appellant responded that he was holding the appellee under the authority of a commitment issued by E. C. Rozar, mayor of the incorporated town of Centerton, Benton county, Arkansas, for a judgment and fine that had been entered against him in the sum of $75.00 for the crime of assaulting an officer.

The undisputed evidence shows that on February 3rd, 1916, the duly elected Mayor of the town resigned and his resignation was accepted by the town council; that E. C. Rozar at the time was recorder and acted as mayor; that on February 11, 1916, the council had a meeting at the office of the lumber yard, at which all the members of the council were present and all voted for E. C. Rozar for mayor. This vote and the resignation of Dr. Duncan were sent to the Governor and the Governor sent Rozar a commission. There was no election called for the election of a mayor by the voters of the town, and Rozar was not elected at such an election, but was elected by the unanimous vote of the council. He was duly sworn in as mayor by the circuit clerk, and was acting as mayor at the time of the arrest and trial of appellee. There was a warrant issued by E. C. Rozar, the mayor, commanding the marshal of the town to arrest the appellee and bring him before the mayor to answer the charge of resisting an officer,

founded on the affidavit of S. M. Sharp, marshal of the town of Centerton.

Appellee was brought before Rozar, tried by him and fined in the sum of $75.00 and costs. He refused to pay the fine, whereupon the commitment was issued, the validity of which the appellee challenged in his petition for habeas corpus.

The chancery court, upon the above evidence, rendered the decree above mentioned and the appellant, who was respondent to the petition in the court below, duly prosecutes this appeal.

WOOD, J. (after stating the facts). The appelle contends that when a vacancy occurs in the office of mayor of an incorporated town the vacancy must be filled by a special election, held on proper notice to the voters, and he cites section 5433 of Kirby's Digest to sustain his contention. But that section has reference to the regular elections and special elections of cities and incorporated towns for the election of officers and members of the council of cities and incorporated towns therein designated. The section does not apply to elections to fill vacancies in the office of mayor of incorporated towns caused by the death or resignation of the mayor. The election of a mayor in such a contingency is provided for by other sections of the statute. See Kirby's Digest, secs. 5581 and 5584, inclusive. Under these provisions, the corporate authority of incorporated towns is vested in the mayor, recorder and five aldermen, who hold their offices for one year and until their successors are elected and qualified. When the mayor is absent or unable to perform the functions of his office the recorder of the town is substituted for him with full power and jurisdiction. The council has the power "to fill vacancies which may happen in their board from the qualified electors of the corporation, who shall hold their appointments until the next annual election, and until their successors are elected and qualified."

The record shows that the minutes of the council showed that at a meeting of the Centerton council at the office of the lumber yard E. C. Rozar, on motion, was unanimously elected mayor. The minutes showed that all the members of the council were present, that their names were recorded, and that the vote was unanimous for E. C. Rozar. This was a substantial compliance with section 5474 of the Digest. The minutes showed that the meeting at which this was done was presided over by E. C. Rozar, the recorder, who, in the absence of the mayor, was the proper person to perform that function. Kirby's Digest, sec. 5582.

The case of *Hogins* v. *Bullock*, 92 Ark. 67, cited and relied on to sustain the contention of the appellee, has no application to the facts of this record. The election and appointment of the mayor by the council of Centerton was in all things regular. The record shows that appellee was tried before the mayor sitting as a justice of the peace for an offense committed within his jurisdiction, and that he was convicted and regularly committed.

The judgment of the chancery court discharging the appellee is therefore reversed and the cause will be remanded with directions to the chancery court to order the appellant to take the appellee into custody and to execute the commitment.

Humphreys, J., not participating.

DOYLE v. DAVIS.

Opinion delivered February 12, 1917.

TRUSTS—CONSTRUCTIVE TRUST—PROPERTY TAKEN IN WIFE'S NAME—PROOF OF INTENTION.—Title to land was taken in the wife's name, the husband undertaking to prove by parol, a constructive trust in his favor, he having paid the purchase price. *Held*, the presumption that he intended a gift to his wife could be rebutted by evidence showing his intention to create a trust in his own favor, but such evidence must show facts that existed or took place antecedently or contemporaneously with the conveyance, or so soon thereafter as to form a part of the transaction.

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

Brundidge & Neelly, for appellants.

1. The sole question is whether or not the act of George Elder in causing the deed to be made to wife was intended as a gift or not. Elder could not buy again, in his own name, so he paid the purchase price and had the deed made in his wife's name and thereby a resulting trust was created. 117 Ark. 575; 40 *Id.* 62; 64 *Id.* 155; 71 *Id.* 373; 89 *Id.* 578; 103 *Id.* 273; 105 *Id.* 318; 169 U. S. 407; 98 Ark. 542. The presumption of a gift was overcome. 98 Ark. 542; 21 Cyc. 1297; 2 Pom., Eq. Jur., 1041.

J. C. & Wm. J. Clark, for appellees.

1. The law of this case is well settled. The burden was on appellants. 117 Ark. 575 does not apply. The presumption is that it was a gift to his wife. No trust is proven. All the acts of Elder show that Mrs. Elder was the absolute owner.

SMITH, J. The St. Louis, Iron Mountain & Southern Railway Company, by its deed dated November 29, 1892, conveyed to Bettie E. Elder, the lands here in controversy; but it is alleged by appellants that the conveyance was thus made to her, instead of to her husband, G. D. Elder, because he had contracted to purchase this land from the railway company, but had defaulted in his payments, and a rule of that company forbid the making of a second contract with a person who had defaulted in a prior one, and that he, therefore, had the contract for the purchase of the land made in the name of his wife, but that he advanced and furnished the consideration for the deed, intending all the while that the purchase should inure to his benefit.

Bettie Elder died January 26, 1894, leaving surviving her certain minor children, who were the plaintiffs below in the action brought to recover the possession of the property, and are the appellees here.

On October 6, 1901, G. D. Elder entered into a contract with one G. W. Hunt for a lease of the land,

with an option to purchase. The names of his children were recited as parties to this contract, although they did not sign it. Hunt assigned this contract to one D. M. Doyle, who later died, and his wife and administrator tendered performance of its unfinished conditions. Appellees, as heirs of their mother, declined to accept the tender of the unpaid purchase money and brought this suit to recover possession of the land.

Appellants, in their brief, say:

"The sole question we desire to raise upon this appeal is whether or not the act of G. D. Elder, causing the deed from the Iron Mountain Railway Company to be made to his wife, was intended as a gift or not."

Appellants contend that by the payment of the purchase money for the purpose of evading the rules of the railroad company there is a resulting trust in favor of the husband. The court below found otherwise, and this appeal has been prosecuted to reverse that decision.

Elder testified that he caused the deed to be made in his wife's name because the railroad company refused to make a deed to him, and that he paid the purchase money, and that he exercised ownership of and control over the land, but that it belonged to his wife. He also testified that he executed the lease contract of October 29, 1901, to convey his right of courtesy as husband of Bettie Elder, and that in executing this contract, he was representing himself as well as his children, although he did not sign their names to the contract, and no attempt is made to show that he had this authority.

On December 30, 1912, Elder deeded his courtesy right to his children.

There was testimony in regard to certain statements made by Elder after the death of his wife which tended to show his claim of the title to the land. But we think these self-serving statements can not be considered. The testimony shows that Elder never, at any time undertook to have asserted a trust in his favor, but in the lease under which appellants seeks to assert

title, Elder recited the names of his children as grantors. Elder was asked this question:

"State whether or not this land, after it was conveyed to Bettie Elder by this deed, was it your property, or the property of the plaintiffs in this case by inheritance from their mother after her death?"

He answered:

"One-half of that by inheritance, and the other deeded to them by me."

It is argued that this answer shows that Elder did not at any time consider his wife the sole owner. But this is not necessarily the case. The witness had a courtesy interest, and as he was sixty years old at the time of testifying, his curtesy at the time of his conveyance represented a large per cent. of the value of the land, and this answer does not necessarily conflict with his statement that the title to the land was in his wife.

At any rate, we think it can not be said that the chancellor's finding that the proof is insufficient to support a finding that there was a resulting trust is against the preponderance of the evidence.

In the case of *Colegrove* v. *Colegrove*, 89 Ark. 182, this court discussed the quantum of proof necessary to establish the existence of such a trust, and while it was there said that resulting trusts may be established by parol, such evidence is received with great caution, and the courts uniformly require the proof to be full, clear and convincing. The court quoted from the case of *Tillar* v. *Henry*, 75 Ark. 446, the following statement of the law:

"Constructive trusts may be proved by parol, but parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory. Sometimes it is expressed that the 'evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact.' and sometimes it is expressed as requiring the evidence to be 'full, clear and convincing,' and sometimes expressed as requiring it to be 'clearly established.' "

A number of cases decided by this court are there cited.

It is true Elder exercised the ordinary acts of ownership over the land, but he had the right to the possession and occupancy as a tenant by the courtesy. And in the case of *Poole* v. *Oliver*, 89 Ark. 580, it was said, "where a husband purchases land and procures the deed to be made to his wife, the presumption is that he intended it as a gift, and a trust does not result in his favor. This presumption may be rebutted by evidence of facts showing the husband's intention to have been that the wife should have the land as trustee, and not for her own benefit; but such facts must have existed or taken place antecedently or contemporaneously with the conveyance, or so soon thereafter as to form a part of the transaction. *Milner* v. *Freeman*, 40 Ark. 62; *Robinson* v. *Robinson*, 45 Ark. 484; *Chambers* v. *Michael*, 71 Ark. 373; *Womack* v. *Womack*, 73 Ark. 281; *O'Hair* v. *O'Hair*, 76 Ark. 389," and the same case is authority for the statement that the subsequent use and occupation of the husband, of itself, is referable to his natural desire to manage and care for his wife's property.

We think, when this test is applied to the evidence in this case, that we should not overturn a title which has been outstanding for many years in the name of the heirs of Mrs. Elder, especially in view of the fact that she has long been dead and many years have expired since the original purchase of the land.

The decree of the court below is, therefore, affirmed.

BROOKFIELD *v.* BOYNTON LAND & LUMBER COMPANY.

Opinion delivered February 12, 1917.

1. JUDGMENTS—CONSTRUCTIVE SERVICE—PERSONAL JUDGMENT.—A personal judgment can not be taken upon constructive service.
2. JUDGMENTS—SERVICE OF SUMMONS—FOREIGN CORPORATION—PERSONAL JUDGMENT.—When a foreign corporation has complied with the law of the State by appointing an agent upon whom summons may be served, or when it has a regular place of business within the State with employees in charge, in order to obtain a personal judg-

ment against the company, service must be had either on its designated agent or some employee at its place of business, and under these facts, service upon the Secretary of State will not be sufficient.

3. JUDGMENTS—WANT OF SERVICE—MERITORIOUS DEFENSE.—A chancery court will not set aside a judgment at law for the want of service unless the judgment debtor has a meritorious defense to the cause of action.

Appeal from Cross Chancery Court; *E. D. Robertson*, Chancellor; affirmed.

S. W. Ogan, for appellants.

1. The justice of the peace judgment is valid. Appellee appeared by attorney—they asked a continuance and this was an appearance. 35 Ark. 276; 90 *Id.* 316. The appeal was prayed too late.

2. The requirements of the statute were complied with. Kirby's Digest, § § 4631-3. The sheriff's deed is evidence of the regularity of the sale. *Ib.*, § § 760-1.

3. The statute was complied with. Kirby's Digest, § § 4631-3; the title passed and the sale was actually made. Brookfield conveyed to the trustee of Drury. Drury was not made a party. The decree should be reversed.

Killough & Lines and *Jones, Hocker, Sullivan & Angert*, of St. Louis, Mo., for appellee.

1. The attachment was wrongfully sued out. Const., art. 12; Kirby's Dig., § § 828, etc.; Castle's Suppl., § 824-A, *et seq.*; Acts 1907 and 1911. It was never sustained by the justice.

2. No personal judgment can be rendered on service by publication. Kirby's Digest, § § 6046, 825, 4558. The judgment was void.

3. There never was an appearance and no proper service was had. The corporation had complied with the law and designated an agent upon whom service could be had. Its place of business was well known. 69 Ark. 396. The service on the Secretary of State was not sufficient, as the company had a designated agent and a regular place of business within the State.

HUMPHREYS, J. Appellant, J. C. Brookfield, brought suit in a magistrate's court in Cross County, against appellee and obtained two judgments for $50 each, one dated the 23d day of November, 1909, and the other the 14th day of May, 1910. When the suit was instituted, he obtained a writ of attachment which was levied upon eight hundred acres of wild land in Cross County belonging to appellee, and procured and published a warning order. A personal judgment was rendered by the justice of the peace on constructive service and no order was made sustaining the attachment. The judgment recites that the *defendant did not appear*. There is some evidence tending to show that prior to the day of trial a Mr. Harris of the firm of Harris & Marshal, who had represented appellee in other matters, called on the justice of the peace and requested a continuance, and suggested that the proper way to get service on the company was to issue summons against O. C. Ludwig, Secretary of State. The justice of the peace testified that Harris was present when the judgment was rendered. There is nothing in the record showing that Harris had any connection with appellee or any authority to represent it in this case.

No further proceedings were had until the 27th day of April, 1910, when appellant, J. C. Brookfield, procured a summons and had it served on O. C. Ludwig, Secretary of State, as the agent of appellee. This summons was served and on the return day thereof the appellee, Boynton Land & Lumber Co., *failing to appear*, a second judgment for $50 was entered.

Execution was issued on the judgments and returned by the sheriff, *nulla bona*. A transcript of these judgments was procured and filed in the office of the circuit clerk of Cross County. An execution was issued on one or the other of these judgments and levied on the northeast quarter of the northeast quarter of section 3, township 7 north, range 2 east, in Cross County, Arkansas. Sale was had under the execution and subsequently a sheriff's deed was made to the purchaser, J. C. Brookfield, appellant herein. Later, appellant

brought a suit and procured a confirmation of his title and then executed a deed of trust on said real estate to Chas. Drury, the other appellant in this cause. Appellee had no knowledge of the rendition of the judgments or of any of the proceedings thereunder.

Appellee then brought this suit against appellant, J. C. Brookfield, to cancel the two judgments obtained in the magistrate's court; to set aside the sale of its land under the execution; to cancel the sheriff's deed and the decree of confirmation. Chas. Drury, the other appellant herein, intervened and set up his deed of trust and asked that his interest in said land be preserved. The chancellor set aside the decree of confirmation; the sale and sheriff's deed, and permitted the judgments to stand. The cause is here on appeal and cross-appeal.

It may be well to say in order to prevent further complications that the two judgments rendered in the same suit were upon the same claim and have been treated by the chancellor and are now treated by this court as one judgment against appellee.

Appellee contends that the judgments in the magistrate's court are void because rendered without service on it. Appellants contend that if the service was insufficient, appellee entered its appearance through its attorney, Harris. There is not sufficient evidence in the record to warrant the finding that appellee entered its appearance by attorney or otherwise.

(1) It is unnecessary to cite authorities to the effect that a personal judgment can not be taken on constructive service. The judgment obtained on November 23, 1909, was upon constructive service and could not support an execution and sale of the real estate in question.

The judgment obtained on the 14th day of May, 1910, was upon a personal service on O. C. Ludwig, Secretary of State, as the authorized agent of appellee. Appellee had designated Walter Davis its agent upon whom service could be had in accordance with law. Its established place of business in Arkansas was at Boynton in Mississippi County.

(2) When a foreign corporation has complied with the law of the State by appointing an agent upon whom summons may be served, or when it has a regular place of business within the State with employees in charge, in order to obtain a personal judgment against the company, service must be had either on its designated agent or some employee at its place of business. *Lesser Cotton Co.* v. *Yates*, 69 Ark. 396.

Service on the Secretary of State did not warrant the entry of the second judgment, consequently the proceedings thereunder, of which appellee had no knowledge, were without authority in law and can not give validity to the execution sale, the sheriff's deed, decree of confirmation or the Drury deed of trust.

(3) Appellee does not claim it had a meritorious defense to the judgments obtained in the magistrate's court, and properly permitted the judgments to stand. A chancery court will not set aside a judgment at law for the want of service unless the judgment debtor has a meritorious defense to the cause of action. *Mo. & N. Ark. Ry. Co.* v. *Killebrew*, 96 Ark. 520.

The decree is affirmed.

LEE WILSON COMPANY *v.* OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered January 8, 1917.

1. ROADS—ORGANIZATION OF DISTRICT—JURISDICTION—ISSUES FIRST RAISED ON APPEAL.—The organization of a road district being essential to any valid local assessments and levies, the question of whether there was such an organization is jurisdictional, and may be raised for the first time on appeal.
2. ROADS—ORGANIZATION OF DISTRICT—FAILURE TO FILE SURVEY—JUDICIAL NOTICE.—Although they do not appear in the record, this court will not take judicial notice of the fact, that no preliminary surveys, etc., were filed as required by section 1 (B) of Act 338, Acts of 1915, before the order of the county court was entered creating the district.
3. ROADS—ORGANIZATION OF—REQUISITES.—It is essential to the creation of a road improvement district under Act 338, p. 1400, Acts of 1915, that the course prescribed by section 1 (B) of the act be followed, notwithstanding the provisions of section 7 permitting the

preliminary surveys, plans, etc., therein specified were followed. (*Lamberson* v. *Collins*, 123 Ark. 205.)

4. ROADS—ORGANIZATION OF DISTRICT—PRELIMINARY SURVEYS.—Where the record in the formation of a road district shows that section 7 of Act 338, Acts 1915, was complied with after the district was created, but is silent as to whether the provisions of section 1 (B) of the act were complied with, in the absence of a showing to the contrary, it will be presumed that the circuit court, in the exercise of its appellate jurisdiction duly ascertained that the county court had duly exercised its original jurisdiction in the creation of the district.

5. ROADS—ORGANIZATION OF DISTRICT—INVALIDITY OF ASSESSMENTS. The acts of the assessors in failing to properly assess the property in the district, held invalid.

6. APPEAL AND ERROR—RECORD OF OVERRULING MOTION FOR NEW TRIAL. —An exception to the overruling of a motion for a new trial can properly be made in the record entry of its overruling, and when that is done, it is not necessary to repeat the same formality in the bill of exceptions.

7. APPEAL AND ERROR—RULES OF COURT—ABSTRACT OF TRANSCRIPT—REHEARING.—Where the appellee filed no abstract of the transcript as required by the rules of this court, he will not be permitted to ask a rehearing on the ground that the court has in its opinion overlooked some fact in the record.

Appeal from Mississippi Circuit Court, Osceola District; *S. C. Costen*, Special Judge; reversed.

Hughes & Hughes, *Lamb & Rhodes*, and *Coleman, Lewis & Cunningham*, for appellants.

1. The whole proceeding is void under the decision in 123 Ark. 205. No plans or specifications were procured from the State Highway Commission.

2. The whole assessment of benefits is void because made arbitrarily and without any reference to the actual benefits to accrue. 59 Ark. 536; 64 Ark. 258.

3. The cost of improvement exceeds the statutory limit of indebtedness. 119 Ark. 198.

4. The cost exceeds the aggregate of the benefits. 73 Ark. 526.

5. Extravagant fees were allowed and paid engineers and attorneys. 122 Ark. 14.

A. F. Barham and *J. T. Coston*, for appellees.

The validity of the organization is tacitly recognized and plaintiff's have abandoned all the allegations

of the complaint. The demurrer was sustained. Having abandoned all of the allegations of the complaint, the plaintiffs have abandoned their case.

2. The chancery court had no jurisdiction. There was an adequate remedy at law. Acts 1915, pp. 1406, 1414-1418; 2 Page & Jones, Tax. by Assessment, § § 1411, 1413.

WOOD, J. This is an appeal from a judgment of the circuit court confirming the assessment of benefits to land owners in appellee district and ordering a levy of taxes to meet the cost of the improvement.

(1-2-3) 1. Appellants contend that the organization of the appellee district was void because there were no preliminary surveys, plans, specifications and estimates of the road proposed to be constructed and improved, as required by section 1 (B) of Act 338, Acts 1915, pp. 1400-4. This was held in *Lamberson* v. *Collins*, 123 Ark. 205, to be a prerequisite to the organization of the district. Appellants made no attack upon the organization of the appellee district in the court below. But as the organization of the district was essential to any valid local assessments and levies, the question as to whether there was such organization was one of jurisdiction which appellants have the right to raise at any time. Appellants conceded that upon a petition filed in the county court of Mississippi County, appellee district was organized and commissioners for the district were appointed by order of the court. This appeal is prosecuted from judgments making assessments and levies. This court can not take judicial knowledge of the fact, if it be a fact, as stated in appellant's brief, that no preliminary surveys, etc., were filed as required by section 1 (B) of Act 338, Acts 1915, before the order of the county court was entered creating appellee district. Appellants did not bring into the record of the circuit court, and have not brought into the record before this court the proceedings that were had before the county court prior to the creation of appellee district. There is no recital in the judgment

of the circuit court, and no facts set forth in the bill of exceptions, showing that such preliminary surveys, etc., were not made as the law requires. True there is in the bill of exceptions a report of the commissioners of appellee district showing that after their organization they called upon Pride and Fairley, civil engineers, appointed by the court and employed by them "to prepare preliminary plans, specifications and estimates of the roads proposed to be constructed, maintained and repaired. They state specifically and set out in detail what these preliminary plans show as to the general direction of the road to be constructed, their terminii, cuts, fills, grading to be done, bridges and culverts to be constructed, the length, width and depth of the roads and the character of the material to be used in their construction, and the estimated cost of the whole improvement. The commissioners state after thus setting out in detail what these preliminary plans, etc., show, what they estimate the cost to be. Section 7 of the Act 338, *supra*, provides that the Board of Commissioners immediately after their organization, shall call upon the State Highway Engineer unless the county judge should deem it advisable to employ some other competent engineer instead to prepare preliminary plans, specifications and estimates of the roads which it is proposed to construct, etc. It was under the authority of this section doubtless, that the commissioners acted and made the report which appellants have brought into this record by their bill of exceptions. But this court in *Lamberson* v. *Collins*, *supra*, held that the provisions of section 7 *supra* were not intended by the Legislature as an alternative method of procedure which could be adopted, instead of the method prescribed by section (B) of that act; that it was essential to the creation of the district that the method prescribed by section (B), be followed, notwithstanding the provisions of section 7, permitting the preliminary surveys, plans, etc., therein specified. Appellants have the burden, even on direct attack, to show that the judgments appealed from are erroneous. They do not

pretend that the record of the county court creating the district fails to show that the preliminary surveys, plans, etc., were filed as required by section 1 (B) of the Alexander Road Law. There are no recitals in the judgments under review showing that these preliminary surveys, etc., were not made, or that the judgment of the county court creating the district fails to recite these facts, essential to its jurisdiction. Nor do appellants bring into the record by bill of exceptions, facts showing that such preliminary survey, etc., were not made. The report of the commissioners to the county court made under section 7 of the act after the order of the court creating the district and appointing the commissioners, does not prove, or even tend to prove, that the provisions of section 1 (B) had not been complied with.

(4) Section 1 (B) as held in *Lamberson* v. *Collins*, *supra*, "was intended to provide a source of information as to the magnitude and cost of the improvement" for the benefit of property owners before they sign and present their petition for the creation of the district, and as section 7 was not intended as an alternative method, as held in *Lamberson* v. *Collins*, the fact that the commissioners, after the district was created, complied with the provisions of this section does not show that the provisions of section 1 (B) were not complied with. We conclude, therefore, in the absence of any showing in this record to the contrary, that the circuit court in the exercise of its appellate jurisdiction duly ascertained that the county court had rightly exercised its original jurisdiction in the creation of the district, without which the circuit court would have had no jurisdiction to render the judgment now under review.

(5) 2. Appellants contend that the assessors, in making the assessment of benefits to accrue to the land owners acted in an arbitrary and unreasonable manner, which resulted in an assessment far in excess of any benefit that they would derive from the improvement, and which was so "discriminatory and confiscatory as to amount to taking their property without compensation

and without due process." Appellants set out in their brief illustrations showing that in one instance the benefits were assessed at 300 per cent. of the assessed value of the land, and more than 200 per cent of its actual value. In another instance that the benefits were assessed at 300 per cent. of the assessed value, and at 150 per cent. of the actual value. In one instance the assessed value was $165 and the benefits were assessed at $577.50. In another the assessed value was $800, and the actual value about twice that sum, and the benefits were assessed at $3,259.23, making more than 400 per cent. of the assessed value and more than 200 per cent. of the actual value. The appellees, although represented by able counsel, who had permission to brief this case in connection with the case of *Chapman & Dewey Land Co. et al.* v. *Osceola & Little River Road Improvement District No. 1 et al.*, just decided, *infra*, p. 318, has not favored us with an abstract challenging these statements and showing that they are incorrect. But, on the contrary, appellants abstract the testimony of two of the assessors, and state that the third did not testify. One of the assessors testified that the basis for making the assessment of benefits was all made out when he went to work on it. It was made out by Waddell, Fairley, and Pride, and witness did not know how they arrived at the benefits. From the list of lands it appeared in most instances that they multiplied the assessed value of the land by three and took the product as the benefits to be assessed against the land; that was the general basis used. Witness did not go out and look at each particular tract. So far as he knew, none of the assessors did. Witness did not arrive at the result reached at all himself. He just accepted what the others said, and did not do any figuring on it at all himself. The other assessor testified as follows: "I have been familiar with the lands in this road district for a number of years, and at different times have been over most of the lands. From my knowledge of the lands, I made the assessment of benefits. After assessing the benefits, I estimated

the cost of the improvement at one-third the amount of the benefits. In practically every instance, the benefit is assessed at just three times the cost apportioned to the particular tract of land. I do not know who apportioned the cost. The engineers had the map and the printed assessment sheets when we went to make the assessment. I made some of the figures on the map. I do not know who made the others."

Witness was asked to tell all the facts that entered into his judgment in making up the assessment of benefits, on a certain tract, the character of the land, whether high or low, wild or cultivated, timbered or cut over, and its market value. He answered that he took into consideration the fact as shown by the map that the land would be within a mile and a half of the road, as the sole factor in estimating the benefits.

An assessment of benefits made in the manner indicated by the above testimony, was not such as the law contemplates. It was in fact no assessment at all made by the assessors. It was made up by others, and the assessors, acting individually and not as a board, simply approved what others had done. The statute constitutes the assessors a board. They take an oath to well and truly assess the benefits. A majority of the assessors is a quorum, but the business of the assessors is transacted as a board. The undisputed testimony shows that the so-called assessment of benefits was arbitrary, unreasonable, and unjust, and not made in the manner required by the statute. The court erred therefore, in sustaining these assessments and in ordering the levy of taxes based thereon. For this error the judgment is reversed and the cause is remanded with directions to quash and set aside the assessments and levies of which complaint is here made.

WOOD, J., (on rehearing). The appellee contends on rehearing that this court can not review the evidence in the case as it has done because the bill of exceptions does not disclose the filing or overruling of a motion for a new trial. Citing *Beidler* v. *Friedell*, 44

Ark. 411, where we said: "The bill of exceptions fails to show directly or indirectly that any motion for a new trial was made, or any exceptions saved as to overruling the same. It is wholly silent as to any motion for a new trial at all. No error, therefore, as to the proceedings on the trial, nor as to the proof, can be noticed, if any there were." And also citing, *Johnson* v. *State*, 43 Ark. 391.

(6) But these cases were expressly overruled in *Carpenter* v. *Dressler*, 76 Ark. 400-405. In that case we said: "The court is of the opinion that an exception to the overruling of a motion for a new trial can properly be made in the record entry of its overruling, and that it is not necessary, when that is done, to repeat the same formality in the bill of exceptions."

The record entry on the overruling of the motion for a new trial recites: "This matter coming on to be heard upon the motion for a new trial filed herein, and the court being sufficiently advised in the premises, doth overrule said motion, and to the overruling of said motion all of the defendants and each of them at the time excepted, and asked that their exceptions be noted of record, which was accordingly done."

(7) Appellee further contends that the assessments were not arbitrarily made, as held in the opinion, and it presents in its brief an abstract showing the manner of the assessment of benefits which it contends proves that the assessments were not unreasonable and arbitrary.

Under rule 3 of this court, in no case will a petition for rehearing "be granted when based on any fact thought to be overlooked by the court unless reference has been clearly made to the same in the abstract of the transcript," prescribed by rule 9. Appellee filed no abstract under rule 9 on the original hearing of the cause, and we can not, on rehearing, consider the abstract now presented in the brief of appellee's counsel on such motion.

The motion for a rehearing is therefore overruled.

CHAPMAN & DEWEY LAND COMPANY v. OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered January 8, 1917.

1. LOCAL ASSESSMENTS—EQUITABLE RELIEF.—The doctrine that equitable relief will not be given where the legal remedy is adequate, applies to complaints against local assessments.
2. ROADS—ORGANIZATION OF DISTRICT—ERRORS IN ASSESSMENTS—REMEDY.—Where a road improvement district is organized under Act 338, Acts of 1915, property owners are by the act given the right to have any errors in the assessments of their property corrected in the law courts, which affords them a complete remedy at law and precludes a resort to chancery.

Appeal from Mississippi Chancery Court; *Chas. D. Frierson*, Chancellor; affirmed.

Hughes & Hughes, *Lamb & Rhodes*, and *Coleman, Lewis & Cunningham*, for appellants.

A. F. Barham and *J. T. Coston*, for appellees.

STATEMENT BY THE COURT.

This is an appeal from a decree of the chancery court of Mississippi County, Osceola District, sustaining a demurrer and dismissing the complaint of appellants, which sought to enjoin the commissioners and other officers of the Osceola & Little River Road Improvement District No. 1 from taking any steps toward the construction of the improvement contemplated by the district. It is unnecessary to set out the complaint *in haec verba.*

The first paragraph sets up that the appellants are corporations having authority to sue, and that the appellees are a road improvement district, and its commissioners, officers and attorneys, and certain construction companies which claim to have entered into a contract with the commissioners of the district for the doing of certain work for the district.

The second paragraph sets up, among other things, that certain proceedings were had whereby the district was organized, and the purposes for which it was organized, setting up and describing in general terms the

character of the improvement for which the district was organized and its estimated cost, together with the assessment of benefits to be derived from the improvement as found by the county court.

The third paragraph sets up in detail the facts which it is alleged renders the making of the improvement as contemplated wholly impracticable.

The fourth paragraph alleged that the district is not only impracticable, but that the cost thereof would far exceed the benefits to the property owners of such district, and that in the assessment of benefits, and in attempting the improvements contemplated, the commissioners abused their authority, and for which the appellants alleged they had no adequate remedy at law.

The fifth paragraph alleged that the incorporated town of Osceola was included within the district, rendering the same null and void, and that the same was included for the purpose of enabling the commissioners to adopt a character of improvement that would cost more than three times 30 per cent. of the assessed value of the lands that would be benefited by the improvement; that this was done by conspiracy of the commissioners and promoters of the district in order that the town of Osceola might be benefited at the expense of the owners of real property situated in that part of the district lying outside of the town of Osceola; that, according to this conspiracy and illegal arrangement, the country property in the district was required to pay fifteen times as much in proportion as the city property.

The sixth paragraph sets up that the commissioners had made, or were about to make contracts with certain of the appellees, construction companies, for work and material contemplated by the improvement far in excess of thirty per cent. of the total assessed value of the real property in the district, and therefore, far in excess of the legal limit of the indebtedness which the district, under the law, could incur.

The seventh and eighth paragraphs set up the manner in which the assessors of the district made the assessment of benefits for the district as a whole, setting out

the manner in which they assessed the benefits on certain corporations owning lands in the district, and alleging that the manner of assessing benefits as therein set forth destroyed arbitrarily the just proportionment of the benefits throughout the district and arbitrarily placed upon certain lands in the district an unjust and undue proportion of the cost of the improvement.

The ninth paragraph set up that the arbitrary and excessive assessment of benefits was so entirely out of proportion to the benefits to be received from the improvement and so discriminatory and confiscatory that it amounted to the taking of private property for public use without compensation and depriving the owners of their property without due process of law.

The tenth paragraph alleged that the commissioners had entered into a contract with certain attorneys, agreeing to pay them three per cent. of a bond issue of $300,000, and a contract with certain engineers, agreeing to pay them 5 per cent. of such amount; that the commissioners borrowed the sum of $15,000 from certain of the appellees and paid over $8,000 of that sum to the attorneys and $7,000 to the engineers before any of the work contemplated by the improvement district had been done; that these sums were grossly in excess of the reasonable value of the services to be performed, and that the contracts thus made exceeded the authority of the commissioners; that the attorneys and engineers, who were made defendants, should be required to refund the excess already received by them, and the commissioners should be restrained from making further payments to the attorneys or engineers under the alleged contract.

The eleventh paragraph set up that the commissioners entered into a contract with certain parties, who are made defendants, by which they agreed to sell them the entire bond issue of the district, amounting to $300,000; that the money for the bonds was not to be received by the district upon the delivery of the bonds, but was to be paid from time to time in small sums as the work progressed; that though the bonds were nom-

inally sold at par, and bear interest at the rate of 6 per cent., the purchasers were to enjoy the use of the money, except the amount of the small payments to be made in the manner alleged; that the commissioner borrowed the sum of $15,000 from those who were to purchase the bonds, which amount they distributed to the attorneys and engineers as alleged in the preceding paragraph.

The twelfth paragraph set up that certain corporations, construction companies, naming them, claimed to have contracts with the commissioners for the performance of certain work for the district, and designating the amounts of these contracts.

The thirteenth paragraph alleged that the commissioners were threatening to carry out the contracts and to issue and deliver bonds to those who had agreed to purchase the same, and that they were threatening to dissipate the proceeds that might be derived from a sale of the bonds, and the other funds of the district in the construction of the improvement, from which the land owners would derive no benefit, and that such improvement would constitute a cloud on their title. They alleged that they would suffer irreparable injury by reason of the facts complained of, and that they had no adequate remedy at law.

The prayer was for an injunction against the commissioners and other defendants named in the complaint, to be enjoined from further, other and all proceedings looking to the completion of the improvement in the manner alleged, in the preceding paragraphs of the complaint, and for the cancellation of the contracts with the attorneys and engineers and further payment of any sums of money to them; and praying that a master be appointed to take an account showing the value of their services and that these parties be required to refund any excess over the amounts ascertained by the master to be due them. And there was a prayer also for general relief.

The appellees demurred to the complaint on the grounds: (1) that the action was premature; (2) that

the plaintiffs had a full, complete and adequate remedy at law; and (3), that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained on the ground that the chancery court had no jurisdiction.

WOOD, J., (after stating the facts). Counsel for appellants state in their abstract that this appeal "is from a decree sustaining a demurrer to the complaint, which assailed the validity of the organization of the Osceola & Little River Road Improvement District No. 1." And in their brief they contend that the organization of the district was invalid under the decision of this court in *Lamberson* v. *Collins*, 123 Ark. 205. In that case we held that a judgment establishing a certain road improvement district was void because the provisions of Act 338 of the Acts of 1915, requiring, among other things, the furnishing by the State Highway Engineer of preliminary surveys, plans, specifications and estimates of the road to be constructed and improved within the district proposed, were not complied with.

The complaint under review does not challenge the validity of the organization of the district, and no facts are alleged therein to show that the judgment of the county court establishing the district is void. The judgment sustaining the demurrer and dismissing the complaint was grounded upon the allegations of the complaint and we can only look to the complaint for a statement of facts that would render the organization of the district under consideration invalid.

Section 3 of Act 338 of the Acts of 1915 provides: "The order of the county court establishing a road improvement district shall have the force and effect of a judgment, and shall be deemed conclusive, final and binding upon all territory embraced in said district, and shall not be subject to collateral attack, but only to direct attack, on appeal."

In the absence of allegations of fact in the complaint showing that the record of the county court does

not state facts essential to its jurisdiction, or that the organization of the district was invalid, we must hold that under the above and other sections of the statute, the appellants had a complete and adequate remedy at law for all the grievances set forth in their complaint. Act 338, Acts 1915, pp. 1414-1418. Equitable relief is not given where there is an adequate remedy at law. This doctrine applies to local assessments. A right to sue an official who has collected an invalid tax is an adequate remedy at law. Act 338 gives property owners the right to have any errors in the assessments of their property corrected in law courts. This right affords them a complete remedy at law which precludes a resort to chancery. 2 Page & Jones, Taxation by Assessment, sections 1411-12-13-14, and cases cited in note.

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

LOUISIANA & ARKANSAS RAILWAY COMPANY v. WOODSON.

Opinion delivered January 29, 1917.

1. EVIDENCE—PERSONAL INJURIES—STATEMENT OF PLAINTIFF REDUCED TO WRITING BY ANOTHER.—Plaintiff sustained personal injuries when struck by a moving railway train; an employee of defendant company reduced to writing an oral statement by plaintiff, which, however, the latter did not sign; *held*, the writing was inadmissible.
2. EVIDENCE—SUBMISSION OF PLAINTIFF TO X-RAY EXAMINATION.—In a personal injury action where plaintiff sustained injuries and physicians who examined and attended him, testified that the injury was to his nerves, that an operation would be useless, and that the injured nerves could not be seen by the use of the x-ray; *held*, it was not error for the trial court to refuse to require plaintiff to submit to an x-ray examination.
3. EVIDENCE—PERSONAL INJURIES—PLACE OF INJURY—VIEW BY JURY.—In an action for damages for personal injuries, where plaintiff was struck by a moving train, it is no abuse of its discretion for the trial court to refuse to order the jury to visit the scene of the accident, when the same is in another county, and where a very exact plat of the ground in question had been introduced in evidence.
4. RAILROADS—INJURY TO PERSON AT PUBLIC CROSSING—BURDEN OF PROOF.—Where plaintiff was struck and injured by a train at a public

crossing, a *prima facie* case of negligence against the railroad company exists, and the burden is upon the company to prove its own due care on the contributory negligence of the plaintiff.

5. Appeal and error—objections to instructions.—Objections to instructions must be made, and exceptions saved, at the time the instructions are given.

6. Railroads—personal injury—application of lookout statute.—Where plaintiff was struck by a moving train at a public crossing, on a dark night, and the keeping of a lookout on the train might have prevented the injury, it is not error for the trial court, in instructing the jury, to frame an instruction in the terms of the lookout statute. (Public Acts 1911, No. 284, p. 275.)

7. Appeal and error—instruction—improper reference to plaintiff.—In a personal injury action, where plaintiff was present at the trial in person, the inadvertent reference to him as the *deceased* by the court in one of its instructions, will not be held prejudicial error.

8. Negligence—personal injury action—definition of negligence in instruction.—In an action growing out of personal injuries, where negligence is the foundation of the suit, in order that the jury may make a proper application of the law to the facts, a definition of negligence may be given to the jury, without being subject to the criticism that it is abstract.

9. Appeal and error—objection to verbiage in an instruction.—Appellant is required specifically to call the attention of the trial court to doubtful language, expressions or sentences contained in instructions.

10. Damages—mental and physical suffering.—The rule for measuring damages is elastic, and is dependent to a large extent upon the facts and circumstances of each case. Unless the amount of a verdict is so large that it necessarily shocks the sensibilities of a court, the verdict will not be set aside or modified.

Appeal from Lafayette Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

Henry Moore and *Henry Moore, Jr.*, for appellant.

1. The verdict is excessive. 50 Tex. 254; 5 Am. Negl. Cases, 755; 58 L. R. A. (N. S.) 1915, F. p. 30; 153 S. W. 32; 78 Ark. 22; 89 *Id.* 87; 89 *Id.* 122; *Ib.* 522; 101 *Id.* 376; 103 *Id.* 376; *Ib.* 374; 104 *Id.* 529; 105 *Id.* 269; *Ib.* 392; *Ib.* 533; 106 *Id.* 138, 177, 353; 109 *Id.* 231; 107 *Id.* 512; 119 *Id.* 246; 121 *Id.* 351; 94 *Id.* 270, and others.

2. The statement of plaintiff made before witnesses, should have gone to the jury. The jury should have been allowed to view the place of the injury.

3. Plaintiff's instructions given from Nos. 1 to 10 were error. No. 1 was abstract. 110 Ark. 519-21; 107 *Id.* 431. No. 2 was held error in 110 Ark. 161. The duty to look and listen is an absolute one. No. 4 is abstract and misleading, as is No. 5, under the "Lookout statute." 113 Ark. 353-358. The giving of abstract instructions is condemned in 14 Ark. 529; 23 *Id.* 289; 36 *Id.* 642; 37 *Id.* 593; 41 *Id.* 382; 42 *Id.* 57. No. 7 assumes facts and tells the jury what to do—thus weighing and passing upon the evidence.

4. A verdict should have been directed for defendant on account of the contributory negligence of the plaintiff. 54 Ark. 431; 61 *Id.* 549; 79 *Id.* 608; 65 *Id.* 235; 62 *Id.* 156; 97 *Id.* 438; 100 Ark. 533; 101 *Id.* 315; 102 *Id.* 160. Failure to look and listen will necessarily constitute negligence. *Supra.*

Searcy & Parks and *Steve Carrigan, Jr.*, for appellee.

1. Under our statute, where an injury occurs by a running train, the presumption is that the railroad company was negligent, and the law casts upon it the burden of showing ordinary care, and as a corollary, presumes that the injured was in the exercise of due care. 57 C. C. A. 387; 78 Mo. 195; 163 U. S. 366; 103 Ark. 377; 80 Ark. 19; 105 *Id.* 187; 115 *Id.* 534; 99 *Id.* 228. Proof of injury at road or street crossings is *prima facie* evidence of negligence on part of the railroad. 65 Ark. 237; 63 *Id.* 638; 110 *Id.* 519. There was no error in instruction No. 1 for appellee.

2. Instruction No. 2, for appellee, is the law. No objection was made to it at the time. 81 Ark. 195; *Ib.* 488; 101 *Id.* 387.

3. No. 4 is an exact copy of the lookout statute, from Acts 1911, 275. 116 Ark. 518. No specific objection was made to No. 5. The court's attention was not called to the use of the word "deceased's." 101 Ark. 387; 113 *Id.* 353; 123 Ark. 458. It correctly states the law.

4. No. 6 is a legal declaration of negligence and No. 7 was not specifically objected to. 39 Ark. 40. No. 8 is a *veteran* of the law, almost a maxim.

5. There is no error in the refusal of appellant's requests for instructions "A" and "1." The law is well settled as to contributory negligence at crossings. 74 Ark. 373; 93 *Id.* 246; 96 *Id.* 643; 99 *Id.* 167; 90 Am. Dec. 767. The law must be complied with. No lights were visible, no bell ringing and no whistle was sounded. Cases *supra*; 163 U. S. 366; 11 L. R. A. 364; 54 Ark. 54; 431-5; 110 Ark. 168; 62 *Id.* 164; *Ib.* 238; 123 Ark. 458. The law as to contributory negligence is correctly stated.

6. The refusal to require an x-ray examination was not error. 46 Ark. 284; 60 *Id.* 485. The unsigned statement was not admissible.

7. The verdict is not excessive under the evidence. It is not shocking to one's sense of justice. Larger ones have been approved by the courts. 156 S. W. 166; 107 Ark. 512; 113 Ark. 265; 105 *Id.* 533; 137 S. W. 1103; 99 Ark. 265; Ann. Cas. 1913, B-141, 69 S. W. 653.

Humphreys, J. The appellee, J. E. Woodson, sued appellant, Louisiana & Arkansas Railroad Company, in the Lafayette Circuit Court for damages on account of personal injury, and obtained a judgment for $12,500. The injury occurred on Fifth Avenue in Hope, Arkansas, at the intersection of said avenue with appellant's railroad, between 9 and 10 o'clock on the night of August 30, 1915. The railroad track at that point runs practically north and south and the avenue east and west. There was a concrete walk on the south side of Fifth avenue leading to the railroad and extending to within twelve feet of the railroad tracks. The sidewalk extends across the railroad tracks but is made of cinders instead of concrete. The main line of appellant's railroad track is laid in the street that intersects Fifth Avenue on the east side thereof, and there are three other tracks parallel thereto in the same street belonging to the Frisco Railroad Company.

The street itself in which these tracks are laid is forty-two feet wide. An incandescent light on a pole eighteen feet high is in Fifth Avenue on the west side of the tracks. On each side of the tracks there are railroad crossing signs and the injury to the plaintiff occurred while attempting to cross the railroad tracks at this public crossing. He was walking at the time of the injury in a westerly direction. On the east side of the tracks and on the south side of Fifth Avenue, there was a row of cottonwood trees from five to seven in number some fifteen feet apart in full foliage with limbs hanging over toward the main line of appellant. There was also a house on the south side of Fifth Avenue near the track. The light on the west side of the tracks gave sufficient light to see across the tracks. The injury occurred on a dark night. The train that is supposed to have caused the injury was a freight train composed of some thirty cars which had been switching in the yards south of the point where the injury occurred, some considerable distance. There was an oil tank car on the north end of this train. The train, or a portion thereof, backed across Fifth Avenue in order to connect with the caboose which was standing some four hundred feet north of the street crossing. After backing across the street and making this connection it pulled out south. No one saw the injury. The appellee testified that as he approached the railroad crossing, he looked and listened and could see no light either north or south and heard no signals; that no lights were visible on the rear end of said train when it hit him; that he heard some switching down about the yards, but heard nothing near the crossing; that about the time he stepped on the track he was struck, knocked down and injured by the train backing north. When found, he was lying some sixteen feet from the track south of the point of the concrete walk in the edge of the yard of the house just north of Fifth Avenue. His hat was several feet further south. According to the theory of appellant, he was struck, if at all, by the train as it pulled out going south.

There was evidence tending to show that appellee might have been injured by the train as it moved either north or south; that if it struck him when moving north, either that a lookout was or was not being kept; or that a light was or was not on the back end of the north end car.

Appellee made a statement the next day after the injury to the effect that he did not know what hit him; this statement was reduced to writing by an employee of appellant, but appellee did not sign same. Appellant asked permission to introduce the written statement. The court excluded the statement and the appellant saved its exceptions to the ruling of the court.

The injury received by appellee was to the motor nerve causing the loss of the use of his right leg. He is compelled to walk on crutches and drag his right leg. The sensory nerves are still normal, but the motor nerve is either split or under pressure. Before the injury, appellee was a strong man; after the injury, a weak, nervous man. At the time of the injury, he was fifty-seven years of age, his expectancy sixteen and one-half years, and his earning capacity eighty dollars per month.

Appellant requested that appellee submit to an x-ray examination to determine whether the injury was permanent. Two physicians testified as to the nature and extent of the injury. Dr. Kelley treated appellee in his private sanitarium for thirty days after the injury. A portion of his testimony is as follows:

"Q. From the objective symptoms as presented by this case, do you think, in your opinion as a physician that Mr. Woodson is permanently injured?

A. He looks like he is. You can't tell what a nerve will do. Sometimes you can operate on a nerve. If it is a pressure on the nerve, by operating and removing the pressure on the nerve the function is restored, but in divided nerves of this character, of such an injured nerve, an operation would be a failure.

Q. Then, Doctor, in your opinion, an operation would not be of benefit to Mr. Woodson?

A. Well, I will tell you my advice to him about it. Doctor Dale suggested he might be relieved by an operation. I told him if he was my brother, I would not advise it. I don't know what an operation will be. He is living now. If you go to cutting around the spinal cord, you don't know what the result will be. I would not advise it."

Doctor Ellis Weaver, in answer to questions, said:

"Q. In your opinion, Doctor, from the objective symptoms you have seen in this man, is his condittion permanent?

A. Yes, sir; I think so.

Q. Would the most delicate x-ray machine that is in use show whether or not a bone, if it was pressing on the nerve, had divided the nerve or cut it in two, or whether it was just pressing on it?

A. You wouldn't see the nerve at all.

Q. Then if in Mr. Woodson's case the blow from the train had injured the spinal column, or rather the back bone, or broken a piece of the bone, could you tell from the x-ray whether that nerve was cut in two by that bone, or whether it was just pressing on it?

A. You couldn't tell."

The circuit court declined to order an x-ray examination. Appellant moved the court to permit the jury to view the place where the injury occurred. The court declined to do so.

Appellant set up eighteen grounds in its motion for a new trial which was overruled, and this cause is here on appeal.

(1) Appellant insists that the trial court erred in refusing to admit the unsigned written statement of appellee written by its employee. The court offered to permit witnesses to use the statement as a memorandum to refresh their memories. We think this carried the doctrine far enough. These witnesses testified to the substance contained in the writing without referring to the paper. It certainly would be a novel precedent to allow interested parties to take an oral statement in writing from an injured party and use it against him in

the trial of a cause as his solemn written admission. No authorities are cited in support of this character of evidence in personal injury suits and we have none in mind.

(2) The refusal of the circuit judge to force the appellee to submit to an x-ray examination is urged as reversible error. The testimony of the physicians in this case does not disclose the fact that an x-ray examination would determine the extent of the injury. Doctor Kelley was of the opinion that no relief could come except from a very delicate and dangerous operation; one that he would not advise a brother to submit to. Doctor Ellis Weaver said the nerve could not be seen by the use of an x-ray. Both believed the injury permanent. Under this state of case, the circuit judge did not abuse his discretion in overruling the motion for an x-ray examination. This court will not interfere with matters within the discretion of the lower court unless there is a clear abuse of the power. *Railway Company* v. *Dobbins*, 60 Ark. 485.

(3) Our attention is called to the refusal of the circuit judge to permit the jury to visit the scene of the injury. A very exact plat of the ground was introduced in evidence. It is easily understood. There is nothing peculiar about the topography of the land or the construction of the tracks. The case was being tried in another county, and the absence of the jury might have interfered with the orderly and rapid dispatch of the court's business. To permit a view of the locality where the injury occurred is a matter clearly within the sound discretion of the presiding judge and nothing appears in this record disclosing abuse of the power.

Instruction No. 1, given by the court, is as follows:

"You are instructed that whenever a person is struck or injured by the operation of a railroad train at a public crossing, the presumption is that the striking or injuring of such person was caused by the negligence of the railroad company's servants and employees in charge of the train at the time, and the burden is upon the railroad company to show that its servants and

employees were not guilty of any negligence causing the striking and injury."

(4) Appellant insists that this instruction, in almost the identical language, was condemned by the court in the cases of *St. L., I. M. & S. Ry. Co.* v. *Gibson*, 107 Ark. 431, and *St. L., I. M. & S. Ry. Co.* v. *Zerr*, 110 Ark. 519-521. Those cases were dealing with trespassers. The instant case is dealing with a licensee; a person crossing a railroad track at a public street crossing. There is some conflict in the evidence as to whether the appellee was injured while the train was backing north or when it was pulling out south, but it is clear from this record that appellee was injured by appellant's train. This being true, our court is committed to the doctrine that it makes a *prima facie* case of negligence against the railroad. If the injury is established, the *prima facie* case made thereby, can be overcome in no other way than by proof of contributory negligence on the part of the injured party or that defendant was not guilty of negligence; and the burden is upon the railroad to establish such contributory negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Morgan*, 115 Ark. 534.

Instruction No. 1, as given, so informed the injury and is correct as applied to parties on a railroad track with right. It is urged that the use of the word, *whenever*, used in this instruction is tantamount to saying to the jury that appellee was struck by appellant's train. In the connection used, it carries the same meaning as the word "if."

(5) Our attention is called to the fact that instruction No. 2, given in the case at bar, is in the same language of an instruction given in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Roddy*, 110 Ark. 161; that in the case referred to, this court held such an instruction erroneous. It is useless to enter upon a discussion of the instruction as applied to the facts in this case for the reason that it is recited in the transcript that 'The court gave said instruction No. 2, asked by the plaintiff, without objection being made on the part of defendant." It has often been held by this court that

objections and exceptions to instructions must be made at the time the instruction is given. In the case of *Plumlee* v. *St. Louis S. W. Ry. Co.*, 85 Ark., at page 495, the Justice, in expressing the opinion of the court, said: "No objections were saved to instructions of the court, and therefore, by a familiar rule of practice, error, if any occurred, was waived." This well established rule of practice, precludes the appellant, in the instant case, from urging error by the lower court in giving instruction No. 2.

(6) Instruction No. 4, given by the court, is a copy of the lookout statute. Public Acts of 1911, p. 275. Appellant contends that there is no evidence in this case upon which to base this instruction. The undisputed evidence in this case is to the effect that this long freight train was backed across Fifth Avenue, a public thoroughfare, on a dark night. The evidence is conflicting as to whether a lookout was being kept on the north end car and as to whether signals were being given, such as blowing the whistle and ringing the bell. The evidence is also conflicting as to whether this train was moving slowly or rapidly. Had a lookout been kept by some one with a light on the end of the car, this accident might have been prevented. In relation to the facts in this case, this statute can bear only one construction. Unless the meaning of the statute as applied to the facts in the case is susceptible of more than one construction it is not error to read such a statute to the jury. *St. Louis, I. M. & S. Ry. Co.* v. *Elrod*, 116 Ark. 514.

(7) Instruction No. 5, referred to appellee as *deceased*. Appellants contend this was prejudicial error. The court's attention was not called specifically to this word at the time the instruction was given, and it is too late now to interpose such an objection. It is quite apparent that no prejudice resulted from this inadvertent reference as appellee was present at the trial. Further objection was made to the instruction because it is contended that there was no evidence to show that appellant could have used any care to pre-

vent the injury after discovery of appellee, had it kept a lookout. The instruction is as follows:

"(8) You are instructed that if defendant's servants discovered *deceased's* peril in time to have avoided injuring him by the exercise of ordinary care, or if by keeping a constant lookout they could have discovered his perilous position in time, by the use of ordinary care, to have avoided injuring him, then you will find for the plaintiff."

Appellee said that as he approached the track, he kept listening and looking. Had the brakeman been on the rear end of the car with his lantern, appellee could have detected the approaching train, and the brakeman, by signaling with his lantern, might have prevented the injury. This court in a recent case spoke in certain terms as to the purpose for which the lookout statute was enacted. "Indeed, it was enacted for the purpose of making railroad companies liable where, notwithstanding the contributory negligence of the person injured, the injury could have been averted had a lookout been kept, and it is immaterial whether the operators of the train know of the person's presence and danger or not, provided the circumstances are shown to be such that the injury could have been avoided by the exercise of ordinary care had a lookout been kept." The circumstances in the case at bar are sufficient to support a finding of the jury that had the brakeman been on the end of the car with his lantern, signaling as the train approached the street, the injury could have been averted. Ordinary care would exact of the brakeman that he signal with his lantern from the end of the car as the train approached the street crossing.

Instruction No. 6, given by the court, is a legal declaration of negligence. In a case where negligence is the foundation of the suit, in order that the jury may make the proper application of the law to the fact, a definition of negligence would be of material assistance to the jury, and therefore, in a case of this character, is not abstract and misleading.

(9) Instruction No. 7, given by the court, refers to contributory negligence, and appellant argues that it is an erroneous instruction because certain language in the instruction assumes that appellee was struck by appellant's train. The record recites that "Instruction 7 was given over the general objection of defendant." If the language in the instruction is susceptible of the construction now placed upon it by appellant, it should have called the special attention of the trial judge at that time to the objectionable language. Every record will contain errors of this character unless such a rule of practice is enforced. The trial court has no time to safeguard every expression and nicely weigh the effect and bearing of every sentence, one upon the other; so it is a sound rule to require litigants to specifically call the attention of trial courts to doubtful language, expressions or sentences contained in instructions.

It is argued that the court erred in instructing the jury as to the manner of weighing the testimony in the case. In the latter part of instruction No. 8, the court used the following language: "You should not arbitrarily disregard the testimony of any witness but weigh the same, and then you may believe one witness, though he is opposed by all the other witnesses, if you believe his testimony *comports more nearly with the truth than others who have testified.*" The language specially objected to is in italics. Appellant says this is a direction to the jury that it may believe the testimony of a witness when the testimony only approaches toward the truth. This language in the instruction was immediately followed by the following language: "So after all, you are the sole and illimitable judges of the testimony and the credib lity of the witnesses," and immediately before the sentence in which the objectionable language is used, the following language is used: "You may believe them in whole or in part, or you may disbelieve him in whole or 'n part." We think in view of the connection in which the language was used, the jury must necessarily have understood that

they might believe only such testimony as they found to be true. Certainly it was not an instruction to believe untruthful testimony or to believe testimony that approached the truth only. No authorities are cited with reference to this instruction by either appellant or appellee, and after having carefully considered the instruction as a whole, we are quite sure the jury understood that they were to consider only the testimony in the record they found to be true.

Appellant contends that a peremptory instruction should have been given in its favor on the whole evidence in the case, and that it was entitled to instructions "A" and "1," asking that a verdict be rendered in its favor because of contributory negligence on the part of the plaintiff. In support of this position, many authorities are cited to the effect that one is guilty of contributory negligence who attempts to cross railroad tracks at a regular crossing without stopping or listening for approaching trains and without continuing to look and listen until the danger is passed; and authorities to the effect that when the undisputed evidence establishes the fact that the injured party passed over the tracks without listening and looking, it would be error to submit the question to the jury; that it would then become a question of law for the court, and not a question of fact for the jury. Most of the cases cited by appellant were cases where the injured party had approached the crossings in the daytime, and where there were no obstructions, and where the injured party could have heard if he had listened, and could have seen the approaching train if he had looked.

The undisputed evidence in this case neither establishes the fact that appellee failed to look and listen; or that he could have seen or heard the approaching train if he had looked and listened, and continued to do so until the danger was passed.

The evidence is conflicting on these points. It was a dark night. There was a row of trees along the track in full foliage, the limbs hanging over toward the track. The back end of a long train was being pushed across the

street. The engine was a long distance from the rear end of the train. Appellee was facing an electric light which might more or less have blinded him. This light only enabled him to see straight across the tracks, and not up or down them. If it be true that this train was backing slowly across the street with the engine on the far end, it might have made little or no noise. If it be true that the brakeman was not on the back end of the back car signaling with his lantern, it may have been impossible for appellee to have seen the approaching train if he had been looking or to have heard said train if he had been listening. Appellee swears that he was listening and looking and that if there had been a light on the rear end of the train, he could have seen it. In case an instruction on contributory negligence has any place in this case under the evidence, it was a question for the jury to say whether appellee was looking or listening or whether if he had been looking and listening he could have seen or heard the approaching train under the existing situation. The following cases support these declarations of law if an instruction on contributory negligence has a place in the case: *St. L., I. M. & Southern Ry. Co.* v. *Johnson*, 74 Ark. 372; *Ft. Smith & Western Ry. Co.* v. *Messek*, 96 Ark. 243; *Ark. & La. Ry. Co.* v. *Graves*, 96 Ark. 638; *Ark. Central Ry. Co.* v. *Williams*, 99 Ark. 167.

If any error was committed in this case, it was by giving an instruction on contributory negligence, if the lookout statute was applicable, and the failure to comply with its terms was the cause of the injury.

(10) The only remaining question is whether the verdict is excessive. Appellant contends that it appears to have been rendered under the influence of passion or prejudice. Nothing appears in the record indicating that the verdict of the jury was induced by either passion or prejudice. Appellant cites a long list of authorities where verdicts for less than this amount were rendered in cases where the suffering and injury was perhaps greater than in this case. It is suggested that a fair average of the verdicts rendered in all such cases

might be a proper test as to whether a verdict in a given case is excessive.

We know of no exact legal measure in damages for mental and physical suffering. The rule for measuring damages is elastic and is dependent to a large extent upon the facts and circumstances in each case. Unless the amount of the verdict is so large that it necessarily shocks the sensibilities of a court, the verdict will not be set aside or modified.

The injury in this case not only affected a portion of appellee's body, but it has affected his nervous system. The injury is perhaps permanent, and appellee will likely spend the balance of his days on crutches, dragging his right leg. On account of his nervous condition, as well as the condition of his body, he must necessarily suffer to some extent during his entire life. His earning capacity is destroyed; his expectancy is sixteen and a half years, and at the time of the injury, he was earning from $75 to $80 a month.

The amount may be in excess of some verdicts in like cases, but under all the circumstances in this case we can not say that it is excessive. The judgment will be affirmed.

MARTIN v. NORMAN & SON.

Opinion delivered February 19, 1917.

1. JUDGMENT LIEN—JUDGMENT OF INFERIOR COURT—FILING IN CIRCUIT COURT.—In order that the judgment of an inferior court may become a lien on real estate, when filed in the office of the circuit clerk in the manner provided by statute, it is necessary for the judgment or record of the proceedings to show that the court rendering the judgment had jurisdiction of both the person and the subject matter.
2. LIENS—MORTGAGE AND JUDGMENT—PRIORITY.—One D. executed a deed of trust upon certain lands to appellant, which was filed for record on June 12, 1915; appellant sought to foreclose the same, but appellee intervened setting up a judgment on May 1, 1915, against D., before a magistrate and filed with the circuit clerk on May 29, 1915. This judgment did not recite service upon D. On May 29, 1916, appellee procured a *nunc pro tunc* judgment in the magistrate's court which recited service, and filed the same in the circuit clerk's office on May 31, 1916. *Held*, the lien of appellant's deed of trust was superior to appellee's judgment.

Appeal from Nevada Chancery Court; *Jas. D. Shaver*, Chancellor; reversed.

McRae & Tompkins, for appellant.

1. Justices' courts are inferior courts of the lowest grade, possessing only special limited jurisdiction and their judgments must show jurisdiction of the person and subject matter. No lien was created by the judgment on the land. 6 Ark. 182; 5 *Id.* 27; 87 *Id.* 313; 23 Cyc. 848; 7 Ark. 159; 103 *Id.* 446. All essential facts to show jurisdiction must appear in such judgments. No presumptions of validity will be indulged. 16 Ark. 105-9; 45 *Id.* 101; 23 Cyc. 1082, etc.; 103 Ark. 446; 59 *Id.* 483; 54 *Id.* 627; 52 *Id.* 312.

2. Such judgments are void on collateral attack. 59 Ark. 483, 487. No service was shown and the judgment created no lien when filed in the circuit clerk's office. Cases *supra*. The *nunc pro tunc* order and amended judgment was also void. 72 Ark. 185; 92 *Id.* 299. It could not affect the rights of innocent third parties. 75 Am. Dec. 107; 23 Cyc. 833; Cent. Dig. §§ 633, 1334; 17 Am. & Eng. Enc. 823.

3. The court properly reformed the deed of trust. 51 Ark. 433. The filing of the bill created a lien and appellees were charged with notice. 98 *Id.* 105.

J. O. A. Bush, for appellees.

1. If the original judgment was not a lien, the corrected judgment showed all jurisdictional facts and it became a lien as of the date of the original judgment. Appellant cannot attack it collaterally or otherwise; he had no lien until the court reformed the deed of trust. So appellee's lien is prior and superior. The propositions are elementary and no citations of authority are needed.

The judgment was duly rendered and certified. Only the fact of service upon defendant was left out of the original. But this was cured by the *nunc pro tunc* order and corrected judgment and was a first lien on the land, prior to appellants.

HUMPHREYS, J. Appellant, Clint Martin, brought suit in the Nevada Chancery Court against C. T. Dickerson to reform and foreclose a deed of trust executed by Dickerson to appellant on January 22, 1915. The deed of trust was filed for record June 12, 1915. The appellee Norman & Son, intervened, setting up a judgment obtained May 1, 1915, before a magistrate, and filed in the circuit clerk's office on May 29, 1915, and claiming under it a prior lien to the lien claimed by appellant under his deed of trust on said real estate. Appellant filed an answer to the intervention, denying the validity of the judgment for want of service on C. T. Dickerson. The judgment did not recite service.

Viola Pearl Rentz, an heir of a former owner, intervened, and the court decreed an undivided one-eighth interest to her in said real estate without objection of the parties to the suit.

Before this cause was tried, and on May 29, 1916, appellee procured a *nunc pro tunc* judgment in the magistrate's court which recited service, and on May 31, 1916, filed the amended judgment in the circuit clerk's office.

On the trial appellant introduced his note and deed of trust and appellee introduced the original and amended judgments. The transcript certifying each judgment to the circuit clerk's office contained a summons, but neither summons was incorporated in the judgment. The summons attached to the original judgment was issued on April 1, 1915, returnable on May 1, 1915. The return thereon showed it was served on the 19th day of May, 1915, or nineteen days after the judgment was rendered. The summons attached to the amended judgment was issued the 1st day of April, 1915, returnable on the 1st day of May, 1915, and the return shows that is was served on the 17th day of April, 1915. The original judgment recited that an execution had been issued and returned *nulla bona*. The amended judgment contained no such recital. The record contains a copy of the motion filed before the justice of the peace for a *nunc pro tunc* order. The record is silent as to whether

notice was served on any one before the motion for the *nunc pro tunc* order was filed or considered.

Upon the pleadings and evidence the court reformed the deed of trust so as to describe the real estate correctly; ordered the lands sold and the part of the proceeds belonging to C. T. Dickerson to be applied first to the payment of Norman & Son's judgment; then on appellant's deed of trust. From the decree adjudging appellee's judgment a first lien on said real estate this appeal is prosecuted.

Appellant contends that the deed of trust is a first and prior lien on said real estate for the reasons, that the original judgment omitted to recite service and that the judgment as corrected by the *nunc pro tunc* order was filed after the issues had been joined in this suit.

In order that the judgment of an inferior court may become a lien on real estate, when filed in the office of the circuit clerk in the manner provided by statute, it is necessary for the judgment or record of the proceedings to show that the court rendering the judgment had jurisdiction of both the person and subject matter. Otherwise, it will create no lien upon the land of the judgment debtor so as to interfere with rights of third parties acquired before the judgment is amended or corrected by a *nunc pro tunc* order. See 23 Cyc., p. 846, and authorities cited in support of the text.

In this case the deed of trust was filed on June 12, 1915, and the *nunc pro tunc* judgment on May 31, 1916. The appellee had become a party to this suit and knew of the equitable mortgage claimed by appellant on the land under the trust deed, before the *nunc pro tunc* order correcting the original judgment was procured.

The decree is therefore reversed with instructions to declare the lien of appellant prior to the lien of appellee on the interest of C. T. Dickerson in said real estate or the proceeds thereof.

SPECIAL SCHOOL DISTRICT OF TEXARKANA v. BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 13 OF TEXARKANA.

Opinion delivered February 5, 1917.

1. STATUTES—PROSPECTIVE CONSTRUCTION.—All statutes are to be construed as having a prospective operation only, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used.
2. LOCAL IMPROVEMENT—ASSESSMENT OF BENEFITS—ACT 125, ACTS 1913, § 7, NOT RETROACTIVE—PROPERTY OF PUBLIC SCHOOL DISTRICT. —Section 7, Act 125, page 527, Acts 1913, providing that the property of public school districts shall be subject to assessment for local improvements beneficial thereto, is not retroactive, and contains no authority for the levy of assessments on school property by a local improvement district formed prior to the enactment of the said statute.

Appeal from Miller Chancery Court; *James D. Shaver*, Chancellor; reversed.

Webber & Webber, for appellant.

1. The Act of 1913, § 7, Acts 1913, p. 531, is not only unconstitutional, but is retroactive in effect and therefore void. It was the intention of the Legislature to enact a law to operate only *in futuro*. Retroactive laws affecting rights vested, creating new obligations, duties, disabilities, etc., are invalid. 116 Ark. 472; 117 *Id.* 606; 173 S. W. 846; 174 *Id.* 248; 36 U. S. 185; 114 *Id.* 511; 2 Aiken (Vt.) 284; 16 Am. Dec. 715.

Frank S. Quinn, for appellee.

1. The language of the Act is sufficient to cover districts in existence at the time as well as those formed afterward. The benefit is present, not past. The Act is a valid exercise of the sovereign power of taxation. 89 Ark. 598; 77 *Id.* 383; 85 *Id.* 228.

2. The Act is not unconstitutional. 2 Cooley Taxation (3 Ed.) 1234; Hamilton on Special Assessments, § 313; McQuillin on Mun. Corp., §§ 2063-5; 1 Page & Jones Taxation by Special Assessments, pp. 955-6, §§ 580, 586; 2 *Id.* § 1073; 97 Ark. 334; 106 *Id.* 39; 56 Ark. 354, 358, 363; 65 *Id.* 343.

3. The Act is amendatory and as to the effect to be given it, see 89 Ark. 598; 55 *Id.* 389; 73 *Id.* 600; 91 *Id.* 243; 100 *Id.* 175; 109 *Id.* 556.

4. School property is not State property. 62 Ark. 481, 488.

Marshall & Coffman, Amici Curiae.

Contend that the Act is unconstitutional and void citing many authorities. As the court does not decide this, it is superfluous to cite the points and authorities.

McCULLOCH, C. J. The school buildings and grounds of Special School District of Texarkana are situated within the bounds of an improvement district organized in the year 1911 in that city for the purpose of paving streets, and an effort is now being made to enforce the assessments against the school property to pay for said improvement. The chancery court granted the prayer of the complaint filed by the Board of Improvement and rendered a decree adjudging a lien on the school property for the amount of the assessments and directing a sale of the property upon default in payment of the amount adjudged. The right to levy assessments against school property is asserted under section 7 of an Act of the General Assembly of 1913 (p. 527), entitled "An Act to Amend the Statutes in Reference to Improvement Districts in Cities and Towns." The section reads as follows:

"The property of public school districts shall be subject to assessment for local improvements beneficial thereto. The president or secretary of said district may sign a petition for making of such improvements when authorized by the Board of Directors."

In addition to the briefs of counsel interested in this particular controversy we are favored with briefs of attorneys acting as friends of the court, presenting very ably the question of the constitutionality of a statute imposing upon public school property the burden of assessments to pay local improvements. But in our view of the matter the decision of that question is not necessary to the disposition of the

present controversy, for we reach the conclusion that learned counsel for the school district is correct in his contention that the Act of 1913 has no retroactive effect so as to apply to the assessments levied by a district organized prior to the passage of the Act. We start out with the presumption that all legislation is intended to act only prospectively, and, as announced by this court, that "the established rule is that all statutes are to be construed as having only a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used." *State ex rel.* v. *K. C. & M. Ry. & Bridge Co.*, 117 Ark. 606. This court held in *Board of Improvement* v. *School District*, 56 Ark. 335, that the statutes of the State authorizing the levying of assessments for local improvements did not contemplate that school property should be assessed, and the principal reasons given for the holding was that the statutes provided no method for enforcing such assessments against that character of property. Since then there has been no legislation on the subject until the Act of 1913 was passed. That statute contains no specific provision with reference to the method of enforcing assessments against school property, but conceding, as contended by counsel for appellee, that the specific reference in the new statute to that character of property brings it within the operation of the general statutes on the subject of enforcing such assessments, there is still no provision in the statute, or in any other, containing authority for the levy of assessments on school property by a district formed prior to the enactment of the statute. The benefits are assessed and the amounts levied as soon as the district is organized, and there is no authority in the statute for the levying of any assessments thereafter except in the way of a revision or re-adjustment of assessments theretofore made.

Section 2 of the Act of 1913 provides that the Board of Improvement "may require the assessors thereafter to revise their assessments not oftener than

once per annum increasing or diminishing the assessments against particular pieces of property as justice may require," and there are other provisions of the general statutes in force before that time authorizing readjustment of assessments already made, but there is nowhere found any statute which contains authority to assess property anew which was not subject to assessment at the time of the organization of the district.

We are of the opinion, therefore, that the statute, when considered as a whole, not only fails to overcome the presumption against an intended retroactive effect, but it is shown affirmatively that no such effect was in fact intended by the law-makers.

It follows, therefore, that the assessments levied against the school property of appellant district were without authority and void. The decree of the chancellor is reversed and the cause is remanded with directions to dismiss the complaint of the Board of Improvement.

CURTIS v. HOPSON.

Opinion delivered February 5, 1917.

IMPROVEMENT DISTRICTS—DRAINAGE DISTRICTS—EXEMPTION OF CERTAIN CHURCH PROPERTY.—Act 368, page 890, Acts 1907, creating the Western Clay Drainage District, held valid, although it exempts from assessment lands upon which churches and parsonages are erected in cities and towns, but does not exempt similar property in rural districts; the legislative determination in the matter will be upheld, the same not being arbitrary or beyond the scope of reason. (*Martin* v. *Reynolds*, 125 Ark. 163, expressly overruled.)

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

S. A. D. Eaton, for appellant.

1. The Act is unconstitutional and void as by its terms it exempts certain property in the district from assessment, etc. It is void on its face. It exempts school lands, churches and parsonages in cities and towns, but not those outside or rural, etc. Acts 1907, 897; 188 S. W. 4; 125 Ark. 163; 46 Ark. 312; 48 *Id.* 371; *Ib.* 251; 25 *Id.* 289; 94 U. S. 260.

2. There is no estoppel if the Act is void. 55 Ark. 157; 58 *Id.* 270; 94 U. S. 260; 61 Ark. 74; 83 *Id.* 275; 31 *Id.* 701; 58 *Id.* 270; 32 *Id.* 576; 59 *Id.* 360; 130 U. S. 674 and others. There were no laches.

D. Hopson and *G. B. Oliver*, for appellees.

1. The Act is not unconstitutional nor void. It was upheld in 87 Ark. 8.

2. The matter is *res adjudicata.* 23 Cyc. 1246 (c) M. 36; 24 A. & E. Enc. Law, 758 (g), and notes 5, 6, 7; 114 Pac. 816; 106 S. W. 707; 237 U. S. 662; 213 Fed. 660.

3. 188 S. W. 4, *Martin* v. *Reynolds*, does not settle this case. It is not the law. The Legislature is the sole judge. 100 Ark. 366; 125 Ark. 163.

4. Appellants are estopped. 184 U. S. 450; 194 *Id.* 553; 8 Cyc. 791 (9); Cooley Const. Lim., pp. 250-2; Page & Jones on Special Assessments, § 1019; 118 N. W. 869; 124 *Id.* 492; 55 Ark. 148, 157; 2 Corpus Juris., § 114, 124; 124 N. Y. S. 14; 95 N. E. 911; 98 *Id.* 84; 100 *Id.* 35; 154 S. W. 55; 174 *Id.* 986; 163 *Id.* 806.

MCCULLOCH, C. J. In the recent case of *Martin* v. *Reynolds*, 125 Ark. 163, we decided that a special statute creating a certain drainage district was void on its face for the reason that the following designation of the property to be assessed for taxation to pay for the improvement was discriminatory:

"All lands whether surveyed or unsurveyed, except lands of the United States; all school lands, except tracts not to exceed three acres in area on which school buildings have been erected, or are in course of erection; all railroads owned, leased or operated in said district, including sidetracks; and all other real property belonging to railroad companies or bridge companies; all tramroads, whether made of wood, iron or steel; all town lots and blocks and other subdivisions of land in cities and towns, except those on which churches and parsonages are erected, and every other kind or char-

acter of real property whatsoever situated within said drainage district."

The particular part of the designation found to be discriminatory was that which exempted lots and blocks in towns, on which churches and parsonages were situated, and included rural lots or tracts on which such buildings were situated, to be assessed according to benefits, the same as other property. The opinion was expressed in the case that the discrimination against the lands in rural territory on which churches and parsonages were situated was purely arbitrary and could not be treated as a legislative determination that lands in towns on which such buildings were situated would receive no benefit from the proposed improvement because no reason could be discovered why the same rule should not apply to such rural lands.

Since that decision was rendered it is found that the statute in question is an exact copy of a special statute enacted by the General Assembly of 1907 (Act 368, p. 890), creating the Western Clay Drainage District in Clay county and appellants, who are the owners of real property in said last named district, instituted this suit in the chancery court of Clay county to annul the proceedings under said statute. They have adopted the same form of complaint, with identical allegations, as in the case of *Martin* v. *Reynolds*, *supra*, and ask the same relief. In the former case there was a demurrer to the complaint which we directed the chancery court to overrule, but in the present case appellees filed an answer, to which the chancery court refused to sustain a demurrer, and appellants declined to plead further and suffered a dismissal of their complaint. The answer of appellees, which by the demurrer is admitted to be true, alleged that there is only one parsonage building in the district, and that one is situated in the town of Corning; that no benefits have been assessed on rural church property because the assessors found that no benefits would accrue to such property from the improvement; and that no substantial benefit would accrue to such property in the towns. It is also alleged

in the answer that said improvement has been completed and paid for with the proceeds of bonds sold pursuant to authority contained in the statute and that there are no means afforded for raising funds with which to pay said bonds and interest thereon, except from assessments levied on benefits accruing to lands in the district.

Appellees also plead in bar of this suit a former adjudication as to the validity of the organization and the assessment of benefits thereunder, in a case decided by this court favorably to the validity of the proceedings. *Caton* v. *Western Clay Drainage Dist.*, 87 Ark. 9. We are asked to reconsider the question decided in the former case and to overrule that decision if now found to be erroneous.

After careful reconsideration of the matter, we are of the opinion that the exemption contained in the statute in favor of lands in the towns on which churches and parsonages are situated should be treated as a legislative determination that such property would receive no benefit from the improvement, and that that determination ought to be respected by the courts. It is a familiar principle often announced by this court, that a legislative determination in such matters must be respected unless the same is found to be arbitrary and entirely beyond the scope of reason. *St. L. Sw. Ry. Co.* v. *Grayson*, 72 Ark. 119; *St. L. Sw. Ry. Co.* v. *Board of Directors*, 81 Ark. 562; *Sudberry* v. *Graves*, 83 Ark. 344; *Moore* v. *Board of Directors*, 98 Ark. 113; *Salmon* v. *Board of Directors*, 100 Ark. 366; *Bd. Directors Crawford County Levee Dist.* v. *Crawford County Bank*, 108 Ark. 419; *Fellows* v. *McHaney, Recvr.*, 113 Ark. 363.

The error of our decision in *Martin* v. *Reynolds*, *supra*, was in saying that the omission of rural church property from the exemption was arbitrary and unreasonable; in other words, that the legislative determination, if treated as such, was a demonstrable mistake which rendered the statute discriminatory and void. There may have been a mistake in the determination of the lawmakers, but it was not such an obvious

one on its face as the court ought to say, as a matter of law, was an arbitrary and unreasonable exercise of power. There might reasonably be found a distinction between rural and urban church property with respect to deriving benefit from a drainage district. The situation of such properties is different and use of them may be made under different circumstances. Rural churches may be so situated that a complete drainage scheme in the locality will improve the approaches to them and result in direct benefit to the property as a place of worship, whereas, churches in a city or town, on account of other improvements in the way of grades, sidewalks and surface water outlets already constructed, may derive no benefit whatever from a general drainage scheme such as ordinarily enhances the value of other kinds of property, both urban and rural. We cannot, therefore, say in this instance that the legislative determination of no benefits to urban church property, as distinguished from that character of property in the rural districts, was arbitrary and unreasonable, and we ought not to have said so in the former case. Nor can it be said that the lawmakers would not have enacted the statute if they had found that rural church property would receive no benefit from the improvement, for it was entirely within their power to leave that matter in the hands of the assessors to determine that question.

We overrule a former decision with great reluctance, especially one involving a question of such importance, but in the present instance we find ourselves in the situation that we must overrule the decision found to be erroneous, or adhere to it, notwithstanding the error, and expose the court to the charge that a decision is now rendered which departs from a former adjudication with regard to the validity of this particular district, upon the faith of which obligations have been created and which would be impaired. Between the two disagreeable tasks, we choose to pursue the course which leads to less disastrous results and which now appears to be just and correct in point of law, and overrule the recent decision which we now conclude was erroneous.

It is not amiss to say, not as an apology for the present decision, but in further explanation of the former ones, that this feature in the case of *Caton* v. *Western Clay Drainage Dist.*, *supra*, was not called to our attention in the consideration of *Martin* v. *Reynolds*, and the similarity of the two statutes is not apparent from the opinion in the former case. Affirmed.

Mr. Justice WOOD concurs on the ground that appellants are estopped, he thinks, by their conduct in acquiescing in the construction of the improvement, to challenge the validity of the proceeding at this time.

STATE EX REL. NELSON *v.* MEEK.

Opinion delivered February 5, 1917.

1. TAXATION—BASIS OF ASSESSMENT—CONSTITUTIONAL LIMITATION.—The Constitution of 1874 does not compel an assessment of property according to full value, the matter of assessment being left to the law-making body.
2. TAXATION—VALUATION OF PROPERTY.—Only two specific mandates are contained in the Constitution as to the valuation of property for taxation, one is that a valuation basis must be adopted, and the other is that in fixing the value the same shall be equal and uniform throughout the State.
3. TAXATION—VALUATION—LEGISLATIVE POWER.—The Legislature may fix any basis of valuation that may be found fair or necessary, either at the full valuation in money or any less percentage of valuation, provided that the element of uniformity throughout the State is preserved.
4. TAXATION—VALUATION—UNIFORMITY.—Although a statute requires all property in the State to be assessed for taxation at its full value, it is a defense to an action to require the assessor in a certain county to assess the property in the county at its full value, that all the property in the other counties of the State was assessed at less than its full value.
5. TAXATION—UNIFORMITY—RIGHTS OF CITIZENS.—Citizens of one county may compel an assessment of their property for taxation in uniformity with the basis of assessment in the other counties of the State, but the assessor of one county can not be compelled to assess at a higher valuation than is done in the other counties of the State.
6. MANDAMUS—CONSTITUTIONAL INHIBITION.—Mandamus will not lie to compel a county assessor to value property for taxation in his county in a manner not in uniformity with the rest of the State, and in violation of an express direction from the State Tax Commission.

Appeal from Johnson Circuit Court; *A. B. Priddy*, Judge; affirmed.

Warner & Warner, for appellant.

1. The court erred in overruling the demurrer and in rendering judgment for defendants. Under our Constitution and laws it is the plain mandatory duty of the assessor and Board of Equalization to assess and equalize property subject to taxation at its true value in money. Const. Art. 16, § 5; *Ib.* §§ 9, 10; Kirby's Digest, §§ 6956, 6970; 43 Ark. 243, 257; Kirby's Digest, § 6974; 119 Ark. 362; 49 *Id.* 390; 116 *Id.* 206; Kirby's Digest, §§ 7004-8. The Tax Commission and the equalization board are bound by the mandate of the Constitution and laws and it was no defense that the Tax Commission advised the assessor or ruled that property should only be assessed at 50 cents on the dollar. Cases *supra;* Kirby and Castle's Digest, §§ 8456, 8457; Acts 1909, Act 257, § 12.

The Tax Commission is expressly required to use the "true and full value" basis. 233 Fed. 235-6; 221 *Id.* 289.

2. A plain legal duty is required; there is no discretion under the law and mandamus is the proper remedy. 221 Fed. 289; 177 Fed. 1; 43 Ark. 62; 45 *Id.* 121; 113 *Id.* 40; 7 Okla. 198; 191 Ill. 528; 44 *Id.* 240; 106 Fed. 459; 152 *Id.* 907; 166 *Id.* 677; 72 Ark. 27; 103 Fed. 418; 43 C. C. A. 261; 26 Cyc. 320.

The appellees *pro sese.*

1. The cardinal rule is that all property shall be assessed according to value and that the rate of taxation be equal and uniform. Const. Ark. 16, § 5. According to the first clause the assessment must be according to value in money. The second clause says "that value to be ascertained in such manner as the General Assembly shall direct." While value is the basis, it does not mean *full* value. The General Assembly was authorized to select and determine the means and method of placing a value or percentage on the property taxed for the purpose of assessment.

The rate must be uniform and equal and a system of assessors and boards of equalization have been provided. Act 257, Acts 1909. The State Tax Commission is an arm of the Legislature, and constitutional power is delegated over assessment and taxation, except as to the rate. 92 Ark. 492; Kirby's Digest, §§ 6970, 6074, 9956, 7004, 7008, etc. When the valuation is equalized with other property of the same kind property is taxed according to value. 92 Ark. 492. The Constitution does not require an assessment at 100 per cent., but merely that the assessment be on a basis of value, *equal and uniform.* 88 Fed. 350, 363.

2. The uniformity rule cannot be violated. 62 Ark. 461; 88 Fed. 350. The Jimmerson case, 222 Fed. 497, is not binding. 233 Fed. 235; 92 Ark. 492. Our own State courts are the final arbiter in the construction of our own Constitution and laws. Petitioner is seeking to compel the performance of a duty which does not exist, and from which this court will grant relief. 92 Ark. 492; 119 *Id.* 362, 372; 124 *Id.* 569.

McCULLOCH, C. J. This is an action instituted in the circuit court of Johnson county in the name of the State of Arkansas on the relation of J. L. Nelson, against W. A. Meek, the assessor of Johnson county, and against the county judge and the persons constituting the board of equalization of said county, to compel the defendants, by mandamus, to assess the property of the county for taxation at its true money valuation. It is alleged in the petition that the relator is the holder of certain warrants of the county, duly issued in pursuance to judgments of the county court; that he has obtained judgment on said warrants in the circuit court of Johnson county and the same has not been paid; that there is a large amount of floating scrip of Johnson county which is of depreciated market value by reason of the fact that the outstanding scrip largely exceeds the possible revenues of the county under the present system of taxation; that the assessor and board of equalization have heretofore valued the property of the county for taxation at only

fifty per cent. of its true valuation in money, and propose to continue to do so under future assessments unless otherwise directed; and it is further alleged that unless the assessing officers of the county be required to discharge their legal duty by assessing property at its true value in money there will be no means whereby the relator can secure payment of his said judgment against the county.

The defendants filed an answer admitting that the relator was the holder of the scrip as mentioned and described in the petition and had obtained judgment thereon, and also admitted that the assessments of valuation of property for taxation purposes had been on a basis of fifty per cent. of true valuation and would remain the same in the future, but alleged that said assessments of valuation were in accordance with assessments of other property in the other counties of the State and under the express direction of the State Tax Commission which had made an order fixing fifty per cent. as the proportionate valuation to be assessed on property for purposes of taxation.

The relator demurred to the answer, which was overruled, and he declined to proceed further and suffered a judgment dismissing the petition and he prosecutes an appeal to this court.

In the state of the pleadings just related the only question presented is whether or not the answer of the defendants set forth facts sufficient to justify them in assessing the property of Johnson county at less than its full value in money. It is contended on the part of the relator that the Constitution and laws of this State embody a specific command to the assessing officers to assess all property at its full valuation in money and that a refusal on the part of those officers to obey that command calls for compulsory action by the courts in behalf of those who are aggrieved by such dereliction. It therefore becomes important to inquire what the commands of our laws are with respect to the taxation of property, and the relation of those commands to each other.

The only provision of the Constitution bearing upon the question at issue reads as follows:

"All property subject to taxation shall be taxed according to value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Sec. 5, Art. 16.

(1) Counsel for relator erroneously assume that the above quoted provision of the Constitution amounts to a command to assess property at full valuation, but a consideration of the language used by the framers of the Constitution leads to the conclusion that no such meaning was intended. The only command embraced in this provision is that the property shall be taxed "according to value." That is to say, on a valuation basis and not on some other basis. The further provision is that the value is to be ascertained in such manner as the General Assembly shall direct, which shows that it was intended to be a matter for the Legislature to determine what the basis of the valuation should be and how it should be ascertained. There is no doubt of the power of the Legislature to provide for an assessment based on the full money valuation of property, not that the Legislature has so provided in the statutes which have been enacted since the adoption of the present Constitution, but it is equally clear that the Constitution itself does not compel an assessment according to full value, and it does, in fact, leave that matter entirely to the lawmakers. That is the effect of our previous decisions on that subject. In *Bank of Jonesboro* v. *Hampton*, 92 Ark. 492, we said:

"It is true the Constitution provides that all property subject to taxation shall be taxed according to its value, but this is done when the valuation is equalized with other property of the same kind in the county."

See also *Ft. Smith & Van Buren Bridge Co. Ex Parte*, 62 Ark. 461, and *Drew County Timber Co.* v.

Board of Equalization, 124 Ark. 569, in each of which cases this court ruled that an individual taxpayer was entitled to a reduction of his assessment so as to conform to the valuations placed upon other property in the county, notwithstanding the fact that his own property was then assessed at less than full value. The same interpretation has been placed upon similar provisions in the Constitutions of other States. *Taylor* v. *L. & N. Rd. Co.*, 88 Fed. 350.

(2-3) The only two specific mandates contained in the Constitution are, one that a valuation basis must be adopted, and the other that in fixing the value the same shall be "equal and uniform throughout the State." Aside from the constitutional limitations in those two respects the legislative will is left supreme, but any action of the Legislature looking to the ascertainment of the value of property for purposes of taxation, or in fixing the basis of taxation, must conform to that paramount command of the Constitution that the valuation must be equal and uniform throughout the State. In other words, the Legislature can fix any basis of valuation that may be found fair or necessary, either at the full valuation in money or any less percentage of valuation, provided that the element of uniformity throughout the State is preserved. And it is also readily seen that the action of executive officers in carrying out the methods of taxation prescribed under the statutes of the State must conform to the Constitutional commands of equality and uniformity. We have then this situation: The lawmakers have, in the statutes enacted, provided for a system of taxation in accordance with the constitutional plan of assessments "according to value" and have provided that the assessments shall be at the true and full valuation of property in money. Kirby's Digest, sec. 6974. And in order to conform to the constitutional command of uniformity and equality, there has also been provided an appropriate statutory method of equalization in the counties and throughout the State, of the valuations of property for purposes of taxation. The whole plan is outlined in

the various sections of the statute which provide for county boards of equalization, charged with the duty of examining the assessments of all classes of property in the county and raising or lowering same so as to make the assessments uniform; and in providing for the State Tax Commission which performs the functions of a State Equalizing Board with authority to raise or lower assessments by districts, counties or municipalities. Act 257, Act of 1909. The powers and duties of the Tax Commission as set forth in the Act, so far as they relate to the question now before us, are declared in the first subdivision of section 11 of the statute referred to above, which reads as follows:

"11. To have and exercise general and complete supervision over the assessment and collection of taxes and the enforcement of the tax laws of the State, and over the several county tax assessors, tax collectors, county boards of review and equalization and other officers charged with the assessment and collection of taxes in the several counties of the State, to the end that all assessments on property, privileges and franchises in the State shall be made in relative proportion to the just and true value thereof, in substantial compliance with the law."

Also in section 12, which provides that the commission shall meet annually as a State Equalization Board on the second Monday in November "for the equalization of the taxable values of such personal or real property as may come before it by reason of report or otherwise;" that they "shall examine and compare the returns of the assessments of property in the several counties of the State and proceed to equalize the same so that all the taxable property in the State shall be assessed at its true value and that all property shall bear its equal and just proportion of the taxes of the different counties of the State."

It is further provided in the Act that when the valuation of property in any county, district or municipality, is found to be out of proportion with the values assessed in other localities, the Tax Commission may

"raise or reduce the same to its true, full and proportionate value." It is thus seen that the most important function of the Tax Commission and its first duty, is to preserve uniformity in the assessments throughout the various counties of the State, and that it is to sit annually as a Board of Equalization. It will be observed from a consideration of the language of the statute just quoted defining the duties of the Tax Commission, that it provides that the commission shall review the acts of other assessing officers to the end that the assessments of property in the State "shall be made in relative proportion to the just and true valuation thereof." It does not require complete attainment of the full valuation, nor absolute uniformity, but it recognizes the fact that valuations are merely relative and that uniformity is only an approximation, and that perfection in neither direction can be attained. It is readily seen, however, that uniformity is the dominant idea in the performance of the duties of the Tax Commission.

(4) Now, the answer of the defendants in this case, as the assessing officers of Johnson county, is a confession that they have not literally obeyed the mandate of the statute which obviously provides for the assessment of all property at its true value, but it is also an assertion that in disobeying the statutory command they have done so in order to meet the constitutional requirement of uniformity and that this was done in accordance with the specific directions of the State Tax Commission under whom the county assessing officers are required to act. In other words, they justify the assessments at less than true value under the plea that it was necessary to do so in order to make the assessments uniform with those in other counties, and also to conform to the directions of the Tax Commission. To this the relator replies that there is a double command to assess the property at full value as well as on an equality with other property in the State, and that the derelictions of the assessing officers of other counties and of the Tax Commissioners in permitting it

to be done, afford no justification as against the rights of a suffering creditor.

(5) We are of the opinion that the answer of the defendants is a sufficient one and that they are compelled by the plain mandate of the Constitution to assess property in the county in conformity with valuations placed on such property in other counties, regardless of the fact that it calls for an assessment at less than full value. Any other view of the matter would work an injustice to the taxpayers of that particular county and that, too, in manifest violation of the constitutional guaranty. Such is the necessary effect of the decision of this court in *Ft. Smith & Van Buren Bridge Co., supra.* It is true that in that case the court was dealing solely with the question of uniformity within a single county, but the decision was that a taxpayer whose property had been assessed at less than full value had a remedy to compel a reduction where the assessment was disproportionate with the assessments of other property in the county. Now, the constitutional guaranty with respect to uniformity is not restricted to county lines, for the express declaration is that the valuations shall be "equal and uniform throughout the State." Therefore, when this court held in the case just cited, that a taxpayer had the right to compel the reduction of his assessments to conform to the assessments of other property in the county, it necessarily follows therefrom that the citizens of one county are entitled to the same remedy to compel such reduction as would afford equality and uniformity with assessments of property in other counties in the State. The creation of the State Tax Commission was for the purpose of providing just such relief, and if this court should undertake to direct the assessing officers of Johnson county to assess the property there at full value regardless of the assessments in other counties, it would create a conflict with the specific directions of the Tax Commission, a tribunal which the lawmakers have erected for the purpose of settling all such questions.

It is urged that this view of the question might lead to a disastrous result to the creditors of a county for the reason that various assessing officers of the State might conspire together to put the assessments down to a minimum so that the revenues would be wholly inadequate to discharge the obligations of the State and counties. This is a reflection on the taxation scheme of the State and on the officers who are selected to carry it out and it cannot be taken into consideration in the solution of the question now before us. No presumption can be indulged that all of the public officials of the State in the various counties who have to do with the assessment of property for taxation, will knowingly violate the duties imposed upon them by law. But even if it be conceded that hardships may occasionally result, it is one of those eventualities which one dealing with the State or its sub-agencies, have to take into account when they accept the obligations thereof. We do not by any means intend to say that the courts will afford no remedy for a refusal on the part of a public officer to discharge his duty, but we do say that there are some ills of a public nature for which the courts afford no relief and the argument just referred to relates to one of that kind. If that situation were to arise it could only be dealt with as a political or legislative matter and could not be corrected by the courts.

The relator relies principally upon the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of *United States* v. *Jimmerson*, 222 Fed. 489, where, in a case identical with the facts of the present case, that court held that a creditor of a county was entitled to the relief which we now deny to the relator in this case. It is regrettable that there should be a conflict in the decisions of courts exercising jurisdiction over the same territory, but we are very firmly convinced that the learned court rendering that decision reached the wrong conclusion. This court is the final arbiter in the construction of the Constitution and laws of this State and is not influenced in those matters by the decisions of other courts further than

the persuasiveness of the views expressed in those decisions. We do not know how far, if at all, the Federal Court was influenced in its decision by the fact that there was an express stipulation in the contract which was signed between the county and the complaining creditor that the property of the county should thereafter be assessed at its full and true value, but that was an element in the case which does not appear in the present one. We do not, however, think that fact alters the law on the subject as herein declared. The officers of the county who entered into the contract could create no greater obligation with regard to future assessments than the law itself imposed, and we are of the opinion that whether there was any such contract or not, the creditors have no right to compel the assessing officers to value the property in the county at such a percentage as would make the assessments in excess of the rate of valuation placed on similar property in other counties.

(6) Mandamus is the appropriate remedy to compel a public officer to perform all duties prescribed by law, but the remedy cannot be used as is asked in this case, for the purpose of compelling an officer to do that which he is required by the constitutional mandate and by the express direction of a superior tribunal, not to do.

We are of the opinion that the circuit court was correct in refusing the relief sought, and the judgment is, therefore, affirmed.

BYERS v. HAYNIE.

Opinion delivered February 5, 1917.

1. APPEAL FROM COUNTY COURT—LOSS OF JURISDICTION BY COUNTY COURT.—In a contest over an election for the removal of a county seat, a judgment of the county court is final unless suspended by an order of the circuit court, but after the lapse of the term and the taking of an appeal to the circuit court, the county court has no further control over the matter.
2. ELECTION CONTESTS—COUNTY SEAT—APPEAL FROM COUNTY COURT—JURISDICTION OF CIRCUIT COURT.—In a contest of an election for the

removal of a county seat, where an appeal has been taken to the circuit court from a judgment of the county court, ordering a removal of the county seat, it is within the power of the circuit court, or the circuit judge in vacation, to make an order suspending the judgment of removal pending the trial of the case in the circuit court on appeal.

3. ELECTION CONTESTS—APPEAL TO SUPREME COURT.—Where, in an election contest, the county court, entered an order of removal of the county seat, and an appeal was taken to the circuit court, where the judgment of the county court was upheld, and on appeal to the Supreme Court, the judgment of the circuit court was reversed and the cause remanded for further proceedings. *Held*, the effect of the judgment of the Supreme Court was merely to wipe out the judgment of the circuit court and to remand the cause to that court with the same status as if there had never been any trial there.

4. APPEAL AND ERROR—REVIEW OF DISCRETION OF CIRCUIT COURT.—The action of a trial court, especially in a matter in which it is clothed with discretion, will not be reivewed, unless the matter was brought to the attention of that court, and it refused to act or to grant appropriate relief sought.

5. COUNTY SEAT ELECTION—CONTEST—REVERSAL OF JUDGMENT OF CIRCUIT COURT—CONTROL OF DISCRETION OF CIRCUIT COURT.—In an election contest, the county judge ordered the removal of the county seat, which order was affirmed on appeal to the circuit court; upon appeal to the Supreme Court the judgment of the circuit court was reversed and the cause remanded for further proceedings. Thereafter the county judge issued an order, removing the county offices back to the old county seat. *Held*, a petition to the Supreme Court, asking that the circuit judge be restrained from interfering with the county officials in holding their offices at the old county seat, would be denied.

Mandamus to Hempstead Circuit Court; *George R. Haynie*, Judge; petition dismissed.

D. B. Sain, *Dan W. Jones*, *T. D. Crawford* and *Etter & Monroe*, for petitioners.

1. This court has jurisdiction to grant the writ. Const. Art. 7, § 4; 6 Ark. 9; 30 Cal. 325. Mandamus is the proper remedy. It is the only one available.

2. The writ should be granted. It is discretionary with the court. It was error to remove the county seat while the contest was pending. If a *prima facie* case was made it was overcome by the evidence and finding of this court. 124 Ark. 244.

3. The county court had jurisdiction to remove the county seat back to Washington. 33 Ark. 101.

See also 73 Ark. 607. The matter is not *res adjudicata.* The contest was appealed and the judgment reversed.

Jas. H. McCollum, O. A. Graves and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for respondent.

1. The judgment of the county court changed the county seat and place of keeping the records and offices from Washington to Hope. 43 Ark. 62, 67; 55 *Id.* 323; 73 *Id.* 66, 72; 96 *Id.* 427. The appeal did not annul or suspend the judgment. (Cases cited).

2. The judgment of this court did not change the county seat; it still remained at Hope. This court only remanded the cause for a new trial. 75 Ark. 452; 79 *Id.* 475, 479.

Unless the mandate otherwise directs, "the reversal of a cause restores the parties to the position they occupied when the original judgment was rendered." Elliott's App. Pro., § 580; 3 Cyc. 460; 29 Ark. 85, 98. The county seat remains at Hope. 79 Ark. 479.

3. The judgment of the county court January 8, 1917, was wholly without jurisdiction and void. 55 Ark. 323; 27 *Id.* 215; 60 *Id.* 155; 102 *Id.* 277. The former judgment of the county court settled the matter and the appeal invested the circuit court alone with jurisdiction. 2 Enc. Pl. & Pr., p. 327; 2 Cyc. 967; 29 Ark. 85; 100 *Id.* 496; 104 *Id.* 145; 117 *Id.* 534; 27 *Id.* 202, 217; 60 *Id.* 159; 96 *Id.* 427; 93 *Id.* 215; 76 *Id.* 485; 95 *Id.* 308; 73 *Id.* 66, 72-5. See also 55 Ark. 200; 104 Ark. 145. The circuit judge had the power to make the order. 73 Ark. 606; 106 *Id.* 433.

PER CURIAM. This is a proceeding instituted here for the purpose of controlling the action of the circuit judge in a county seat removal contest pending in the circuit court of Hempstead county on appeal from the county court. The form of the remedy is designated in the petition as an application for a mandamus, but the prayer is that the circuit court be compelled, by an order of this court, to enforce the former judgment of this court entered in remanding the cause, and that the circuit judge be restrained from interfering with

the county officials in holding their offices at the old county seat. The main facts of the controversy are related in the petition. There was an election held in August, 1914, on the question of removal of the county seat of Hempstead county from Washington to Hope, and on the face of the returns of that election there was a majority in favor of removal and in favor of the city of Hope. J. H. Webb and other partisans of Washington in the controversy, instituted a contest in the county court, as provided by statute, and J. H. Bowden and other partisans of the city of Hope appeared as contestees. The contest was tried out in the county court and the result was a judgment in favor of Hope for the removal of the county seat to that place, in accordance with the majority, as shown on the face of the returns of the election. The contestants appealed to the circuit court and after the transcript was lodged there an application was made to the circuit judge for a suspension of the order of removal pending the trial of the cause in the circuit court. The application for suspension was denied by the circuit court and no appeal was prosecuted from that order, but subsequently the main cause was tried in the circuit court and judgment was rendered in favor of the contestees, from which an appeal was prosecuted to this court by the contestants. On the hearing in this court the judgment of the circuit court was reversed and the cause was remanded for a new trial. *Webb* v. *Bowden*, 124 Ark. 244. The judgment of this court was rendered in January, 1916, and the cause is still pending in the circuit court awaiting trial.

On January 8, 1917, an application was presented to the county court of Hempstead county, then sitting at Hope, asking that the county seat be removed back to Washington, on the alleged ground that the effect of the judgment of the Supreme Court was to order such an immediate removal. This petition was presented by the contestants in the cause and the county court on that day made an order in accordance with the prayer of the petition, directing a removal back to Washington.

The contestees then applied to the circuit judge, in vacation, for an order restraining the county judge, and other officers, from removing their offices and the records thereof back to Washington, and that is the order of the circuit judge which it is sought in the present proceedings to control.

The only ground alleged in the brief for requiring the circuit judge to make an order of removal back to Washington is that the necessary effect of the judgment of this court reversing the cause, was to make such an order, but the further contention was made in the oral argument, as we understood it, that the county court had a continuing control over its own orders with respect to the removal, and possessed the power, even when the cause was pending in the circuit court, to direct the removal back to Washington.

We are of the opinion that each of the contentions of counsel is without foundation. The original judgment of the county court in favor of the contestees operated as a removal of the county seat, and unless properly suspended by an order of the circuit court it took effect at once. After the lapse of the term and an appeal taken to the circuit court, the county court had no further control over the matter and could not, therefore, make any order with respect thereto. *Patterson* v. *Temple*, 27 Ark. 202. It was, however, within the power of the circuit court, or the circuit judge, in vacation, to make an order suspending the judgment of removal pending the trial of the case in the circuit court on appeal. *Reese* v. *Cannon*, 73 Ark. 604. No such order has been made and the original judgment of the county court yet remains in full force. It is a mistake to assume that the judgment of the Supreme Court reversing the judgment of the circuit court, had any effect on the judgment of the county court. This court, if it had found the testimony undisputed and fully developed, could have rendered final judgment here and remanded the cause to the circuit court for execution, and in that form there might have been a judgment here which operated to set aside the judgment of the county

court. But no such judgment was rendered here and the cause was remanded for further proceedings. The effect of the judgment of the Supreme Court was merely to wipe out the judgment of the circuit court and remand the cause to that court with the same status as if there had never been any trial there. *Hartford Fire Insurance Co.* v. *Enoch*, 79 Ark. 475.

It was intimated by counsel in the oral argument here that the recent appearance before the circuit judge in response to the application for injunction ought to have been treated as an effort to secure from the circuit judge an order suspending the original judgment of the county court, and that the petition now before us should be treated as an application for certiorari to review the action of the circuit judge in refusing to grant that relief. The first and the all-sufficient answer at present, is that there was no request made to the circuit judge to make an order of suspension and we cannot, in this proceeding, treat that as having been done. The principle is too well settled for discussion that the action of a trial court, especially in a matter in which it is clothed with discretion, will not be reviewed unless the matter was brought to the attention of that court and it refused to act or to grant appropriate relief sought.

It follows that the petition is without merit, and the same is dismissed and the prayer thereof is denied.

MEBANE v. CITY OF WYNNE.

Opinion delivered February 12, 1917.

1. MUNICIPAL CORPORATIONS—ACCEPTANCE OF DEDICATED STREET—RIGHT OF CITY—ENCROACHMENT.—Where land has been platted into streets and blocks, and there has been an acceptance of the dedication, and the public has used a portion of the streets, the city, as the representative of the public, may require encroaching property owners to withdraw the encroachments at any time that the public authorities elect to open the streets to their full width.
2. MUNICIPAL CORPORATIONS—DEDICATION OF STREETS—OBSTRUCTIONS—LIMITATIONS.—Where there has been an acceptance of the dedication to public use of a street by a city of the second class, the statute of limitations does not run against the right of the city to open the street.

3. LIMITATION—STREETS—CITY OF SECOND CLASS.—The raising of the grade of a municipal corporation to that of city of the second class, stops the running of the statute of limitations against the city in favor of a person who has encroached upon streets dedicated to, and accepted by the public.
4. DEDICATION—STREETS, ALLEYS AND OTHER PUBLIC PLACES.—An owner of land by laying out a town upon it, platting it into lots and blocks intersected by streets and alleys, and selling lots by reference to the plat, is held to have dedicated to the public use the streets and alleys and other public places marked on the plat, and such dedication is irrevocable.
5. DEDICATION—ACCEPTANCE BY THE PUBLIC.—Where property is dedicated to public use, an acceptance by the public may be expressly given by representatives of the public or by the use of the property by the public, and only in those ways.
6. DEDICATION ACCEPTANCE.—An acceptance by the public or the proper local authorities is necessary to make a dedication complete. A purchase of property from the dedicator with reference to the plat on which public places are designated, constitutes an acceptance which is irrevocable.
7. DEDICATION—FAILURE TO ACCEPT.—Where there has been no acceptance by the public of property dedicated to public use, the dedication may become extinct either by an express withdrawal on the part of the original dedicator, or by his death before acceptance, or by lapse of time.
8. DEDICATION—PUBLIC RIGHTS—LIMITATIONS.—The statutory exemption of cities from the operation of the general statute of limitations with respect to public property, has no application where public rights have not accrued, and there is no right in existence to be exempted, so where property is dedicated to, but not accepted by, the public, the statutory exemption has no application.
9. LIMITATIONS—DEDICATION—RIGHTS OF CITY.—The exemption from the operation of the statute of limitations in favor of a city, does not extend to the rights of private owners who claim to have been injured by virtue of an encroachment upon public property.

Appeal from Cross Circuit Court, First Division; *W. J. Driver*, Judge; reversed.

Hawthorne & Hawthorne, for appellant.

1. Neither the town nor city of Wynne made any claim from the filing of the plat until this suit, more than twenty-one years. Nor did either occupy it or use it. The fact of dedication depends upon the intention of the owner to dedicate the land to the public. There is no evidence that the owner knew the plat was

filed, or that it was filed by his authority. No intention to dedicate was shown nor that he sold any lots around "Franklin Square." All the facts show there was no dedication to the public. 91 Ark. 350; 123 *Id.* 175; 77 *Id.* 177, 221, 570; 80 *Id.* 489.

2. It was never accepted by the town or city. Kirby's Digest, § 5531; 88 Ark. 478.

3. The city is barred. The town was barred before the Act making Wynne a city of the second class. 41 Ark. 45; 59 *Id.* 151; 50 *Id.* 416.

4. There is no title in the city by dedication, public use or prescription, or otherwise. A verdict should have been directed for defendants. Kirby's Digest, § 5331; Acts 1875, 13. Taxes were paid continuously for more than seven years prior to the Acts of 1905, and three years before the Act of 1899. There never was any acceptance by the city or public. The court erred in its declarations of law. Cases *supra.*

Killough & Lines, for appellee.

1. The owner prepared the plat and filed it and had it recorded. Filing the plat and selling lots according to it constitutes an irrevocable dedication. 80 Ark. 493; 91 *Id.* 350; 77 *Id.* 570; 85 *Id.* 520; 13 Cyc. 455. In addition the owner indicated his intention to dedicate by starting the erection of a public building. From conflicting evidence the jury found there was a dedication and their finding is final.

2. There was no adverse holding during the life of Raphaelsky. 85 Ark. 527; 69 *Id.* 562; 58 *Id.* 142; 84 *Id.* 52. The statute of limitations did not run. Kirby's Digest, § 5593.

3. There was no duty to accept by ordinance. § 5531, Kirby's Digest, does not apply to "squares," and the Act of March 9, 1875, § 30, does not apply.

4. A continuous use of the streets and alleys by the public is sufficient acceptance and dedication. 80 Ark. 493. A statutory acceptance by ordinance may yet be made. *Ib.* 489; 68 Ark. 68; 85 *Id.* 525.

5. The payment of taxes was a nullity. 68 Ark. 69; 42 *Id.* 77. It was not wild land and it was city or town property.

6. There is no error in the instructions and the verdict is sustained by the evidence.

McCULLOCH, C. J. This is an action instituted by the city of Wynne, an incorporated city of the second class, against the defendant, J. C. Mebane, to recover possession of a block of land in that city alleged to have been dedicated to public use, and also a portion of a public street alleged to have been so dedicated and now in the possession of the defendant. There was a trial of the cause before a jury, which resulted in a verdict and judgment in favor of the plaintiff, from which the defendant has prosecuted an appeal to this court.

The parties claim title from a common source and the question at issue is whether or not there was an accepted dedication of the ground to the public use and whether or not the right of the public to use it still exists. The property was owned originally by Morris Raphaelsky as a part of acreage property owned by that individual. In the year 1892 Raphaelsky platted this property, which was then in the suburbs of the village of Wynne, into blocks and lots intersected by streets and alleys, and caused the plat to be placed of record in the office of the recorder of deeds. There was an issue in the case whether or not the plat was actually recorded by authority of Raphaelsky, but the evidence was sufficient to sustain the finding of the jury in favor of the plaintiff on that issue, and we must, therefore, treat it as settled. On the plat one of the blocks, 210 feet square, was designated as "Franklin Place." There were streets on the east and west side, respectively, of the block, which were generally of the width of fifty feet, but in that particular block the two streets on the plat were widened so as to make the width of each eighty feet. Some of the witnesses in the case speak of this as a jog thirty feet wide, but according to the plat it must be treated as the widening of the street as above stated.

Those two streets were designated on the plat as Second and Third streets, the former running north and south on the east side of Franklin Square, and the latter running north and south on the west side of Franklin Square. There were also two narrower streets on the north and south sides of Franklin Square, designated, respectively, as North avenue and South avenue. Raphaelsky sold off lots and blocks by descriptions having reference to the plat, and the city has been built up in that subdivision. The streets were used by the public, but the undisputed evidence is that the space designated as "Franklin Square" has never at any time been put to any public use, and has never been accepted by the city council as a public place. Raphaelsky had some sort of notion, according to the testimony, of constructing a public building on the lot. Some of the witnesses say that his purpose was to erect a public school building, and others that he proposed to erect a public sanatorium. He did not in fact erect any building at all, but he began one and caused a concrete foundation to be laid. His reasons for abandoning the project are not clear from the testimony in the record, nor indeed is it very clear that he intended to abandon the project, but he spent much of his time abroad and it was only at intervals that he returned and discussed with citizens his plans. He died in January, 1896, leaving a last will and testament whereby he devised all of his undisposed of property to trustees. The will was duly probated and in April, 1901, the trustees sold and conveyed the block designated as Franklin Square, to one Sharp. Sharp sold and conveyed to J. C. Harrell in November, 1901, and the latter immediately fenced up the property and extended his fence on the east and west sides so as to take in thirty feet of the streets designated on the plat and to leave only spaces fifty feet wide of Second and Third streets, respectively. In other words, he fenced up those streets so as to make them of uniform width of fifty feet on the side of this block, the same as the remaining portions of those streets. Harrell continued to occupy the property for several years until he sold it

to the defendant Mebane, who built a store house on the northeast corner of the enclosure. That building faces north and is mainly on the thirty foot strip designated as a part of the street. The undisputed evidence is that the property has been held by Harrell and the defendant, respectively, in hostility to any adverse claim, since Harrell took possession in the autumn or winter of 1901. In the deed from the trustees of the Raphaelsky will to Sharp, and also in the deeds from Sharp to Harrell, and from Harrell to the defendant, the property was described merely as "Franklin Square of the Raphaelsky Addition to the City of Wynne," and it is conceded that that description did not cover the portions of the designated streets now occupied by the defendant.

On the trial of the case before the jury the court refused to submit the question of title by adverse possession, and submitted only the issue as to whether or not there was an intention on the part of Raphaelsky to dedicate the property to public use, and the jury found that issue in favor of the plaintiff.

(1-3) It is easy to dispose of that portion of the case which relates to the property included in the designation of the public streets, for we think that feature of the case is ruled by the decision of this court in *Paragould* v. *Lawson*, 88 Ark. 478. The evidence shows in the present case, the same as in the case just cited, that there had been an acceptance of the dedication, and that the public had used a portion of the street, and this court held that the city, as the representative of the public, had the right to require encroaching property owners to withdraw the encroachments at any time that the public authorities elected to open the street to its full width. We held that the statute (Kirby's Digest, sec. 5593, subd. 3) which exempts cities of the second class from the operation of the statute of limitation with respect to encroachments upon streets, alleys and other public places, was applicable to the facts of the case, and that where there had been an acceptance of the dedication to public use

the statute of limitation did not run against the right of the city to open the street. The incorporated town of Wynne became a city of the second class in the year 1905, and the occupancy by defendant, and his grantor of that portion of the land which constituted a portion of the dedicated street, had not ripened into title by limitation, and it is not claimed that the defendant has acquired title in any other manner, for it is clear that the description contained in the deeds to him and his immediate grantor, described nothing more than the block of ground designated as Franklin Square. The raising of the grade of the corporation to a city of the second class stopped the statute of limitations from running, and the defendant's possession could not then thereafter ripen into title. *Paragould* v. *Lawson, supra.* It follows, therefore, that the city's right to open the public street to its full width as originally dedicated to the public use and accepted and used by the public, has not been barred by lapse of time and by adverse occupancy.

(4) The defendant's claim of title to the block designated as Franklin Square appears, however, in a different attitude and falls within the application of other principles. This court has steadily adhered to the rule that "an owner of land by laying out a town upon it, platting it into lots and blocks intersected by streets and alleys, and selling lots by reference to the plat, is held to have dedicated to the public use the streets and alleys and other public places marked on the plat and such dedication is irrevocable." *City of Hope* v. *Shiver*, 77 Ark. 177; *Davies* v. *Epstein*, 77 Ark. 221; *Dickinson* v. *Arkansas City Improvement Co.*, 77 Ark. 570; *Brewer* v. *Pine Bluff*, 80 Ark. 489; *Stuttgart* v. *John*, 85 Ark. 520; *Paragould* v. *Lawson, supra; Balmat* v. *City of Argenta*, 123 Ark. 175.

In *Frauenthal* v. *Slaten*, 91 Ark. 350, we extended the rule so as to make it applicable to the dedication of public grounds other than streets and alleys, and we held that the word "Square" used on a plat designating a certain portion of ground within the limits of a city or

town, indicated a public use and constituted a dedication of the space so indicated to public use, and when the dedication was accepted it became irrevocable. A dedication by this mode falls within the class of implied dedications and, as stated by a learned author on the subject, is based on the doctrine of estoppel. 1 Elliott on Roads and Streets, sec. 137; *Forney* v. *Calhoun County*, 84 Ala. 215; *Mann* v. *Bergmann*, 203 Ill. 406; *Lewis* v. *City of Portland*, 25 Ore. 133.

(5-6) "In order to make a dedication complete on the part of the public as well as the owner," says the same author in section 165, "there must be an acceptance by the public or the proper local authorities. The owner may, as a rule, recall a dedication at any time before it has been accepted. * * * The acceptance must generally be made by representatives of the public having authority over highways or by the public by general use of the way." Now, it should be added to what the learned author has said on this subject, that so far as the rights of private individuals are concerned, a purchase of property from the dedicator with reference to the plat on which the public places are designated, constitutes an acceptance which is irrevocable. In other words, private rights accrue by virtue of the acceptance given in that manner, but the public rights only accrue by some method of public acceptance, which, as the author states, may be expressly given by representatives of the public or by the use of the property by the public.

(7-9) In the present case there has been no public acceptance in either of the modes indicated. The city has never formally accepted the dedication, nor has there been any use made of the property by the public. There having been no acceptance by or for the public, the dedication may become extinct either by an express withdrawal on the part of the original dedicator or by his death before acceptance, or by lapse of time. So according to that rule the present attempt on the part of the public authorities to accept the dedication and put the property in use, comes too late. The statu-

tory exemption of cities from the operation of the general statute of limitations with respect to public property has no application in this case for the reason that the public rights have never accrued and there are no such rights in existence to be exempted. The only rights which might be involved are those as to private ownership under purchase from the dedicator, according to the descriptions contained in the plat filed and recorded. The assertion of those rights is now barred by the statute of limitations as the exemption in favor of a city does not extend to the rights of private owners who claim to have been injured by virtue of an encroachment upon public property. *Broad* v. *Beatty*, 73 Ark. 107. In that case we said: "Without undertaking to determine the full scope and effect of the statute we hold that it is not applicable to prevent a plea of limitation in an action of this kind brought by an individual to require the removal of an obstruction from the public grounds of the city after an adverse holding for more than the statutory period and when no order of removal has been made by the city council or police court."

This case is distinguished from the case of *Paragould* v. *Lawson*, *supra*, by reason of the fact that there had been an acceptance by the public, the use of a portion of the street having the effect of accepting the dedication to the full extent of the width of the street as indicated on the plat. In the present case, however, there has been no acceptance at all and no use made of this block of land by the public.

The plaintiff relies upon other decisions of this court (*Hope* v. *Shiver*, *supra*, and *Brewer* v. *Pine Bluff*, *supra*), as holding that a dedication by designation of streets and other public places on a plat is preserved indefinitely and may at any time be accepted by the public authorities, but we think that neither of those cases are applicable to the facts of the present case. In the case first cited, the occupancy by an individual had been upon the express authority of the city council, and in the last mentioned case there had been such a

use of the street as constituted an acceptance by the public though there never had been a formal acceptance on behalf of the public. We are, therefore, of the opinion, that according to the principles announced on this subject in the previous decisions of this court, and according to the views expressed in the decisions of other courts, the original dedication by the former owner, was never accepted by the public and that it is too late now for such an acceptance after the private rights of those who purchased with reference to the plat have been barred by lapse of time and adverse possession. It follows that the circuit court erred in its ruling, and according to the undisputed evidence the defendant was entitled to a judgment in his favor so far as concerns the title and right of possession to the area described as "Franklin Square."

The judgment is, therefore, reversed and the cause remanded with directions to enter judgment in favor of the plaintiff for that portion of the street which is occupied by the defendant, and to render judgment in favor of the defendant as to the remainder of the property.

MITCHELL v. COLEMAN.

Opinion delivered February 12, 1917.

1. FRAUD AND DECEIT—SALE OF LAND.—The evidence held to show that a certain sale of land was procured by the false representations of the seller's agent, and that the purchaser relied upon such false representations.
2. FRAUD—FALSE REPRESENTATIONS—FAILURE TO SET UP—AFFIRMATIVE RELIEF.—Appellant was induced by the false representations of appellee's agent to purchase land, and having discovered the fraud, permitted the foreclosure of a vendor's lien thereon, and a sale thereof for an inadequate price, without setting up the fraud; *held*, thereafter, because of laches, appellant would not be permitted to base an action for affirmative relief upon the said fraud.

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

Jeff R. Rice and *Carmichael, Brooks, Powers & Rector*, for appellants.

1. Damages occasioned by the fraudulent representations which were the inducement for the execution of the contract were properly the subject of a counterclaim, and judgment should have been rendered on the counterclaim to the extent of the damages proven. The result of the transaction is that appellants *lost both places*, without fault on their part. The damages were properly pleaded. Kirby's Digest, § § 6099, 6101; 4 Ark. 527; 1 *Id.* 31; 54 *Id.* 187; 95 *Id.* 488; 98 *Id.* 125.

2. Appellants were clearly entitled to judgment unless estopped which they are not. The measure of damages was the difference between the real value of the land and the price agreed to be paid therefor. The acceptance of the land after knowledge of the falsity of the fraudulent representations is not a waiver nor an estoppel. 47 Ark. 148; 95 *Id.* 488; 81 *Id.* 549.

3. There was no estoppel. 103 Ark. 326; 1 Am. & Eng. Dec. in Eq. (1 Series), 47; 4 *Id.* 265. Estoppel can not be asserted to create a right. 64 Ark. 221 is squarely in point on appellant's right to a counterclaim. It nowhere appears that appellee has been required to pay any part of the $3,000. The land sold for an excess over the vendor's lien. So appellee was not injured by the failure of appellants to defend. The chancellor should have allowed the damages set up in the counterclaim, less the amount sued for by appellee.

McGill & Lindsey, for appellee.

1. The findings for appellants on the issue of fraud and damages in excess of the notes sued on, are clearly against the preponderance of the evidence. The burden was on appellants to show deceit based on fraudulent representations; that they were false and fraudulent with intent to deceive to appellant's injury; that they induced the contract and worked an injury; that appellants contracted on faith thereof and relied and had a right to rely on them. 38 Ark. 334; 47 *Id.* 148; 71 *Id.* 91; 104 *Id.* 388; 113 *Id.* 78.

2. All the statements were made by Porter who was not the agent of appellee. Appellant did not rely on them, nor did he have the right to so rely. Mitchell examined the place for himself. 38 Ark. 334; 71 *Id.* 91; 97 *Id.* 265; 99 *Id.* 438; 112 *Id.* 489.

3. No reduction should be made from the amount of the purchase money notes. 26 Ark. 28.

4. The cause should be reversed on the cross-appeal. The measure of damages is the difference between the real value of the property and the purchase price. 123 Ark. 275. The preponderance of the evidence is that the real value of the farm is in excess of $3,000 over the value of the Little Rock property on which there was a claim of $1,250.

STATEMENT BY THE COURT.

This suit was instituted by the appellee against appellants. Appellee alleged in his complaint that on the 26th day of February, 1912, he sold to Mrs. Maud O. Mitchell a tract of real estate situated in Benton County, Arkansas, and that as part of the purchase price appellants agreed to pay $3,000 and interest, which sum was a first lien on the land, held by one Velma Barry, and also executed to appellee their five joint promissory notes for $110 each, bearing interest at the rate of 8 per cent. per annum from date until paid; that a vendor's lien was retained on the real estate mentioned to secure the payment of these notes; that the appellants failed to pay the $3,000 vendor's lien according to the terms of the contract of Velma Barry, and that she foreclosed her lien; that by the failure of the appellants to perform their contract, the real estate was sold without any fault or carelessness on the part of the appellee, and appellee asked for judgment in the sum of $550 and interest.

Appellants, in their answer, admitted that appellee sold the land to Mrs. Mitchell, and that they executed the notes in suit, and that Barry had foreclosed the lien. They alleged that the lien of $3,000 was reserved in the

deed to Mrs. Maud O. Mitchell, and denied that they owed the appellee any sum whatever. The appellants set up that E. J. Mitchell had been engaged in carpentering the greater part of his life, had no experience whatever in farming, fruit growing or the values of farms and fruit lands, all of which appellee well knew at the time; that appellee and one Porter, his agent, represented to appellant E. J. Mitchell, the husband of Maud O. Mitchell, that he (appellee) had a farm near Gentry, in Benton County, Arkansas, for sale or trade; that appellee falsely represented that the real estate was of the value of $6,500; that there were 44 acres of first-class bearing apple orchard, 4 acres of first-class bearing peach orchard, and 6 acres of bearing pears, all in good condition; that these representations were material; that they were false, and that appellee well knew them to be false, and that appellants not knowing the value of the land, relied on the representations; that the land was not worth exceeding the sum of $3,500; that by reason of the false representations appellants were induced to enter into the contract of purchase and to execute the notes, and deeded to the appellee as a part of the consideration for the purchase thereof their home in Little Rock, which was of the value of $3,000; they prayed that they have judgment for the sum of $3,000, and that appellee take nothing by his suit on the notes.

The appellee replied to the answer and counterclaim, denying the allegations thereof, and alleged that appellee had his farm advertised for sale, and that E. J. Mitchell saw such advertisement and wrote to appellee in regard to it, and that they afterwards made the trade; that appellants traded upon their own judgment with knowledge of appellee's place after seeing it; that appellee had not seen the farm himself which he traded to appellants for about two years prior to that time, and informed appellants of that fact. Appellee alleged that the place was worth as much as $6,500. He further alleged that E. J. Mitchell represented that the place he traded to appellee in Little Rock was worth $4,000,

and was put in the trade at that sum; that there was $1,250 against the property and in the trade appellee paid in cash $1,250, and also $400 in cash to J. H. Barry as agent for his wife, who, in fact, owned the property at the time; that appellee had the land deeded to him, and he deeded the same to Maud O. Mitchell, and appellants assumed notes for $3,000 which appellee had executed to Barry and also executed the notes for $550 to appellee; that appellee had paid out in cash on the property traded to him by appellants the sum of $1,650, and that this property in Little Rock, instead of being worth $4,000, was worth not exceeding $2,000.

Appellee testified substantially as follows: That the five notes in suit were executed by the appellants to the appellee as a part of the consideration for the trade between appellee and appellants; that appellee did not solicit E. J. Mitchell to buy the farm, but that Mitchell saw appellee's advertisement in the Gazette of the farm for sale; that appellee had not seen the farm since 1910, and the trade was made with appellants in January and February, 1912; that when appellee last saw the place, it was in good condition; that when he first saw it, it was owned by one West; that witness, acting for West, who lived in Independence, Kansas, had traded it to a man in Argenta, and the consideration in the trade was $6,500; that the purchaser, T. B. White, had the deed made to Velma Barry, his daughter; that Mitchell went with one Porter to look at the land. Appellee advised Mitchell to go look at it; that Porter was not appellee's partner, but was a real estate agent in the same office with appellee; that he had never seen the country and wanted to see it, and Mitchell knew that Porter had not seen the country. Appellee did not authorize Porter to make any representations about the farm, and if he made any he had no authority to do so. Appellee did not know what occurred between Porter and Mitchell. Mitchell told appellee that he had examined the farm and was satisfied with it. He made no objection to the condition of the orchard, nor the number of acres. Appellee was acting as the agent of

Mrs. Velma Barry in selling the farm. She did not want the Mitchell property at all, and his commission for making the trade was in the $550 notes. Mitchell took possession of the property after the trade and lived on it with his family until Barry foreclosed and never made any complaint about the condition of the place or about any false representations having been made in the trade. Appellee did not know at the time he made the trade whether Mitchell had ever had any experience in farming or not.

Appellee testified that he tried to sell the property acquired from the appellants at $2,000, but was unable to do so. He took the property at Mitchell's figures, $4,000, to get what he could out of it. Barry did not want the Mitchell property with the mortgage on it, and would not take it and told appellee to take it and get what he could out of it as his compensation. He finally got rid of it by trading it with some other stuff without any profit to himself.

There was other testimony on behalf of the appellee tending to show that about the average market value of the place that appellee traded to appellants was $60 per acre. There was also testimony on behalf of the appellee tending to show that the Mitchell property traded by the appellants to the appellee was worth all the way from $1,800 to $2,500.

E. J. Mitchell, on behalf of the appellants, testified that he had never been a farmer before he made the deal about the Barry place; had no experience about farm values, orchards, etc. He saw an advertisement in the Gazette, signed by L. P. Coleman, of an 84-acre fruit farm in Benton county for sale, 54 acres in apple, pear and peach orchard, just in its prime; good house, barn and improvements. He traded the property in Little Rock to appellee for this farm. Appellee was engaged in the real estate business, and Porter was his partner and was assisting him as his agent. Porter made nearly the whole deal himself. Porter represented the place in Benton county as 84 acres, 54 acres in first-class bearing fruit trees, 44 in pears, 80 trees to the

acre; this would make several thousand trees. He told witness that the place was worth $100 an acre. Witness was not shown the place; they went out and sat in the lane. He represented that the trees were between eight and nine years of age. Witness did not know anything to the contrary, and he doubted whether an experienced man in that kind of weather could have told the difference. He relied upon the representations of Porter. Witness learned a short time after the trade was made that the place was not worth half what he paid for it. It sold for $3,000. There was only about 80 acres in the whole place, and 30 or 33 acres in orchard; about 20 acres in apple orchard, practically all dead, and none of them bearing. There were not 8 acres in peach trees on the farm. They had cut them down the year before witness got there. No fire got in the orchard and burned the same after witness got there. The property in Little Rock that witness traded to appellee was worth about $4,200. There was $1,000 or $1,200 against it. Witness valued their property at $4,000, and gave appellee $3,550 difference. Appellee got property worth $4,200, and the notes and the $3,000 vendor's lien assumed by the appellants for nothing. Witness wrote to Coleman (appellee) and thought he had told about Porter's misrepresentations. Witness did not know much about law or the papers. He did not know that he was getting the place from Barry. After the suit was instituted by Barry against Mitchell in the chancery court to foreclose the vendor's lien, Mitchell wrote Barry proposing to compromise and settle that suit, and stating the terms, but in this letter he made no complaint to Barry of the trade by which he had acquired his interest in the property. On the contrary, he stated to Barry that he had paid about $4,000 on the place, and did not propose to be thrown out the first year, and offered to make certain arrangements for extending the loan for six years, with the payment of interest, and agreeing in addition to make certain improvements on the property. Mrs. Mitchell testified that Coleman's partner, Mr. Porter, represented

in her house in Little Rock that there were 84 acres in the place, fifty-four acres in fruit, 6 in pears, 4 in peaches, and the rest in apples, all in first-class bearing condition.

The suit by Barry against Mitchell was instituted May 23, 1913, and judgment was rendered against Mitchell July 12, 1913, for $3,247.50. The land was ordered sold to satisfy the decree, and the sale was made on the 22d day of August, 1913. The land was purchased by Velma H. Barry for $3,301. Deed was made by the commissioner reciting these facts, and the deed was approved August 25, 1913. The present suit was instituted August 21, 1913, and the answer and counterclaim was filed August 28, 1913.

Upon substantially the above facts, the court found as follows: "That plaintiff (appellee) and Velma Barry jointly sold the real estate described in the complaint to the defendant (appellant), Maud O. Mitchell, at and for a trading consideration of $6,550; that the notes sued on were a part of this consideration; that the plaintiff (appellee) falsely represented to the defendants (appellants) that there were 53 acres of fruit trees on the farm conveyed to them, which were in their prime, but as a matter of fact, they were diseased and dying; that defendants had the right to rely upon said representations, and did rely upon them as true; that they were material and were the inducement to the defendants to make said purchase, and that thereby the defendant, Maud O. Mitchell, has sustained damages in excess of said indebtedness sued on, but she is estopped from recovering said excess because she permitted Barry to foreclose on the $3,000 note and vendor's lien which were part of the purchase money, without making any defense, or resisting said foreclosure, but voluntarily let said farm be sold in said foreclosure suit and proceeds applied as a payment and by offering to Barry to pay same after foreclosure proceedings were instituted."

The court thereupon entered a decree cancelling the notes sued on and dismissing appellee's complaint

for want of equity, and entered a further decree sustaining the appellant's cross-complaint to the extent of the indebtedness sued on, and dismissing same as to any further damages. Both parties appeal.

WOOD, J. (after stating the facts). The findings of the chancellor on the issue of fact as to fraudulent representations are not clearly against the preponderance of the evidence. There is a decided conflict in the evidence as to whether or not Porter, who showed appellant E. J. Mitchell the place in Benton county, and who made representations concerning it as testified to by appellant E. J. Mitchell, was the agent of the appellee for that purpose. The appellee testifies positively that he was not his agent. But the testimony of Mitchell and his wife and the circumstances as revealed by the testimony of the appellee as well as the testimony of appellants, show clearly that Porter was appellee's agent and representing the appellee while showing appellant Mitchell the farm in Benton county, and the representations he made concerning the land were therefore binding upon the appellee.

It was shown that Porter visited the home of Mitchell in Little Rock and talked to Mitchell's wife about the place in Benton county. He had a photograph of the house and front yard which he exhibited to appellant E. J. Mitchell during this trip. Mitchell said Porter "made nearly the whole deal himself." It was cold, bad weather, snow on the ground, and they would sink up to their knees in the mud. They stopped in the lane and did not go further to look over the place. Porter kept hold of Mitchell's arm most of the time, never let him get three feet away, and Mitchell never talked to the tenant that was on the place in regard to it.

The strenuous efforts put forth by Porter to sell or trade to appellants the farm in Benton county, as disclosed by the testimony of the Mitchells, are wholly incompatible with the conduct of a mere stranger or volunteer in the transaction. We conclude therefore,

notwithstanding the testimony of the appellee, that a decided preponderance of the evidence shows that Porter was the agent of the appellee in the transaction. Under familiar rules of law, the principal is bound by the acts and declarations of his agent while acting within the scope of his authority.

Now, Mitchell, who acted as the agent of his wife in making the trade, was born and reared in the city, had never been on a farm, unless for a day, and had no knowledge or experience of farming or farm values, or of orchards and raising fruit. The conduct of Porter shows that he claimed to be perfectly familiar with the farm in Benton county and the property in that vicinity.

The preponderance of the evidence warrants the conclusion that Mitchell was an unsophisticated city carpenter, and that Porter was a shrewd real estate agent. Mitchell states that in his dealings he had never been imposed upon, that his transactions had been with honest men, and that he believed every word that Porter told him was the truth and relied upon it. It is fair to conclude that Porter knew that Mitchell was ignorant of farms and farm values. It could serve no useful purpose to discuss in detail the evidence and state *in extenso* the reason for our conclusions. It suffices to state that we are convinced from the evidence that Porter either knowingly made false representations to Mitchell concerning the farm in Benton county, or if he did not know that these representations were false, asserted them as if they were true; that he did this for the purpose of having Mitchell to act upon them and to enable him to consummate the deal they were negotiating; that these representations were an inducement to the trade; that the deal financially was disastrous to appellants; that the relations of Porter and Mitchell at the time the representations were made were such that Mitchell relied upon the representations made by Porter, and that he had a right to believe them to be true and to rely upon them.

The law applicable to such cases, under varying facts and conditions, has been announced and frequently reiterated by this court. *Hanger et al.* v. *Evins & Shinn*, 38 Ark. 334; *Matlock* v. *Reppy*, 47 Ark. 148; *Neely* v. *Rembert*, 71 Ark. 91; *Evatt* v. *Hudson*, 97 Ark. 265; *Jarratt* v. *Langston*, 99 Ark. 438; *Bank of Monette* v. *Hall*, 104 Ark. 388; *Grant* v. *Ledwidge*, 109 Ark. 297; *English* v. *North*, 112 Ark. 489; *American Realty Co.* v. *Hisey*, 113 Ark. 78.

The conclusion of the chancellor was therefore correct in cancelling the notes in suit and in dismissing appellee's complaint for want of equity.

II. Mitchell testified that at the time the trade was made he thought Coleman was the agent of Barry; thought he was doing business with Barry all the time. Witness made the notes payable $550 to Coleman, and the others to Barry for $3,000. Coleman made the deed and reserved a vendor's lien in favor of Mrs. Barry for $3,000 and $550 for himself.

Now, the record shows that deeds to the farm in Benton county were made from Barry and wife to Coleman and from Coleman and wife to Maud O. Mitchell. Both of these deeds were dated and acknowledged February 26, 1912. The Barry deed recites a consideration of $3,500, of which $500 was paid in cash, and five notes for $600 each executed by Coleman and wife to Barry for the balance. The Coleman deed to Mrs. Mitchell recites a consideration of $6,300, of which $2,750 was paid in cash, and the assumption of the payment of the five Barry notes and the execution of the five notes to the appellee on which the present suit is based.

Upon these facts the chancellor found that Coleman and Barry jointly held and conveyed the farm to Mrs. Mitchell. Coleman was Barry's agent to sell the farm. Barry did not desire the Little Rock property in exchange in the trade, but Coleman was willing to take it, and the transaction assumed the form shown by the deeds and the evidence to conserve the convenience and wishes of appellee Coleman and Barry. It

was one transaction, and Mitchell understood it as such to enable Mrs. Barry, through Porter and Coleman, to sell her farm. While it would have been technically more accurate for the court to have designated it as a sale, perhaps, from Barry to Mitchell, yet it is true that Barry and Coleman were inseparably connected in the transaction which was consummated by the trade, and it is in this sense doubtless that the court made its finding that Coleman and Barry jointly held and conveyed the property. Barry was bound by the representations of Coleman and Porter within the scope of their real or apparent agency in selling her farm.

It was therefore the duty of the Mitchells when Mrs. Barry instituted her suit to foreclose the vendor's lien notes against Mrs. Mitchell, which the Mitchells assumed to pay as a part consideration for their trade, to set up in defense the alleged false representations that were made as an inducement to her and her husband to trade for the farm. Appellants were in possession of the land something over a year after the trade was made before foreclosure suit was instituted, and after this suit was instituted they continued in possession and set up no defense of fraudulent representations against the vendor Barry's notes. If appellants had set up the fraudulent representations, they might have had the trade rescinded and the equity in the Little Rock property restored to them, and the chancery court might then have adjusted all equities and made such disposition of the cause as would have left all parties *in statu quo*. Appellants failed to do this, but on the contrary, while the suit was pending and after they had been in possession of the property for more than a year, by letter to J. K. Barry, concerning the suit Mitchell made no complaint of any fraud.

Appellants, without setting up any fraud on the part of Barry or her agents, permitted the suit to progress to judgment and the land to be sold for the sum of $3,247.50, when the undisputed evidence shows that it was worth considerably more than that.

Under these circumstances the court's decree was correct in dismissing appellant's cross-complaint in so far as it asked for affirmative relief in damages. Appellants, under the facts, were entitled to set up the fraudulent representations of the appellee in connection with the transaction as a defense to the notes sued on, but on account of their laches in not seeking earlier to rescind the trade for fraud and to recover damages growing out of such fraud, and by reason of their failure to set up any fraud in the foreclosure proceedings against them, they waived their rights and are not entitled to use such fraudulent representations to obtain affirmative relief by way of damages in this suit. In other words, under the facts of this record, while equity will allow appellants to use the plea of fraudulent representations as a shield, it can not permit them to use it as a sword.

The decree of the chancellor is in all things correct, and it is affirmed.

HUMPHREYS, J., not participating.

ENGLES v. BLOCKER.

Opinion delivered February 12, 1917.

1. CONTRACTS—CORRESPONDENCE—DUTY OF COURT.—Where the terms of a contract are evidenced by certain letters exchanged between the parties, it is the duty of the trial court to construe the contract and declare its terms to the jury.
2. CONTRACTS—CONSTRUCTION OF TERMS.—The correspondence between appellant and appellees held to constitute a contract whereby appellant agreed to transfer a certain interest in certain oil leases.
3. TRIAL—INTRODUCTION OF EVIDENCE AFTER CASE IS CLOSED.—The refusal of the trial court to permit defendant to introduce further testimony after the evidence was closed and the witnesses discharged, held within the court's discretion.
4. CONTRACTS—BREACH—DAMAGES.—In an action for breach of a contract to deliver certain leases to plaintiffs, the value of the leases may be proved by testimony showing the amount defendant received for other leases upon similar property.
5. EVIDENCE—CARBON COPY OF LETTER.—In an action for breach of contract, a *carbon copy* of a letter addressed to an adversary in a lawsuit is

admissible in evidence without making any effort to require the adverse party to produce the letter received by him.

6. EVIDENCE—CARBON COPY OF LETTER—PRESUMPTION.—In an action for breach of a contract founded upon correspondence, the carbon copies of letters written by plaintiff to defendant and introduced in evidence by plaintiff, will be presumed to be duplicates of the letters sent to defendant, where defendant admits their receipt but fails to produce the originals.

7. BROKERS—FAILURE TO PAY LICENSE—RECOVERY OF COMMISSION.—A broker may recover commissions earned by him, although he failed to pay a license required by the city, in the absence of a provision in the city ordinance rendering the broker's acts void.

8. CONTRACTS—CORRESPONDENCE—MEETING OF THE MINDS—OFFER AND ACCEPTANCE.—An offer by defendant to give to plaintiffs each a one-third interest in certain leases, held to have been accepted by the plaintiffs, the contract being evidenced by correspondence.

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

James B. McDonough, for appellant.

1. The court erred in refusing to reopen the case for additional evidence. 119 Ark. 450; 108 N. E. 757.

2. There was error in admitting copies of letters in evidence. The proper foundation was not laid, nor showing made. 115 Ark. 142; 72 *Id.* 47; 53 S. W. 655; 18 Barb. 530; 76 N. W. 416; 107 *Id.* 299; 81 Am. Dec. 690.

3. The court erred in admitting the testimony of Blocker and others as to what Engles received in stock. It was hearsay.

4. Blocker had no license; it was error to exclude proof to that effect. Contracts of brokers without license are void. 33 Ark. 436; 89 *Id.* 195; 102 *Id.* 200; 36 Iowa 548; 63 N. W. 325; 54 L. R. A. 939.

5. The contract is within the statute of frauds. The letters did not constitute a contract. There was no acceptance—only a counter offer made. 121 Ark. 150; 97 *Id.* 613; 107 *Id.* 629; Kirby's Digest, § 3656. No contract was ever concluded. There is no proof that the leases were of any value whatever.

6. It was error to exclude the evidence of J. H. Keller. Also to exclude the evidence of appellant

that he never agreed to the terms of Blocker's letter. 121 Ark. 150.

7. The court erred in its instructions. 96 Ark. 206; 93 *Id.* 564; 95 *Id.* 108; 121 *Id.* 150.

Winchester & Martin, for appellees.

1. The letters constituted a contract.

2. It was within the sound discretion of the court to reopen the cause for additional evidence—no abuse of discretion is shown. 41 Ark. 57; 122 *Id.* 395; 119 *Id.* 152; 99 *Id.* 412; 36 *Id.* 645; 26 *Id.* 501; 25 *Id.* 387; 21 *Id.* 387. No prejudicial error is shown. 112 Ark. 507.

3. The proper showing was made that the originals were lost.

4. There was no error in the rulings of the court as to the admission of testimony.

5. Blocker was not a real estate broker and no license was necessary. There was no violation of any city ordinance. There was no sale of real estate. 48 Ark. 557, 565; 15 *Id.* 680. A lease is a chattel. But if real estate a recovery could be had, notwithstanding no license was procured. 89 Ark. 209; 145 U. S. 421; 60 Ark. 473.

6. The agreement was not within the statute of frauds. Kirby's Digest, § 2654; 48 Ark. 557; 60 *Id.* 473; 103 *Id.* 175; 39 W. Va. 231; 68 Oh. St. 259. Oil and gas leases convey no interest in land.

7. There is no error in the instructions. The verdict is sustained by the evidence and is right on the whole case.

STATEMENT BY THE COURT.

W. F. Blocker and J. A. Brake sued Frank Engles to recover commissions alleged to be due them for disposing of certain leases on real estate for him. The material facts are as follows:

Frank Engles secured oil and gas leases on 14,000 acres of land in Crawford county, Arkansas. For lack of money he could not drill for oil or gas and entered into negotiations with W. F. Blocker for a sale or other disposal of his leases. Engles turned over the leases to

Blocker for that purpose. On June 27, 1914, Engles wrote to Blocker to send him the leases to his residence at Sapulpa, Oklahoma, because he had a party there who wanted to look them over. In the letter he promised to mail them back to Blocker after he was through with them. Blocker resided at Ft. Smith and sent the leases to Engles at Sapulpa, as requested. At the same time he informed Engles of a proposition to take over his leases which he had secured for him. In response to this letter, on July 4, 1914, Engles wrote to Blocker the following:

"Dear Sir: Yours at hand and will say that if those parties will go ahead and drill a well I will only be too glad to go in with them as I have a great feeling for old Arkansas and my friends down there, and I have spent more money trying to get development in that country than any other man that has ever taken hold of this proposition, and I will still do anything that is reasonable to promote this deal; now if your parties will put one test well down to the depth of 2,500 feet I will give them 12,000 acres in the company, and retain one-sixth interest in the company and the first well and after this first well will pay my share on all other wells.

"Now if they have decided to drill and want to act on this proposition I am ready to assign to them that amount to the company and I will lend them all the help I possibly can, but I do not want any more jaw bone as that will not drill oil wells. This is the best time to develop down there as everything has shut down here for four months. Please advise me at once as these parties here are making up a company to drill down there, and it is the first one in that will make his jack. Let me hear from you at once."

Blocker answered this letter on July 7, 1914, as follows:

"Dear Sir: Yours received this morning, and I have seen the other parties and closed a deal with them as follows: You are to put in 8,000 acres of your leases into the company against their 8,000 acres; you are to own

a one-sixth interest in the company. They are to furnish the money to do the drilling. They agree to spend the sum of $15,000 in drilling, which amount they have already subscribed. They are to begin drilling within ninety days from the organization of the company, which is to be known as the Clear Creek Oil & Gas Company. They are to have a meeting for permanent organization as soon as this deal is finally closed with you, and will give you notice of same so that you can either be here in person, or by representative here with proxy.

"We have saved you in this deal 4,000 acres of leases and the sixth of the cost of any wells they may drill after the first one. As you offered to do in your last letter; this has saved you in cash not less than from $1,600 to $2,000. In view of this fact I think it not more than fair that you agree to assign an interest in the remaining leases to Mr. Brake and myself and to pay us in cash $500.00. When the deal is finally closed and you have signed contract from these people to do as I have stated to you.

"Send me the leases at once so we can select from them 8,000 acres and hold out the others properly located. I would suggest that you let us close this deal and represent you in the formation of the company, as I am sure that we can handle this situation for you to better advantage. You will be fully protected by this letter and the fact that you do not assign the leases until the company is organized and you are assigned a one-sixth interest in it, and until you receive an agreement in writing as to what they agree to do. If the above is agreeable to you forward the leases at once as these people are anxious to get ready to drill. They will have an expert geologist to report on this field at once."

On July 9, 1914, Engles wrote to Blocker the following:

"Dear Sir:—Yours at hand and I will say that I will accept the proposition of the first parties to which I will give them 8,000 acres and own one-sixth interest

and they to do as you say they have agreed to do—spend $15,000 in drilling three wells or two wells. Mr. Blocker, as far as you and Mr. Brake are concerned, you propose that I divide the remainder 4,000 acres. Yes, that is fair. I will give each of you one-third of the remainder. Let it be whatever it will, 6,000 or more, or less, but as far as the $500 is concerned I will take that and assign you the whole 12,000 acres and step out now if this proposition suits you. Say so, and you shall have the assignment in the next five days if you had or could convince me where there is any $500 coming I might do it, but I can't see now. Don't you think my proposition is more reasonable than yours, and I will do this just as I write you.

"Let me hear from you at once."

Blocker replied to that letter under date of July 11th, as follows:

"Dear Sir:—Yours received dated 9th inst. and noted. In reply I want to urge you to close up the deal with those parties with the 8,000 acres without delay, as some of the people who have helped you get these leases are threatening to have written notice served on you of the cancellation of the leases as the leases provide. We have been holding them off and I don't know how much longer we can do so.

"In regard to Mr. Brake and myself, your proposition to divide the balance one-third each is fair enough. In your former letter you offered to pay your one-sixth part of the cost of each well drilled after the first one. In making the trade with these people here I have saved you that cost and expense and I thought you would be willing to give us a percentage on the amount you would be saved.

"In regard to the 8,000 acres for these people here, I would like for you to send the leases at once so that I can select from them the leases on the lands, beginning with the London's and running south and east of Alma, which I think is the best, and these leases we can hold for ourselves. We have another party on the string that will agree to drill by the first of September coming

if we can get him one thousand acres, but we will have to get new leases for him as he does not like the contract in yours. I want to urge you to not delay in getting these matters finally closed up. Send the leases over. We can put them in escrow in the bank here, and get the contract signed up with these people as to what they will do and showing your interest in the company. This contract will be sent you and if as agreed upon, you can sign it, keeping one copy of it and then assign them the 8,000 acres to go into the company. Mr. Keller is still working with Wright and McGee, getting leases on the lands covered by yours in a number of instances."

Engles went to Ft. Smith and sold his leases on the whole 14,000 acres to the Clear Creek Oil & Gas Company for $2,500 worth of stock in that corporation. Blocker did not know anything about this transaction until after it had been done. After he learned of the contract between Engles and the Clear Creek Oil & Gas Company, he wrote to Engles under the date of July 28, 1914, as follows:

"Dear Sir:—The deal having been closed up between you and the Clear Creek Oil & Gas Company as per your instructions, it is in order that we carry out the agreement with Mr. Brake and myself for handling the matter for you, as per your letter of the 9th inst.

"Kindly execute an assignment of one-third interest in the remaining six thousand acres to Mr. Brake and one-third to myself. If this is done at once I think we can interest another party we have on hand and make it doubly sure of getting the acreage drilled.

"Kindly attend to this at once and let me hear from you."

Other evidence will be stated or referred to in the opinion.

The jury returned a verdict for the plaintiff in the sum of $614.28 and the evidence tended to show that the leases which the defendant had transferred in violation of the agreement with plaintiffs were worth that sum. To reverse the judgment rendered, the defendant prosecutes this appeal.

HART, J. (after stating the facts).

(1-2) The court instructed the jury that the letters read in evidence constituted a contract between the plaintiffs and defendant and the action of the court in so ruling is assigned as error calling for a reversal of the judgment. Ordinarily it is the duty of the court in the trial of cases to construe a written contract and declare its terms and meaning to the jury. In the instant case the terms of the contract were evidenced by the letters set out in the statement of facts and it was the duty of the court to construe the contract and declare its terms to the jury. The reason is that the letters which constituted the contract did not contain any words of latent ambiguity and show in express terms that Engles agreed to give each of the plaintiffs one-third of the remainder of his leases whether that amounted to 6,000 acres more or less, after he had transferred to the Gas & Oil Company the leases on 8,000 acres. *Mann* v. *Urquhart*, 89 Ark. 239; *Paepcke-Leicht Lbr. Co.* v. *Talley*, 106 Ark. 400. In his letter of July 9, 1914, addressed to W. F. Blocker at Ft. Smith, he expressly so stated. Blocker received this letter and acted on it. On July 11, 1914, he wrote to Engles stating that he had received his letter of July 9th and that he accepted the proposition to divide the balance of the leases, giving a one-third interest therein to each of the plaintiffs after the leases for the 8,000 acres had been transferred to the Oil & Gas Company for stock in that corporation.

Counsel for the defendant also assigns as error the action of the court in refusing to permit him to introduce further testimony after the evidence had been closed and the witnesses in the case discharged. He wanted to show by the secretary of the Gas & Oil Company that Mr. Blocker told him that he did not want the stock in the corporation to be issued to the defendant, Engles, because Engles had not settled with him for his commissions and also offered to introduce a letter written to Robinson by Blocker as follows:

"Mr. Engles and myself have come to an understanding regarding the commissions due me."

(3-4) Counsel for the defendant sets out at length the reason why he did not introduce this evidence before the case was closed but we do not deem it necessary to set it out in this statement. If it be admitted that defendant was not negligent in not sooner informing his counsel of this testimony, still it was a matter of discretion with the court and we do not think that the court erred in refusing to reopen the case to let in this testimony. It is true the letter apparently contradicted the statement that Robinson said Blocker had made to him, but the letter was open to explanation and when explained by Blocker, it might not have tended in any wise to have contradicted his purported statement to Robinson. In any event the letters constituted the contract between the parties in regard to the commissions due Blocker, and the offered testimony could not have changed their effect. It is contended that the court erred in admitting the testimony of Blocker and others as to what Engles received in stock, and what it was worth. It will be remembered that Engles transferred all his leases amounting to about 14,000 acres to the Gas & Oil Company and received therefor $2,500 in the stock of the corporation. Under the contract as evidenced by the letters the plaintiffs were to receive a one-third interest each in the leases remaining after transferring leases for 8,000 acres to the Gas & Oil Company. The court instructed the jury that if it should find from the evidence that the defendant had disposed of the leases in violation of his agreement with the plaintiffs, that the plaintiffs would be entitled to recover from the defendant the fair and reasonable market value of said leases at the time so disposed of by the defendant which he had agreed to assign to the plaintiffs. The leases to the whole 14,000 acres were situated in the same gas and oil territory and the amount for which the defendant sold and transferred these leases was evidence tending to show their market value. He received for their sale and transfer a certain amount

of stock in a corporation organized for the development of these and other gas and oil lands in the same territory. Under these circumstances we do not think the court erred in admitting the testimony.

(5) It is also insisted that the court erred in admitting the carbon copies of the letters written by Blocker which were set out in the statement of facts. We do not think the court erred in admitting these letters in evidence. Blocker testified that they were mailed to Engles and the letters written by Engles to Blocker show that each of these letters except one dated July 11, 1914, and that of the date of July 28, 1914, were received by Engles. The record also shows that Blocker wrote Engles a letter notifying him of the formation of the oil and gas corporation and did not keep a copy of it. His counsel asked Engles to produce the copy of this letter. Engles denied having received the letter but admitted that he had received all the other letters written to him by Blocker. We think that a carbon copy of the letter addressed to an adversary in a law suit is admissible in evidence without making any effort to require the adverse party to produce the letter received by him. In this respect there is a distinction between letter press copies and instruments produced by carbon paper. What is called the carbon copy is produced by placing a sheet of carbon paper between two sheets of letter paper so that the same impression produces both the letter and the carbon copy. Because the carbon copy is made at the same time by the same impression it may be regarded as a duplicate of the original letter itself and admitted in evidence without notice to produce the letter. *International Harvester Co.* v. *Elfstrom*, 101 Minn. 263, 11 A. & E. Ann. Cas. 107, 12 L. R. A. (N. S.) 343; *Chesapeake & Ohio Ry. Co.* v. *F. W. Stock & Sons*, 51 S. E. (Va.) 161; *Cole* v. *Ellwood Power Co.*, 65 Atl. (Penn.) 678.

(6) The letters signed by Blocker of which copies were kept, were mailed to Engles as the evidence of their understanding and Engles admits that he received them. There seems to be no good reason for Blocker, when

he is seeking to enforce their obligation, to ask for the production of the letters received by Engles. If proof of the duplicate was important to Engles, he was at liberty to make use of it and could have introduced the letter received by him to show that the carbon copy was not a duplicate of it. Inasmuch as he did not do so, it is to be presumed that the carbon copy introduced by Blocker was a duplicate of the original letter received by him.

(7) It is also insisted that the court erred in excluding proof that Blocker has no license as a broker to deal in real estate in the city of Ft. Smith. In the first place Blocker was not a real estate broker. He was engaged in other business and this was a single transaction by him. Moreover the provision of the ordinance referred to did not provide that contracts made by real estate brokers without a license should be void. Provisions of the ordinance neither directly nor indirectly refer to any consequences save the payment of a fine for not taking out a license. The purpose of the ordinance was to impose a license tax upon real estate brokers and not to invalidate contracts. The ordinance neither by its manifest intent nor in express terms declares that any contract made by a broker without a license should be invalid. The ordinance in question does not prevent the recovery on a contract made without having procured a license. *Stiewel* v. *Lally*, 89 Ark. 195; *Hodges* v. *Bayley*, 102 Ark. 200.

Counsel complains that the court erred in giving instructions in favor of the plaintiffs and in refusing instructions asked by the defendant. We do not deem it necessary to set out these instructions. The court instructed the jury according to the principles of law above announced.

Counsel for the defendant also contends that the court erred in excluding the evidence of the defendant to the effect that he never agreed to the terms of Blocker's letter of July 11th. He relies on the case of *Allen* v. *Nothern*, 121 Ark. 150. In that case there was never a meeting of the minds of the parties as shown by

the letters. Here the facts are essentially different, as we have already pointed out.

(8) On July 7, 1914, Blocker wrote to Engles about transferring the leases on 8,000 acres to the Oil & Gas Company and for his commissions proposed that Engles should assign an interest in the remaining leases to plaintiffs and pay them in cash $500.00. On July 9, 1914, Engles answered this letter and proposed to give each of the plaintiffs one-third of the remainder of the leases after transferring leases to the amount of 8,000 acres to the Oil & Gas Company, but he refused to pay them the $500 in cash. He proposed to make the assignment in the next five days, and further told Blocker that if he could convince him that there was any $500 coming to him that he might give him that, and wound up his letter with the following: "Don't you think my proposition is more reasonable than yours and I will do this just as I write you. Let me hear from you at once."

On July 11, 1914, Blocker answered this letter and said, in regard to Mr. Brake and myself your proposition to divide the balance one-third each is fair enough. The contract showed that he referred to a transfer of the leases remaining after leases to the amount of 8,000 acres had been transferred to the Oil & Gas Company. This was an unqualified acceptance of Engles' offer and constituted a binding contract between the parties.

It is also contended that the court erred in excluding the evidence of J. H. Keller to the effect that he, Keller, was the moving cause that brought Engles and the Gas & Oil Company together. We do not think the court erred in excluding this evidence. As we have just seen a binding contract was entered into between the parties as shown by the letters which passed between them.

Finally it is insisted that the agreement between the parties is in contravention of the statute of frauds. On this point we need only say that if we are correct in holding that the letters constituted a binding obligation

between the parties, the statute of frauds is not available as a defense to the action.

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

BACHE, RECVR. v. CENTRAL COAL & COKE COMPANY.

Opinion delivered February 12, 1917.

1. LEASES—LEASE OF MINE—REMOVAL OF TIPPLE.—The lessee of a mine was given the right to remove certain personal property at the expiration of the lease, which was a part of the mining equipment. The lessee sought to remove a tipple at the expiration of the lease; *held*, it was proper to submit to the jury the question whether the tipple was a part of the mining equipment and removable as such under the lease, that is, whether it was a trade fixture or a part of the realty.
2. DEFINITIONS—"MACHINERY."—The word "machinery," as used in a lease, held to include appurtenances necessary to the working of a machine.
3. LEASES—REMOVAL OF PERSONAL PROPERTY BY LESSEE.—In the absence of an express stipulation in the lease agreement to the effect that the lessee must remove his property from the premises before the expiration of the lease agreement, it will not be held that the right to remove personal property expires upon the exact moment that the lease expires.
4. LEASES—DAMAGES BY LESSEE—PROOF.—Appellee, lessee of a mine, brought an action for certain personal property, which he sought to remove after the expiration of the lease. Appellant sought to show that the mine was damaged by reason of appellee's neglect. *Held*, evidence of conversations between appellee and representations of the receiver who took possession of the mine upon the expiration of the lease, were material upon the issues, and was admissible.

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

James B. McDonough, for appellant.

1. Plaintiff had no right to tear down and remove the tipple. Jones Landl. & Ten., § 590, 103 Ind. 203. The provisions of the lease as to removal are absolutely controlling. Jones Landl. & Ten., § 713; 41 Conn. 471; 23 Vt. 222; 50 Atl. 1092; 48 *Id.* 38. A tipple is machinery like a railroad track. 86 N. E. 837; 81 N. E. 1103; 64 S. E. 65. It does not come within the

definition of "machinery." 85 Fed. 218; 11 So. 41; 81 Fed. 289; 21 So. 167.

2. Appellee had no right to remove machinery after the lease expired. Jones on Landl. & Ten., § § 711-716; 40 Ind. 142; 153 N. Y. S. 728; 66 So. 54.

3. The court erred in its instructions. They must comply with the pleadings and issues. 82 Ark. 562; 84 *Id.* 67; 85 *Id.* 425; 87 *Id.* 243; 70 N. W. 1110. Whether the tipple was machinery or not was a question of law for the court. Evidence to show the intention with which the tipple was placed on the premises is immaterial and inadmissible. Jones on Landl. & Ten., § 713; 2 Pet. 137; 70 N. W. 1110.

4. There was error in admitting testimony. Boring's payment of taxes and conversations of Boring and Shaleen were all not admissible.

Oglesby, Cravens & Oglesby, for appellee.

1. The violation of the lease was submitted to the jury under proper instructions and their verdict is final. They found that the tipple was machinery or trade fixture and removable.

2. It was clearly the intention of both parties to the lease that the tipple was a part of the mining equipment and therefore removable. 56 Ark. 55; 63 *Id.* 625; 73 *Id.* 227; 53 *Id.* 526. It was a trade fixture. 95 Ark. 268; Snyder on Mines, § 1311; 163 Fed. 624; 33 Atl. 95; 101 N. Y. App. Div. 22; 12 Allen, 77; 83 Atl. 269; 52 Am. 817; 44 Atl. 1024; 14 L. R. A. (N. S.) 439; 98 Ark. 597; 2 Sandf. (N. Y.) 202; 161 U. S. 316; 12 Allen (Mass.) 75; 101 N. Y. App. D. 22.

3. The law does not require the lessee to remove trade fixtures and machinery before the expiration of the lease, unless so provided. 2 Snyder on Mines, § 1311; 21 So. 322; 62 Pac. 342; 30 S. W. 907; 33 Atl. 95. The lessee has a reasonable time, after expiration of the lease, to remove. Cases *supra.*

4. The intention was a question for the jury. 70 Ark. 230; 72 *Id.* 500; 53 *Id.* 526.

5. Appellee was not liable for negligence producing "squeezes" before it purchased the property. 24 Cyc. 982. There is no reversible error in the instructions. As a whole, taken together, they state the law and are supported by the testimony.

6. No improper or incompetent testimony was admitted. The trial was free from prejudicial error.

SMITH, J. This is a suit in replevin brought by the Central Coal & Coke Company against John Shaleen, and other defendants, who are the appellants here. The suit was brought to recover possession of certain property belonging to a mine which was owned by the Hartford Coal Company, which mine was by that company leased to the plaintiff Central Coal & Coke Company, hereinafter referred to as the appellee. The Hartford Coal Company, a corporation, leased certain lands to E. W. Hoffman for coal mining purposes. Hoffman assigned the lease to the Hoffman Coal Company, which later failed, and, by proper conveyances, appellee became the owner of all the interest of the Hoffman Coal Company in said lease. The lease, by its terms, expired on November 1, 1914, but, before its expiration, the Hartford Coal Company was placed in the hands of a receiver by the order of the United State Court for the Western District of Arkansas. By agreement this lease was extended to December 10, 1914, and at midnight of that day one John Shaleen took possession of the property for the receiver and, in this manner, became a party to the litigation. He disclaimed any other interest.

At the time Shaleen took charge of the mine, appellee was engaged in removing the property which forms the subject matter of this litigation from the premises. Other property was removed which the receiver did not claim, but the answer filed by the receiver sets out a complete list of the property which he claimed as belonging to the Hartford Coal Company under the terms of the lease, and, although this list is a lengthy one, it does not embrace all the property described in the order of delivery. However, no disagree-

ment has arisen as to the description of the property alleged to have been unlawfully detained. Appellee acquired the title of the original lessee to all of the improvements and equipment in and about the mine by a conveyance which expressly named and included the tipple, and it also acquired all rights of the original lessee, subject to the conditions of the original lease.

The fifth article of this lease contained the following recital: 5. It is agreed by the parties hereto that at the expiration of this lease, whether at the expiration of the regular term thereof or by agreement of the parties, the party of the second part may remove from the said above described tract of land all machinery, pit cars, mine rails and pipe as may have been placed therein by him provided the party of the second part has carried out the terms and covenants of this contract, and all other property on said tract of land at the expiration of the lease aforesaid shall belong to and revert to the party of the first part.

Appellants insist that appellee has no right to the possession of the personal property involved in this litigation for the reasons, that it was not removed from the mine prior to the expiration of the lease, and because the right to remove was made contingent upon the performance of the conditions of the contract, and it is said that these conditions were not performed by appellee and there was, therefore, no right of removal. As to the tipple, it is said there was no right to remove it even prior to the expiration of this lease, and even though the condition of the lease had been performed for the reason that the tipple became, and was, a fixture which under the contract and under the law the original lessee himself would have had no right to remove.

It is said that appellee failed to comply with the provisions of the contract in that it permitted the slopes and room to squeeze down, and permitted water to accumulate therein, and that it destroyed and removed the tipple used in the operation of the mine, and it is argued that by reason of these alleged breaches

of the contract appellee forfeited the right to remove the property herein involved, this right being conditioned upon a compliance with the terms of the contract.

The tipple was removed prior to the expiration of the contract, and the right so to do presents the principal question in the case.

By instruction numbered 4, requested by appellants, the jury was told that, if appellee failed to prevent squeezing in the mine through negligence, and if it negligently permitted water to accumulate in the mine, the jury should find for appellants whatever amount the said mine was damaged, and if appellee so damaged said mine, appellee was not entitled to the possession of the property sued for until said damages are paid.

The evidence is conflicting as to the extent and cause of the squeezing and of the accumulation of water; but as the jury has found under the above instruction that appellee is entitled to the possession of the property, we must assume that there was a preliminary finding that appellee had not breached its contract in the particulars alleged.

At the request of appellee, and over the objection and exceptions of appellants, the jury were told that, if they believed that the tipple was used in connection with the machinery for the purpose of mining coal, and that it was placed upon the leased premises in connection with the hoisting engines, and other machinery and appliances, for the purpose of mining coal, and for the sole use and benefit of appellee in conducting such mining operations, with the intention of removing same, and not with the intention that it was to remain upon the leased premises as a part of the freehold, but should be the property of appellee, and was removed before the expiration of the lease, such removal was not a violation of the lease contract.

This instruction is challenged upon two grounds. The first is that the right to remove depends upon the terms of the contract of lease; and it is argued that the

court should have construed this lease as giving no right of removal. It is also said that, independently of the contract, the tipple is neither machinery nor a trade fixture, but was a part of the freehold.

A witness gave the following description of the tipple. The tipple was constructed by plaintiff of native pine, laid upon a rest, about 30 feet high and 300 or 400 feet long; that you can not remove coal from a mine without a tipple; the tipple is an essential part of the machinery, and connected with it; the machinery on the tipple consists of a shive wheel and bull wheel, which the rope goes around and connects with the cars, the scales and the machines for separating the coal; this machinery is held in place by the tipple, and it is all one connecting whole which is necessary in the operation of a coal mine; the engine and hoister is connected with the tipple by a rope which goes around the bull wheel on the tipple and connects the cars; that it was constructed so that it could be removed and it could be placed on rollers and moved away.

The testimony shows the value of the tipple to have been anywhere from twenty-three hundred to four thousand dollars.

It was shown on behalf of appellee that the tipple was so erected that it could be taken down and rebuilt, and that it was taken down before the expiration of the lease and was removed and rebuilt and is now in use in another mine owned by appellee.

Appellant asked the court to instruct the jury to return a verdict in his favor for the value of the tipple, even though it was removed prior to the expiration of the contract. These instructions were asked upon the ground that the court should have declared, as a matter of law, that the tipple was an expensive improvement which became, and was, a part of the realty.

(1) We are of the opinion, however, that no error was committed in submitting to the jury the question whether the tipple was a part of the mining equipment and removable as such under the lease.

(2) Learned counsel for appellant argue that the word "machinery" used in the article of the lease set out above, should be construed to mean machines of some kind and that the tipple is not a machine.

It appears, however, that the word "machinery" is a more comprehensive one than the word "machine" and includes appurtenances necessary to the working of a machine. Bouvier's Law Dictionary.

It is, of course, true that parties by their contracts, may stipulate what machinery and fixtures may be removed, and, when they have done so, such stipulations are controlling. But, in the case of *National Bank of Wichita* v. *Spot Cash Coal Co.*, 98 Ark. 597, this court, upon the authority of a statement of the law contained in 2 Snyder on Mines, § 1320, said:

"Under the mining law, mining machinery, apparatus and appurtenances placed upon the property by the lessee are not regarded as fixtures that pass with the soil and lease as appurtenances, but as personal property of the lessee that may be removed by him, in the absence of an express stipulation in the lease to the contrary."

We think there is no express stipulation here against the removal of the tipple, and, this being true, it was a question of fact for the jury to say whether the tipple was a trade fixture or a part of the realty. In support of this view learned counsel for appellee cite the following authorities: *Demby* v. *Parse*, 53 Ark. 526; *Choate* v. *Kimball*, 56 Ark. 52; *Bemis* v. *First National Bank*, 63 Ark. 625; *Ozark* v. *Adams*, 73 Ark. 227; *Field* v. *Morris*, 95 Ark. 268; *Shellar* v. *Shivers*, 33 Atl. 95; *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, and numerous other cases.

In Snyder on Mines, volume 2, section 1311, it is said:

"Obviously, the safer course is to provide for the ownership and removal or purchase, by the lessor, of mining machinery, fixtures and appurtenances placed upon the leased mine by the lessee. Where, however, the parties have omitted this, the general rule, coming

down to us from ancient customs in England, is that such machinery, appurtenances, fixtures and appliances as are placed there by the lessee, and can be removed without serious injury to the mine are his personal property, and are removable by him at the expiration of the lease, or within a reasonable time thereafter, unless there is a clear intention to the contrary. An example of this rule is thus stated in an article in a leading law review: 'Where land is leased for mining purposes, engines and machinery placed on the land, as well as houses for miners to live in temporarily, and any other structures necessary to the carrying on of the business for which the land is leased, and intended for no other purpose, are trade or business fixtures and may be removed by the lessee at or before the expiration of the lease.' "

It is argued that there is no provision in the lease authorizing the removal of any machinery after the expiration of the lease, and it is said, therefore, that a verdict should have been directed in appellants' favor on that account.

We are cited by respective counsel to authorities somewhat conflicting on the duty of a lessee to remove his property from the demised premises before the expiration of the lease. We are not called upon here to decide what restrictions exist upon the right of a lessee to enter for the purpose of removing property from the premises after the expiration of the lease. The instruction requested by appellant upon this phase of the case told the jury that "under the undisputed evidence in this case the plaintiff did not have the right to the possession of the property in controversy at the time the suit was brought."

(3) We think this instruction was properly refused. The proof is that the Hartford Coal Company was contemplating the purchase of the property, and negotiations to that effect were pending, and had they been consummated the property would not have been removed. That appellee began removing the property on October 21, and its representative was not definitely

advised that the prospective purchase was off until about 4 o'clock Saturday afternoon of December 5, 1914. At that time there was an extension of the lease for ten days which made it expire December 10. On Sunday, December 6, at 10 'oclock, appellee began removing its property, working day and night, with three shifts of men, until midnight of December 10, at which minute the lease expired, when appellant stopped the work of removal. At this time the tipple had been removed and there remained only such property as admittedly could have been removed unless the right of removal had been lost by a breach of the contract of lease. As we have stated, the jury found there was no breach of the contract, and appellee was proceeding with great expedition to remove its property, and we think under the circumstances it would be unreasonable and arbitrary to hold that appellee's right to remove its property expired at the instant the hands of the clock marked the expiration of the lease, and especially in the absence of any express stipulation that this right must be exercised before its expiration. Supporting this view, counsel for appellee cite the following authorities: 2 Snyder on Mines, § 1311; *Chalifoux* v. *Potter*, 21 Sou. 322; *Wright* v. *McDonald*, 30 S. W. 907; *Updegraff* v. *Lesem*, 62 Pac. 342; *Shellar* v. *Shivers*, 33 Atl. 95; *Mickle* v. *Douglas*, 75 Iowa 78, 39 N. W. 198.

The evidence does not present a case for the application of the rule that a tenant can not remove fixtures after the expiration of his tenancy, or after the surrender of possession.

(4) Exceptions were saved to the admission of proof of conversations between Boring, who was the superintendent of the mine for appellee, and Shaleen, representative of the receiver, which occurred at midnight when the receiver's representative took possession of the mine. This conversation related to the proposition of leaving a fireman in charge of the pump to keep it running to prevent the accumulation of water in the mine. The purpose of this evidence was

to exonerate appellee from any charge of negligence in the accumulation of water in the mine. It is argued that Shaleen was not present as a witness to contradict any statements in this regard, and that there was nothing in the pleadings to apprise appellants that such evidence would be introduced, and hence there was no reason why Shaleen should have been present, and that, for the same reason, error was committed in admitting testimony in regard to similar conversations between Boring and a Major McClure who executed the orders of the court in taking possession of the mine at the expiration of the lease. The cause of the damages to the mine, and the question whether appellee was responsible therefor, was one of the important questions in the case, and was raised by the pleadings, and we think the evidence was competent.

Various assignments of error relating principally to alleged errors in the instructions are argued by counsel; but the views of the law which we have here expressed render it unnecessary to discuss them.

Finding no prejudicial error, the judgment is affirmed.

HILL v. GREEN.

Opinion delivered February 12, 1917.

1. ACCOUNT—PLEA OF PAYMENT—BURDEN OF PROOF.—In an action on an account, the burden is upon the debtor to maintain his plea of payment.
2. ACCOUNT—PLEA OF PAYMENT—BURDEN OF PROOF.—A. sued B. on an account, and B. plead payment, showing the payment to A. of certain sums by check; *held*, unless the check shows on its face for what purpose it was given, or there is some positive evidence as to the transaction to which it is referable, the burden still continues on the party pleading payment to show that the check was given in payment of the account.

Appeal from Union Chancery Court; *James M. Barker*, Chancellor; affirmed.

R. L. Floyd and *W. D. Jackson*, for appellants.

1. The findings of the court are clearly against the preponderance of the evidence, except as to check 4. The burden was shifted to the appellee when payments were shown. 54 Pac. 932; 97 N. W. 1023; 142 *Id.* 1069; 66 S. W. 188; 82 S. E. 588-591. See, also, 72 Am. Dec. 619; 187 S. W. 446.

2. The appellants have conclusively proved payments aggregating $919.74 and the appellee has failed to show how he was given credit for them. Even if the burden of proof is on appellants, they have sustained the burden by a great preponderance of the evidence.

W. E. Patterson, for appellees.

1. The burden is on him who pleads payment. 67 Ark. 172.

2. The notes and mortgages sued on were admitted. The credits were not established and the chancellor so found. The finding of the chancellor is overwhelmingly sustained by the evidence.

HUMPHREYS, J. Appellees, B. B. Green and J. E. Frisby, trustees, brought this suit in the Union Chancery Court against appellants, Frank C. Hill and Birdie S. Hill, on two notes and an open account secured by mortgages, praying for judgment and sale of the lands described in the mortgages to satisfy said judgment.

Appellants pleaded payment. On motion of the parties a master was appointed to state an account between them to ascertain whether the indebtedness had been paid.

The master reported that Frank C. Hill owed B. B. Green the sum of $1,354.82.

Exceptions were filed by appellants to the master's report and upon hearing, the chancellor rendered judgment against Frank C. Hill in favor of B. B. Green for $1,304.82 and decreed foreclosure. From this judgment and decree of foreclosure, an appeal is prosecuted to this court.

No attack is made by appellant on the debit items in the account. The bone of contention is whether or not Hill was entitled to credits for eleven checks total-

ing $885.57 as of date the checks were given. The account in question grew out of business transactions between B. B. Green and Frank C. Hill in the years 1909 and 1910. The major portion of the transactions took place prior to September 9, 1909. Business was transacted between these parties during said time which did not enter into or become a part of the account in question. Many checks given by Hill to Green during that time relate to business transactions independent of the merchandise account in question. On September 9, 1909, Green rendered an account to Hill showing a balance against Hill of $39.76. All the checks for which credits are claimed were dated prior to and on September 9, 1909. There were some transactions between the parties that entered into and became a part of the account after September 9, 1909. The final balance on this account, together with taxes paid by Green on the mortgaged land, and a note in the principal sum of $600 with interest thereon, and a note showing a balance of $203.55 with interest thereon, entered into and became the subject of this suit. After the parties ceased to do business with each other, Green made a diligent effort to collect these amounts from Hill, but was put off from time to time until the 29th day of October, 1914, when this suit was instituted. No contention had ever been made by Hill that he had paid these notes and the balance due on the open account until after the institution of this suit. Had he received credit for the eleven checks on September 9, 1909, when Green rendered the account to him, Green would have been indebted in quite a sum to Hill.

The evidence as to whether the eleven checks should have been credited on the account was conflicting. If the checks were given in payment of transactions not carried into the account, then they should not have been credited on it. If given as payments on the account, they should have been credited on it. Nothing appears either on the checks or stubs indicating for what purpose they were given. Neither appellee nor appellant testified definitely to what transac-

tions the checks related. The master's report indicates that he made a diligent effort to ascertain the purpose for which each check was given. The chancellor reviewed the findings of the master on each item claimed as a credit and modified the findings of the master as to one item only. This court has read the evidence carefully and could not say with certainty that either one of these checks should have been credited on the account. It can not be said with assurance that either check was given as a payment on the account. In fact there are many circumstances in the record indicating that they had reference to independent transactions. It is impossible for us to say that the findings of the chancellor are against a clear preponderance of the evidence.

It is urgently insisted that the burden is upon the appellee to show what application was made of the funds derived from the checks in question; that having received and cashed the checks, the burden is shifted to him to definitely establish the purposes for which the checks were given. The burden is upon the debtor to maintain his plea of payment.

Unless the check shows on its face for what purpose it was given, or there is some positive evidence as to the transaction to which it is referable, we think the burden still continues on the party pleading payment to show that the check was given in payment of the account.

The checks in this case being referable under the conflicting testimony to either the account or to independent transactions, we can not find by a preponderance of the evidence that the checks were given in payment of the account.

The decree is affirmed.

MONTICELLO STATE BANK *v.* KILLIAN

Opinion delivered February 12, 1917.

1. SALES—SALE OF STALLION WITH RIGHT OF RETURN—DEATH OF STALLION—LOSS.—Defendants purchased a stallion from one C., the contract of sale providing that if the stallion did not prove to be a satisfactory foal-getter, the purchasers agreed to return him to the seller and receive another horse of equal value; the horse proved not to be satisfactory, but died before the purchasers returned him to the seller. *Held*, title had passed to the purchasers, subject to be divested in a certain way, and not having been so divested at the time of the horse's death, that the loss fell upon them.
2. SALES—AGREEMENT AS TO SELLER'S LIABILITY.—In the sale of personal property the seller has the right to define his liability by a special warranty and to provide for the measure of damages, or the manner of fulfilling his warranty.
3. CONTRACTS—BREACH—AGREEMENT AS TO REMEDIES.—When the parties to a contract agree upon the remedies that accrue for a breach of it, these remedies constitute the only relief that the purchaser has, and he will be governed by the stipulations contained in his contract.

Appeal from Miller Circuit Court, *Geo. R. Haynie*, Judge; reversed.

Wm. J. Berne, of Texas, for appellant.

1. The court erred in refusing to give the peremptory instruction asked by the plaintiff. (1) The animal when he died was the property of defendants, and his death did not relieve defendants from liability. The notes were purchased for value in reliance on the guaranty and contracts, under them there was no defense to the notes. The horse was sold under a contract of sale or return and the title passed on delivery with the right to return and exchange for another within the specified time; the horse died before any offer to return; the title was in defendants and they must bear the loss. There was no breach by Holbert, but if so the only remedy was the exchange for another horse. 138 S. W. 655; 157 *Id.* 390; 187 *Id.* 632; 188 *Id.* 17; 142 *Id.* 653; 159 *Id.* 1054; 2 Blackst. Com. 199; 17 Me. 344; 35 Am. Dec. 262; 117 Mass. 321; 20 Me. 317; 49 *Id.* 97; 100 Mass. 200; 52 Conn. 52; 7 Cow. 752; 35 Cyc. p. 290 (f); 200 U. S. 298; 38 W. Va. 312; 6 Am. & E. Enc. Law (2 ed.) 463, 473; 84 Neb. 464;

121 N. W. 582; 59 Am. Dec. 187; 127 S. W. 722; 12 Cush. 281; 16 Q. B. 493; 117 Eng. Rep. 968-9; 150 U. S. 312, 328; 35 Cyc. 343, 254; Tiedeman Sales, 321 § 213; Williston Sales, p. 377, § 273; 151 Fed. 896; 6 Eng. Rul. Cases, 575; 98 Ala. 176; 39 Am. St. 42; 7 *Id.* 42, and others.

2. The sole objection to the horse was that he did not comply with the warranty as to his foal-getting quality. The only remedy provided was for his return within the time specified. Cases in S. W. Rep. cited *supra.*

3. The case is fully developed and judgment should be entered here.

J. M. Carter, for appellees.

1. Defendants literally complied with every condition of the contract—the only exception being their failure to return the horse for exchange within the time specified. But the horse was dead from natural causes and without any fault or neglect of appellees. Appellant was not an innocent purchaser. 79 Ark. 149; Acts 1913, 284, §§ 56, 83.

2. By the death of the horse before the expiration of the time the law relieves defendants from anything more than paying the actual value of the horse; a cause over which they had no control preventing the return. Failure of consideration is a complete defense. 70 Mo. 272; 42 S. W. 1055. The contract here differs from that in 124 Ark. 535. Where no penalty is fixed by the contract the law fixes none. 27 Ark. 539; 19 Cyc. 710. This court will not extend the rule in 108 Ark. 325 as it would be unconscionable and harsh.

3. The facts warrant the verdict. The facts are undisputed except as to the value of the horse and thus it became a question of law on all issues except as to value of the horse. The law so given by the court was correct. The evidence fully sustains the verdict.

STATEMENT BY THE COURT.

The Monticello State Bank sued M. W. Killian and others to recover on three promissory notes. The notes were all dated May 10, 1913, and were due respectively, on November 1, 1914, 1915 and 1916, and were payable to the order of A. B. Holbert. The notes contained a provision that upon the failure to pay any one of them or any installment of interest, the holder at his option might declare all of them due. One of the notes was for $500.00, and the two remaining ones were for $1,000.00 each. The notes were given to Holbert for the purchase price of a stallion. Among other provisions the contract for the purchase of the stallion contained the following:

"In selling stallion horse Wahrsager (2240) 5181, to a company at Fouke, Arkansas, and surrounding towns and their vicinities, it is especially understood by the purchasers who have subscribed the shares in the said horse Wahrsager that A. B. Holbert agrees to and binds himself to fulfil only the following guarantee on the said horse Wahrsager (2240) No. 5181.

"1st. Because I believe there are few truly sound stallions, A. B. Holbert gives notice that he guarantees no stallion sound, but guarantees all serviceably sound as serving stallions."

"2d. If the said horse should not prove himself a satisfactory foal-getter, the purchasers agree to return him to the barns of A. B. Holbert at Greeley, Iowa, and receive another horse of value equal at the time of exchange to that of the horse now sold, and A. B. Holbert hereby agrees that upon return of the said horse by the purchasers to his barns at Greeley, Iowa, he will give the purchasers a horse of then equal value in even exchange, and in no case can the purchasers exchange for a horse of less value. It is agreed that the purchasers may have the option of making exchange at the barn of A. B. Holbert at Texarkana, Arkansas, while said Holbert is maintaining a barn at said place."

The fourth clause of the contract provided that the obligations on the part of Holbert should continue and be in force until after April 1, 1915. In the fifth clause of the contract the purchasers agree to have the life of the horse insured for a period of not less than one year, for not less than $1,000.00, for which amount, in the event of the death of said horse during the next ensuing three years from the date of the contract, the said A. B. Holbert agrees to replace him with a horse of equal value at his barn at Greeley, Iowa, or at Texarkana, Arkansas. The contract was dated May 10, 1913, the day on which the notes were executed.

The horse was delivered to the defendants pursuant to this contract and remained in their possession until December 15, 1914, when he took sick with blind staggers and died about two hours later.

The defendants, pursuant to the terms of the contract, procured a policy of insurance on the horse for $1,000.00 which covered a period of time from the 19th day of May, 1913, to the 19th day of May, 1914.

The notes were transferred by Holbert to the Monticello State Bank for value received on October 7, 1915. The notes were endorsed by A. B. Holbert and it was represented to the bank by his agent that the signers of the notes were solvent and that the notes could be collected. The bank knew that the notes were given for the purchase price of the stallion and the contract was shown to it before the notes were purchased.

The defendants testified that they purchased the horse for a breeding stallion and that he was almost wholly worthless for that purpose. They said the reason they did not send the horse back the first year was because they wanted to give him a fair trial.

The jury returned a verdict for the defendant and the plaintiff has appealed.

HART, J. (after stating the facts). The court submitted the case to the jury on the theory that the sale of the stallion was a sale on trial or a delivery with the

right to buy within a stipulated time if the defendants liked the horse, and that until the expiration of the limited time the title and risk was in the vendor.

On the other hand it is contended that the delivery of the stallion under the agreement amounted to what is called a contract of sale or return and that in such cases the title vests immediately in the defendants and that the loss of the horse, under the facts of this case, must fall upon the defendants. If the transaction is a sale on trial, it is said to be a sale on condition precedent; that is, the title does not pass until the condition described is fully performed although the possession is delivered.

Such transaction is rather a bailment with the option to buy than a sale, and the title does not become vested in the purchaser until he exercises his option to purchase. *Haddon* v. *Finley*, 125 Ark. 529, 189 S. W. 353; *Ward Furniture Manufacturing Co.* v. *Isbell*, 81 Ark. 549. On the other hand in cases of a purchase with a right of return, the title and risk immediately pass to the purchaser. If it is a sale or return, it is said to be a sale on condition subsequent; that is, the title passes with the possession but subject to be divested if the condition is not performed and the property is returned. In this class of cases the title passes by the delivery of possession subject to defeasance by the exercise of the option reserved to rescind and return. *Osborne* v. *Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859; *Guss* v. *Nelson*, 200 U. S. 298; *Sturm* v. *Boker*, 150 U. S. 312; 35 Cyc. 290; Tiedeman on Sales, sec. 213; 1 Wharton on Contracts, sec. 590; Benjamin on Sales, Bennett's 7th Ed. American Note, 605.

In the contract under consideration, the transaction is called in one place a purchase and sale. The defendants are spoken of throughout as the purchasers. In the second clause of the contract it is expressly provided that if the horse should not prove himself a satisfactory foal-getter the purchasers agree to return him to the seller and receive another horse of equal value. By the fifth clause of the contract it is provided that the pur-

chasers shall procure a policy of insurance on the stallion for a period of not less than one year for not less than $1,000.00, for which amount, in the event of the death of the horse during the next ensuing three years from date, the seller agrees to replace him with a horse of equal value.

(1) The terms of the contract in question show the transaction to be a sale or return. Therefore the title to the horse passed to the defendants subject to be divested out of them and revested in the seller by the return of the horse to the seller in accordance with the terms of the contract. The horse died before the defendants exercised their right to return him under the contract and the loss must fall on them. 35 Cyc. 254; *Strauss Saddlery Co.* v. *Kingman & Co.*, 42 Mo. App. 208, and *Sturm* v. *Boker*, 150 U. S. 312.

It is claimed that this construction of the contract renders it harsh and unjust in its terms. It is sufficient for us to say that the parties have so willed it. Under the law the parties were competent to make the contract in that manner and if the terms of the contract are sufficient to show they did so their stipulation is the law of the case. Courts can only enforce contracts which may be lawfully made according to their terms. They are not at liberty to pass upon the justice or injustice of the actions of parties who are capable of contracting for themselves. The construction we have given the contract is borne out by the fifth clause of it. In it the purchasers agree to have the life of the said stallion insured for a period of not less than one year for not less than $1,000.00, for which amount, in the event of the death of said horse during the next ensuing three years from date, said A. B. Holbert agrees to replace him with a horse of equal value at his barn.

The parties are presumed to have understood the terms of the contract. Thus the parties themselves recognized that the purchasers would be liable for the purchase price of the horse in case he died. This is borne out by the fact that they provide that in case they should insure him as provided in the fifth clause of the

contract, that the seller should give them another horse in case he died within three years. This of itself shows that the purchasers realized that they must pay for the horse unless they exercised their option to return him in the manner provided for in the contract.

It follows that the court erred in not instructing a verdict for the plaintiff as requested by it and for that error the judgment must be reversed. Inasmuch, however, as the case has been fully developed and the question of the liability of the defendant is entirely one of law, it will not be necessary to remand the case for a new trial. Judgment will be entered here for the balance due on the note amounting to $2,450.00 with interest thereon from May 10, 1913, at the rate of 8% per annum until paid.

HART, J. (On rehearing.) Counsel for the defendants in their petition for rehearing insists that the court overlooked the theory on which the lower court submitted the case to the jury.

The trial court told the jury that the defendants contended that the horse in question was worthless as a breeding stallion, the purpose for which they say that he was purchased, and that therefore, the consideration for which the notes sued on were executed had wholly failed. The court further told the jury that if it found from a preponderance of the evidence that the horse was worthless as a breeding stallion, its verdict should be for the defendants.

(2) Counsel for the defendants insists that this instruction was correct and to sustain his position cites section 28 of the Uniform Negotiable Instrument Act, passed by the Legislature of 1913. Acts of 1913, p. 260. The section relied on provides that absence or failure of consideration is a matter of defense against any person, not a holder in due course, and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise. This section of the statute is but declaratory of the law as it existed before the statute was passed. *Webster* v. *Carter*, 99 Ark. 458. It has no application, however,

under the facts of this case. In the sale of personal property the seller has a right to define his liability by a special warranty and to provide for the measure of damages or the manner of fulfilling his warranty. This was done in the present case by the seller. Such a contract is valid at common law and there is nothing in our statute forbidding it. The special guarantee in the present case is that if the horse should not prove himself a satisfactory foal-getter, the purchasers agree to return him to the barn of A. B. Holbert at Greely, Iowa, and to receive another horse of equal value. The horse died before he was returned.

(3) Counsel for the defendants say that he died through no fault of theirs. Be that as it may, they did not return the horse as provided in the contract. However harsh the terms of the contract may appear to be, it must be remembered that the parties were capable of contracting and the contract between them was a lawful one. The parties it to must, therefore, abide by its terms. Contracts containing similar provisions to this have been before this court before and it has been uniformly ruled that when the parties to a contract agree upon the remedies that accrue for a breach of it, these remedies constitute the only relief that the purchaser has and he must be governed by the stipulations contained in his contract. *Harrison* v. *Walker*, 124 Ark. 555, 188 S. W. 17; *Crouch* v. *Leake*, 108 Ark. 322; *Holland Banking Co.* v. *Haynes*, 125 Ark. 10, 187 S. W. 632.

It necessarily follows that the court erred in giving the instruction referred to. The point discussed by us in our former opinion contains the real question of law in the case and we adhere to what we there said with reference to it.

The motion for rehearing will be denied.

CITY OF MALVERN v. NUNN.

Opinion delivered February 12, 1917.

1. IMPROVEMENT DISTRICTS—ORGANIZATION—VALUATION.—The last assessment roll prior to the organization of the district is the only criterion by which to ascertain the total valuation of real property within the bounds of the district.
2. IMPROVEMENT DISTRICTS—ASSESSMENT OF PROPERTY—SCHOOL PROPERTY.—Act 125, Acts of 1913, does not repeal Kirby's Digest, § 5717 but section 7, Act 125, Acts of 1913, subjects the property of public school districts to assessment for local improvements beneficial thereto.
3. IMPROVEMENT DISTRICTS—ORGANIZATION—PETITION—OWNERS OF ESTATES BY INHERITANCE.—Owners of lands which they have acquired by inheritance may sign the petition for the organization of an improvement district.
4. IMPROVEMENT DISTRICTS—ORGANIZATION—PETITION—WHO MAY SIGN. —Section 1, Act 125, Acts 1913, held to mean that all property represented by instruments subject to record shall be considered in determining whether the petition represents a majority in value of the property in the proposed district, otherwise not.
5. IMPROVEMENT DISTRICTS—ORGANIZATION—PETITION—GUARDIAN MAY SIGN.—The guardians of minors and insane persons may sign the petition for the organization of an improvement district.
6. SAME—SAME—SAME—CORPORATIONS.—The petition for the organization of an improvement district may be signed by the officers of a corporation owning property in the proposed district, when properly authorized by the directors.
7. SAME—SAME—SAME—PARTNERSHIP.—One partner may sign for partnership property, the petition for the organization of an improvement district, and it will be presumed that the signature of the partnership was executed with authority, in the absence of a showing to the contrary.
8. IMPROVEMENT DISTRICTS—ORGANIZATION—OWNERS OF PROPERTY UNDER RECORDED DEEDS MAY SIGN PETITION.—In the organization of a local improvement district, deeds of record in the recorder's office in the county, at the time the city council passes on the question, are the criterion in so far as the property represented by instruments subject to record is concerned.
9. IMPROVEMENT DISTRICTS—PETITION—"JAS. D. CAMPBELL AND WIFE." The signature "Jas. D. Campbell and Wife," to a petition for the organization of an improvement district, held sufficient.

Appeal from Hot Spring Chancery Court, *J. P. Henderson*, Chancellor; reversed.

Henry Berger and *Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellants.

1. A majority in value of the owners of real property signed both petitions. The majority must be determined solely by the county assessment books and property left off these books cannot be considered. 99 Ark. 508, 516. Churches and school property should both be put upon the assessment books, but if they are omitted the books are still conclusive. *Ib.*

2. Guardians may sign for their wards. Kirby's Dig., § 5717; 2 Page & Jones on Taxation by Assessment, § 788; 32 Oh. St. 545, 561; 42 *Id.* 62; 93 N. W. 231-3; 20 Atl. 1028; 64 Md. 10; 14 Ark. 396; 84 *Id.* 258; 48 *Id.* 297.

3. The signature to the partnership property in the firm names was sufficient. 36 Ark. 464 overruled in 65 Ark. 503-6; 92 *Id.* 63; 74 *Id.* 476; 68 *Id.* 157; 56 *Id.* 179, 324.

4. Deeds filed and recorded at the time the court disposes of the case should be considered. Act of 1913. Chancery cases are tried *de novo.* If the deeds were of record when the case was tried in the chancery court they should be considered. 85 Ark. 105; 93 *Id.* 396; 101 *Id.* 503.

5. Estates by inheritance and will should be considered. The Constitution provides that local improvement assessments shall be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. The title of heirs and devisees is of *record* even if not recorded in the office of the recorder of deeds. The Legislature can not arbitrarily deprive owners of rights given by the Constitution. 33 Ark. 816; 49 *Id.* 535; 76 *Id.* 135; 89 *Id.* 273; 123 *Id.* 284, 327. If the court below was right the Act of 1913 is void. Acts of 1913, p. 528; 64 Kans. 802; Cooley Const. Lim. (5 Ed.) 453; 34 Am. Rep. 55; 39 Minn. 438; 56 L. R. A. 468, 472; 32 Ark. 132; 4 Am. Rep. 214; 4 Wheaton, 519; 13 Mich. 329; 45 Barb. 212; 23 Ind. 46, etc.

6. Corporations can sign by directors through their officers. 2 Cook on Corp. (4 Ed.), §§ 708, 709; Kirby's Dig., § 841.

7. All of the Malvern branch railroad was not within the district. The property was certified by the Tax Commission, but it is not shown where the property was located. Buildings are not real property. Kirby's Dig., § 6949. Buildings and grounds are real estate. The railroad property should not be counted.

8. The signatures by husband and wife were good. 84 Ark. 258; 86 *Id.* 368; 112 *Id.* 362.

9. J. P. Fletcher, who signed the water petition did not sign the sewer petition. Mary McCoy also failed to sign the latter. These should be deducted. Mrs. J. P. Browning signed both and should be counted. Mr. & Mrs. are no part of the names. 29 Cyc. 267.

If these contentions are correct, and we contend they are, a clear majority for the petition is shown.

W. Morton Carden and *E. H. Vance, Jr.*, for appellees.

1. The questions before this court are of two kinds: (1) What properties and values are to be considered in arriving at the total property and values; (2) the legality of certain signatures to the majority petitions. Const. Art. 19, § 27; Kirby's Dig., §§ 5667, 5673, 5717; Acts 1913, p. 528.

2. School property should be counted in the aggregate valuation. 99 Ark. 508; 84 *Id.* 320. The Act of 1913 changed or repealed Kirby's Dig., § 5715, etc. 56 Ark. 335; 91 *Id.* 5; 2 How. (N. S.) 423; 69 Ark. 68; 91 *Id.* 5. The tax rolls plus the school property is now the basis for the consideration of whether or not a majority has signed.

3. Guardians cannot sign for property owned by their wards. 108 Ark. 146; 69 *Id.* 74; 50 *Id.* 127; 111 *Id.* 332. They are not owners. 14 *Id.* 396; 48 *Id.* 297; 53 *Id.* 573. The probate court cannot ratify. The Legislature says "the absolute owner," and guardians are not so.

4. One partner cannot sign for the firm. 36 Ark. 464; Schumaker on Partnership, (2 Ed.) 124; 111 Ark. 322.

5. Deeds filed after the petitions were filed and after the council had acted cannot be considered. The Act says the council and court shall be guided by the record of deeds in the office of the recorder and shall not consider any unrecorded instrument. This is mandatory and the act is constitutional. 26 Ark. 285; 99 *Id.* 518; 45 *Id.* 401; 49 *Id.* 376; 67 *Id.* 591; 59 *Id.* 436.

6. Estates by inheritance and will are not of record as prescribed by the act. 99 Ark. 518 and cases cited *supra* under No. 5.

7. The stockholders of a corporation are the owners. A signature by officers or directors is not sufficient. 108 Ark. 146.

8. The value of the railroad property in both districts should be considered. Both properties should be on the tax books and were benefited. The tax rolls are conclusive. 99 Ark. 518. It was error to deduct the $1,532.00 because of double taxation. The buildings were real estate, Kirby's Dig., §§ 5673, 6872.

9. Where the wife owns the property she must sign. The signatures of "J. D. Campbell and wife" and "Mrs. J. P. Browning" and "J. P. Browning" the husband's name, are not sufficient. There could be no ratification for the wife's name was not signed. 111 Ark. 323.

10. Only one of the Chamberlain heirs signed. 23 Ark. 568; Kirby's Dig., § 8020. A refusal to allow certain owners to sign petitions is not confiscation. The Legislature is granted the power to form these districts and prescribe the manner and methods. It has spoken and their determination is final. Appellants, after making these proper deductions, have not a majority of the values. The decree should be affirmed.

HUMPHREYS, J. Appellees brought two suits in the Hot Spring Chancery Court against the city of Malvern, and G. E. Mattison, T. E. Nunn and E. T. Bramlitt, Commissioners of Water Works Improvement District No. 12 and Sewer Improvement District No. 13, seeking to enjoin the city council and commissioners

from proceeding further in the promotion or construction of the districts.

Appellants answered and the pleadings and proof tender only one issue for decision here. The issue is whether a majority in value of the owners of real property in each district signed the second petition in the course of the organization of said districts. For the purpose of convenience, the two cases were consolidated by the consent of all parties.

Appellants assert that the taxable value in each district amounted to $381,719.15; appellees contend for a total valuation of said properties at $404,651.00. The correct amount of the total valuation depends upon what shall be done with two items. The chancellor deducted $1,532.00 from the total amount on the ground that the Malvern Branch of the Rock Island Railroad was doubly assessed. It is immaterial that the last assessment roll shows a double assessment, for this court has construed section 5717 of Kirby's Digest on its application to the question of the method of determining whether a majority in value of the owners of real property within an improvement district had consented to the improvements. Mr. Justice Frauenthal, in rendering the opinion, said in referring to section 5717 of Kirby's Digest:

"By that statute we are of opinion that the Legislature has prescribed that the total value of all the real property in an improvement district shall be evidenced and determined by the total valuation placed upon the property therein as shown by the last county assessment, and that the value of each lot and parcel of real property therein shall be evidenced and determined by the valuation placed thereon in said assessment." *Imp. Dist. of Clarendon No. 1* v. *St. Louis S. W. Ry. Co.*, 99 Ark. 508.

(1) The last assessment roll prior to the organization of the district is the only criterion by which to ascertain the total valuation of real property within the bounds of the district. The chancellor erred in

deducting $1,532.00 from the total value shown on the last assessment roll on account of the double taxation.

(2) The chancellor declined to include in the total valuation, school property of the assessed value of $19,900.00. It is agreed that no assessment was made of this property and that it is not listed or valued in the last assessment roll. Appellee contends, however, that school property is exempt from general taxation and should not appear in the clerk's assessment. Section 6987 of Kirby's Digest declares otherwise. It requires the assessor to list all exempt property—specially mentioning school property and property used exclusively for public purposes—in a special list. Appellees say that section 7, Act 125, Acts of 1913, repeals that part of section 5717 of Kirby's Digest, insofar as school property within the district is concerned. Act 125, referred to, only undertakes to amend two sections of Kirby's Digest. It does not specifically repeal section 5717, nor does it do so by necessary implication. Section 7 of Act 125, Acts 1913, *subjects the property of public school districts to assessments for local improvements beneficial thereto.* There is no language or expression in the statute that sets up any different standard for measuring the value of school property than any other real estate in the district. This property has a voice in the organization of the district according to its value fixed by the assessment roll. There is no conflict between section 7 of Act 125, Acts 1913, subjecting school property to assessment for local improvement purposes, and section 5717 of Kirby's Digest providing that the last county assessment on file in the county clerk's office shall govern the council as to the value of the property. The statutes can be construed together and both stand. Both of these statutes are perfectly consistent with section 6987 of Kirby's Digest, requiring the assessor to carry public school houses and other public property on a separate list or roll.

The holding of the chancellor excluding the school property in the district is correct.

The chancellor found the total valuation to be $38,719.15 by deducting $1,532.00 on account of a double assessment of the Malvern Branch of the Rock Island Railroad. By adding this amount erroneously deducted, the total valuation of assessments according to the last assessment roll should be $383,251.15. Any appreciable amount over one-half of this sum would be a majority in value of the property in each district. In round numbers, the sum of $191,626.00 is a necessary majority.

It is conceded and agreed that the petitioners had signers on the petitions for the creation of the districts representing a property value of $219,120.00. The parties agree that property to the value of $12,512.50 should be deducted from the last named amount because of unauthorized and illegal signatures to said petition.

(3-4) It is also agreed that owners by inheritance and under wills signed for property to the value of $8,800.00. The chancellor held this amount should be deducted from the petition because the deeds of owners by inheritance and under will do not appear on the record of deeds in the office of the recorder of the county. In striking this property from the petition, the chancellor was guided by his construction of the latter part of section 1 of Act 125 of Acts of Arkansas, 1913. The language used in the act is as follows:

"In determining whether those signing the petition constitute a majority in value of the owners of real property within the district, the council and the chancery court shall be guided by the record of deeds in the office of the recorder of the county, and shall not consider any unrecorded instrument."

It is provided by our Constitution that assessments for local improvements "shall be based upon consent of a majority in value of the property holders owning property adjoining the property to be affected."

The construction placed upon the act by the chancellor brings the act in direct conflict with this provision of the Constitution. The Act must fall if the

construction placed upon it by the chancellor is correct. The Act can stand and be perfectly consistent with the Constitution if we construe the statute to mean that *unrecorded instruments*, subject to record, shall not be considered by the council in determining whether a majority in value have signed the petition. Certainly the intent of this statute was not to prevent property owners of real estate in improvement districts from signing the petition. Validity may be given the statute by saying it means that all property represented by instruments subject to record shall be considered if recorded, otherwise not. Then any one holding a deed to property can sign the petition by placing his deed on record. He is not excluded from participation in the organization of the district if he follows the method provided by law. The owner of lands by inheritance or under will holds a derivative title; the one derives it from the ancestor or relative, the other from the testator. Neither acquires it by an instrument subject to record in the recorder's office of the county. They are real owners and can convey by instrument subject to record. Was the intention of this statute to exclude owners and holders of lands in fee from participating in the organization of improvement districts simply because they had no instruments evidencing their title on record? A large portion of the lands in every district is held by derivative title. Our construction of this statute is that it applies only to lands evidenced by instruments subject to record in the recorder's office of the county. The chancellor committed error in striking the estates by inheritance and will from the petitions.

(5) Guardians signed the petition for property to the value of $4,450.00 and the chancellor deducted said amount from the petition because the legal title to the real estate was not in the guardian. Guardians are authorized by statute to sign for their wards. Kirby's Digest, section 5717. Minors and insane persons are not *sui juris*, and can act only through guardians by authority vested in them by the statute laws of the State. This court has held that an owner of real estate

within the bounds of a contemplated district can sign by duly authorized agents. It has held that a wife may ratify her signature if signed by her husband without authority. *Board of Improvement* v. *Offenhauser*, 84 Ark. 258.

The State of Arkansas has absolute power to provide for the appointment of a guardian for a minor or insane person and to fix the scope and extent of his authority. The State has provided the ways and means for his appointment, and conferred power on the guardian to sign petitions for the organization of improvement districts wherein his ward's lands are situate. The relationship existing between guardian and ward suggests the vesting of such power in the guardian. The statute is valid and confers the power, so the chancellor erred in deducting the value of lands signed for by guardians.

(6) It is contended that the property of a corporation must be signed for by the stockholders or specially authorized by a majority of the stockholders. This contention is on the theory that the real owners of the fee must sign the petitions seeking to organize the district. Under former adjudications of this court, it is proper to sign by agent, or if the name of the owner is signed by agent without authority, the owner can afterward ratify the act.

Boards of directors are agents for the corporations they represent and have very broad powers under the statutes of this State. Section 841 of Kirby's Digest provides: "The stock, property, affairs and business of every such corporation shall be under the care of, and shall be managed by, not less than three directors, who shall be chosen annually by the stockholders, etc." The power vested by this statute is so general as to include the power of the board of directors through its duly authorized officers to sign a petition for the organization of an improvement district. Necessarily, the reserved powers in the stockholders in a corporation must be limited, else the conduct of the corporate affairs would be hampered at every turn. This broad statute

conferring power on the board of directors to act for the corporation is grounded in the wisdom of the general law on the subject. In signing these petitions, the boards acted within the scope of their actual and implied authority. The chancellor was correct in not excluding the property represented by corporations from the petitions.

(7) It is contended that one partner cannot sign for the partnership property. This court has decided that conveyances executed by one partner in the presence of the other, and by his consent, are binding in equity on the firm. *Ferguson* v. *Hanauer*, 56 Ark. 167; *Greer* v. *Ferguson*, 56 Ark. 306.

Two subsequent cases are cited to the effect that the signing of a co-tenant binds his interest only. In those cases the partnership or joint name does not appear to have been signed. In the case at bar, the names of "Johnson & Parish" and "Sheldon Handle Company" were signed. Unless something to the contrary appears, this court will presume that the firm or joint names were signed by authority, and therefore bind the firm. The chancellor erred in deducting $300.00 from the petition on account of the signature of "Johnson & Parish."

(8) The chancellor deducted $7,700.00 in value from the second petitions presented for the organization of the districts, because the deeds or conveyances representing these amounts were not on record on the 23d day of June, 1916, the date that the city council found that the petitions contained a majority in value of the owners of real property within said districts. It is said that he erred for the reason that at the time he heard the case, deeds representing $3,650.00 of said sum had been recorded. It is argued that since the chancellor heard this case as an original proceeding, he heard it *de novo;* and under section 7, Act 125, of the Acts of Arkansas, 1913, he was directed to be guided by the deed record on the date of the hearing. In the same section referred to, the character of action in the chancery court is designated as a *review* of the proceed-

ings had before the city council. Improvement districts within towns or cities are established by proceedings before the city council and not in chancery courts. It follows that deeds of record in the recorder's office in the county, at the time the council passes on the question, is the criterion in so far as the property represented by instruments subject to record is concerned. The chancellor correctly deducted the amount of $7,700.00 from the petitions on this account.

(9) Lots 7 and 8, block 19, value $150.00, appear to have been signed for in the name of "Jas. D. Campbell and Wife." The husband signed in this manner with the consent and knowledge of his wife. Had he signed either the name "Birdie Campbell" or "Mrs. J. D. Campbell" with her consent and knowledge, certainly no question would have been raised as to the sufficiency of her signature. Jas. D. Campbell & wife included the name of "Mrs. Jas. D. Campbell" as effectually as if signed "Mrs. Jas. D. Campbell."

Mrs. Jas. P. Browning signed both petitions for property of the value of $500.00. She signed the Water Works Petition as "Mrs. J. P. Browning" and the Sewer petition "J. P. Browning." In both instances she was signing for herself and not her husband.

The signatures under the agreed statement of facts are sufficient and neither amount should be deducted from the petition.

The record discloses that J. P. Fletcher signed the Water Works petition for $350.00, and Mary McCoy for $250.00; and that neither signed the sewer petition.

By way of resume—the correct total valuation of the property in each district is $383,251.15.

Amounts signed originally in the Water Works District were $219,120.00. Amounts signed originally in the Sewer District, $218,520.00.

The necessary majority in value would be $191,-626.00. By our findings, the following amounts should be deducted from the petitions presented to the city council for the organization of the districts.

Deeds not recorded on June 23, 1916, $7,700.00, and illegal and unwarranted signatures in the sum of $12,512.50, making a total of $20,212.50.

Deducting said amount from the total amount signed for Water Works leaves a balance of $198,970.50, or $7,281.50 more than the necessary majority; and deducting said amount from the total amount signed for the Sewer District leaves $198,307.50, or $6,681.50 more than the necessary majority.

More than a majority in value of the property owners in each district having signed the petitions for the organization thereof, injunction will not lie to restrain the city and commissioners from taking further proceedings, either in the organization of said districts or the construction of said improvements.

The decree will be reversed and the cause remanded with instructions to dismiss the bill.

SCOTT v. CLEVELAND.

Opinion delivered February 5, 1917.

REAL ESTATE BROKERS—COMMISSIONS.—In an action for commissions for the sale of certain timber, the appellant claimed that he was the procuring cause of the sale closed by the appellee, the owner. *Held*, a verdict in appellee's favor which was supported by some evidence would not be disturbed although it appeared to be against the preponderance thereof.

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

G. B. Oliver, for appellant.

1. This is the third appeal in this case. The law was settled on the former appeals. 110 Ark. 9; 122 *Id.* 259; 183 S. W. 197. Under the evidence and instructions there was only one proposition to consider, viz.: "Who, *under the instructions*, procured the purchaser and made the sale? The only rule for determining that question is found in instructions six and seven. The jury found for plaintiff but there is no evidence to support the verdict on any of the points in the instructions. Day

refused to buy from James at the price asked. Day was solicited to buy after James' time had expired. Fleetwood had the agency to sell and consummated the trade. The evidence is fully developed and this cause should be dismissed. 88 Ark. 592, 594.

2. There is only one explanation of the verdict, and that is they did not understand the instructions—were confused and uncertain as to their meaning. Defendant's motion to amend or change the instruction should have been granted. All confusion or misunderstanding would have been eliminated if the modification had been made.

3. If the court had given the instructions asked by defendants, no confusion or misunderstanding would have resulted. But the court gave ambiguous instructions, refused to modify, and refused Nos. 5, 6 and 7 for defendant, all of which were errors.

4. Fleetwood has been paid and defendants should not be required to pay a second commission to one not entitled thereto.

C. T. Bloodworth, for appellee.

1. Scott made the contract with Cleveland and Cleveland procured the buyer. This was the contract as sworn to by Cleveland and the jury believed him, just as two other juries before did. The judgment should be affirmed. 121 Ark. 315; 110 *Id.* 9; 122 Ark. 243.

2. There is no error in the instructions—either in giving or refusing. Three juries have found for the plaintiff and found evidence sufficient to sustain a verdict. This litigation should end and the judgment should be affirmed. 121 Ark. 315.

SMITH, J. This is the third appeal of this case. Opinions on the former appeals are found in 110 Ark. 9, and 122 Ark. 259. Upon the first appeal the judgment was reversed because of the error of the court in refusing to grant a continuance, and the judgment was reversed upon the second appeal because of the error in refusing to give two instructions set out in the opinion.

Upon the third trial, from which this appeal is prosecuted, the court gave the instructions approved by us upon the second appeal. During the argument before the jury, a difference of opinion arose between counsel as to the meaning of instruction numbered 6, which is identical with instruction numbered 2 set out in the second opinion. This instruction reads as follows:

"6. Even though you should find from the evidence that plaintiff through Fleetwood, procured the man who finally purchased the timber; yet, if you further find that the man so procured, refused to buy the timber at the price asked, but later, after the time of James had expired was solicited by Fleetwood and that Fleetwood then had the agency to sell the timber at a lower price and consummated the trade through Fleetwood, then plaintiff would not be entitled to any commission and you will find for the defendants."

Counsel for defendants, who are now appellants, contended in his argument that the words, "at a lower price," meant at a lower price than John James had asked for the timber; while the attorney for the plaintiff, who is the appellee, argued to the jury that the words, "at a lower price," meant a lower price than it was offered by defendants; and the court refused the request of appellants to amend the instruction to read, "at a lower price than James asked Day for it."

The evidence is summarized in both former opinions, but a brief statement of it is essential to an understanding of this instruction. Appellee claimed a commission for making a sale of a tract of timber on land owned by appellants. The timber was sold to one T. E. Day through the efforts of one Fleetwood, to whom a commission was paid by appellants, and appellants say Fleetwood was their agent and made the sale as such, and that appellee was not their agent at the time of the sale and did not procure the purchaser. That they had given an agency to one John James to sell the timber, this agency expiring July 1, 1911, and before the sale was made. That appellee was a son-in-law of James and attempted to assist James to make a sale during the

existence of that agency by showing the timber to Day who subsequently became thepurchaser, and that after July 1, there was no agreement between appellant and appellee except that appellee was to show the timber to any prospective purchaser and be paid a reasonable compensation for his services. The sale was finally consummated in December, 1911, and appellee testified that he then had an agency for the sale of the timber, pursuant to which he had employed Fleetwood, at an agreed compensation of $100, to interest Day in the purchase of the timber and that the sale was thus consummated. Appropriate and correct instructions stated the law applicable to this contention.

We think the point in dispute between counsel an immaterial one, and that the court committed no error in refusing to modify the instruction. We held on the second appeal that the instruction should have been given because it covered a phase of the case not covered by any other instruction and told the jury to find for Scott, the defendant, if they found that the purchaser was procured after the expiration of the agency of James, although the purchaser was procured through plaintiff by Fleetwood, provided they found the purchaser refused to buy during the existence of that agency, but later, and after its expiration, Fleetwood then procured Day as a purchaser. It was contended by appellants that the only authority appellee could ever have had to negotiate a sale of the timber existed during the agency of his father-in-law James, and that his authority then was to assist James in making a sale, and that after the expiration of the agency of James appellee was without authority to negotiate a sale, and the instruction set out above was given to cover that phase of the case. Appellant prepared this instruction and asked it at two trials, and while it is somewhat ambiguous the amendment proposed did not make it less so, as there was no question about the price at which the timber sold. Fleetwood admittedly had the authority to sell at the price paid by Day, for the sale was made by appellant at that price. The question was

whether Fleetwood had an independent agency, or was acting under the employment of appellee who, himself, had an agency to sell the timber. The instruction quoted presented the law applicable to appellant's contention. Other instructions presented the law applicable to appellee's contention. Upon sharply conflicting evidence three juries have found that appellee had an agency to sell the timber, and that the sale was consummated through Fleetwood, his sub-agent.

Even though this finding may be against the preponderance of the evidence, it cannot be said, as appellants insist, that it is without evidence to support it, for appellee so testifies and his evidence, if believed by the jury, is legally sufficient to support the verdict.

Other questions are discussed, but we do not regard them as important.

Finding no prejudicial error the judgment is affirmed.

LOWE AUTO COMPANY v. WINKLER.

Opinion delivered February 5, 1917.

1. LIENS—MECHANICS' AND WHEELWRIGHTS' LIEN—AUTOMOBILES.—In the absence of a statute on the subject, wheelwrights and mechanics, doing repairs on an automobile, are entitled to a lien thereon.
2. LIENS—REPAIRS ON AUTOMOBILES.—Although appellant may have a lien upon an automobile belonging to appellee for labor performed thereon, he has no right to hold possession of the same until the amount due is paid, as was the case with respect to common-law liens.
3. LIENS—REPAIRS ON AUTOMOBILE—ASSERTION OF LIEN—COUNTERCLAIM.—A. did repairs on B.'s automobile and held the same for the debt. B. brought replevin, and A. filed a counterclaim setting out his lien. *Held,* the filing of the counterclaim was not a proper assertion of the lien under the statute (Act 147, Acts 1903).

Appeal from Arkansas Circuit Court, Southern District; *Thomas C. Trimble*, Judge; affirmed.

Lee & Moore and *L. C. Smith*, for appellant.

1. It was not necessary to file with the circuit clerk a just and true account, as this suit was com-

menced within the ninety days, the time in which to file the affidavit. Defendant also had possession of the car, either of which was sufficient to preserve the lien. 49 Ark. 475; 57 *Id.* 284; 58 *Id.* 16; 27 Cyc. 384, 389; 31 *Id.* 335.

2. Defendant had a lien. Acts 1911, p. 298, amending Kirby's Digest, §§ 5013-14; 103 Ark. 144; 171 Ill. App. 310; 185 *Id.* 425.

3. The verdict is neither founded upon the evidence, law, equity, common sense or right between man and man. Instruction No. 1 for plaintiff is not the law. Not only are labor, repairs and material used in repair the basis of a lien, but gasoline, oil, prestolite and tires are absolute necessities and are also a lien. 71 Ark. 338. No. 2 is not the law. 58 Ark. 7. It was error also to give § 5018, Kirby's Digest. It had no place in the trial. It only gives the right to sell but is not mandatory. Defendant was entitled to judgment on its cross-complaint.

Carpenter & Bowers, for appellee.

The evidence is ample to sustain the verdict. It is admitted that no lien was filed with the clerk as required by law. This is ample to justify the jury in their verdict.

2. There is no error in the instructions. Acts 1911, 298, amending Kirby's Digest, § 503; *Ib.* § 5017-18. The Act of 1911, if it does not repeal §§ 5017-18, does supersede them. The instructions fairly state the law.

3. The filing of a cross-complaint was not a substantial compliance with the act and the cases cited are not in point. Kirby's Digest, § 5013-14. Appellant had no common law lien. Our statute supersedes the common law. The statute must be complied with.

McCULLOCH, C. J. This is an action instituted by appellees, E. H. Winkler and his wife, M. D. Winkler, to recover possession of an automobile held by defendant, J. M. Lowe Auto Co. at its garage for payment of a repair bill. The defendant filed a counterclaim on an account for repairs alleged to have been made, the

original account aggregating the sum of $244.00, with credits reducing the same to $140.05. The account shows repairs made from time to time, and it appears from the evidence that the car was left with the defendant for repairs by appellees. The jury returned a verdict in favor of appellees for the possession of the car and in the sum of $1.00 as damages for the detention. There are questions in the case concerning rulings of the court during the progress of the trial which have been eliminated by the verdict, and we proceed to determine only those questions which are necessarily presented on this appeal.

(1) The contention of counsel for appellant is that the appellant had a lien for repairs which authorized it to hold the car until the repair bill was paid, and also that the filing of the counterclaim within the period prescribed by statute for filing a lien with the clerk of the circuit court, was sufficient compliance with that statute. Automobiles are a species of vehicle which were unknown at common law, but little doubt can be entertained that in the absence of a statute on the subject, wheelwrights and mechanics would be entitled to a lien on an automobile the same as upon any other kind of vehicle repaired. The Legislature enacted a statute at the session of 1899 (Kirby's Dig., secs. 5017-5019), providing for a method of enforcing a common law lien. It created no lien, but merely provides that "mechanics and artisans who are in possession of articles of personal property, and hold the same by virtue of a lien thereon for labor and material, shall have a right to sell the same for the satisfaction of the debt for which the property is held." The statute further requires that a bond be given in an amount to be fixed by a justice of the peace or circuit judge, before the sale is made, and that such sale shall not take place until the expiration of thirty days from the time the work was completed. The General Assembly of 1903 enacted a statute, approved April 15, 1903 (Kirby's Digest, secs. 5013-5016), creating a statutory lien in favor of blacksmiths and wheelwrights and providing a method for enforce-

ment of such lien. A section of that statute provides that a person desiring to avail himself of its provisions must, within thirty days after work or labor is done, file with the clerk of the circuit court of the county in which the debtor resides, an account of the demand due and description of the property to be charged with the lien, and that the lien accruing under the statute may be enforced at any time within four months after the account has been filed with the clerk in the manner provided by statute for the enforcement of laborer's liens. The statute has since been amended so as to make ninety days the time allowed for filing the account in the office of the circuit clerk, instead of thirty days as provided in the original statute. Act of Session 1911, p. 298.

In *Shelton* v. *Little Rock Auto Co.*, 103 Ark. 142, we held that the Act of 1899, *supra*, was repealed by Act 147, p. 259, of April 15, 1903, and that the remedy prescribed in the latter statute must be pursued. The decision in the case just cited related only to the remedy, but it necessarily follows that if the remedy prescribed by that statute was swept away by the subsequent enactment of the Legislature, the lien itself which arose under the common law, was also superseded by the statutory lien. It was said in the opinion in the case just cited that the Act of April 15, 1903, covered the whole subject and is inconsistent with the provisions of the former statute and it necessarily follows from that conclusion that the lien created by the common law was superseded by the one created by the statute.

(2) Now, this settles the question of the right of the appellees to recover possession of the automobile, for notwithstanding the fact that appellant may have had a lien, there was no right to hold possession until the amount was paid as was originally the case with respect to common law liens. The verdict for the possession of the car and the nominal amount of damages awarded, was correct, according to the undisputed evidence.

(3) The only serious question for our determination is that which relates to the right of the appellant to assert

its lien by a cross-complaint filed in this action without having filed the lien with the circuit clerk as required by statute. The counterclaim was filed in this case within ninety days from the completion of the last repairs made on the car, and if that be treated as the commencement of an action, it was sufficient without having previously filed a claim with the clerk. *Simpson* v. *Black Lbr. Co.*, 114 Ark. 464; *Anderson* v. *Seamans*, 49 Ark. 475. But, was the counterclaim properly filed in this case and was it equivalent to the commencement of a suit to enforce the lien? We think not. A counterclaim allowed under the statute "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." Kirby's Dig., sec. 6099. This was a replevin suit for possession of the automobile and the counterclaim did not set forth a cause of action arising out of any contract or transaction set forth in the complaint or connected with the subject of the action. *Barry-Wehmiller Co.* v. *Thompson*, 83 Ark. 283. Where the right of recovery of plaintiff in a replevin suit depends upon the existence or non-existence of a debt claimed against the defendant, then a set-off, counterclaim or plea for recoupment may be asserted for establishing the non-existence of the debt and defeating the right of the plaintiff to recover. *Ames Iron Works* v. *Rea*, 56 Ark. 426. In the present case, however, since we have held that there is no question of debt involved in the plaintiff's right of action, and that regardless of any lien on the part of the defendant against the car, the plaintiff is entitled to recover possession, then the counterclaim has no place in the case and must be the subject of a separate action in compliance with the terms of the statute, which provides the methods of enforcing the lien.

The verdict of the jury was, therefore, correct upon the undisputed evidence and the judgment is, for that reason, affirmed.

BLACKBURN v. THOMPSON.

Opinion delivered February 5, 1917.

1. EVIDENCE—PLEA OF USURY—BURDEN OF PROOF.—The burden of proving usury is upon the party pleading the same, where it does not appear upon the face of the instrument alleged to be usurious.
2. PARTIES—CAPACITY TO SUE—DUTY TO OBJECT.—Objections to the plaintiff's capacity to sue must be taken by demurrer or answer, else they will be deemed to have been waived.
3. APPEAL AND ERROR—CHANCERY HEARING—INCOMPETENT TESTIMONY.—In an action in chancery it is the duty of the chancellor to hear and determine the cause between the parties to the record, and to consider only the competent testimony as between such parties.
4. USURY—PROOF—EVIDENCE OF CONVERSATIONS WITH DECEASED.—A. and B. entered into a contract with C. B. died and A. and B.'s administrator joined in an action in equtiy against C. on the contract, and to foreclose a mortgage given by C. to A. and B. C. defended on the ground that the contract was usurious. *Held*, although B.'s administrator was improperly joined as party plaintiff, that nevertheless he was a party to the record, and that therefore under section 2, Schedule of the Constitution of 1874, C. could not testify in the action as to conversations relative to the transactions between himself and deceased in this action.
5. USURY—PROOF.—Testimony that when C. purchased goods from B., that B. charged him $1.10 for every one dollar's worth of goods bought, is insufficient to prove usury, in the absence of any testimony showing that the charge was for a period less than a year.
6. USURY—PRESUMPTION—PROOF.—Usury will never be presumed and must be proved by the party pleading it; usury will not be imputed to the parties when the opposite conclusion can be reasonably and fairly reached.
7. MORTGAGES—STATEMENT OF TERMS.—A mortgage is not invalidated for a failure to state the nature and amount of the debt to be secured, but it will be sufficient if it contains a general description, sufficient to embrace the liability intended to be secured, and to put a person examining the records upon inquiry, and to direct him to the proper source for minute and particular information of the amount of the incumbrance.
8. MORTGAGES—AMBIGUITY—ORAL PROOF.—Oral proof is admissible to explain ambiguities in a written mortgage, and to ascertain the intention of the parties to it.

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

Coleman & Lewis, for appellant.

The chancellor erred in holding that defendant was not a competent witness to testify as to the conversation with the deceased partner. The surviving partner was allowed to testify as to the same transaction, and there is no good reason why the other's mouth should be closed. 19 Ark. 443; 26 *Id.* 135; 54 *Id.* 395; 69 *Id.* 242. The administrator was not a necessary party to the suit. George on Partnership, p. 384; 65 Am. Dec. 293; 44 Ill. 33; 27 Mich. 537; 23 Me. 550; Shumaker on Partnership, 284; 17 Ark. 477; 30 Cyc. 623; 114 Ga. 668; 61 *Id.* 189. The testimony was competent. Cases *supra;* 41 Tex. 449; 56 Miss. 455; 62 *Id.* 831; 18 R. I. 652; 13 Nev. 279; 8 Allen 101; 12 Gray 453; 51 Ala. 108; 63 Ind. 87; 29 Ind. App. 563.

2. The account was usurious. 111 Ark. 593; 46 *Id.* 131.

3. The items for whisky sold and the charges for goods, moneys or whisky sold to tenants should have been excluded.

4. There is not sufficient proof of the account. There is no showing that the books were regularly or fairly kept or correct. Kirby's Digest, § 3071-2; 60 Ark. 333.

5. There was no proof that the mortgage was given to secure $2,000.00 and future as well as past or existing indebtedness. 66 Ark. 550. If usury is established the only charge against the land would be the lien for taxes. There was no proof that if oral testimony is admissible, that future advances were covered by the mortgage.

Jack Bernhardt and *Sam Frauenthal*, for appellees.

1. Defendant was not a competent witness as to conversations and transactions with the deceased partner, W. P. Thompson. His administrator was a party to the suit. 66 Ark. 550; 93 *Id.* 447. If the administrator was not a proper party, then there was a misjoinder and the question should have been raised by demurrer or answer. Kirby's Digest, §§ 9993, 6996. This was not done. 43 Ark. 33; 19 *Id.* 602; 35 *Id.* 360;

36 *Id.* 205; 76 *Id.* 391; 95 *Id.* 32. The testimony was clearly incompetent. 46 Ark. 306; 63 *Id.* 556; 83 *Id.* 210; 68 N. J. Eq. 480; 12 Encl. Ev. 761; 4 Jones on Ev., §§ 772, 777.

2. There was no usury. 55 Ark. 265; 91 *Id.* 458; 49 L. R. A. 550; 66 Ark. 387; 91 *Id.* 458. Usury must be clearly proven. 68 Ark. 162; 91 *Id.* 458; 39 Cyc. 1054. Where a loan is made without a specific time for payment, the fact that the interest is more than the legal rate will not render the loan usurious, for the time of payment may be postponed. 166 Pa. St. 207; 31 Atl. 47; 39 Cyc. 946. The evidence of usury must be clearly proven, with certainty. 57 Ark. 251.

3. The items for whisky and supplies furnished tenants were excluded. At any rate, the correct amount is found by the chancellor.

4. The proof is sufficient. The books were properly admitted as evidence. 2 Enc. Ev. 610, 613, 615, etc.; 52 L. R. A. 552, 561.

5. The mortgage secured $2,000.00 and future advances. The instrument speaks for itself—the intention of the parties is plain. 27 Cyc. 1057; 46 Ark. 70; 91 *Id.* 400, etc. The decree is equitable and just and should be affirmed as no prejudicial errors appear.

STATEMENT BY THE COURT.

T. T. Thompson and W. P. Thompson were partners doing business under the firm name of the Laconia Supply Company. W. P. Thompson died on the 19th of June, 1914. J. J. Blackburn, July 2, 1912, executed a mortgage on certain real property to the Laconia Supply Company to secure the sum of $2,000.00 more or less, for merchandise and cash advanced, evidenced by running account. On the 12th of August, 1912, the Desha Bank & Trust Company qualified as administrator of the estate of W. P. Thompson. On the 17th of September, 1914, this suit was instituted by T. T. Thompson, the surviving partner, and the Desha Bank & Trust Company, as administrator of the estate of W. P. Thompson deceased, against Blackburn to

recover on account the sum of $2,645.39, and to foreclose the mortgage.

Blackburn answered, admitting that the mortgage was given to secure a past indebtedness to the Laconia Supply Company; denied that it was for future supplies, and denied the correctness of the account. He further set up that the account was void for usury.

Blackburn testified that he had done business with the Laconia Supply Company for about four years; that he rented his place during the years 1911, 1912 and 1913, and did not supply the tenants. The Laconia Supply Company furnished the tenants and he waived the rent. He had a conversation with Percy Thompson with regard to the money and supplies to be furnished on account in January, 1912. He details this conversation as follows: "He (Thompson) said: 'I will have to charge you interest of ten per cent. on the dollar flat for money or supplies.' I said, 'Well, Percy, I think that is pretty steep.' He said, 'Well, I am going to have to charge it to you because supplies are the same as money and I will have to charge you ten per cent. on each dollar you get. If you get $1.00 I will have to charge you $1.10 for it.' I agreed to that charge. I got goods and money after that under that agreement. Later on a mortgage was executed to cover what I owed at that time. I had on hand some money from Mr. Thompson, I suppose about $800. I gave him a mortgage to secure that and the open account to that time. The mortgage was given for $2,000.00. The mortgage was prepared when I came in. I said, 'Well, Percy, I don't owe you anything like $2,000.00, and I am not going to sign it.' He said, 'Well, I don't know exactly what the amount is. Here are the books and the charges. The ledger shows your account. I noticed several items charged for $100.00 at ten per cent., that is $110.00. That is all right according to my agreement. I said, 'Percy, I haven't time to go over this account now. Give me an itemized statement of it.' He said, 'I will give you an itemized statement later on, and we will make this mortgage for $2,000.00, more or less.'

At this time I did not know how much I owed. I saw the books, but did not go over them. When this agreement was made in the spring of 1912 the account was to be paid the next January. That was understood. That was the way I always did business with him."

The further testimony of this witness tends to prove that the account in suit was not accurate, and that he did not owe the amounts charged on his account for any goods or money furnished to the tenants on his place. The testimony of the witness goes into detail showing the items of cash and the interest charged. As to some of these items, witness admits that he received the cash, but according to his testimony, there was a usurious charge of interest on the items of cash. Other items of cash he denies having received. The witness concludes his testimony by stating that for such amounts as he got, both of merchandise and cash, there was a ten per cent. charge. The amount was supposed to be paid on the first of January. The items abbreviated on the account, marked "Mdse." meant liquor that he bought from the company.

The testimony of T. T. Thompson was to the effect that the Laconia Supply Company furnished Blackburn and his tenants during the years 1911, 1912 and 1913. He paid the taxes for Blackburn during the years 1911, 1912 and 1913 and exhibited the receipts. He was associated with his brother, W. P. Thompson, who kept the books. Witness did not keep up with the accounts at all. Witness stated that he was present when a conversation occurred between Mr. Blackburn and his brother. Blackburn said: "I am going to need some money; my wife is sick.' I said, 'Mr. Blackburn, how much will you need?' He said, 'I don't know how much. I will want a little along.' I said, 'Mr. Blackburn, we have to borrow money ourselves from the Desha Bank & Trust Company. We pay eight per cent. interest. We can't let you have money, keep the books, our time and stationery for the same amount per cent. that we have to pay. Therefore, wouldn't it be worth

ten per cent.?' He said, 'Old boy, that will be all right; I need the money; got to have it.'"

This witness' testimony further tended to show that they furnished the tenants on Blackburn's place during the years 1911, 1912 and 1913 on the orders of Blackburn. Most of the orders were verbal. The mortgage, which was prepared on July 2, 1912, was intended to include all the merchandise purchased by Blackburn at the credit prices and also the cash and check charges, with ten per cent. added. The mortgage was intended to cover all that.

This witness exhibited as a part of his deposition a statement showing taxes paid for Blackburn, amounting to $146. Witness exhibited cancelled checks and drafts showing cash advanced amounting to $915.00.

Witness H. L. Thompson testified that he was a brother of the other Thompsons, who constituted the partnership known as the Laconia Supply Company. He was a bookkeeper and lived in Memphis. He prepared the statement made an exhibit with the complaint, upon which the suit was instituted. He made two statements. Found mistakes in the first statement, which he had corrected in the revised statement. The items of cash and interest charged upon the books were reflected in the revised statement. He had not undertaken to change the books of original entry. The balance found to be due from Blackburn to the Laconia Supply Company of $2,320.64 is a correct balance as reflected by those books, and to this is added the amount of $146.00, the amount of the tax receipts, making the total amount due $2,466.66. Witness was examined and cross-examined in detail on the various items of the account, and his testimony shows that there were many mistakes in the first statement filed. But in his last and revised statement he enters into detail showing these errors and also the corrections that were made, and stating the manner in which he made up the account from the books of the Laconia Supply Company. He concludes his testimony by stating that

"in every doubt as to the correctness of any charge I gave the benefit of the doubt to Mr. Blackburn."

Witness John Jones testified, in part, as follows: "I heard a conversation between Mr. Percy Thompson and Mr. Blackburn during the year 1912 in regard to Mr. J. J. Blackburn's business with the firm and his account. They were standing at the bar taking a drink and I was waiting on them. I heard Mr. Blackburn ask Mr. Percy what per cent. he was going to charge him on his business on the dollar for 1912, and Mr. Percy told him 10 per cent. on the dollar. Mr. Blackburn told him that he thought that it was too much, but he guessed he would have to stand it. When Mr. Thompson said he would charge him ten cents on the dollar Mr. Blackburn asked him how he meant, and he said if Mr. Blackburn got $5.00 he would charge him 50 cents interest and make the charge $5.50, and if he bought goods he would add the 10 cents to it when the goods were put down on the books and there would not be any more interest due after that. I don't know for sure as I heard anything about when the account would be paid, but Mr. Blackburn always paid in the fall, like everybody else that farms."

One witness who was a tenant on Blackburn's place during 1912 and 1913 and another one who was on his place during 1910, 1911, 1912 and 1913 testified that they purchased goods from the Laconia Supply Company on their own account, and not on any orders of Blackburn; that the credit was extended to them individually and not to Blackburn.

The chancery court held that the mortgage would not secure an account exceeding $2,000.00; that there was no usury in the account, and that the taxes paid by the Supply Company on the land were a lien on the same. The court eliminated from the account all items of liquor and the amounts furnished the tenants on Blackburn's place. A decree was entered in favor of the appellees in the sum of $2,000.00, with 6 per cent. interest on all cash items from the date advanced, and 6 per cent. interest on the amount of the account for 1912

from the 1st of January, 1913, until paid and on the account for 1913 from January 1, 1914, until paid, and also for the amount of the taxes paid on the lands, with interest at 6 per cent. on the amount as shown by the receipts from the date thereof until paid, and declared the total of these several sums a lien on the land and ordered the mortgage foreclosed for the payment of such sum. The court also entered a personal decree in favor of the appellees against the appellant for the balance due on the account and the amount of the personal taxes as shown by the receipts, with six per cent. interest from the date of such decree, and directed that the appellees have execution for such sum, but did not declare the same a lien on the lands. From that decree this appeal has been taken.

WOOD, J. (after stating the facts).

(1) There is no usury on the face of the account or the mortgage. Appellant admits the execution of the mortgage and that same was given to secure an amount then due, and sets up in defense the plea of usury. The burden was therefore upon appellant, by competent testimony, to establish his plea.

(2) Conceding, without deciding, that the administrator of the estate of W. P. Thompson was not a proper party, it is a fact nevertheless that the administrator, from the inception of the cause to its final hearing by the trial court, was a party plaintiff. Appellant, neither by demurrer nor answer raised any objection to the capacity of the administrator to join in the suit, and he must be deemed therefore, under our statute and decisions, to have waived such objection. Kirby's Digest, secs. 6093-6096.

As early as *Gossett* v. *Kent*, 19 Ark. 602, 607, this court said: "In cases of misjoinder of plaintiffs the objection should be taken by demurrer, for if not so taken, and the court proceeds to a hearing on the merits, it will be disregarded, at least if it does not materially affect the property of the decree." In that case it appeared on the face of the bill that one Smith was

improperly made a party complainant. He had no interest in the subject of the suit and no relief was prayed for him—a stronger case than the one at bar.

In the case of *Pettigrew* v. *Washington Co.*, 43 Ark. 33, we held that objections to the plaintiff's capacity to sue must be taken by demurrer or answer, else they will be deemed to have been waived. Such has been the uniform holding of this court. See *Murphy* v. *Myar*, 95 Ark. 32; *Kraft* v. *Moore*, 76 Ark. 391; *Hot Springs R. R. Co.* v. *Tyler*, 36 Ark. 205.

(3) The appellant allowed the cause to progress to a decree without raising any objection to the joinder of the administrator of W. P. Thompson as a party plaintiff and to the capacity of the administrator to sue. The appellant, without raising such objection, presented his own deposition in support of his charge of usury. The court held that his testimony relating to the conversation between W. P. Thompson, deceased, and himself, tending to show a usurious contract, was incompetent. Appellant here challenges such ruling. It was the duty of the chancery court to hear and determine the cause between the parties to the record and to consider only the competent testimony as between such parties.

(4) Under section 2 of the schedule of the Constitution of 1874, neither party shall be allowed to testify in actions by administrators, in which judgment may be rendered for or against them, as to any transactions with or statement of the intestate.

In *McRae* v. *Holcomb*, 46 Ark. 306, we held that this provision of the Constitution applies only to parties to the record. In *Stanley* v. *Wilkerson*, 63 Ark. 556, we held, under the above provision, that "it is not the interest in the issue to be tried that renders incompetent, but the being a party of record to that issue;" that "competency or incompetency of the party as a witness is to be determined relatively to his status at the time he was proposed and objected to as a witness." See also *Snyder* v. *Harris*, 61 N. J. Eq. 480.

Now, as we have shown, at the final hearing of this cause the administrator of W. P. Thompson was a party plaintiff to the record, and if a judgment had been rendered in favor of the appellant, such judgment would have necessarily resulted in a judgment for costs against the administrator, and even though no other judgment might have been rendered against the administrator, such judgment for costs might have been a substantial judgment, and will be treated as one calling for the application of the constitutional and statutory provisions requiring the exclusion of the testimony of the appellant relating to the alleged usurious contract between him and the deceased, W. P. Thompson. *Bush* v. *Prescott & N. W. Ry. Co.*, 83 Ark. 210, 213; Sec. 2, Schedule of Const., *supra;* Kirby's Dig., sec. 3093.

"The object and purpose of these statutes," says Mr. Jones, "then is to guard against the temptation to give false testimony in regard to the transaction in question on the part of the surviving party, and further to put the two parties to a suit upon terms of equality in regard to the opportunity of giving testimony. If one party to the original transaction is precluded from testifying by death, insanity or other mental disability, the other party is not entitled to the undue advantage of giving his own uncontradicted and unexplained account of the transaction. The sources of original information on the part of the representative of the deceased or incompetent person are so inadequate as compared with those of the surviving party that the law presumes the representative to be utterly unable to testify as to the details of the transaction, and hence excludes the adverse party." 4 Jones' Com. on Evidence, sec. 773, p. 628.

As was said by the Supreme Court of Florida, "What the living knows or would testify is excluded, because what the dead would testify if living cannot be or is not given in evidence, or because his representatives or assignee is not himself so acquainted with the facts of it as to encourage him to go upon the stand."

Harris v. *Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 South. 140.

The rule of our Constitution finds just and appropriate application under the facts of this record because the alleged corrupt agreement which appellant claims rendered the account and mortgage in suit usurious was had alone, according to the testimony of the appellant, with the deceased partner, W. P. Thompson. Appellant's testimony falls both within the letter and the spirit of the provisions of our Constitution and the statute based thereon. Eliminating the testimony of appellant, the other testimony is not sufficient to establish the plea of usury.

(5) The testimony of Jones to the effect that he heard Thompson tell appellant that he would charge him 10 cents on the dollar, that is, if he got $5.00 he would charge him 50 cents interest and make the charge $5.50 and that if he bought goods he would add a 10 per cent. charge when the goods were put down on the books, was not sufficient to prove usury, for this testimony falls short of showing that the 10 per cent. interest on the money and the 10 per cent. charge on the goods was to be for a less period than one year from the time the money was advanced and the goods purchased. The witness who gives this testimony states that he did not know for sure that anything was said about when the account would be paid.

(6) The court cannot take judicial knowledge of when an account between a merchant and his customer is due. Usury cannot be established by presumption. The presumption is that parties will obey the law and not enter into a corrupt agreement to charge usurious interest, and the burden is upon the one who pleads usury to overcome this presumption by positive proof. "The wrong act of usury will never be imputed to the parties when the opposite conclusion can be reasonably and fairly reached." *Briggs* v. *Steele*, 91 Ark. 458.

The testimony of T. T. Thompson tended to show that he was present and heard the agreement between his brother and the appellant, and that his brother in

effect told appellant that his firm was paying 8 per cent. for money borrowed, and that they could not let appellant have the money for the same amount that they had to pay, but would have to charge him 10 per cent. on account of the trouble in keeping the books and for their time and stationery; that the books showing the charge of 10 per cent. on the checks and cash items conformed to their agreement with appellant. This testimony likewise falls short of showing that the interest on the account was to be at a greater rate than ten per cent. per annum. There is nothing in the testimony of Thompson to show either that the money advanced or the account for the goods and merchandise were due and payable in less than one year from the time the money and merchandise were obtained by appellant from the supply company.

Counsel for appellant say in their brief: "Nowhere does T. T. Thompson contend that the account was not due at the end of the year." But that is a matter about which T. T. Thompson had a right to remain silent. It was not incumbent upon him to contend or show that the account was not due at the end of the year, but the burden was upon the appellant to show that it was due at that time or at such time as would make the account usurious.

Counsel for appellant rely upon the case of *Hall Bros.* v. *Johnson*, 111 Ark. 593. But in that case notes were given to cover future advances bearing ten per cent. interest from the date of the note, regardless of the date when the advances were made. Appellant in that case sued upon an account, and it is stated in the opinion: "It appears from the face of the account, as well as from H. G. Hall's own admission, that interest was charged at a higher rate than ten per cent. per annum." And in the statement of facts it is said: "It appears that appellants charged straight ten per cent. upon all amounts advanced during the year without reference to the time when the advances were made, and did not charge ten per cent. per annum."

No such proof was made in the instant case. Here there were no recitals in the mortgage as to any rate of interest to be charged, or fixing any time for the maturity of the debt secured. The account does not show on its face when it was due, and certainly does not contain any statement showing that interest was to be charged at a greater rate than ten per cent. per annum.

The chancellor construed the mortgage to secure an indebtedness not to exceed the sum of $2,000.00, even though the debt at the time the indebtedness became due and at the time the mortgagee sought to foreclose the mortgage might be for a much larger amount. It is reasonably certain from the testimony that the mortgage was given to secure the indebtedness of the appellant to the supply company that then existed, and also was intended to cover any future indebtedness as evidenced by appellant's running account with the company to the extent at least of $2,000.00.

(7) In *Curtis & Lane* v. *Flinn*, 46 Ark. 70, 72, Judge Cockrill, speaking for the court, said: "It is usual for the mortgage to set forth the amount of the debt to be secured and to recite that it is witnessed by a note, a stated account or other evidence of debt, but the neglect to do either or both does not necessarily invalidate the mortgage security. If the mortgage contains a general description, sufficient to embrace the liability intended to be secured and to put a person examining the records upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand." See *Hoye* v. *Burford*, 68 Ark. 256; *Cazort & McGehee Co.* v. *Dunbar*, 91 Ark. 400; *Richeson* v. *National Bank of Mena*, 96 Ark. 594, 604; *Briggs* v. *Steele, supra.*

(8) There was sufficient ambiguity in the mortgage to justify the introduction of oral testimony to ascertain the intention of the parties to it. When this testimony is considered, it is clear that the intention of the parties was to secure an indebtedness evidenced by a running account. The construction which the court gave the

mortgage was more favorable to appellant than he was entitled to, but the appellees have not appealed. The items for liquor and the items of the account furnished to appellant's tenants which the court eliminated amount to the total sum of $349.65. This amount deducted from the revised account, which the court found to be correct, except as to this sum, would leave more than the sum of $2,000.00 still due the Supply Company, and secured by its mortgage. On account of the loose and imperfect system of bookkeeping on the part of the Laconia Supply Company, as revealed by the testimony, we entertain some doubt as to the correctness of the revised account, but cannot say that the finding of the chancellor to the effect that this account is correct (except in the particulars designated by him) is clearly against a preponderance of the testimony.

The finding and decree of the chancellor as to the amount and lien for taxes is correct.

Upon the whole record we find no reversible error. The decree is therefore affirmed.

HART and SMITH, J. J., dissenting.

ENSIGN & CO. v. COFFELT.

Opinion delivered February 19, 1917.

APPEAL AND ERROR—REVERSAL—RETRIAL.—Where a cause has been reversed on appeal, and tried a second time in accordance with the statements of law made by this court on the first appeal, it will be affirmed on a second appeal if the verdict is supported by the evidence.

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

E. P. Watson, for appellant.

1. When this case was tried before, this court held that the case was tried upon the wrong theory and in disregard of the facts that the rights of the parties must be determined by the written contract. The court again erred in its instructions to the jury. 35 Cyc. 274-5; Benjamin on Sales, 888-9, 893; 75 Ark. 503.

2. As to the right of recoupment for damages for breach of warranty, see 35 Cyc. 543-6-7.

3. Defendant was estopped. 26 Pac. 703; 114 N. W. 780. He waited too long after a discovery of defect. 53 Pac. 84; 68 *Id.* 202; 77 S. W. 489; 21 Pa. 95; 80 S. W. 857; 38 Ark. 342.

4. The remark of the court, in the former opinion, as to some defect which appellee could have corrected by some trifling outlay, etc., is *obiter dicta.*

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

1. The law of this case was settled on the former appeal. 119 Ark. 1. The issues are the same. 79 Ark. 475; 122 *Id.* 491; 124 *Id.* 224. The questions are *res adjudicata,* 102 Ark. 568.

McCULLOCH, C. J. This is an action instituted by appellant to recover from appellee the amount of an alleged debt for the price of sale and installation of a private lighting plant. The apparatus was installed in appellee's house and the written contract contained an undertaking on the part of the vendor to guarantee the apparatus for the period of one year, and also undertaking to remove the apparatus if it failed to come up to the guaranties. The defense offered by appellee was that the apparatus failed to do the work it was guaranteed to do and that there was a total failure of consideration. The case was here on a former appeal from a judgment in appellee's favor and we reversed the judgment and remanded the case for new trial, the law applicable to the case being stated in the opinion. The record now before us shows that the case was tried in accordance with the statements of law made by this court on the former appeal, which statements have, of course, become the law of the case.

Learned counsel re-argue the questions settled in the former opinion, but since that opinion has become the law of the case it is too late to reconsider it on the second appeal. *Eminent Household of Columbian Woodmen* v. *Howle*, 124 Ark. 224. The evidence in the case was substantially the same as on the former trial

so far as relates to the questions raised, and since the evidence is found sufficient to support the verdict, nothing remains for us but to affirm the judgment, which is accordingly done.

FARMERS UNION WAREHOUSE CO. *v.* STURDIVANT.

Opinion delivered February 19, 1917.

1. WAREHOUSES—DUTY OF WAREHOUSEMAN TO INSURE.—Act 273, page 983, Acts 1915, does not impose upon a warehouseman the duty to insure goods stored with him.
2. WAREHOUSES—INSURANCE OF STORED GOODS.—A warehouseman is obliged to insure goods stored with him, only when so directed by the owner, and the statute gives a lien in the warehouseman's favor only when the insurance is procured at the owner's request.

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

W. C. Rodgers, for appellant.

1. The court erred in directing a verdict for defendant and in refusing the instructions for plaintiff. The liability of a warehouseman at common law is well settled—they are bound only to common and reasonable care. Story on Bailments, §§ 11, 144; 32 Ark. 224; 42 *Id.* 200; *Ib.* 204; 64 *Id.* 115; 52 *Id.* 26; 46 N. Y. S. 576; 1 Jones on Liens, § 967.

2. Act 273, Acts 1915, supplants the old law and changes the rights of both parties. This law forms part of the agreement. 73 Ark. 470; 75 *Id.* 435; 79 *Id.* 266; 80 *Id.* 108; 118 Ark. 558; 115 Ark. 113. Appellee was just as liable for insurance as he was for storage. The universal custom is to insure.

W. P. Feazell, for appellee.

Appellee was not liable for the insurance. 32 Ark. 224; 42 *Id.* 200; Acts 1915, Act 273; 10 Ark. 671; 4 *Id.* 251; 17 *Id.* 78. No authority was given to insure and it was not the custom of the warehouse unless authorized. The jury found for appellee. The facts are undisputed. The court properly directed a verdict for appellee.

McCULLOCH, C. J. Appellant was, during the cotton season of 1915-16, engaged in operating a public warehouse for the storage of cotton and other products at Mineral Springs, Howard county, Arkansas, and received from appellee 153 bales of cotton for storage. The cotton was placed in the warehouse during the period extending from September, 1915, the beginning of the cotton season, up to about the middle of February, 1916, and was removed from the warehouse in April, 1916. There was a charge for storage service and appellant, having caused the cotton to be insured against loss or damage from fire, presented a bill for the expense of procuring the insurance. Upon refusal by appellee to pay the account for insurance appellant instituted this action to recover the amount. The evidence adduced in the trial of the cause was undisputed, and the court directed a verdict in favor of appellee. Appellee gave no directions to appellant to insure the cotton and was not informed that the insurance had been procured until about the time the cotton was taken out of the warehouse.

The contention of appellant is that the statute enacted by the General Assembly of 1915 (Acts 1915, p. 983), entitled "An Act to Make Uniform the Law of Warehouse Receipts," imposes the duty upon public warehousemen of insuring property left on storage and gives a lien on the stored commodity for the amount of the premiums. Counsel rely on sections 21 and 27 of the Act, which read as follows:

"Section 21. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

"Section 27. Subject to the provisions of section 30, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful

charges for storage, and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods, also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien."

We do not deem it necessary to enter into any discussion concerning the extent to which the Legislature may go in imposing a duty upon warehousemen to insure the property of their customers, for we are of the opinion that the statute in question imposes no duty whatever in that respect. Section 21 merely imposes upon the warehouseman the duty to exercise such care in regard to the property stored "as a reasonably careful owner of similar goods would exercise," which does not require the warehousemen to enter into a contract of insurance. That matter is left to the preference of the owner, or perhaps to whatever custom may become established with reference to such transactions at the particular place. The section of the statute which gives a lien was merely intended to be for the protection of a warehouseman where he has procured insurance upon authority from the owner, and puts the expense of the matter upon the same standing as the charge for storage. The evidence in the case shows that there was no authority given, either express or implied, for the procurement of the insurance. No such custom was proved which would be sufficient to charge the owner of the cotton with notice that the commodity stored would be insured pursuant to custom.

We are of the opinion, therefore, that the court was correct in holding that according to the undisputed evidence there was no liability on the part of appellee for the expense of the insurance.

Judgment affirmed.

UNION SAND & MATERIAL CO. v. STATE.

Opinion delivered February 19, 1917.

1. SAND AND GRAVEL—TAKING SAME FROM BED OF NAVIGABLE STREAM.—Permission to appellant, by the War Department of the United States Government to erect a hoisting plant or elevator to be used in lifting sand from the bed of the Mississippi river to cars on the river bank, does not give to appellant any affirmative rights to appropriate sand from the river bed, without complying with the statute of Arkansas.
2. SAND AND GRAVEL—CONTROL OF IN NAVIGABLE STREAMS.—Act of 1913 page 1088 and Act of 1915, page 532, controlling the taking of sand and gravel from the beds of navigable rivers, held to apply to sand and gravel in the beds of navigable streams over which the State has jurisdiction wholly or in part, the Mississippi River being included therein.

Appeal from Desha Circuit Court, *W. B. Sorrells*, Judge; affirmed.

Caruthers Ewing, of Memphis, Tenn., for appellant.

1. The Act is unconstitutional and void. Congress is supreme and has acted. Appellant was acting directly under the authority of the Secretary of War, and the State's authority must yield, as the Act was in aid of navigation. 53 Ark. 314; 113 *Id.* 149; 121 Ark. 601; 186 Fed. 426; 140 U. S. 371; 142 *Id.* 161; 227 *Id.* 229; 241 *Id.* 371; 236 *Id.* 439; 222 *Id.* 370, 424; 227 *Id.* 267; 230 *Id.* 352, etc.; 241 *Id.* 371; 176 *Id.* 211; 113 Ark. 149; 188 U. S. 410.

2. The Mississippi river is not wholly within the State of Arkansas, and is a public highway. Arkansas has no power to legislate on the subject. 93 U. S. 4; 3 Wall 724; 159 S. W. 1139; 124 U. S. 465; 94 Ark. 394; 143 Wisc. 18; 125 N. Y. App. Div. 641; 68 N. J. Eq. 500; 109 U. S. 385; 191 *Id.* 17; 99 Va. 747; 54 U. S. 392.

3. The Act imposes burdens on corporations that are not imposed upon natural persons. 118 U. S. 394; 216 *Id.* 400, etc.

4. The corporation is coerced to give evidence against itself. 3 Wigmore on Ev., § 2263, 2257; 81 Fed. 830; 116 U. S. 616; 66 N. Y. S. 542; 29 L. R. A.

(N. S.) 827; 1 Sawy. 605; 142 U. S. 547; 68 N. E. 353; 15 L. R. A. 676; 20 Atl. 1037; 91 N. E. 1048; 62 So. 397.

5. Federal control is necessarily exclusive. 182 S. W. 555; 240 U. S. 227; 166 *Id.* 269; 96 *Id.* 379; 59 U. S. 421; 95 *Id.* 459; 32 Fed. 9; 39 *Id.* 77; 41 *Id.* 867; 57 *Id.* 803; 202 *Id.* 776; 204 *Id.* 489; 17 L. R. A. 223; 1 McCrary, 400; 46 How. Pr. 24; 241 U. S. 351.

John D. Arbuckle, Attorney General, and *R. W. Wilson*, special counsel, for appellee.

1. The same defense is made here as in 122 Ark. 151. The State owns the bed and bars to the thread of the stream. 152 U. S. 1; 53 Ark. 320; 178 S. W. 378; 113 Ark. 150. The title is in trust for the people. 152 U. S. 1. Appellant is a trespasser. 223 U. S. 60. The State alone has the right to collect for sand and gravel taken from west of the center of the current of the river. 121 Ark. 601.

2. The shifting of sand and gravel gives appellant no title. 140 Pac. 637-652.

3. No rights are acquired by trespass, long permitted. 56 Conn. 508; 16 Atl. 548; 3 Cruise, 467; 146 U. S. 387.

4. The permit of the Secretary of War gave the defendant no rights; it merely permitted it to erect a hoisting plant on land in Tennessee. 18 Hall 65, 66; 140 Pac. 638.

5. There is no conflict in Federal and State rights here. 29 Cyc. 364 (E); 103 Am. St. 77. The War Department was without power to authorize defendant to remove sand and gravel in aid of navigation from Arkansas soil.

6. Appellant was not denied the equal protection of the laws. 113 Ark. 150, 160; 229 U. S. 53.

7. This is not a tax, but a privilege. The Act is unobjectionable. 113 Ark. 150; 125 U. S. 181; 204 *Id.* 359; 140 Pac. 651.

8. The corporation was not coerced to give evidence against itself. 221 U. S. 361; 158 S. W. 599; 102 Ark. 166; 91 *Id.* 13. The Act is valid.

McCULLOCH, C. J. Appellant is a foreign corporation engaged in the business of taking sand and gravel from the bed of the Mississippi river for commercial purposes, that is to say, for sale to users of those materials, and this is an action instituted by the State against said corporation to recover the price of sand and gravel taken from the bed of that river between the center of the main channel and the Arkansas shore line. The State relies, for recovery, upon the statutes enacted by the General Assembly of the year 1913 and of the year 1915, declaring the ownership of sand and gravel, and certain other material and mineral, in the bed of the navigable rivers to be in the State, and fixing the terms and prices upon which the same can be removed. Acts 1913, p. 1088; Acts 1915, p. 532.

The Act of 1913 provided that it should be unlawful "for any railroad company, corporation or company, or person, of any kind whatever, to take sand or gravel from any sand or gravel bar of any navigable stream in this State without first notifying the Attorney General of the same and then by his consent the said railroad company, corporation or company, may take from said navigable stream sand or gravel by paying into the State treasury the sum of not less than four cents per cubic yard for sand and not less than five cents per cubic yard for gravel."

Section 1 of the Act of 1915 reads as follows: "That hereafter it shall be unlawful for any person, firm, company, corporation or association of persons to take sand or gravel, oil or coal from the beds or bars of navigable rivers and lakes of this State without first procuring the consent of the Attorney General of the State so to do. Such consent may be withheld unless such person, firm, company or corporation shall agree in writing to keep an accurate record and account of all sand and gravel, oil and coal, taken by him or them, from said rivers and lakes, and render to the said Attorney General at the end of each month an itemized, verified statement of the number of cubic yards of sand and gravel, and gallons of oil and tons of coal

taken out each day during the month. At the time of making such statement, the person, firm, company or corporation shall pay into the State treasury five cents for each cubic yard of sand and gravel so taken, and one-half (½) a cent for each gallon of oil, and six cents per ton for coal taken, and if any other valuable minerals be found in such rivers, any firm, corporation, or persons taking the same out shall make a contract with the Attorney General, stating the per cent. due the State."

The State sues under the Act of 1913 for a certain quantity of sand and gravel taken by appellant subsequent to the passage of that statute and prior to the statute enacted in 1915, and also sues under the Act of 1915 for certain quantities of said materials taken by appellant subsequent to the passage of that statute. The case was tried upon an agreed statement of facts showing the precise amount of materials taken by appellant and there is no dispute about the amount. The court rendered judgment in favor of the State for the recovery o fthe aggregate price of the sand and material taken as fixed by the respective statutes in accordance with the amounts stipulated in the agreed statement of facts. It is unnecessary to consider further the attack made upon the constitutionality of the statute, because the question has been entirely set at rest by a former decision of this court which has been subsequently adhered to. *State ex rel. v. Southern Sand & Material Co.*, 113 Ark. 149; *Southern Sand & Material Co.* v. *State*, 121 Ark. 1; *C. M. Johnson Sand & Gravel Co.* v. *Quarles*, 121 Ark. 601.

In the first case cited above we held (quoting from the syllabus):

"The State having dominion over the sand and gravel in the river beds of navigable streams may require corporations taking sand and gravel therefrom to pay the State therefor. * * * * A statute requiring payment to the State for sand and gravel taken from the beds of navigable streams does not levy a tax, but

provides a method of utilizing the common property of the State for the benefit of the citizens."

It was further held in that case that the sovereignty of the State over the subject-matter named is not in conflict with the authority of Congress over navigable streams for the purposes of protecting navigation, and that the two powers are exercised in entire harmony, the authority of Congress, of course, being paramount in any conflict which might arise.

(1) It is insisted in the present case that appellant was acting directly under the authority of the War Department and that therefore the State's authority must yield. In other words, it is contended that appellant had secured authority to take sand and gravel in order to dredge the bed of the river in aid of navigation. The facts do not, however, bear out appellant in the defense attempted to be set forth. The record shows that appellant applied to the War Department through the engineer of the Memphis district for permission to erect an elevator or hoisting plant to load sand and gravel from barges upon railroad cars standing on the river bank. The assurance was given in the application that there would no no interference with navigation and that the plant would be erected so as to meet the approval of the engineer. The engineer made a favorable recommendation to the department on the ground that the plant would not interfere with navigation, and that recommendation was approved by the Secretary of War. It appears, therefore, that there was no authority at all granted by the Government to appellant to dredge the bed of the Mississippi river, but permission was merely granted to erect a plant in connection with the operation of taking sand and gravel on the theory that it would not interfere with navigation. The approval of the War Department merely manifested the consent of the Government and showed knowledge on the part of the United States officials concerning appellant's operations, as recited in the agreed statement of facts. It is the policy of the Government to require permission of the

War Department before anything can be erected in the way of a bridge or other obstruction over or about navigable streams which might interfere with navigation, and the permission was granted in this instance pursuant to that policy. The order of the War Department operated merely as a permit and granted to the appellant no affirmative rights. *State ex rel.* v. *Akers*, 92 Kans. 169, 140 Pac. 638. The unquestioned power of the Federal Government to provide for dredging the beds of navigable streams in order to protect or to aid navigation is not involved in this case.

(2) It is next contended that sand and gravel in the bed of the Mississippi river does not come within the terms of our statute for the reason that the Mississippi river is not wholly within the State. Appellant relies upon the peculiar language of the two statutes, the Act of 1913 referring to "sand or gravel from any sand or gravel bar of any navigable stream in this State," and the Act of 1915 refers to "sand or gravel, oil and coal, from the beds or bars of navigable rivers and lakes of this State." The argument is that because the Mississippi river is not a navigable stream "in" this State, or "of" this State, the material lying in the bed of the stream is not covered by either of the statutes referred to. This is a very narrow view to take of the statute and one which it is perfectly obvious the lawmakers did not intend. The preamble of each of the statutes declares that the sand and gravel bars in the beds of the navigable streams of Arkansas belong to the State, and there is no reason to suppose that the lawmakers intended to place any less value on that part of the bed of the Mississippi river which lies in the State, or to exclude it from the exercise of the State's power with respect to that ownership. The purpose of each of the statutes was to assert the sovereign power of the State with respect to the ownership of beds of navigable streams within its jurisdiction and this, of course included the bed of the Mississippi river between the Arkansas shore line and the center of the channel. While the river itself is not in the

State and the stream is not, literally speaking, one of the navigable rivers of the State, it is, broadly speaking, a part of the navigable waters available to the State and in that sense may be considered a navigable river of the State, and the bed of one-half of the stream is within the boundaries of the State. We think it would defeat the obvious intention of the lawmakers to put the construction upon this statute insisted upon by learned counsel for appellant. It is a fair interpretation of the language of the two statutes to say that they were intended to apply to the materials in the beds of navigable streams over which the State has jurisdiction wholly or in part.

The only other contention necessary to consider is that to the effect that the Act is void because it is an attempt to coerce a corporation into giving evidence against itself, but it is sufficient to say in answer to that contention that there is no coercion at all, as the statute merely prescribes conditions upon which corporations may be permitted to take such materials out of the beds of the rivers. All of the attacks upon the validity of the statute are unfounded and it follows that the judgment, upon the undisputed evidence with reference to the facts of the case, was correct, and the same should be affirmed and it is so ordered.

WEAVER-DOWDY CO. v. BREWER.

Opinion delivered February 19, 1917.

1. BILLS AND NOTES—INDORSMENTS—CONTRIBUTION.—The right of contribution in the order of indorsement applies only when the contracts of the indorsers are new and subsequent to the original contract; and not when the indorsers sign with the principal, and as accommodation.
2. PRINCIPAL AND SURETY—CONTRIBUTION.—The right of contribution is an equitable one growing out of the relation of the parties, and does not depend on contract.
3. PRINCIPAL AND SURETY—CONTRIBUTION.—Where the surety on a note pays the same, he may recover from his co-sureties their pro-rata share based on their solvency, but he can not obtain a joint judgment.

Appeal from Independence Chancery Court, *G. T. Humphries*, Chancellor; reversed.

McCaleb, Reeder & McCaleb, and *Samuel M. Casey*, for appellants.

1. The appellee endorsed the note in blank, with the appellants, at the time it was made and for the same consideration, and intended to lend his credit as a surety, and such was the effect of his endorsement. 34 Ark. 524; 24 *Id.* 511; 40 *Id.* 545. He was not entitled to contribution. 34 Ark. 75; Bispham's Eq. (3 ed.), § 330; 1 Lead. Cas. in Eq., p. 132. One who is guilty of bad faith cannot invoke the aid of equity. 6 R. C. L. 1036, § 2; *Ib.* 1040, § 5; 10 Am. St. 646.

The real situation of the parties may be proved for the purpose of defense to a suit for contribution. 10 Am. St. 646.

2. Plaintiff had already undertaken to secure judgment against the principal and sureties in a court of law under Kirby's Digest, §§ 7927-8, and the action is still pending. Until that suit is disposed of it is not proper to seek the same relief in another forum.

3. The judgment was wrong because it was absolute for the full amount against each of the individual co-endorsers or sureties with plaintiff. 24 Ark. 511; 34 *Id.* 524; 40 *Id.* 545. It was wrong also to assess ten per cent. interest when the note only drew eight per cent. 49 Ark. 104; 86 Cal. 449; 10 L. R. A. 54.

4. The rule of successive indorsers has no application. 57 Ark. 541-3; 267 Ill. 367; 81 Atl. 863; 98 N. Y. S. 858.

Chas. F. Cole and *Campbell & Suits*, for appellee.

1. The chancery court is the original and appropriate forum to enforce contribution. 57 Ark. 541; 94 *Id.* 335; 108 *Id.* 291; 114 *Id.* 183.

2. Appellee was the last endorser and as such entitled to all remedies against prior endorsers as well as the maker. 57 Ark. 541; 94 *Id.* 335.

3. There was no defense shown by the answer after submitting the facts set out in the complaint. 95 Ark. 488; 108 *Id.* 291; 123 *Id.* 594.

HART, J. This was a suit for contribution brought by appellee against appellants in the chancery court. Appellee in his complaint states facts substantially as follows:

That the defendant, Weaver-Dowdy Company, is a mercantile corporation at Batesville, Arkansas; that on July 1, 1914, the defendant, Weaver-Dowdy Company executed a promissory note to the Union Bank & Trust Company for $6,000.00 payable ninety days after date; that after the note was signed by Weaver-Dowdy Company, it was endorsed by the following individuals, in the order named: M. C. Weaver, G. E. Hogan, Frank Handford and F. W. Brewer; that on January 18, 1916, the bank sued the makers and endorsers of the note in the circuit court and obtained judgment against all of them except Brewer for the amount due on the note with accrued interest. Appellee further alleges in his complaint that he paid off the judgment whereby he became subrogated to the rights of the bank against the appellants. The prayerof his complaint is that he have judgment against appellants and each of them for the amount so paid by him.

Appellants answered and admitted the execution of the note. They also admitted that the bank obtained judgment against them for the balance due and the accrued interest and that appellee paid off the judgment after its rendition. For further answer appellants say that appellee Brewer, was a stockholder in the Weaver-Dowdy Company and was its secretary; that the other appellants were stockholders in said corporation; that appellee, Brewer, claimed to them that he was in bad health and wished to retire from the business; that he sold his stock to them for a valuable consideration and expressly agreed to continue to endorse for the Weaver-Dowdy Company so long as it should need his endorsement and especially until the

indebtedness which is the subject-matter of this suit was paid off; that appellee further expressly agreed that he would not again enter into the mercantile business in the city of Batesville in competition with the said Weaver-Dowdy Company; that in violation of said agreement he again entered into the mercantile business in competition with the said Weaver-Dowdy Company and when said indebtedness became due served notice on the bank under the provisions of section 7921 of Kirby's Digest to forthwith commence action against the principal debtor and the other persons liable on the note.

Appellee interposed a demurrer to the answer of appellants which was sustained by the court and it decreed that he have contribution as prayed for in his complaint. It was further decreed that he recover from the defendants, Weaver-Dowdy Company, Frank Handford, G. E. Hogan and M. C. Weaver, or either of them, jointly or severally, the sum of $6,234.20 and costs.

To reverse that decree appellants prosecute this appeal.

It is sought to uphold the decree upon the authority of *Porter* v. *Huie*, 94 Ark. 333 and *Rice* v. *Dorrian*, 57 Ark. 541. That is to say, it is contended that when several persons endorse a note in succession the legal effect is to subject them to liability as to each other in the order they endorse and that appellee having endorsed last, the others are liable to him for the whole amount of the note.

The principles announced in those cases only apply when the contracts of the endorsers are new and subsequent ones. They have no application whatever to the facts of this case. According to the allegations of the complaint the endorsers signed the note at the time it was signed by the Weaver-Dowdy Company. They all signed it at the same time, one after another. They signed the note as accommodation for the Weaver-Dowdy Company and thus became sureties for that company and not endorsers in succession as contended

by counsel for appellee. Contribution is an equitable right growing out of the relation of the parties and does not depend upon any contract by one surety with another.

Appellee was a surety on the note and paid off the judgment after its rendition. The right of a surety to come into equity for contribution, from his co-sureties is well settled. Appellee was not entitled to recover against them jointly however. He was only entitled to recover against his co-sureties their proportionate part of the judgment. Of course, in doing this the *pro rata* amount must be based upon the number of solvent company sureties. *Briggs* v. *Manning*, 80 Ark. 304; *Wilks* v. *Vaughan*, 73 Ark. 174; *Thorsen* v. *Poe*, 123 Ark. 77.

It follows that the court erred in holding the appellants jointly and severally liable to appellee and in entering a decree to that effect. For this error the decree must be reversed and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

LANSDELL v. WOODS.

Opinion delivered February 19, 1917.

1. APPEAL AND ERROR—EXCEPTIONS TO INSTRUCTIONS IN GROSS.—Exceptions in gross to requested instructions will not be considered on appeal, if any one of them was bad.
2. LEASES—LIABILITY OF ASSIGNEE.—The assignee of a lease will generally be liable for all rent accruing while he is in privity of estate with the lessor, but no liability exists where the assignment was merely intended as a mortgage.

Appeal from Crawford Circuit Court, *Jas. Cochran*, Judge; affirmed.

Wear & London, for appellant.

1. This well known rule is laid down by our own court. When a party accepts a written lease for a term of years * * * and enters upon and holds the premises for a term, he will not be exempted from the

payment of rent because he did not sign the lease. 21 Ark. 50; 7 Ala. 772; 37 Pac. 1037; 30 Cal. 547; 1 Ga. 220; 172 Ill. 547; 141 *Id.* 565; 135 Ind. 357; 20 Mo. App. 544; 71 Tex. 228.

2. After enjoying the profits and benefits, one cannot disaffirm the contract and escape the burdens.

3. Parol evidence to vary the items of a written contract is not admissible. The contract was plain and certain and needed no explanation. The court erred in its instructions to the jury, especially in refusing those asked for appellant. The latter are a simple declaration of the law. 3 Ark. 222; *Ib.* 358; 4 *Id.* 199. The trial court proceeded upon the wrong theory. The contract was valid and the testimony supported appellant's contention that Woods is bound by his written agreement.

C. A. Starbird, for appellee.

Woods had no connection with this case, except the lease was assigned to him as indemnity against loss on the note of Weese. None of the instructions asked by defendant state the law. Each leaves out of consideration whether Wood entered into possession of the land or farmed it under the lease. Wood signed no contract or lease and never agreed to pay the rent. The instructions given were correct.

STATEMENT BY THE COURT.

Tom Lansdell instituted this action in the circuit court against John F. Woods and Frank Weese to recover $600.00 alleged to be due him on a lease contract. The facts are as follows:

In September, 1913, Thomas Lansdell leased to J. H. Bozarth by a contract in writing a certain tract of land in Crawford county, Arkansas, for the period of five years for the sum of $600.00 each year. It was shown by oral testimony on the part of the defendants that Bozarth assigned this lease to Frank Weese and that the latter immediately went into possession of the land and has been in possession

of the same ever since. Bozarth agreed to transfer the lease to Weese for the sum of $225.00. Weese did not have the money. To get it, it was agreed that the lease should be transferred to Woods as security for this loan. Pursuant to this verbal agreement, Bozarth transferred the lease to Woods. Woods held the lease until Weese paid off the note which he had signed for Weese and then Woods transferred the lease to Weese. Woods was never in possession of the land at all. Weese paid the note in 1914. Woods then assigned the lease to Weese and did not thereafter have anything to do with the lease. In the spring of 1915, there was an overflow in the Arkansas river, which destroyed most of the crop of Weese on the land in question. On this account he failed to pay the rent and this suit was instituted against him and Woods by Lansdell to recover the rent for that year.

Lansdell introduced a letter written to him in regard to the matter in which Woods stated that he had transferred the lease to Weese and referred to the fact that the river had destroyed the crops on the land for the year in question. He also asked in the letter what Lansdell proposed to do with them and made a proposition about the rent for Weese. In explaining this letter both Woods and Weese testified that the latter could not write and that the letter was written for him and that the parties had no intention of stating that Woods was then interested in the lease or that he had ever been except to hold it as collateral security.

At a former term of the court the jury had returned a verdict against Weese for the amount of the rent and no appeal was taken from that judgment. Hence the liability of Woods only for rent is involved in this case.

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

HART, J. (after stating the facts).

(1) Counsel for the plaintiff claim that the court erred in refusing to give certain instructions asked by them, but the exceptions to these instructions were in

gross. Where the exceptions to the court's several instructions were in gross, they will not be considered on appeal, if any one of them was bad. There are numerous decisions of this court to this effect and we need only cite a few of them. *H. D. Williams Cooperage Co.* v. *Clark*, 105 Ark. 157; *K. C. So. Ry. Co.* v. *Morris*, 80 Ark. 528; *K. C. So. Ry. Co.* v. *Belknap*, 80 Ark. 587. At least one of the instructions was peremptory in its nature and for that reason should not have been given to the jury. It follows we cannot consider the other instructions refused. Moreover the case was submitted to the jury upon proper instructions to which no objections were made or exceptions saved.

It is next insisted that the court erred in admitting oral evidence to the effect that the lease was assigned to Woods as collateral security for a note signed by him for Weese to obtain money with which to purchase the lease.

(2) It may be stated at the outset that this testimony, if it is competent, would be prejudicial to the rights of the plaintiff. On the ground that there is privity of contract between the lessor and the lessee, the latter is liable to the former upon an express covenant to pay rent even though there has been an assignment of the term to a third party. *Evans* v. *McClure*, 108 Ark. 531. The assignee will generally be liable for all rent accruing while he is in privity of estate with the lessor. Underhill on Landlord and Tenant, vol. 2, p. 1080.

On the other hand if the assignment of the lease was merely intended as a mortgage or as security, it will be presumed that the parties never intended that the assignee should have possession but that the mortgagor should continue in possession and on this presumption of intention the law will not hold the assignee liable for the rent to the lessor. Underhill on Landlord and Tenant, vol. 2, p. 1087.

The evidence in question does not tend to vary or contradict the terms of the instrument but to establish

the fact of a loan and that the assignment was made to secure the loan.

In *Reynolds* v. *Blanks*, 78 Ark. 527, it was held that parol evidence is admissible to show that an assignment of a contract absolute in form was intended merely as security for a loan. As we have already seen, the disputed question of fact was submitted to the jury upon instructions to which no exceptions were saved.

The judgment will be affirmed.

GREENBERG IRON CO. v. DIXON.

Opinion delivered February 19, 1917.

1. COUNTIES—BRIDGE BUILDING—APPROPRIATION.—If the levying court of any county appropriates any sum for bridge building, their act indicates their judgment that the work be done, and the county court, in contracting for the construction of bridges, is not limited to the amount appropriated.
2. COUNTIES—CONSTRUCTION OF BRIDGE—REFUSAL TO ISSUE WARRANT. A county court issued a warrant in payment for the construction of a certain bridge, and after calling in county warrants, refused to re-issue this one. *Held*, the record not showing that no contract for bridge building had been made, that the county court could not thereafter refuse to re-sisue the warrant.
3. COUNTY COURTS—CALLING IN AND RE-ISSUING WARRANTS.—The county court is not authorized to review its former judgments for mere errors in the allowance of claims, but can only reject those warrants which have been illegally or fraudulently issued.
4. COUNTIES—USE OF ROAD TAX.—The county court may use road funds in the construction of a bridge in a city, in conjunction with the city authorities.
5. COUNTY COURTS—RATIFICATION OF UNAUTHORIZED ACT OF COUNTY JUDGE.—The county court may ratify an unauthoried contract made by the county judge in behalf of the county, if the contract is one which the court could have made in the first instance.

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

Lindsey & Lindsey and *Walker & Walker*, for appellant.

1. The court erred in its refusal to declare the law as requested by appellant. The allowance by the

county judge and court is a judgment and no appeal was taken. 33 Ark. 793; 22 *Id.* 595; 37 *Id.* 595; *Ib.* 654; Kirby's Digest, § 1487.

2. Where a contract is made by the county judge and later a warrant is issued, the contract is ratified and binds the county. 107 U. S. 355; 72 Ark. 330; 38 *Id.* 557; 96 U. S. 341-350; 122 Ark. 502.

3. Defendant has fulfilled his contract in good faith; the material has been furnished and the bridge built and accepted by the court and the bridge is being used by the public. The warrant was properly issued and should have been reissued.

McGill & Lindsey, for appellee.

1. No appropriation had been made to build county bridges by the county court. 77 Ark. 330; 61 *Id.* 4; 1073 *Id.* 468; 63 *Id.* 400, etc.

2. The warrant was not a proper charge against the county and should not have been reissued. The court had power to call in all warrants. Kirby's Digest, § 1175; 33 Ark. 793.

3. A county judge has no authority to make a contract in vacation. 55 Ark. 437; 58 *Id.* 494, 502; 97 *Id.* 321.

4. This was not a claim against the county. The court properly disallowed it. There is no error. 61 Ark. 74 to 79; 54 *Id.* 645; Kirby's Digest, §§ 1494-9; 36 Ark. 641; 98 *Id.* 493; 63 *Id.* 400; 49 Ark. Law Rep. 336; 122 Ark. 557; 33 *Id.* 794.

HART, J. This is an appeal from a judgment of the circuit court affirming the judgment of the county court cancelling a certain warrant issued to A. L. Greenberg Iron Company in part payment for materials furnished by it to build a bridge on one of the main streets of the city of Bentonville, Arkansas. The facts are as follows:

The county judge and the city authorities of Bentonville decided to build a bridge on one of the main streets of the city. The materials were purchased

from A. L. Greenberg Iron Company for $1,200.00 which was a reasonable price therefor. The city agreed to pay $500.00 of this amount and the county judge agreed to pay the remainder, $700.00. After the bridge was constructed and in use, the county court made an order that a warrant of $700.00 be issued to A. L. Greenberg Iron Company, which was accordingly done. No appropriation was made by the levying court of Benton county to build said bridge. No notice of the proposed contract was published, no commissioners were appointed to locate the bridge, and the contract to construct it was not let to the lowest bidder at public outcry. Subsequent to these proceedings the court made an order calling in all the outstanding county warrants. The A. L. Greenberg Iron Company presented the warrant in question for $700.00 to the county court for cancellation and re-issuance. Sam Dixon, a citizen and tax-payer of the county appeared and contested the right of the company to have the warrant re-issued. The county court refused to re-issue the warrant and as above stated the appeal here is from the decision of the circuit court affirming the judgment of the county court.

(1-3) The judgment of the circuit court was wrong. It has been held that under our statute the county court has no power to let a contract to construct a bridge without some appropriation made for building bridges by the levying court. *Fones Hardware Co.* v. *Erb*, 54 Ark. 645. It cannot be determined from the record whether or not there was an appropriation for building bridges in Benton county for the year in question. It is true the record recites that there was no appropriation for building this particular bridge, but this was not necessary. Upon the authority above recited, if there was an appropriation for building bridges, the county court had the power to act and is not limited to the amount appropriated. When the levying court appropriated any sum for building bridges, that indicates its judgment that the work should be done, and the county court in contracting for the

construction of bridges, is not limited to the amount appropriated. The record being silent upon the question of whether or not an appropriation was made for building bridges, the county court could not refuse to re-issue the warrant. In construing our statute in regard to calling in, cancelling and re-issuing warrants, this court has held that the county court is not authorized to review its former judgments for mere errors in the allowance of claims but can only reject those which have been illegally or fraudulently issued. That is to say, a claim would be illegal where it was one which under no evidence that might have been adduced could have been a valid claim against the county. *Izard County* v. *Vincennes Bridge Co.*, 122 Ark. 557, and *Monroe County* v. *Brown*, 118 Ark. 524. It will be readily seen that evidence might have been introduced to show that the levying court had made an appropriation for building bridges, and upon the authorities just cited it may be said that in the absence of such affirmative showing the presumption is that such appropriation was made.

(4) Again it is sought to uphold the judgment on the ground that the county court had no authority to expend the road funds in constructing a bridge in a city or town, but this contention has been decided against them in the case of *Texarkana* v. *Edwards*, 76 Ark. 22. There it was held that the road tax, when collected, is a fund belonging to the county, and should be paid into the county treasury; and that the expenditure of the fund is under the jurisdiction of the county court, which, so far as street improvements are concerned must act in conjunction with the city authorities having control of the streets. See also *City of ElDorado* v. *Union County*, 122 Ark. 184.

(5) Finally it is insisted that the judgment should be upheld because the county judge had no authority to make the contract in question and that the county court could not ratify his act. It will be remembered that the county judge first made the contract with the iron company to furnish materials for the bridge and

that the county court subsequently ratified this contract by ordering a warrant for the amount to be issued to the iron company. As we have already seen the contract is one which the county court could have made in the first instance and this court has held that the county court may ratify an unauthorized contract, made in behalf of the county if the contract is one the county court could have made in the first instance. *Leathem & Co.* v. *Jackson County*, 122 Ark. 114.

It follows that the judgment must be reversed and the cause will be remanded for further proceedings in accordance with law.

St. Louis, Iron Mountain & Southern Ry. Co. v. Clark Pressed Brick Company.

Opinion delivered February 19, 1917.

1. Railroads—control of by state commission—power of courts.—The State has power to create a commission and to give it the power of regulating railroads, and investigating conditions upon which regulations may be directed, and the courts will interfere with the acts of the commission, only when it appears that the commission has transcended its powers.
2. Railroads—switching and transportation—freight rates—authority of railroad commission.—The action of the Railroad Commission of Arkansas in fixing the carload rate for switching instead of fixing tonnage rates for transportation, for the movement of carload lots of freight between points wholly within the terminal district of the cities of Little Rock and Argenta, *held*, not to be unreasonable, and therefore that such action of the Railroad Commission was not subject to review by the courts.

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

E. B. Kinsworthy and *R. E. Wiley*, for appellant.

1. Plaintiff was not entitled to recover on the third count of the complaint. No notice was given. Kirby's Digest, § 6733; 62 Ark. 452.

2. There was no unjust discrimination in freight charges. Act Mch. 11, 1899; Kirby's Digest, § 6808-10, etc. The rate collected was the lawful rate and ap-

proved by the R. R. Commission. The switching charges were authorized and reasonable.

3. But the charging of these rates does not operate as a discrimination, because the different rates applied to plaintiff and the Ark. Brick & Mfg. Co. are not applied under the same circumstances. 64 Ark. 275; 73 *Id.* 373; 71 *Id.* 363; 112 *Id.* 147. No undue discrimination is shown. The conditions and circumstances surrounding the industries are not the same, but entirely unlike. Cases *supra.*

4. Plaintiff paid only the lawful, established charges on the shipment. It is not damaged. Kirby's Digest, § 6808, 6813.

5. The carrier is bound by the tariff as fixed by the Railroad Commission and the court and is not bound or liable civilly or criminally for collecting a rate fixed by the R. R. Commission. If the rate is discriminatory or unjust the remedy is given by § 6810, Kirby's Dig. If the tariff was unjust, plaintiff should have brought suit to enjoin. 204 U. S. 426.

6. To sum up: Plaintiff cannot recover on the third count because its claim was not filed in accordance with § 6733, Kirby's Digest. Nor can it recover on the first and second counts, because defendant collected only the rate established by the R. R. Commission and the Act, and no damage recoverable under § 6808 was shown. If a competitor was charged less the remedy was by suit under § 6813 for the penalty.

7. The court erred in its findings and judgment.

Mehaffy, Reid & Mehaffy, for appellee.

1. There was unjust discrimination in the charges. The question is: What is the difference between a "road haul" and a "switching movement." This has been directly decided in 155 Ill. 283, affirmed in 93 N. E. 312. See also 35 S. E. 369.

2. There is no difference in business or circumstances. The orders of the Railroad Commission are not impervious to attack collaterally. 112 Ark. 147.

3. The statutes with respect to unjust discrimination are declaratory of the common law. 95 Ark. 251.

4. The charge for "town switching" is unjust and discriminatory. 155 Ill. 283; 93 N. E. 312. There is no distinction or difference between the movements of cars by appellee and the Ark. Brick Co., a competitor in business. The discrimination is apparent.

HART, J. Appellee, Clark Pressed Brick Company, instituted this action in the circuit court against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for unjust discrimination in freight charges and to recover the statutory penalties for the same, and upon trial before the court sitting as a jury obtained a judgment for $2,000.00. The railway company has appealed to this court.

The complaint contained three counts. The first appears to have been based upon section 6808 of Kirby's Digest providing for double damages against railroads for unjust discrimination in freight charges against shippers. The second count appears to be a common law action to recover damages for unjust discrimination in freight charges. The third count is based upon section 6733 of Kirby's Digest providing for the payment of a penalty by railroad corporations unjustly discriminating in freight charges against shippers.

The views we shall hereinafter express render it unnecessary for us to determine whether or not the three counts were properly embraced in one action. For this reason we shall proceed immediately to a statement of facts necessary to a determination of the issues on the merits raised by the appeal.

The cities of Little Rock and Argenta have a combined population of about 65,000, and three different railroad carriers including appellant, operate lines through said cities. Each road is engaged in both interstate and intrastate commerce and the cities named are necessary and convenient points to locate division headquarters and terminal facilities for making up of trains, for unloading and feeding live stock, and

for shops for repairing cars, etc. The cities are also distributing points for freight throughout the State of Arkansas. Therefore it was necessary to establish what may be called terminal or yard facilities including switching tracks, industrial tracks, spur tracks, side tracks, team tracks and storage tracks, etc. Each of said railroad carriers fixes its own yard limits in the two cities within which the movement and shifting of cars is conducted by switching under the charge of the yard master. The regular trains are operated under the direction of the train-master. When the yard limits are fixed by the general manager, they are designated by signs marked "yard limit." These signs indicate to the operatives of trains where they must conform to the yard rules. Each line of road has numerous spur or industrial tracks connected with its main line in said cities. The railroads have physical connection with each other by means of connecting tracks. The spur track on which is constructed the plant of the Arkansas Brick & Manufacturing Company was laid in 1899 and was at that time within the yard limits of appellant company. The plant of the Arkansas Brick & Manufacturing Company is about one-half of a mile from the main track of the railroad company and is about three miles from the Union Station in the city of Little Rock, being situated in a southwesterly direction therefrom. In 1897 appellant fixed its yard limits on the south at a point about 1700 feet south of the switch connection of the railroad's main line with the spur track of the Arkansas Brick & Manufacturing Company's plant. The latter company secured the right of way for the railroad company and the railroad company constructed the track and operates it as a part of its railroad.

The Arkansas Brick & Manufacturing Company is engaged in the manufacture and sale of brick in carload lots. The Clark Pressed Brick Company is engaged in the same business at Malvern, Arkansas, its plant being situated 2945 feet distant from the station of appellant at Malvern, Ark.

In 1909 appellant established a rate of 1 cent per 100 pounds upon brick from its plant to and from points in Little Rock in car-load lots and filed its tariff with the Railroad Commission of Arkansas. The Railroad Commission disapproved its tariff and prohibited its enforcement. The reason was that the industrial track on which the plant of the Arkansas Brick & Manufacturing Company was situated was within the yard or terminal limits of the cities of Little Rock and Argenta and the rate established was higher than the town switching rate fixed by the Railroad Commission for movements between points within said yard and terminal limits.

The railroad companies of Arkansas including appellant brought suit in the Federal Court at Little Rock alleging that all rates put in force by the commission were confiscatory and prayed an injunction. Answer was filed by the Railroad Commission putting in issue the allegations of the complaint. During the pendency of this suit what is commonly called the court tariff became effective and continued in force during the whole period covered by the transactions which formed the basis of this suit. Little Rock and Argenta were treated for the purposes of town switching, as if they constituted but one city.

The court tariff provides that shipments from one industrial track to another shall be considered as town switching and shall be charged for at a certain rate per car, varying according to the number of miles the cars are carried. The court tariff fixed transportation rates at from two to eight cents per hundred pounds, depending upon the number of miles the shipment was carried. For instance, if the Arkansas Brick & Manufacturing Company should sell a car-load of brick to another company situated on an industrial track, the car would be carried from one track to the other at switching rates.

Again there are a number of team tracks in the city of Little Rock from which the public generally load and unload freight for shipment. If a car-load of

brick is carried from the company's plant to one of these team tracks the switching rate only is charged. In short, switching rates are charged for the movement of all freight within the yard limits in the cities of Little Rock and Argenta and movements of freight within these yard limits are made under the supervision of the yard master. If the Arkansas Brick & Manufacturing Company, or any other company which is situated on an industrial track, desires to ship freight to any other point in Arkansas, the regular transportation rate is charged the company from the union station in the city of Little Rock and no charge is made for hauling the shipment from the company's plant to the union station. The same rule is applied to incoming shipments, shipments from points in the city to the brick plant are charged switching rates and shipments from other places in the State are charged regular transportation rates from there to the union station at Little Rock and no charge is made for transporting the shipment from there to the company's plant. The same rule is observed with regard to the Clark Pressed Brick Company. No charge is made for service in hauling from that company's plant to the station at Malvern or from the station to the company's plant. The shipments from the plant take the regular transportation rate fixed by the Railroad Commission from the station at Malvern with reference to outgoing shipments and to the station at Malvern with reference to incoming shipments. When shipments are made from the Clark Pressed Brick Company's plant to industries on appellant's line of road in the cities of Little Rock and Argenta, no charge is made for switching to the various industrial tracks. The proof shows that the switching rates charged as above on car-load lots are smaller than would be the regular transportation rate. As we have already seen the rates charged both brick companies were fixed by the Railroad Commission acting under orders from the Federal Court in a suit pending by the railroad companies against the Railroad Commission.

The record does not show whether or not appellee applied to the Railroad Commission for relief. They seem to have proceeded on the theory that the action of the Railroad Commission in fixing the tariff was discriminatory as a matter of law and for that reason the courts could afford relief.

To sustain the judgment, counsel for appellee rely upon the case of *Dixon* v. *Central of Georgia Ry. Co.*, 110 Ga. 173, 35 S. E. 369, and other cases of like character, which hold that a switching or transfer service is one which precedes or follows a transportation service, and applies only to shipments on which legal freight charges have already been earned or are to be earned.

We do not think this alone is the test. Another test is whether the movement of cars is under the direction of the yard master or under orders from the train dispatcher. The yard master has charge of the switching service and the train master of transportation service. In determining the question another thing to be considered is that in order to afford facilities to shippers and to operate its line of road to the best advantage, a railroad company establishes a terminal district usually called its yards. In these yards, as in the present case, the railroad constructs industrial tracks, side tracks, team tracks, etc., for the accommodation of manufacturing establishments and other shippers situated within the terminal district. The switches are so built as to enable the railroad to take cars from the shippers at their places of business and deliver them to other points within its yard limits or to other lines of railway with which it has physical connection and also to deliver cars, received by it from other roads to consignees. If the cars are to be transported from its own line to destination or to come into the city over its own road the switching service is free. The charge for switching is only made when the goods are carried to the connection with another line of railroad or to and from other industrial plants and team tracks within the city. It is true that the fact that the

entire service rendered by railroad companies are confined to its own side or switch tracks will not prevent it from being transportation.

(1) In *Grand Trunk Ry. Co.* v. *Michigan Railroad Commission*, 231 U. S. 457, in upholding the validity of an order of the State Railroad Commission requiring that railroads shall accept freight for transportation between two points within the same city, as against the contention that such a service was not transportation service but was a switching service, the court said that a service calling for the use of the so-called terminal facilities of a connecting railroad does not lose what would otherwise be the quality, of transportation, from the mere facts either that the movement begins and ends within the switching or corporate limits of a city; or that the transportation is only between an intra-city junction and team track or side track. In reaching that conclusion the supreme court of the United States recognized that a State is competent to create a Commission and give it the power of regulating railroads and investigating conditions upon which regulations may be directed; and that the judiciary will only interfere with such a commission when it appears that it has clearly transcended its power. In that case it was contended that the order of the commission was an appropriation of the terminal facilities of the railroad for the use and benefit of other railroads. The court said that transportation is the business of railroads and when that business may be regulated and to what extent regulated may depend upon circumstances. The extent of Detroit was about twenty-two miles; its population was about 500,000. Large and varied industries were situated within its limits. The court said that while a city may be a terminal unit of a railroad that considering the extent of Detroit it was competent for the state, under the conditions which the record presented, to consider points within it the beginning and destination of traffic.

In the present case we have the converse of the proposition. As we have just seen no inflexible rule

can be laid down. No case could better illustrate the value of the principle than does the present case. The cities of Little Rock and Argenta are only separated by the Arkansas river. Most of the terminal facilities of the railroads passing through these cities are in Argenta. Both cities combined have only a population of 65,000, and the industrial and manufacturing plants within their borders are necessarily few and the business transacted by them small in comparison with those situated within the limits of the city of Detroit. It will be readily seen that the question of discriminating in these matters may be the controlling facts by which to determine the validity or invalidity of the order of the Railroad Commission.

Again in the *Los Angeles Switching case*, 234 U. S. 294, in discussing the powers of the Interstate Commerce Commission, the court held that it is permissible for a railway company to establish a terminal district, and that it is for the commission to determine, according to the actual conditions of operation, whether an extra charge for spur track delivery within that district, regardless of the variations in distance, is either unreasonable or discriminatory.

(2) In the application of these principles of law it cannot be said that the condition and circumstances as shown by the record in this case presents such an exceptional case as to render the findings of the Railroad Commission unreasonable. When the population and commerce of Little Rock and Argenta are considered in connection with the number, length and situation of the side tracks, we do not think that an exceptional situation was created as was in the case of Detroit. For this reason the circuit court could not substitute its judgment for that of the Railroad Comission upon matters of fact within the province of the commission. Under the situation presented by the record, it can not be said that the action of the Railroad Commission in fixing the car-load rate for switching instead of tonnage rates for transportation for movement of car-load lots of freight between points within the termi-

nal district was unreasonable, and, therefore, subject to review by the courts.

It follows, therefore, that the court erred in finding for appellee and for that error the judgment will be reversed and inasmuch as the case has been fully developed the complaint of appellee will be dismissed here.

DE BORGES v. GREEN.

Opinion delivered February 19, 1917.

STENOGRAPHER'S FEES—DEPOSITIONS IN CHANCERY CASE.—Where counsel in an action in chancery, agree upon a stenographer to take depositions, it is the duty of the court to fix the fee for such service, which will be charged as costs in the suit (Act 290, page 1081, Acts 1915, § § 18 and 19).

Appeal from Union Chancery Court, *James M. Barker*, Chancellor; reversed.

Neill C. Marsh, for appellant.

1. The stenographer's fees should have been allowed by the court as costs and taxed as such. Acts 1915, 1090.

W. E. Patterson, Amicus curiae.

1. Depositions were taken in vacation and without order of court. 80 Ark. 574. The Act 1915, p. 1081, does not allow the fee. It was not so intended. Such statutes are strictly construed. 73 Ark. 603; 61 *Id.* 407; 86 *Id.* 280. The chancellor's ruling is correct.

SMITH, J. Appellant was employed as a stenographer to take depositions of witnesses on behalf of the defendant in the case of *Green* v. *Hill*, pending in the chancery court of Union county. The depositions were taken in vacation by agreement of counsel. Thereafter appellant filed a petition in that case, accompanied by a bill for her services, in which she prayed that her fees as stenographer be allowed and charged as costs. Upon the hearing, the petition was dismissed "for the reason that the depositions were

taken in vacation without the order of the court," and this appeal questions the correctness of that ruling.

In the case of *Reese* v. *Cannon*, 80 Ark. 574, this court held that there was no provision in the statute for paying, as costs, the copying of stenographer's notes in taking depositions, even when the costs for the depositions themselves were properly charged. Since this decision there has been passed an Act entitled, "An Act to regulate Pleading and Practice in the Chancery Courts of the State of Arkansas." Act No. 290, Acts 1915, page 1081.

This legislation appears to have contemplated the state of the law as pointed out in that opinion and to have remedied the omission in the law which prevented courts from charging up the costs of stenographic services as costs of the litigation by providing that such costs might be so charged.

Section 18 of this Act, among other things, provides:

"Officers and stenographers taking depositions shall prepare an original and two carbon copies of same at the time of transcribing for which service said officer shall be allowed a reasonable compensation to be fixed by the court and taxed as costs."

Section 19 of this Act is as follows:

"Section 19. Upon the trial of any issue or motion in any action or special proceeding, the court may order all oral testimony to be taken down in shorthand by a stenographer, and said stenographer, whether he be the official court stenographer or one specially designated by the court for the purpose, shall transcribe his stenographic notes at the request of the court or counsel for either party, and when so transcribing said notes he is hereby required to make three copies, two of which may be carbons, of the proceedings so reported by him, of which the original copy shall, in case of an appeal, be delivered to appellant's counsel to be inserted in the original transcript as a part of the same and for which portion so inserted the clerk shall receive no pay. Another copy shall be delivered to appellant's counsel

to be used in the bill of exceptions and filed in the clerk's office, while the third copy shall be kept on file in the clerk's office with the other papers in the case, which copy so filed shall, in cases in chancery, be treated as and have the same effect as depositions in the case taken in the regular manner. And in such cases, as well as in cases where depositions are taken in shorthand and transcribed by a stenographer, whether the stenographer is the officer taking said depositions or the party called to write and transcribe the same as provided by law, the court shall allow a reasonable fee for such taking and transcribing and making said three copies, to be taxed as cost of suit."

It is insisted by learned counsel who has filed a brief as *amicus curiae* that the language, "and in such cases," appearing in the last quoted section, refers solely to depositions taken under the order and direction of the court. But, to so interpret the statute, much of it would have to be treated as surplusage and this, according to the insistence of the learned friend of the court, should be done. But we think this is not the proper construction of the language employed, especially when sections 18 and 19 are read and considered together.

While counsel may agree upon and may employ some stenographer to take depositions, yet the court fixes the fee for such service which may be charged as costs of suit, and only the fee fixed by the court may be charged and collected as costs.

The court below did not pass upon the reasonableness of the fee charged, but held that it was without jurisdiction to fix any fee, and the decree will be reversed on that account and the cause will be remanded with directions to the court to fix a fee for this service and to charge the same as costs of suit. Such costs, as well as the costs upon this appeal, will be charged as costs in the original litigation, the payment of which will abide the final result of that case.

BROWN v. PEOPLES BANK OF SEARCY.

Opinion delivered February 19, 1917.

BILLS AND NOTES—LIABILITY OF ONE WHO SIGNS AS SURETY A NOTE FOR A PRE-EXISTING DEBT.—One who signs a note as surety, before delivery, the note being given for a pre-existing debt, is liable thereon. An antecedent indebtedness is a good consideration to support a new note, as to one who signs the note as surety.

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

Emmet Vaughan and *W. A. Leach*, for appellant.

1. Brown signed merely as a surety. Plaintiff extended the time of payment without consultation or notice. The note was past due long before demand was made and in the meantime Yarnell became insolvent. The note was for an antecedent debt and no new consideration was given. There was fraud in obtaining his signature. Each of these is a valid defense. 20 Cyc. 110, note 87; Pingrey on Suretyship, §§ 40-41; Stearns on Suretyship, 239; Brandt on Suretyship, vol. 1 (2nd ed.), § 17; 30 Ark. 684.

2. There must be a consideration to support a promise to pay by a surety, and if the debt of the principal was incurred previous to the undertaking by the surety there must be a new consideration to support the surety's promise. 43 Ark. 21; 21 *Id.* 18-20; 103 *Id.* 473-477. An antecedent debt is not sufficient. Cases *supra.*

3. Parol evidence was admissible to prove that appellant was in fact a surety. 54 Ark. 99-100; 92 *Id.* 604; 32 Cyc. 40; 34 S. W. 78. The note was also signed for a specific purpose and the proceeds fraudulently diverted. Norton on Bills (4 ed.), 241 and cases cited.

Brundidge & Neelly, for appellee.

1. Conceding, for argument, that Brown signed as a surety the consideration was sufficient to bind him. 103 Ark. 477; 32 Cyc. 56.

2. Appellant was a joint maker and responsible. 96 Ark. 111; 118 *Id.* 225; 113 *Id.* 120; 3 Rul. Case Law, p. 1138, § 354.

SMITH, J. Appellant was sued upon the following note:

"Searcy, Ark., April 29, 1914. No. 2203.

Due June 29, 1914. 60 days after date, I, we, or either of us, promise to pay to the order of the Peoples Bank, Searcy, Ark., five thousand & no-100 Dollars ($5,000.00) for value received, negotiable and payable, without defalcation or discount, at the Peoples Bank, Searcy, Ark., with interest from date at the rate of 8 per cent. per annum until paid. The makers and indorsers of this note hereby waive presentment for payment, notice of non-payment and protest. With attorney fees and collection charges.

Yarnell Produce Co.
John S. Yarnell,
H. L. Brown."

As a witness in his own behalf appellant offered to testify that John S. Yarnell, who joined with him in the execution of the note, was, together with the Yarnell Produce Company, of which he was the owner and manager, the principal in the note, and that he (appellant) was a mere surety. But the court excluded this testimony.

Appellant offered also to show that the proceeds of the note were used in the discharge of an overdraft of $4,535.78 due the bank by the produce company, and that the balance of the note was used in the payment of checks drawn against the account of the produce company which the bank had refused to pay upon their presentation for payment. After the $5,000.00 represented by the note was credited to the account, and the dishonored checks had been paid, the account stood overdrawn at the close of business that day in the sum of $229.03.

Appellant also offered to testify that Yarnell had represented to him the money was desired for current

uses of the produce company, which was about to be incorporated, and in which appellant was to become a stockholder. The business was never incorporated. No proof was offered to the effect that the bank knew anything about the representations made to appellant by Yarnell.

Neither Yarnell nor the produce company made any defense against the demand for judgment.

Some incidental questions are discussed in the brief, but the controlling questions are whether error was committed in refusing appellant permission to prove that he signed as surety and without knowledge of the existence of the antecedent debt, to the payment of which the proceeds of the note were applied, and in directing the jury to return a verdict in favor of the bank.

It is true that parol testimony is admissible to show the relation of parties to a promissory note in litigation between themselves and to show that one signed only as surety whose name appears therein as a joint maker; but it does not follow on that account that the judgment in this case must be reversed. Appellant makes the fundamental mistake of assuming that he cannot be liable as a surety upon a note which was given in satisfaction of a pre-existing debt. This question was considered in the recent case of *High* v. *Reed*, 124 Ark. 294; 187 S. W. 168. We therein quoted from the syllabus in the case of *Harrell* v. *Tenant, Walker & Co.*, 30 Ark. 684, the following statement of the law:

"An antecedent indebtedness is a good consideration to support a new note, as to one who signs the note as surety."

And we there also quoted from that opinion the application of that statement of the law which Judge English, in delivering the opinion of the court, made to the facts of that case. He 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."

And in the case of *High* v. *Reed*, *supra*, we said that, if subsequent to the execution and delivery of a note, a surety signs it solely on account of a loan previously made, that action is without consideration to support it; but that, if the surety signs the note before its delivery, intending thereby to join in the execution of an obligation to supersede the outstanding one, he becomes liable, and cannot defend against the assertion of this liability by saying that the creditor advanced no new consideration and should, therefore, be remitted to the collection of the debt which he originally had.

Here the undisputed evidence is that appellant signed the note before its delivery to the bank, and when it was delivered the bank credited the account of the produce company with the amount of the note and paid the dishonored checks amounting to $693.25 and an extension of sixty days was secured for the entire indebtedness—this being the time covered by the note.

We think the evidence sufficient to warrant the court in declaring, as a matter of law, that there was sufficient consideration to support the note, even though appellant had signed only as surety, and in directing the jury to return a verdict accordingly. The judgment is affirmed.

ROBERTS v. LETCHWORTH.

Opinion delivered February 19, 1917.

1. RECEIVERS—DUTY TO FILE INVENTORY.—While it is better practice in all cases for receivers to file inventories of the estates over which they are appointed, it will not be held to have been error for the chancellor to fail to require the filing of an inventory, when the complaining party did not request the filing of an inventory until all the assets of the estate had been disposed of.
2. RECEIVERS—VALUE OF BUILDING.—A receiver can not be charged with the value of a building belonging to the estate, when title to the metal roof therein, and machinery inside the same remained in the vendors, and where such articles were ordered returned by the chancellor.
3. RECEIVERS—ORAL ORDERS OF CHANCELLOR.—It is better practice for chancellors to make all orders concerning a receivership, after notice, and to place the same on record, but creditors can not complain of oral orders made by the court in the absence of a showing of injury to them.
4. RECEIVERS—PURCHASING ASSETS FOR HIMSELF.—While receivers should not purchase assets of the estate for themselves, such a purchase will not be disturbed where the estate is not injured thereby.
5. RECEIVERS—APPOINTMENT OF INTERESTED PARTIES.—An interested party may be appointed receiver upon application of the creditors.
6. RECEIVERS—PAYMENT OF OWN CLAIM.—It is improper to permit a receiver to sell property belonging to the estate and appy it to the payment of his own judgment.

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

Emmet Vaughan, for appellants.

1. An inventory of the estate should have been ordered filed by the receiver. 34 Cyc. 246.

2. The building was an asset in the hands of the receiver; he should have been charged with its value. He had no right to dismantle it and parcel it out to creditors who had liens for material. 61 Fed. 546; 68 N. E. 20.

3. It is reversible error for a chancellor to direct a receivership verbally. His orders should all be made a matter of record. It was also error to allow the receiver to buy part of the property.

4. It was error to appoint a receiver who has an attachment suit pending—a party in interest—and to allow him to buy. 61 Fed. 546, 549. It was the receiver's duty, immediately upon his appointment, to intervene in his own attachment suit and move to dissolve. Kirby's Digest, § 4055.

5. The chancellor erred in approving the receiver's final report, showing a sale privately, and applying the proceeds to his own debt. He was allowed to plunder the estate and the poor laborers got "*left.*" A decree should be entered for $409.27, the amount of the preferred claims against the receiver.

W. A. Leach, for appellee.

1. It is not mandatory that an inventory should be filed. It was a matter of discretion for the court and no abuse is shown. No proper showing was made and no injury resulted.

2. There was a vendor's, or materialman's lien on the saw mill building; the receiver was powerless. It was never an asset in the hands of the receiver. The owners removed the roofing, under the directions of the chancellor.

3. It is not against the law, nor public policy, to appoint a party receiver who has an attachment suit pending.

4. No principle of equity was violated in permitting the receiver to buy lumber no one else would have. None of the creditors could use it and no one else wanted it. Under all the proof the receiver discharged his duties properly, and no injury is shown. He accounted for all property that came into his hands. The burden was on appellants to sustain their objections. The findings of the chancellor are sustained by the evidence. The decree should be affirmed.

HUMPHREYS, J. This suit was commenced in the Pulaski chancery court for the purpose of winding up the partnership affairs of Brown & French. It became necessary to appoint a receiver. The first receiver appointed was C. R. Powell, who resigned, and the

court appointed J. W. Letchworth, one of the creditors, receiver in succession. J. W. Letchworth was appointed receiver at his own suggestion on application of the other creditors in order to save fees and other expenses incident to the receivership. At the time C. R. Powell resigned he filed a report showing a small balance due him for expenses. He turned the assets, which consisted largely of lumber and household effects in and about a sawmill located at Letchworth, Arkansas, over to his successor, J. W. Letchworth. During the administration of C. R. Powell he had been ordered to file an inventory but the matter was overlooked. No order was made by the chancellor requiring J. W. Letchworth, as receiver in succession, to file an inventory. No request was made by appellants for him to do so until September 21, 1915, at which time disposition had been made of practically all the assets in his hands.

The matter proceeded until the receiver in succession filed his second report, at which time the other creditors filed exceptions to the report, which were overruled by the chancellor.

This appeal is prosecuted to correct alleged errors of the chancellor in overruling the exceptions to said report.

(1) The first alleged error urged for reversal is that the chancellor refused to require the receiver to file an inventory. The statutes of Arkansas do not require him to do so; no order had been made by the court requiring J. W. Letchworth, as receiver, to file an inventory until disposition had been made of the assets. The estate was small and the assets had been converted either into money or applied to the payment of his own judgment at the time the creditors made their application. It is the better practice in all cases for receivers to file inventories of the estates over which they are appointed, but we think this a belated request and cannot find that the chancellor committed reversible error in refusing to require the receiver to file an inventory.

(2) The second alleged error consisted in the refusal of the chancellor to charge the receiver with $400.00 for the sawmill building. This building had a metal roof and when the roof was bought the seller had reserved the title in himself until the purchase money was paid. A like reservation of title had been retained in all machinery in the mill building. The chancellor directed the receiver to return the roof and machinery to the parties from whom Brown & French had purchased same. This he did, which left nothing except an uncovered, dismantled sawmill building. In this condition, and where located, the mill building had no market value. It would not be proper to charge the receiver with the original cost of constructing the building, nor to charge him with its value if it could not be sold.

(3-4) The third ground urged for reversal is that the chancellor made oral orders with reference to the disposition of a part of the lumber and permitted the receiver to buy a portion thereof. It were better to make all orders after notice and to place them of record, but unless some injury has resulted to the creditors for the want of notice, or on account of oral orders, they cannot be heard to complain. The burden of their complaint in this regard is that the receiver sold to, and charged himself with about fifteen or twenty thousand feet of lumber at the price of $65.00, which amount had been agreed upon between him and the chancellor. The evidence is to the effect that there was not enough lumber of the same dimensions to make marketable lots for car shipments. It was mostly cull, scrap stuff. As a general rule, receivers should not be permitted to buy assets from themselves. J. W. Letchworth lived near the mill and was the only person who could make use of this character of lumber. An effort was made to sell it, which failed, and as a last resort the receiver was permitted by the chancellor to take it for the lump sum of $65.00. No injury resulted to the creditors; in fact, the sale was a benefit to them. The chancellor's act in this respect is to be commended rather than condemned.

(5) The fourth alleged error raised the questions: First, of appointing parties in interest as receivers; and second, in permitting them to buy the assets. As a matter of policy, it is perhaps better to appoint disinterested parties to act as receivers, but in this case the chancellor appointed J. W. Letchworth on the written application of the creditors. As stated above, receivers should not be permitted to buy the assets at private or public sale. If, however, there is no market for the property and his purchase redounds to the good of the creditors, as in this case, the act should be and is approved.

(6) The fifth alleged error consists in permitting the receiver to sell property in his hands and apply it to the payment of his own judgment. At the time J. W. Letchworth was appointed receiver in succession to C. R. Powell he had an attachment suit pending against the firm of Brown & French. He proceeded to take judgment in the attachment suit and issued an execution. He allowed certain property of the firm of Brown & French to be levied upon and sold under the execution, and sold a part of the property himself and turned the proceeds over to the sheriff, all to be applied on his own judgment. His relationship as receiver and attaching creditor was wholly inconsistent. If he intended to prosecute his attachment suit and to collect his claim in full to the exclusion of the other creditors, he should never have accepted the receivership. Having sought and elected to take the receivership, it was his duty to abate or suspend the attachment suit and to present his claim to the court for allowance. Equity will treat that done which ought to have been done. Therefore, his judgment will be treated as filed and allowed as were the other claims. The receiver should be held to account for any property in his possession belonging to the firm of Brown & French not otherwise accounted for; also the proceeds of any property sold under his writ of attachment or execution; also moneys he collected from sales of property and turned to the sheriff on his own judgment and any other moneys

collected under the writ of attachment or execution by said sheriff.

For the error indicated the decree is reversed with directions to the chancellor to charge the receiver in accordance with this opinion and to pro rate the balance in the hands of the receiver among the creditors, including the judgment claim of the receiver.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT v. MCVEY.

Opinion delivered February 26, 1917.

LEVEE DISTRICTS—TAKING LAND OF ADJACENT OWNER.—A levee district obtained a right of way over certain land for its levee; thereafter the owner of the land deeded the same to appellee. *Held*, the district had the right to appropriate certain of the land when the levee board believed it necessary for the purpose of strengthening and enlarging the levee, and the land taken being contiguous to the line originally built.

Appeal from Crittenden Circuit Court, *W. J. Driver*, Judge; reversed and dismissed.

L. C. Going, for appellant.

1. The agreed statement of facts shows that (1) the board under its right of way deeds constructed a levee across the lands and (2) that the land appropriated was necessary for strengthening the levee and that the land used lies contiguous to the line of levee originally built. Under the deeds the board secured title to sufficient ground to construct a levee of sufficient height and width to protect the lands from overflow. 95 S. W. 993 is not conclusive of this case.

The levee was not completed and the ground was necessary. Only sufficient ground lying contiguous to the original line was taken under the right of way deed and there was no liability.

Hugh Hayden, for appellee.

1. The principle of this case is settled in 95 S. W. 993. If the levee board has once selected its right

of way and constructed its levee it cannot appropriate any additional land without compensation.

STATEMENT BY THE COURT.

This is a suit by the appellee for damages alleged to have been sustained by him through the taking of his land by the appellant for the purpose of using the dirt thereon to enlarge appellant's levee. The answer set up that appellant was entitled to the use of the land by virtue of deeds deraigning title from the George Arnold Co., a corporation, and from R. W. Barton.

Appellee owns the land in controversy and acquired title from the George Arnold Company, a corporation, and R. W. Barton. Before appellee acquired this title the Geo. Arnold Co. and R. W. Barton had conveyed to the appellant "all right of way that may be necessary in the judgment of the board of directors of the St. Francis Levee District for the construction and maintaining of the levee or levees to be built and constructed in, upon or across the following lands in said State of Arkansas, to-wit" (describing a quarter section of land.)

After appellee acquired title to the quarter section of land mentioned, the appellant appropriated six acres of the same of the value of $300 to its own use for levee construction purposes, claiming the right to do so under its right of way deed, and refuses to pay appellee for the same.

The appellant, soon after the right of way deeds were executed to it by the Arnold Company and R. W. Barton, and before the appellee purchased the same, established and constructed a line of levee across the lands mentioned. The six acres of land in controversy was appropriated by the appellant because its board of directors believed it was necessary for the purpose of strengthening and enlarging the levee, and because it lies contiguous to the line of levee originally laid out and built by the appellant.

It was admitted that if the appellee was entitled to recover at all the judgment should be for the sum of $300 and costs.

This appeal is here from a judgment in favor of the appellee.

WOOD, J. (after stating the facts.) In the case of *Board of Directors of St. Francis Levee Dist.* v. *Powell*, 89 Ark. 570, Powell sued the district to recover damages done to his land by the taking of dirt therefrom to use in the enlargement of the levee which had been previously built through his lands. The deed by Powell's grantor, the former owner, who had previously conveyed the right of way across the land, was precisely the same as the deed now under review. Powell alleged in his complaint "that the defendant without authority entered upon land outside of the strip of land necessary for the construction and maintenance of the levee and removed soil for a distance of 600 feet and stripped the land of productive soil." In that case the bill of exceptions showed that the cause was heard upon an agreed statement of facts, and that other evidence was introduced. But the bill of exceptions failed to show that it contained all the evidence. The court rendered judgment in favor of the plaintiff. In that case we said: "There is nothing in the record to show where the dirt was taken from. The defendant, even under the broad authority conferred upon it by the terms of the right of way deed, would have no right arbitrarily to enter upon plaintiff's land at will and remove soil for use in the maintenance of the levee. It would have to confine the removal of soil within parallel lines so as to inflict as little injury as possible to the land. As the record is silent, we must indulge the presumption that the allegations of the complaint were sustained by the evidence."

In the case at bar the record shows that the cause was heard upon an agreed statement of facts, and there is nothing to show that there was any other evidence. It appears from the undisputed testimony that the six

acres of land in controversy was appropriated by the levee board "because the board believed it necessary for the purpose of strengthening and enlarging said levee, and the land was contiguous to the line originally built." The taking of the land under these circumstances was authorized under the deed from the original owner to appellant.

While appellant would have no right, as stated in *Levee District* v. *Powell, supra*, "arbitrarily to enter upon plaintiff's land at will and remove soil for use in the maintenance of the levee," it did have authority, under that deed, to take all land that in the judgment of the board was necessary for the construction and maintenance of the levee so long as the board was not acting arbitrarily in so doing and only took the soil within parallel lines or contiguous to the immediate line of the levee. The undisputed evidence here shows that the board was justified, under its right of way deed, in appropriating the land in controversy for the purpose of constructing, strengthening and enlarging the levee. The finding of the court to the contrary is error, and the judgment is therefore reversed and the cause is dismissed.

KEFFER v. STUART, ADMX.

Opinion delivered February 26, 1917.

1. REVIVOR—LAPSE OF ONE YEAR—CONSENT.—Where a party to an action dies, the cause can not be revived after the lapse of one year except by consent (Kirby's Digest, § 6314).
2. REVIVOR—ACTION ON NOTE—REVIVOR IN NAME OF EXECUTORS.—Where an action is brought on a promissory note executed to the plaintiff, upon the death of plaintiff, her right passes to her personal representatives, and a revivor must be in their names.
3. REVIVOR—PROCEEDINGS IN NAMES OF ADMINISTRATORS.—Where proceedings are had in an action on a note, after plaintiff's death, in the name of her personal representatives, the proceedings in court are tantamount to an order reviving the cause in the names of the executors.
4. REVIVOR—CONSENT—LIMITATIONS.—Where the plaintiff in an action in a promissory note dies, the revivor may be made in the names

of his representatives forthwith, whether the defendant consents or not; the defendant need not be consulted until after the expiration of a year from the time when the order of revivor might have been first made; and after the expiration of the year, if the defendant does not consent, the right of revivor is barred.

5. REVIVOR—FAILURE TO PASS ON MOTION—ACTS OF THE PARTIES.—The plaintiff, in an action on a promissory note, died, and her personal representatives, within a year, moved the court to revive the cause in their names. No order reviving the cause was entered, but all the parties proceeded as though such order had been made. *Held,* the cause would be treated as revived in the name of the administrators.

6. ADMINISTRATION—CLAIM ON NOTE—PRESENTATION TO ADMINISTRATOR.—In an action on a promissory note, when the plaintiff died during the pendency of the action, the evidence *held,* to show a substantial compliance with the statutes (Kirby's Digest, § § 113, 114), and that the claim in suit was duly authenticated and exhibited to the defendant.

7. ADMINISTRATION—EXHIBITION OF CLAIMS.—While the statute governing the exhibition of claims is mandatory, yet a substantial compliance with the statute in such cases is sufficient to meet the requirements of the law.

8. EVIDENCE—RECEIPT OF MAILED LETTER—PRESUMPTION.—Where a letter is properly mailed, it will be presumed that it was received by the addressee.

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

C. Floyd Huff and *Buzbee, Pugh & Harrison,* for appellants.

Heyn & Covington, of New York, of counsel.

1. All the necessary steps necessary were taken under our statutes to place the claim in judgment were taken. The claim was duly authenticated and presented within one year. Act 438, Acts 1907; Kirby's Digest, §§ 113, 114. A substantial compliance is all that is necessary. 110 Ark. 222; 116 S. W. 189; 21 Ark. 519; 97 Ark. 296; 113 S. W. 1039; 124 Ark. 466.

2. The claim was proven and the proof of presentation to the administratrix within time was made. A letter properly mailed is presumed to reach its destination in due course of mail. 98 Ark. 388.

3. The motion to dismiss should be overruled. The cause was properly revived in apt time. Kirby's Digest, § 6314; 76 Ark. 122. Defendant was present in court and made no objections and the court and all parties treated the case as duly revived. 48 Ark. 30; 110 *Id.* 311. Defects in methods or even failure to present can be waived. 25 Ark. 221; 13 *Id.* 276; 29 *Id.* 239.

Martin, Wootton & Martin and *Carmichael, Brooks, Powers & Rector*, for appellee.

1. The appeal should be stricken from the docket. No order of revivor was made within the year. Kirby's Digest, §§ 6314-15; 48 Ark. 30; 69 *Id.* 215. No summons was issued. Kirby's Dig., § 6306. The statutes as to revivor are mandatory. 76 Ark. 122; 103 *Id.* 601. See also Kirby's Digest, §§ 6304, 6315; 105 Ark. 222; 39 Ark. 104; 85 *Id.* 144; 110 *Id.* 311; 1 Corp. Jur., §§ 440 and notes, 509; 20 Minn. 173.

2. The claim was not duly authenticated nor presented in time. Kirby's Digest, §§ 113, 114; 110 Ark. 222. The statutes are mandatory. 105 Ark. 95; 90 *Id.* 340; 97 *Id.* 296; Act 438, Acts 1907. The claim is barred.

WOOD, J. 1. This suit was instituted by Lizzie Z. Duke against Harriet R. Stuart, administratrix of the estate of Dan A. Stuart, to recover on a promissory note alleged to have been executed by Dan A. Stuart on December 4, 1905, for the sum of $11,000, with interest at six per cent. per annum, due December 4, 1906. Appellee denied the allegations of the complaint.

The suit was instituted December 12, 1910. Lizzie Z. Duke, the original plaintiff, died April 10, 1912. On March 29, 1913, the death of the plaintiff was suggested and an affidavit filed and motion was made to revive in the name of the executors of the plaintiff, and it was ordered by the court that the defendant show cause on or before the first day of the next term of the court why the cause should not be revived. At the next term of the court, on the 15th

of October, 1913, the executors of Lizzie Z. Duke filed a substituted complaint. On April 9, 1915, they filed an amendment to their complaint.

On July 1, 1915, the defendant filed a motion to dismiss, in which she set up that the plaintiff died during the year 1912, and that the action had never been revived by order of the court, and that the right to revive same had lapsed. The court overruled the motion. The appellee did not appeal from the order overruling the motion, and the attorneys for the appellee renewed the motion in this court and asked that the appeal be dismissed and the cause stricken from the docket. This presents the first question for our consideration.

(1) Section 6314 of Kirby's Digest provides that, "An order of revivor in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made," after the death of the plaintiff. It must be made within one year after that time, except by consent of the parties.

(2-3) The order of the court of March 29, 1913, and the proceedings had thereafter in the names of the plaintiff's executors, were tantamount to an order reviving the cause in their names because it was not necessary for the court to require the defendant to show cause why the action should not be revived and to give the defendant time for that purpose. The cause of action was on a promissory note, executed to the original plaintiff, Lizzie Z. Duke, and when she died her right passed to her personal representatives and the revivor had to be in their names. Kirby's Dig., sec. 6309.

(4) Under the statute, when a plaintiff dies, the revivor may be made in the names of his representatives forthwith whether the defendant consents to it or not. The statute does not require that the defendant be consulted until after the expiration of a year from the time when the order of revivor might have been first

made. After that time the order of revivor could not be had without the consent of the defendant. But where the defendant dies the cause of action cannot be revived against his personal representatives forthwith except by the consent of such representatives, and where they do not consent, the order of revivor against them must be made within one year from the time it could first have been obtained, or else the right of revivor is barred. See *Temple* v. *Culp*, 105 Ark. 222; *Peay* v. *Pulaski County*, 103 Ark. 601.

In ordering that the defendant show cause why the case should not be revived in the names of the representatives of the plaintiff the trial court misapprehended the statute applicable to such cases. But the effect of his order and the subsequent proceedings in the names of the executors of the plaintiff was to revive the cause in their names. The defendant was present by her attorneys of record, as shown by the order when the motion to revive was made and no notice was necessary to the defendant for a forthwith order of revivor made then, or, as we have stated, at any time within a year after the death of the plaintiff.

The statutes provide that at any term of the court succeeding the death of the plaintiff, whilst the action remains on the docket, the defendant having given to the plaintiff's proper representatives, in whose names the action might be revived, ten days notice of the application therefor, may have an order to strike the action from the docket unless the action is forthwith revived. Kirby's Digest, sec. 6316.

The defendant was present when the order of March 29, 1913, was made by the court. She was advised of the affidavit and motion of the executors to have the cause revived in their names, and that she was required to show cause why the same should not be revived in their names. She did not at that term ask that the cause be stricken from the docket unless the action was forthwith revived, but, on the contrary, she allowed the case to continue on the docket and to proceed in the names of the executors the same as if a

formal order of revivor had been made in their names, until July 1, 1915.

(5) It thus appears that the court and all parties proceeded after the motion was made to revive and the order of March 29, 1913, had been entered as if the case had been revived, until it was too late for plaintiff's executors to have the same revived in their names if it had not already been done. Under these circumstances, we must hold that these proceedings constituted a revivor, even if no formal and technical order to that effect was had. The failure of the court to enter any such formal and technical order of revivor is in no manner prejudicial to the rights of the appellee, for the executors, upon their motion, were clearly entitled to have such order made, and it was no concern of the defendant whether the suit progressed in the names of the executors or in the name of the original plaintiff, since it is apparent that she could not have been subjected, in the cause of action set up in the complaint, to double liability.

The motion to dismiss the appeal and strike the cause from the docket is therefore overruled.

II. Appellee contends that the judgment should be affirmed because no duly authenticated claim was ever presented to appellee, as the administratrix of Stuart, as the law required. The law provides that a claim founded on a note may be exhibited by delivering to the administrator a copy of such instrument, with the assignments and credits thereon, if any, exhibiting the original. Kirby's Dig., sec. 113. It further provides that the claimant shall append to his demand an affidavit of its justice, which may be made by himself, or an agent, attorney or other person. If made by the claimant, it shall state that nothing has been paid or delivered towards the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due. Kirby's Dig., sec. 114.

Appellee testified that some person representing herself to be Mrs. Duke came to her at the Belleclaire

Hotel in New York City sometime in the spring of 1910; that this lady exhibited to her a note which purported to have been signed by her deceased husband; that there was no affidavit or paper attached thereto, and that she saw no such affidavit or other paper. Her husband died November 15, 1909. She came to Hot Springs about the 1st of December, 1909, and lived there until about the 1st of May, 1910. Her residence was Dallas, Texas.

Witness Meyer testified on behalf of the appellant that he was the attorney for Mrs. Duke in her life time, and resided in New York City. On the 12th of December, 1910, he sent by registered mail, in the name of Harry W. Mack, to defendant an affidavit, which is as follows:

"State of New York, county of New York.

Lizzie Z. Duke, being duly sworn, says:

"1. That the estate of Dan A. Stuart, deceased, is justly indebted to deponent in the sum of eleven thousand dollars ($11,000) with interest thereon at 6 per cent. per annum from the 4th day of December, 1905, on a promissory note in the amount of eleven thousand dollars ($11,000.00), which note was signed by the said Dan A. Stuart, now deceased, dated New York, December 4, 1905, payable December 4, 1906, to the order of Mrs. L. Z. Duke, at the Knickerbocker Trust Company, Fifth Avenue and Thirty-fourth street, New York City, and was for value received.

"2. That the said sum of eleven thousand dollars ($11,000.00) with interest thereon at 6 per cent. per annum from the 4th day of December, 1905, is now justly due and owing to deponent, and that no payment has been made thereon, except that interest had been paid thereon up to December 4, 1908, and that there are no offsets against the same to the knowledge of deponent, and that the same is not secured by judgment or mortgage upon or expressly charged on the real estate of the said deceased, or any part thereof.

"(Signed) Lizzie Z. Duke.

"Sworn to before me this 12th day of December, 1910.

(Signed) Isaac Lande,
Notary Public, New York County."

Mack testified that Meyers used his name in registering the letter to Mrs. Stuart; that he received a registry receipt dated December 13, 1910, and signed "Mrs. D. A. Stuart." This receipt was introduced in evidence, and showed that Mrs. Stuart receipted for the article named on the 13th of December, 1910.

(6) The above testimony, which is undisputed, constitutes a substantial compliance with the statutes, *supra*, and shows that the claim in suit was duly authenticated and exhibited to the defendant.

(7) The testimony of Mrs. Duke shows that the original note had been exhibited to her, and the affidavit set out substantially what the note contained and gave to the administratrix all the information that she could have obtained by having a literal copy of the note furnished her, and it stated that the amount, with interest, except the interest that had been paid thereon, was justly due and owing to the defendant. While the statute for the exhibition of claims is mandatory, yet a substantial compliance with the statute in such cases is sufficient to meet the requirements of the law. See *Eddy* v. *Loyd*, 90 Ark. 340; *Wilkerson* v. *Eads*, 97 Ark. 296; *Hayden* v. *Hayden*, 105 Ark. 95; *Davenport* v. *Davenport*, 110 Ark. 222; *Little* v. *Ark. Trust & Banking Co.*, 124 Ark. 466.

(8) While Mrs. Stuart testifies in her examination in chief that the claim had not been presented to her with an affidavit attached, yet, in view of the above facts, this statement can only be taken as an expression of her opinion, for the undisputed testimony shows that the letter containing the affidavit was sent to her by registered mail in due course, and her testimony shows that the registry receipt for the letter containing the affidavit was signed by her. Even if there were no positive proof that she had received the affidavit, since the letter was properly mailed, the presumption would

be that she received it. *Southern Engine & Boiler Works*, v. *Vaughan*, 98 Ark. 388.

The statute requires that the presentation shall be within one year after the issuance of the letters. The letters of administration were issued to the appellee December 15, 1909. The letter containing the demand and affidavit of authentication of the claim was mailed December 12, 1910, and the registry receipt shows that the letter was actually received December 13, 1910. The undisputed evidence therefore shows that the claim was duly presented before the expiration of one year after the issuance of letters of administration, and the claim was not barred by the statute of non-claims.

III. The undisputed testimony shows that the note in suit was given in renewal of a note for $10,000, and accrued interest, which was loaned by Mrs. Duke to D. A. Stuart. Mrs. Duke issued her check for the money, which was deposited to the credit of D. A. Stuart in the Garfield National Bank of New York City.

The judgment in favor of the appellee is therefore reversed and the cause will be remanded for a new trial.

PRICE v. PRICE.

Opinion delivered February 26, 1917.

1. HUSBAND AND WIFE—ILL-TREATMENT—CONDONATION.—A voluntary resumption of co-habitation by the wife after separation from her husband, on account of cruel treatment constituting grounds for divorce, operates as a condonation of the cruelty.
2. DIVORCE—FORMER ACTION—USE OF TESTIMONY TAKEN AT FORMER TRIAL.—A wife brought an action for divorce against her husband, but her action was dismissed for want of equity; subsequently the husband brought an action for divorce against the wife. *Held*, testimony taken in the first action was inadmissible in the second.
3. DIVORCE—FORMER DIVORCE—PROPERTY.—A wife obtained a divorce from her husband and was awarded certain lands by the court. The parties later remarried, the wife deeding the land back to her husband. Thereafter the husband sought and obtained a divorce from his wife for cause, the decree being affirmed in this court. *Held*, the wife was not entitled to a return of the land above mentioned under Kirby's Digest, § 2684.

Appeal from Yell Chancery Court, Dardanelle District; *Jordan Sellers*, Chancellor; affirmed.

John B. Crownover, for appellant.

1. The chancellor erred in granting appellee a divorce and in giving all the property to him. Kirby's Digest, § 2684.

Indignities to the person need not consist of personal violence, but may be unmerited reproach, rudeness, contempt, studied neglect, open insult and other things habitually and systematically pursued to an extent which would render a woman's life intolerable. Nor is it necessary that she be entirely blameless. 44 Ark. 429; 53 *Id.* 484.

2. Appellant was entitled to have restored to her all of the property that she had in her own right, and was entitled to a part of what they both had. 16 Ark. 296; 80 *Id.* 37; 39 L. R. A. (N. S.) 193; 77 *Id.* 94; 98 *Id.* 540; 94 *Id.* 485.

3. It was error to sustain the pleas of *res adjudicata* and estoppel.

R. F. Sandlin and *Hays & Ward*, for appellee.

1. The decree of the chancellor is supported by the evidence. Mutual forgiveness and condonation of past causes of divorce was shown. 88 Ark. 59; 98 S. W. 975; 73 Ark. 261; 87 *Id.* 175.

2. The decree rendered March 21, 1916, is correct and is supported by a clear preponderance of the testimony. Wilful desertion was shown. Appellant was not entitled to a divorce upon her uncorroborated testimony. 102 Ark. 58; 38 *Id.* 324; 34 *Id.* 37; 76 *Id.* 38; 90 *Id.* 43.

3. She was not entitled to be endowed. Kirby's Digest, § § 2684, 2694; 59 Ark. 452. Her conveyance to Price in consideration of marriage was valid. 30 Ark. 417; Kirby's Digest, § 3654, subd. 3; 1 Elliott on Cont. 241. In her cross-complaint she did not ask the court to restore the property conveyed by her in July, 1911. 59 Ark. 452. The finding of the chancellor

as to divorce and property is right and amply sustained. 90 Ark. 43; 72 *Id.* 67; 62 *Id.* 611.

HART, J. On the 27th day of July, 1915, J. H. Price brought suit against his wife, Seleetha J. Price, for divorce on the ground of wilful desertion for more than one year without reasonable cause. She denied the allegations of the complaint and alleged that she was forced to leave home on account of his ill-treatment. By way of cross-complaint she asked for a divorce on the statutory ground of cruel treatment.

The chancellor dismissed the cross-complaint of the defendant and decreed the plaintiff a divorce on the ground of desertion. The infant daughter of the parties was awarded to the custody of the defendant. The plaintiff was given the right to visit the infant daughter at all reasonable times and it was decreed that he should pay the sum of $10 monthly for her support and maintenance. The court also gave judgment for the defendant for attorney's fees and costs of court. The defendant has appealed.

The plaintiff and defendant were first married on December 16, 1888, and nine children were born unto them. They were divorced in March, 1911, and the chancery court which entered the decree also awarded to the wife personal property to the amount of $255 and real estate to the amount of twenty-four acres. In July, 1911, they were remarried and just before the ceremony was performed, Mrs. Price reconveyed the twenty-four acres of land to J. H. Price. They lived together until June, 1913, when Mrs. Price left her husband and brought suit against him for divorce and also for the restoration of the property. Statutory ill-treatment was the ground for divorce alleged in her complaint and evidence was introduced tending to prove her charge. The husband denied the allegation of her complaint and introduced testimony tending to establish his defense.

The court found against Mrs. Price and on March 19, 1914, entered of record a decree dismissing her com-

plaint for divorce and restoration of property, for want of equity.

On March 28, 1914, she again returned to her husband's home and lived with him until July 3, 1914; at which time she again left him and has been wilfully and continuously absent from him ever since.

The plaintiff testified in his own behalf in the present case and stated that he treated his wife kindly and affectionately and provided for her as well as his condition in life would permit. He denied that he had ill-treated her in any way or had so conducted himself as to give her any reasonable grounds for leaving him. He stated that she left her home against his will and that he wanted her to stay there with him.

Three of their children and also a daughter-in-law corroborated his statements. Each of them denied that their father had in any wise ill-treated their mother. They stated that he had treated her kindly and had given her no cause whatever for leaving him and that she had left him of her own accord on the third day of July, 1914, and had been wilfully and continuously absent from his home ever since.

The defendant testified in her own behalf and according to her testimony she was forced to leave home by her husband continually quarreling at her and otherwise mistreating her. No testimony was introduced tending to corroborate her statements except the testimony taken on the former divorce suit.

(1-2) It will be remembered that she had brought suit against her husband for divorce on the ground of statutory ill-treatment and that in March, 1914, her complaint had been dismissed. She introduced the depositions taken in that case to corroborate her testimony in the present suit. No appeal was taken from the decree in that case and the presumption is that the decision of the chancellor was correct. The testimony taken in that case can not be used as evidence in the present case. A few days after the decree was entered of record, she returned to her husband's home and lived with him as his wife for several months. By

so doing she condoned his mistreatment. A voluntary resumption of cohabitation by the wife after separation on account of cruel conduct constituting grounds for divorce operates as a condonation of the cruelty. Their reconciliation and living together as husband and wife from March, 1914, until July of the same year amounted to a condonation of past causes of divorce. Neither the husband nor the wife can forgive the acts of, and cohabit voluntarily with the other, and at the same time reserve the right to assert them as a means of obtaining a divorce, if there be no further misconduct, or as a screen to prevent a divorce being obtained on account of subsequent breach of marital duty by the condoning party. *Shirey* v. *Shirey*, 87 Ark. 175; *Mathy* v. *Mathy*, 88 Ark. 56; *Womack* v. *Womack*, 73 Ark. 281.

It follows that the court did not err in dismissing the cross-complaint of the defendant. The testimony of the plaintiff and the four children was sufficient to warrant the chancellor in finding for the plaintiff and in granting him a divorce.

It is to be regretted that children should be drawn into these cases and take sides with either parent against the other, but we must take the record as we find it, and when this is done we can not say that the finding of the chancellor is against the preponderance of the evidence. It is true the wife contradicts the testimony of the husband and their children, but she is not corroborated by any other witness and no effort was made by her to introduce such corroborating evidence.

(3) Again it is insisted that the court erred in not restoring to her the twenty-four acres of land which had been awarded to her by the former decree of divorce and which she had deeded back to her husband immediately preceding her marriage. This property is asked to be restored pursuant to section 2684 of Kirby's Digest, but her contention in this respect has been decided adversely to her in the case of *Dickson* v. *Dickson*, 102 Ark. 635. A precisely similar contention was made in that case and the court held that the property was

not "obtained from or through the other during the marriage and in consideration and by reason thereof" within the meaning of the statute.

It follows that the decree must be affirmed.

HOWES v. KING, ADMINISTRATOR.

Opinion delivered February 26, 1917.

1. JUDGMENT LIENS—NATURE OF.—A judgment lien is a creature of the statute, and none exists except as there provided.
2. JUDGMENT LIENS—EXTENT OF.—A judgment lien does not attach to the land, but to the judgment debtor's interest in it, and if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attached thereto ceases with it.
3. JUDGMENT LIENS—LIMITATIONS UPON.—The lien of a judgment is subject to all valid liens on the debtor's land at the time the judgment is rendered, whether recorded or not.
4. JUDGMENT LIENS—EXTENT OF.—The lien of a judgment is in all cases limited to the actual interest which the judgment-debtor has in the estate.

Appeal from Clark Chancery Court; *Jas. D. Shaver*, Chancellor; reversed.

John H. Crawford and *Dwight H. Crawford*, for appellant.

1. LaCroix, prior to February 14, 1914, had no title to the land that could have been affected by the lien of a judgment against him. He only had a vendor's lien for the purchase money notes, which is not subject to the lien of a judgment or sale under execution. 66 Ark. 167.

2. The legal and beneficial title, prior to February 14, 1914, was in appellant subject to the vendor's lien notes held by F. R. LaCroix.

The judgment, if a lien at all, was only a lien on such interest in the land as F. R. LaCroix had at the time of its rendition, or he subsequently acquired, and will not affect outstanding rights and equities of third parties. The lien of the judgment can only be on land *owned* by the defendant, actually, not apparently. It

only attaches to an estate in land—not to a lien on land. Nor does it attach to the interest of a naked trustee for the equitable or beneficial owner. Kirby's Digest, § 4438; 69 Iowa 222; 106 Cal. 355; 58 Ark. 252; 90 *Id.* 149; 71 *Id.* 318; Freeman on Judgments (3 ed.), § 357; 23 Cyc. 1368, 1371; 7 Wall. 205; 12 *Id.* 150; 25 Fed. 372; 56 *Id.* 129; 43 Pac. 667; 17 W. Va. 276, 41 Am. Rep. 670; 102 Ind. 524; 1 N. E. 386; 4 *Id.* 457; 108 Ind. 585; 137 *Id.* 218; 95 Am. Dec. 741; 25 N. W. 701; 46 *Id.* 1043; 3 Bland Ch. 284; 22 Am. Dec. 236; 19 Pac. 210; 93 Am. Dec. 337; 11 Neb. 222; 9 N. W. 52 114; Ark. 447, and others.

HART, J. On June 29, 1915, Albert Howes instituted this action in the chancery court against Joe King, as administrator *ad litem* of J. S. King, deceased, and Frank R. LaCroix to restrain the defendant King from attempting to enforce the judgment against the defendant, LaCroix, on the lands described in the complaint.

The complaint alleges a state of facts substantially as follows:

On September 14, 1912, Mrs. J. B. LaCroix sold a quarter section of land in Clark County to J. S. King for $2,200 in cash and $4,000 to be paid in the future. Mrs. LaCroix executed a warranty deed to King, and in it reserved a lien for the unpaid purchase money. She died in August, 1913, and by will left all her property to her husband, F. R. LaCroix. On the 16th day of February, 1914, Albert Howes executed two mortgages to the Colonial & United States Mortgage Company upon the lands in question. Each one of said mortgages was for $2,000 and the last mortgage was given subject to the first one. The $2,000 secured by the first mortgage was paid by Howes to Frank R. LaCroix on his purchase money obligations against the land. On January 28, 1914, J. S. King obtained a judgment against F. R. LaCroix for $150 with interest and costs amounting to $73.75 and the judgment is unsatisfied. On February 18, 1914, defendant F. R.

LaCroix executed to the circuit clerk a deed of release authorizing him to mark the purchase notes named in the deed from Mrs. J. B. LaCroix satisfied on the margin of the record, which was done on February 28, 1914.

On February 18, 1914, plaintiff executed to defendant F. R. LaCroix a deed conveying to him said land, and the consideration recited in the deed was one dollar.

On February 25, 1914, defendant F. R. LaCroix, by warranty deed, reconveyed said land to plaintiff, in which the consideration named was $6,787.13 paid and to be paid, of which $4,066 was at or prior to that time paid, and $2,731.13 in deferred payments, to secure which a lien was retained on said land. The total amount of purchase money being the original amount agreed to be paid when said land was conveyed by Mrs. J. B. LaCroix, with accrued interest on deferred payments named in said deed. The $2,000 secured by said mortgage to Colonial & United States Mortgage Company was paid to defendant F. R. LaCroix, and is included in above amount of $4,066. The purchase money notes given by plaintiff to F. R. LaCroix in the last transaction for $2,731.13, were at once and before maturity transferred by him and are now held by innocent purchasers for value.

Howes went into the possession of the lands when Mrs. LaCroix executed the deed to him and he has been in possession of them ever since.

It was the purpose of all of the above transactions, towit, the said release deed, the deed from plaintiff to F. R. LaCroix, and from F. R. LaCroix back to plaintiff, and plaintiff's mortgage to said Colonial & United States Mortgage Company to enable plaintiff to secure $2,000 to pay on his purchase money obligations held by F. R. LaCroix, and to secure the payment of the purchase money notes therein described, and there was no other consideration for said transactions, and it was so understood by all parties to said transactions.

At the time plaintiff had no actual knowledge of said judgment against defendant F. R. LaCroix, and did not know that his rights were jeopardized by said judgment. It was never intended that said F. R. LaCroix should retain either the legal or equitable title to said land.

The court sustained a demurrer to the complaint and the plaintiff having elected to stand on his complaint, it was adjudged insufficient and dismissed for want of equity. The plaintiff has appealed.

(1) The decree of the chancellor proceeded upon the theory that the judgment lien was a prior lien on the lands in question. A judgment lien is the creature of the statute, and, except as there provided, none exists. Our statute provides that all real estate, whether patented or not, whereof the defendant, or any person for his use, was seized in law or equity on the day of rendition of the decree shall be liable to sale under execution. Kirby's Digest, § 3228.

In *Stephens* v. *Shannon*, 43 Ark. 464, the court held that a vendor's lien upon land is not an estate in the land, but is a charge or right which has its inception only on bill filed.

In *Strauss* v. *White*, 66 Ark. 167, the court held that the interest of a vendor of land who had given a bond for title is not subject to sale under execution issued against him.

In *Lavender* v. *Abbott*, 30 Ark. 172, the court held that the vendor's equitable lien for purchase money descends to his heirs or passes to his devisees in the same condition as the ancestor held it.

Under these authorities it will be seen that after Mrs. LaCroix sold the land she had no interest in it, which was subject to sale under execution by reason of the fact that she reserved in the face of her deed a lien for the unpaid purchase money and that her vendor's lien passed to her devisees in the same condition as she held it. This brings us to the question of whether or not the judgment of King against F. R. LaCroix became a lien on the land when Howes exe-

cuted a deed to F. R. LaCroix for the land on February 18, 1914.

(2-3) In *Apperson* v. *Burgett*, 33 Ark. 328, the court held that the lien of a judgment is subject to all valid liens on the land at the time it is rendered, whether recorded or not. The reason is that a judgment lien does not attach to the land, but to the judgment-debtor's interest in it, and, if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attached thereto ceases with it. *Hunter* v. *Citizens Savings & Trust Co.*, 157 Iowa, 168, Ann. Cas. 1915 C, 1019. In the application of this rule to the case at bar, it is clear that the judgment-lien of King did not attach to the land.

(4) According to the allegations of the complaint, the release deed of F. R. LaCroix to the clerk, the deed from Howes to LaCroix and the deed from LaCroix back to Howes and Howes' mortgage to the Colonial & U. S. Mortgage Company were all considered parts of the same transaction and constituted but one act. The intention of the parties was to enable Howes to secure $2,000 to pay his purchase money obligations to LaCroix. It is true they accomplished this in a round about way, but such was clearly their intention as shown by the allegations of the complaint. There was no moment of time when LaCroix owned or held the lands free from the condition, nor when he could have voluntarily conveyed them except subject to the condition. This rule is based on principles of justice and public policy and can work no hardship to the judgment-creditor; for as we have already seen the lien of the judgment is in all cases limited to the actual interest which the judgment-debtor has in the estate. The judgment-creditor having parted with nothing on the strength of these conveyances, it would be highly inequitable to permit his judgment to be satisfied out of what in fact was the property of Howes. In support of the rule, see Kent's Commentaries, 14 Ed., vol. 4, star pages 173 and 174; *Thornton* v. *Findley*, 97 Ark. 432; *Murray Co.* v. *Satterfield*, 125 Ark. 85;

Western Tie & Timber Co. v. *Campbell*, 113 Ark. 570, Ann. Cas. 1916 C, 943 and case note at 949.

It follows that the decree must be reversed and the cause will be remanded with directions to overrule the demurrer to the complaint and for further proceedings according to law and not inconsistent with this opinion.

JOHNSON v. STATE.

Opinion delivered February 26, 1917.

1. HOMICIDE—FIRST DEGREE MURDER—SUFFICIENCY OF THE EVIDENCE—In a prosecution for homicide, the evidence held sufficient to warrant a conviction for first degree murder.
2. EVIDENCE—CREDIBILITY OF WITNESS—BELIEF OF ONLY PORTION OF TESTIMONY.—Although a witness is found to have testified falsely to a material fact, the jury will not be warranted in disregarding other parts of his testimony which appear to be true. It is the jury's duty to accept such portions of a witness's testimony as they believe to be true, and to reject the part that they believe to be false.
3. INSTRUCTIONS—MULTIPLICATION ON SAME POINT.—The trial court is not required to multiply or repeat instructions on the same point.
4. APPEAL AND ERROR—FAILURE TO OBJECT TO INSTRUCTIONS—CAPITAL CASE.—Even in capital cases, a judgment will not be reversed for the giving of an erroneous instruction, which was not objected to in the trial court.

Appeal from Desha Circuit Court; *W. B. Sorrells*, Judge; affirmed.

The appellant *pro se*.

1. The verdict is contrary to the evidence. Joe Corporeau was the only eye-witness intrduced by the State. If his statement be true, appellant was justified in killing the deceased. The other eye-witness testified that appellant never fired a shot.

2. The court erred in its instructions given and refused. Some of those given were prejudicial. Others do not correctly state the law. Those refused should have been given. From the evidence, Joe Corporeau either killed appellant or was an accomplice and it was error not to give an instruction touching the credibility of an accomplice. Kirby's Digest, § 2384.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The testimony is conflicting and the finding of the jury is conclusive. 95 Ark. 172; 104 *Id.* 162; 101 *Id.* 51; 100 *Id.* 330; 103 *Id.* 4. The verdict is amply sustained. 92 Ark. 586; 66 *Id.* 53.

2. The instructions refused are covered by others given. 56 Ark. 4; 62 *Id.* 494; 72 *Id.* 384; 73 *Id.* 425; 103 *Id.* 505.

If part of an instruction is good and part bad, it is proper for the court to refuse the whole. 13 Ark. 317; 62 *Id.* 543; 92 *Id.* 71; 86 *Id.* 456, and others. The latter part of No. 3 asked by appellant is erroneous. The law provides two ways of impeaching a witness—one by proving that he has made different statements, and the other by evidence that his reputation for truth and morality renders him unworthy of belief. Kirby's Digest, § 3138; 102 Ark. 302.

3. No objections were made to the giving of the others refused. 103 Ark. 505. The action of the court in giving instructions is not set up in the motion for new trial. 80 Ark. 345; 101 *Id.* 120.

HART, J. Aaron Johnson was indicted for the crime of murder in the first degree charged to have been committed by killing R. L. Rutherford. The indictment was returned by the grand jury of Jefferson County where the alleged crime was committed and the defendant was granted a change of venue to Desha County. He was tried before a jury which returned a verdict of guilty of murder in the first degree, and he was sentenced to death.

From the judgment of conviction defendant Johnson has duly prosecuted an appeal to this court. The facts are substantially as follows:

R. L. Rutherford was a white man who owned a plantation in Jefferson County about seven miles south of the city of Pine Bluff. The defendant, Aaron Johnson, Joe Corporeau, Charley Corporeau, his son, and Dilcian Corporeau, his mother, were all colored people

and were tenants on the Rutherford farm during the year 1916. R. L. Rutherford was killed on the morning of September 19, 1916, while driving a buggy over his plantation.

Dr. H. E. Williams, the coroner of Jefferson County, testified that he examined Rutherford's body and found three bullet wounds, one about one inch below the right shoulder blade, ranging to the left, one to the left and up and one below the left shoulder blade, ranging upward and forward. In addition to these wounds Rutherford had been shot with a shotgun and his body was strewn with shot from the edge of his hair down below the waist. Three or four shots penetrated his left eye. The gun shot wound was on the front part of his body and the pistol wounds were in his back. Doctor Williams testified that he had been practicing medicine nearly thirty-six years and that either of the wounds found in the back of Rutherford's body was sufficient to have caused his death.

W. S. Steed, a citizen of Pine Bluff testified that he saw R. L. Rutherford and Aaron Johnson standing talking on the streets of Pine Bluff on Monday afternoon before Rutherford was killed on Tuesday and heard a part of what they said; that Rutherford did not talk very loud, and that he did not understand much that he said, but understood enough to know that he was talking to Johnson about having sold some cotton seed on the Saturday before and having disposed of the money instead of paying it to Rutherford on a wagon and team for which Johnson owed Rutherford. The witness stated that Rutherford was reprimanding Johnson in a mild way and that his attention was attracted by Johnson speaking abruptly to Rutherford and striking his fist against his hand in Rutherford's face and saying to Rutherford, "By God, because you are a white man and I am a negro, you can not run over me. I will see you tomorrow."

Sam M. Goldstein testified that he was engaged in the brokerage business in Pine Bluff, Arkansas, and sold Aaron Johnson a pistol on the afternoon before

Rutherford was killed. He stated that Johnson came into his place of business and went out again; that Johnson stated he was going to see his boss and that he came back later on in the day and purchased a .38 caliber pistol and five cartridges to put in it. A pistol was exhibited to the witness which he identified as the one he had sold Johnson, and he stated that the pistol was powder marked, which indicated that the pistol had been shot since it left his store.

J. L. McBurnett, a deputy sheriff of Jefferson County, arrested Aaron Johnson in Jefferson County about a mile and one-half from the scene of the killing on the next evening after the killing. Johnson at the time was at the house of one George Ashley, and G. W. Marks. He had a .38 caliber pistol, which was taken possession of and kept by the sheriff until the date of the trial. This was the pistol which was exhibited to the witness Goldstein. When Johnson was arrested, he was shot through the left hand. His pistol was loaded at the time he was arrested. It was also shown that the pistol had not been fired since it came into the hands of the deputy sheriff.

Dilcian Corporeau testified that she was 79 years old and that Aaron Johnson came to her house on the morning before Rutherford was killed. She said that Johnson told her that he expected that he and the boss man would have a fuss that day; that if the boss throwed up anything to him that he would get him or the boss would get him, one; that Johnson stated that he would fix him today (referring to Rutherford); that she advised him to not do that; that Johnson said he liked to have killed him last year, and she thinks he said, that he wished he had done it, that R. L. Rutherford was the man referred to as the boss.

Joe Corporeau testified that R. L. Rutherford drove into the field where he and his son Charley and Aaron Johnson were picking cotton; that Rutherford was in a buggy and driving his horse along in a walk; that he spoke to them as he drove up and asked them about their crops and how they were getting along;

that then Rutherford asked Aaron to let him see him for a few minutes and drove off something like between 25 and 50 yards; that Rutherford and Johnson talked a little bit and finally got to talking loud enough for him to hear them; that Rutherford said, "I understand you gave Mr. Stockwell sass about putting some hands in your field," Johnson replied: "I did, Captain, you know Mr. Stockwell ain't nothing but a God damn poor white man." Johnson said further: "No white man ain't going to put no hands into my field." After talking a little longer, Rutherford told Johnson that he would put some hands in his field, and Johnson replied: "You or no other God damn man won't put no hands in my field," and from that they started cursing. Witness said he then called to Aaron to stop and Aaron's wife began to scream at him; that Aaron then said to his wife, "Shut up your mouth, God damn you; I will come down there and beat hell out of you; that is the reason white folks beats niggers out of what they makes on account of your mouth." That Mr. Rutherford then said: "I don't want to beat you out of anything;" that Johnson then said, "It looks very much like it," and stated further: "You beat me out of a bale of cotton and got a bale of cotton seed last year;" that Rutherford started to move and Johnson said, "Come down out of the buggy, white man, God damn you, and fall on your face;" that he told Aaron to stop cursing him; that Aaron kept on cursing Rutherford and directly Rutherford said, "Stop cursing me; if you don't stop, I will kill you." The witness then said that they seemed to stop, but that Johnson started up again and called Rutherford a God damn son of a bitch; that Rutherford made a move and that as he did so, Johnson fired; that the horse then moved and that the movement of the horse threw Rutherford's face to the east, the horse's head being to the west; that Johnson made two more shots and said, "God damn me, if I had the balls, I would put some more balls in him," and then left. The witness was asked who fired the first shot, and stated that Aaron shot first. He said that he had

never had any trouble with Rutherford himself, and had nothing to do with the shooting. He admitted that the shotgun was taken from his house, and said that it was claimed that his son Charley shot Rutherford with it. Charley Corporeau left the county after the killing. Rutherford fell out of the buggy on his face after he was shot, and expired at once. A pistol was found near his body, which was fired. Joe Corporeau helped to carry his body to a house nearby.

The defendant Johnson testified in his own behalf and denied shooting Rutherford. He stated that Joe Corporeau and his son Charley shot him; that they were angry at Rutherford because he had complained about the way they were doing on the farm. He made a detailed statement of how the killing occurred and denied that he had anything to do with it.

Monroe Adams, a colored man who also lived on the Rutherford place, testified that he heard the shooting and looked after the first shot and saw Johnson running toward his house and thought they were shooting at him; that the smoke from the gun looked like it was Joe Corporeau who was doing the shooting; that one shot was made from the right and one from the left side, and that he never saw Johnson shoot at all.

In rebuttal it was shown that this witness had stated to the officers after the shooting, that he was down in the field gathering corn and did not know anything about the shooting at all.

Leroy Johnson, the 14-year-old son of defendant, testified that he was down in the field when the shooting took place and saw Joe Corporeau shoot Rutherford with his pistol, and that Charley had a gun and shot at Rutherford with it; that his father never shot at all. He admitted on cross-examination that he told the deputy sheriff he did not see any of it at all, but said that he was scared because Joe Corporeau was telling what he would do if the witness told anything on him. It was also shown that the reputation of the defendant for truth was good.

George Ashley and G. W. Marks testified that they saw and talked with Johnson the day after Rutherford was killed.

Ashley stated that Johnson told him that he shot at Rutherford five times, but did not know whether or not he had hit him five times. Marks stated that Johnson told him he had shot at Rutherford five times.

It is earnestly insisted by counsel for the defendant that the evidence was not legally sufficient to warrant the verdict for murder in the first degree. We do not agree with counsel in this contention. Of course, if the jury believed the testimony of Johnson, and that of his son and of Monroe Adams they would have found him not guilty, because it appears from their testimony that Rutherford was shot by Joe Corporeau and his son, and that Johnson did not have anything to do with the killing.

The testimony of Monroe Adams was contradicted by that of the deputy sheriff who went down there to make an investigation on the day Rutherford was killed. He talked with Monroe Adams about the killing and Monroe told him that he did not know anything about it. Johnson's son also admitted that he had told the officers on that day that he did not know anything about the killing. The jury were the sole judges of the credibility of the witnesses.

It appears from the evidence adduced by the State that Johnson shot Rutherford in the back with his pistol, and that Charley Corporeau shot him with the shotgun; that Rutherford fell out of the buggy on his face; that Johnson stated that if he had any more cartridges in his pistol, he would shoot him again. Johnson threatened to kill Rutherford just before he did shoot him. He told Dilcian Corporeau before Rutherford got there that morning that he intended to kill Rutherford or Rutherford would kill him. He had threatened Rutherford the afternoon before on the streets of Pine Bluff.

(1) The evidence adduced by the State tended to show that the defendant formed a specific intent to

kill Rutherford and that the shooting was done after deliberation and with premeditation. In other words, the jury might have found from the evidence that the killing was the result of a previously formed design to kill growing out of the ill will on the part of Johnson to Rutherford. The evidence was legally sufficient to sustain a conviction of murder in the first degree. *Strong* v. *State*, 85 Ark. 536; *Kinslow* v. *State*, 85 Ark. 514; *Ferguson* v. *State*, 92 Ark. 120; *Coats* v. *State*, 101 Ark. 51; *Rosemond* v. *State*, 86 Ark. 160; *King* v. *State*, 117 Ark. 82.

It is insisted by counsel for the defendant that the judgment should be reversed because the court refused to give instruction No. 3, asked by the defendant. The instruction reads as follows:

"The court instructs the jury, that they are the sole judges of the facts in this case, and of the credit to be given to the respective witnesses who have testified; and in passing upon the credibility of such witnesses who have testified they have a right to take into consideration their prejudices, motives or feelings of revenge, if any such has been proven or shown by the evidence in the case; and if the jury believe, from the evidence, that any witness or witnesses have knowingly and wilfully testified falsely as to any material facts in the case for the purpose of shielding his or herself from prosecution, the jury are at liberty, unless corroborated by other evidence, to disregard the testimony of such witness or witnesses *in toto*."

(2) There is no objection to the first part of the instruction, but it is the settled rule in this State that if any portion of the requested instruction is bad, the trial court may refuse to give the instruction. The instruction might be construed as warranting the jury in disregarding testimony which they believed to be true if it came from a witness who had sworn falsely to some other material fact. Thus construed it does not reflect the law, for although a witness is found to have wilfully testified falsely to a material fact, the jury will not be warranted in disregarding other parts

of his testimony which appear to be true. In other words under the latter part of the instruction it might appear to the jury that if any witness had wilfully testified falsely concerning any material fact, it was their duty to disregard his whole testimony unless corroborated by other evidence regardless of the fact of whether they might believe the remaining part of his testimony. The jury had the right to believe such portions of any witness's testimony as they believed to be true, regardless of the fact of whether they believed other portions of it. In short, it was their duty to accept such portions of the witness's testimony as they believed to be true, and reject that part of it they believed to be false. See *Frazier* v. *State*, 56 Ark. 226; *Taylor* v. *State*, 82 Ark. 540, and *Bruder* v. *State*, 110 Ark. 402.

(3-4) Counsel for the defendant also assigns as error the action of the court in refusing to give seven other instructions asked by him. We do not deem it necessary to set out these instructions, for they are fully covered by the instructions given by the court, and it is well settled that the court is not required to multiply or repeat instructions on the same point. The court gave sixteen instructions to the jury. These instructions cover every possible phase of homicide, and the jury also were fully instructed on the question of reasonable doubt and the presumption of innocence that attended defendant throughout the trial. The instructions given covered every possible question of fact that might arise in the case. We have not set them out and we do not deem it necessary to do so. No objections were made to them in the court below, and even in capital cases there can be no reversal of judgment for an erroneous instruction which was not objected to in the court below. *Alexander* v. *State*, 103 Ark. 505.

We have carefully examined the record and find no prejudicial errors in it. Therefore, the judgment must be affirmed.

KENYON, EXECUTOR, *v.* GREGORY.

Opinion delivered February 26, 1917.

1. ADMINISTRATION—ATTORNEY'S FEES.—Under Act 118, pages 511, 512, Acts 1913, attorneys' fees for services rendered in the administration of estates, are placed in the same category as necessary expenses incurred in the course of administration of executors or administrators, and the probate court has jurisdiction over the matter.
2. ADMINISTRATION—ATTORNEY'S FEES.—An attorney's fee like other expenses of administration, should take its place in the account current, when allowed by the court.
3. ADMINISTRATION—ATTORNEY'S FEES.—When an administrator or executor fails to file an account, he should be cited and required to file one; an attorney for the executor should present his claim for legal services at such time or place, so that any party interested in the estate may have an opportunity to file exceptions to the account or claim.
4. CERTIORARI—CAN NOT TAKE THE PLACE OF APPEAL.—The writ of certiorari can not be used as a substitute remedy for appeal, unless the judgment sought to be cancelled is void on its face, or the right of appeal has been lost without fault on the part of the defendant, the writ of certiorari can not be invoked.
5. CERTIORARI—ALLOWANCE.—Certiorari is not a writ of right, and its allowance rests in the sound discretion of the court.
6. CERTIORARI—DISALLOWED WHEN.—When a judgment is valid on its face, and the remedy by appeal is adequate, it is no abuse of its discretion for the circuit court to refuse to grant a writ of certiorari.

Appeal from Prairie Circuit Court, Southern District; *Thos. C. Trimble*, Judge; affirmed.

C. B. & Cooper Thweatt, for appellant.

1. The judgment of the probate court is void for want of jurisdiction of the subject matter. The attorney should have sued for his fee and reduced his claim to judgment. 61 Ark. 410; 62 *Id.* 226.

2. Act 118, Acts 1913, gives an administrator the right to employ an attorney and leaves the amount of the allowance to be fixed by the probate court, *to be taxed and allowed as expenses*, indicating no intention to change the law, but leaving it as before that the allowance should be *to* the administrator *for* fees paid by him to the attorney.

Expenses of administration are allowed the administrator and the method is pointed out in Kirby's

Digest, § § 133, 139, 140-1-3; hence it was not the intention to make the allowance of attorney's fees an *ex parte* matter, to be decided without notice, or hearing. The only remedy is by suit against the administrator personally. 2 Enc. Law, 934; 17 Ark. 572.

Under Act 118, it is not necessary to get authority from the court to employ an attorney and the provision "to be taxed and allowed as expenses" is practically the same as similar provision under the statute, prior to the act.

3. The judgment is void for want of jurisdiction of the person. No notice or process was served and Kenyon had no actual notice. The judgment being void, certiorari was the proper remedy.

Blackwood & Newman, for appellee.

1. Appellant's remedy was by appeal and not by certiorari. He had notice in time to appeal. 89 Ark. 604; 37 *Id.* 318; 73 *Id.* 604; 101 *Id.* 522; 91 *Id.* 63.

2. The probate court had jurisdiction of the subject-matter. Act 118, Acts 1913, pp. 511, 512. The act expressly repealed Kirby's Digest, § § 221-2-3. The allowance was a judgment, and appeal was the remedy. 102 Ark. 114; 55 *Id.* 200, 208; 40 *Id.* 175. The allowance was for expenses of administration. 31 Ark. 647; 43 *Id.* 171.

3. The act of 1913 changed the law and method of procedure. 65 Ark. 443; 101 Pac. 448, 450; 39 S. W. 251; 25 L. R. A. (N. S.) 75, note.

4. The probate court had jurisdiction of the person. By appealing the administrator entered his appearance. 62 Ark. 144; 53 *Id.* 181. No presentation to the administrator was necessary. 40 Ark. 175.

5. The demurrer was properly sustained. 69 Ark. 518. No defense to the claim is set up.

HUMPHREYS, J. On the 1st day of November, 1915, W. H. Gregory, appellee, filed an application for the allowance of an attorney's fee against Ralph W. Kenyon, executor of the estate of J. M. Kenyon, deceased, in the probate court for the Southern District

of Prairie County, Arkansas. He alleged in his petition that Mrs. J. M. Kenyon was first appointed administratrix of said estate and later Ralph W. Kenyon was appointed executor of the last will and testament of J. M. Kenyon; that he represented them by employment in winding up the affairs of said estate. No notice was given of the filing of this petition to either Mrs. J. M. Kenyon, as administratrix, nor to Ralph W. Kenyon, as executor, and, on the same day, without their knowledge, a judgment was rendered in said court for the sum of $1,000 against the estate of J. M. Kenyon, deceased; and Ralph W. Kenyon, as executor of the last will and testament of J. M. Kenyon, deceased, was ordered to pay the appellee, W. H. Gregory, $1,000 out of said estate; and a lien was declared in favor of appellee upon all personal and real property of the estate of J. M. Kenyon, deceased, on the personal and real property of the estate of Mrs. J. M. Kenyon, administratrix, and upon all the personal and real property of the estate of Ralph W. Kenyon, executor of said estate.

On the 12th day of November, 1915, the appellant filed a petition in the Prairie Circuit Court, Southern District, against the appellee asking that a writ of certiorari issue to bring up the original petition and papers, judgment and decree aforesaid, and that said judgment and decree be quashed, set aside and held for naught. Appellant alleged in substance; that the probate court had no jurisdiction to enter the judgment allowing appellee an attorney's fee of $1,000 against the estate of J. M. Kenyon, deceased; nor to declare a lien for said amount on said estate.

To this petition the appellee filed the following demurrer, omitting the caption and signature: "First, that the complaint does not state facts sufficient to constitute a cause of action. Second, that the court has no jurisdiction of the subject-matter of this action."

The circuit court sustained the demurrer to the petition for a writ of certiorari, and this cause is here on appeal.

(1) Appellant contends that the judgment rendered in the probate court in favor of W. H. Gregory for a fee is void, for the reason that the probate court had no jurisdiction of the subject-matter or service on the appellant before obtaining the judgment. Prior to the passage of Act 118, Acts of 1913, pages 511-512, it was necessary, unless the administrator would allow the fee and obtain credit in his annual account current, for an attorney to procure a judgment therefor in an adversary suit in another forum; then present his claim in judgment form to the administrator or probate court for allowance. The purpose of the act was to prevent this circuitous route in the collection of attorney's fees for services rendered executors or administrators in winding up estates. Since the passage of this act, attorneys' fees for services, rendered in the administration of estates, are placed in the same category as necessary expenses incurred in the course of administration of executors or administrators. It follows that the probate court had jurisdiction over the subject matter involved in this suit.

The next inquiry is: What is the method by which an attorney may obtain an allowance for his services to an estate in the probate court having jurisdiction of the matter? The statute plainly states it shall be *taxed* and *allowed* as *expenses*. Executors and administrators are required to file annual accounts current in which they are permitted to take credit for all sums lawfully expended in settling the estates. Kirby's Digest, § 133.

(2-3) An attorney's fee, like other expenses of administration, should take its place in the account current, when allowed by the court. In case the administrator or executor fails to file an account, he should be cited and required to file one. The attorney should present his claim for legal services at such time and place so that the executor, administrator, heir, legatee or other parties interested in the estate might have an opportunity to file exceptions to the account or claim. There is nothing in Act 118, Acts 1913, authorizing an

attorney to procure an allowance for an attorney's fee on an *ex parte* showing. The statute provides for the probate court to allow a reasonable fee. The allowance of the fee and the amount thereof are matters of grave importance to parties interested in the estate and they should have the privilege of presenting exceptions to the allowance. *Burke* v. *Coolidge et al., Excrs.*, 35 Ark. 180.

In the instant case, the application for an attorney's fee of $1,000 was presented and allowed on the same day, without notice or knowledge of the executor or parties in interest. The allegations of the petition are to the effect that the services rendered were of little value, so the necessity of notice and hearing are quite apparent.

(4) The appellant in this cause discovered that the judgment had been rendered in the probate court in favor of appellee for legal services within a few days after the rendition thereof, and within ample time to have appealed the case to the circuit court. The judgment in question was not void on its face. Unless the judgment sought to be cancelled is void on its face, or the right of appeal has been lost without fault on the part of the defendant, the writ of certiorari can not be invoked. The writ of certiorari can not be used as a substitute remedy for appeal. *Merchants & Planters Bank* v. *Fitzgerald*, 61 Ark. 605; *Reese* v. *Cannon*, 73 Ark. 604; *Douglas* v. *Hamilton*, 91 Ark. 63; *Leonard* v. *Leonard*, 101 Ark. 522.

(5) This court has often said that the granting of the writ is a matter within the sound discretion of the court. In the case of *Johnson* v. *West*, 89 Ark. 604; Mr. Justice Battle, in rendering the opinion in that case, said: "The writ of certiorari is not a writ of right, and its allowance rests in the sound discretion of the court." In the instant case, it was not necessary to resort to this extraordinary remedy. The pleadings disclose the fact that the time for appeal had not expired when appellant discovered that the judgment for a fee in favor of appellee had been rendered in the probate court.

(6) The judgment being valid on its face, and the remedy by appeal adequate at the time the application for this writ was made, we can not say the circuit court abused its discretion in refusing to grant the writ. The judgment is affirmed.

WILLIAMS v. O'DWYER & AHERN CO.

Opinion delivered February 26, 1917.

1. PARTIES—JOINDER OF AGENT AND UNDISCLOSED PRINCIPAL.—Both the agent and the undisclosed principal are liable for a debt incurred by the agent within the scope of his authority, and it is not error to permit them to be joined as defendants in one action.
2. MARRIED WOMEN—ACTION AGAINST—MAY BE JOINED WITH HUSBAND.—In an action to recover the purchase price of goods sold, a husband and wife may be joined as defendants.
3. HUSBAND AND WIFE—HUSBAND AS WIFE'S AGENT.—In an action against a husband and wife for the price of goods purchased, the evidence *held* to warrant the jury's finding that the husband was acting for the wife as her agent, and that she was liable for the goods purchased.

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

Henry Moore and *Henry Moore, Jr.*, for appellee.

1. The two defendants were improperly joined in one suit. The motion to make the complaint more specific so as to show the relationship existing between the parties should have been granted. A married woman must be sued alone for a debt incurred in her separate business. 66 Ark. 116. She cannot form a partnership with her husband. 56 Ark. 297; 66 *Id.* 168. The court had no jurisdiction to entertain a suit against a married woman when joined as a defendant with her husband. Kirby's Digest, § 5214.

2. These goods were purchased and action instituted prior to the passage of the Married Woman's Act No. 159, Acts 1915. The complaint does not allege the business relation, if any, between the co-defendants, and there is no evidence whatever to show any business relations between them. If the husband was the agent

of the wife and the wife the undisclosed principal, such facts should have been stated and the court should have dismissed the suit as to the wife. 48 Ark. 223; 66 *Id.* 117; 52 *Id.* 238.

3. There was no evidence that the wife was conducting the business, but is to the contrary. The fact that she allowed her husband to use the rents from her farm and mortgage her individual property to raise money to carry on his business did not make her responsible for his debts. The court's instructions were misleading and prejudicial. The evidence shows no liability of the wife for the debts and the verdict was merely based upon speculation. 117 Ark. 643. The court should have given the peremptory instruction asked by Mrs. Williamson.

W. H. Arnold, for appellee.

1. N. H. Williamson was the agent of his wife and did not disclose his agency, therefore he was liable, and has not appealed. Defendants were not sued as partners, but as persons jointly liable. The evidence shows also the liability of the wife and she is estopped by her acts. 52 Ark. 234, 238.

By permitting her husband to use her separate estate as his own, or by holding out to the world that he is the owner thereof, she is estopped as against creditors who relied upon such apparent ownership. 74 Ark. 26; 62 *Id.* 26; 84 *Id.* 227; 76 *Id.* 252; 50 *Id.* 42. See also 11 Mich. 470; 46 S. W. 183; 44 Wisc. 332.

2. She was also liable on undisclosed principal. 89 N. Y. Supp. 900; 34 *Id.* 930; 59 *Id.* 40; 70 Ga. 385. She was estopped to deny that her husband acted as her agent. 69 Ill. 452; 56 Miss. 321; 22 Ill. App. 493; 30 Mo. App. 316; 53 N. Y. 93; 7 Hun. (N. Y.) 514; 15 *Id.* 4.

3. They were jointly liable and properly joined as defendants. 22 Fla. 114; 115 Mass. 374; 120 Ind. 193, 21 N. E. 888; 65 Me. 578; 45 Miss. 43; 75 S. W. 365; 95 *Id.* 108; 6 Atl. 581; 19 S. E. 61; 60 N. E. 561; 64 Oh. St. 354; 114 N. C. 50.

McCULLOCH, C. J. Appellee was the plaintiff below and instituted this action against the defendants, N. H. Williamson and C. B. Williamson to recover the amount of $773.63, alleged to be due on account for merchandise sold and delivered. Both the defendants were held liable on the ground that N. H. Williamson was acting as agent of his wife, C. B. Williamson, in the purchase of the merchandise, and failed to disclose his agency, and that for that reason the agent and the undisclosed principal were both liable. N. H. Williamson made no defense and has not appealed from the judgment against him. Mrs. Williamson defended on the ground that the purchases of merchandise were made by N. H. Williamson for his own use and that he did not act as her agent. She denied that she was concerned in any way in the purchases. The court submitted the case to the jury on instructions authorizing a verdict in favor of appellee and it was found that N. H. Williamson was the agent of his wife and purchased the good for her. The jury returned a verdict in favor of appellee and Mrs. Williamson appealed to this court.

(1) It is first argued that the two defendants were improperly joined, but the law being clear that both the undisclosed principal and the agent are liable for a debt incurred by the agent within the scope of his authority, it is unimportant to inquire whether or not there is any such joint liability as authorizes a suit against them jointly, for the reason that the two actions, if brought separately, could properly have been consolidated and the technical error in joining the two actions is immaterial. *Mahoney* v. *Roberts*, 86 Ark. 130.

(2) Nor is there any merit in the contention that under the statutes of this State a married woman must be sued alone and that her husband cannot be joined. The statute provides that a married woman may bargain and sell her separate property and carry on any trade or business or service on her separate account and that "she may alone sue or be sued in the courts of this State on account of said property or service," (Kirby's

Digest, sec. 5214), but that does not mean that she must in every instance be sued alone. There might, in other words, be a joint liability on the part of a married woman which could be asserted in an action against all the parties liable. It is not contended in this case that there was a partnership between the husband and wife or any joint obligation on their part, but they both were sued on the theory that each is liable, one as the agent who has failed to disclose his principal and the other as a principal, acting through an agent who has not disclosed his agency. But, as before stated, if there was any error in joining the two defendants in the same action it was immaterial for the reason that the two actions brought separately could have been consolidated. The only serious question presented by this appeal is whether or not there is sufficient evidence to warrant a finding that the purchase was made for Mrs. Williamson, the appellant. It appears that she owned a plantation in Miller County, Arkansas, containing 500 acres of land in cultivation and that N. H. Williamson's mother owned the adjoining farm, containing about 700 acres of land in cultivation. The principal improvements, including the dwelling house, a barn and store building were situated on the farm of N. H. Williamson's mother and N. H. Williamson operated the mercantile business in said store building and the debt to appellee was incurred during the operation of said business, for merchandise purchased for resale. The evidence shows that the business was operated in the name of N. H. Williamson, but it was for the purpose mainly of supplying the tenants on the two plantations. N. H. Williamson collected all of the rents from tenants on each of the plantations, one owned by his wife and the other by his mother, and they permitted him to use the funds so collected according to his own will. The bank account, however, was carried in the name of his wife, the appellant, and he also deposited his funds used in connection with the mercantile business to his wife's credit and checked the same out in her name. There is also evidence to the

effect that on one or more occasions Mrs. Williamson made purchases from appellee, but the evidence on the part of appellant tends to show that this was done at the direction of N. H. Williamson himself. He wanted his wife to make the purchases on account of her superior knowledge concerning the line of goods in which appellee dealt.

The account of appellee was originally kept on the books in the name of N. H. Williamson, but near the close of the year 1913 one of the managers of appellee's business discovered that N. H. Williamson did not own the farm or other property and he directed the bookkeeper to change the account so as to run it in the name of Mrs. Williamson, but this change in the method of keeping the account does not appear to have been brought to the attention of either of the Williamsons.

(3) A due consideration of all these circumstances leads us to the conclusion that they were sufficient to warrant the jury in drawing an inference that the mercantile business operated at the farm was the property and business of Mrs. Williamson; that she owned the same, as well as the large farm which her husband operated for her, and that he was acting as her agent in operating the mercantile business, as well as the farm. *Hickey* v. *Thompson*, 52 Ark. 234.

It is true that both the defendants in the case gave testimony to the effect that the business belonged to N. H. Williamson and that his wife was not at all concerned in it, but the inference which we have said might be drawn from the circumstances in the case made a conflict, which the jury has settled in favor of appellee, and there being sufficient evidence to sustain the verdict, it follows that the judgment must be affirmed. It is so ordered.

BRADY v. WIEMER.

Opinion delivered February 26, 1917.

1. CONTRACTS—SEVERAL INSTRUMENTS—NOTE.—Where several instruments witnessing a contract were executed at different times, but were intended by the parties to be considered together, they will be so treated.
2. CONTRACTS—LOAN OF MONEY—TERMS—JURY QUESTION.—A. loaned money to B., he giving A. his note bearing 6% interest, but attached to the note a "rider" stating that it was agreed that B. pay a rate of interest greater than 6%. Correspondence between the parties was introduced tending to show their intention as to the rate of interest to be charged. *Held*, it was for the jury to determine the agreement between the parties as to the interest rate, and that the trial court properly submitted that issue.

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

H. C. Mechem, for appellants.

1. There was no evidence of consideration for the "rider" attached to the note or for any parol agreement made subsequent thereto. A past consideration furnishes no valid basis for a subsequent contract. 1 Beach on Cont., § 150, p. 192; 9 Cyc. 358; 37 Ala. 702; 36 Ohio St. 361, 369; 4 Ky. Law Rep. 348.

2. There was no proof that the parties mutually agreed on a higher rate than six per cent. The instructions were erroneous and prejudicial. 16 Ark. 308; 70 *Id.* 82; 80 *Id.* 457-8; 109 *Id.* 29.

J. F. O'Melia, for appellee.

1. The evidence shows that defendants agreed to pay 10 per cent. interest.

2. There is evidence that the parties mutually agreed on 10 per cent. and there is no error in the instructions.

3. A judgment will not be reversed upon the weight of evidence if there is any legal evidence to sustain the verdict. 57 Ark. 577; 15 *Id.* 540; 73 *Id.* 377; 75 *Id.* 111; 67 *Id.* 326.

STATEMENT BY THE COURT.

Appellee instituted this suit against the appellants alleging that on February 2, 1912, appellants executed their note to the appellee in the sum of $1,000, due in one year from date, with interest at 6 per cent. and that on February 9, 1912, they agreed in writing to pay her 10 per cent. on the note, under the following written contract:

"To whom it may concern: The rate of interest in this note is six per cent., but this comes to me at a time I need it and I agree to pay such premium for the use of this money as may be mutually agreed on, which rate shall be in excess of the amount named in this note.
"Lawrence, Kans., Feby. 9, 1912.
(Signed) J. L. BRADY."

The answer admits the execution of the note, but denies the execution of the writing as to premium for the use of the money. Alleged that on February 17, 1913, appellee gave J. L. Brady her note for $100, payable ninety days after date, with interest at 6 per cent., which had not been paid. Denied that anything was due appellee and alleged that she owed appellant J. L. Brady, and asked to off-set the $100 note.

The reply of the appellee denied that the appellee owed the $100 note set up in the answer.

The testimony on behalf of plaintiff tended to show that she lived in Peoria, Ill. Her brother, J. L. Brady, lived at Lawrence, Kansas. Her brother wrote her that he would have to borrow $1,000, and asked if she could let him have it soon. She found out that she could get 10 per cent. for the $1,000 by making a farm loan. Her brother was asking her to let him have it at 6 per cent. She wrote him that she could not let him have it unless he paid her 10 per cent. interest. She did not hear from him at once and in about ten days she made the farm loan at 10 per cent. In a few days she got a letter from him stating that he would have to have so much money at that time and asked her to let him have the $1,000, and stating in the letter that he could not afford

to pay more than 6 per cent. She replied, telling him how she was situated, and that she could not afford to and would not let him have the $1,000 unless he paid her 10 per cent. He wrote, stating that he was compelled to have the money, and asking her to send it by the first mail, and stating that he would only pay 6 per cent. She answered that she would not put up the money unless he would pay 10 per cent. So the next morning he sent her a telegram and said he was in trouble and that he must have the $1,000 by the first mail. "I took it," says the witness "that he meant to comply with my terms. I did not have the $1,000 and went out and borrowed the money and sent it to him. It was nearly two weeks before I heard from him, and I wrote him several times, and when I wrote him to send the note to be at 10 per cent., signed by himself and Lee (Mrs. Brady) he sent the note in suit. I told him that I could not accept it and would not because he agreed to pay me 10 per cent. by admitting in sending the telegram that this was his agreement, to pay me 10 per cent. Attached to the note was a slip of paper which he said fully explained itself, and further stated that the rate of interest in Kansas was not ten per cent., and that if anything happened it might put me to some trouble and that this explained it fully as to the rate of interest. I kept the note about a month and returned it and asked as to why he made it that way, and he sent it back to me with just about the same statement that he had made before. He stated in his letter returning the note that this statement which he had pinned on the note was put in there for my protection. There is still due me on the note at 10 per cent. $514.15, and at 6 per cent $388.17."

The testimony on behalf of the appellants, by J. L. Brady, tended to show that he borrowed $1,000 February 2, 1912; that nothing was said about the interest at the time and he put it at the legal rate in his State. Appellee wrote that he would have to pay her more. He wrote that he would be glad to pay her according to benefits received. He attached the rider on the note.

He exhibited checks payable to the appellee dated between February 2, 1913, and February 15, 1914, amounting to $500; and checks were introduced, signed by Mrs. Brady, in favor of the appellee, bearing the appellee's endorsement, dated between July and December, 1914, amounting to $500; and some smaller checks. He testified that plaintiff was overpaid the sum of $18.48.

Appellants introduced a letter which was post marked "Havana, Cuba, November 20, 1914," in which the appellee stated that she wanted the entire balance due on the note paid in one payment, January 10, 1915, with interest at 7 per cent. In this same letter she complains that he had refused to pay her what she asked for it, and that the money was long past due, and that she had directed that suit should be brought, and stated that she regretted it, but that she had done all in her power to prevent it, but that her brother, J. L. Brady, had positively refused to pay, saying in one of his letters that forty telegrams would not get the money. In this letter she stated that "if pleadings and telegrams would not get the money there was nothing left for her to do but to go to law. She concludes the letter by saying "no matter what business necessitates, you are still my brother and I shall ever love you."

The court, among others, instructed the jury as follows:

"If you believe that the defendant J. L. Brady signed the agreement to pay plaintiff a premium for the use of this money, which rate shall be in excess of six per cent. named in the note, then you should find a verdict for plaintiff for such amount as the evidence shows he agreed to pay, if any."

And further, "That the note in suit bears interest at six per cent. per annum and the calculation of interest must be made at that rate unless the testimony shows a mutual agreement to pay a higher rate, and you are charged that a higher rate than ten per cent. cannot be enforced, and the burden is on the plaintiff to show an agreement."

The appellants requested a peremptory instruction in their favor, and also presented prayers for instructions in effect telling the jury that the writing attached to the note was not a contract to pay 10 per cent. interest or any other rate and was not enforceable, and that the jury could not consider it in determining the amount to be paid on the note in suit; that the note in suit bore interest at six per cent. per annum, and that the calculation as to the amount of interest due the appellee, if any, had to be made at that rate.

The court granted appellants' prayer to the effect that if the $100 note signed by the appellee was not paid that the amount due thereon, with interest, should be credited on the $1,000 note sued on.

The verdict and judgment were in favor of the appellee in the sum of $235.75, and this appeal is duly prosecuted.

WOOD, J. (after stating the facts).

(1) Appellants contend that there was no consideration for the writing attached to the note which appellant J. L. Brady designates as a "rider." But the note and the "rider" and the letters concerning this, written before the execution of the note and "rider," should all be considered in determining as to what the contract was between the appellants and the appellee as to the loan of money and the rate of interest to be paid therefor.

In *Mann* v. *Urquhart*, 89 Ark. 239, we held that where several instruments witnessing a contract were executed at different times, but were intended by the parties to be considered together, they will be so treated. See also *McDonough* v. *Williams*, 77 Ark. 261.

(2) The correspondence between the appellee and appellant, as well as their testimony, shows the circumstances under which the note and "rider" were executed, and that they were really but parts of one transaction which was consummated by the loan of the money by the appellee to the appellants. The loan of the money was the consideration for the "rider" as

well as the note. The recitals of the "rider" show that the appellants agreed to pay a premium for the use of the money in excess of the amount named in the note.

Under the evidence it was a question for the jury to determine as to what the agreement was between the parties as to the rate of interest that the loan should bear, and the court did not err in submitting that question to the jury.

Learned counsel for appellants insist that there was no evidence of a mutual agreement between the parties for some higher rate of interest than six per cent. But the testimony of the appellee tends to show that she demanded of the appellants interest at 10 per cent. before the note and "rider" were executed, and the jury were warranted in finding that appellants accepted this offer and impliedly agreed to pay her 10 per cent. as evidenced by appellant J. L. Brady's telegram and letters requesting her to send him the money. Since appellants had been informed that appellee would not loan the money for less than 10 per cent. per annum, when the appellant J. L. Brady wrote and telegraphed appellee to send the money, the jury were warranted in inferring that he accepted the money on the terms that appellee proposed.

Upon the whole, we find no error in the instructions prejudicial to the appellants, and the question as to what amount, if any, was due to the appellee was, under the evidence, for the jury. The issues were correctly submitted, and there was evidence to sustain the verdict. The judgment is therefore affirmed.

TAYLOR v. WALKER

Opinion delivered February 26, 1917.

LEASES—WIRE FENCE—ERECTED BY LESSEE—RIGHT TO REMOVE AT EXPIRATION OF TERM.—The lessee of premises was allowed a sum of $100 per annum to be expended in necessary repairs. The lessee purchased and used some wire to reinforce a fence about the cow and hog lot, which he sought to remove at the expiration of the term. *Held,* it was a question for the jury whether the wire was used in permanent repairs which the lessee was obliged to make, and which was included in the $100 allowance made by the lessor.

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

Walter Gorman and *C. W. Norton*, for appellant.

1. There are two meritorious grounds of defense to this suit. (1) Plaintiff and George Walker were partners, at least in the operation of the farm under the lease, if not in the ownership of the lease; that the wire was put on the old fence and was merely a repair thereof, and was compensated for by the reduction of $100.00 from the rental and the title to the repairs passed to the landlord. (2) The wire became a fixture, part of the realty, and replevin would not lie. The first is a question of fact, the second of law.

2. As to fixtures the law is well settled. 53 Ark. 526; 14 S. W. 899; 66 Ark. 87; 93 *Id.* 77. A license by a tenant is not effectual to preserve the chattel character of an improvement where it is a fixture. 93 Ark. 77; 66 *Id.* 87; 56 *Id.* 55.

3. Plaintiff surrendered possession without removal of the wire before the lease terminated. 64 Fed. 939; 9 S. E. 366.

Mann, Bussey & Mann, for appellee.

1. None of the cases cited for appellant are in point. They all involve buildings except one and that a heating plant. The wire was not a fixture and not so intended. 19 Cyc. 1037. It was only a temporary trade fixture. 53 Ark. 526; 19 Cyc. 1067; Tiffany Landl. & Ten., § 248. It was a mere chattel. 33 Ark. 633.

2. Plaintiff had the right of removal within a reasonable time; it had already been taken down and stored on the premises. The presumption of abandonment does not apply. 19 Cyc. 1071, 1067. The intention of the parties is the true criterion. Appellee did not intend the wire should be a fixture. 19 Cyc. 1037.

SMITH, J. Appellant was the owner of a plantation known as the Linden Place, which she leased to the J. W. Beck Company for a term of years. This company sublet the place to one George Walker, who cultivated the land in partnership with his brother, Charles Walker, who is the appellee here and was the plaintiff in the court below. The Walkers were partners in the operation of the farm, but not in the ownership of the lease. George Walker testified that he gave Charles Walker permission to fence up a pasture or hog lot, and that Charles Walker bought the wire which forms the subject matter of this litigation and placed it around the pasture. Before the expiration of the lease Charles Walker took down the wire from the posts to which it had been attached and rolled it up and placed it in one of the buildings on the place. After the expiration of the lease he sought to remove the wire from the house where he had stored it and, permission being refused him so to do, he brought replevin to recover it.

The lease was executed in consideration of the payment of the annual rental of $2,700.00, with a proviso that improvements and repairs might be made by the tenant in any sum not exceeding $100.00, and George Walker testified that the value of the repairs made by him always exceeded that amount.

Appellant testified that, at the time Walker took possession of the place, there was a fence around the pasture where appellee placed his wire. That she saw the pasture fence after the wire had been put on it by appellee and that it was in the same location as the old one surrounding the pasture, used for the same purpose, and that she neither gave permission for it to be placed there nor for its subsequent removal.

The court instructed the jury to return a verdict in favor of appellee, which was accordingly done, and this appeal has been prosecuted to reverse that action.

Appellee defends the action of the court in directing a verdict in his favor upon the ground that the record presents no disputed question of fact. It is urged that the tenant built the fence to promote his more convenient use of the premises and that such improvements are removable, as are mere trade fixtures. This is the law in relation to improvements of that character. But the proof on appellant's part, as has been stated, was to the effect that the fence in question was one of the permanent fences which the tenant under the lease was in duty bound to maintain in repair, and that any repairs thereof would have been, and were, compensated by the annual allowance of $100.00 for that purpose. This question should have been submitted to the jury, and for the error in failing so to do the judgment will be reversed and the cause remanded.

STROZIER v. STATE.

Opinion delivered February 26, 1917.

LIQUOR—ILLEGAL SALES—INDICTMENT—ALLEGATION OF QUANTITY.—Under Act 30, p. 98, Acts 1915, prohibiting the sale or giving away of *any* alcoholic, etc., liquors, the quantity sold is immaterial, and is not a necessary allegation in an indictment.

Appeal from Pulaski Circuit Court; *W. H. Pemberton*, Special Judge; affirmed.

Albert Gerlach, for appellant.

1. The indictment charges that a quart was sold, hence the quantity was material. It was error to instruct the jury that it was not material as to the quantity sold. The evidence should not vary from the allegations in the indictment. 66 Ark. 120; 60 *Id.* 141.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Unless the statute makes the quantity an essential element of the crime, an allegation as to the

quantity sold need not be proved. Proof of sale of any quantity is sufficient. McClain on Cr. Law, § 1273; 13 Enc. of Ev. 732; 54 Minn. 105; 38 N. H. 81; 16 Mo. 551; 28 *Id.* 17; 14 N. H. 451; 6 Va. 634; 12 Metcalf (53 Mass.) 524; and others. There was no variance.

SMITH, J. Appellant was convicted under an indictment which alleged that he had sold one quart of alcoholic liquors to one Robert Edwards, while the proof showed the sale of two half-pint bottles of whiskey. Upon the trial the court instructed the jury, over appellant's objection, that it was immaterial whether the amount sold was a pint, quart, or a half-pint, provided the jury found appellant had sold some quantity. This appeal questions only the correctness of this instruction. Appellant says it is erroneous because there is a variance between the allegation of the indictment and the proof. The authorities, however, hold to the contrary. In 13 Encyclopedia of Evidence, under the title of Variance, and the subhead of Offenses Relating to Intoxicating Liquors, p. 732, it is said: "An allegation as to the quantity sold need not be proved as laid, unless the quantity constitutes an essential element of the crime."

The note to this text cites the following cases which support it: *State* v. *Connell*, 38 N. H. 81; *State* v. *Cooper*, 16 Mo. 551; *State* v. *Andrews*, 28 Mo. 17; *State* v. *Moore*, 14 N. H. 451; *Brock* v. *Commonwealth*, 6 Va. 634; *Commonwealth* v. *Buck*, 12 Metcalf (53 Mass.) 524.

In addition, we are cited to the case of *State* v. *Tisdale*, 54 Minn. 105, and McClain on Criminal Law, sec. 1273, which cites other cases.

This prosecution was had under Act No. 30 of the Acts of 1915, p. 98, section 2, of which reads as follows:

"Sec. 2. After January 1, 1916, it shall be unlawful for any person, firm or corporation to manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away of any alcoholic vinous, malt, spirituous or fermented liquors or any

compound or preparation thereof, commonly called tonics, bitters or medicated liquors within the State of Arkansas."

It will be observed that the Act prohibits the sale or giving away "of *any* alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors." The quantity sold is immaterial.

No error was committed, therefore, in giving this instruction, and the judgment is affirmed.

HAMILTON NATIONAL BANK *v.* EMIGH.

Opinion delivered February 26, 1917.

1. BILLS AND NOTES—DEPOSIT—CREDITING ENDORSER'S ACCOUNT—PURCHASE BY BANK.—Where a bank receives a note endorsed without restriction, and gives credit for the proceeds of the same to the depositor as cash in a checking account, and such proceeds are checked out by the depositor, the bank becomes the absolute owner of the note.
2. BILLS AND NOTES—TRANSFER BEFORE MATURITY—PAYMENT TO ORIGINAL PAYEE.—The maker of a note is not discharged by payment to the original payee, without surrender of the note, when the note was transferred before maturity to an innocent purchaser for value.
3. EVIDENCE—ALTERATION OF NOTE—SUIT BY BONA FIDE HOLDER—TRANSACTIONS BETWEEN ORIGINAL PARTIES.—When a note was transferred for value before maturity to an innocent purchaser, in an action by him against the maker when the maker plead an alteration of the note, evidence of conversations had between the maker and payee should be limited to matters relating to an alteration of the note.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; reversed.

A. R. Cooper, for appellant.

1. The note is a negotiable promissory note and appellant is the *bona fide* holder for value, before maturity and without any notice of any infirmity or defense between the original parties. 113 Ark. 72; 170 S. W. 852; 101 Ark. 281; 121 *Id.* 250; 48 *Id.* 454.

2. The bank being an innocent purchaser for value in the usual course of business was not affected

by any question of payment to the payee of the note. Payment to the payee is no defense against an innocent purchaser. 109 Ark. 113; 105 *Id.* 152; 113 *Id.* 190; 89 *Id.* 134; 105 *Id.* 155; 150 S. W. 411.

3. The bank became the absolute owner of the note and instructions 3 and 4 requested by it should have been given. 107 Ark. 603; 101 *Id.* 266.

4. The statement made by the Hanna-Brackenridge Co. to appellee was not competent and was immaterial. 107 Ark. 603; 8 Cyc. 256 and note 66; 75 S. E. 771; 84 *Id.* 1003; 36 Ark. 506.

Rowell & Alexander, for appellees.

The note was negotiated by and for the individual benefit of the president of the payee company. This was in itself sufficient to have placed the bank on inquiry.

But the sole defense of appellees was that the note had been materially altered without their consent or knowledge after delivery to the original payee. This rendered the note void even in the hands of an innocent holder. 35 Ark. 146; 49 *Id.* 40; 102 *Id.* 302; 110 *Id.* 578; 111 *Id.* 263; Joyce on Defenses to Commercial Paper, §§ 152, 154; 2 Daniels on Neg. Instr. (6 Ed.) §§ 1376-7.

The defense of alteration as a defense was properly submitted to the jury in appropriate instructions. Even if the evidence was conflicting, the jury by their verdict have settled the matter and this court will not disturb it. The jury were warranted by the evidence in finding that the defense was sustained, under instructions really too favorable to appellant.

SMITH, J. Appellant was the plaintiff in the trial of the cause in the court below, which is a suit upon the promissory note of appellees executed to the order of The Hanna-Brackenridge Company, of Fort Wayne, Indiana, for the sum of $500.00, under date of July 14, 1913, and by that company endorsed to appellant. The execution of the note was denied, and the truth was alleged to be that appellees had executed a note similar

to the one sued on in June, 1913, but that this note had been discharged by certain payments which had been made and by the execution of a renewal note for the balance.

Appellant contends, however, that it is a *bona fide* holder of the note for value, before maturity, and without notice of any infirmity or defense between the original parties. The evidence on the part of appellant is to the effect that the note was transferred to it on July 17, 1913, three days after its date and that the proceeds of the note, then discounted, were placed by the bank to the credit of its endorser's account with the bank, and that checks were drawn and paid in the usual course of business, which exhausted this deposit before the maturity of the note. There appears to be no denial of the truth of this evidence.

In regard to the alleged alteration of the note, the testimony on appellant's part was to the effect that the body of the note was written by the treasurer of the payee company with a stylo pen sometime prior to mailing, and that just before mailing the date was filled in with an ordinary pen and that there were no changes or alterations in the note after its execution. Appellees testified that the note was executed in the first part of June and that it had been paid by a renewal note but had never been returned. Other testimony was offered in support of this defense, including a statement of the transactions between appellees and the payee company purporting to give the dates of all the notes executed by appellees to that company.

The court gave appropriate instructions on the question of the alteration of the instrument which are not questioned; but refused to give instructions numbered 3 and 4 requested by appellant which read as follows:

"3. You are instructed that where a bank receives a note endorsed without restriction, and gives credit for the proceeds of same to the depositor as cash in a checking account, and such proceeds are checked out

by the depositor, the bank becomes the absolute owner of the note."

"4. A maker of a promissory note is charged with the knowledge that the note is negotiable and may be transferred and endorsed by the person or firm to which it is payable to some third party or endorsee; and when such maker pays the person to whom said note was originally payable, the amount of the said note or any part thereof, without the production of the original note, such payment is made at the maker's peril, and such payments so made are of no effect as against the third party or endorsee thereof who had possession of the note at the time the payments were made.

"Therefore, you are instructed that although you may believe from the evidence that the note was paid by the Emigh Land & Lumber Company to the party to whom it was originally payable, yet if at the time of such payment said note was in possession of the plaintiff herein, your verdict will be for the plaintiff, unless you believe it was altered."

The refusal to give these instructions, and the admission of evidence tending to show payment of the note to the payee, present the questions we are called upon to decide.

(1) The third instruction should have been given. In the case of *Little* v. *Arkansas National Bank*, 113 Ark. 72, the facts were that Gunter endorsed notes, payable to his order, to the bank, and his account was credited with the proceeds thereof, and this money was checked out by him in the usual course of business, and we held this transaction constituted the bank an innocent purchaser for value. See also *Southern Sand & Material Co.* v. *People's Savings Bank*, 101 Ark. 281; *Tabor* v. *Merchants Nat. Bank*, 48 Ark. 454.

(2) Under the issues joined the fourth instruction should have been given. It would constitute no defense that appellees had paid the note to the payee if such payments were made subsequent to the sale and delivery of the note to the bank. *Exchange Nat. Bank* v. *Steele*, 109 Ark. 113; *Briggs* v. *Collins*, 113 Ark. 190.

(3) The statement of the account furnished by the Hanna-Brackenridge Co. to appellees was not competent as evidence tending to prove the transactions there set down, because the bank was not a party thereto; but it would have been proper to show these transactions by competent testimony as tending to show there was no note which bore the date of the one sued on, this evidence being competent to prove the alteration of the instrument. But the court, on the trial anew, should limit any testimony in regard to transactions between the maker and the payee of the note to the question of alteration, and the jury should be told that such evidence should be considered only as bearing upon the question of alteration. *Cox Wholesale Grocery Co.* v. *National Bank*, 107 Ark. 601.

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

DRAINAGE DISTRICT NO. 11 *v.* STACEY.

Opinion delivered February 26, 1917.

DAMAGES—TAKING OF LAND BY DRAINAGE DISTRICT.—Where land is taken by a drainage district in the construction of its ditch, the measure of the land owner's damage is the true market value of the land taken.

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

J. T. Coston, for appellant.

1. Instruction No. 4 given on the court's own motion was error. If it had stopped at the word "taking" it might have been free from error, but it did not. It went further and told the jury that their verdict would be for the market value of the land considered with reference to the use to which it was made at the time, *or* the most *valuable use* to which it was adapted. This is not the law. 110 Ill. 414; 49 Ark. 390-394; 133 S. W. 1023; 2 Lewis on Em. Domain, 1233-4; 101 Fed. 665; 13 S. W. 124; 52 S. W. 781. The market value of the land for *all* uses and not the *most valuable*

uses, is the correct rule. The jury disregarded all benefits to plaintiff's land.

Jasper N. Thomason, for appellee.

1. The instruction complained of, No. 4, states the law. It states the proper criterion of damages. 103 Ark. 412; 49 *Id.* 390; 101 *Id.* 50; 90 U. S. 403; 103 *Id.* 412; 144 *Id.* 334.

There is no error. The twenty acres of land taken was worth $1,000.00. The instruction clearly presented to the jury that the proper test was the *true market value* of the land. There is no affirmative showing that the jury disregarded the benefits to the land by reason of the construction of the ditch.

HUMPHREYS, J. Appellee instituted this suit in the Crittenden Circuit Court against the appellant to recover damages in the sum of $1,777.50 for constructing a drainage ditch or canal across his lands in Crittenden county, towit: Northeast quarter and the southeast quarter and the southwest quarter of section 15, Tp. 9 N., R. 8 E. He alleged that appellant appropriated 23 7-10 acres of land for said purpose of the value of $75.00 per acre. The appellant denied that said real estate so appropriated was of the value of $75.00 per acre or any other sum; and charged that the benefits accruing to said lands by reason of the construction of the drainage canal were greater in value than the value of the land appropriated or the damages resulting to said lands by reason of the construction of the drainage ditch.

The jury returned a verdict for $1,000 in favor of appellee, for which amount judgment was rendered. Proper steps were taken and the case is here on appeal.

Appellant contends that the jury disregarded the benefits derived by appellee from the construction of the drainage ditch, in arriving at the verdict. There is evidence in the record tending to show the land appropriated to be of greater value than the amount of the verdict. A plat was introduced showing the course of the ditch through the lands. Much evidence is intro-

duced pro and con as to whether there were openings in the ditch for the purpose of draining the land. The situation was described to the jury in detail by the several witnesses. We cannot say the jury ignored the question of benefits. Nor can we say the evidence is insufficient to support the verdict.

The assignment of error most earnestly insisted upon for reversal is the giving of instruction No. 4 on the court's own motion over the specific objection of appellant. The instruction pertains to the measure of damages and is as follows:

"You will take into consideration the fair and reasonable market value of the lands actually appropriated by the defendant for drainage purposes, and in determining such value you will be guided by the same consideration which would be regarded in the sale of property between private persons and what the land included in the drainage ditch and any additional land appropriated for the purpose of receiving the dirt excavated from the line of the ditch was worth in the market at the time of its taking, considered with reference to the use to which it was made at the time, or the most valuable use to which it was adapted. You will then determine, gentlemen, what benefits, if any, accrued to the plaintiffs by reason of the construction of the drainage ditch through their lands."

It is admitted that had the instruction stopped with the word "taking," it would have been free from error. The objection is made that said instruction limits the jury to two standards of value with the privilege of adopting either. If the instruction does this, it is erroneous. If the instruction establishes any other standard than the true market value, it is erroneous. This court said in the case of *Ft. Smith & Van Buren Dist.* v. *Scott*, 103 Ark. 405: "The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes, comprehending its availability for any use to which it is plainly adapted, as well as the most val-

uable purpose for which it can be used and will bring most in the market."

Instruction No. 4, given by the court, is not accurately worded, but after carefully reading it, we are of the opinion that it clearly presented to the jury that the proper test was the *true market value*. It will be observed that the instruction begins with the following statement: "You will take into consideration the fair and reasonable market value of the lands appropriated." They were also told that, in determining such value, to be guided by the same consideration which would be regarded in the sale of property between private persons. In the latter part of the instruction, they were told that, in arriving at the market value, they might consider it, "with reference to the use to which it was made at the time, or the most valuable use to which it was adapted." By telling the jury that it might consider these two uses in arriving at the market value, in no way prevented them from considering all the uses to which the land was adapted. Neither was it stating to them that they were to base their verdict on the most valuable use to which the land was adapted, as contended by appellant.

There being no affirmative showing that the jury disregarded the benefits to the lands of appellee by reason of the construction of the ditch, and instruction No. 4 being in accordance with law, the judgment is affirmed.

TOLER v. CROWDER.

Opinion delivered February 26, 1917.

BANKRUPTCY—SALE OF PROPERTY SUBJECT TO LIEN—TITLE OF PURCHASER—PRESERVATION OF LIEN.—In bankruptcy proceedings, the court and referee may order the property of the bankrupt sold, free and clear from mortgages and other liens, and preserve such liens by transferring them to the funds which are the proceeds of the sale, and where the mortgagee consents to a waiver of his lien on the property, the purchaser takes the property free and clear.

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

G. B. Oliver, for appellant.

1. The court erred in holding that plaintiff could maintain the suit *in personam* for the purchase money without first having tendered a deed.

2. The court erred in holding that the trustee exceeded his authority in offering the property free of incumbrance and in agreeing to procure the release of the Allen-West Commission Co. mortgage.

3. The release of said company did not follow the laws of Missouri. Rev. Stat., §§ 2844-2851.

D. Hopson, for appellee.

1. A deed was tendered by the former trustee and also by appellee in the complaint. This was sufficient. The declarations of defendants that they would not carry out the contract relieves plaintiff from any tender of deed. 39 Cyc. 1910; 97 Ark. 623.

2. The lots were sold by order of court free of all incumbrances and Allen-West Commission Co. consented. The rule of *caveat emptor* applies. 24 Cyc. 57; 32 Ark. 321; 32 *Id.* 97. The sale of the lots cleared the incumbrance. 5 Cyc. 383.

3. A purchaser cannot rescind without surrendering possession and putting the vendor *in statu quo.* 5 Ark. 395; 4 *Id.* 467; 15 *Id.* 286; 20 *Id.* 424.

4. The statutes of Missouri have no application here.

HUMPHREYS, J. On the 17th day of June, 1911, appellants bought lots 4 and 5, in block 2 of Borden's addition to the town of Neelyville, Missouri, from C. W. Jones, trustee in bankruptcy of the estate of J. M. Hawks. These lots were included with other property in a mortgage given prior to this time by the bankrupt, J. M. Hawks, to Allen-West Commission Company, to secure a large indebtedness owed by Hawks to said commission company. In the bankrupt proceedings, other creditors had attacked the validity of said mort-

gage, and by consent of Allen-West Commission Co., the bankruptcy court ordered the lots sold and the proceeds deposited with the clerk subject to the order of the court. The sale was made, reported and confirmed. Appellants took possession of said lots and collected the rents until the building burned, at which time they collected $1,600.00 insurance. Appellants executed notes for the unpaid purchase money and the last note so executed is the basis of this action. At the time of the sale, the trustee stated the lots were being sold free from incumbrance. After the indebtedness became due, he tendered a trustee's deed and release to appellants and demanded payment of said note. Appellants objected to the form of the release by Allen-West Commission Company, and declined to accept the deed and pay the note.

C. W. Jones died and T. J. Crowder was appointed trustee of J. M. Hawks, bankrupt. He offered to make a deed and give a release to appellants, who declined to carry out the contract. Thereupon, he instituted this suit and in the complaint tendered a trustee's deed to appellants for said real estate. Appellee obtained a judgment on the note; proper steps were taken and the cause is here on appeal.

Appellants contend that the judgment should be reversed because appellee never tendered a release sufficient in form from Allen-West Commission Company. In support of this contention sections 2844 to 2851, inclusive, of the Revised Statutes of Missouri of 1909, describing the method by which mortgages and deeds of trust are released in Missouri, are cited by appellant. These statutes have no application to the facts in this case, for under appellant's own evidence, no contract or promise was made by the trustee at the time of the sale to have Allen-West Commission Company release its mortgage in accordance with the statutory form required in Missouri. The order of sale gave the trustee no such authority. The statement made by him at the time of the sale was that the property was being sold free of encumbrance. The sale was made

at the instance of the creditors of the bankrupt by and with the consent of the mortgagee, Allen-West Commission Company.

In bankruptcy proceedings, the court and referee may, in proper cases, order the property of the bankrupt sold "free and clear from mortgages or other liens, and preserve such liens by transferring them to the funds which are the proceeds of the sale." 5 Cyc. 383, and cases cited in support of the text.

The mortgagee consented that this should be done, and therefore waived all right under the mortgage to his lien. The mortgagee's lien was as effectively wiped out by this sale as if it had been sold under the mortgage. No release, therefore, was necessary.

An objection is made that the deed was not tendered until after this suit was instituted. We do not so understand the facts. Jones, as trustee, tendered a deed in his lifetime. Appellee, as trustee, tendered both a deed and release, to which no objection was made on account of form, but refused because appellants had decided not to carry out the contract. Appellee offered in his complaint to make a deed.

No authorities are cited in support of the contentions made by appellant for reversal of the judgment, nor do the record facts support the contentions advanced.

Under the undisputed evidence in the case, the court was correct in instructing a verdict on the note. The judgment is affirmed.

DICKINSON, RECEIVER CHICAGO, ROCK ISLAND & PACIFIC RY. CO., v. MCBRIDE.

Opinion delivered February 26, 1917.

1. TRIAL—PROCEDURE—ORDER OF ARGUMENT OF COUNSEL.—In a personal injury action, the defendant denied all the material allegations of the complaint, throwing the burden of proof upon the plaintiff. After instructing the jury the court gave counsel one hour and a half on a side; one of plaintiff's counsel addressed the jury for thirty-five minutes, whereupon defendants' counsel moved to submit the case without further argument, refusing himself to make any argument. The court overruled defendant's motion and over defendant's

objection permitted another of plaintiff's counsel to continue the argument. When this argument was concluded plaintiff's counsel had not exhausted all of the time allotted to them, and defendants' counsel then moved the court to permit him to address the jury. The court overruled this motion also, and submitted the cause to the jury. *Held,* the plaintiff had the right to open and close, the record not showing that it had violated Kirby's Digest, § 6196, and that the court's rulings were correct.

2. DAMAGES—PERSONAL INJURIES—REVIEW OF VERDICT.—In a personal injury action the court will not interfere with a verdict on the ground that it is excessive if the record contains sufficient substantial and legal evidence to support the verdict, and when liability is established, this court will not interfere on appeal with a verdict, unless it is so manifestly out of proportion to the nature and extent of the injury as to shock the sense of justice.

3. DAMAGES—PERSONAL INJURIES—AMOUNT.—In an action by a brakeman against a railway company for damages caused by negligence. Where the plaintiff fell from a moving freight car because of a defective handhold, the evidence held sufficient to warrant a verdict for $20,000 in plaintiff's favor.

4. CONTINUANCES—DISCRETION.—Where appellant's motion for a continuance in the trial court is not based upon a statutory ground, the exercise of the court's discretion in refusing the continuance will not be disturbed on appeal in the absence of a showing that the trial judge acted arbitrarily.

Appeal from Prairie Circuit Court, Southern District; *Thos. C. Trimble,* Judge; affirmed.

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

1. The continuance should have been granted. The accident occurred less than three months before that time; there were no broken bones, abrasions or other evidences of any injury, much less a permanent one. The jury could do no more than guess as to the extent of his injuries. We think the court abused its discretion in refusing a continuance. We offered to prove by doctors that there was no permanent injury. A continuance should have been allowed as it was impossible to determine in so short a time whether the injury was permanent or not, and whether he was incapacitated for the remainder of his life, etc.

2. The statistics from the reports of the Interstate Commerce Commission reports show that in Illinois this company paid for 13 deaths $24,299.55,

while in Arkansas there were 12 deaths for which it paid $40,025.00. On the Illinois division there were 311 injuries for which $11,796.70 was paid, while on the Arkansas division there were 316 injuries for which we paid $46,264.27. One of two things is certain—we are paying too much in Arkansas or too little in Illinois. In Arkansas $169,669.13 was paid for personal injuries and death claims while on the whole system 8,201 miles, there was paid $794,133.09. The mileage in Arkansas is only 707 miles of track.

3. The court erred in its ruling as to the argument of counsel. 80 Pac. 944; 51 *Id.* 307; 29 Ark. 151; 32 *Id.* 593. Its action was prejudicial.

4. The verdict is grossly excessive. 100 Ark. 107; 106 *Id.* 177. Whether the excessiveness was caused by the erroneously permitted double argument for appellee, or some other cause, we do not know, but that, no doubt, was the exciting cause.

Pace, Seawel & Davis, for appellee.

1. There was no error in overruling the motion for a continuance. That was a matter of discretion for the court.

2. No error was committed in permitting Mr. Pace to argue the case and in refusing to permit Mr. Pugh to conclude the argument after the argument of Mr. Pace. The Kansas statute is different and the cases cited do not apply. The provisions of the different states can be found in 61 L. R. A. 520. Under our statute the plaintiff here had the right to open and close. This is a substantial right. Kirby's Digest, § 2388; 32 Ark. 593; 29 *Id.* 151.

Other states have passed on this question holding that the matter is within the discretion of the trial court, and that unless abused, no error can be predicated thereon. 30 Tex. Civ. App. 341; 72 S. W. 97; 141 *Id.* 243; 136 *Id.* 784; 19 *Id.* 545; 36 Mich. 254-7; 71 Neb. 691; 46 N. W. 872; 99 *Id.* 484; 72 N. E. 489; 82 Ind. 476; 87 S. E. 851; 94 Am. St. 870; 136 S. W. 784-6; Thompson on Trials (2 ed.), § 936; 36 Mich.

257. The concluding argument is a decided advantage and it is a right to which the party having the burden of proof is entitled. 29 Ark. 151; 98 *Id.* 132, 139. This court will not control the discretion of the trial court in such matters as argument of counsel, continuances, etc. 86 Ark. 486; 87 *Id.* 443; 89 *Id.* 612; 172 S. W. 843; 53 *Id.* 161; 54 Ark. 124; 34 *Id.* 390; 36 *Id.* 316; 67 *Id.* 57; 58 *Id.* 358; 54 Id. 588-597.

3. If the court committed error it was harmless. 96 Ark. 343; 69 *Id.* 442; 100 *Id.* 526; 80 *Id.* 376; 74 *Id.* 326. The liability is not denied and the alleged error could only affect the amount of damages and no prejudice is shown.

4. The verdict is not excessive under the evidence.

HUMPHREYS, J. Appellee, J. F. McBride, instituted this suit in the Southern District of the Prairie Circuit Court, on the 25th day of February, 1916, against the appellant, Jacob M. Dickinson, receiver of the Chicago, Rock Island & Pacific Ry. Co., to recover damages on account of personal injury received while engaged as head brakeman in the operation of a freight train running from Brinkley to Hulbert, Arkansas, and obtained a judgment in said court for $20,000.00. Proper proceedings were had, and this cause is here on appeal.

No serious contention is made that appellant is not liable for some amount. The appellee was injured in attempting to reach the top of a freight car for the purpose of giving signals which was a part of his duty. There was a defective handhold that gave way while he was climbing to the top of the car and he fell from four to six feet from the slowly moving train to the ground and received the injury. He had no knowledge of the defective condition of the handhold.

The third assignment for error is most strongly insisted upon for reversal. When all the evidence was in, the record recites: "After giving the foregoing instructions the court announced that each side would be

awarded an hour and a half for argument of the case to the jury, and requested the attorneys to arrange the division of time. It was agreed that Mr. Seawel would consume thirty-five minutes and Mr. Pace the balance of the time for the plaintiff. Mr. Seawel, for the plaintiff, thereupon addressed the jury, using thirty-five minutes of the time allotted to the plaintiff. At the conclusion of Mr. Seawel's argument the court offered Mr. Pugh, attorney for the defendant, an opportunity to proceed with his argument to the jury. Whereupon Mr. Pugh stated to the court that the defendant did not desire to make any argument in answer to the argument made by plaintiff's attorney, Mr. Seawel, and moved that the case be submitted without further argument. To this the plaintiff objected and the court refused the motion for the defendant to have the case submitted without further argument and permitted Mr. Pace, attorney for the plaintiff, to proceed with his argument to the jury. The defendant saved his exceptions to the ruling and action of the court in refusing to let the case be submitted upon the plaintiff's opening argument to the jury and objected and saved his exceptions to the action and ruling of the court in permitting any further argument being made upon the part of the plaintiff. Thereupon Mr. Pace, on behalf of the plaintiff, addressed the court and jury for the space of forty minutes and argued the testimony in detail and made a strong argument on the amount and extent of the damages to which he claimed the plaintiff was entitled. The argument of Mr. Pace for the plaintiff was made to the jury over the protest and objections of the defendant, and the defendant saved his exceptions to the ruling of the court in permitting the same to be made. At the conclusion of said argument, the court announced to Mr. Pace that he had not consumed the time remaining to plaintiff for argument, but had fifteen minutes more time if he desired to use it. Whereupon Mr. Pugh, attorney for the defendant, moved the court that he now be given an opportunity to answer said argument of the plaintiff. To this the

plaintiff objected and the court overruled said motion and refused to allow the defendant to answer the argument of the plaintiff; to which ruling and action of the court the defendant at the time saved his exceptions and same are noted of record."

It is not clear whether Mr. Pugh agreed for Mr. Seawel to argue the case thirty-five minutes and for Mr. Pace to use the balance of time assigned to plaintiff; or whether the time assigned to plaintiff was divided in this manner between Mr. Seawel and Mr. Pace. The request on the part of the court for the attorneys to arrange the division of time and the statement immediately following "that it was agreed, etc." might well include Mr. Pugh in the agreement, and might well be construed as an assent on the part of appellant for Mr. Seawel to use thirty-five minutes of the hour and a half assigned to plaintiff and for Mr. Pace to use the rest of the time assigned to plaintiff.

Be that as it may, we deem it best to construe the statute pertaining to argument of counsel in cases. The sixth subdivision of section 6196 of Kirby's Digest in reference to the course an argument shall take, uses the following language: "In the argument the party having the burden of proof shall have the opening and conclusion; and if, upon the demand of his adversary he shall refuse to open and fully state the grounds upon which he claims a verdict, he shall be refused the conclusion." Appellant contends that where the defendant makes no argument, the opening argument by the plaintiff must be regarded as a closing argument. It will be observed under this statute that the plaintiff is to be denied a closing argument in the event he fails to fully state the grounds upon which he claims a verdict in his opening argument. And this seems to be the only contingency upon which the party having the burden can be denied the right to close the argument. The language of the statute is so plain and direct that it is hardly susceptible of more than one construction, and that construction is, that as a matter of right the one upon whom the burden rests shall have

the right to close the argument as well as to open it, if in his opening statement he fully states the grounds upon which he claims a verdict. In the case of *Tobin et al.* v. *Jenkins et al.*, 29 Ark. 151, Mr. Justice Walker used the following language: "It is provided in the Code, sec. 349, that the party having the burden of proof shall have the conclusion of the argument. The complainants in this case held the affirmative and were consequently entitled to conclude, as held by this court in *Rogers et al.* v. *Diamond*, 13 Ark. 479; *McDaniel* v. *Crosby et al.*, 19 Ark. 533. We must, therefore, hold that it was error in the court below to deny to the complainants the right to conclude the argument before the jury. That there is a decided advantage before a jury in having the concluding argument, there can be no doubt; the extent of the wrong, however, it is hard to estimate. It may suffice that it is a right and a privilege to which complainants were entitled." In the case of *Mann* v. *Scott et al.*, 32 Ark. 593, this court approved the construction placed upon the sixth subdivision of Sec. 349 of the Civil Code of Arkansas, 1869, in *Tobin et al.* v. *Jenkins et al.*, *supra.* It is true the sixth subdivision of section 349 of the Civil Code of Arkansas, 1869, has been amended, but the amendment did not eliminate the right of the party, upon whom the burden rested to close the argument. It simply abridged or modified the right to close by requiring him to fully state the case in an opening argument, if his adversary insists. Under the amended statute, the party upon whom the burden rests not only has the right to conclude the argument, but also to open it.

In the instant case, the answer filed denies every material allegation in the complaint, and clearly places the burden of the whole case upon appellee.

The authorities in other states with reference to the conduct of arguments seem to be divided but the division grows out of the peculiar wording of the statutes in the several states and the different rules of practice in vogue therein. We cannot conform our views to

the construction placed upon this statute by learned counsel for appellant.

(1) Of necessity, trial courts must be conceded a discretion in the conduct of proceedings before them, else, disorder will follow. If the statute in question is not mandatory, it certainly grants the power to trial courts to control the course of argument so as to conform to orderly procedure. Unless there is a clear abuse of discretion, this court will not interfere. Certainly the trial court did not abuse its discretion in this case. He offered ample opportunity to counsel for appellant to argue the case at a proper time and place in the proceeding. Appellant declined to take advantage of this opportunity. Appellant attempted to control the course of argument itself in the instant case. There is no authority in the statute granting such right to a defendant in a case unless the burden is upon him, neither is it in accordance with the general rule of practice in this State.

(2) The first, second and fourth contentions insisted on for reversal are of a kindred nature and we regard it appropriate to consider them together. They emphasize the incongruity of so great measure of damages where there are not abrasions or broken bones. It is true that such evidences generally accompany severe injuries, but it is likewise true that very severe injuries may be received without abrasions or broken bones evidencing them. Especially is this true with reference to injuries to the nervous system. Many internal injuries bear no such evidences. It would not do to lay down the rule that large verdicts or judgments are excessive unless the injuries are accompanied by abrasions, bruises or broken bones. We thoroughly agree with learned counsel for appellant that the amount of damages should be commensurate with the injury. Large damages should not be awarded by juries nor countenanced by courts for slight injuries. Large verdicts can find support only in severe injuries. It must be admitted that the verdict and judgment in this case is large. This fact, however, will not warrant

the invasion of the province of the jury by the court. The court cannot try the case *de novo*. The court can only look to the record to see whether there is sufficient, substantial, legal evidence to support the verdict. If the liability is established, this court on appeal will not interfere with verdicts unless so manifestly out of proportion to the nature and extent of the injury as to shock the sense of justice.

It becomes necessary then to turn to the record of the evidence to ascertain whether or not the motion for continuance requested by appellant should have been granted and whether or not the verdict is excessive. We will first discuss the evidence to ascertain whether there is enough substantial legal evidence to sustain so large a verdict. The substance of appellee's evidence in the material parts is as follows: He fell on his back and was rendered unconscious until thirty-five cars had passed him. Just as the caboose reached him he became conscious and felt that every bone in his body was broken. He walked about two blocks toward the depot and became deathly sick and sat down. A little later, he went to the depot. A physician examined him and found no bones broken. He was suffering and in misery. Train No. 45 stopped and he rode in the smoker to Little Rock. He got a man there to help him on the street car and went out to St. Vincent's Hospital, where parties receiving injury on the Rock Island were cared for. After arriving there, he went to bed. In the afternoon, a physician called and put strips of adhesive plaster on the small of the back where the injury seemed to be. The next day was Christmas and he went to his home in Little Rock on a street car and took Christmas dinner and returned to the hospital that evening. He then went to bed and was up some the next day. He kept getting worse and the next day procured a pair of crutches. He complained to the physician in charge that he was getting worse and remained in the hospital for about a week or ten days. During this time he was up and down. The physician put more strips of adhesive plaster on his back when the

other wore off. Feeling that he was getting worse under the treatment, he left the hospital and went home in an automobile. When he reached home, he went to bed and remained there until the morning of the 17th of January. He then sat up in a rocking chair. At the time of the trial he felt worse than he did ten days after he got hurt. At that time he had no control over the left leg and could cross his legs only by lifting the lame leg over the well one with his hands. After crossing his legs, he could not take the lame limb down without using his hands. He had no feeling in the left leg until he would pinch it a half dozen times. He had no feeling in the injured limb until it was rubbed a long time. He exhibited his leg to the jury and stated that it was smaller than the well leg and that it was cold and numb. The jury examined and felt the limb. He walked up and down before the jury and claimed he could not stand on the lame limb without the use of his crutches. He claimed that the movement caused a pain and misery in the small of his back. He said that he had no control whatever over the limb and had to drag it as he walked. He had lost twenty-five pounds after the injury and before the trial. At the time of the injury he weighed 193 to 196 pounds and was a very strong, active man. The pain seemed to cover about seven inches in the small of his back. In describing the feeling he said that it felt like a thousand needles sticking in his back. He could not rest at night; only slept about three or four hours during the night and the balance of the time had to sit up in a chair. He could not lie on his back unless he was propped up. Said that he was very nervous and described his nervous condition as a nervous collapse. Said that at times he would just collapse and lie there. Said that he had spells of feeling as if he were going to die, and could not get enough air to relieve him at such times but that when water was placed on his head he would get all right. After the injury he was afflicted with very severe headaches, the pain being over his eyes, and it caused a blurring such as to interfere with reading fine print. After the injury

he had to use the urinal from three to five times at night and seven or eight times during the day. He had no power to hold his urine when the desire seized him, and after he urinated the water kept dribbling.

He was twenty-six years old at the time of the injury and when working regularly could earn about $100 a month, but on a general average had earned $85 per month.

He was corroborated as to the extent of his suffering by his sister. There was a sharp conflict as to the nature and extent of the injury between the medical experts who testified for the appellee and those who testified for appellant.

The two who testified on behalf of appellee in substance say that appellee received a permanent injury in five lumbar vertebrae involving the spinal cord in such a way as to impair the nerves that control the motion of the left leg. As a result of the injury, appellee lost control of the left leg and a part of the sensation therein and the foot became cold and clammy, and had atrophied one inch at the time of the trial. The nervous system had degenerated on the left side. In the opinion of these medical experts, ample time had elapsed for improvement in the condition of appellee, but instead he had grown worse and was permanently injured.

The medical experts who testified on behalf of appellant regarded the injury as a slight one and temporary in its effect. They prognosed the injury to be neuritis traumatis, or an inflammation of the nerves caused by a blow. In their opinion, the limb had not diminished or withered and appellee would recover from the injury in four to eight months.

There was a sharp conflict between these experts, and each one was compelled under grilling cross-examination to give the reasons for arriving at his conclusions.

The expectancy of appellee at the time of the trial was thirty-eight years. He was a splendid specimen of manhood. His earning capacity averaged about $85 per month and when he had regular work he could earn

about $100 per month. He was engaged in a line of work where promotions are not infrequent and an increase in pay might reasonably be expected.

(3) If the jury accepted the evidence of appellee and his expert witnesses as correctly revealing the nature and extent of the injury, then it follows that there was a serious, permanent injury that practically destroyed the comfort, pleasure and earning capacity of a stalwart young man. The jury had a right to believe this testimony and must have given great credence to it. We cannot say to the jury what witnesses they shall believe or disbelieve. There is ample evidence here, if believed, upon which to base a verdict for $20,000.00. *St. L., I. M. & S. R. R. Co.* v. *Osborne*, 95 Ark. 310.

(4) Was it an abuse of the trial court's discretion not to grant a continuance in order to test out whether this was a permanent or temporary injury? The trial was had about three months after the injury occurred. Both parties were present and ready for trial. Before appellee could recover, it was necessary for him to make out his case by a preponderance of the evidence and the burden was upon him to establish the nature and extent of his injury. The ground assigned for a continuance does not come within any of the well known statutory grounds for continuance, so it was a matter wholly and purely within the sound discretion of the trial court to grant or refuse. No flagrant abuse of this discretion has been pointed out. There is nothing to indicate that the refusal to grant the continuance was an arbitrary exercise of the court's discretion. It has been uniformly held by this court that the granting of continuances is within the sound discretion of the trial court and unless clearly abused a refusal to grant a continuance will not work a reversal of the judgment. *Ft. Smith & Van Buren Dist.* v. *Scott*, 103 Ark. 405; *Taylor* v. *Gumpert*, 96 Ark. 354.

Finding no error, the judgment is affirmed.

JAGGERS v. SPARKS, RECEIVER.

Opinion delivered January 29, 1917.

1. BILLS AND NOTES—PURCHASE OF PATENTED ARTICLE—COMPLIANCE WITH STATUTE—BURDEN OF PROOF.—A note given as part of the purchase price of a patented article, comes within the terms of Kirby's Digest, § 513, which requires the note to be executed on a certain form, but when the defendant sets up that the statute has not been complied with, the burden is upon him to show that fact.
2. BILLS AND NOTES—PURCHASE OF PATENTED ARTICLE—FORM OF NOTE—DEFENSE MUST BE SET UP, WHEN.—The defense that a note given in the purchase of a patented article does not comply with the statute, cannot be raised for the first time on appeal.
3. EVIDENCE—LOST NOTE—ORAL PROOF.—Where it is shown that a note, which is the subject of the suit, has been taken from the State, improperly, by one who has been made a party to the action, a recovery may be had on the note upon oral proof.
4. BILLS AND NOTES—LOST NOTE.—Recovery may be had by a receiver, upon a note endorsed to a bank, and held among its assets, where the same is past due, and has been wrongfully taken from the jurisdiction of the court, without the production of the note.
5. BILLS AND NOTES—SUIT TO COLLECT BY RECEIVER—RELEASE OF NOTE BY PREVIOUS HOLDER.—A release of a note and mortgage executed after a receiver has been appointed for the holder bank, will not be effective to discharge the obligation of the same.

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

Davies & Davies, for appellant.

1. The note was void and the mortgage to secure it was also void. Jones on Mortg. (3 ed.), § 619, p. 488; 75 Ark. 331; 88 *Id.* 202.

2. Plaintiff has not established any ownership to either the note or account for the goods sold. The goods had been paid for when the note was signed.

3. The suit could not be maintained because the patent company had not complied with the foreign corporation law.

4. The plea of former adjudication that the note was void on account of having been given for a patented article was good; but if erroneous it could only be corrected by appeal. 88 Ark. 302; 114 S. W. 700.

5. The note was never in the possession of the receiver, nor was it put in evidence. 75 Ark. 331. Besides, it was void. 88 *Id.* 302.

6. If the note was lost, indemnity must have been tendered. Dan. on Neg. Inst. (6 ed.), § 1480. Possession is necessary to bring suit. *Ib.*, § 1201; 89 Ark. 435; 102 *Id.* 422.

7. Maxey was not an innocent purchaser. Appellant had settled with Lemoine and Maxey and the mortgage had been released.

C. Floyd Huff, for appellee.

1. The note and mortgage were an asset of the bank and appellant admitted her liability. The note is and was outside the jurisdiction of the court and could not be had. The court could make no binding order in reference thereto. It was, however, returned by Maxey afterwards.

2. The question of *res adjudicata* is not established by the record. No final adjudication of the case had been made. The only final decree was on April 20, 1916.

3. The note was not void. 127 Fed. 206. There is no evidence as to whether the note did or did not show on its face the absence of any reference to a patented article.

4. There is an entire lack of evidence that the obligation had reference to a transaction with a foreign corporation who had not complied with the laws of Arkansas.

The chancellor's opinion settles all the points raised against appellant and there is abundant evidence to sustain his findings and decree.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Garland county to recover the amount of a promissory note executed by appellant, and to foreclose a deed of trust executed by appellant to secure said note. C. C. Sparks, as receiver, appointed by the chancery court of Garland county in a certain cause pending therein, and E. H. Johnson, trustee in

the mortgage executed by appellant, were the plaintiffs below. The note sued on was for the sum of $2,000.00 and was executed by appellant to H. J. Fenelon, and by Fenelon assigned to R. E. L. Maxey.

The receiver was appointed in a certain action instituted in the chancery court of Garland county by one Cushman against R. E. L. Maxey and the United States Steel Railway Tie Company Bank, in which Cushman as creditor of the bank asked for a receiver to take charge of the assets of the bank on account of insolvency and collect the same for the purpose of paying the debts. Maxey was connected with the bank as one of its officers, and it was alleged that he held the securities of the bank, and there was an order made directing him to turn them over to the receiver. Maxey was, as before stated, a party to that suit, and demand was made on him by the receiver to turn over the particular note now in suit, and he promised to do so, but absconded and went to the State of Pennsylvania without complying with the demand of the receiver. The note, as originally executed, was for the sum of $2,000.00, and there was a payment of $600.00 thereon, leaving a balance of $1,400.00, and it is alleged in the complaint that the note was purchased by Maxey from Fenelon with assets of the bank and for the bank. On the final hearing of the cause the chancery court rendered a decree in favor of appellee for a recovery of the amount of the note and foreclosure of the mortgage, and an appeal has been prosecuted.

Several grounds are stated on behalf of appellant why the decree is erroneous and should be reversed. In the first place it is contended that the note is void for the reason that it was executed as a part of the price of certain patented articles purchased from the Domestic Utilities Manufacturing Company, a foreign corporation, and that the note was not executed on a printed form showing upon its face that it was given in consideration of a patented article, as required by statute. Kirby's Digest, Sec. 513. It is set forth in the answer that the note was executed to Fenelon as a part of the

purchase price of patented articles purchased from the Domestic Utilities Manufacturing Company, but there is no evidence in the record tending to show that the note was not on a printed form or that it failed to state on its face the fact that it was executed in consideration of the sale of patented articles.

(1-2) The note was not produced—it being shown that the receiver was unable to produce it for the reason that Maxey had absconded and carried it with him to another State—and there was no evidence introduced on that subject at all. Appellant admitted the execution of the note, but made no effort to prove that it was not in the form prescribed by the statute. It appears from the evidence that appellant purchased from the aforesaid corporation a list of patented articles consisting of washers and ovens. Fenelon was the agent of the selling corporation and accounted to his principal for the purchase price, but took the note in suit as the portion of the purchase price which fell to him as his commission. The fact that the note represented a part of the purchase price of the patented articles brings it within the operation of the statute, but in order to defeat the collection of the note it must appear that the statute was not complied with as to the form of the note. The presumption cannot be indulged that the law was violated, and it devolved upon appellant to show that as a matter of defense. The note itself was the best evidence of that fact, and ordinarily should have been produced, but the inability of the plaintiff to produce the note was established, and the form of the note was a matter within the knowledge of appellant, upon which he could have given testimony. There was no effort made below to develop this defense, and it is too late now to ask this court to reverse the judgment on the ground that the note was not in proper form.

(3) Again it is contended that it was error to render a judgment in favor of the receiver without requiring him either to produce the note or prove that it had been lost. It was a negotiable note, but it was

past due at the time of the institution of this suit, and the proof shows that it was in the hands of Maxey in a foreign jurisdiction. Maxey was a party to the original cause in which the receiver was appointed, and was amenable to the order of the court directing him to turn over that and other assets of the bank, and it is alleged that this note constituted a part of the assets of the bank. In fact, there is direct testimony to the effect that the note had in fact been endorsed by Maxey to to the bank and placed among the assets of the bank. At any rate, the receiver, acting under orders of the court, succeeded to the rights of both Maxey and the bank, who were parties to the action, and he had a right to maintain an action on the note. The receiver should have been required to produce the note and file it as a part of the record in the case if it was within his control, but the proof shows it was entirely beyond his control and outside of the jurisdiction of the court. It would operate as a complete defeat of the ends of justice to say that the receiver is barred from maintaining an action because the note cannot be produced, even though the proof shows that it is still in existence.

(4) Neither is it a case of exposing the maker of the note to the peril of a second suit by a subsequent holder of the note, for it is past due and at the time of the institution of this suit was in the hands of Maxey, who could not thereafter transfer it to another person so as to create any greater rights than he had. The right on the part of the receiver to maintain this action, under the circumstances, is likened to an action on a lost instrument where it devolves upon the plaintiff to prove his inability to produce the instrument and to furnish to the defendant indemnity against second liability to a subsequent holder, if in the discretion of the court it is found that such indemnity should be given. *German National Bank* v. *Moore*, 116 Ark. 490. The court was not asked to require the receiver to furnish indemnity and we are not called on to review the exercise of the court's discretion in that respect. It is clear, however, that the court would have been justified under the proof

in this case in refusing to compel indemnity, inasmuch as the money was to be held under the orders of the court and the rights of the parties could in that way have been protected.

We are of the opinion, therefore, that the court was correct in holding that the proof was sufficient to justify a court of equity in rendering a decree in favor of the receiver for the amount of the note, notwithstanding the fact that the note itself was not produced. A consideration of the evidence leaves no escape from the conclusion that the note was in the hands of Maxey and had not been assigned to any third party, and Maxey is bound by the decree for the reason that he was a party to the action in which the receiver was appointed.

(5) Appellant produced in evidence a release of the mortgage executed by Maxey, but this cannot defeat the foreclosure for the reason that the release was given after the appointment of the receiver, when Maxey had no right to give such a release. Indeed, the proof shows that this release was given after the institution of this particular suit in which recovery is sought on the note.

Finally, it is urged that the right to recover on the note was barred by a former action in which it was held that the note was void. The former suit in which it is claimed there was an adjudication of the question now involved was one instituted by the receiver joining with him the Domestic Utilities Manufacturing Company against appellant to recover on the original contract of sale of the patented articles. It was not a suit on the note, and the court in dismissing the complaint for want of equity decided only that there was no right of action on the part of the receiver on the original contract of purchase, but that the dismissal should be "without prejudice to a future action" by the receiver on the note. Nothing could have been adjudicated in that case except the right to recover on the cause of action stated in the complaint, and the dismissal without prejudice to the receiver's right to sue on the note

expressly excluded the adjudication of questions concerning liability on the note.

The chancellor delivered a written opinion in that case reviewing the evidence, which is brought into the present record, and there are expressions in the opinion which would indicate the view that the note was void because it was not executed in the form required by the statute, but those expressions did not reach to the point then being adjudicated, for it is plain from the language of the decree itself that the court meant to reserve for future litigation the question of the right of the receiver to recover on the note. We are of the opinion, therefore, that there has been no adjudication which barred the present action.

We are convinced upon the whole record that the decree was correct and should be affirmed. It is so ordered.

LODEN v. HALL.

Opinion delivered March 5, 1917.

ELECTIONS—CONTESTS—JUDGMENT OF CIRCUIT COURT—MOTION FOR NEW TRIAL.—A. and B. were rival candidates at an election; the returns showed a majority for A., and B. instituted a contest alleging that illegal votes cast for A. had decided the election. The circuit court ordered a recount, and after examining the ballots gave judgment for A. B. thereafter sought a new trial on a new issue that certain ballots had been changed by the election officials. *Held*, the circuit court properly refused to reopen the case.

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

A. A. McDonald, for appellant.

1. The judgment should have been set aside and a new trial granted. The motion is duly verified by affidavit and properly set up newly discovered evidence. The court abused its discretion is refusing to grant a new trial. The newly discovered evidence was competent and went to the merits of the contest. The issue is always "who received the majority of the legal

votes?" 53 Ark. 161; 94 *Id.* 478; 50 Ind. 298; 61 Ark. 317.

2. If the ballots have been tampered with any evidence tending to support the ballot or impeach it, is admissible. 125 Ill. 141; 159 Mo. 51; 60 S. W. 129; 85 Ark. 33. The allegations in the motion for a new trial were sufficient. 2 Ark. 133; 107 *Id.* 498; 91 *Id.* 362; 103 *Id.* 362.

John W. Goolsby, for appellee.

1. The judgment is right upon the merits of the case.

2. The motion for new trial is not sustained by affidavits showing their truth. Kirby's Digest, § 6219.

3. The motion should have been denied. No proper showing was made. The issues were properly tried and no abuse of discretion is shown. The motion for new trial and the questions raised are purely an *afterthought* of appellant. He did not try the case on that theory, and it is too late after judgment to advance a new theory and try the case over again on a new theory not raised before. He cannot be allowed to attack the integrity of ballots which he introduced below. The cases cited by appellant are not in point. The principles are elementary. No sufficient showing was made. The judgment is correct.

McCULLOCH, C. J. Appellant and appellee were rival candidates for the office of mayor of the city of Greenwood at the municipal election held April 4, 1916, and on the face of the returns appellee was elected over appellant by a majority of 32 votes. Appellant instituted a contest for the office, alleging that 103 of the votes received by appellee were cast by persons who were not legal voters of the city, and the prayer of the complaint was that said illegal votes be excluded from the returns and that appellant be declared elected to the office. That was the sole ground for the contest set forth in the complaint, and the answer tendered an issue as to the truth of the charge.

During the progress of the trial before the court the parties litigant agreed that 88 of the voters at the election, naming them, were not entitled to vote and upon the evidence adduced the court found that there were 5 other illegal votes, making a total of 93 illegal votes cast at the election. The ballots were opened and exhibited to the court and after comparison of the names of the illegal voters with the poll books and original ballots the court ascertained the number of illegal ballots cast for the respective candidates and struck them from the returns, which left, according to the finding of the court, a majority in favor of appellee of 2 votes, and judgment was accordingly rendered by the court in favor of appellee. Appellant filed his motion for new trial on the sole ground of newly discovered evidence, alleging therein that when the ballots were opened appellant ascertained for the first time that 4 of the ballots cast by certain individuals showed the erasure of the names of both of the candidates, whereas it could be shown by proof, if opportunity be given, that the 4 persons who cast those ballots had in fact erased only the name of appellee and left thereon the name of appellant, which would change the result so as to establish the election of appellant by a majority of 2 votes. Appellant did not verify the motion for new trial by his own affidavit, but filed therewith the affidavit of the 4 voters named in the motion, who stated on oath that they had voted at said election and cast their ballots for appellant—that they had erased the name of appellee, but had left appellant's name on their respective ballots. The record does not show anywhere, except in the motion for new trial itself, that the particular ballots of the persons named in the motion by numbers were cast by the 4 voters referred to. The statute provides that "a motion for new trial on the grounds of newly discovered evidence must be sustained by affidavits showing their truth." Kirby's Digest, sec. 6219. The affidavits of the voters filed with the motion went only to the extent of showing the fact that they voted for appellant, and no further.

These four did not undertake to show what particular ballots they cast. The allegations in the motion connecting the names of those individuals with the particular ballots cast were not verified. It is, therefore, doubtful, to say the least of it, that the motion is sufficiently verified to call for an examination on the grounds set forth. Passing that question, however, we are of the opinion that the court did not abuse its discretion in refusing to grant a new trial. The case was tried before the court on the sole issue presented in the pleading—that is to say, that illegal votes had been cast which changed the true result of the election. After the ballots were opened and exhibited and the trial on that issue was completed and resulted in a judgment against appellant, he sought then to raise another issue by showing that ballots had been changed by the election officers after they were cast. If such procedure be tolerated, there would be no end to election contests, for the exhibition of the ballots would only afford an opportunity to introduce new issues after those presented in the pleading had been settled. If appellant had, upon the opening of the ballots and the discovery of the votes cast against him, then asked for an opportunity to investigate and ascertain whether or not those ballots had been changed, it would have presented a matter for the exercise of the court's discretion in granting such an opportunity, but in the present instance the appellant did not ask for time, but waited until after he had lost the case by the judgment of the court and then sought to introduce another issue, but it was too late, and we think the court very properly refused to open up the case for further proceedings.

Judgment affirmed.

ST. LOUIS UNION TRUST COMPANY v. CHICOT COUNTY COTTON-ALFALFA FARM COMPANY.

Opinion delivered March 5, 1917.

1. MORTGAGES—PROVISIONS FOR RELEASE—MATURITY.—Where property is subject to a trust deed, which provides that portions thereof may be released from its operation by the payment of certain sums, where no language in the contract expressly limits the right to secure a release to a period anterior to the maturity of the debt, the right exists at least until foreclosure proceedings are instituted.
2. ESTOPPEL—VOID NOTE—RATIFICATION.—Notes, secured by a mortgage on Arkansas lands were executed in Missouri in 1910, the payee being a New York corporation, doing business in Missouri without complying with certain Missouri Statutes. Under the law of Missouri the notes were void. In 1912 the payee corporation complied with the Missouri Statutes. *Held*, the maker of the notes could not escape liability thereafter, when it appeared that it had ratified the same after the payee had complied with the Missouri Statute, by its conduct, in treating the notes as valid, in securing an extension, and in making payments thereon.
3. BILLS AND NOTES—PAYMENT TO PAYEE AFTER ASSIGNMENT.—The payment of a note to the payee, after assignment by him to an innocent purchaser for value, is no defense to an action by the innocent purchaser.

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

Stewart, Bryan & Williams and *Hope & Seibert*, of St. Louis, Mo., for appellants.

1. The chancellor erred in releasing from the lien the 800 acres claimed in the appellee's, Hollywood Farms Co., cross-complaint, because (1) The release provision is so vague and uncertain as to be void and uninforceable. 195 Mo. 91, 101; 32 *Id.* 79; 67 Cal. 43; 95 Ind. 326. (2) It should be interpreted in connection with the entire instrument, and any right to have the land released by paying $9.00 an acre was forfeited and extinguished when appellees failed to comply with the agreements on their part; they were in default and after the maturity of the debt the right to release did not exist. 133 Mass. 120, 121; 9 Cyc. 579; 6 Rul. Case Law, § 227, p. 837; 43 Fed. 535; etc. (3) No demand was made at the time the $5,000.00 was paid, nor when

a subsequent payment of $2,000.00 was made. Jones on Mortg., § 981, p. 1051 (6 ed.). (4) There was no tender of the $200.00 made. Only $7,000.00 was paid when $7,200.00 was the proper amount. 21 Ark. 563; 30 *Id.* 505; 90 *Id.* 206; Hunt on Tender (ed. 1903), §§ 222, 86, 234; 34 Ala. 126, etc., etc.

2. On the cross-appeal.

The payment of the $4,000.00 was paid to the American Forest Co., after the notes were assigned to plaintiffs, and hence no part of it ever reached plaintiffs, and no credit was allowed. 16 Wall (U. S.), 271; 5 Otto (U. S.), 16; 93 Iowa 572; 25 Kans. 625; 131 Wisc. 152; 80 N. W. 801; 113 Ark. 588; 104 *Id.* 388, 395; 113 *Id.* 120, 123-4, 28, 34. Plaintiffs were innocent purchasers before maturity—they were pledgees. 102 Ark. 472, 451, 459-60; 37 *Id.* 556; 41 *Id.* 418; 18 A. & E. Enc. Law, 608.

3. The Missouri statutes as to foreign corporations do not apply. The property was wholly in Arkansas, and the transaction was interstate. 229 Mo. 397; 217 U. S. 91; 160 Mo. 435; 184 S. W. 999; 153 Mo. App. 139; 25 Mo. 3; 132 U. S. 282. The company was not doing business in Missouri, within the scope of its charter. 184 S. W. 119. The mere taking a mortgage and note to secure a debt is not doing business contrary to law. 54 Ark. 566; 62 *Id.* 53; 60 *Id.* 120; 113 *Id.* 72; 105 *Id.* 281. The American Forest Co. did comply with the statute, and was afterwards duly licensed. This subsequent taking out of license cured the transaction. 77 Ark. 203; 184 S. W. 999, 1024.

4. The decree is erroneous in that part releasing the 800 acres, but correct in all other respects.

J. C. Gillison, for appellees.

1. The contract was purely a Missouri contract, and must be construed and enforced under the Missouri laws. Rev. St. Mo. 1909, §§ 3037-8-9-40; 245 Mo. 168; 216 Fed. Rep. 878. Where the contract or debt is void the security is void. 111 Mo. 620; 1 Jones on

Mortg. (3 ed.), § 110, p. 84, § 610, p. 481; 66 Ark. 77; 73 *Id.* 518.

The Forest Company was a New York corporation doing business in Missouri, in violation of law, with Missouri corporations and was not interstate business.

2. The $4,000.00 paid should have been credited on the notes for the purchase money. The notes had not been endorsed to the plainiffs when this payment was made.

3. The release clause was certain and definite. The description of the land to be released is made so by the selection. The right may be exercised after as well as before default in the payment of the mortgage debt, and even after foreclosure suit is begun, if before final decree. 27 Cyc. 1415, 1416 and note.

4. A tender was made and kept good. $7,000.00 was paid and accepted and the $200.00 was deposited with the clerk of the court.

McCULLOCH, C. J. This is an action to foreclose a deed of trust executed by the Chicot County Cotton-Alfalfa Farm Company (a Missouri corporation) to B. H. McFarland, as trustee, conveying two large tracts of land in Chicot county, Arkansas, one of the tracts containing 10,200 acres and the other 5,600 acres, to secure a debt in the sum of $60,000.00, evidenced by four promissory notes executed by said defendants to the American Forest Company, a New York corporation. Said notes were transferred by the payee to the St. Louis Union Trust Co., and Broadway Bank of St. Louis, as collateral security for indebtedness of the payee to said assignees, who are plaintiffs in the present action. The Hollywood Farms Company was joined as defendant in the action on account of having subsequently purchased from the mortgagor 800 acres of the land described in said deed. Said notes and deed of trust were executed on December 1, 1910, falling due, 3, 4, 5 and 6 years, respectively, from date, and were assigned, as aforesaid, to the plaintiffs before maturity, the first maturing note being assigned to Broadway

Bank of St. Louis, and the other three to the St. Louis Union Trust Co. Defendant Hollywood Farms Company in its answer and cross-complaint pleads the purchase of 800 acres of the land from the mortgagor, and the right to have the same released under a clause to that purport and effect in the deed of trust. The other defendant, Chicot County Cotton-Alfalfa Farms Co., pleads a payment of $4,000.00 which has not been credited on the notes, and also as defense against recovery of any part of the debt pleads that the original beneficiary in the trust deed, the American Forest Co., was a New York corporation, doing business in the State of Missouri without having complied with the laws of the latter State, that said transaction between the parties took place in the State of Missouri, and under the laws thereof the contract was void. The chancellor sustained the defense of defendant, Hollywood Farms Co., and decreed a release of said lands purchased by that defendant, but decided against the contentions of defendant, Chicot County Cotton-Alfalfa Farm Co., on all of its pleas and rendered a decree foreclosing the mortgage for the full amount of the debt. The decree provides, however, that "should there be any surplus going to the American Forest Company out of the proceeds of said sale after first paying all costs of this action and the amounts due from the American Forest Company to the plaintiffs respectively, $4,000.00 of such surplus, with interest thereon at the rate of 5% per annum from August 1, 1914, until paid, shall be paid out of such surplus to the defendant Chicot County Cotton-Alfalfa Farm Company."

Both sides have appealed to this court.

The clause in the deed of trust under which the release is claimed, reads as follows:

"Now, if the said four notes for fifteen thousand ($15,000.00) dollars each, and interest thereon, be well and truly paid as the same shall become due and payable, according to the tenor and effect of said notes, and if the said covenants and agreements in regard to taxes,

mechanics' liens or interest on said prior mortgage notes be faithfully kept and performed and all money paid by the said party of the third part, its endorsees or assigns, on account of said taxes, liens and interest as above provided, be fully paid,

"Then this deed shall be null and void, and the property hereinbefore conveyed shall be released at the cost of said party of first part, its successors and assigns, shall have the right at any time to procure the release of any portion of said tract of 5,600 acres of land from the lien hereof by payment to the party of the third part, its endorsees or assigns, of $9.00 per acre, for the land so to be released; and shall also have the right at any time to procure the release of any portion of said tract of 10,200 acres above referred to from the lien hereof by the payment to the party of the third part, its endorsees or assignees, of $3.00 per acre for the land so to be released; and all payments so made for the release of land from either of said tracts shall be applied upon the earliest maturing of said four notes at the time outstanding; and to procure such release of record of any portion of said land hereunder, it shall not be necessary to procure said notes or any of them. And in case of payment of all of the said four notes and interest thereon, and the observance of the covenants and agreements herein set out by party of the first part, its successors or assigns, so as to entitle it or them to a release of all the property above described, or in case of the payment to the party of the third part, its endorsees or assigns, of $9.00 per acre for any portion of the 5,600 acres of land above described, or $3.00 per acre for any portion of the 10,200 acres above described, so as to entitle party of the first part, its successors or assigns, to a release as set out above in this paragraph, then the party of the second part, or his successors in this trust, its successors or assigns, upon its request and at its expense, all proper instruments or deeds of release that may be necessary to release such land, or any portion thereof, * * * *

"But should default be made in the payment of said notes or any of them," then the trustee shall proceed to sell said lands, etc.

(1) The plaintiffs contend that this clause in the contract is void, in that it does not specifically describe any of the lands to be released, and also contend that the contract only confers the right to obtain release by payment of part of the secured debt before the maturity thereof. Cases are cited by plaintiffs on the brief in support of the contention that the clause is too vague for enforcement, but we think those cases have no application to the language employed in this contract, which we think is not limited in its operation to a release sought before the maturity of the debt. There is some conflict in the authorities on this proposition, but we think that sound reason is with that line of authority which holds that unless there is language in the contract expressly limiting the right to secure a release to a period anterior to the maturity of the debt, the right exists at least until foreclosure proceedings are instituted.

The authorities on the subject are collated in 27 Cyc., p. 1415-1416, where the rule is stated to be that the right to obtain a partial release under a contract conferring it "may be exercised after as well as before default in payment of the mortgage debt." One of the most satisfactory discussions on the subject is found in the opinion of the Supreme Court of Minnesota in the case of *Vawter* v. *Crafts*, 41 Minn. 14, where the following statement is found: "It is claimed, however, that this agreement to give releases is conditioned upon performance by the mortgagors of all the covenants and conditions of the mortgage, and that, as default had been made in these, the right to demand a partial release no longer existed. There is certainly no express provision to this effect. By its terms the covenant is unconditional. If there is any such condition, it must be implied from other provisions in the mortgage. The covenant is not in its nature necessarily dependent on any other covenant or condition in the instrument." * * * *

"The provisions of the mortgage as to foreclosure and sale of the mortgaged premises, in case of default, do not support defendant's construction of the covenant. They are to be construed in connection with that covenant, and as qualified by it. So construed, there is no inconsistency between them. Reference is made to the supposed injustice and unreasonableness of construing the covenant as requiring the mortgagee to execute a partial release after there had been default in the conditions of the mortgage, and interest had accrued, and perhaps expenses incurred in commencing foreclosure proceedings. But we cannot see sufficient force in this to warrant attaching by implication a condition or limitation to the covenant. If the mortgagee is paid the proportionate share of the accrued interest, and reimbursed for his expenses, we do not see how he can be prejudiced. His remaining security would be just as ample as if the release had been demanded before default, and, in case foreclosure proceedings had been commenced, they would not be defeated or affected, as to the remaining lots, by the execution of a partial release. On the other hand, a contrary construction might work harshly against purchasers from the mortgagors, and defeat the very purpose for which the covenant was inserted."

The sum necessary under the contract to release the 800 acres of land from the mortgage had been paid, except the small balance of $200, which had been tendered. The sum so paid ($7,000) for the release was received by one of the plaintiffs which held the first maturing note, and that sum was credited on said note. We think the right to affect a release existed at the time it was asserted and the chancery court was correct in the decision on that branch of the case.

(2) The first question presented by the appeal of the defendants concerns the ruling of the court against the contention of the defendants that the notes are void because of the fact that the payee of the notes and beneficiary under the deed is a New York corporation and had failed to comply with the laws of the State of Missouri when the tran-

saction was had between the parties. It is agreed that the said corporaion had not complied with the laws of Missouri and the evidence in the case shows that it was doing business in that State, and that the loan made to the defendant Chicot County Cotton-Alfalfa Farm Co., was in the State of Missouri in connection with the business being operated there. The American Forest Company had an office and place of business in the city of St. Louis and the loan was made in connection with the business. The notes were dated in Missouri and made payable there. and, therefore, constituted Missouri contracts. The notes and deed of trust, as aforesaid, were executed on December 1, 1910, and the American Forest Company complied with the laws of the State of Missouri on January 27, 1912. The statutes of Missouri (sections 3039 and 3040, Revisted Statutes of 1909) require foreign corporations to comply with the laws of the State before doing business there, and the courts of that State have decided that all contracts made by a corporation which has not complied with the statute are void. *Amalgamated, Etc., Co.* v. *Mining Co.,* 221 Mo. 7; *Parke, Davis & Co.* v. *Mullett,* 245 Mo. 168. The defendants base their defense on the violation of that statute. The defendants are, we think, at the threshold of this contention met by the fact that even if the notes were void under Missouri statutes, they were ratified by the defendants after the American Forest Company had complied with the laws of that State. This ratification resulted from the conduct of the said makers of the note in securing extensions of time, and making payments on the notes. In other words, the makers of the notes treated them as valid at a time when the American Forest Company had complied with the laws of the State of Missouri and was authorized to do business there, and an estoppel to thereafter set up the invalidity of the notes results from such conduct. Joyce on Defenses to Commercial Paper, section 288.

(3) The only remaining question in the case is that concerning the claim of defendants that they should be credited with $4,000 paid for the extension. The evidence established the fact that this payment was made to the

American Forest Company after the assignment of the notes to plaintiffs, who were innocent purchasers, for value without notice of such payment. The assignees never received the payment and were not chargeable with the payment made to the original payee of the notes after assignment. Our conclusion is that the decree of the chancery court was correct in each particular, and the same is, therefore, affirmed.

ARKANSAW WATER COMPANY v. FURNISH.

Opinion delivered March 5, 1917.

WATER COMPANIES—ORDINANCES CONTROLLING—RIGHTS WHERE SUBSCRIBER WASTES WATER.—An ordinance of the city of Little Rock passed December 9, 1880, giving the water company certain rights where a subscriber permitted water to waste, *held* repealed by an ordinance passed in 1904; and under the latter ordinance, where a subscriber, who was not in arrears with the water company, and was on a flat rate, permitted water to waste from a hydrant, the company could only notify him to repair the defective hydrant and if he failed to do so, then to place the subscriber on a meter.

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

Moore, Smith, Moore & Trieber, for appellant.

1. Section 13 of the ordinance of December 9, 1880, is not repealed by any portion of the ordinance of March 31, 1904; and under section 13, appellant had the right, upon the discovery of the leak, to shut off the water without prior notice, provided that notice was given him at that time that the supply was cut off on account of the leak, and that it would be turned on again upon the leak being repaired. The court found the facts for appellant, but refused the second declaration of law requested by appellant. Section 13, of the ordinance of 1880 was not repealed by the ordinance of 1904. The appellant had the right to cut off the water, without notice, until the leak was repaired. 29 Pac. 320. The two sections are not repugnant.

2. The former ordinance was not repealed. Repeals by implication are not favored. 92 Ark. 600; 41 *Id.* 149; 101 *Id.* 238, etc. There is no inconsistency or repugnancy be-

tween the ordinances. The second declaration of law should have been given as requested. Campbell & Stevenson's Digest City Ordinances, § 1897. The ordinance of 1904 only operates to give an additional remedy or election to the water company and in no way affects or modifies section 13 of the old ordinance.

O. D. Longstreth and *E. R. Parham,* for appellee.

The ordinance of 1904 clearly points out the only remedy and repeals the ordinance of 1880. The only remedy now is to notify the owner, and if leak is not repaired in a reasonable time, install a meter. Notice must be given before the water is cut off.

STATEMENT BY THE COURT.

Appellant is a corporation having a franchise to supply water to the inhabitants of the city of Little Rock. Appellee is a consumer of water under a contract with appellant by which it was to supply him with water at $9 per annum on the flat rate. He instituted this suit against the appellant, setting up his contract and alleging in substance that on or about July 7, 1915, without prior notice, appellant or its agent shut off the water supply to his residence, which remained off until July 10; that this was a breach of contract on the part of appellant which damaged appellee in the sum of $600, for which he asked judgment.

The appellant denied that it violated its contract with the appellee; admitted that it cut off the supply of water from his residence, and justified its act in doing so under an ordinance which will be referred to in the opinion.

The court, after hearing the testimony, found that the appellant, on July 7, 1915, turned off the water supply at appellee's residence; that this was done because a hydrant in appellee's yard a few days before, was discovered to be in a leaky condition; that the leak was sufficient to warrant the appellant in cutting off the water supply had the appellant given reasonable notice to appellee to repair before cutting off the water. The court found that at the time the water was cut off on July 7, the agent of the appellant notified appellee's wife that same was cut off on account of a leak and

would remain off until said leak was repaired; that appellant did not, by its contract, waive its right to cut off the water on account of the leak.

The court declared the law substantially as follows: That under the ordinance of the city of Little Rock, the appellant, in case of the discovery of a leak in the water fixtures of the appellee, had the right to shut off appellee's water supply until he had the leak repaired and requested that the supply be again turned on.

Appellant asked the court to declare that it was not the duty of the appellant, before cutting off appellee's water supply, to give appellee any prior notice of its intention to do so unless the leak in his hydrant was repaired; that the only duty resting upon the appellant was to notify the appellee at the time of shutting off the water that it was being shut off on account of the leak, and would remain off until same was repaired. The court refused this request.

The cause, by agreement, was heard by the court sitting as a jury; and it was also agreed that in case the court should find for the appellee, that the judgment should be in the sum of $50. The court entered a judgment in favor of the appellee for that sum, from which this appeal was taken.

WOOD, J. (after stating the facts). The findings of fact by the court are sustained by the evidence. The appellant contends that it had the right to cut off appellee's supply of water when it discovered that there was a leak in the hydrant resulting in a waste of water, and that it was not required to give the appellee any prior notice in order to enable him to repair the leak. Appellant justifies its act in cutting off the water, without giving the appellee previous notice that it was going to do so, under section 13 of the ordinance of December 9, 1880, as follows:

"13. The authorized agents of the company shall have the right to enter upon the premises of any consumer of water furnished by the company, for the purpose of examining the pipes and fixtures and preventing waste, and in the event that any consumer permits waste of water, then the company may shut off the water supply from said premises."

An amended ordinance of the city, passed in 1904, reads as follows: "The water company shall have the right to refuse to supply at flat rate any consumer whose fixtures are allowed to get out of repair and leak, or when water is wasted and improperly used; in such cases the water company shall first notify the consumer to repair leaky fixtures or correct the abuse; if not repaired and corrected in a reasonable time and water is again found wasting and fixtures leaking, the water company shall have the right to set a meter."

It will be observed that section 13 of the ordinance of 1880 does not expressly require any notice to be given to consumers of water before shutting off their water supply where they are permitting a waste of water. The ordinance is silent as to notice. But it expressly grants the right to shut off the water supply where the consumer permits a waste of water and appellant contends that it should be construed as if the words "without notice" were contained therein. If this were the only ordinance on the subject of the waste of water, it might be conceded for the purposes of this decision that the appellant would have the right to shut off appellee's water supply without giving him previous notice of its intention to do so.

But that part of the ordinance of 1904 above quoted fully covers all of the subject-matter of section 13, and more. In *Coats* v. *Hill*, 41 Ark. 149, we said: "Repeals by implication are not favored. To produce this result, the two acts must be upon the same subject, and there must be a plain repugnancy between their provisions; in which case the latter act, without the repealing clause, operates, to the extent of the repugnancy, as a repeal of the first. Or, if the two acts are not in express terms repugnant, then the latter act must cover the whole subject of the first and embrace new provisions, plainly showing that it was intended as a substitute for the first."

Now, under the ordinance of 1904, when the consumer under the flat rate allows his fixtures to get out of repair and leak, and therefore waste the water, the company has no right to shut off his water supply at all as a means of

preventing the waste of water. The method which it must pursue in such cases to prevent waste is to first notify the consumer to repair the leaky fixtures or correct the abuse. If the consumer, after receiving such notice, does not repair the fixtures or correct the abuse, then the company, after a reasonable time has elapsed, may install a meter and in this way charge the consumer for the water that is being wasted. The two methods prescribed by section 13 and the ordinance of 1904, for the prevention of waste are entirely different and wholly repugnant to each other. For, conceding that under section 13, the supply of water may be shut off without previous notice to the consumer, still, under the ordinance of 1904 the water supply can not be shut off at all so long as the consumer is paying the water charges, even though he has notice to repair the leaky fixtures. If the consumer allows the waste to continue after he receives such notice and after he has had a reasonable time to make repairs, then the company may, by installing its meter, compel him to pay for the water that thereafter goes to waste. The latter ordinance does not contemplate that the consumer on a flat rate shall be denied a supply of water to his premises so long as he pays the rent charges, even though there may be a waste of water by defective and leaky fixtures. But the design of the ordinance was to compel the consumer to pay for the water which was going to waste through his neglect to repair the fixtures after he was notified of their defective condition, and had had a reasonable time to repair them. The two ordinances being totally repugnant to each other, can not therefore stand together. Moreover, even if they were not repugnant to each other, the last ordinance, as before stated, covers the whole subject-matter of the first, with other provisions, and was manifestly intended as a substitute for it so far as the method of preventing waste is concerned. See *Carpenter* v. *Little,* 101 Ark. 238.

The judgment is correct and it is affirmed.

SHAPARD v. LESSER.

Opinion delivered March 5, 1917.

1. CONTRACTS—IN PARTIAL RESTRAINT OF TRADE.—Contracts in partial restraint of trade with reference to a business or profession, where ancillary to the sale of the business or profession and the good will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser.
2. CONTRACTS—SALE OF BUSINESS—AGREEMENT BY VENDOR TO STAY OUT OF BUSINESS.—A stipulation, on the sale of a business, that the vendor will not engage in a similar business, in that locality for a certain period, is valid and binding.
3. CONTRACTS—SALE—AGREEMENT TO STAY OUT OF BUSINESS.—A. was doing a ginning business in a certain locality, and when B. proposed engaging in the same business in the same locality, A. agreed to pay B. a certain sum if he would refrain from engaging in that business. *Held*, the contract was against public policy and unenforceable.
4. ACCOUNTS—ASSIGNMENT.—An account is not assignable and a party to whom it is sold or transferred cannot sue on it alone but must make his assignor a party to the action.
5. CORPORATIONS—SURRENDER OF CHARTER—ACTION ON ACCOUNT—TRANSFER TO EQUITY.—A corporation assigned certain accounts which it owned to one L., and then surrendered its charter. L. brought an action at law upon one of them, and all of the stockholders of the original corporation were joined as plaintiffs. *Held*, the cause should have been transferred to equity, but where the law court reached the same conclusion as the equity court would have reached, and all parties being before the court, no one's rights were prejudiced, the judgment will not be reversed.

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

Moore, Vineyard & Satterfield, for appellant.

1. This action is bottomed on an open account and plaintiff should have made the Marianna Cotton Oil Company a party plaintiff. Kirby's Digest, § 6000; 69 Ark. 66; 47 *Id.* 541; 80 *Id.* 167.

The fact that the other former stockholders came in and asked to be made parties, stating that they had an interest, merely made additional interested parties plaintiff, but did not make the corporation a party. The corporation was extinguished. 105 Ark. 421; 116 *Id.* 74; 168 N. Y. 70. The case should have been transferred to chancery. Kirby's Digest, § § 958, 6000.

2. It was error to sustain plaintiff's demurrer to the plea of set-off. The complaint and the testimony show the amount due defendant under the contract, being $400 per annum so long as he bought seed for them and stayed out of the cotton seed business at Rondo. 98 Ark. 294.

3. Under section 841, Kirby's Digest, the sale of property of a corporation must be ordered by the board of directors. 89 Ark. 435; 79 *Id.* 45; 103 *Id.* 283. The judgment should be reversed and dismissed or remanded with directions to transfer to chancery.

Daggett & Daggett, for appellees.

1. Ordinarily the assignor of an open account must be a party, but the rule has no application here. All of the original stockholders were made plaintiffs. The corporation had lost its legal existence. 91 Ark. 414; 101 *Id.* 335; Thompson on Corporations, § 6586; 10 Cyc. 1328; 173 U. S. 698; 65 S. W. 171; 63 *Id.* 627; 69 Ark. 62, 67.

2. The counter-claim was properly stricken out. Kirby's Digest, § 6098; 83 Ark. 286; 106 *Id.* 241; 105 *Id.* 421.

3. The contract was complied with. Unliquidated damages can not be pleaded as a set-off. 30 Ark. 50; 54 *Id.* 187; 95 *Id.* 488.

4. The contract with the Marianna Cotton Oil Company was void because made for the purpose of stifling competition. Page on Contracts, § 434, p. 685; 85 Am. St. 125; 39 *Id.* 458; 84 *Id.* 559.

Agreements not to engage in a particular business are objectionable and usually void. 6 Rul. Case Law, § 196. The case was fairly tried; the evidence sustains the judgment and should be affirmed.

HART, J. On March 8, 1915, Harry Lesser, doing business under the firm name of the Marianna Cotton Oil Mill, brought suit in the circuit court against T. L. Shapard for $876.65, alleged to be due upon an open account. The plaintiff stated that the Marianna Cotton Oil Company, a corporation, had conveyed this account together with all of its other property of every kind to him, and that shortly there-

after it surrendered its charter to the State of Arkansas, and lost its legal entity as a corporation.

In April, 1915, A. D. Goldman, Blanche L. Goldman, J. L. Isaacs, W. B. Mann and Jim Thompson filed a motion in the cause, stating that at the time the Marianna Cotton Oil Company surrendered its charter they were stockholders in it and owned all the shares of stock issued by it. They stated that Blanche Goldman owned 796 shares, Harry Lesser, 797 shares, J. L. Isaacs, four shares, and the rest of them one share each and asked to be made parties plaintiff to the action. The motion was granted over the objection of the defendant.

The plaintiff alleged that the balance due was for hulls and meal set out in the account sued on.

The defendant answered and admitted that he had received the hulls and meal set out in the account sued on, but stated that he had purchased same from the Marianna Cotton Oil Company, and denied that plaintiffs had any right to recover on said account. The material facts are as follows:

In January, 1915, the Marianna Cotton Oil Company, by deed duly executed, pursuant to resolution unanimously passed by its stockholders, conveyed all of its property of every kind to Harry Lesser, and the consideration was that Harry Lesser should pay all the debts of the corporation. The corporation then, by resolution duly passed by its stockholders, surrendered its charter to the State of Arkansas. It was solvent at the time Harry Lesser took possession of its property under the conveyance to him. He paid its debts and thereafter conducted the business under the style of Marianna Cotton Oil Mill. The account sued on came into his possession along with the other assets of the corporation. Other facts will be stated or referred to in the opinion.

The jury returned a verdict for the plaintiff for $876.65 with accrued interest. The defendant has appealed.

The defendant in his amended answer, sets up the following:

"That on the.....day of....., 1912, he entered into an agreement with the Arkansas Cotton Oil

Company, of Helena, Ark., by the terms of which he and the said Cotton Oil Company were to erect and operate a cotton gin at Rondo, Arkansas; that the Marianna Cotton Oil Company at that time and for a long time prior thereto owned and operated a cotton gin and bought cotton seed at said town of Rondo; that as soon as the Marianna Cotton Oil Company learned that it was to have competition in the gin business and in buying cotton seed at Rondo, it immediately began negotiations with the defendant for the purpose of inducing him to rescind his agreement with the Arkansas Cotton Oil Company (which was competitor of the Marianna Cotton Oil Company) and proposed that if he would do so, it would pay him $400 annually for his good-will and influence in staying out of the gin business and cotton seed business at Rondo in competition with Marianna Cotton Oil Company; that thereupon by mutual agreement he rescinded his said agreement with the Arkansas Cotton Oil Company, and accepted the proposition of the Marianna Cotton Oil Company, and has ever since abided by and faithfully lived up to said agreement and has not been in any wise connected with the gin or cotton business at Rondo in opposition to or competition with the Marianna Cotton Oil Company or its assigns."

It is insisted that the judgment should be reversed because the court refused to allow the defendant the $400 annually as set out in that part of the answer just quoted.

(1-2) Contracts in partial restraint of trade with reference to a business or profession where ancillary to the sale of the business or profession and the good-will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser. *Hampton* v. *Caldwell,* 95 Ark. 387; *Bloom* v. *Home Insurance Agency,* 91 Ark. 367, and cases cited; *Edgar Lumber Co.* v. *Cornie Stave Co.,* 95 Ark. 449. In such cases the vendor by entering into and observing the covenant not to engage in his business or profession for a stipulated time in a certain locality secures to himself the full value of his business or profession and its good-will and such contract does not in any wise tend to stifle competition to the detriment of the public. The

good-will of a business or profession has a value which the seller has an absolute right to secure in this way. The purpose to create a monopoly in the territory around the town of Rondo is obvious from the matter set forth in the answer.

(3) According to its allegations the Marianna Cotton Oil Company executed the contract in question with the defendant in order to prevent him and another oil company from erecting and operating a cotton gin at Rondo, and thus becoming its competitor in buying cotton seed. The avowed object of the contract, according to the allegations of the answer, was to stifle competition and to promote a monopoly in the cotton seed business to the manifest injury of the public. The contract was not entered into for the purpose of protecting the oil mill company in a legitimate use of something which it acquired by it; for nothing was conveyed to the oil mill corporation. The purpose and effect of the contract was to enable the oil mill corporation to enjoy an illegitimate use of something which it already had. The contract was against public policy and the court correctly refused to allow defendant to use it as a set-off against the account sued on. *Clemmons* v. *Meadows* (Ky.), 94 S. W. 13, 6 L. R. A. (N. S.) 847; *Tuscaloosa Ice Mfg. Co.* v. *Williams,* 127 Ala. 110, 28 Southern 669, 85 Am. St. Rep. 125; 6 R. C. L., sec. 196, p. 791; Page on Contracts, § 434, p. 685.

(4) In *Jett* v. *Maxfield Co.,* 80 Ark. 167, the court held under our statute an account is not assignable and that a party to whom it is sold or transferred can not sue on it alone, but must make his assignor a party to the action.

(5) In the present case the corporation before it surrendered its charter sold and transferred all its assets to Harry Lesser. It is urged that the judgment should be reversed because Harry Lesser did not bring himself within the above rule. After the corporation had surrendered its charter to the State, all the stockholders came in and asked to be made parties plaintiff to the action which was done. It is conceded that they had a right to surrender the charter of the corporation to the State under the authority of *State ex rel. Atty. Gen.* v. *Arkansas Cotton Oil Co.,* 116

Ark. 74, and *Freeo Valley Rd. Co.* v. *Hodges,* 105 Ark. 314; but it is contended that under the principles announced in *Alf Bennett Lumber Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421, that the cause should have been transferred to equity when the stockholders were made parties to the suit. Counsel are correct in this contention but it by no means follows that the judgment should be reversed for that reason. It is well settled that this court only reverses for errors prejudicial to the rights of the party appealing. The record shows that the corporation was solvent at the time it surrendered its charter to the State and that Harry Lesser agreed to pay its debts. All persons interested in the assets of the corporation were before the court. It is true the court did not formally transfer the cause to the chancery court, but it reached the same end at which it would have arrived had it done so. The fact that the circuit court reached the same conclusion as the chancery court would have been compelled to have reached had the case been transferred to it, shows that the defendant was not prejudiced. See *Boles* v. *Jessup,* 57 Ark. 469, and *Eagle* v. *Oldham,* 116 Ark. 565. In other words the defendant did not dispute that he owed the account sued on. All the parties interested in the assets of the corporation were parties to the suit and the defendant was not entitled to the set-off claimed by him for the reason already given. It necessarily follows that the result should have been the judgment rendered in the event it had been tried in equity. No prejudice therefore could have resulted to the defendant and the judgment is affirmed.

MARVEL *v.* STATE EX REL. MORROW.

Opinion delivered March 5, 1917.

NUISANCES—ABATEMENT—JURISDICTION OF CHANCERY COURT—ILLEGAL SALE OF LIQUOR.—Act 109, Acts of 1915, making the business of selling intoxicating liquors illegal in any building, structure or place within this State a public niusance, and enjoining upon the chancery and circuit courts of the State the duty of abating them, *held* valid.

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

Covington, Reynolds & Reynolds, for appellant.

1. The demurrer should have been sustained. The petition does not allege that the nuisance affected any public property or public civil rights, or that criminal process was inadequate to afford relief, or that there was no adequate remedy at law. 81 Ark. 117; High on Injunctions, 23; 37 S. W. 478; 34 L. R. A. 95; 45 S. W. 506. Where the remedy at law is complete or criminal process adequate, equity will not grant relief. 26 Ark. 649; 27 *Id.* 157; 48 *Id.* 331; 81 *Id.* 117.

2. The act is void. The Legislature had no authority to confer jurisdiction upon chancery courts to abate a public nuisance as defined by the act. 80 Ark. 145; 6 *Id.* 318; 56 *Id.* 391; 80 *Id.* 145. Prior to the passage of the act this court has repeatedly held that chancery courts had no jurisdiction. 81 Ark. 117; 98 *Id.* 437; 80 *Id.* 145; 87 *Id.* 213; High on Inj. (4 ed.), § 20; 56 Fed. 654; 99 Ark. 636; 81 *Id.* 125; 102 Ill. App. 449; 81 Ark. 117; 85 *Id.* 230 ;98 *Id.* 437, 521.

3. The case should be reversed upon the facts, as against the preponderance of the evidence.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

The action of the chancery court is undoubtedly fully authorized by Act 109, Acts 1915, p. 408. The only question, then, is the act constitutional or void? 99 Ark. 633; 80 *Id.* 145, etc.

SMITH, J. By the decree of the chancery court of Johnson County, appellant was enjoined from selling intoxicating liquors illegally in a building owned by him in the town of Hartman, in said county. The suit was brought in the name of the State, on the relation of the prosecuting attorney. A demurrer to the petition was filed and overruled. It is now said this demurrer should have been sustained because the petition did not allege that the nuisance affected any public property or public civil rights; nor that the criminal processes were inadequate to afford relief; nor that there was no adequate remedy at law. The petition did not

contain these allegations, and such allegations are not required under the statute under which this proceeding was had. The court below made an order directing the abatement of the business conducted by appellant upon the ground that it was a public nuisance under Act No. 109, Acts 1915, page 408, and the appeal taken from that order questions the constitutionality of that act.

Sections 1 and 2 of this act read as follows:

"Section 1. That the conducting, maintaining, carrying on or engaging in the sale of intoxicating liquors in violation of the laws of this State, in any building, structure or place within this State, and all means, appliances, fixtures, appurtenances, materials and supplies used for the purpose of conducting, maintaining, or carrying on such unlawful business, or occupation, are hereby declared to be public nuisances, and may be abated under the provisions of this act.

"Section 2. That jurisdiction is hereby conferred upon the chancery and circuit courts of this State to abate the public nuisances defined in the first section of this act, upon petition in the name of the State, upon relation of the Attorney General, or any prosecuting attorney of the State, or without the concurrence of any such officers, upon the relation of five or more citizens and freeholders of the county wherein such nuisances may exist, in the manner herein provided."

Other sections of the act make effective the sections quoted.

It is insisted upon the authority of *Hester* v. *Bourland,* 80 Ark. 145, and *United States Express Co.* v. *State,* 99 Ark. 633, that the act in question is unconstitutional.

In the case of *Hester* v. *Bourland, supra,* it was held that the Legislature could vest chancery courts only with jurisdiction in matters of equity, and that all other jurisdiction is vested in other courts, and that the Legislature is without power to divest or change this jurisdiction, and that any law passed for that purpose would be unconstitutional and void. And it was also there held that election contests for nominations are not matters of equity, and

have never been so considered, and the act of the Legislature vesting chancery courts with jurisdiction as to them is unconstitutional and void.

Other cases to the same effect are: *Gladish* v. *Lovewell,* 95 Ark. 619; *German National Bank* v. *Moore,* 116 Ark. 490; *Walls* v. *Brundidge,* 109 Ark. 250; *Hempstead* v. *Watkins,* 6 Ark. 317.

This court has had frequent occasion to consider the jurisdiction of courts of equity to abate nuisances, and in these cases familiar principles have been announced as controlling the action of the court in the decision of those cases. These cases have held that a court of equity will not lend its aid, by injunction, for the enforcement of right or the prevention of wrong in the abstract, disconnected with any injury or damage to the person seeking the relief, and that the petition for an injunction should generally show some primary equity in aid of which the injunction is asked. The court has also had before it suits to abate public nuisances, and our case of *State* v. *Vaughan,* 81 Ark. 117, has become one of the leading cases on this subject. In this case, upon a review of the authorities, it was held that a suit would not lie at the instance of the State to restrain a public nuisance unless the nuisance sought to be abated was one touching civil property rights or privileges of the public or affecting the public health.

The case of *Lyric Theater* v. *State,* 98 Ark. 437, reaffirmed the doctrine of the *Vaughan case, supra.*

At the time of the enactment of the Act of 1915, *supra,* the laws of this State, as announced in the decisions cited, may be summarized as follows: The jurisdiction of chancery courts was fixed by the Constitution of 1874, beyond the power of the Legislature to enlarge or diminish. Courts of chancery were not authorized to restrain acts constituting a public nuisance unless the acts constituting the nuisance affected the civil or property rights or privileges of the public, or the public health.

The act in question made the business of selling intoxicating liquors illegally in any building, structure or place within this State a public nuisance and enjoined upon the

chancery and circuit courts of the State the duty of abating them. Is the act void?

We think this act is not open to the objection which was made and sustained to the act involved in the case of *Hester v. Bourland, supra.* That was an act to provide for the contesting of primary elections. The court there pointed out that election contests for nominations are not matters of chancery jurisdiction, and had never been so considered, and it was, therefore, held that the act of the Legislature which attempted to vest chancery courts with jurisdiction as to them was unconstitutional and void.

The subject-matter of this legislation—the abatement of nuisances—however, has always been within the jurisdiction of courts of chancery. In 2 Story's Equity Jurisprudence (13 ed.), section 921, it is said:

"In regard to public nuisances the jurisdiction of courts of equity seems to be of very ancient date and has been distinctly traced back to the reign of Queen Elizabeth."

These courts have imposed various conditions upon the exercise of this jurisdiction, but have always asserted the existence of the jurisdiction.

The act in question has not conferred upon the chancery courts of this State any additional jurisdiction. It has merely prescribed a new condition upon which this ancient jurisdiction may be exercised. The act is remedial in its nature and, while the Legislature can not enlarge or restrict the jurisdiction of chancery courts, it is entirely within the province of the Legislature to prescribe the procedure for the exercise of this jurisdiction and to prescribe new conditions under which that jurisdiction may be exercised. The Legislature has not conferred the jurisdiction upon the chancery court to abate public nuisances. This jurisdiction they have always had.

The jurisdiction of all the courts is fixed by the Constitution as appears from the above-cited cases. But this jurisdiction may be applied to new conditions if the Legislature so elects. For instance, the jurisdiction of justices of the peace in matters of damage to personal property is limited by the Constitution to suits for damages not exceeding $100.

The Legislature might create a cause of action for damages to personal property which did not exist at the time of the adoption of the Constitution of 1874. If this was done, a suit to compensate these damages in a sum not to exceed $100 could be brought in the court of a justice of the peace. This would not be an enlargement of the jurisdiction of a justice of the peace. It would be a mere creation of a new condition upon which that jurisdiction would operate. We are of the opinion that this is what the Legislature did here.

It follows therefore that the demurrer was properly overruled and the decree so ordering is affirmed.

HART, J., dissenting. I dissent from the judgment in this case because I think the principles of law announced are in conflict with the established law of this State. The opinion of the majority in my opinion in effect overrules several of our prior decisions.

The act under consideration makes the business of selling intoxicating liquors in violation of the laws of this State in any building a public nuisance and this part of the act is but declaratory of the law as it already existed. The authorities are in conflict as to whether or not a chancery court has jurisdiction to abate a nuisance by injunction where no civil or property rights are involved. We need not review these authorities for our court has held that injunction is not the proper remedy.

In the case of *State* v. *Vaughan,* 81 Ark. 117, the court said: "It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the State to restrain a public nuisance where the nuisance is one arising from the illegal, immoral or pernicious acts of men which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law. On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may

also be crime. The criminality of the act will neither give nor oust jurisdiction in chancery."

The holding of the court in that case has also been approved in several later decisions which are cited in the majority opinion.

In the case of *State* v. *Ehrlick,* 64 S. E. 935, 23 L. R. A. (N. S.) 691, the Supreme Court of West Virginia, in an able and exhaustive opinion in which many of the authorities on both sides of the question are reviewed, held that equity had no jurisdiction to abate a public nuisance by injunction at the instance of the State where no property or personal rights are involved.

In some of the States it has been held that the Legislature may confer upon the chancery courts jurisdiction to abate by injunction public nuisances where no property or civil rights are involved, but under the construction given to our Constitution the Legislature can neither enlarge nor diminish the jurisdiction of chancery courts. *Hester* v. *Bourland,* 80 Ark. 145; *Gladish* v. *Lovewell,* 95 Ark. 618; *Walls* v. *Brundidge,* 109 Ark. 250.

Under our Constitution, the jurisdiction of equity, like that of law, is of a permanent and fixed character and courts of equity have only such jurisdiction as they could properly exercise at the time of the adoption of the Constitution. As we have already seen, they did not have the power to abate, by injunction, public nuisances where no property or civil rights are involved.

The opinion of the majority attempts to distinguish these decisions from the present one by saying that equity has always had jurisdiction over public nuisances and that the statute in question is only a statute regulating the practice in chancery courts. It occurs to me that this is reasoning in a circle. As we have already seen, this court has repeatedly held that chancery courts have no jurisdiction to abate public nuisances where no property or personal rights are involved. So it will be readily seen that the statute grants an additional power to the chancery court which it could not exercise before the statute in question was passed.

Such has been the interpretation by the American courts including the Supreme Court of the United States.

In *Mugler* v. *Kansas,* 123 U. S. 623, the statute involved expressly conferred jurisdiction upon chancery courts to prevent the use of real estate in the manufacture of intoxicating liquors. It declared all places where intoxicating liquors were manufactured or sold in violation of the act to be public nuisances and authorized a suit in the name of the State to abate them by injunction. This was recognized to be a jurisdiction created by statute.

So, too, in *State* v. *Ehrlick, supra,* it was recognized that the Legislature of that State within the constitutional limits of its powers might grant to courts of equity the power to abate a public nuisance where no property or civil rights are involved.

This statute conferred upon circuit courts the same jurisdiction that is given to chancery courts; and has been construed in the case of *Hickey* v. *State,* 123 Ark. 180. We did not there construe it as a statute regulating the practice in circuit courts, but expressly stated that under the act, the circuit court was given the power to abate the nuisance by injunction.

All the cases that I have read which uphold the power of chancery courts to abate public nuisances by injunction where no civil or property rights are involved proceed on the theory either that equity has always had jurisdiction to abate all public nuisances regardless of the fact of whether or not civil or property rights are involved; or that the Legislature has the power to confer such jurisdiction upon chancery courts.

As we have already pointed out, this court has held that chancery courts have no power to abate public nuisances by injunction except where property or civil rights are involved and has also held that the Legislature has no power to enlarge or diminish the jurisdiction of chancery courts. I think that the statute in question confers upon the chancery court a jurisdiction which it did not possess before the statute was enacted.

The views I express make the statute void as it confers jurisdiction upon the chancery courts, but it by no means follows that the whole statute should fail. It is evident that the statute is divisible, and that it would have been passed even if the jurisdiction in the premises had not been conferred upon the chancery court. This is apparent from the fact that jurisdiction to abate the nuisance in question was conferred upon the circuit courts and the jurisdiction of the circuit court to abate nuisances under this act by injunction was upheld in the case of *Hickey* v. *State,* 123 Ark. 180. The reason is that all jurisdiction was parceled out and distributed by the Constitution, and the jurisdiction not expressly granted to some other court, or authorized to be granted, is reserved to the circuit courts.

I am authorized by Mr. Justice WOOD to state that he concurs in this dissenting opinion.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* CONSUMERS COAL COMPANY.

Opinion delivered March 5, 1917.

1. CARRIERS—DELAY IN SHIPMENT OF FREIGHT—STATUTORY PENALTY—WHO MAY SUE.—The consignee of freight may sue to collect the penalty provided by Act 193, p. 453, Acts 1907, against the carrier, for delay in making the shipment of freight.
2. CARRIERS—DELAY IN SHIPMENT OF FREIGHT—DIVISION POINT—TIME.—A car of coal was shipped over the line of defendant carrier from Hartford, Ark., to Little Rock, a distance of 47 miles. The train carrying the car passed through Booneville, a division point on the defendant railway. *Held,* under Act 193, p. 453, Acts 1907, requiring carriers to transport freight at the rate of fifty miles per day, and fixing a penalty for delay, that since the car must necessarily pass through a division point, that a period of four days would be allowed for a shipment from Hartford to Little Rock.
3. CARRIERS—DELAY IN TRANSPORTING FREIGHT—ATTORNEY'S FEES.—In an action for damages for delay in transporting freight, brought under Act 193, p. 453, Acts 1907, an attorney's fee may be assessed against the defendant carrier, as costs, under Kirby's Digest, § 6621.

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

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

1. This suit is not prosecuted by the *shipper* of the coal, under the Act No. 1903, Acts 1907, but by the consignee. The act is penal and should be strictly construed. The language is plain and the forfeiture is to the shipper and to no one else.

2. Defendant should have been allowed four days to carry the shipment; the court below assessed penalties on a three days' movement from Hartford to Little Rock. Booneville is a divisional point, where freight destined east must be taken from the trains and placed in other trains, after classification, etc. The time allowed by the act for rehandling freight should be considered. Only 51 days should have been allowed, if our first contention is not sustained.

3. The act does not authorize the allowance of attorney's fees, nor does any other law.

Marvin Harris, for appellee.

1. The statute is remedial as well as penal. The act provides that the shipper or *other party whose interest is affected* by the delay, may recover. It was the intention of the act that the real party in interest should recover. Sutherland on Stat. Const. (2 ed.), § § 337, 532, 526; Kirby's Digest, § 5999.

2. According to the agreed statement of facts, appellee was the shipper. Delivery to the carrier is delivery to the consignee, and the consignor has no title or right of possession and can not sue for conversion or damages by delay. 79 Ark. 456; 105 *Id.* 53; 115 *Id.* 221; 118 *Id.* 17.

3. The attorney's fee was properly taxed as part of the costs. Kirby's Digest, § 6621; 66 Ark. 602; *Ib.* 543; 112 *Id.* 125.

Smith, J. This cause was tried upon an agreed statement of facts, which may be summarized as follows: The appellant railroad company operates a line of railroad from and through this State. Hartford is a station in Arkansas on this railroad, 147 miles west of Little Rock, which is also located on said railroad. Between the stations of Hartford and Little Rock is located the station of Booneville, which is a division point on said line of railroad. Carload freight,

consigned from Hartford, and other stations west of Booneville, destined for points east of Booneville, are handled into the station of Booneville, by trains which terminate at said point, and the said trains are broken up and cars containing freight for eastern points are classified and placed in other trains, to be carried on to the respective destinations of said freight. That cars loaded with coal, with correct shipping instructions, were delivered to the railroad company by various coal companies located at Hartford, and by the Midland Valley Railroad Company, consigned to the Consumers Coal Company at Little Rock, which company was the plaintiff below. That the total number of days, or fraction thereof, of delay of said cars of coal, after deducting the free time allowed at the station of Hartford, Sundays, and holidays, and using three days as the time within which defendant was required by law to move said cars of coal from Hartford, Arkansas, to Little Rock, Arkansas, amounted to 118 days. That by using the period of four days as the basis of computing the delay to said cars, the total number of days delay amounted to 51. That the coal contained in said cars was purchased by the plaintiff, f. o. b. mines at Hartford, and other points on the Midland Valley Railroad, and the bills of lading issued to cover the shipments of coal consigned to plaintiff at Little Rock, were signed by the individual or company which delivered the cars of coal to either the defendant railway company or its connecting carrier, the Midland Valley Railroad Company. That the coal was bought by plaintiff at certain prices, f. o. b. mines, and the freight thereon was paid by plaintiff on delivery before it was delivered to plaintiff's customers at the request of the plaintiff, the customers paying the freight bills in such cases and deducting the amount of the freight bills from the prices agreed upon for the coal.

The court awarded judgment for plaintiff for $590, the full amount sued for, that is, for the penalty of $5 per day for 118 days, and assessed an attorney's fee in favor of plaintiff's attorney, and this appeal has been prosecuted to reverse that judgment.

This suit was instituted under the authority of Act No. 193, Acts 1907, p. 453. Section 2 of this act provides that, when freight in carloads or less is tendered to a railroad company, and correct shipping instructions given, the railroad, upon receiving such freight, must carry it forward at the rate of not less than fifty miles per day of twenty-four hours, computing from 7 o'clock A. M., the day following the receipt of shipment, and for failure to receive and transport such shipments within the time prescribed, "the railroad company so offending shall forfeit and pay *to the shipper*" the sum of five dollars per car per day, or fraction thereof, on all carload freight, and one cent per hundred pounds per day or fraction thereof, on freight in less than carloads, with a minimum charge of five cents for any one package, upon demand in writing by the shipper, or other party whose interest is affected by such delay; "*provided,* that in computing the time of freight in transit, there shall be allowed twenty-four hours at each point where transferring from one railroad to another or rehandling of freight is involved, and in all computation of time between shippers and carriers, Sundays and legal holidays are to be excluded." There are other provisions in this section covering the shipment of live stock, and the allowance of time for delay resulting from accident, or other cause which the railroad company could not prevent, which is unimportant here.

It is first insisted that the plaintiff below had no right to maintain this suit, for the reason that he is not a shipper within the meaning of the act. The act provides that the railroad company "shall forfeit and pay to the shipper the sum of five dollars per car per day." But it will be observed that the cause of action is conferred "*upon demand in writing by the shipper, or other party whose interest is affected by such delay.*"

Of course, only a single cause of action is given to sue for this penalty, and that suit must be brought by the person upon whom the cause of action is conferred. That person is the shipper, or other party whose interest is affected by the delay, if we are to give the act the construction it

should have to carry out the obvious intention of the Legislature. Statutes which are both remedial and penal, as is this one, must be so construed. Lewis' Sutherland on Statutory Construction (2 ed.), Sections 337, 532 and 526.

It was evidently the intention of the Legislature to give this penalty to the person whose interest suffered as a result of the delay. Why otherwise would the party "whose interest is affected by such delay" make demand for the penalty unless he was entitled to receive it? To give the act any other construction would defeat its application to the great majority of all shipments.

In the case of *Isbell-Brown Co.* v. *Stevens Gro. Co.*, 118 Ark. 17, it was said: "It is the settled law in this State that as soon as a vendor delivers property to a carrier consigned to a vendee, the title passes to the vendee, and for any delay in shipment, the vendee's remedy is against the carrier. *Brownfield* v. *Dudley E. Jones Co.*, 98 Ark. 495; *Roberts Cotton Oil Co.* v. *Grady*, 105 Ark. 53; *Templeton* v. *Equitable Mfg. Co.*, 79 Ark. 456."

In the case of *W. & O. V. Ry. Co.* v. *Southern Lbr. Co.*, 115 Ark. 221, a consignor sued to recover the value of a carload of lumber which had not been delivered to the consignee. It was there insisted that the consignor was not the owner of the goods, and, therefore, had no right to sue. We said: "It is earnestly insisted by counsel for defendant that the plaintiff, as consignor, is not the owner of the goods, and therefore has no right to sue. We are of the opinion that this contention is well founded, and that the plaintiff has failed to establish its right to sue for the failure to deliver. It is undisputed that the sale of the carload of lumber by plaintiff to its customer in Pottsville was unconditional, and that it delivered the same to the carrier for shipment in acordance with the directions of the purchaser. The delivery to the carrier under those circumstances constituted a delivery to the purchaser and completed the sale, the title to the goods then being in the consignee. *Roberts Cotton Oil Co.* v. *Grady*, 105 Ark. 53. Any loss or damage thereafter sustained fell upon the purchaser as the owner of the goods, and he alone is entitled to sue."

(1) Upon the acceptance of these cars of coal by the railroad company for shipment, the title thereof passed to the plaintiff, and there was a delivery to him so far as his vendor was concerned, and plaintiff alone was thereafter the "other party whose interest is affected by such delay," and, within the meaning of the act, must be held to be the shipper.

(2) It is next insisted that the court erred in holding that the carrier was not allowed four days in which to move the shipments from Hartford to Little Rock. And we think the contention is well taken. The agreed statement shows the distance from the point of origin to the point of destination is 147 miles. This alone would give the railroad three days. But between these two points is the division point of Booneville, where freight, destined from Hartford to points east of Booneville, must be taken from the trains in which such shipments reached Booneville, and placed in other trains, after being classified, for movement to destination. Counsel for plaintiff contends that the allowance of twenty-four hours, "at each point where transferring from one railroad to another or rehandling of freight is involved," inures to the benefits of the railroad only when it unloads and reloads freight in quantities less than carload lots at transfer points. But we think the act should not be so construed. The Legislature must, of course, have had in mind the fact that all freight trains, whether local, or fast, or through, freight trains, have their appointed schedules governing their arrival and departure at the various stations along their route, and that the orderly dispatch of this vast business requires that these trains be made up according to some definite plan, and time was accordingly allowed for the rehandling of freight. There can be no reason for allowing "free time" to handle a portion of the contents of a car which would not apply to a whole car, where, as here, the car is taken out of a train, which arrives upon one schedule, and becomes a part of another train which departs upon another schedule.

We conclude, therefore, that the court should have used four days as a basis of computing the delay, and, under the

agreed statement of facts, the judgment should have been for only 51 days, or $255.

(3) It is finally insisted that the court erred in the assessment of an attorney's fee, because the law does not authorize its assessment. Section 6621 of Kirby's Digest provides that, in all actions at law, or suits in equity, against any railroad company, for a violation of any law regulating the transportation of freight or passengers, by any such railroad, the plaintiff, if he recovers in any such action, shall also recover a reasonable attorney's fee, to be taxed as costs. The recovery here was for a violation by the railroad company of a statutory provision regulating the transportation of freight by such railroad company, and the attorney's fee was, therefore, properly assessed as costs. *St. Louis S. W. Ry. Co.* v. *Knight,* 81 Ark. 429; *K. C. So. Ry. Co.* v. *Tonn,* 102 Ark. 20; *St. Louis, I. M. & S. Ry. Co.* v. *Evans,* 94 Ark. 324; *K. C. So. Ry. Co.* v. *Marx,* 72 Ark. 357; *Midland Valley Rd. Co.* v. *Horton,* 112 Ark. 125.

The judgment will be modified in accordance with this opinion and, as modified, affirmed.

BARRETT *v.* BERRYMAN.

Opinion delivered March 5, 1917.

1. APPEAL AND ERROR—SUFFICIENCY OF THE EVIDENCE.—If there is any substantial, legal evidence to sustain the verdict of the jury, it will not be disturbed by this court on appeal.
2. APPEAL AND ERROR—ACTION ON ACCOUNT—INSPECTION OF BOOKS.—In an action on an account, it is not error for the trial court to refuse to require plaintiff to produce his books during the trial, where the account has been sworn to, and where defendant did not show diligence in asking for the production of the books.
3. ACTIONS—RESPONSIBILITY OF SEVERAL DEFENDANTS.—An action may be maintained against a corporation and an individual for the same indebtedness.
4. CONTRACTS—ORIGINAL UNDERTAKING.—M. was employed by the A. company, and sustained a severe personal injury in the course of his employment. B. and C. the owners of the stock in the A. company, after the injury, directed that appellee doctors assume the care of M. *Held,* under the evidence that the acts of B. and C. constituted an original undertaking on their part to pay for the services rendered to M.

Appeal from Pope Circuit Court, *A. B. Priddy*, Judge; affirmed.

R. W. Holland, for appellant.

1. Instructions should have been given to the jury to return a verdict for the defendants. This was not an original promise or obligation, but a collateral undertaking not in writing and void under the statute of frauds. 12 Ark. 174; 102 *Id.* 435; 88 *Id.* 592.

2. Plaintiffs should have been requested to file an itemized account.

3. A great preponderance of the evidence is against the verdict. It should be set aside for the reason that there is not sufficient proof to sustain it.

4. Plaintiffs have a judgment for this debt against coal company. Therefore they cannot recover against the Barretts.

5. The books of account should have been exhibited. They were the best evidence.

R. B. Wilson, for appellee.

1. This was an original undertaking. 40 Ark. 429; 102 *Id.* 438.

2. The copy of the account was attached to the complaint as required by the court.

3. Two companies or parties can be sued for the same debt and two judgments obtained, but only one satisfaction.

4. Appellees were not required to produce their books at the proper time. The suit had been pending a year when the motion was made.

5. The instructions are not complained of—they embody the law.

HUMPHREYS, J. W. F. McBride, an employee of the Arkansas Anthracite Coal Company, was seriously injured on the 6th day of August, 1914, while working in the mine of said company. All the stock in the corporation was owned by appellants and Thos. M. Barrett. W. H. Barrett, Sr., was president and general manager, and W. H. Barrett, Jr., was secretary-treas-

urer and superintendent of said company. Appellees are physicians and surgeons and own and operate a hospital in Russellville, Arkansas. Prior to the institution of this suit, W. F. McBride prosecuted a suit for damages against the Arkansas Anthracite Coal Company and recovered judgment against it for $16,500.00. There is evidence tending to show that this judgment included hospital and surgeon's fees, and evidence tending to show to the contrary. Efforts were made to collect the judgment, which failed. Appellees brought this suit on January 2, 1915, against the Arkansas Anthracite Coal Company, Thos. M. Barrett, W. H. McBride and appellants for $750.00 covering the following items:

August 6 to Nov. 20:

To Hospital Room and Floor Nurse	$300.00
To Special Nurse	150.00
To Medical Services	300.00

The suit was dismissed as to W. F. McBride and Thos. M. Barrett and judgment was rendered against the other defendants. On motion the judgment against the Barretts was set aside and they filed an answer denying that they, or either of them, made any promise to the appellees to pay the medical and hospital charges of W. F. McBride. At a later date they filed an amended answer as follows:

"Come now the defendants W. H. Barrett, Jr., and W. H. Barrett, Sr., and make this their amended answer in the above entitled cause.

The said W. H. Barrett, Sr., and W. H. Barrett, Jr., plead as a special defense herein that they each and both of them are relieved of liability to plaintiffs for the sum of $750.00 as prayed for in plaintiffs' complaint or any other sum for the reason that plaintiffs seek to hold them, the said defendants, liable in their verbal promise to stand good for the debt of another, and that they claim this their defense for the reason that the said promise on which plaintiffs seek to hold them is within the statute of frauds."

The cause was tried on the issues joined and a verdict returned and judgment rendered in favor of appellees against the appellants for $750.00. A motion for new trial was filed and overruled. Proper steps were taken and the cause is here on appeal.

It is insisted that the judgment should be reversed for the reason that the trial court overruled appellant's motion to dismiss the suit for failure to attach an itemized account to the complaint. If such contention were tenable, no exception was saved to the court's ruling in overruling the motion.

(1) Appellants also insist that the judgment should be reversed because they say "a great preponderance of the evidence is against the verdict." This contention is not tenable in suits at law. If there is any substantial, legal evidence to sustain the verdict of the jury, it will not be disturbed by this court on appeal.

(2) Appellants insist that the judgment should be reversed because the trial court refused, when requested by appellants, to require appellees to produce their books of account. The request for the books was made during the progress of the trial and when Dr. Smith was being cross-examined. The record does not disclose where the books were at the time of the trial nor how long it would have taken to get them. The account contained only three items, and appellee, Smith, stated that the account was a correct copy of the books. None of the items of the account were questioned except in a general way. It is argued by appellants that the books would have thrown much light on the real issue in the case; that is, that the entry would have disclosed whether the account was entered in the book against W. H. Barrett, Sr., and W. H. Barrett, Jr. On proper application before the trial began, appellants could have secured an order to inspect the books. They might have used the process of *subpoena duces tecum*. As a general rule, the court's business is too important to suspend proceedings while witnesses are sent for books, papers, etc. The record fails to show that the rights of

appellants were in any way prejudiced by the refusal of the court to stop the trial and send for the books. The record does not disclose even a hint by appellants prior to this time that they desired to inspect the books. They should have shown both diligence and prejudice before asking this court to find that the trial court had abused its discretion by refusing to suspend the proceedings for a witness to go after his books.

(3) It is also contended that inasmuch as the appellees procured a judgment in this cause against the Arkansas Anthracite Coal Company that they are precluded from recovering a judgment against W. H. Barrett, Sr., and W. H. Barrett, Jr., on the same account and for the same amount. We cannot agree with learned counsel on this proposition. More than one person or corporation may be responsible for the same indebtedness. The liability of one does not necessarily exclude the liability of the other.

(4) The only remaining question in this case, and the one most urgently insisted upon for reversal of the judgment, is whether or not under the undisputed evidence the oral contract between appellants and appellees was an original or collateral undertaking. The evidence of both Dr. Smith and W. F. McBride is to the effect that W. F. McBride did not engage the services of appellees; that he was removed from the mine to the hospital at the instance and under the employment of W. H. Barrett, Sr., and W. H. Barrett, Jr. While McBride accepted the services rendered by these physicians, it was with the distinct understanding that he should not become responsible personally. The evidence seems quite conclusive that it was not an original undertaking on his part. The only question under the record in this case is whether the appellants or the Arkansas Anthracite Coal Company undertook to pay the hospital fees and medical services rendered by appellees to W. F. McBride. Certainly it cannot be said that the undisputed evidence shows that the original undertaking was by the Arkansas Anthracite Coal Company. There is much legal evidence in the record

tending to show that the original undertaking was by appellants. The evidence of U. L. Meade, W. F. McBride, L. D. Berryman, Dr. R. L. Smith and R. C. Berryman tended to show that appellants agreed to pay appellees for caring for and treating W. F. McBride. The following is an excerpt from the testimony of W. F. McBride: "When I was brought out and laid on the stretcher, they called for Dr. Bob Smith. An hour or so later he arrived there and he and old man Barrett was in conversation in three or four feet of me; and I refused to go to their place. I didn't want to go there. I wanted to be taken to my boarding house. Old man Barrett told me I was under their care and they wanted to put me where I would get proper medical treatment and he said that Dr. Smith would take me to the sanitarium and they would pay it." McBride's evidence was to the effect that W. H. Barrett, Jr., made about the same statement concerning the matter as was made by W. H. Barrett, Sr.

Appellants and their kinsmen were the owners of all the stock in the mining corporation where McBride had been crushed by the falling rock and were, therefore, greatly interested in McBride receiving proper care and attention. They were the sole representatives of the mining company.

This court said in the case of *Millsaps* v. *Nixon*, 102 Ark. 435: "It is the settled law in this State that 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 the circumstances attending the transaction should be taken into consideration."

Applying this test to the facts in the instant case, the court might well have found that this was an original and not a collateral undertaking. It would not be proper, however, for this court to try the case *de novo*. If there is substantial, legal evidence to support the finding of the jury that this was an original undertaking, that is sufficient on appeal. Unless it can

be said that the undisputed evidence established the fact that this was an oral undertaking on the part of appellants to pay the debt either of McBride or the Anthracite Coal Company, then appellants had no right to request a peremptory instruction requiring the jury to render a verdict for them.

This court cannot say on the record before us that the whole transaction was an oral undertaking on the part of appellants not in writing to pay the debt of another. The judgment is therefore affirmed.

APPENDIX.

I.

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St. Louis, Iron Mountain & Southern Railway Company *v.* Wm. N. Cook; White Circuit Court; J. M. Jackson, Judge; submission set aside and cause dismissed pursuant to stipulations of the parties, January 29, 1917; *per curiam.*

R. A. Young, Receiver of Hiawatha Smokeless Coal Company *v.* German National Bank, *et al.;* Sebastian Chancery Court; W. A. Falconer, Chancellor; settled and appeal dismissed pursuant to stipulations of the parties, February 12, 1917; *per curiam.*

Union Seed & Fertilizer Company *v.* H. L. Love; Lawrence Circuit Court, Eastern district; Dene H. Coleman, Judge; appeal dismissed for non-compliance with Rule 9, February 12, 1917; *per curiam.*

A. H. Campbell, A. C. Carter & Company, *et al. v.* White River Levee District; Woodruff Chancery Court; Edward D. Robertson, Chancellor; appeal dismissed on appellants' motion, February 26, 1917; *per curiam.*

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Alcorn *v.* Singleton; appeal from Chicot Chancery Court; Z. T. Wood, Chancellor; affirmed January 22, 1917, *per* Hart, J.

Ferguson *v.* Rynes; appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed February 5, 1917, *per* McCulloch, C. J.

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Scullin *et al.* Recrs. *v.* Still; appeal from Searcy Circuit Court; J. I. Worthington, Judge; affirmed February 12, 1917, *per* Wood, J.

Singfield *v.* Vogler; appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor; affirmed February 12, 1917, *per* Wood, J.

Farmers Oil & Fertilizer Co. *v.* Hester; appeal from Howard Chancery Court; Jas. D. Shaver, Chancellor; reversed February 26, 1917, *per* McCulloch, C. J.

Morgan *v.* Langford; appeal from Bradley Chancery Court; Z. T. Wood, Chancellor; reversed February 26, 1917, *per* Wood, J.

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