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IN THE

Supreme Court of Arkansas

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JAMES V. JOHNSON
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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

WILLIAMS *v.* WILLIAMS.

Opinion delivered March 5, 1917.

CONTRACT FOR SUPPORT—AGREEMENT TO CONVEY LAND—STATUTE OF FRAUDS.—Deceased agreed to give certain lands to plaintiff if he would come to deceased's home, live with him and take care of him; plaintiff left his employment in a nearby town, and removed to deceased's home, and performed his part of the undertaking. *Held,* after deceased's death, that equity would enforce the agreement, although the same was only orally made.

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

Manning & Emerson, for appellants.

1. The parol agreement, if any, made by appellee and deceased was within the statute of frauds. This is a question of fact, and it must appear by an affirmative preponderance of the evidence that the agreement was made. Appellee failed. Strict proof is required. 11 Enc. of Ev., 943; 39 Ark. 429; 44 *Id.* 340.

2. While this may be a question of fact, the chancellor's decision is persuasive merely, not final. The evidence is such that his findings should be reversed.

3. Appellee did not perform his part of the contract. He is barred by the statute of frauds. A parol contract must be established and its terms definitely established. Appellee must show by clear and convincing proof his performance and that he was put in possession in pursuance thereof. His right of recovery must be proven so conclusively that it could be maintained against deceased,

if alive. 81 Ark. 169; 82 *Id.* 43; 75 *Id.* 526; 173 S. W. 394; 11 Enc. Ev. 943, etc.

C. B. & Cooper Thweatt, for appellee.

The contract was proven clearly and by convincing testimony and the chancellor so found. The testimony shows clearly and definitely the terms of the contract; that appellee gave up his home and a good job and went and resided with his uncle and took care of him as long as he lived, under a promise that he would give him everything he had after his death. He took possession and made valuable improvements. The plea of the statute of fraud is not sustained. 105 Ark. 494; 102 *Id.* 30; 55 *Id.* 583.

McCULLOCH, C. J. Sanders Williams, an aged negro, who died in the latter part of the year 1913, owned and resided upon a small tract of farm land in Prairie County, Arkansas, and also owned several horses and mules and some cattle. He was seventy years of age when he died, and had been very feeble for several years, according to the testimony in the case, and was unable to do very much work in the cultivation of the crops or otherwise. He died unmarried and without issue. The plaintiff, Jake Williams, Jr., was a nephew of Sanders Williams, and after the latter's death he instituted this action in the chancery court of Prairie County against the heirs at law of Sanders Williams, alleging that in the month of February, 1911, said Sanders Williams entered into an oral agreement with him whereby he was to take care of said Sanders Williams during the remainder of his lifetime in consideration of which the latter was to convey to him said lands and personal property. The plaintiff alleged further that at the time the said agreement was entered into with his uncle he was residing at DeValls Bluff, where he had permanent and lucrative employment, and that in consideration of said agreement he gave up said employment and moved to his uncle's farm, and during the lifetime of the latter took care of him and made valuable improvements on the place. The relief

sought was the specific performance of the agreement on the part of Sanders Williams to convey to plaintiff said lands and personal property.

The heirs of said decedent, among whom was Jake Williams, Sr., the father of plaintiff, answered the complaint, and denied the allegations with respect to the agreement on the part of said decedent to convey said lands and personal property to the plaintiff, and also denied that the plaintiff had made any substantial improvements on the said farm. On the trial of the case the chancery court decreed in favor of the plaintiff for the specific performance of said agreement to convey the land. The personal property had been mortgaged by Sanders Williams and the mortgage debt remained unpaid, but the title to the personal property was decreed to be in plaintiff, subject to the said mortgage, and he was decreed the privilege of redeeming from the mortgage, and defendants have appealed to this court.

The testimony in the record is quite voluminous, and we find it unnecessary to review the same at length. Many witnesses testified concerning the physical and mental condition of Sanders Williams during the last few years of his life, and there is a conflict in the testimony, not only on that particular feature of the case, but also on the question whether or not the plaintiff lived with Sanders Williams pursuant to an agreement on the part of the latter to convey the land and personal property to him, either by conveyance during his life or by last will and testament.

After consideration of the testimony in the case, we are of the opinion that it clearly establishes the fact that plaintiff went to live with his uncle under an agreement that the latter was to convey the property to him in consideration of care and attention to be bestowed during the latter's lifetime, and that the plaintiff occupied the premises pursuant to that agreement and made substantial improvements. The rule in such cases is that in order for a court of equity to grant relief in requiring specific performance of a contract the evidence must be clear and

satisfactory so as to be substantially beyond doubt. We think this rule has been fully met in the present case and the testimony is altogether convincing that Sanders Williams entered into such an agreement with the plaintiff, his nephew, and that the latter performed the agreement. There is indeed some doubt whether the agreement was that the old man was to convey the land to plaintiff during his lifetime or was to convey it by last will. We do not think it is necessary that the testimony should be free from conflict or variance on that issue, since it is fully established that the property was to be conveyed by some mode, and it is immaterial whether it was to be done by conveyance during the lifetime of the grantor or by last will and testament. The basis of the plaintiff's claim is that there was a contract whereby he was to get the property in consideration of his services rendered to his uncle, and it is entirely unimportant as to the particular method in which the property was to be conveyed. The proof having established the contract and a performance of its terms by the plaintiff, it follows that a court of equity should grant him relief. We need go no further than our own decisions in finding authority on this question. *Hinkle* v. *Hinkle,* 55 Ark. 583; *Naylor* v. *Shelton,* 102 Ark. 30; *Fred* v. *Asbury,* 105 Ark. 494. The law stated in the syllabus of the last case is peculiarly applicable to the facts of the present case and reads as follows: "Where intestate verbally agreed that, if plaintiffs would give up their employment, change their residence and take care of him for the rest of his life, he would leave them all of his property, real and personal, at his death, and plaintiffs complied therewith, their conduct was such a performance as would take the contract out of the statute of frauds."

In that case the elements forming the consideration were about the same as in the present case, except that one of the contracting parties removed to Arkansas from the State of Indiana for the purpose of performing the contract. It is urged that that element does not enter into

the present case, and that the change of residence in the present case was not a substantial one in that he did not remove from his State or county. The proof does show, however, in the present case that the plaintiff was enjoying lucrative employment, and was held in high esteem by his employer when he gave up his work in DeValls Bluff, and he did so with reluctance in order to go to live with his uncle and take care of him. In order to assume the obligations imposed upon him by the contract, he made an entire change of his surroundings and changed his occupation and place of residence. He gave his services to his uncle for more than two years before the latter's death, and continued in the performance of his contract until his obligation was fully discharged. The evidence shows, therefore, that the contract was made and that the plaintiff has earned the enjoyment of its fruits. His rights are not to be defeated because there may be some doubt as to the mode in which he was finally to secure the enjoyment, and we are of the opinion that the chancellor was justified from the evidence in decreeing the performance of the contract and in quieting the title of the plaintiff. The decree is, therefore, affirmed.

WALDEN v. WILLIAMS.

Opinion delivered March 5, 1917.

1. TITLE—PRESUMPTION FROM POSSESSION.—Possession is presumed to follow the true title, and those who deal with the owner of the record title are warranted in treating him as being the exclusive owner. In order that actual occupancy be constructive notice of ownership it must be apparently exclusive.
2. TITLE—JOINT POSSESSION.—Possession to be notice must be not only open and visible, but exclusive; a possession held jointly with another person is not an exclusive possession, nor such as to operate as notice, or to excite inquiry.
3. MORTGAGES—UNRECORDED DEED.—A. held the record title to land, and deeded a portion to B., but this deed was not recorded. A. then mortgaged the property to C. at the time occupying the property jointly with B. *Held*, C.'s mortgage was paramount, he having neither actual or constructive notice of B.'s deed.

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

John E. Miller, for appellant.

1. Walker had no interest in the land at the time of the mortgage. Williams and Walker doubtless were cotenants, but their agreement was verbal until long after the rights of appellant accrued. Their agreement was void. Kirby's Digest, § 3654; 41 Ark. 169; 44 *Id.* 79; Am. Ann. Cas., 1913 E. 655. Walker's possession was not open, adverse nor exclusive and hence not notice.

2. Appellant was an innocent purchaser. 49 Ark. 217; 71 *Id.* 31; 27 Cyc. 1187; Burdick on Real Prop., § 201.

Brundidge & Neelly, for appellees.

1. Walker had an interest in the land but was not a cotenant. At the time of his purchase he was a stranger and purchased under a parol agreement and was placed in possession. 44 Ark. 79; 21 *Id.* 137; 42 *Id.* 246.

2. Appellant was not an innocent purchaser. Actual possession with visible indications of occupancy and ownership is notice to the world. 33 Ark. 465; 96 *Id.* 609; 49 *Id.* 217; 71 *Id.* 31; 27 Cyc. 1187.

The chancellor's findings are sustained by the evidence.

McCULLOCH, C. J. This was an action in the chancery court of White County to quiet title to a small tract of land thirty-five yards wide and 150 yards deep, situated at a village or country store and postoffice in White County, known as "Walker's Store."

The tract of land was originally owned by P. G. Williams, who had the record title and who on February 20, 1908, mortgaged it to appellant, J. M. Walden, to secure a debt in the sum of $550 for borrowed money, evidenced by promissory note. The debt was not paid and appellant foreclosed the mortgage under the power therein contained, and purchased the land at the mortgage sale, which was made on May 8, 1915. On February 25, 1915,

P. G. Williams executed to appellee, John T. Walker, a warranty deed purporting to convey an undivided one-half interest in a portion of said tract, being 100 feet square, beginning at the southeast corner, and the present controversy is between appellant and appellee Walker, concerning the priority of their respective titles acquired under said conveyances from Williams. The deed from Williams to Walker recites a consideration of the payment of the sum of $12.50 on April 1, 1901, and also the construction of a storehouse on the lot in question. Walker claims to have purchased an undivided one-half interest in the land from Williams in April, 1901, and paid in consideration the sum of $12.50 and built a storehouse which cost from $250 to $300, and that the deed was not executed until February 25, 1915, but he claims that he was in possession of the lot in the meantime, and that appellant had actual as well as constructive notice of the conveyance at the time Williams executed the mortgage. The case was heard by the chancellor on the evidence adduced and the court found in favor of appellee Walker, sustaining the priority of his title to the undivided one-half interest conveyed to him by Williams, and an appeal is prosecuted in this court by appellant Walden.

It appears from the testimony that Williams and Walker formed a partnership to conduct a mercantile business at the place in question in the year 1901, and built a small frame storehouse in which they did business for several years. They both testified that an agreement was entered into whereby Williams sold to Walker an undivided one-half interest in the portion of land hereinbefore described and the consideration of $12.50 was paid, and Walker built the storehouse, which probably cost $250. Another small building already on the lot was moved up to the new house and joined to it. Those parties conducted the mercantile business in the store for several years, and thereafter rented out the property to tenants from time to time and collected the rent.

The evidence is sufficient to warrant the finding of the chancellor that there was in fact a sale of said interest made by Williams to Walker upon the terms stated above, and that said parties jointly occupied the premises thereafter. There was no deed executed, however, and at the time that Williams mortgaged the land to appellant he held the record title. Appellee attempted to prove that appellant had actual notice of Walker's interest in the lot at the time the mortgage was executed, but this was disputed by appellant, and there is a sharp conflict in the testimony on that issue. Williams testified that at the time he mortgaged the property to appellant he told the latter that Walker had an interest in the property, but that he (Williams) had never executed a deed to Walker. Appellant testified in the case and denied that Williams gave him any information concerning the alleged interest of Walker, or that he had received any information on the subject from any other source, and he testified positively that he had heard nothing of Walker having any interest in the property until after his foreclosure sale. Williams was contradicted by two witnesses, relatives of appellant, who both testified that they approached Williams on the subject of a sale of the property and asked him to sell it to them, but he declined to do so, and stated that Walker had tried to buy the property and he refused to sell it. The testimony of Williams to the effect that he gave appellant notice of Walker's interest in the property is entirely uncorroborated, and after carefully considering it as it appears in the record, it does not appear to us as being at all convincing. In fact, his own statement is wholly at variance with his conduct in executing to appellant a mortgage conveying the entire tract. Appellant was a farmer, living several miles away, and he testified that he had no reason to believe that Walker had any interest in the property and he was not so informed at the time he accepted the mortgage.

Upon consideration of the inherent weakness of the testimony of Williams and its contradiction by the testi-

mony of other witnesses, we are of the opinion that the testimony produced on this point by appellant clearly preponderates over the testimony of Williams himself, and that it was not sufficient to sustain a finding in favor of Walker upon the question of actual notice to appellant of Walker's interest in the property. Nor do we think that under the facts in the case appellant is chargeable with constructive notice of Walker's adverse interest, for Walker's occupancy was a joint one with Williams and is referable to the latter's record title. In order that actual occupancy be constructive notice of ownership it must be apparently exclusive. Otherwise, the possession is presumed to follow the true title and those who deal with the owner of the record title are warranted in treating him as being the exclusive owner. *Haines* v. *McGlone,* 44 Ark. 83; 27 Cyc. 1187-8; *Elliott* v. *Lane,* 82 Iowa, 484; *Hammond* v. *Paxton,* 58 Mich. 393; and *Roderick* v. *McMeekin,* 204 Ill. 625. "Possession to be notice," said the Illinois court in the case quoted above, "must be not only open and visible, but exclusive. A possession which he held jointly with another person is not such a possession as is exclusive, or operates as notice, or to excite inquiry."

Appellant having had no notice, either actual or constructive, of the alleged interest of Walker in the property, his title under the mortgage executed by Williams is superior to the interest of Walker and the chancery court erred in declaring Walker's title to be superior to that of appellant. The decree is, therefore, reversed and the cause remanded with directions to quiet the title to the whole of the tract of land described in the mortgage executed by Williams.

HARNWELL v. ARNOLD.

Opinion delivered March 5, 1917.

1. REAL ESTATE BROKERS—COMMISSIONS—PAYMENT BY NOTE—CONSIDERATION.—One H., acting as agent for his wife, procured appellee to negotiate a sale of certain lots. Appellee produced a purchaser, who failed, however, to close the trade because of financial inability. The property was then sold to the wife of the party introduced by appellee. Appellee claimed a commission on the sale, which H. denied was due, but thereafter H. executed a note to appellee for $200, the amount of commission claimed. *Held*, H. was liable on the note but that, under the facts, that as to H.'s wife, that it was error to withdraw the issue of her liability from the jury, and declare as a matter of law that she was liable for the commission.

2. REAL ESTATE BROKERS—COMMISSIONS—FAILURE OF PURCHASER TO COMPLETE TRADE.—Unless a real estate broker expressly warrants the financial ability of the purchaser procured by him, in the absence of fraud on his part, he does not lose his commission when a binding contract of sale is effected through his agency, because the purchaser procured by him is financially unable, or for any other reason fails to carry out his contract of purchase.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks,* Judge; reversed as to Mrs. Harnwell and affirmed as to C. P. Harnwell.

C. P. Harnwell, for appellants.

Mrs. Harnwell was not liable to Arnold nor Spencer in any way. She knew nothing of the original contract and never signed the note and had no interest therein. There was no consideration for the note. In order to sustain a judgment in favor of a broker for a commission for selling real estate, the burden is upon him to show that he produced a customer ready, willing and financially *able* to purchase. Booher was willing, but not able, and so the contract with him was abandoned. 81 Ark. 96. No exclusive privilege was given Spencer. 174 S. W. 531; 80 Ark. 254; 103 *Id.* 629; 104 *Id.* 459; 87 *Id.* 221; 91 *Id.* 212.

A subsequent deal was made with Ella Booher, but Spencer's agency was at an end. In no event is Mrs. Harnwell liable, and as to C. P. Harnwell, there was no

consideration for the note. It was error to direct a verdict. Cases, *supra.*

Marshall & Coffman, for appellee.

Mr. Harnwell was his wife's agent and acted for her in all the transactions. The note was executed by the husband as surety for his wife and there was a consideration for it. 48 Ark. 267; 45 *Id.* 313.

The court properly directed a verdict against both. The commission was earned. 87 Ark. 506; 89 *Id.* 289. The evidence is undisputed and the judgment should be affirmed as to both.

McCULLOCH, C. J. Appellee instituted this action in the circuit court of Pulaski County against appellant, C. P. Harnwell, and his wife, L. B. Harnwell, to recover the sum of $200, alleged to be due as commission on sale of real estate on Pulaski Heights. Appellee was engaged in the real estate business in the city of Little Rock and employed several salesmen or solicitors, one of whom was a Mr. Spencer. The transactions involved in this controversy were conducted between Spencer and C. P. Harnwell, and the real estate which was the subject of the contract was owned by Mrs. Harnwell. It is alleged in the complaint that Mrs. Harnwell, through her husband and agent, C. P. Harnwell, engaged with Spencer to permit the latter to sell said real estate at a price stated and to pay a commission of 5 per centum for it; that Spencer produced a purchaser with whom Mr. Harnwell entered into a contract for the sale of the property and that subsequently Mr. Harnwell executed his note to appellee for the sum of $200, for the amount of agreed commission, but said note was not given in satisfaction of his account against said L. B. Harnwell, but only as security therefor, and that no part of said commission had been paid. Appellants in their answer denied that Mrs. Harnwell entered into any agreement to pay a commission or that Spencer had procured a sale of the property in question, but that the purchaser produced by Spencer was unable

to consummate the attempted sale; that negotiations with that person were abandoned, and the owner of the property subsequently made a sale to the wife of the proposed purchaser and that said note executed by said C. P. Harnwell was given without any consideration. The cause was tried before a jury, but the court gave a peremptory instruction in favor of appellee against both of the appellants, and after judgment was entered against them, they both appealed to this court.

The question presented was whether or not the testimony tended to establish a defense which gave the appellants the right to a submission of the issues to a jury. It appears from the testimony that Mrs. Harnwell owned three lots on Pulaski Heights which her husband had endeavored to sell for her. Spencer, in acting for appellee, approached Mr. Harnwell for the purpose of getting the property on his sales list, and an agreement was entered into for the payment of a commission in the event the purchaser was produced. Spencer negotiated a sale of the property to a Mr. Booher, and presented Booher to Mr. Harnwell, and they entered into a contract for the sale of the lots, which contract was reduced to writing and signed by Mr. Harnwell as agent for his wife. That sale was not, however, consummated, for the reason that Mr. Booher was involved in financial difficulties and unable to pay for the lots, and the contract was abandoned, and a new one entered into between Mrs. Booher and Mrs. Harnwell. The latter sale was consummated by the execution of deeds conveying the property to Mrs. Booher and a mortgage was taken for purchase money in favor of Mrs. Harnwell. At the time of the trial below the transaction stood in that attitude without all of the purchase price of the lots being paid. A few months after Spencer had introduced Booher to Harnwell, the latter, at Spencer's request, went to see Mr. Arnold, the appellee, about the payment of commission, and, in the absence of Spencer, Harnwell executed his note to appellee for the sum of $200, which note has never been paid. The testimony on the part of appellee tends to show that the note was not

executed in payment of commission, but merely as an evidence of the amount, and that there was no intention to release Mrs. Harnwell from the obligation as the owner of the property and the principal for whom her husband acted. Arnold testified that he knew nothing about the details of the transaction when he accepted the note from Mr. Harnwell. On the other hand, Harnwell testified that he denied any liability for commission on the ground that the sale to Booher was not consummated, but was abandoned and that he finally executed the note merely in response to persistent solicitation of Arnold and Spencer. Appellants offered to introduce evidence showing that the contract of sale with Booher was abandoned because of the latter's inability to arrange to pay the purchase price, and that another trade was negotiated with Mrs. Booher upon different terms, which involved considerable expense and trouble to Mr. Harnwell. The trial court refused to admit this evidence on the theory that the commission was earned when a purchaser was produced with whom a binding contract was entered into. The court then gave a peremptory instruction in favor of appellee.

We think the judgment against Harnwell was, upon his own testimony, correct. He admits that he executed the note and that he did so voluntarily in order to satisfy the demands of appellee and Spencer for the commission. He pleads in his answer that there was no consideration for the execution of the note, but we think his own testimony shows clearly that there was a consideration, for there existed a dispute between him and Spencer concerning the liability for a commission, and the settlement of this controversy afforded a sufficient consideration for the execution of the note. The judgment against C. P. Harnwell will, therefore, be affirmed.

The cause stands, however, in a different attitude with respect to the defense of Mrs. Harnwell. She did not join in the execution of the note, nor does it appear from the testimony that she authorized the execution of the note, or that her husband was acting as her agent in

that respect, although the testimony is clear that Mr. Harnwell was representing his wife in the execution of contract which was entered into with reference to the sale of the property. We think the court was right in excluding the testimony concerning the abandonment of the contract entered into with Booher, for the undisputed evidence seems to bring the cause within the following rule announced by this court in *Moore* v. *Irwin,* 89 Ark. 289; "In the absence of an express contract by which the broker warrants the financial ability of the purchaser procured by him, or in the absence of fraud on his part, he does not lose his commission, where a binding contract of sale is effected through his agency, because the purchaser procured by him is financially unable, or for any other reason fails to carry out his contract of purchase."

The evidence of Harnwell warrants the inference that the note was executed in settlement of the controversy, and that being true, the note itself is the full measure of the liability and all other liability was extinguished. The question ought, therefore, to have been submitted to the jury to determine whether or not the note was executed as claimed by appellee merely as security or as an evidence of the amount, and without any intention to extinguish the liability of Mrs. Harnwell, or whether, as claimed by Mr. Harnwell, it was executed in settlement of the pending controversy concerning the liability for commission. If Mrs. Harnwell authorized or ratified the contract entered into with Spencer for the payment of commission, as the testimony clearly shows, then the execution of the note by her husband would not absolve her from that liability, but, on the other hand, there was a controversy concerning her liability, and if appellee accepted the note of her husband in settlement of the controversy, there could be no recovery except from Mrs. Harnwell herself. The court erred, therefore, in taking the case from the jury so far as the defense of Mrs. Harnwell is concerned and the judgment against her is reversed and that part of the cause is remanded for a new trial.

ABRAHAM v. HATCHETT.

Opinion delivered March 5, 1917.

1. EJECTMENT—IMPROVEMENTS.—Color of title, as well as good faith, is necessary to entitle an occupant of lands to compensation for the improvements made by him.
2. COLOR OF TITLE—DEFINITION.—"Color of title" defined as that which in appearance is title, but which in reality is not.
3. COLOR OF TITLE—VOID CERTIFICATE OF HOMESTEAD ENTRY.—A void certificate of homestead entry constitutes color of title.
4. EJECTMENT—IMPROVEMENTS—VALUE.—The amount that the loser in an action in ejectment may recover for improvements made by him is the difference between the value of the land without the improvements and its value with the improvements in their then condition.

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

O. D. Longstreth and *E. R. Parham,* for appellant.

1. There was no evidence to justify a verdict for $350 for improvements. 71 Ark. 605. The measure of value is the enhanced value of the land and not the cost. 92 Ark. 190.

2. Defendants had no "color of title" to sustain the claim for improvements. 120 Ark. 620; 47 Ark. 528; 42 *Id.* 118; 8 Pac. 818, 820. An invalid certificate of homestead entry does not constitute color of title. 84 Ark. 316; 84 S. W. 224; 1 Cyc. 1030-1; 92 Ark. 184; 41 Pac. 357.

3. Betterments are only allowed to one who believes himself honestly to be the owner, and is ignorant of outstanding better rights. 45 Ark. 410; 48 *Id.* 183; 92 Id. 184.

Bratton & Bratton, for appellees.

Appellant has failed to comply with rule 9 of this court and the judgment should be affirmed. 104 Ark. 375; 103 *Id.* 430; 101 *Id.* 207; 74 *Id.* 322; 89 *Id.* 351; 88 *Id.* 450.

HART, J. This is an action of ejectment instituted in the circuit court by J. T. Abraham against Doc Hatchett, Jr., and Doc Hatchett, Sr., to recover two hundred acres of land.

The defendants admitted that the plaintiff had title to the land but they claimed to be in possession of it under "color of title" by virtue of a homestead certificate and claimed judgment for improvements to the amount of $479.50. On the trial of the case it was shown that the defendants filed their homestead application in the United States Land Office at Little Rock, Arkansas, on February 1, 1911, and paid the fees therefor. A certificate of homestead entry by the United States Government was issued to them. Afterward, it was ascertained that the lands had been previously granted to the State of Arkansas, for the benefit of the Little Rock and Fort Smith Railroad Company, and the United States Land Department having discovered this fact, held that the lands were not within its jurisdiction at the time of the homestead entry of the defendants and the same was canceled.

The defendants made certain improvements on the lands during the time they were in possession of them and testified to the value of these improvements.

Judgment was rendered in favor of the plaintiff for the possession of the land, but it was further adjudged that no writ of possession be issued in his favor until he should pay to the defendants the sum of $300, the value of the improvements in excess of the rental value of the land as found by the jury. It was further provided that the defendants should have a lien on the land for said amount. The plaintiff has appealed.

(1-2) It is first contended that the certificate of homestead entry was not sufficient to constitute "color of title" in the defendants. "Color of title," as well as good faith, is made necessary to entitle an occupant of lands to compensation for improvements made by him. *Beasley* v. *Equitable Securities Co.*, 72 Ark. 601; *Bloom* v. *Strauss*, 70 Ark. 483; *White* v. *Stokes*, 67 Ark. 184; *Beard* v. *Dansby*, 48 Ark. 183; *Nunn* v. *Lynch*, 89 Ark. 41. It is also apparent from those authorities that the words, "color of title," had received a judicial interpretation at the time our Betterment Act was passed. They have

been generally defined as "that which in appearance is title, but which in reality is not title."

In *Whitcomb* v. *Provost,* 78 N. W. 432, the Supreme Court of Wisconsin decided that a holding under an invalid certificate of homestead entry is not "color of title" so as to entitle the defendant in ejectment to recover for improvements. We do not think that case and others of similar character are authority for so holding in this State. Under our statute a plaintiff claiming possession of land under an entry made with the register and receiver of the proper land office of the United States may maintain an action for the recovery of the lands. Kirby's Digest, Sec. 2738.

The certificate issued by the agents of the proper land office to an applicant for a homestead entry entitles the holder of the certificate to take possession of the land and make improvements upon it. It is true the certificate of entry only gives him an inchoate equitable title subject to be defeated by noncompliance with the provisions of the act of Congress or to be canceled for cause, but under the liberal provisions of our statutes, the person holding the certificate may maintain ejectment for possession of the land against one having no better title or right of possession. *Gaither* v. *Lawson,* 31 Ark. 279.

(3) While our Betterment Act was passed many years after our ejectment statute, yet the former was passed with a knowledge of the existence of the latter statute and with reference to its provisions. While the certificate of homestead entry did not invest the holder with the legal title, it was sufficient, under our statute, to enable him to maintain or resist ejectment. The receiver's receipt and the certificate of entry gives to the holder the immediate right to the possession of the land with the power to oust any intruder by an action of ejectment. When the applicant has paid his money and taken the receipt, he has done all in his power, and the land from that time is reserved from entry. It is true the certificate is liable to be canceled by the government in case the sale was improperly made, but such would

be the case if a patent had been issued. Either a certificate or patent may be recalled or canceled in case the government has previously sold the land. But we think that when our ejectment and betterment statutes are construed together, it was the evident intention of the Legislature to make a certificate of homestead entry "color of title" and the circuit court property so held. As bearing on the question, see *Cawley* v. *Johnson,* 21 Fed. Rep. 492, and *Hannibal & St. Joe Railroad Co.* v. *Clark,* 68 Mo. 371.

The court, however, erred in allowing the defendants the cost of the improvements placed by them on the land. In considering the question of how the value of improvements are determined, in *McDonald* v. *Rankin,* 92 Ark. 173, the court said:

"The value thereof is based upon the enhanced value which these improvements at the time of recovery impart to the land. But such enhanced value of the land should arise solely by reason of the improvements themselves, and should be determined only by the ordinary considerations that would apply to lands that are similarly situated. The condition of the improvements at the time of the recovery should be taken into consideration. The difference between the value of the land without the improvements and the value of the land with the improvements in their then condition would be a just sum to allow therefor. In any event, no value that the land might impart to the improvements should be considered in estimating the value of such improvements. The reasonable cost in making the improvements, their deterioration, if any, or the reasonable cost of making them at the time of the recovery in their then condition, may well be taken into consideration in arriving at the value of such improvements."

For the error in determining the measure of the value of the improvements, the judgment will be reversed and the cause remanded for a new trial.

SUHS v. HOMEWOOD RICE LAND SYNDICATE.
SUHS v. MOEKER AND GOTTSCHALK.

Opinion delivered March 5, 1917.

1. COUNTERCLAIM AND SET-OFF—FAILURE TO PLEAD—FUTURE RIGHT.—In an action at law, on contract, the defendant cannot plead a claim for unliquidated damages as set-off, and therefore his failure to do so will not affect his right to bring an independent action at law against the plaintiff on his claim.
2. COUNTERCLAIM AND SET-OFF—NONRESIDENT PARTIES—TRANSFER TO EQUITY—ERROR.—Plaintiff, a nonresident, brought an action at law against defendants, who were also nonresidents; the defendants plead a set-off. *Held*, it was error to transfer the cause to equity, and since plaintiff was entitled to have the issues of fact raised by the pleadings submitted to the jury, the transfer to equity constituted prejudicial error.

Appeal from Prairie Chancery Court, Southern District; *John M. Elliott,* Chancellor; reversed.

C. B. & Cooper Thweatt, for appellant.

1. The case should not have been transferred to the chancery court. The transfer was made evidently on the theory that a counterclaim or set-off could not be set up in a court of law because plaintiff was a nonresident. 95 Ark. 488. Plaintiff was not insolvent nor is it so alleged; nor is it alleged that he did not have property subject to attachment in this State. The plaintiff and defendants are both residents of Illinois. 92 Ark. 594; 101 *Id.* 493; 25 Enc. Law, 546; 3 Johns. Chy. 569.

2. Except for the alleged set-off the issues were purely legal, and plaintiff had a constitutional right to a trial at law. 73 Ark. 463; 75 *Id.* 403; 93 *Id.* 381. The transfer to chancery and the refusal to transfer back to the law court was prejudicial error.

3. The court erred in dismissing the complaint. The contract creates the relation of master and servant; the contract was not separable or divisible; Suhs was not discharged, but completed his term of employment. Defendant did not repudiate the contract but paid $3,500 of the agreed amount and stands on the contract and claims damages for failure to comply with its terms by counterclaim. Under the circumstances Suhs was entitled to re-

cover the entire balance promised under the contract. 35 Ark. 755; 97 *Id.* 278; 64 *Id.* 38; 105 *Id.* 356. He fully complied with it.

4. The judgment for defendants on the counterclaim is contrary to the law and the evidence. 105 Ark. 421. The intention of the parties and the "situation" should govern in construing the contract. 104 *Id.* 486. What the parties have done is a potent factor to explain its terms. 95 Ark. 449; 104 *Id.* 466; 88 *Id.* 363. The judgment on the counterclaim is clearly contrary to the evidence. 101 Ark. 103; 102 *Id.* 386.

John L. Ingram, for appellee.

1. The appellant did not comply with his contract. All of the tract was not watered, nor was the rice all cut. Sowing was delayed and the pumps were not started in time nor kept running as needed.

2. The court found that plaintiff failed to properly irrigate, cultivate and harvest the crop. The damages exceeded the amount claimed. The decree is just, except the counterclaim should have been allowed.

3. Appellant was a nonresident, and the transfer to chancery was proper. 92 Ark. 594; 101 *Id.* 493; 34 Cyc. 641, 626-7, 633; 123 Ark. 40.

4. The evidence sustained the counterclaim or set-off. 92 Ark. 594; 34 Cyc. 641; 101 Ark. 493; 34 Cyc. 626-7, 633

HART, J. Edward Suhs brought separate suits against the Homewood Rice Land Syndicate and Henry Gottschalk and Henry Moeker to recover amounts alleged to be due him for raising rice crops on the land of the defendants.

Henry Gottschalk and Henry Moeker lived at Homewood, Illinois, and owned a tract of land in Prairie County, Arkansas, comprising one hundred and sixty acres. They organized a corporation called the Homewood Rice Land Syndicate, which was located at Homewood, Illinois, and this corporation owned a one-half section of land in Prairie County, Arkansas. Gottschalk

and Moeker entered into a written contract with Edward Suhs to raise one hundred and forty acres of rice for them on their land in Prairie County, Arkansas.

The Homewood Rice Land Syndicate Company also made a contract with him to cultivate three hundred acres of rice on their lands in Prairie County during 1912. Suhs came to Arkansas pursuant to the contract and raised a rice crop for the corporation and for Moeker and Gottschalk during the year 1912. By agreement of the parties the terms of both these written contracts were extended to cover the year 1913. Under the terms of the contract Suhs remained on the lands and put into cultivation and gathered a rice crop during the year 1913. Moeker and Gottschalk and the Homewood Rice Land Syndicate Company paid him part of the money stipulated in the contract for raising the rice but refused payment of the balance on the ground that he had not complied with his contract in that he had not put in all the land, had not properly irrigated the land and cultivated it in the manner provided for in the contract and had not gathered all the rice which had been grown. As above stated, he brought separate suits to recover the amounts alleged to be due him under the contract for growing and gathering the rice crop. Each defendant filed an answer setting up a counterclaim on account of the failure of the plaintiff to carry out the terms of his contract as above stated, and each defendant also filed a set-off, which will be more particularly stated hereafter. Over the objection of the plaintiff, the court transferred the cases to the chancery court. The plaintiff saved his exceptions thereto. When the cases were transferred to the chancery court the plaintiff moved to transfer them back to the circuit court. The court overruled his motion and he saved his exceptions thereto. Testimony was taken by the plaintiff to establish his cause of action and testimony was taken by each defendant to establish the counterclaim filed in the action. The amount of land which the plaintiff agreed to plant and cultivate in rice for the Homewood Rice

Land Syndicate was three hundred acres. He sued that corporation for the sum of $1,500 for the amount alleged to be due him. The defendant put in a counterclaim for the sum of $5,625, and asked that it be allowed a set-off in the sum of $163.35. The defendant also filed a cross-complaint. An attachment had been issued and levied by the plaintiff on the lands of the corporation on which the rice was grown. The court found that there was no equity in either the plaintiff's complaint or the defendant's cross-complaint and decreed that both should be dismissed for want of equity and that the writ of attachment issued and levied on the land of the defendant should be dissolved.

Suhs sued Gottschalk and Moeker for $1,550. Under the contract he was to raise one hundred and forty acres of rice for them. They filed an answer and counterclaim and also a cross-complaint. They asked that $9,725 be allowed as a counterclaim and that $170 be allowed as a set-off.

The plaintiff introduced testimony tending to maintain his cause of action and the defendants introduced testimony tending to support their counterclaim and set-off. An attachment was also issued and levied upon the lands of the defendants upon which the rice was grown.

The chancellor found that the plaintiff's complaint should be dismissed for want of equity and the writ of attachment should be dissolved. The chancellor further found that the defendants were entitled to recover from the plaintiff the sum of $3,400 by way of counterclaim, and that plaintiff is indebted to defendants in that sum as damages for breach of contract, and decree was rendered accordingly. The plaintiff has appealed from both decrees.

In the case of Suhs against the Homewood Rice Land Syndicate the defendant alleges that a quantity of what is called "cracked rice" of the value of $163.35 accumulated on the place in the fall of 1913, and pleads this as an equitable set-off to the demand of the plaintiff.

In the case of Suhs against Gottschalk and Moeker,

the contract provided that the defendants were to furnish a thresher to thresh the rice; that the plaintiff used this thresher to thresh the rice of other parties and received therefor the sum of $170 which is pleaded as an equitable set-off to the demand of the plaintiff. It is sought to uphold the decree in each case on the ground that the plaintiff was a nonresident and that the set-off pleaded as above stated gave the chancery court jurisdiction.

(1) The plaintiff resided in the State of Illinois and came to the State of Arkansas to raise a rice crop for the defendants in each case under the contracts above set forth in 1912. The terms of the contract were also extended for the year 1913. The plaintiff remained here and grew a rice crop for the defendants for the year 1913. He was here when he brought his action against the defendants but soon moved back to Illinois to again become a resident of that State. Both the defendants are nonresidents of this State. The defendants seek to uphold the jurisdiction of the chancery court on the authority of *Ewing-Merkel Electric Co.* v. *Lewisville Light & Water Co.*, 92 Ark. 594. In that case the court held that in a suit upon contract by a nonresident against a resident of this State, the defendant will be allowed in equity to set-off a claim for unliquidated damages growing out of the breach of an independent contract between the parties. In that case the court recognized that as to a set-off equity generally follows the law and will only extend the doctrine of set-off and claims in the nature of set-off beyond the law in cases where peculiar equities intervene between the parties. Unliquidated damages arising from a breach of contract or from a tort are not the subject of set-off at law. *Stewart* v. *Scott,* 54 Ark. 187. They may be set off in equity only where peculiar equities intervene between the parties. The non-residence of the plaintiff was recognized in the case last cited as a ground in equity for permitting a resident defendant to plead in set-off of the plaintiff's demand his claim for unliquidated damages. The decision in that case was not wholly based on the fact of the plaintiff being a nonresident, but the fact that the

defendant was a resident was of equal force. In an action at law on contract, the defendant can not plead as a set-off his claim for unliquidated damages, and for this reason his failure to do so would not affect his right to bring an independent action at law against the plaintiff on his claim against the latter. Where the plaintiff is a non-resident, service of process in an independent action can not be had within the jurisdiction in which he is attempting to enforce his demand against a resident of this State, and it would be inequitable to allow him to enforce his demand and deny relief to a resident defendant in the same action. Here the defendants were non-residents. In the one case, the defendant was a non-resident corporation and in the other the defendants were non-resident persons. Hence there was an entire absence of equitable jurisdiction and the circuit court erred in transferring the cases to the chancery court. *First National Bank of Lake Providence* v. *Reinman,* 93 Ark. 376.

(2) The plaintiff made objections to the transfer and properly saved his exceptions to the orders of the court in transferring the case to equity. He then moved the chancery court to transfer the case back to the circuit court, and upon its refusal to do so saved his exceptions thereto. This brings us to the question of whether or not he was prejudiced by the action of the court; for it is well settled in this State that the judgment of the lower court will only be reversed for errors prejudicial to the rights of the party appealing.

It appears from the record that the plaintiff brought this suit to recover an amount alleged to be due him under a written contract with the defendants to raise a crop of rice on their lands. According to the testimony introduced by the plaintiff he in all respects complied with his contract and was entitled to recover from each of the defendants.

According to the testimony introduced by the defendants in each case, the plaintiff had failed to comply with the provisions of his written contract with them and they were entitled to recover against him on their counter-

claims. Inasmuch as there were no grounds for the assertion of any right by the defendants in a court of equity, the plaintiff had a right to have the issues of fact raised by the pleadings and the testimony submitted to a jury.

It follows that the court erred in transferring the cases to the chancery court, and for that error the decree in each case will be reversed and the cause remanded with directions to transfer the cases back to the circuit court and for further proceedings according to law.

It is so ordered.

WEBBER v. RODGERS.

Opinion delivered March 5, 1917.

APPEAL AND ERROR—REQUEST BY ONE SIDE FOR INSTRUCTED VERDICT ONLY.—Where only one of the litigating parties requested the court for a peremptory instruction without asking for other instructions on the issue, the trial court will not be justified in refusing to submit the issue to the jury.

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

John Mayes, for appellant.

1. The attachment should have been sustained. 76 Ark. 513. The gift was in fraud of creditors. 101 Ark. 578; 56 *Id.* 73; 50 *Id.* 46; 73 *Id.* 174; 76 *Id.* 509; 74 *Id.* 161.

2. It is error to direct a verdict where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed. 89 Ark. 368; 84 *Id.* 57; 62 *Id.* 63; 36 *Id.* 451.

3. The gift to the son was void as a fraud upon creditors. 56 Ark. 73, and cases cited, *supra.*

R. J. Wilson, for appellee.

1. Appellee was solvent and the property was exempt from legal seizure. The gift was not void. 52 Ark. 547; 54 *Id.* 193; 57 *Id.* 331; 21 *Id.* 387; 23 *Id.* 435; Ware (U. S.) 474; Wood on Master & Servant, 15-19, note 1, p. 19; 28 Ark. 82.

2. If a debtor's obligations are small in comparison with the property retained, sufficient to pay his debts, he may make a valid gift. 101 Ark. 573; 8 *Id.* 470; 23 *Id.* 494; 29 *Id.* 407; 56 *Id.* 73. The question of fraud depends on the circumstances of the case. 23 Ark. 494; Freeman on Ex., § 140; 26 Ark. 20.

3. A father may permit his son to use his own earnings. 23 Ark. 435. See also 10 Ark. 211; 66 *Id.* 409; 80 *Id.* 525; 91 *Id.* 122; 31 *Id.* 429.

4. There was no error in directing a verdict. Appellant moved the court for a verdict, and if there was any error it was invited. It was the duty of the court to pass upon the attachment.

SMITH, J. This suit was commenced in the court of a justice of the peace upon a promissory note, upon which, after allowing certain credits, there was a balance alleged to be due, with the interest thereon, of $77.67. Ancillary to this suit, there was an attachment against appellee, who was the defendant below, upon the ground that he was a nonresident of the State. It is admitted that appellee was then and is now a nonresident of the State. But the attachment was resisted upon the ground that appellee was not the owner of the horse, bridle and saddle which constituted the attached property. An interplea was filed by appellee's son, who claimed to be the owner of the property. The cause was tried in the court below before a jury, and, when the evidence was all in, appellant, who was the plaintiff below, asked the court to direct the jury to return a verdict in his favor for the amount sued for, and to sustain the attachment.

The defendant requested the court to give two instructions, the first of which related to the debt, and the second to the attachment, but both were refused. Thereupon the court charged the jury as follows: "Gentlemen of the Jury: After listening to this case as carefully as the court could, and taking into consideration all the evidence in this case, and all the facts surrounding the case, I feel it is the duty of this court to direct a verdict in

this case. The court does not do it to invade the province of the jury, but I think it absolutely just and fair, under the facts in this case, for the court to direct a verdict in favor of the plaintiff, and against the defendant, upon this note sued on, for the balance, whatever it is. I think it is equally true and just for the court to direct the jury to dissolve this attachment. I do not believe the attachment could be sustained. I think the father gave this mare to his boy, just like he said, to encourage the boy and get him to be a better boy at home. He did that when he went home, I think. He did not know at that time there would be any trouble about this note. I say I think the attachment should be dissolved, and I direct you to dissolve the attachment, and direct you to find a verdict against the endorsers here for the balance you find due upon the note."

This record does not present the question of the trial of an attachment alone, but of the right of the interpleader to the attached property. It was held in the case of *VonBerg* v. *Goodman,* 85 Ark. 605, that the court, and not the jury, should pass upon an attachment, although it was there said that the court might submit the question to the jury and that it was not error so to do. But this practice does not obtain in the trial of an interplea. That is triable before the jury, and is usually tried as an issue independent of the attachment, in the trial of which the interpleader is given the right to open and close the argument, as having the burden of proof. *Excelsior Mfg. Co.* v. *Owens,* 58 Ark. 556.

The interpleader was a boy sixteen or seventeen years old, and testified that, with his own earnings, he had purchased the attached bridle and saddle, and that his father had given him the horse to induce him to remain at home and assist him in making and gathering his crop. The defendant corroborated this statement. It was contended, however, by appellant that the attached property belonged to the defendant, who was not only a nonresident, but that he was also insolvent, and that any gift of property by him to his son was presumptively

fraudulent. Defendant admitted that he was a nonresident, and the proof is sufficient to sustain a finding that he was also insolvent.

It is not denied that the record presents such a state of facts as that a jury might have found for the plaintiff upon the interplea; but it is said that, inasmuch as he requested the court to direct a verdict in his favor, and did not request the court to give any other instruction, he thereby consented to the submission of the trial of this question of fact to the court, and that the finding of the court will be treated as would have been the verdict of the jury, and that, inasmuch as there was evidence which would have sustained a verdict in favor of the interpleader, we must now affirm the court's direction to that effect. It is said that this is the effect of the decision of this court in the case of *St. Louis Sw. Ry. Co.* v. *Mulkey,* 100 Ark. 71, as applied to the facts of this case. In that case it was said: "It is also true that the parties had the right to waive a jury and submit the matter to the court for trial in the first instance, and, each having requested the court to direct a verdict in his favor, and not having requested any other instruction, they in effect agreed that the question at issue should be decided by the court, and waived the right to the decision of a jury, and the court's decision and direction has the same effect as would have been given to the verdict of the jury upon the question at issue, without such direction."

A number of cases are cited in that opinion to support that declaration of the law. Among the cases so cited is the case of *Love* v. *Scatcherd,* 77 C. C. A. 1, to which case there is appended a note collecting the cases upon this subject. This note cites a number of cases which support this declaration of the law. Chief among these are cases in the Federal courts and in the State of New York. It appears from this note, however, that the courts are not unanimous in so holding, and that courts of the highest authority hold that, though both parties move for a directed verdict, neither, as against the motion of the other, waives the right of submission to a jury. However,

we are committed to the contrary view, and we reaffirm the doctrine of our own case. This case has been approved in the following later decisions: *St. L., I. M. & S. Ry. Co.* v. *McMillan,* 105 Ark. 25; *Belding* v. *Vaughan,* 108 Ark. 69, 72; *Home Fire Ins. Co.* v. *Wilson,* 109 Ark. 324, 326; *Sims* v. *Everett,* 113 Ark. 198, 201; *Gee* v. *Hatley,* 114 Ark. 376, 380; *Supreme Tribe of Ben Hur* v. *Gailey,* 117 Ark. 145, 151; *Ozark Diamond Mines Corporation* v. *Townes and Garanflo,* 117 Ark. 552, 554; *Hill* v. *Kavanaugh,* 118 Ark. 134, 136; *St. L., I. M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 377, 388; *Nutt* v. *Fry,* 119 Ark. 450, 454.

In each of these cases it will be observed that attention was called to the fact that both parties requested the court to direct a verdict each in his own favor, and neither requested any other instruction. This condition obtained in all of the cases cited by the court in the *Mulkey* case, *supra,* and in all of the cases quoted in the note to the case in 77 C. C. A., *supra,* and so far as we are advised no court has ever applied this rule except where the request was made by both parties to the litigation. We are not impairing the authority of our *Mulkey* case, *supra.* We are only declining to extend the doctrine of that case. The courts which approve this practice do so upon the theory that the request for a directed verdict, unaccompanied by any request for other instructions, or for the submission of any issue of fact to the jury is tantamount to a request that the court find the facts, or to an agreement that there are no disputed questions of fact to be found. But, so far as we are advised, no appellate court has held that the trial court may withdraw the submission of a case from the jury, and decide controverted questions of fact, simply because one of the litigants requests the court to direct a verdict in his favor. To so hold would either deny the right of trial by jury, on the one hand, or would prevent a litigant from asking a directed verdict, on the other, and would tend to prevent litigants from ever submitting the question of the legal sufficiency of evidence to the court. This practice would encourage litigants, in all cases, to go to the jury and obtain a verdict

there, and would, consequently, lengthen the time of trials; and it does not appear to be a practice to be approved.

For the error of the court in refusing to submit the contention of the appellant upon the right of the interpleader to the attached property, the judgment must be reversed, and the cause will be remanded for a trial upon that issue.

McCULLOCH, C. J., dissenting. The rule established by the decision of this court in *St. L. Sw. Ry. Co.* v. *Mulkey*, 100 Ark. 71, is that a request for a peremptory instruction, unaccompanied by a request for other instructions of law upon which the issues are to be submitted to the jury, is tantamount to an agreement for the court to decide the issues and constitutes a waiver of the right to go to the jury on the issues of fact. The waiver results, if at all, from the act of the party himself in asking for a directed verdict, and not from what his adversary does or fails to do. There need not be mutuality in the waiver. It is not based on the mutual agreement of the parties, but on the separate acts of each, and when one party moves the court to direct a verdict he thereby waives the right to go to the jury whether the other party joins in the waiver or not. Such is the effect of the rule laid down in the *Mulkey* case. I think the rule there laid down was wrong, and that it is against the very great weight of authority, but the case has been followed many times by this court and the practice under it has become firmly established. It seems to me to be thoroughly illogical to say that the waiver must be joint in order to be effectual. It is true, as stated in the opinion of the majority, that no court has ever held that the request of only one of the parties for a directed verdict constitutes a waiver of the submission of the issues to the jury, but it is equally true that the point has never been raised in any of the reported cases.

ENGLAND *v.* SPILLERS.

Opinion delivered March 5, 1917.

MORTGAGES—DEATH OF MORTGAGOR—LIMITATIONS UPON RIGHT OF FORECLOSURE.—After the passage of Act 260, p. 256, Public Acts, 1911, the period of limitations governing the foreclosure of mortgages and deeds of trust, after the death of the mortgagor, either by suit in chancery, or by proceedings under the power of sale incorporated in such instruments, is not that provided by the statute of non-claim, but is the general statute of limitations applicable to the debt for which the security was given had the debtor not died.

Appeal from Fulton Chancery Court; *George T. Humphreys,* Chancellor; affirmed.

Lehman Kay and *C. E. Elmore,* for appellants.

1. The act May 10, 1911, page 256, does not repeal or amend section 110, Kirby's Digest, nor Act 438, Acts 1907, page 1170, relating to demands against estates, and therefore will not permit a foreclosure as is sought here.

2. The law in effect at the date of the death of the debtor and issuance of letters, which was the act May 28, 1907, will control regardless of any subsequent act. 112 Ark. 6; 92 *Id.* 522; 27 *Id.* 27, 600; 101 *Id.* 238; 97 *Id.* 546; 6 *Id.* 513.

John H. Caldwell and *Ernest Neill,* for appellee.

The demurrer was properly overruled and the suit was not barred. 107 Ark. 462; 112 *Id.* 113; *Hicks* v. *Hicks,* ms. op. June 24, 1915; 91 Ark. 5; 94 *Id.* 426; 102 *Id.* 213; 65 *Id.* 529; 107 *Id.* 462; Acts 1911, page 256.

SMITH, J. This suit was brought to foreclose a mortgage executed by N. J. England and Mary J. England, his wife, on November 17, 1907, to secure certain notes which matured February 16, 1911. N. J. England died some time prior to November 16, 1910, this being the date of the letters of administration which were granted to his wife on his estate; the exact date of his death is not shown by the record. This suit was filed September 23, 1915, which was within less than five years from the date of the maturity of the notes, but more than two years after the issuance of letters of administration. The defendants de-

murred to the complaint upon the ground that the cause of action was barred; but the demurrer was overruled. Defendants stood on their demurrer, and have appealed from the decree of foreclosure, which was rendered upon their refusal to plead further.

The parties agree that the decision of this case turns upon the construction to be given Act No. 260 of the Public Acts of 1911, page 256. The history of this legislation has been recited in former opinions of the court, and may be here summarized as follows: In the case of *Mueller* v. *Light,* 92 Ark. 522, it was held (to quote the syllabus) that "where the mortgagor dies before the statute bar of five years applicable to the mortgage note has attached, the statute of limitation which applies to the mortgage is the statute of nonclaim," and that the right to foreclose was barred when the debt itself was barred by the statute of nonclaim. *Culberhouse* v. *Hawthorne,* 107 Ark. 462; *Rhodes* v. *Cannon,* 112 Ark. 6.

The opinion in the case of *Mueller* v. *Light, supra,* was delivered November 29, 1909, and the act of 1911 was passed at the first session of the Legislature thereafter, for the manifest purpose of changing the law as announced in that opinion. This result was accomplished by amending section 5399 of Kirby's Digest, this being a section which prescribed the time within which suits to foreclose mortgages and deeds of trust should be brought. By a comparison of the act of 1911 with this section of Kirby's Digest, it will be seen that section 5399 of Kirby's Digest is re-enacted with the addition of the following proviso:

"Provided, that in all cases where any indebtedness has been or may hereafter be secured by any mortgage or deed of trust, such mortgage or deed of trust may be enforced or foreclosed at any time within the period prescribed by law for foreclosing mortgages or deeds of trust so far as the property mentioned or described in such deed of trust or mortgage is concerned; but no claim or debt against the estate of a dead person shall be probated against such estate whether secured by mortgage or deed

of trust or not, except within the time prescribed by law for probating claims against estates."

In construing this act of 1911 in the case of *Rhodes* v. *Cannon, supra,* we said: "A reasonable interpretation of it is that it only refers to debts that have been contracted and their payment secured by mortgage or deed of trust prior to its enactment, but which were not barred at that time, and to such as might thereafter be executed, and gave to the creditor the right to go into the probate court and present his claim in the usual way against an estate generally, or to foreclose his lien in a chancery court, or by sale under the power, or to pursue both remedies; and since the enactment of this amendment any creditor may or may not, as best suits him, probate his claim. If he prefers to collect it within the period of administration he will probate it. If the security is ample and he prefers the interest, he can let the claim run and foreclose his lien, as he could do if the obligor had not died."

It is now argued that the statement in that opinion that the creditor could, if he so elected, postpone the foreclosure of his lien, without reference to the statute of nonclaim, and that the applicable statute is the statute of limitations which would have applied if the obligor had not died, was *obiter,* as the controlling questions in that case were, whether this act of 1911 was retroactive, and whether one can have a vested right in the defense of the statute of limitations when the bar of the statute had once attached. However that may be, the question is now squarely presented by the record in this case, and we now approve the statement of the law quoted from that opinion.

It is argued that the obligor died prior to the enactment of the act of 1911, and that letters of administration upon his estate issued November 6, 1910, and that thereafter the statute of limitations commenced running against any action to foreclose the mortgage given by him, this statute being the statute of nonclaim, and that this act of 1911 did not, and could not, change this statute

so far as it related to that cause of action. As we have said, however, in *Rhodes* v. *Cannon, supra,* the purpose and effect of this legislation was to provide that thereafter the period of limitations governing the foreclosure of mortgages and deeds of trust, either by suit in chancery, or by proceedings under the power of sale incorporated in such instruments, should not be that provided by the statute of nonclaim, but should be the general statute of limitations applicable to the debt for which the security was given, had the debtor not died.

Appellant's construction of the act would render it nugatory as applied to the facts of this case. Indeed, the contention is made that the act did not, and could not, change the statute of limitations which was set in motion upon the death of the obligor. While we said, in the case of *Rhodes* v. *Cannon, supra,* that one may have a vested right in the defense of the statute of limitations, of which he can not be deprived by subsequent legislation, we have never held that this right becomes vested before the statute has fully run. We have held to the contrary. The period of limitations may be shortened, provided a reasonable time is allowed, after the act accomplishing that result is passed, in which an interested party may prevent the consequences of the act falling upon him. So, also, the time for the falling of the bar of the statute may be postponed. That the power to enact such legislation exists, see Wood on Limitations (4 ed.), § 11; *Dyer* v. *Gill,* 32 Ark. 410; *Hill* v. *Gregory,* 64 Ark. 317; *Tipton* v. *Smythe,* 78 Ark. 392; *Pope* v. *Ashley,* 13 Ark. 262; *Sadler* v. *Sadler,* 16 Ark. 628; *Towson* v. *Denson,* 74 Ark. 302.

The mortgage was not barred when the act took effect, the administration having commenced about six months prior thereto, and, upon its enactment, the act of 1911 became applicable, and the period of limitation became five years, the debt secured being a promissory note.

The demurrer was properly sustained, and the judgment is affirmed.

ALEXANDER *v.* STATE.

Opinion delivered March 5, 1917.

1. CRIMINAL LAW—BURGLARY AND GRAND LARCENY—SUFFICIENCY OF EVIDENCE.—Where defendant was found in the possession of recently stolen property, and had had the opportunity to steal the same, the defendant cannot complain that the verdict of guilty was without evidence to support it.
2. APPEAL AND ERROR—MOTION FOR CONTINUANCE—ABSENT WITNESS.—A continuance was asked and in the motion it was set out what the absent witness would testify; this was read to the jury. *Held,* the court did not abuse its discretion in refusing to grant a continuance.
3. APPEAL AND ERROR—MULTIPLICATION OF INSTRUCTIONS.—It is not error to refuse to give an instruction correctly reflecting the law as applicable to the particular case, if the same subject matter is covered by other instructions given.
4. INSTRUCTIONS—MATTERS OF FACT.—It is not proper for a trial court to instruct a jury what inference they may draw from certain parts of the evidence.
5. CRIMINAL LAW—BURGLARY AND LARCENY—INTENT.—In a prosecution for burglary and grand larceny, where defendant plead that he had found the article alleged to have been stolen, *held,* the State's burden was to show a criminal intent when defendant entered the house, and not a criminal intent thereafter.

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

E. F. Friedell and *J. M. Carter,* for appellant.

1. The verdict is clearly against the uncontradicted evidence.

2. The court erred in its instructions to the jury.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

1. The proof is amply sufficient to sustain a verdict of conviction. 92 Ark. 120, 586; 95 *Id.* 172, 321; 100 *Id.* 330. The jury were the sole judges of the evidence. They did not believe the evidence of Williams and appellant. 101 Ark. 51; 104 *Id.* 162.

2. The motion for continuance was properly overruled. 58 Ark. 513.

3. There is no error in the instructions. Where the usual and proper instruction on reasonable doubt is given,

it is not error to refuse others on the same subject couched in different language. 101 Ark. 569; 103 *Id.* 352; 92 *Id.* 481; 74 *Id.* 33; 58 *Id.* 473; 52 *Id.* 180; 61 *Id.* 88, and others.

It was the exclusive province of the jury to determine whether the fact that appellant was in possession of the stolen property was a *weak* or strong presumption of guilt. 55 Ark. 244; 92 *Id.* 590. The sixth instruction asked by defendant is not the law. 15 Ark. 624; 13 *Id.* 705; 103 *Id.* 352.

4. No objections were saved to Stephens' testimony. 105 Ark. 82; 73 *Id.* 407; 44 *Id.* 103.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Miller Circuit Court of the crimes of burglary and larceny. He filed a motion for a new trial, which was overruled. The requisite steps were taken and this cause is here on appeal.

(1) The first assignment of error urged for reversal is that the verdict is clearly against the uncontradicted evidence. The substance of the evidence tending to establish the guilt of appellant is as follows: The latter part of September or first part of October, as it was getting dark one evening, a man fitting the description of appellant was seen to enter the home of P. M. Crouch in Texarkana, Arkansas, and remain within the house about one-half hour. Upon the return of Mrs. Gussie Crouch she discovered that her home had been burglarized, and along with other jewelry a ring had been stolen. The ring was of the value of $15. Not long after the burglary appellant gave Mrs. Fannie Pratt the stolen ring and at the time told her he had purchased it. Appellant told John Strange, chief of police, that he found the ring. Before and after the burglary appellant delivered meat daily to the Crouch home and was acquainted with the surroundings. He had been convicted of a similar crime prior to this time.

In the face of such a record as this, we can not concur in the opinion of learned counsel that the verdict is

contrary to the uncontradicted evidence. This record reflects the opportunity and tendency on the part of appellant to commit such an offense as this; also the possession of a recently stolen ring; also conflicting statements as to how he acquired possession of it.

It is true that the verdict is contrary to the proof introduced by appellant. He said he found the ring by a rock wall near the Crouch residence and denied burglarizing the Crouch home. Charles Williams, who had been convicted of many burglaries and larcenies, gave testimony that he entered the Crouch house and took the ring and other missing jewelry; that in his hurry and fright he lost the ring at the place appellant claims to have found it. Williams confessed to many other crimes when arrested, but denied that he burglarized the Crouch home. Appellant and Williams were in jail together awaiting trial and for a part of the time occupied the same cell.

There is ample evidence in the record to sustain either the State's or appellant's theory. The case involved a question of fact to be determined by the jury. The jury probably concluded that the defense of appellant was concocted between Williams and himself in the quiet hours of incarceration and regarded the testimony of appellant and Williams as unworthy of belief. The weight of the evidence is a question for the jury and not the court. This court will not invade the province of the jury to pass upon the weight of the evidence. *Rhea* v. *State,* 104 Ark. 162.

Another assignment of error for reversal is that the court excluded the evidence of A. W. Stevens tending to establish the good character of appellant. No objection was made or exceptions saved at the time to the court's ruling in this particular. For this reason, the error, if any, can not be corrected on appeal. *Birones* v. *State,* 105 Ark. 82.

(2) Another assignment of error set up in the motion for new trial is that the court erred in overruling appellant's motion for continuance. The motion for continuance was correct in form and stated that appellant

could prove by G. W. Citty that "about the time the Crouch house is alleged to have been broken into and after that time, defendant herein was working for him and it was his duty to carry meat for his butcher shop and deliver same to his customers, which necessitated that defendant get up early in the morning, and go about town before it was light, and which he did about said time and after said burglary is said to have been committed." The prosecuting attorney agreed that the motion might be read to the jury and admitted the truth of what the motion stated the testimony of G. W. Citty would be. The motion for continuance was properly denied by the court. *Baker* v. *State,* 58 Ark. 513.

The trial court refused instruction No. 1, asked by appellant, which is as follows:

"The court instructs the jury that the burden is on the State to prove the defendant guilty as charged in the indictment, and if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of such doubt and acquit him.

"If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of defendant, then it is your duty to adopt such view and acquit him."

(3) This instruction was fully covered by the instruction given by the court on its own motion and by giving instructions Nos. 2 and 4, asked by appellant. It is not error to refuse to give an instruction correctly reflecting the law as applicable to the particular case, if the same subject-matter is covered by other instructions. *Goss* v. *State,* 74 Ark. 33; *McWilliams* v. *State,* 101 Ark. 569; *Morris* v. *State,* 103 Ark. 352.

(4) It is insisted that the trial court erred in refusing to give instruction No. 5, asked by appellant. The instruction refused is as follows:

"The jury are instructed that the presumption that the person in whose possession stolen property is found is the thief, is not one of law, and weak one of fact; it is

not at all conducive, and of itself is not sufficient for a conviction."

This instruction is erroneous because it attempts to advise the jury what inferences they may draw from a certain part of the evidence. Our Constitution forbids trial judge from instructing juries on matters of fact. *Blankenship* v. *State,* 55 Ark. 244; *Wiley* v. *State,* 92 Ark. 586.

(5) The court also refused to give the following instruction asked by appellant:

"The court instructs the jury that the law presumes in favor of innocence, and of a good motive rather than a bad one, and the burden is not on defendant to show he had no criminal intent in keeping the ring after he found it, but it devolves upon the State to prove he had such criminal intent."

The instruction is erroneous because its effect would be to divert the minds of the jury from the intent involved in entering the house and taking the ring, to the intent appellant had in keeping the ring. This instruction, if given, would have placed upon the State the burden of proving that appellant formed a criminal intent in his mind to keep the ring after he obtained possession thereof. The State's burden under the charge of burglary and larceny was to show the criminal intent of appellant at the time of entering the house and not thereafter.

No error appearing in the record, the judgment is affirmed.

ARMSTRONG *v.* LAWSON, ADMINISTRATOR.

Opinion delivered March 12, 1917.

APPEAL AND ERROR—APPEAL FROM PROBATE COURT—ORDER OF DISMISSAL.—The action of the circuit court in dismissing an appeal from the probate court held proper where the record failed to disclose that appellant, who had made himself a party in the probate court, was either a creditor or distributee of the estate involved.

Appeal from Cross Circuit Court; *W. J. Driver,* Judge; affirmed.

J. C. Brookfield, for appellant.

1. No bill of exceptions or motion for new trial was necessary. Where the error appears of record in the judgment neither is necessary, and this court will reverse. 125 Ark. 305; 46 Ark. 17, 21, 468, 474. Appellant did everything required by the Acts 1909, page 957. The cause should have been reinstated and the appeal allowed, upon the showing made.

S. R. Simpson, for appellee.

1. There is nothing before this court. Appellant was not a party and could not appeal. 123 Ark. 61; 68 *Id.* 492; Kirby's Digest, § 140; Acts 1909, p. 957; 119 Ark. 185; 105 *Id.* 301; 121 *Id.* 448; 123 *Id.* 61; 99 *Id.* 56.

2. No bill of exceptions was filed and no motion for new trial was filed. It is not shown that appellant was an interested party. He is a stranger to the suit. Kirby's Digest, § 1351; 123 Ark. 61; 68 *Id.* 492; 99 *Id.* 56; 119 *Id.* 185; 123 *Id.* 61.

McCULLOCH, C. J. The appellant, W. W. Armstrong, undertook to appeal from two judgments of the probate court of Cross County, one being a judgment of allowance of a claim against the estate of appellee's decedent, and the other a judgment directing the sale of real estate of the decedent by said administrator. The circuit court dismissed both of said appeals, and an appeal has been prosecuted to this court from the order of dismissal. The transcript of the record sent up from the probate court shows that the appellant appeared in that court and had himself made a party to the proceedings on the part of the administrator to procure the order of sale, and the record shows that the probate court granted the appeal from the order of sale, and also from the order allowing the claim against the estate. Appellant filed an affidavit for appeal in the form prescribed by the statute. It does not, however, appear in the record, either in the order making appellant a party, or in the affidavit for appeal, that he

was interested in the estate as a creditor or distributee. The record of the circuit court shows that the administrator filed a motion to dismiss the appeals, but the motion itself does not appear in the record. The court made an order dismissing the appeals and a few days later, during the same term, appellant filed his motion for reinstatement of the cause, which was overruled, and appellant saved his exceptions and prayed an appeal to the Supreme Court, which was granted and time was allowed for filing a bill of exceptions, but no bill of exceptions was in fact filed.

In the state of the record just prescribed we are compelled to indulge the presumption that the court's ruling in dismissing the appeals was based upon facts which justified it. *Billingsley* v. *Adams,* 102 Ark. 511.

It does not appear affirmatively anywhere in the record that appellant was interested in the estate, and appellee's motion to dismiss may have presented that or some other issue of fact for the consideration of the court concerning the interest of appellant in the proceedings and the right to prosecute an appeal. This presumption is strengthened by the fact that the court gave time (120 days) in which to file a bill of exceptions. It is true that the court at first entered an order of dismissal reciting that the motion to dismiss was heard upon the face of the record, but that order was set aside at the instance of appellant and the last order of dismissal contains no such recital, and it is fairly inferable that the court on the last presentation of the motion heard the matter on something more than the face of the record itself.

There being nothing to overcome the presumption of regularity and correctness of the court's order of dismissal, it follows that the judgment must be affirmed, and it is so ordered.

ARKANSAS VALLEY TRUST COMPANY v. YOUNG.

Opinion delivered March 12, 1917.

1. ADMINISTRATION—AGREEMENT OF DECEASED TO CONVEY LAND—POWER OF PROBATE COURT TO ORDER A CONVEYANCE.—Kirby's Digest, § 213, gives an administrator, with the approval of the probate court, authority to convey land belonging to deceased to a third party in pursuance of an agreement between deceased and the third party, where the administrator is satisfied that payment has been made therefor according to the contract. The statute merely grants to the administrator this discretion, and does not confer upon the probate court jurisdiction to enforce the equitable remedy of specific performance.
2. ADMINISTRATION—AUTHORITY OF PROBATE COURTS.—Probate courts are the guardians of the estates of deceased persons, and have the custody of such estates for the purpose of settling the debts and performing the contracts entered into by the decedent. It is their duty to administer these estates in the most expeditious and frugal manner consistent with the rights and interests of all concerned. Kirby's Digest, § 213, gives a more direct and expeditious relief than that under the right of specific performance in proceedings in chancery.
3. ADMINISTRATION—AGREEMENT TO CONVEY LAND BY DECEASED—ORAL AGREEMENT.—Deceased agreed *orally* to convey certain land to one A. but died before making the conveyance. *Held*, under Kirby's Digest, § 213, the administrator may make a valid conveyance of the same to A. with the approval of the probate court.
4. ADMINISTRATION—STATUTE OF FRAUDS.—Where the personal representative of a decedent cannot plead the statute of frauds, a judgment creditor cannot do so.
5. ADMINISTRATION—CONTRACT TO CONVEY LAND—DEED BY ADMINISTRATOR.—Deceased was indebted to one A. and in order to pay the debt agreed to convey certain lands to him, A. in turn surrendering certain securities which he held as collateral. Before the deed was executed deceased died. *Held*, the facts presented a case for the application of Kirby's Digest, § 213, and that a conveyance by the administrator to A., under authority of the probate court, was valid.

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

Read & McDonough and *Kimpel & Daily*, for appellant.

1. Probate courts are not courts of equity—they have no chancery jurisdiction to enforce the specific per-

formance of contracts. Any authority to justify the order here must be found under Kirby's Digest, § 213, Acts 1859, No. 181. This is a special power and must be exercised as such. Courts of chancery do, under certain circumstances, decree specific performance of oral contracts for the conveyance of real property. This is an equitable remedy and is exercised only by courts of chancery, and by them with caution. 39 Ark. 429.

2. This statute has been on the books since 1859. The probate court is one of limited jurisdiction, and the Legislature could not authorize an administrator to make a conveyance. The order was void. 50 Ark. Law Rep. 90.

It was never intended to vest in probate courts jurisdiction to enforce or decree specific performance. Rev. St., chap. 23, § 1; Kirby's Digest, § § 213, 214, 209, 212, etc.

3. The proof was not sufficient to authorize specific performance by a court of chancery on the ground of partial performance. 41 Ark. 97.

John H. Vaughan, Geo. F. Youmans and *Nagel & Kirby,* of St. Louis, Mo., for appellees.

1. The estate was solvent as found by the probate court.

The probate court had jurisdiction to make the order under the act of February 21, 1859, Kirby's Digest, § § 213, 214. The homestead is not involved here as in 50 Ark. Law Rep. 90. This is the only case construing this act. The contract here is one that could have been enforced against Young specifically if he had lived. 66 Ark. 333; 50 S. W. 695.

Read & McDonough and *Kimpel & Daily,* for appellants, in reply.

1. Probate court had no jurisdiction to make the order. There was no written contract. In 123 Ark. 189 this court did not decide that the probate court had equitable jurisdiction to decree specific performance of an oral contract upon proof of part performance.

The contract here was void under our statute of frauds. 51 Me. 423; 49 Cal. 469, and cases cited in our brief, *supra.*

2. There is no proof of part performance in the lifetime of Young.

John H. Vaughan, George F. Youmans and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellees.

1. *Oliver* v. *Routh,* 123 Ark. 189, does hold that section 213 does confer the power upon the probate court to enforce an oral contract to convey lands where partial performance is shown under the equity rule. Section 213 is a valid statute. Const. 1836, art. 6, § § 6 and 10; Acts 1873, p. 113; Const. 1874, art. 7, § § 15, 34, etc. The jurisdiction is now the same as it was before the transfer of probate jurisdiction to the circuit court by Acts 1873. 33 Ark. 575, 727; 50 Ark. 34.

The act merely provides a cumulative remedy. Suth. on Stat. Const., § 505, p. 505, and cases cited; 8 Ark. 9; 50 *Id.* 34; 119 Mass. 482.

The giving of a limited jurisdiction to enforce specific performance, etc., of contracts to convey land, entered into by the testator or intestate during life is a subject-matter properly *within* the jurisdiction "pertaining to probate courts" and the "estates of deceased persons," and is not foreign to such jurisdiction. Woerner on Adm. (2 ed. star, p. 350); 5 Sawy. (U. S.) 229; 217 U. S. 331; 53 Atl. 746, 750; 54 *Id.* 938; 51 Me. 423; 82 Pac. 68; 104 N. W. 467; 81 Pac. 334-6; 117 S. W. 730; 89 Pac. 477; 41 N. W. 977; 20 Wall. 375; 128 U. S. 53, 86; 17 Mo. 347; 80 Pac. 38; 20 Ga. 142; 38 Conn. 86; Pom. Spec. Perf., § 497, and others.

2. The contract was enforceable in equity. 66 Ark. 333; 107 *Id.* 473; 81 *Id.* 70.

3. The statute of frauds does not apply and this proceeding is not one within the usual cognizance of courts of equity. 36 Cyc. 543, 758; 20 Enc. Pl. & Pr. 389; 3 Pom. Eq., § 1400.

The probate court has jurisdiction over matters affecting the estates of deceased persons, to the extent prescribed by law. 67 Ark. 522; 123 *Id.* 211, 222; 82 Pac. 68; 61 N. H. 624; 95 N. E. 973; 163 U. S. 625; 94 *Id.* 320; 170 *Id.* 288; 203 *Id.* 552, etc.

4. The defense of the statute of frauds may be waived. 96 Ark. 186, 194; 71 *Id.* 302. A stranger nor a creditor can not plead it. 11 Neb. 222; 49 Tenn. 127; 71 Ala. 202; 72 Ind. 505; 109 Fed. 48. A contract within the statute is voidable only, not void. 15 O. 569, 572; 17 Mo. 347; 18 Pick. 369; 22 Ark. 290; 108 Ark. 80; 84 *Id.* 61; 50 *Id.* 228. An administrator is not bound to plead limitation or the statute of frauds.

5. The statute is not confined to written contracts. See also 1 Fed Cases, 132.

STATEMENT BY THE COURT.

Appellees, as administrators of the estate of D. J. Young, deceased, presented a petition to the probate court of Sebastian County, alleging that D. J. Young, a short time prior to his death, agreed with the Anheuser-Busch Brewing Association (hereinafter for convenience called the association) to convey to it certain real property, describing it, in satisfaction of his indebtedness to it in the sum of $24,154.59. They alleged that D. J. Young was solvent; that the widow and heirs of Young desired to carry out the agreement he made with the association and pursuant thereto had executed a deed conveying the property described in the petition to the association. They set forth that if the real property described in the petition were conveyed to the association in satisfaction of Young's debt to it that there would be ample assets of the estate left for the payment of all other debts and liabilities; that the satisfaction of the debt of Young to the association would be a fair consideration for the real property described in their petition, and they prayed an order of the probate court authorizing and directing them to make the conveyance.

The probate court granted the prayer of the petition and entered an order directing the administrators to execute a deed conveying the property described in the petition to the association in satisfaction of Young's indebtedness to it.

The appellants, who were judgment creditors of the estate of Young, duly prosecuted their appeal to the circuit court, and in that court they demurred to the petition, and also answered denying specifically all of its allegations, and setting up that there was no contract entered into between D. J. Young and the association and no memorandum in writing of the alleged agreement between Young and the association for the conveyance of real property signed by him or any one by him properly authorized. Appellants contended that a conveyance under the order of the probate court would be void under the statute of frauds, and also challenged the jurisdiction of the court to make the order.

It is conceded that there was no written contract between Young and the association by which the former agreed to convey to the latter real estate in payment of a debt. But it was contended by the petitioners that the testimony showed an oral contract with such part performance on the part of the association as would have entitled it to a deed had Young lived. The circuit court so found and entered its judgment affirming the judgment of the probate court directing the petitioners to make the deed. This appeal followed from that judgment. Other facts stated in the opinion.

WOOD, J., (after stating the facts). I. As authority for the probate court to make the order under review, appellees invoke section 213 of Kirby's Digest, which is as follows: "When any testator or intestate shall have entered into any contract for the conveyance of lands and tenements in his lifetime which was not executed and performed during his life, and shall not have given power by will to carry same into execution, it shall be lawful for the executor or administrator of such testa-

tor or intestate, with the approval of the court, in term time, to execute a deed of conveyance of and for such lands pursuant to the terms of the original contract, such executor or administrator being satisfied that payment has been made therefor according to the contract, and reciting the fact of such payment to the testator or intestate, or to such executor or administrator, as the case may be, which deed may be acknowledged and recorded as other deeds, and shall have the same force and effect to pass the title of such testator or intestate to any such lands as if made pursuant to a decree of court."

The Constitution of 1836, under which the above act was passed, conferred upon probate courts jurisdiction "in matters relative to the estates of deceased persons, executors, administrators and guardians, as may be prescribed by law, until otherwise directed by the General Assembly." Const. of Ark. 1836, art. 6, § 10. It was not otherwise directed by the General Assembly until 1873, when a law was enacted conferring on the circuit court "exclusive original jurisdiction of everything properly pertaining to matters cognizable in courts of probate, and all the powers and jurisdiction now possessed by courts of probate." Act of April 16, 1873.*

The Constitution of 1874 confers on the probate court "exclusive original jurisdiction in matters relative to estates of deceased persons, executors, administrators, etc., * * * as is now vested in the circuit court or may hereafter be prescribed by law." Const. 1874, art. 7, § 34.

The statute under review is clearly within the above provision of our Constitution. The statute does not take from chancery courts their ancient jurisdiction to enforce the equitable remedy of specific performance as applied to contracts for the conveyance of real estate, nor does it confer such jurisdiction upon courts of probate. That remedy, as enforced in courts of chancery, contemplates adversary proceedings in which the party who conceives that he is entitled to the remedy of specific performance institutes a suit by a bill in chancery against the recusant

* Act 53, p. 113, Acts 1873—*Reporter.*

party to the contract, praying that he be required to specifically perform the same. 4 Pomeroy's Eq., § 1400; 20 Enc. Pl. & Pr. 389; 36 Cyc. 543, 758.

"In most of the States," says Mr. Pomeroy, "the statutes expressly provide for the case where the vendor dies before completing the contract and leaves heirs or devisees adult or infant. * * * This legislation is of different types. In some States it deals entirely with the suit in equity for a specific performance. In others it provides for a more summary special proceeding by which the contract may be enforced without suit, as a step in the settlement of the deceased vendor's estate. By the common form of this special proceeding, where a vendor who had entered into a written contract, dies before completing the contract, and the party entitled to a conveyance has paid or is ready to pay the purchase price, the probate court which has control of the administration may authorize or order the administrator or executor of the decedent to make the conveyance which the vendor himself should have made had he been alive; and the conveyance so made is declared to have the same force and effect as though it had been executed by the vendor himself." Pomeroy on Contracts, § 497, p. 556.

Our statute takes the form of the special proceeding by which the contract may be performed without suit and as a step in the settlement of the deceased vendor's estate. We must assume that the General Assmbly of 1859 was familiar with our statute of frauds, which was a part of the Revised Statutes of 1837, and with the decisions of this court at that time, holding that notwithstanding the statute of frauds specific performance of an oral contract for the sale of lands could be enforced by a bill in chancery where the party seeking such relief had performed or so partly performed the contract on his part as to make it inequitable or a fraud upon his rights not to grant the relief prayed. Rev. Stat. (1838), chap. 30, § 1; *Keatts* v. *Rector,* 1 Ark. 391; *Underhill et al., Admrs.* v. *Allen,* 18 Ark. 466; *Wynn* v. *Garland,* 19 Ark. 23.

(1) In view of the statute of frauds and these decisions, if the Legislature of 1859 had intended to vest courts of probate with jurisdiction to enforce the equitable remedy of specific performance of contracts for the conveyance of lands it can not be doubted that they would in express terms have authorized the vendee or those in privity of right to institute suit for that purpose in the probate court against the personal representatives of the vendor, his heirs, assigns, or devisees. And the Legislature, in express terms, would have conferred upon the probate court jurisdiction to hear the cause and to determine the same according to the rights of the parties. No such procedure is projected, even in outline, by the language of the act under consideration. It does not provide for an action at all to be instituted in probate court for specific performance. The vendee or those claiming under him are not authorized to file any petition or complaint in the probate court asking for the equitable remedy of specific performance. This act simply confers authority upon the executor or administrator of the testator or intestate, with the approval of the court, to execute a deed of conveyance pursuant to the terms of the original contract with the decedent, where the executor or administrator is satisfied that payment has been made according to the contract. The statute does not give to the purchaser the right to insist that this special proceeding be pursued for his benefit. It is only a license or permission granted by the sovereign power to the executor or administrator to make the deed when he finds certain facts and conditions to exist. The license is to be exercised then only upon the approval of the probate court.

The executor or administrator, who is an officer of the probate court, has in his hands such property of the decedent, real and personal, as is not exempt under the Constitution, for the purpose of the settlement of the debts of the estate, under the orders of the probate court. He may put the statute in motion, and, with the approval of the probate court, is licensed to make the conveyance

as one of the steps in the regular course of the administration of the *res* in his hands for the payment of the debts of the decedent. It would do violence to the language of the act to construe it as expressing an intention upon the part of the Legislature to confer jurisdiction upon probate courts to enforce the equitable remedy of specific performance of a contract to convey real estate.

In the recent case of *Oliver* v. *Routh,* 123 Ark. 189, 196, we held that "the probate court had no power to make an order for specific performance of the contract made by the decedent in his lifetime to convey his homestead to another." In that case we said: "The authority to grant specific performance of an executory contract to convey land against the executor or administrator of a decedent is a special power conferred upon the probate court. It is to be exercised in a special manner, and not according to the course of the common law." In that case it was not necessary to the decision and the court did not have under consideration, and hence did not decide, the question as to whether or not the statute now under review was unconstitutional because it invested probate courts with the jurisdiction exercised by courts of chancery to enforce the equitable remedy of specific performance of a contract for the conveyance of land. True, we there designated the privilege or license conferred by this statute as "the authority to grant specific performance," yet what we decided in that case was that the authority under this statute is a "special power," and not one to be exercised according to the course of the common law, and that the wife had not joined in the contract for the conveyance of the homestead. That decision is not in conflict, but in harmony with our present holding.

(2) Since our Constitution (art. 7, sec. 34) vests courts of probate with exclusive original jurisdiction in matters relative to the estates of deceased persons, executors, administrators, etc., it can not be questioned that the authority or license contained in this statute is peculiarly germane to the jurisdiction so conferred. Thus, by the

organic law, probate courts are made the guardians so to speak, of the estate of deceased persons, and have been given the custody of such estates for the purpose of settling the debts incurred and performing the contracts entered into by the decedent. It is their duty to administer these estates in the most expeditious and frugal manner consistent with the rights and interests of all concerned. The Legislature doubtless had in mind in enacting this law the time and expense usually incident to adversary proceedings in a suit in chancery for the specific performance of contracts to convey lands. Instead of compelling the one entitled to the remedy of specific performance to pursue a circuitous route through the chancery court to obtain such relief, the Legislature adopted the more direct, simple and inexpensive course prescribed by this statute. Thus the summary proceedings authorized by the act of 1859, as one of the steps in the administration, accomplishes the same purpose that would be attained by the equitable remedy of specific performance, but in a manner far more advantageous to the estate.

In *Ferguson* v. *Bell's Admr.,* 17 Mo. 347, 350, the court, concerning similar legislation, said: "Indeed this authority was given to the probate courts to be liberally used and exercised for the speedy execution of such contracts, without the delay and expense usually attending a proceeding in chancery."

And the Supreme Court of California says: "This special statutory remedy would seem to be a wise provision. It evidently tends to save the expense and delay that would follow a separate action in equity for a specific performance." *In re Garnier's Estate,* 82 Pac. 68, 69.

The Constitution of Minnesota vests its probate courts with jurisdiction over the estates of deceased persons. See art. 6, sec. 7, Const. of Minn., Rev. Stat. Minn. 1905, p. 1176. *Frank H. Peterson* v. *Wm. H. Vanderburgh,* 77 Minn. 218.

In re Mousseau's Estate, 41 N. W. 977, the Supreme Court of Minnesota held that a statute similar to the one

under review was valid and appropriate to the administration of estates under their Constitution. Judge Mitchell, in a concurring opinion, spoke of such legislation as appropriate "for the purpose of disposing of the decedent's interest in the land and freeing it from the claims of administration."

We have thus adverted to the wisdom and policy of the statute under consideration for the purpose of showing that as an act providing for one of the steps to be taken in the administration of estates, it does not in any manner conflict with the jurisdiction of courts of chancery to enforce specific performance of contracts, and is not only a valid enactment, but one exceedingly appropriate to the jurisdiction conferred by our Constitution on courts of probate.

Learned counsel for appellants, in their original brief, among other things, say: "The Legislature, by this act, gives to the probate court, which is, in a sense, a court of limited jurisdiction, a special limited jurisdiction to authorize an administrator to convey lands when his intestate has entered into a contract to convey same during his lifetime. * * * The title of the act is 'An Act to enable administrators and executors to make title.' Thus it will be seen that neither in the title nor in the body of this act, upon which appellees must rely, is there any reference to specific performance. * * * It was never intended to vest in the probate court that chancery jurisdiction which, under our statutes, has always been either in our circuit courts, sitting in chancery, or as, since 1903, in separate courts of chancery."

These statements are a correct and accurate characterization of the act and its purpose. But counsel for appellants, in their "Supplemental Brief in Reply" have made an elaborate argument, endeavoring to show that the act under review is unconstitutional, based upon the erroneous assumption that the act does vest probate courts with "jurisdiction of the pure equitable remedy of specific performance." Having reached the conclusion that the act does not vest the probate court with such

jurisdiction, it would be *obiter* to decide whether or not such an act, if it did exist, were constitutional. We therefore pretermit any discussion or decision of the interesting question propounded by counsel, and so exhaustively argued in their "supplemental brief in reply," towit: "Has a probate court, under the Constitution and laws of Arkansas, jurisdiction of the pure equitable remedy of specific performance?"

II. Counsel for appellants also, in their original brief, urge that the statute is applicable only to written contracts. They say, "The only character of contract with reference to lands recognized by our statutes or by courts of law generally are written contracts." Hence, they now contend that the present contract because of the statute of frauds could not be performed by courts of probate.

The jurisdiction conferred on probate courts under our Constitution is general and exclusive in the matters relating to the estates of deceased persons, administrators, executors, etc., and they may determine all issues arising within the sphere of their jurisdiction according to the principles of law involved. If the issue is one that can only be decided correctly by the application of the rules and principles of equity, then the court having plenary power over the subject-matter must so decide it. This special act confers jurisdiction upon the probate court to approve the making of a deed by the personal representative of a decedent, and when it is made, under the direction of such court, it has the same force and effect to pass title as if made pursuant to a decree of court. Therefore, if the approval of the probate court is sought under the statute for permission to make a deed where an oral contract is involved, the court, in deciding the issue, must apply the principles applicable to the performance of such contracts just as they are applied in courts having jurisdiction to enforce the remedy of specific performance. But this power is quite another and different thing from having jurisdiction to hear and determine causes of action cognizable only in courts of chancery.

In *Cresswell* v. *McCaig,* 11 Neb. 222, it is held (quoting syllabus): "The statute of frauds does not render a contract void, but voidable, at the option of either party; but it does not require a party to ignore considerations of moral obligation, equity and good faith by pleading the same, and a creditor can not do so." See, also, *Wright* v. *Jones,* 105 Ind. 17; *Kemp* v. *National Bank,* 109 Fed. 48; *Minns* v. *Morse,* 15 Ohio 569; *Cahill* v. *Bigelow,* 18 Pick. 369.

This court, in *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 186, said: "A parol agreement is neither illegal nor void. A plea of the statute of frauds is a plea or defense which may be waived."

In *Ferguson* v. *Bell's Admr.,* 17 Mo. 347, an infant executed a deed, and after coming of age, expressed satisfaction with her bargain and received part of the consideration and spoke of her intention to make a confirmatory deed, but died suddenly without doing so. The probate court held that sales by infants were not void, but voidable only; that the privilege of avoiding or disaffirming the contract or deed of an infant was one that could be exercised by his personal representative or his privies in blood, but not by his assignees or privies in estate only. The administrator of the infant refused to disaffirm the contract, and the Supreme Court sustained his action, saying: "The probate court of St. Louis County had ample jurisdiction over the whole subject-matter of the petition, and the probate court erred in refusing to order the deed to be made by the administrator upon the proof as preserved by the petitioners on this record."

The general statute of limitations, when set up in actions on contracts to which it applies, is analogous to the statute of frauds. The effect of both alike in actions on contract to which they apply is to bar recovery, though the contract sued on be valid. In one of the earlier cases this court, through Judge Fairchilds, speaking of the statute of limitations, said: "It is an obligation resting upon no man to discharge an honest subsisting debt by the plea of limitations. What would be infamous by a

man when alive can not be commendable or legally binding to be done for him by his representatives when he is dead." *Conway* v. *Reyburn,* 22 Ark. 290. See, also, *Jacoway* v. *Dyer,* 50 Ark. 228; *Williams* v. *Risor,* 84 Ark. 61; *Rhodes* v. *Driver,* 108 Ark. 80.

Honest men are always anxious and willing to perform their contracts when they are able to do so. When death only prevents one from performing a contract, his personal representative is not compelled to set up the statute of frauds to defeat the performance of such contract. To so hold would be to convert a statute which was intended to shield from fraud into an instrument by which fraud could be perpetrated. For, if the personal representative could be compelled to set up the statute of frauds to defeat a contract which the decedent not only intended to perform, but the performance of which could have been enforced, this would be a fraud upon the rights of parties to contracts and perpetrated by the personal representative whose duty it is, as far as possible, to perform those contracts. We can never underwrite such a doctrine.

(3-4) The statute under consideration contemplates that the personal representative of a decedent may, on his own motion, put the same in operation by seeking the approval and direction of the probate court concerning the subject-matter contained in the statute. It necessarily follows that it is not incumbent upon him to set up the statute of frauds. The statute of frauds has no application to proceedings under this statute, for no adversary proceedings are provided for. The personal representative only is authorized to take the initiative and make the deed, and thus perform the contract of the decedent under the statute in those cases, where the conditions exist that render the statute of frauds inapplicable. Where the personal representative of a decedent can not plead the statute, a judgment creditor can not do so, even under the broad provisions of the act of 1909, p. 956. At the time the act of 1859 became a law, oral contracts for the sale of land, as we have seen, were not void, but voidable

only, and the performance of same could be enforced where the conditions essential to such performance existed, notwithstanding the statute of frauds. See *Keatts* v. *Rector; Cahill et al., Admrs.,* v. *Allen; Wynn* v. *Garland, supra.*

Since the Legislature must have known of these decisions, the conclusion is irresistible that if it had intended that the statute should apply only to written contracts, it would have said so in plain terms. We may assume, also, that the Legislature, while they had under consideration the passage of this act, had their attention drawn to similar legislation in other states. At that time our neighbor State of Texas had a similar law, only it specified *contracts in writing.* Now, with such a model before them, if they had intended to limit the operation of the statute to written contracts, they would have followed the model and have put into the statute the words "written contracts." Instead, they have deliberately chosen to write into the act of 1859 the words "any contracts," showing unmistakably an intention not to limit the operation of the statute to written contracts only, but to make it apply to oral contracts as well. At any rate, the language "any contracts" is certainly broad enough to include oral contracts. To construe the statute as meaning only written contracts, would, in effect, change its language by writing into it the word "written" before the word "contract." Where the language of a statute is unambiguous, the intention of the Legislature must be gathered therefrom. If we change it, we thereby encroach upon the peculiar function of the sovereign power lodged in a co-ordinate branch of the Government. Although as individual judges, some of us doubt the wisdom of lodging the important power prescribed by this special statute in probate courts, whose judges are not required to be lawyers, and who may not therefore have the technical knowledge necessary to best determine such an issue, yet it nevertheless appears to a majority of us that the law is so written, hence it must be enforced as enacted.

III. The appellants contend in the last place that the proof is not sufficient to sustain the findings and judgment of the court. The broad language "any contracts" is sufficient to confer jurisdiction upon probate courts over the subject-matter regardless of whether the contract has been partly performed. Whether probate courts would abuse their discretion and commit reversible error in making the order in cases where the contract had not been performed or partly performed by one of the parties to it, does not arise and need not be decided now. For here the contract was sufficiently performed by the association.

(5) The facts briefly stated, are as follows: D. J. Young died February 21, 1915. He was indebted to the association in the sum of $24,154.59. The court found, and there is no evidence in appellant's abstract to the contrary, that his estate was solvent. The association, for some time prior to Young's death, had been pressing him for a settlement. On October 12, 1914, a written agreement was entered into by which Young acknowledged indebtedness to the association in the sum of $25,000, and executed notes in the aggregate for $15,000 of the indebtedness, evidenced by three notes for $5,000, payable at future dates named, with interest, and as security for the payment of these notes at the times mentioned, Young pledged stock in certain corporations shown to be of the face value of $56,700, and to have almost that actual value. Young, in several letters, had offered to settle his indebtedness to the association by a conveyance of unincumbered real estate. Young was also indebted to the First National Bank of Fort Smith, and it held a mortgage on certain of his real estate to secure that indebtedness.

After considerable negotiation, evidenced by letters and as shown by personal interviews, the association accepted Young's proposition and agreed to take real estate in settlement of his debt. They agreed upon the real estate that should be conveyed, which included a part of the real estate of Young upon which the bank had a mortgage. To secure the release of this mortgage, Young and the

bank entered into an agreement whereby the association was to deliver the stock which it held as collateral for Young's debt to the bank, and the bank agreed to take this stock as security for its debt, and in consideration of this stock, to release the real estate from the mortgage included therein, which Young had agreed to convey to the association. This agreement was consummated on the part of the bank, and the association in January, 1915, and was evidenced by written receipt of the bank showing that the association had delivered and it had accepted the stock in pursuance of the agreement.

After the real estate to be conveyed had been definitely agreed upon, Young instructed the representative of the association to draw up the deed, which was done, and was ready to sign two or three days before Young's death. The representative of the association went to Young's residence with the deed for him to sign, but Young was then so near death's door that he was unable to sign the deed.

On April 15, 1915, the probate court ordered the administrators of Young's estate to execute the deed, and thus carry out the agreement entered into between D. J. Young in his lifetime and the association. The deed was executed the 19th day of April, 1915, and was signed by Angie E. Young and J. Ross Young, administrators, and also by Angie E. Young, the widow, and the heirs of D. J. Young, in their individual rights.

The mortgage of the association to the bank was introduced in evidence, showing that it had been filed for record December 14, 1914, and the release of the real estate covered by the three party agreement was endorsed on the mortgage under date of April 27, 1915.

It was shown that as a part of the agreement entered into between Young and the association, the association was to pay the taxes which had accrued on the property, amounting to the sum of $1,409.19. These taxes were not paid by the association until after the probate court had ordered an execution of the deed.

The evidence was sufficient to sustain the finding and judgment of the court. The contract was proved, and such part performance thereof on the part of the association as would have entitled it to have the contract performed by Young had he lived. The surrender by the association of the valuable collateral to the creditor of Young, the benefit of which Young received, in pursuance of the agreement to do so, was sufficient to constitute a part performance. The surrender was irrevocable because the stock had been delivered by the association to, and received by, the bank, and the effect of this transaction, under the agreement, constituted a release of the real estate covered by the agreement and embraced in the mortgage from the time the stock was delivered to and accepted by the bank. The entering of the release or satisfaction upon the mortgage afterward was but an evidence of what, in legal effect, had already taken place. See *King* v. *Williams*, 66 Ark. 333. A more meritorious case for the application of the statute could scarcely be conceived.

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

McCULLOCH, C. J., and HART, J., dissent.

MONTAGUE v. CRADDOCK.

Opinion delivered March 12, 1917.

1. JUDGMENTS—PETITION TO VACATE.—A judgment or decree may, under Kirby's Digest, § 4431, be vacated or modified for fraud or mistake in its procurement, in a proceeding instituted for that purpose in the court in which it was rendered.
2. JUDGMENTS—PETITION TO VACATE—MATTERS TO BE SET OUT.—A party moving to set aside a judgment or a decree rendered against him by default must state his defense and make a *prima facie* showing of merit in order that the court may determine whether he is injured by not being permitted to have the benefit of it.
3. MORTGAGES—RECORD—SUFFICIENCY.—To secure a party his full rights under the State's registry laws, the substantial act to be done is to take the mortgage and cause it to be placed on file for record in the office where such instruments are to be recorded, and when this is done and the mortgage is received by the officer for record, this

is sufficient to effect with notice all who subsequently deal with the property.

4. JUDGMENTS—PETITION TO SET ASIDE—SHOWING OF MERIT.—The party asking that a default decree of foreclosure of a chattel mortgage be set aside, shows merit in his petition when he shows himself to be the holder of a mortgage lien upon the same property, and prior to the lien forclosed.

5. JUDGMENTS—WILL BE SET ASIDE, WHEN.—Where by mistake or fraud a party has gained an unfair advantage in proceedings in a court, which must operate to make that court an instrument of injustice, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus improperly gained.

6. JUDGMENTS—WHEN SET ASIDE—EQUITABLE RELIEF—AGREEMENT TO CONTINUE.—In the application of the principle stated in No. 5, *supra*, an injunction will be granted against a judgment taken in violation of an agreement to continue the case, where there is a good defense to the action.

Appeal from Craighead Chancery Court, Eastern District; *Charles D. Frierson,* Chancellor; reversed.

Baker & Sloan, for appellant.

1. Montague's mortgage was prior in time and duly filed for record with the proper officer and the fee paid. If the recorder failed to record it, or to properly index it or record it, the lien is not affected thereby. 28 Ark. 244; 43 *Id.* 144; 59 *Id.* 280, 291; 69 *Id.* 114, 118. Priority as between two chattel mortgages is determined by the record or the filing thereof. *Murray Co.* v. *Satterfield,* 125 Ark. 85.

2. Needham was a resident of the Western District and the mortgage to appellant was properly filed there. The mortgage to Craddock and Stotts was not filed in the proper district, and was not a lien on the horses. The court had no jurisdiction. Act 61, Acts 1883. The decree was a nullity. Consent can not give jurisdiction. 33 Ark. 31. The complaint determines jurisdiction. 70 Ark. 260; 123 *Id.* 40.

3. At least a legal fraud was perpetrated by taking judgment without notice. Appellant had no notice; he relied on the statements of attorney and had a valid defense. The decree should have been vacated.

Lamb, Turney & Sloan, for appellee.

1. The court did not err in dismissing the bill of review. 21 Ark. 528.

2. If appellant had any remedy, it was by motion to set aside the orignal decree. He was not misled by any statements or acts of attorneys. No agreement was made or shown.

3. The court had jurisdiction of the subject-matter and parties. Acts 1893, 90.

STATEMENT BY THE COURT.

W. S. Montague filed what he terms a bill of review in the chancery court against William Craddock and Taylor Stotts and others to vacate and set aside a decree which had been entered in the same chancery court on October 11, 1915, in an action wherein William Craddock and Taylor Stotts were plaintiffs and Andrew W. Needham, W. S. Montague and others were defendants. The material facts are as follows:

On the 3d day of May, 1915, A. W. Needham executed a mortgage to W. S. Montague and his partner on real estate and on a pair of horses, to secure them for the sum of $325, and the mortgage was filed for record in the recorder's office for the Western District of Craighead County, Arkansas. The land was situated in that district, and Needham, at the time, resided at Nettleton, which was in the Western District of the county. Needham has never paid the mortgage debt. Soon after the execution of the mortgage to Montague and his partner, Needham went to Lake City for the purpose of going into the timber business.

On the 21st day of June, 1915, A. W. Needham executed his note to the Bank of Lake City for $150, due in sixty days, with William Craddock and Taylor Stotts as sureties; and to secure Craddock and Stotts, he gave them a mortgage on land situated in the Western District of Craighead County. He also gave them a chattel mortgage upon two horses, being the same two horses which he had previously mortgaged to Montague. This

mortgage was filed for record in the recorder's office in the Eastern District of Craighead County. Craddock says that Needham was residing there at the time and told him that was his permanent residence. Needham says that he resided in the Western District of the county and was only in the Eastern District temporarily for the purpose of working on the timber contract.

Craddock and Stotts instituted an action in the chancery court in the eastern district of Craighead County against A. W. Needham, W. S. Montague and others, to obtain judgment for the $150, which they allege they had paid to the Bank of Lake City for Needham when his note became due. They asked for a foreclosure of the mortgage on the real estate and also the mortgage on the horses.

A decree was entered of record in the case on October 11, 1915. The decree recites that it was heard upon an agreed statement of facts, the substance of which is stated in the decree. The court found that it was a proceeding to foreclose a mortgage, and that prior to the time of the execution of the mortgage by A. W. Needham to William Craddock and Taylor Stotts, that Needham had executed a mortgage upon the real estate described in the complaint to other persons who had been made defendants in the action, and that this mortgage was a prior lien to that of Craddock and Stotts. The court also found that Needham had executed a mortgage on the horses in question to W. S. Montague and his partner which was prior, in point of time, to the mortgage executed on the horses to Craddock and Stotts. The court further found that the mortgage on the horses to Craddock and Stotts was a superior lien to the mortgage on the horses executed by Needham to Montague; that Craddock and Stotts had discharged the debt of Needham to the Bank of Lake City in the sum of $150 and the accrued interest. Judgment was rendered in favor of Craddock and Stotts and foreclosure of their mortgage on the horses was decreed.

As above stated, Montague subsequently obtained permission and filed what he called a bill of review to va-

cate this decree. The facts above stated were shown on the trial of the case, and it was also shown that the decree in the original case was taken by default.

William Craddock testified that he heard a conversation between Judge Walker, his attorney, and Basil Baker, attorney for Montague; that in the conversation Baker brought up the fact that Montague was feeling sore toward him for having drawn up a mortgage on the same horses that Craddock and Stotts had a mortgage on; that there was no agreement between his attorney and Baker in regard to the presentation of the case to the chancellor in vacation.

Basil Baker stated that the judgment of October 11, 1915, was at an adjourned term of the chancery court, and that he had, before that time, had a conversation with Judge Walker about the case in Mr. Craddock's office; that part of the conversation was in the presence of Mr. Craddock; that he did not make the statement testified to by Mr. Craddock, but did say that Mr. Montague had found some fault with him for the reason that he thought Baker ought to have discovered a former mortgage held by Heath and other parties; that the date of Montague's mortgage showed that it was prior in point of time to the mortgage of Craddock and Stotts, and that Craddock knew of that fact; that he told Judge Walker that he did not believe the chancery court for the eastern district had jurisdiction, because he had brought into court a foreclosure of real estate situated in the western district of the county; that he advised Judge Walker that the case could be taken up at some day that would be agreeable to Walker; that he assumed that on any occasion Judge Walker might wish it they would take up the case; that there was no agreement as to any state of facts upon which the case would be tried; that he did not know the case was going to be presented at the time it was presented; that he was not present at court at the time the case was heard, and that he did not stay away from court because he wished to delay the hearing of the case.

W. S. Montague testified that he had purchased the interest of his former partner in the mortgage; that the mortgage was given to him for the purchase price of the horses, and that no part of it had been paid; that the only agreement he had ever made with Judge Walker was to the effect that anything his attorney did would be satisfactory to him; that he did not know anything about the case being heard when it was heard, and understood that it would not be taken up except upon an agreement between Judge Walker and his attorney; that no agreed statement of facts had been made in the case. Other facts will be stated or referred to in the opinion.

The court denied relief to Montague and confirmed and entered the former decree in the case. From the decree dismissing his petition Montague has appealed to this court.

HART, J. (after stating the facts). (1) Counsel for the plaintiff, Montague, filed what they termed a bill of review, but it was, in effect, a motion under section 4431, of Kirby's Digest, after the expiration of the term, to vacate the decree. The evidence shows that the original decree was not based upon an agreed statement of facts, as it purports to be, but that it was in reality a decree by default. A proceeding seeking the vacation of a default judgment or decree is warranted by section 4431, of Kirby's Digest, and such judgment or decree may be vacated or modified for fraud or mistake in its procurement in a proceeding instituted for that purpose in the court in which it was rendered. *Norman* v. *Cammack,* 105 Ark. 121, and *Dale* v. *Bland,* 93 Ark. 266. Hence it will be readily seen that the petition to vacate the judgment in the present action was more properly a proceeding under section 4431, of Kirby's Digest, and it will be so treated.

(2) A party moving to set aside a judgment or a decree rendered against him by default must state his defense and make a *prima facie* showing of merit in order that the court may determine whether he is injured by not being permitted to have the benefit of it. *Citizens Bank of Lavaca* v. *Barr,* 123 Ark. 443.

The record in the present case shows that the mortgage of Montague was prior, in point of time, to that of Craddock and Stotts. The same pair of horses was included in both mortgages. The mortgage to Montague was executed and filed for record more than a month before the mortgage to Craddock and Stotts was executed. Montague deposited the mortgage in the recorder's office of the district of Craighead County in which Needham at the time resided. It is claimed that the mortgage was recorded on the record for real estate mortgages, and for that reason was not notice to subsequent purchasers. We need not decide that question, for the mortgage was filed in the proper office for record.

(3-4) To secure a party his full rights under our registry laws, the substantial act to be done is to take the mortgage and cause it to be placed on file for record in the office where such instruments are to be recorded, and when this is done and the mortgage is received by the officer for record, this is sufficient to effect with notice all who subsequently deal with the property. *Oats* v. *Walls,* 28 Ark. 244, and *Case & Co.* v. *Hargadine,* 43 Ark. 144. The mortgage to Montague was to secure the purchase price of the horses embraced in it, and the mortgage debt has not been paid. This makes a showing of merit and brings us to the question of whether or not the decree should be set aside for fraud or mistake in its procurement.

(5-6) We think it sufficiently appears from the testimony of Baker that he was misled by the statement of Judge Walker, who was the attorney for Craddock and Stotts. He had a right to assume from his version of their conversation, that the case would not be taken up without notifying him. It appears that he thought that the court had no jurisdiction because an attempt was made to foreclose in the same action a mortgage on real estate which was situated in another district in the same county. He says it was understood that he should be notified when the case was to be taken up and did not appear at the adjourned term because no depositions had been

taken by either party, and he relied upon his understanding that the case would not be taken up without notice to him. He stated that Craddock was only present during a part of the conversation that he had with Judge Walker. Judge Walker was not a witness in the case, and there is nothing to contradict the testimony of Baker. It is true Craddock contradicted his testimony in regard to some other matters which occurred during the conversation, but we do not think there is any contradiction of Baker's testimony with regard to the postponement of the trial. There was no negligence on his part in placing reliance upon the statements made to him, and while we do not think that any fraud was intended to be practiced upon Montague, the result was that Montague was deprived of his right to appear and defend the action, and this constituted a fraud in law. This principle has been recognized in the case of *Lawson* v. *Bettison,* 12 Ark. 401. Relief against fraud in judgment and decrees has also been recognized as a ground for equitable jurisdiction. Where by mistake or fraud a party has gained an unfair advantage in proceedings in a court which must operate to make that court an instrument of injustice, courts of equity will interfere and restrain him from reaping fruits of the advantage thus improperly gained. In the application of the principle, an injunction will be granted against a judgment taken in violation of an agreement to continue the case, where there is a good defense to the action. *Beams* v. *Denham,* 2 Ill. 58; *Moore* v. *Lipscombe,* 82 Va. 546; *Sanderson* v. *Voelcker,* 51 Mo. App. 328; *Brooks* v. *Twitchell,* 182 Mass. 443, 94 A. S. R. 662; see, also, 15 R. C. L. sec. 217, p. 766.

It follows that the court erred in not vacating the decree in the original case. For that error the decree will be reversed and the cause remanded for further proceedings in accordance with this opinion.

WIMBERLY *v.* SCOGGIN, RECEIVER.

Opinion delivered March 12, 1917.

1. DEED—DEED AS MORTGAGE—PROOF.—Equity will permit the introduction of parol evidence to show that a deed, absolute on its face, was in fact intended as a mortgage; but to establish this fact, the evidence must be clear, unequivocal and convincing.
2. CONTRACTS—PROOF OF INTENTION—WHAT MAY BE CONSIDERED.—In order to ascertain the intention of the parties to a contract, courts will consider, besides its written terms, all the circumstances connected with it, such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances verbal or written, as well as the acts and declarations of the parties, and will decide upon the circumstances and the contract taken together.
3. DEEDS—DEED AS MORTGAGE—CONSIDERATION.—Adequacy of the consideration is a circumstance to be considered in determining the question whether the transaction was a sale or a mortgage.
4. DEEDS—DEED AS MORTGAGE.—Under the evidence, *held*, a deed, executed by appellant, was, in fact, intended by the parties to operate as a mortgage.
5. USURY—LOAN OF MONEY.—Under the evidence, *held*, a loan of money from one M. to appellant was usurious and was uncollectible in the hands of the receiver of a corporation to whom M. had assigned the note.

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

Riddick & Dobyns, for T. C. and Jennie Wimberly, appellants.

1. The deed to Morgan was only a mortgage to secure a debt for money borrowed. The loan was usurious and the notes void, even in the hands of an innocent purchaser. 47 Ark. 288; 36 *Id.* 248; 46 *Id.* 50; 53 *Id.* 454; 41 *Id.* 331.

2. Goodbar & Co. had no lien. 40 Ark. 146; 58 *Id.* 252.

W. H. Pemberton, for Goodbar & Co., appellants.

1. The instrument was a deed and not a mortgage. Goodbar & Co.'s attachment created a lien on the land. The finding of the chancellor was not in line with the law as laid down by our Supreme Court. The burden was on Wimberly and the proof must be clear, satisfactory and

convincing. 101 Ark. 611; 165 S. W. 273; 31 *Id.* 163; 78 *Id.* 527; 88 *Id.* 301; *Ib.* 336; *Ib.* 363; 106 *Id.* 166; *Ib.* 583; 109 *Id.* 335; 19 *Id.* 298; 40 *Id.* 140.

2. Wimberly can not claim he signed the deed by mistake. 71 Ark. 185; 105 *Id.* 40; 109 *Id.* 542; 119 *Id.* 553.

Minor Pipkin and *Hal L. Norwood,* for appellees.

1. The testimony is not clear and convincing that the deed was intended as a mortgage. 101 Ark. 611; 75 *Id.* 551; 8 *Id.* 336; *Ib.* 229; 78 *Id.* 527.

2. The contract was not usurious. But, if so, there was nothing to put Scoggin on notice. 27 Cyc. 1024.

Riddick & Dobyns, in reply.

1. The proof is clear and convincing that the deed was intended as a mortgage. 13 Ark. 112; 15 *Id.* 280. If there was a doubt, the court should construe the instrument to be a mortgage.

2. The loan was usurious, and the instrument void, even in the hands of an innocent purchaser. Kirby's Digest, § 5390; 41 Ark. 331, 340; 54 *Id.* 572; 39 *Cyc.* 1690-1; 23 Pac. 462.

HART, J. The American Freehold Land Mortgage Company of London, Limited, instituted this action in the chancery court against T. C. Wimberly and Jennie Wimberly, his wife, to recover judgment for the balance alleged to be due them and to foreclose a mortgage on land given to secure the debt.

A. H. Scoggin, receiver of the Egleton Lumber Company, intervened in the action and set up that he sold Ezra J. Morgan some of the assets of the lumber company, and on May 21, 1913, received certain notes executed by Thomas C. Wimberly to E. J. Morgan as collateral security therefor. He alleged that Wimberly sold the land to Morgan, and that there was a resale of the land by Morgan to Wimberly, and that the notes were given by Wimberly to Morgan as part of the purchase money of the land. He prayed that he be permitted to pay whatever judgment that might be rendered in favor of the mort-

gage company, and that he be subrogated to all the rights of the mortgage company, and that he have an enforcement of the lien of Morgan against Wimberly on the purchase money notes given by the latter to the former.

Goodbar & Co. also filed an intervention in the action. It stated that on May 27, 1914, it filed suit in the Pulaski Circuit Court against Ezra J. Morgan, and obtained a writ of attachment which was levied upon the lands involved in this suit; that on October 21, 1914, judgment was rendered in its favor against Morgan in the sum of $471.53. The hearing of the attachment branch of the case was continued to November 3, 1914, at which time the attachment was sustained by the court, and it was ordered that the lien of said attachment take effect from and after date of the issuance and levy on May 27, 1914. The prayer of the complaint was that it should be declared a superior lien to that of A. H. Scoggin, receiver, etc., and that its lien be declared second only to that of the mortgage company.

The defendants, T. C. Wimberly and Jennie Wimberly, filed an answer in which they admitted the debt to the mortgage company, and that its mortgage was a valid lien on their land. They denied, however, that the land had been sold by them to Ezra J. Morgan, and set up that the deed to him, though absolute in form, was only intended to secure a loan of money made by Morgan to Wimberly. They also pleaded that the mortgage debt to Morgan was usurious and void. They prayed that the interventions of Scoggin, as receiver, and of Goodbar & Co., be dismissed; that the notes executed by Wimberly to Morgan be cancelled and the transaction between them be declared a mortgage.

The court found that Wimberly owed the mortgage company the sum of $879.45 with interest from July 1, 1916, until paid at the rate of 10 per cent. per annum, and the mortgage on the land was ordered foreclosed. The court also found that the deed executed by Wimberly and wife to Morgan and the contract of sale from Morgan back to Wimberly was only a mortgage to secure the amount

of money loaned Wimberly by Morgan. The court further found that Morgan transferred to Scoggin, as receiver, the notes of Wimberly to secure the payment of an amount due by Morgan to the receiver. The court further found that Morgan never paid off the plaintiff's mortgage as he agreed to do and that the sum of $877.45 should be deducted from the amount of the notes of Wimberly held by Scoggin, as receiver. It was decreed that Scoggin, as receiver, should recover from Wimberly the sum of $1,611.77 with interest from that date at 10 per cent. per annum, and that there should be a lien upon the lands involved in this suit to secure the payment thereof subject to the debt of the mortgage company.

The cross-complaint of Goodbar & Co. was dismissed for want of equity. The defendants, T. C. Wimberly and Jennie Wimberly and Goodbar & Co. have appealed. The material facts are as follows:

T. C. Wimberly is a colored man, and in 1901 owned eighty acres of land on the Arkansas River, in Pulaski County, not far from Little Rock. On the 20th of March, 1901, he mortgaged his land to the American Freehold Land Mortgage Company of London, Limited, for $1,304, to be paid in yearly payments of $100 each. He kept up his payments for several years, but finally got behind. In February, 1912, he owed the mortgage company $839.77, which he was unable to pay, and the mortgage company threatened him with foreclosure proceedings. There was also a judgment against him in the Pulaski Chancery Court in the sum of $544.10, and there were levee taxes due on the lands to the amount of $183. Being unable to pay these amounts, on the 26th day of February, 1912, Wimberly went to the office of Walter J. Terry in Little Rock, to seek his assistance in borrowing money to meet these obligations, and also an additional amount of $100 with which to make a crop. Terry had been the attorney of Wimberly in the past, and was also the attorney for the Southwestern Telephone & Telegraph Company. This company had just purchased the telephone lines of another company, and Ezra J. Morgan had received as com-

missions for making the sale, between fifty and sixty thousand dollars. He came into Terry's office while Wimberly was there. Terry suggested that Morgan might lend Wimberly sufficient money with which to meet his obligations. The result of the transaction was that Wimberly and wife executed a deed to Morgan to the eighty acres of land above referred to, and Morgan advanced him $835 in money. A written contract was then entered into between them, whereby Morgan agreed to convey the land back to Wimberly in consideration that Wimberly should execute to him one note for $335 due and payable December 1, 1912, with interest at the rate of 10 per cent. per annum from date until paid, and eleven notes for $270 each, one due every year for the eleven years. These notes were to bear interest at the rate of 10 per cent. per annum from maturity until paid.

W. J. Terry testified that he had known Wimberly for twenty years, and that he was a reliable old negro; that he had assisted him in looking after his business; that the mortgage company was threatening foreclosure proceedings; that he remembers the transaction between Morgan and Wimberly; that the reason he remembers it so well is that his telephone company had purchased property from another telephone company by which Morgan had made fifty or sixty thousand dollars in procuring the sale; that it was explained to Morgan that Wimberly would need $1,674.79, which included the debt due by Wimberly to the mortgage company; that Morgan agreed to pay off the debt of the mortgage company and also to advance Wimberly the amount necessary to pay off the judgment against him, the levee taxes, and one hundred dollars with which to make a crop; that the amount so advanced was $835; that to secure Morgan, it was agreed that Wimberly and his wife should deed to Morgan the eighty acres of land in controversy, and that at the same time Morgan should enter into a written contract of sale with Wimberly, whereby he agreed to convey the land back to him upon the repayment of the money loaned by him to Wimberly, and of the amount which he should pay

to the mortgage company to secure the release of the mortgage which it held on the land; that he, Terry, did not have time to draw up the instruments of writing necessary to carry out the agreement of the parties, and that his partner, John P. Streepey, was called in, and the agreement was stated to him. Streepey prepared the deed from Wimberly and wife to Morgan, and the contract of re-sale from Morgan to Wimberly. He said it was the intention to calculate in advance the interest which would become due on all the notes, and add it to the principal, and for this reason the notes should only bear interest after maturity.

Streepey testified that he prepared the papers according to directions, and stated that his understanding was that the transaction was intended to be a loan from Morgan to Wimberly.

Wimberly testified in his own behalf, and in all respects corroborated the testimony of Terry. He further stated that he paid the $335 note and the accrued interest to Morgan at the time it became due, and that he paid two of the $270 notes about the time they became due; that he thought that Morgan had paid off his debt to the mortgage company until about two years afterward; that when he found out Morgan had not done this, he filed his contract for record on July 2, 1914; that his land was worth $5,000, and that he had been offered $4,000 for it a good many times. The record shows that Wimberly received $835 from Morgan, and that Morgan did not pay off Wimberly's debt to the mortgage company.

Morgan testified that he bought the land from Wimberly subject to the mortgage on it, and that he paid him therefor $835. He stated that nothing was said about a re-sale until after he had purchased the land from Wimberly; that the question of re-sale came up then, and he agreed to sell it back to him for the amount stated in the written contract. His testimony flatly contradicted the testimony of the witnesses for Wimberly.

(1) While a deed absolute on its face is presumed to be an absolute deed, equity will permit parol evidence

to be introduced to show that it was intended as a mortgage; but to overcome the presumption of law, and establish the character of a mortgage, the evidence must be clear, unequivocal and convincing. *Hays* v. *Emerson,* 75 Ark. 551; *Rushton* v. *McIllvene,* 88 Ark. 299, and *Gates* v. *McPeace,* 106 Ark. 583.

Tested by this rule, the finding of the chancellor that the deed of Morgan to Wimberly was intended as a mortgage, and not as an absolute conveyance, is sustained by the evidence. It is true that according to the testimony of Morgan himself, the transaction was an absolute sale, but Morgan is flatly contradicted, both by Terry and Wimberly, as well as from circumstances in the case. It is pointed out that there are some inconsistencies in the testimony of Streepey. These alleged inconsistencies are clearly shown to have been due to the witness not having a clear recollection of the matter when he first testified. His testimony was taken several years after the transaction occurred, and when he refreshed his memory by looking over some letters and other files in his office, his testimony is consistent in itself and tends to corroborate the testimony of Terry and Wimberly.

All that Morgan ever gave Wimberly was $835, and that was paid out by Streepey as follows: $544 was applied to cover a judgment against Wimberly in the circuit court; $4.50 to cover abstract expenses; $183 for delinquent levee taxes; $63.40 paid to Wimberly in cash and $40 of it was paid to Terry's firm for their services. Morgan never did pay off the debt to the mortgage company.

(2) For the purpose of ascertaining the true intention of the parties, it is a well established rule, that courts will not be limited to the terms of the written contract, but will consider all the circumstances connected with it; such as circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances verbal or written, as well as the acts and declarations of the parties, and will decide upon the contract and the circumstances taken together. *Scott* v. *Henry,* 13 Ark. 112.

(3) In a case note to 20 A. & E. Ann. Cas., at page

1199, numerous decisions are cited to the effect that the adequacy of the price has been recognized as a circumstance to be considered in determining the question whether the transaction was a sale or a mortgage. Several decisions there are also cited to the effect that gross inadequacy of price is given great weight in determining the question whether the transaction was intended as a sale or a mortgage.

(4) According to the testimony of Wimberly, himself, his land was worth $5,000, and he had been offered $4,000 for it a number of times. No attempt was made to contradict his testimony in this respect. The fact is undisputed that he went to the office of Terry, who had been in the habit of attending to his business for him, for the purpose of borrowing money to pay off the mortgage on his land, as well as to pay his other debts. He resided on the land, and it was not subject to the payment of any of his debts without his consent, except the debt of the mortgage company. His land could only have been sold for the purpose of paying that debt. It is true he wished to pay his other debts, but his land could not have been sold against his will for the purpose. Indeed, the whole amount of his debts was only about one-third of the value of his land. He readily entered into the agreement with Morgan without making any further attempt to borrow money. Therefore, under all the facts and circumstances introduced in evidence, we think, as above stated, the chancellor was right in holding the transaction to be a mortgage, and not an absolute sale of the land.

(5) We think, however, the chancellor erred in not sustaining Wimberly's plea of usury. The total principal which Morgan agreed to lend Wimberly was $1,674.79. $835 of this was furnished in cash, and the balance was to be paid toward the satisfaction of the debt of the mortgage company. Wimberly executed to Morgan one note dated February 27, 1912, and payable December 1, 1912, with interest at 10 per cent. per annum from date until paid, and eleven notes for $270 each, dated on the same day, and one payable on the 1st of December of each year

for eleven years, with interest from maturity. It is perfectly evident that this amounted to more than 10 per cent. interest on the amount of money which Morgan agreed to furnish Wimberly. According to the testimony of the witnesses for Wimberly, it was Morgan's intention to do this, and Morgan prepared the amount and number of notes which were recited in the contract. The notes and contract, being usurious, were void in the hands of Scoggin, as receiver. *German Bank* v. *Deshon,* 41 Ark. 331.

Moreover, the notes which Wimberly executed to Morgan, referred to there being a series of notes mentioned in the contract of the same date. They thereby became a part of the contract itself, and inasmuch as we have held the transaction to be a mortgage, the notes would be subject to the same defenses in the hands of Scoggin that they would have been in the hands of Morgan. Morgan only advanced $835 on the transaction. The proof shows that $40 of this was paid to Terry's firm for legal services by agreement, and this left $795, which went into the hands of Wimberly. Wimberly paid to Morgan the $335 note with accrued interest when it was due, and two of the $270 notes about the time they became due. So that it will be seen that he paid back to Morgan more than he received from him with interest on the same.

Having held that the transaction between Wimberly and Morgan was a mortgage, and not an absolute sale, it follows that the land did not belong to Morgan, and that Goodbar & Co. did not acquire any lien on the land by virtue of its attachment.

It follows that the chancellor erred in not sustaining Wimberly's plea of usury, and in rendering judgment in favor of Scoggin, as receiver, against Wimberly. The decree, will, therefore, be reversed, and the cause remanded for further proceedings in accordance with this opinion.

ARKANSAS NATIONAL BANK *v.* STUCKEY.

Opinion delivered March 12, 1917.

1. APPEAL AND ERROR—REVERSAL AND REMAND OF CAUSE WITH DIRECTIONS.—Where a cause is appealed from the chancery court, the decree of the chancellor carrying a lien in favor of the appellee and the cause is remanded with directions, the lien of the former judgment is not displaced nor held in abeyance until the decree upon the mandate is entered.
2. APPEAL AND ERROR—REVERSAL AND REMAND—NEW ISSUES.—Where a decree is reversed and remanded with directions, the lower court cannot re-open the case for the consideration of a question which was, or should have been, considered on the first appeal.

Appeal from Washington Chancery Court; *Hugh A. Dinsmore,* Special Chancellor; reversed.

O. P. McDonald, for appellant.

1. The chancellor erred in declining to spread of record the appellant's judgment entry, and in reversing the whole case and destroying appellant's lien. 121 Ark. 302. This case on the first appeal settled the issues between appellant and Stuckey. 29 Ark. 83; 61 *Id.* 189; 67 *Id.* 339; 105 *Id.* 205.

The case 54 Ark. 239, does not apply, but 100 Ark. 384, 394-5, is in point. 78 Ark. 208; 38 *Id.* 394. The question now is, what did this court intend to do in handing down its former opinion, and what can and should it do now? 148 U. S. 228-9, 230-1, 238, 240-1; 160 *Id.* 247; 148 *Id.* 247; 195 *Id.* 605.

This court will construe its own mandate and opinion. 94 Ark. 333.

2. The court erred in allowing the $113.40 stenographer's fees. 51 Ark. 380, 384; 121 Ark. 302. It was error to re-open the case and determine new questions. 94 Ark. 330; 79 *Id.* 194; 60 *Id.* 50; 21 *Id.* 197. The decree ordered by the mandate of this court should be entered and appellant's lien be preserved and enforced as requested below.

E. P. Watson and *John Mayes,* for appellee McIlroy Banking Company.

1. There is no error in the decree. The chancellor did not render a decree that is in violation of the mandate and opinion of this court on the former appeal. It is plain and unambiguous, and the chancellor did as this court directed. 139 Cal. 298; 223 Ill. 454; 114 Am. St. 336; 86 Pac. 15; 54 Ark. 239; 47 *Id.* 301; 86 *Id.* 90; 11 Enc. Pl. & Pr. 1076-7.

In chancery cases, this court tries the case *de novo* and renders such judgment as it sees proper, or directs the court below to do so. This was done when the case was here before, and the court below followed the mandate.

2. The $113.40 stenographer's fee was allowed as costs. Plaintiff's lien was not destroyed. There are no errors in the decree.

SMITH, J. The Arkansas National Bank sued W. L. Stuckey, and attached certain property belonging to him. The McIlroy Banking Company and a Doctor Welch, to whom Stuckey was also indebted, were made parties defendant, and there was a prayer, as against them, that they be required to sell the property against which they had liens, to secure their respective debts, and that any excess be impounded and applied to the payment of the debt due the plaintiff bank. Stuckey answered, admitting the indebtedness sued on, but claimed a credit for an attorney's fee, which the bank refused to pay, on the ground that it was excessive. Stuckey also denied the existence of grounds for attachment, and prayed judgment for damages which he claimed he had sustained from its issuance and levy on his property. The court below reserved its decision in the matter of requiring the McIlroy Banking Company to foreclose its lien, but ordered the foreclosure of the deed of trust held by Doctor Welch, with directions that, in satisfaction of the deed of trust, the portion of the land which did not include the homestead be first sold, and that the excess, if any, be brought into court for distribution under the orders of the court. The court allowed Stuckey the attorney's fee claimed by him,

and assessed certain damages in his favor on account of the wrongful levy of the attachment, but credited the sums of money thus allowed against the debt due by Stuckey to the bank, and gave judgment against Stuckey for the balance. Both parties appealed to this court, and the opinion was rendered in the case on November 29, 1915, which is found in 121 Ark., at page 302.

It was there said: "We have held that the decision of the chancellor dissolving the attachment is not against the weight of the evidence, and that his decree in that respect should not be reversed. Therefore, the property of the defendant Stuckey is released from any lien under the attachment. The chancellor rendered judgment against Stuckey for the amount due by him to the bank. His decision in this respect was correct, and under section 4438, of Kirby's Digest, the judgment was a lien on the lands of the defendant in Washington County from the date of the rendition of the decree. * * * The result of our views is that the court correctly found the amount due the plaintiff bank and the amount due Doctor Welch. The defendant (Stuckey) was only entitled to recover $250 and the accrued interest as damages, and $150 and the accrued interest as attorney's fees for services rendered, as indicated in the opinion."

The cause was reversed, with directions to the court below to enter a decree in accordance with the opinion, which, as appears from the above statement of facts, resulted in increasing the amount of the judgment in favor of the bank against Stuckey. A decree was rendered on this mandate, which was sent down to the court below on June 5, 1916.

In the meantime, however, a judgment had been rendered in favor of the McIlroy Banking Company for the amount of the debt due it, and, proceeding under this decree, property upon which it had a lien was sold, together with other property upon which there was no lien except that fixed by the judgment in its favor. Independent litigation grew out of that judgment, which forms the sub-

ject-matter of another appeal to this court, which will be disposed of in the opinion in that case.

(1) In the decree on the mandate, the court adjudged the indebtedness between the parties in accordance with our former opinion, except that it allowed Stuckey $113.40 as stenographer's fees for taking depositions in the original cause, and entered a decree for the balance as if the cause had been tried anew, to which action the bank, at the time, excepted, "for the reason, among others, that this decree, in effect, releases, destroys and supersedes the former judgment and decree which was awarded plaintiff in the original decree, and is not in conformity with the mandate of the Supreme Court, and for the reason that it destroys plaintiff's former judgment and lien, and fails to affirm the judgment and lien against Stuckey and his land." It is conceded that the decree upon the mandate displaces the judgment lien which the bank had prior to the former appeal, and subordinates the judgment lien which it now has to the lien of the McIlroy Banking Company, acquired under its judgment rendered during the pendency of the former appeal. In other words, the question is, whether or not the reversal of the former decree displaces the lien of that judgment and held it in abeyance until the decree upon the mandate was entered, during which time the decree of the McIlroy Banking Company was rendered.

It will be borne in mind that it was not questioned, in the former opinion, that the bank was entitled to a judgment against Stuckey. The only question considered was the amount for which judgment was to be rendered, and the effect of our opinion was to increase this amount, and the cause was remanded with directions to the court below to enter a decree which increased the amount of the judgment against Stuckey. This decree could have been rendered here, but the cause was remanded because of the directions there contained in regard to the enforcement of the lien of Doctor Welch.

The former opinion called attention to the fact that the bank had a lien upon the lands in Washington County

under section 4438, of Kirby's Digest, which dated from the date of the rendition of the decree. It would be an anomalous result if, after so deciding, and the statute expressly so provides, we should further adjudge that the error of the court below consisted in not awarding judgment for the amount actually due, and should remand, with directions to increase the amount of the judgment, that this lien, given by the statute, should be displaced by a judgment which had been recovered while the orders of this court were being executed. A very similar question was involved in the case of *Gaines* v. *Rugg,* 148 U. S. 228, in which case it was said:

"It (Supreme Court of the United States) did not disturb the findings and decree of the circuit court in regard to the title and possession, but only its disposition in the matter of accounting. The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect to the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance in all other respects."

The action of the court below is defended upon the authority of the case of *Millington* v. *Hill,* 54 Ark. 239. That case, however, is not authority for the position. The opinion there points out the fact that the contention was there made that the judgment of this court in that cause on the first appeal was not a judgment of reversal, but was a modification only. The court said, however, that the language of the decree did not warrant such a conclusion. The court had held that the judicial sale under which a party claimed was void, and had ordered that it be "vacated and set aside." Such an order, of course, was not a mere modification.

The record in the instant case does not present the question of the effect of a decision of this court holding that error had been committed in the determination of the question of liability of the appealing party, and the remand of the cause to ascertain and adjudge that question pursuant to principles announced by us. Both the question of liability, and the amount of that liability, were

determined in the former decision, and the cause was remanded with directions to the court below to enter a decree accordingly.

Under such conditions it can not be held that the prevailing party, by winning his case here, lost the security which he would have had, had he not been successful in the prosecution of his appeal.

(2) We are of opinion, also, that the court erred in allowing Stuckey as damages upon the dissolution of the attachment, the stenographer's fee. Any question of this kind should have been raised at the first trial, when the court was adjudging the damages upon the dissolution of the attachment, and upon this first appeal we undertook, upon the trial here *de novo,* to adjudge all those questions, and we did so, insofar as they were presented by the record before us at that time, and we remanded the cause with specific directions to the court to enter a decree in accordance with the directions there given, and the court below should not have reopened the case for the consideration of any question which was, or should have been, adjudicated upon the first appeal.

It follows, therefore, that the decree of the court below must be reversed, and the credit allowed Stuckey, on account of the expenditure for stenographic services, will be disallowed, and the cause will be remanded with directions to the court below to enter a decree in accordance with this opinion.

HUMPHREYS, J., disqualified below, did not participate here.

ARKANSAS NATIONAL BANK *v.* McILROY BANKING COMPANY.

Opinion delivered March 12, 1917.

1. APPEAL AND ERROR—JURISDICTION OF TRIAL COURT AFTER APPEAL.—Where a trial court renders a final judgment and an appeal is prosecuted to the appellate court, the trial court is without jurisdiction to render a further judgment concerning the subject matter of the litigation.
2. APPEAL AND ERROR—SALE OF STOCK HELD AS SECURITY—RIGHT TO OBJECT.—One S. was indebted to appellant and to appellee, the

latter holding certain shares of stock as security for its debt. *Held,* where the shares of stock held by appellee were sold under order of the court in an action in which appellant had sued both S. and appellee, and in which appellee had filed an answer and cross-complaint praying that it be done, and where appellant's counsel was present when the order was made, that appellant could not later object, and ask that the sale of the stock be made a second time in a separate action against appellee.

Appeal from Washington Chancery Court; *Hugh A. Dinsmore,* Special Chancellor; affirmed.

O. P. McDonald, for appellant.

1. The chancellor had no jurisdiction, either of the subject-matter, or the parties on May 22, 1915. The appeal suspends all action in the lower court and the case was absolutely removed to the higher court. 29 Ark. 97; *Ib.* 321-2; 84 *Id.* 213; 93 *Id.* 223; 2 Cyc. 908; 20 *Id.* 1240; 26 Ark. 414; 88 *Id.* 329; 37 *Id.* 318; 38 *Id.* 394; 20 Enc. Pl. & Pr. 1245-6-7.

2. Appellant had a first and prior lien on all of defendant's property, and the judgment was void and a sale would cloud plaintiff's title. 30 Ark. 594; 48 *Id.* 331; 33 *Id.* 778; 37 *Id.* 511; 39 *Id.* 196; 37 *Id.* 646; *Ib.* 511, 516; 97 *Id.* 135; 87 *Id.* 85; 85 *Id.* 5, 6, 8. The judgment was subject to attack collaterally. 101 Ark. 391; 105 *Id.* 89; 91 *Id.* 528.

3. The sheriff should have been required to sell as a junior lien holder. The order declining to subject the collateral stock was appealable.

4. No crossbill had been filed by the bank. Appellant was entitled to special equities by reason of its vigilance. It was error to assess all costs against appellant. There is not a word of proof that appellant was present as a party. Consent can not give jurisdiction. 90 Ark. 198; 34 *Id.* 399; 70 *Id.* 347.

5. One who first brings suit in equity acquires the first lien. 67 Ark. 325, 630, 640; 81 *Id.* 439; 105 *Id.* 202, 205.

E. P. Watson and *John Mayes,* for appellee, McIlroy Banking Company.

1. The appeal is not perfected until the transcript is filed in the Supreme Court. 72 Ark. 475; 88 *Id.* 391. The court below had jurisdiction to proceed with the cause until the Supreme Court acted on motion or otherwise. 54 Ark. 353.

2. The order of the chancellor was not appealable. It was not a final order. Kirby's Digest, § 1188. The decree retained the cause for future judicial determination. 2 Enc. Pl. & Pr., p. 66, note 2; 4 Ark. 255; 52 *Id.* 224; 54 *Id.* 79; 122 *Id.* 151; 92 *Id.* 173; 80 *Id.* 563. There was nothing to appeal from.

3. The judgment of May 22, 1915, is *res adjudicata.* Appellant had notice and was not damaged. It can not attack the judgment collaterally. 122 Ark. 72; *Ib.* 252; 95 *Id.* 302. No valid defense is alleged. 54 Ark. 341; 83 *Id.* 21; 89 *Id.* 163; 95 *Id.* 302.

4. The judgment recites, "All parties at interest being present," etc., and "by consent this cause is submitted," etc. This is conclusive. A corporation can not appear except by attorney. 2 Enc. Pl. & Pr. 669; Fletcher on Eq. Pl. & Pr. 217; Barb. Ch'y Prac. 87, 212-13; 172 Ill. 386; 50 N. E. 194; 31 Cyc. 521. All presumptions are in favor of the regularity of the decrees and orders of courts of superior jurisdiction. 50 Ark. 338; 57 *Id.* 628; 61 *Id.* 464; 75 *Id.* 176; 68 *Id.* 211. The burden was on appellant to show it was not present and has failed.

5. A cross-complaint was filed. The records and recitals show it.

6. The reversal of the judgment and decree for appellant in case against Stuckey destroyed its lien. 3 Corp. Jur. 1263, 1374; 54 Ark. 239; 17 A. & E. (2 ed.), 807; 86 Pac. 15; 4 Corp. Jur., p. 1181, § 3214. On remand of the cause, it was the duty of the court to comply with the mandate. 60 Ark. 50.

7. Plaintiff had full opportunity to purchase the stock, but declined to do so. Plaintiff's complaint was properly dismissed.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Washington County by appellant Ark-

ansas National Bank, to annul a decree rendered by said court in favor of appellee McIlroy Banking Company against W. L. Stuckey. The facts concerning the litigation in which said decree was rendered are set forth in the opinion of this court on a former appeal in the case of *Arkansas National Bank* v. *Stuckey,* 121 Ark. 302, and on the second appeal of said cause decided this day, *infra,* page 76. McIlroy Banking Company held, as a pledge from Stuckey, certain shares of stock in the Ozark White Lime Company (a domestic corporation) of the par value of $17,400, and was made a party defendant in the suit of Arkansas National Bank against Stuckey, and the prayer of the complaint was that McIlroy Banking Company be required to sell said pledged stock, and the surplus proceeds of the sale, if any, be applied on the claim of Arkansas National Bank against Stuckey. McIlroy Banking Company filed an answer in that case, admitting that it held the shares of stock in said corporation as a pledge, and set forth the amount of the debt of Stuckey to secure which the pledge was made. The answer concluded with the following statement and prayer: "And it tenders said collateral to said bank if it will pay said sum and interest, and then prays for all equitable relief."

The decree in the case of Arkansas National Bank against Stuckey was rendered on March 12, 1915, and there was a decree in favor of *Arkansas National Bank* v. *Stuckey* for recovery of a certain amount, but the attachment in the case was dissolved and an appeal was prosecuted to the Supreme Court. The chancery court entered no decree or order with respect to requiring McIlroy Banking Company to sell the pledged stock, but there was a recital in the decree showing that that question was left undetermined and was reserved for further adjudication. The decree now sought to be annulled was rendered on May 22, 1915, in favor of McIlroy Banking Company against W. L. Stuckey, and the contention of appellant is that on account of the appeal to the Supreme Court, the chancery court was without jurisdiction to proceed any further in the cause. It is also contended that the state of

the pleadings at that time did not warrant the court in granting affirmative relief to McIlroy Banking Company against Stuckey. The well-settled rule is, of course, that where a trial court renders a final judgment and an appeal is prosecuted to the appellate court, the trial court is without jurisdiction to render a further judgment concerning the subject-matter of the litigation. The fact is, however, in the present case, that the court had not adjudicated any matter which concerned the rights of the McIlroy Banking Company, but expressly reserved the decision of that issue in the case. The appeal from the decree settling the issue between the Arkansas National Bank and W. L. Stuckey did not have the effect of suspending the jurisdiction of the court over the issue between appellant and McIlroy Banking Company. The court having reserved those issues from the adjudication, it could take them up for decision at any time.

There is a sharp conflict in the testimony as to the circumstances under which the decree in favor of McIlroy Banking Company against Stuckey was rendered. That decree was for the recovery by McIlroy Banking Company from W. L. Stuckey of the sum of $7,375.64, and the clerk of the court, as commissioner, was directed to sell said pledged stock at public auction, upon notice, for the purpose of paying off said indebtedness to McIlroy Banking Company, and the court directed said commissioner to pay McIlroy Banking Company out of the proceeds of said sale, and that the surplus, if any, be held subject to the further order of the court. The clerk, as commissioner, carried out the order of the court by selling the pledged shares of stock, and McIlroy Banking Company became the purchaser of said shares at the price of $5,000, and credited the same on its decree, leaving a balance of $2,375.64 unpaid on the decree. The McIlroy Banking Company then caused an execution to be issued and levied on certain real estate and on shares of stock owned by Stuckey in another corporation. The decree recited that it was rendered upon the cross-complaint of McIlroy Banking Company against Stuckey, but the con-

tention of appellant is that there was no cross-complaint filed and no pleading at all filed by McIlroy Banking Company except the answer hereinbefore mentioned. The evidence also shows that the attorney for the appellant was present at the time of the rendition of decree of McIlroy Banking Company against Stuckey, and that no objection was made. There is, as stated before, a sharp conflict in the testimony, but we are of the opinion that the finding of the special chancellor who heard this cause that there was a cross-complaint filed by McIlroy Banking Company, and that the attorney for appellant Arkansas National Bank was present at the rendition of the decree, was not against the preponderance of the evidence. It is by no means clear that it was essential to the jurisdiction of the court that an additional cross-complaint should have been filed. The answer of McIlroy Banking Company contained a prayer for relief in response to the complaint of appellant Arkansas National Bank demanding that it bring into court its shares of stock that the same might be sold. The record shows that before the decree was rendered in favor of McIlroy Banking Company, Stuckey entered his appearance to the cross-complaint, and even if it be found that no additional pleading was filed by the McIlroy Banking Company, it would seem that a decree in its favor against Stuckey was justified.

The decree compelling a sale of the shares of stock for the purpose of satisfying the debt of McIlroy Banking Company for which the pledge was given was precisely what the Arkansas National Bank, as plaintiff in that suit, had demanded in its complaint and its rights were not prejudicially affected by that decree. It is true that appellant's complaint against McIlroy Banking Company and Stuckey asked that a lien be decreed in its favor on the surplus proceeds after the payment of the debt of McIlroy Banking Company, but the terms of the decree rendered in favor of the McIlroy Banking Company did not conflict with the rights asserted by appellant, for the commissioner was directed to hold the surplus, if any, subject to the further order of the court.

However, we think that the court was justified in finding from the evidence that the additional cross-complaint was filed by McIlroy Banking Company, and that Stuckey, through his attorney, entered appearance. The court having jurisdiction to render the decree, the only further question in the case is whether or not any advantage was taken of the appellant in the rendition of the decree at that time. Certainly there could have been no advantage taken if the attorney for appellant was present and decree rendered without objection on his part, and that is what the special chancellor found from the testimony, which we think does not preponderate against that conclusion.

The effect of that decree was to settle an issue which had been expressly reserved by the court for further consideration and as the decree did not prejudicially affect the rights of appellant, it is difficult to see how it can now complain in a separate action seeking to annul the decree. It is not contended that there was any unfairness about the sale of the stock made by the commissioner, and the sale was duly confirmed upon the report of the commissioner, and that matter is eliminated from the consideration of the case.

The question of priority of liens of the respective decrees in favor of the Arkansas National Bank and McIlroy Banking Company was discussed in detail and decided in favor of the former in the opinion of this court delivered today in the other case, and that question can not be disposed of in the present case, which is merely an attack on the validity of the decree itself. We find no error in the proceedings, and the judgment is affirmed.

HUMPHREYS, J., disqualified and not participating.

HIGHTOWER v. SHOLES.

Opinion delivered March 12, 1917.

EVIDENCE—CROSS-EXAMINATION—MAY COVER WHAT MATTERS.—The right to cross-examine a witness is confined to those facts and circumstances only connected with the matters actually stated in the direct examination of a witness, and if the cross-examining party wishes to examine the witness as to other matters, he must do so by making the witness his own, and call him as such in the subsequent progress of the case. The trial court, however, has a discretion in following this rule, and a cause will not be reversed where the rule has not been followed, unless an abuse of discretion is shown.

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

Ellis & Jones, for appellant.

1. It was error to permit plaintiff and Tom Skidmore to testify as to statements made to them by Denny Reed. This was hearsay merely, and inadmissible. 75 Ark. 463; 78 *Id.* 220; 86 *Id.* 448; 96 *Id.* 387; 99 *Id.* 488; 107 *Id.* 280; 109 *Id.* 130; Hughes on Ev., pp. 51 to 56, 57.

2. It was error to require defendant to answer questions asked her in cross-examination over her objection. The matters were not covered by the direct examination. Hughes on Ev. 352; 40 Cyc. 2501; 14 Pet. 461; 100 U. S. 625; 174 *Id.* 727; 90 Ark. 398, 405; 14 *Id.* 558, 563.

3. The letter read to the jury was improperly admitted. 4 Enc. Ev. 808; 14 *Id.* 744; 105 Ark. 130.

Lehman Kay, for appellee.

1. The cases cited are not applicable. Statements of relevant facts made by persons identified in legal interest with a party to the record by reason of privity are competent evidence. 16 Cyc. 985, 996; 46 Ark. 378; 35 *Id.* 248; 79 *Id.* 414; 78 *Id.* 212; 43 *Id.* 307. Declarations of a deceased owner of personal property, etc., are admissible. 86 Ark. 488; 86 *Id.* 145; 16 Cyc. 985, 996.

2. But, if incompetent, appellant can not complain, for the error was invited. 86 Ark. 48; *Ib.* 145; 75 *Id.* 267; 66 *Id.* 588; 69 *Id.* 140; 88 *Id.* 138; 86 *Id.* 315. Appellant let "down the bars."

3. If inadmissible, it was not prejudicial, as the facts were proved by Mrs. Sholes. 75 Ark. 251; 103 *Id.* 87; 99 *Id.* 597.

4. They were admissible to contradict what she said. Kirby's Digest, § 3138.

5. The letter was competent. 85 Ark. 430.

6. The evidence sustains the verdict.

SMITH, J. This is a suit between two sisters over the distribution of the estate of Denny Reed, their father, and involves also a controversy over a balance of unpaid purchase money alleged to be due appellee, who was the plaintiff below, by appellant.

The only question we need now consider is the competency of the evidence by which appellee sought to show the amount of property owned by her father at the time of his death.

The estate which formed the subject-matter of this litigation was not a valuable one. Appellee alleged that her father owned, at the time of his death, $360 in money, and various notes, payable to his order, a list of which is set out in the complaint, and it was charged that appellant had appropriated this money, as well as the proceeds of several of the notes which she had collected, and that the uncollected notes were in appellant's possession and claimed by her individually.

The sheriff of the county was appointed administrator of Reed's estate, and, in a conversation with appellant about the assets of the intestate, was told that he had hardly left enough money to pay the funeral expenses. Appellant became a witness in her own behalf, and, upon her cross-examination, was compelled to make certain damaging admissions in regard to statements contained in a letter written by her to the administrator in regard to the amount of money in her father's possession at the time of his death, and her ownership of certain of the notes. She was not interrogated about any of these matters in her direct examination; and it is insisted that error was committed in permitting a cross-examination thereon, it being urged that, for this purpose, the witness

should have been called by appellee and made her own witness. A witness named Skidmore was permitted, over appellant's objection, to testify that Reed told him, two years before his death, that he was worth between seven and eight hundred dollars, but that no one was present at the time but Reed and himself.

Appellee was asked, while upon the witness stand, how she knew how much property her father owned at the time of his death, and answered, "My father told me," and she was then asked, "How much did he say he had?" But an objection was sustained to this question, and no answer was given. Upon her cross-examination, she was asked, "How do you get your information as to how much money and notes your father owned, that you allege in your complaint he owned, at the time of his death," and answered, "My father told me." Whereupon, the court held that, since the witness had stated, in response to the question by appellant, the source of her information, she might also answer the question asked by appellee to which the objection had been sustained, and she then stated that her father told her he owned the money and notes set out in the complaint, and that the conversation occurred some time before his death.

It is argued by appellee that this question by appellant "threw down the bars," and rendered competent the testimony in regard to Reed's declarations concerning the amount of property owned by him. We can not agree, however, that such was its effect. Appellant had the right to ask the source of the information upon which appellee based a statement of fact. It is true the witness had already answered the question, but no objection was made to it when asked by appellant on account of the fact that it was being asked the second time. The answer to the question disclosed that the facts recited in the complaint were hearsay, and the development of this fact did not justify proof of the details of this hearsay evidence. But such evidence was admitted when the court permitted appellee to testify what her father had said, and in per-

mitting Skidmore to testify concerning the statements alleged to have been made to him.

We think no error was committed in permitting appellee to cross-examine appellant upon questions which had formed no part of the subject-matter of the direct examination. In 40 Cyc. p. 2500, it is said: "In England, and in some of the United States, the cross-examination of a witness may extend to every issue in the case, regardless of the scope of the direct examination. But the more general rule is that the cross-examination should be confined to matters which have been brought out on the direct examination, and if the cross-examining party wishes to obtain the testimony of the witness as to other matters, he must do so by calling the witness to the stand as his own, and subjecting him to direct examination in regard thereto."

Cases from many states are cited which explain the practice in those states.

In the case of *St. Louis, Iron Mountain & So. R. Co.* v. *Raines,* 90 Ark. 398, this court considered the question of the proper practice where a party attempts to cross-examine a witness offered by his adversary upon matters not connected with the direct examination. The court there announced the different rules upon the subject, and stated that the rule which had been followed by the majority of the courts of America accorded with that announced in the case of *Austin* v. *State,* 14 Ark. 558, where it was said:

"Upon an examination of the authorities, we think that the decided preponderance in the American courts is in favor of confining the right of cross-examination to those facts and circumstances only connected with the matters actually stated in the direct examination of a witness; and that, if the cross-examining party wishes to examine the witness as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the case."

It was recognized, however, in the case of *Railway* v. *Raines, supra,* that the trial court had a discretion in

following this rule, and that a cause would not be reversed where the rule approved had not been followed, unless an abuse of discretion was shown. No abuse of discretion is shown here. The witness was the appellant herself, and she was being interrogated about her own statements, which could not have formed the subject-matter of the direct examination.

Objection was also made to the action of the court in admitting in evidence a letter written by appellant to the administrator concerning the property which had come into her hands. This evidence was admissible against her, not only to contradict her, but as substantive matter showing the quantity and value of the property which she had received.

Other questions are raised in the briefs, but we do not regard them as of sufficient importance to require discussion.

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

WESTCHESTER FIRE INSURANCE COMPANY *v.* SMITH.

Opinion delivered March 12, 1917.

1. INSURANCE — WARRANTY AGAINST ENCUMBRANCES — WAIVER.—A warranty of no encumbrances is waived where the insurer's agent was notified that the property was encumbered when application for the policy was made.
2. INSURANCE—WARRANTY AS TO TITLE WAIVED.—A. deeded property to B. receiving notes therefor, which were not paid. An agent of appellant insurance company solicited A. for insurance on the house on the property. A. related the facts and the agent placed the insurance in A.'s name. *Held,* appellant company was liable on the policy.

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

J. A. Watkins, for appellant.

1. Smith was not the "unconditional and sole owner." The policy was void. 63 Ark. 201; 4 L. R. A. (N. S.) 231; 6 *Id.* 852; 2 Clements on Fire Insurance, 155, 156.

2. There was no waiver.

O. H. Sumpter, for appellee.

1. Appellee told appellant's agents of his interest in the property before the policy was issued, and before the proof of loss was made. There were no intentional false statements made, nor any that were misleading. 100 Ark. 9; 75 *Id.* 251; 19 Cyc. 855.

2. A clear case of waiver is made. 100 Ark. 9; 52 Ark. 11, 16. The cases cited by appellant are not applicable. Here the company knew *all* the facts *before* the policy was issued, and not *after the fire.*

SMITH, J. Appellee, B. O. Smith, was the owner of a dwelling house and barn, which he conveyed to J. H. and W. T. Maux, by deed dated January 12, 1914. The deed recited a consideration of $1,001, and was, in fact, the sum of $1,000, consisting of two notes, each for $500. No part of the consideration had been paid, except by the execution of these notes. A fire insurance policy was issued by the appellant insurance company, covering this property, on July 8, 1915, for the sum of $600. This policy was issued to, and in the name of, B. O. Smith, as the owner. The property was destroyed by fire on October 10, 1915. Smith, soon thereafter, applied at the office of the insurance agency, which had written the policy, for the necessary blanks upon which to make proof of his loss, and, in making this proof, he inserted his own name as the owner of the property, both at the time of the issuance of the policy, and the occurrence of the fire, and he made an affidavit in connection with this proof of loss.

The insurance company denied liability, and this suit was accordingly brought. The denial of liability is based upon the following clause contained in the policy:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

This condition of the policy, and the existence of the facts set forth above, would, of course, render the policy void under ordinary circumstances. It is said, however, that this provision of the policy was waived, and the evidence in support of this waiver is to the following effect. An agent of the appellant company applied to Smith for authority to write a policy of insurance against this property. Smith explained to the agent that he had sold the property, and had executed a deed therefor, but that no part of the purchase money had been paid. This agent stated to him that, if this was true, the property was his, and could be insured in his own name, and the policy was accordingly written. There was also evidence that this explanation was made to the agents of the company before the proof was made, and the insured was directed to make the proof in his own name as owner, and he accordingly did so.

The instructions in the case are not set out, and we must, therefore, assume that the cause was submitted to the jury under correct instructions, and we must affirm the judgment of the court below if we find the evidence set out above is legally sufficient to support the verdict.

Smith's interest in the property was an equitable one, yet he insured it as if he were the owner of the legal unencumbered title. This was in contravention of the provisions of the policy set out above. However, such provisions are for the benefit and protection of the insurer, and may be waived by it.

In the case of *Queen of Ark. Ins. Co.* v. *Laster,* 108 Ark. 261, we said: "This court has often ruled that the warranty of no encumbrance is waived where the insurer's agent was notified, when application was made for the policy, that the property was encumbered. (*Capital Fire Ins. Co.* v. *Montgomery,* 81 Ark. 508; *Capital Fire Ins. Co.* v. *Johnson,* 82 Ark. 90)."

Other recent cases holding such provisions may be waived are *Hutchins* v. *Globe Life Ins. Co.,* 126 Ark. 360, 190 S. W. 446; *Home Fire Ins. Co.* v. *Wilson,* 118 Ark. 442; *Royal Ins. Co.* v. *Morgan,* 122 Ark. 243.

Smith was not the owner of this property within the meaning of the policy, although his equitable interest equalled that of its value, as evidenced by its purchase price. But, with knowledge of this fact, the company elected to issue this policy in the name of Smith, rather than in the name of his vendees, and, under the doctrine of the above cited cases, it must be held to have waived the provision of the policy set out above. The decree of the court below is, therefore, affirmed.

HIGHTOWER v. HIGHTOWER.

Opinion delivered March 12, 1917.

WILLS—SIGNATURE BY MARK—PROOF.—Where a testator signed a will by his mark, and the party who signed his name failed to attest the signature by writing his own name as witness, an affidavit by the witness that he wrote deceased's name for him and witnessed the making of his mark by the deceased, is inadmissible, and there then being no proof of deceased's signature the will is not entitled to probate.

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

Ellis & Jones, for appellant.

1. The court erred in directing a verdict for appellees. The will was not void because the names of all the heirs were not mentioned therein. Kirby's Digest, § 8020; 23 Ark. 569; 31 *Id.* 145; 87 *Id.* 206; 92 *Id.* 88; 94 *Id.* 39.

2. The will was signed as required by law. Kirby's Digest, § 7799. It was duly signed by mark and in the presence of witnesses. 40 Cyc. 1104; 19 Mo. 609; 5 Johns. (N. Y.); *Jackson* v. *Van Dusen;* 17 Ark. 292; 51 *Id.* 48; 14 *Id.* 675; 23 *Id.* 396. Price's testimony shows that he wrote the testator's name and saw him sign by mark. 38 Ark. 279; 49 *Id.* 18; 14 *Id.* 675; 23 *Id.* 396. It was not necessary to have the attesting name signed, where the proof shows the signature was in fact made, but the attesting witness failed to sign as a witness.

Price's affidavit was legal evidence. 51 N. E. 1046. It was never denied that Price witnessed the testator's signature by mark and there was no issue as to how Hightower signed his name.

Lehman Kay, for appellees.

1. The court properly directed a verdict. The will was signed by mark and there was no attesting witness to the signature as prescribed by statute. Price's affidavit was not admissible as evidence. No will was proven. Kirby's Digest, § § 3150, 8012, 8020; 14 Enc. Ev. 758, and notes, 757; 5 Ark. 708; 21 *Id.* 352; 2 *Id.* 319; 5 *Id.* 485; 70 *Id.* 449; 42 *Id.* 357.

The signature was not proved. 49 Ark. 18; 91 *Id.* 274; 36 Cyc. 455; 2 *Id.* 34, and notes; 40 *Id.* 1304. In the absence of a statute, or rule of court, affidavits are not evidence. 2 Corp. Jur. 373; 89 Ark. 487; 13 *Id.* 476.

2. The names of all the heirs are not named. J. H. Hightower was dead when the will was executed. He was a son and his heirs were living. 94 Ark. 43.

3. The court acted within its discretion when it directed a verdict. There was no evidence to sustain the will. 126 Ark. 208; 97 *Id.* 447; 71 *Id.* 447; 43 *Id.* 301.

HUMPHREYS, J. The appellees, except G. M. Caruthers, as administrator of the estate of S. W. Hightower, deceased, brought a suit on August 21, 1916, against appellants in the probate court of Fulton County, contesting the will of S. W. Hightower, deceased. The will was signed by mark on November 25, 1912. No one signed the will as a witness to the signature by mark. The names of O. N. Halcomb and F. L. Lefevers were signed as subscribing witnesses to the will. The will was filed for probate on the 14th day of August, 1916.

On August 21, 1916, the same day appellees filed the contest, J. R. Price appeared and filed his affidavit in substance swearing that he signed S. W. Hightower's name to the will at his request, and that Hightower made his mark in the presence of the subscribing witnesses and himself, and in their presence declared the instrument

present in court to be his last will and testament. The contest proceeded to a hearing on the pleadings and it was adjudged by the probate court that the will was not entitled to probate. An appeal was taken to the circuit court.

On the 7th day of July, 1916, G. M. Caruthers took out letters of administration on the estate of S. W. Hightower, deceased, and on July 15, 1916, brought suit against Allie Hightower in the Fulton County Circuit Court to recover the personal property belonging to said estate. On the 28th day of August, 1916, Allie Hightower answered, claiming that she and her two children, Claude and Madeline Hightower, owned all of said property under the terms of the will then in course of probation.

The case appealed from the probate court was consolidated with the suit brought by the administrator and the cause was heard on the pleadings, the affidavit of J. B. Price, introduced over the objection of contestants, and on an agreement in substance as follows: That J. H. Hightower was dead when the will was executed, and that the names of his three children, William Hightower, Maude A. Mitchell and Martha McCollum were omitted from the will and were grandchildren and heirs of S. W. Hightower, deceased; that J. H. Hightower was the son of S. W. Hightower, deceased; that S. W. Hightower's name was subscribed to the will in the following form:

S. W. Hightower His X Mark

that nothing appeared on the face of the will to show who signed S. W. Hightower's name thereto.

The court instructed the jury as follows: "Gentlemen of the Jury: I instruct you to return a verdict for the contestants herein, for the reason that the will is not signed as required by law, and for the further reason, that under the evidence in the case, the names of all the heirs of S. W. Hightower are not mentioned in his will."

In the will contest case proper, appealed from the probate court, the jury rendered the following verdict:

"We, the jury, find for the plaintiffs, and that the will of S. W. Hightower is void. J. N. Hunt, Foreman."

In the case of G. M. Caruthers, administrator of the estate of S. W. Hightower, deceased, the jury returned a verdict in favor of the administrator for specific property or its value.

A separate judgment in each case was rendered in conformity to each verdict. The necessary steps were taken and the consolidated case is here on appeal.

The first assignment of error, insisted upon by appellant for reversal, is the giving of a peremptory instruction by the trial court to find for the administrator and contestants. Appellant then proceeds to attack the reasons assigned by the trial court for giving the peremptory instruction. It is immaterial whether the reasons given by the court are correct, if for any reason it was proper to give a peremptory instruction favoring the contestants. The will on its face disclosed the fact that it was signed by mark. The *ex parte* affidavit of J. R. Price is the only evidence in the record tending to show who signed the testator's name to the will, or that the testator made his mark. This affidavit was introduced over the objection of appellees. If not competent evidence, then there is no legal evidence in the record establishing the execution of the will, and no evidence whatever to support a verdict in favor of the validity of the will, had the question been submitted to the jury. Section 8013, Kirby's Digest, requires that the party signing the name of one who can not write should attest the signature by writing his own name as witness. Had this been done, the genuineness of the signature would have been sufficient without other proof. *Fakes* v. *Wilder,* 70 Ark. 449; *Ward* v. *Stark,* 91 Ark. 268. This not having been done, it follows that the genuineness of the signature by mark must be established by other proof. In the instant case, the execution of the will was drawn in issue by the pleadings. This court held, in the case of *Smith, Admx.,* v. *Feltz,* 42 Ark. 355, that "A statement or declaration, though made under the sanction of an oath and reduced to writing, is not allowable as evi-

dence on the trial of an issue raised by the pleadings, unless an opportunity has been afforded the adverse party to cross-examine the witness." The rule of evidence laid down in that case was reaffirmed in the case of *Western Union Tel. Co.* v. *Gillis,* 89 Ark. 483. In rendering the opinion in that case, the court used the following language: "The affidavit of Dr. Cheatam was properly refused to be introduced in evidence. He was not a witness in the case, and his *ex parte* affidavit could not be used as independent evidence." Under this view of the law, it is unnecessary to consider the other questions raised and argued in appellant's brief.

No competent evidence having been introduced or offered to establish the genuineness of the testator's signature by mark to the will, it became the duty of the trial court to direct the jury to return a verdict in favor of contestants and against contestees. The judgment is affirmed.

McCULLOCH, C. J. (dissenting). According to my view of this case, it does not present an instance, as stated in the majority opinion of the court, of the trial court giving the wrong reason for a correct decision, but rather that it is an instance of the court making two apparently conflicting erroneous rulings which did not neutralize each other so as to bring about a correct result. The trial court erred in the first instance in permitting the *ex parte* affidavit of Price to be introduced in evidence. That error might have been corrected during the further progress of the trial by the exclusion of the affidavit, but the court did not attempt to make such correction. On the contrary, the court adhered to that ruling, but finally on the submission of the cause to the jury, decided that the signature, as proved by the *ex parte* affidavit, did not constitute a legal signature. In that decision the court again fell into error, for the signature by mark, if proved, was valid even though the person who wrote the name did not sign as a witness. *In re Will of Cornelius,* 14 Ark. 675. It puts the appellant unfairly at a disadvantage for this court, after the trial court has erroneously decided that the signature by mark was not valid, to hold that the signature

by mark was valid, but that the proof to establish that fact was incompetent. Appellant might, if the affidavit had been excluded, have introduced competent testimony to establish the fact that the testator had made his mark as it appeared attached at the end of the will near his name, but she was denied that privilege by the court's erroneous ruling that a signature made in that manner was not valid.

The injustice to appellant is not affected by the fact that the erroneous rulings were not invited by the appellees, or that they objected to the first erroneous ruling in allowing the affidavit to be introduced in evidence. Since appellant has suffered by an error committed by the court, it is a wrong that ought to be righted regardless of the fact whether appellees are responsible for it or not. It is the business of appellate courts to correct prejudicial errors, and not to compel the wronged party to bear the burden simply because the court alone is responsible for it.

I think that the judgment should be reversed and the cause remanded so that it may be tried again on competent evidence, if any can be adduced, establishing the validity of the last will and testament of the testator.

SMITH, J., concurs in the dissent.

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

Opinion delivered March 12, 1917.

CARRIERS—MISDELIVERY OF FREIGHT—DELIVERY TO TRUE OWNER.—A common carrier cannot be mulcted in damages for a misdelivery of goods shipped, where it appears that the delivery was made to the true owner who was at the time entitled to the possession thereof.

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

Blackwood & Newman, for appellant.

1. The rights of Albright & Ramsey, if any, are not affected by and do not affect the issues in this case. The

carrier can not set up the right of a third person who has made no demand for the goods as an excuse for not delivering to the person entitled to the goods under a contract of shipment. 97 Mo. 473, 10 Am. St. 331; 175 Mo. 518; 97 Am. St. 609, 614.

2. The claim was presented to the railway company within the time stipulated in the bill of lading. 118 Ark. 327-8. The delivery here was unauthorized. 124 Ga. 482; note 31 L. R. A. (N. S.) 1178; 93 Ark. 537.

3. The company is liable for the wrongful delivery, for "all damages" sustained. Kirby's Digest, § 531; 77 Ark. 482; 115 Ark. 58. The cause of action was established by the uncontradicted proof, and appellee is liable for breach of contract and conversion of the property.

E. B. Kinsworthy and *W. G. Riddick,* for appellee.

1. The findings of the jury are conclusive. 68 Ark. 83; 70 *Id.* 512; 74 *Id.* 336; 125 Ark. 136.

2. No cause of action was shown. The company had no notice.

3. Schaad could acquire no rights in the engine from Stainback. The goods were delivered to the true owner. 93 U. S. 575; 56 N. Y. 544.

4. Schaad was indebted to Stainback and there is no proof to show that he had any interest in the engine at all.

5. Plaintiff failed to file his claim in time. The finding is supported by the evidence.

HUMPHREYS, J. Ben D. Schaad Machinery Company, a firm composed of Ben D. Schaad and Oscar Schaad, sold B. W. Stainback, under his business name of Batesville Ice & Cold Storage Company, supplies on open account. The account was reduced to $200 by payments, and then put in the form of a note dated August 16, 1912, and due in thirty days. Stainback had bought the plant known as the "Batesville Ice & Cold Storage Company," from Albright & Ramsey in 1909, who took a mortgage from Stainback on the plant for the payment of the balance of the purchase money. Stainback managed the plant and had possession of the entire property during the years

1909, 1910, 1911, 1912, and until February 1, 1913. An engine and some pumps covered by this mortgage were sent from the plant at Batesville to Ben D. Schaad Machinery Company in Little Rock. On the 27th day of September, 1912, the engine was shipped by the Ben D. Schaad Machinery Company from Little Rock to Batesville, over appellee's railroad, with directions to notify the Batesville Ice & Cold Storage Company, but not to deliver the engine unless the original bill of lading was delivered to appellee. Appellant attached the $200 note aforesaid to the bill of lading and transmitted it to the Central Bank & Trust Company at Batesville, with instructions not to deliver the bill of lading until the note was paid. Contrary to instructions, the appellees delivered the engine to the Batesville Ice & Cold Storage Company. On January 12, 1913, the Batesville Ice & Cold Storage Company became bankrupt and failed and refused to pay the note. Albright & Ramsey foreclosed the mortgage and obtained possession of the property, including the engine, on February 1, 1913.

Appellant brought this suit against appellee in the Pulaski Circuit Court, Third Division, on April 3, 1915, to recover the amount due on said note, alleging that appellee had delivered the engine to the Batesville Ice & Cold Storage Company contrary to shipping instructions. An answer was filed by appellee denying liabilty. The cause was heard upon the pleadings and evidence, and the trial court, sitting by agreement as a jury, found for appellee. The necessary steps were taken and the cause is here on appeal.

Appellants contend that the engine was pledged to secure the indebtedness represented by the note attached to the bill of lading. Appellee asserts that the engine, fixtures and pumps were deposited with appellants for sale, and not pledged as security for the payment of said $200 note. There is a sharp conflict in the testimony on the point. This question of fact has been settled adversely to appellants, and there is sufficient legal evidence in the record to support the verdict.

The undisputed evidence in the case shows that appellee delivered the engine to the Batesville Ice & Cold Storage Company in violation of the shipping order. The order was to deliver the engine upon the presentation of the bill of lading properly indorsed. Appellee permitted the Batesville Ice & Cold Storage Company to take the engine without presenting the bill of lading. At the time the engine was delivered, the bill of lading was in the bank with the $200 note attached thereto. It has been determined by the verdict in this case that the Batesville Ice & Cold Storage Company was the true owner of the engine at the time of delivery, and entitled to the possession thereof. A common carrier can not be mulcted in damages for a misdelivery of goods where it is shown that the delivery was made to the true owner, who was at the time entitled to the possession thereof. *The Idaho,* 93 U. S. 575; *Biddle* v. *Bond,* 6 Best & Smith, 225; *The Western Transportation Co.* v. *Barber,* 56 N. Y. 544.

Under this view of the law, it is unnecessary to consider the other questions presented and splendidly argued by learned counsel for appellants and appellee.

The judgment is affirmed.

BUSH, RECEIVER, ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* ALTSCHUL.

Opinion delivered March 12, 1917.

1. CARRIERS — SHIPMENT OF LIVE STOCK — LOSS — DAMAGES — HOW PROVED.—Where some of a shipment of cattle died during transit because of defendant carrier's negligence, the measure of damages will be their market value at the point of destination; and to prove this value a trader or dealer in live stock, or a person who is qualified by experience, may give evidence as to the value of cattle, hogs, and other animals that have a market value although he may never have seen those which are the subject of this litigation.
2. EVIDENCE—DAMAGE TO SHIPMENT OF CATTLE—CONDITION OF RAILWAY PENS.—In an action for damages against a carrier growing out of the negligent handling of a shipment of cattle, *held,* testimony of the shipper as to the condition of certain of defendant's

stock pens, at a place where the cattle were kept several days, from observations made six months after the occurrence of the injury, is admissible.

3. APPEAL AND ERROR—FAILURE TO INSTRUCT ON SPECIFIC ISSUE—HARMLESS ERROR.—The failure of the court to give an instruction upon a certain issue will be held harmless error, when, in an action for damages, the verdict of the jury showed that no damages were awarded on that issue.

4. CARRIERS—SHIPMENTS OF LIVE STOCK—CARE OF.—Railways carrying live stock must provide suitable yards and facilities for resting, feeding, watering and protecting the cattle in transit.

5. CARRIERS—INJURY TO SHIPMENT OF CATTLE—DAMAGES—JURY QUESTION.—In an action for damages to a shipment of cattle, due to negligence. *Held,* under the evidence that it was solely a question for the jury to determine the amount of damages sustained, and that it was improper for the trial judge to disturb the jury's verdict.

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

E. B. Kinsworthy and *W. G. Riddick,* for appellant.

1. There was error in rendering judgment in excess of the amount found by the verdict of the jury. There was no testimony as to "rough-handling" by the company. The court had no power to add to the verdict of the jury. 41 Ark. 121; 33 *Id.* 56; 29 *Id.* 597; 23 Cyc. 820; 99 Ark. 490; 102 *Id.* 460; 97 *Id.* 438; 82 *Id.* 86; 88 *Id.* 550; 38 Cyc. 1899; 22 Enc. Pl. & Pr. 917.

2. There were errors in the admission of evidence. Over the objection of defendant, the deposition of C. C. Stewart was read to the jury. It was hearsay and incompetent.

J. I. Altschul's testimony, as to condition of pens, was prejudicial.

3. The court erred in its instructions. Floods and washouts are the act of God and railroad companies are not liable for delays or damages resulting therefrom. 99 Ark. 363; 1 Michie on Carriers, 620.

4. There is error in the giving and refusal of instructions. 2 Michie on Carriers, 1279, and cases *supra.*

Hal L. Norwood, for appellee.

1. As the uncontradicted proof showed that appellee sustained damages to the amount of $103.90, on account of crippled cattle, caused by the negligence of appellant, the court did right in rendering judgment for the $103.90. The jury allowed nothing for delay, evidently believing it was caused by washouts, but they did believe appellant guilty of negligence in caring for the cattle at Hoxie. The proof was that the pens were small, had no cover, but dirt floors, and were wet and muddy, and that the cattle were not properly cared for, nor fed.

2. C. C. Stewart's testimony was competent. 4 R. C. L., § 467.

3. Eight witnesses testified that the cattle were in good condition when shipped. Altschul's testimony was competent.

4. There is no error in the instructions. 4 R. C. L., § § 433, 436. The verdict and judgment are really too small, under the proof.

HUMPHREYS, J. Appellee shipped forty-eight head of cattle on January 29, 1916, over appellant's railroad from Argenta, Ark., to East St. Louis, Ill. Thirty-five head of these cattle reached their destination, and were delivered to the consignee on February 10, thereafter. Two head died while en route to Hoxie, Ark., seven head while at Hoxie, and four between Hoxie and Illmo. Four head were badly crippled. Another shipment was made by appellee on February 12, 1916, from Argenta, Arkansas, to East St. Louis, and one died en-route. Appellee filed suit against appellant in the Pulaski Circuit Court, claiming damages in the sum of $541.50, on account of the carelessness and negligence of appellant in handling the first shipment; and for $21.42 on account of carelessly and negligently handling the second shipment. The itemized statement of damages on the first shipment is as follows:

To 60 lbs. per head extra shrinkage account of delay on 19 cattle; 1,140 lbs. at $4.33 ave. price plus 50c per cwt. decline in market and depreciation in value ..... $ 55.06

To 35c per cwt. decline in market, and 15c per cwt. depreciation in value account delay on 10,530 lbs.	52.65
To 30 lbs. per head extra shrinkage account delay on 11 yearlings and calves; 330 lbs. at $4.85 ave. price they brought, plus 15c per cwt. depreciation (or amount more they should have brought had they been earlier)	16.50
To damage to 4 cows and one steer injured—average value $29.70 each—$148.50, minus $44.60 salvage	103.90
To 6 ave. grown cattle short	178.20
To 7 ave. yearlings short	87.71
To extra feed bill enroute	47.50
Total	$541.52

and on account of the second shipment, is $21.42.

Appellant answered and denied every material allegation in the complaint. The jury returned the following verdict: "We, the jury, find the plaintiff suffered damages on account of the negligence of the defendant as follows:

(1)	Cattle killed	$150.00
(2)	Cattle crippled	50.00

"H. W. Forte, Foreman."

On the theory that the undisputed evidence showed that the cattle killed were of the value of $265.91, and that the cattle crippled were damaged $103.90, the appellee moved the trial court for judgment in the sum of $391.21. The trial court overruled the motion except as to the damage to the crippled cattle. As to them, he increased the amount from $50, as found by the jury, to $103.90, and rendered a total judgment for $253.90.

Appellant took the necessary steps to preserve his exceptions in the conduct of the case, and has appealed the cause to this court.

(1) Appellant contends that the trial court committed reversible error in permitting C. C. Stewart to give testimony as to the value of the thirteen dead cattle, and

the damage to the four cattle crippled. Mr. Stewart was an employee of the consignee and had been engaged in buying and selling cattle on that market for twenty years. The stock contract issued by appellant was for thirty cows and eighteen yearlings. Six cows and seven yearlings had died and were missing when the car of cattle reached its destination. Taking into consideration the cattle that did reach the stock yards as a basis, Stewart estimated the value of the six dead cows at $178.20, and the seven dead yearlings at $87.71. These cattle were bought from three parties and shipped in one lot. The shipper had owned them only a short time, and had no way to identify each animal. The measure of damages for those lost would have been their market value at the point of destination. In the case at bar, the consignee or some one familiar with the market value at the point of destination must estimate the value of those lost and the damage to those living. No one could do that better than a witness of experience like Stewart, and he must necessarily do it by a general average price, it being impossible to identify and value each animal. In Ruling Case Law, volume 4, section 467, it is said that "a trader or dealer in stock, or a person who is qualified by experience, may give evidence as to the value of cattle, hogs, and other animals that have a market value, although he may never have seen them." The statement of the text is liberally supported by authority.

(2) Appellant contends the court erred in admitting the testimony of J. I. Altschul with reference to the condition of the stock pens at Hoxie in June, 1916, some four or five months after the cattle had been detained in the pens. He said the pens were small; part of them recently refilled with rock; two of them still wet and muddy; feed racks insufficient; and that no shelter was over the pens. These pens were pointed out to the witness by an employee of appellant as the pens where appellee's cattle were kept and fed from January 30 to February 9. Stock pens are not temporary affairs. They are permanent, and their character and condition would continue to be

about the same for a long period of time. It is clearly inferable from J. I. Altschul's testimony, taken in connection with other facts in the case, that the condition of the pens in June was about the same as in January and February. The only evidence of any change was that rock had been recently put in part of the pens. Had any material change been made in the pens between January and June of the same year, appellant could easily have shown it.

(3) It is contended that the trial court erred in giving instructions Nos. 1, 2 and 7, asked by appellee, for the reason that the instructions ignored the right of appellant to attribute the delay in transit to an act of God, instead of its negligence. The undisputed evidence showed that the delay was caused by washouts. It is true these instructions made no exceptions limiting the liability of appellant on account of unavoidable washouts in specific words; but when all the instructions given are read together, it is quite plain the jury was permitted to render a verdict for damages, if any, resulting from the negligent acts of appellant only, and not damages resulting from an act of God. Instruction No. 17, given by the court, is as follows. "You are instructed that if you find that the delay in the shipment was caused without any fault on the part of the defendant, then your verdict should be for the defendant on the alleged damage resulting from delay." The jury understood that if the delay in transit was caused by unavoidable washouts, no damages resulting from the delay could be adjudged against appellant. The verdict returned by it excluded all items of damage resulting from delay. The items of shrinkage, decline in market value and feed bill resulting from the delay, were omitted from the verdict. There is no evidence in the record tending to show that the delay killed or crippled the cattle, and the verdict of the jury covered these two items only; hence, the appellant was not prejudiced on account of these instructions, and can not complain.

Appellant contends that error was committed in refusing to give instructions Nos. 11 and 12, which, in sub-

stance, exempted appellant from liability for delay in transit, if the delay was caused by unprecedented floods. The verdict did not contain any item of damage caused solely by delay, so appellant was not prejudiced by the refusal to give these instructions. No useful purpose could have been accomplished by giving them, as the same idea was manifest in other instructions given by the court.

Appellant contends that the court erred in giving appellee's instruction No. 6, because it told the jury it was the duty of appellant to provide suitable yards and necessary facilities for caring for livestock shipped over its line, instead of telling them it was the duty of appellant to use ordinary care to provide such pens, etc. The imposition on common carriers of the duty to provide necessary and suitable yards, and the facilities for caring for stock, in no way implies the burden of extraordinary care; but even if inferable from the language used, that more than ordinary care was required, the jury was precluded from drawing such an inference by the following instruction given at the instance of appellant: "You are instructed it was the duty of the defendant to use ordinary care and reasonable diligence to handle the cattle to destination, and to provide suitable stock pens, under all the circumstances of the case."

(4) But appellant insists that there is a total want of evidence to show that the pens were at all unsuitable, or improperly maintained, for the purposes for which they were constructed. The evidence tends to show that forty-six head of cattle were confined for ten days in small pens, with poor facilities for feeding and no shelter. "Roughing cattle through" is the practice in some localities. Where that method of raising cattle is in vogue, the cattle as a usual thing have broad acres over which to roam, and are somewhat protected during inclement weather by bluffs, hillsides and timber. Crowding a large number of cattle in small pens in midwinter without shelter and ample facility for feeding is in effect "roughing them through," and smacks rather of cruel treatment to animals than the exercise of ordinary care for their com-

fort and protection. The rule, supported by the weight of authority, is that the railroad companies carrying live stock must provide suitable yards and facilities for resting, feeding, watering and protecting the cattle in transit. R. C. L., vol. 4, secs. 433, 436 and 438.

(5) Appellant contends that the trial court erred in raising the verdict from $50 to $103.90 on account of the item of damage for crippling.....head of cattle in transit. This raise was on the theory that the undisputed evidence showed the .....head of cattle in question were damaged $103.90. This amount was only the estimated amount made by the expert witness, C. C. Stewart. It was opinion evidence only, and should have gone to the jury with all other evidence tending to show the condition and value of the cattle. Much evidence tended to show the cattle were weak when shipped, and unable to stand a long, hard journey. Two of them died on the car on the first run from Argenta to Hoxie. Seven of them died while in the pens, and four of them on the run from Hoxie to Illmo. It is largely problematical as to when and where the crippled cattle were injured. Under the facts and circumstances of this case, the right to fix the amount of damages was within the exclusive province of the jury. The court erred in raising the verdict.

The judgment is, therefore, reversed and modified so as to conform to the verdict of the jury.

WILSON v. WILSON.

Opinion delivered March 19, 1917.

1. DIVORCE—HABITUAL DRUNKENNESS.—Habitual drunkenness is not shown by the habitual but moderate use of intoxicating liquors. The charge of habitual drunkenness, within the statute is shown, however, by proving that the person has a persistent habit of frequently getting drunk; it is not necessary that he be constantly drunk, nor that he have more drunken than sober hours. It is enough that he has the habit so firmly fixed upon him that he becomes drunk frequently and is unable to resist when opportunity or temptation is presented.
2. DIVORCE—DRUNKENNESS AND CRUEL TREATMENT.—Although the defendant husband was guilty of habitual drunkenness, the ground

for divorce stated in the statute, the plaintiff wife will be denied a divorce when she has herself been guilty of cruel treatment of the husband, which is another ground for divorce under the statute.

3. SAME—SAME—RECRIMINATORY DEFENSES.—Habitual drunkenness for one year and statutory cruel treatment are each grounds for divorce, and each is a good recriminatory defense to the other.

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

Botts & O'Daniel, for appellant.

1. The finding that appellee was a habitual drunkard is sustained by the evidence, but the court erred in its finding as to the misconduct of appellant. 9 Ark. 517; 18 *Id.* 327; 33 *Id.* 161; 34 *Id.* 43; 38 *Id.* 119; 44 *Id.* 434; 76 *Id.* 28; 115 *Id.* 32.

2. Profanity and abusive language are not legal grounds of divorce, where the life is not impaired nor condition rendered intolerable. 104 Ark. 381, 384-6.

3. Habitual drunkenness was proven. 103 Ark. 382-4.

John W. Moncrief, for appellee.

1. Appellant failed to prove habitual drunkenness. 103 Ark. 382; 86 *Id.* 364. Appellee was entitled to a divorce if he had asked it. Appellant was equally at fault, and her conduct very reprehensible. She did not come into court with clean hands. She was a fusser and a cusser, and aggravated appellant when he was drinking, and at other times. The decree should not be reversed.

HART, J. Sallie Wilson instituted an action for divorce against her husband, W. W. Wilson, on the ground that he had been addicted to habitual drunkenness for the period of one year before the bringing of the action.

The record shows that the husband filed an answer to the complaint, but it does not contain the answer itself. The record also shows that the parties were given time within which to take depositions.

Upon final hearing of the case, the chancellor found that the testimony of the plaintiff's witnesses established the fact that her husband had been addicted to habitual

drunkenness for the period of one year before the institution of the suit. The chancellor further found that the plaintiff had offered such indignities to the person of the husband as to render his condition in life intolerable. He was of the opinion that both parties were equally at fault and dismissed the plaintiff's complaint for want of equity. The plaintiff has appealed.

(1) Habitual drunkenness is not shown by the habitual, but moderate, use of intoxicating liquors. The charge of habitual drunkenness within the statute is shown, however, by proving that the person has a persistent habit of frequently getting drunk. It is not necessary that he be constantly drunk, nor that he have more drunken than sober hours. It is enough that he has the habit so firmly fixed upon him that he becomes drunk frequently, and is unable to resist when opportunity or temptation is presented. *O'Kane* v. *O'Kane,* 103 Ark. 382.

Tested by this rule, we think the court was correct in holding that the testimony of the plaintiff showed that the defendant was an habitual drunkard within the meaning of our divorce statute. We do not deem it necessary to abstract the testimony on this point, for the reason that we think the chancellor properly denied the plaintiff relief, because she was equally at fault.

(2-3) Habitual drunkenness for one year and statutory cruel treatment are each grounds for divorce in our statute. Section 2672 of Kirby's Digest. Hence, each is a good recriminatory defense to the other. It is well settled that one who has been guilty of misconduct, which is in itself a ground for divorce, has no standing to demand a divorce upon another statutory ground. In such cases the parties will be denied relief because they are equally in fault. *Malone* v. *Malone,* 76 Ark. 28; *Healy* v. *Healy,* 77 Ark. 94.

It is true in the present case the answer of the defendant is not in the record, but the record does show that the defendant filed an answer, and also was granted leave to take testimony. The depositions filed by him tended to disprove the charge of habitual drunkenness on his part,

and to establish statutory cruel treatment on the part of his wife. The evidence adduced by him tended to show that his wife frequently cursed and abused him in the presence of others; that she accused him of being drunk when he had not drank any intoxicating liquors at all; that she had threatened him with bodily harm before their separation, and had threatened to kill him after she separated from him.

His wife admitted that she had gotten a butcher knife to him at one time, but stated that she had done so because he was drunk and had a gun. She also admitted that she had kicked him on one occasion, but she stated that she had done so because he had mistreated one of the children. She also admitted that after she had separated from her husband, she had threatened to kill him if he came back to her house, and said that she was disgusted with him and had a settled hatred for him because of his drinking.

Without going into details, it may be said that the other evidence in the case shows that the defendant always treated his wife kindly when he was not drunk, and that she was in the habit of cursing and abusing him without any cause therefor; that she had a very violent temper and systematically treated her husband with rudeness and contempt.

It follows that the decree was correct, and it will be affirmed.

LEWIS v. WILLIAMS.

Opinion delivered March 19, 1917.

TRUST DEEDS—CONSIDERATION.—B. purchased lands belonging to A. at a sale for the non-payment of certain drainage taxes. The lands were deeded to B., who deeded them to A. for $125, which sum was not paid, but was secured by a trust deed on the property. A. refused to pay, and B. foreclosed the deed of trust. *Held*, the deed of trust was valid and founded upon a sufficient consideration to support the same.

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

Carmichael, Brooks, Powers & Rector, for appellants; *Troy W. Lewis,* on the brief.

1. Plaintiffs had no right of redemption. The time had expired. The act of 1915 could not be retroactive. Acts 1911, Act. 49; Act 43, 1915; 37 Cyc. 1390; 28 Ark. 304; 30 Am. St. 95; 16 L. R. A. 308; 51 Ark. 458; 105 *Id.* 40; 86 *Id.* 285.

2. This is a collateral attack upon a judgment. 118 Ark. 449; Castle's Suppl., § 1436; 114 Ark. 554; 94 *Id.* 588. The court had jurisdiction. 50 Ark. 188; 74 *Id.* 253, etc.

3. There was a disputed claim between the parties. This was a consideration, and the mortgage was not void. The sale was not void, and the time for redemption had expired. 43 Ark. 172; 44 *Id.* 556; 21 *Id.* 69; 99 *Id.* 588; 78 *Id.* 603.

Webster & White, for appellees.

1. The former decree is subject to attack. 83 Ark. 532; 60 *Id.* 374; 98 *Id.* 457; 124 N. W. 135.

2. There was no service. 51 Ark. 34; 83 *Id.* 532.

3. Amanda Williams not a party. 127 N. W. 782.

4. The tax was illegal.

5. Appellees were entitled to redeem. 99 Ark. 328. The act is retroactive.

SMITH, J. Appellees were the owners of certain lots, which were sold to appellant Troy W. Lewis, on account of the nonpayment of the drainage taxes due thereon for the year 1913. The sale took place December 21, 1914, at which time the period allowed by law for redemption from such sales was one year. The General Assembly of 1915 passed an act, which was approved and became effective on February 9, Act 43, page 123, of that year, wherein it was provided that a period of five years should be allowed for redemption from sale for drainage and other special assessments. Lewis assigned the certificate of purchase to his wife, and, upon the expiration of the year, the sale was duly confirmed and a commissioner's deed executed to Mrs. Lewis. Thereafter, Lewis entered into negotiations with appellees concerning the lots.

Appellees say Lewis told them he was the owner of the lots, which constituted their homestead, and that he threatened to turn them out of doors unless they would pay him $125 for a quitclaim deed. This statement was denied by Lewis, but there was no testimony of any immediate coercion, and this alleged threat, if made, could have meant only that Lewis intended to enforce the rights given him under his purchase.

Lewis and wife executed a quitclaim deed to appellees, for the consideration of $125, which was not paid, but was secured by a deed of trust on the lots for that amount. Appellees brought this suit to cancel this instrument, upon the theory that it was a cloud upon their title, and was void, and the complaint, in which this relief was prayed, was accompanied by a tender of the taxes, penalty, and costs paid by Lewis on account of his tax purchase. Upon the final hearing, it was adjudged that the deed of trust was without consideration, and was void, and it was cancelled as a cloud, and this appeal has been prosecuted to reverse that decree.

The action of the court below is defended upon the ground that the sale was void, because of certain alleged jurisdictional defects; and it was also contended that a right of redemption existed, under the act of 1915, above mentioned, at the time of the execution of the quitclaim deed, and the deed of trust.

Very interesting briefs are filed upon these questions, and it is apparent that there was, and is, a genuine and serious controversy over the validity of this original sale, and of the existence of any right of redemption under this act of 1915. We expressly refrain from deciding whether this act of 1915 applies to sales made prior to its enactment, and likewise whether the sale was void.

We need only to ascertain that there was a genuine controversy between the parties to conclude that a sufficient consideration existed to support a contract for its adjustment. The existence of the controversy is, itself, the consideration, and it is immaterial that the claim of one of the parties subsequently proves to have been with-

out valid foundation. *Gardner* v. *Ward,* 99 Ark. 588; *S. H. Kress Co.* v. *Moscowitz,* 105 Ark. 638.

These lots were worth $1,500, and were lost to appellees but for the quitclaim deed, which formed the consideration for the deed of trust, if appellants are correct in the contention, which they now earnestly make, that the sale for taxes was not void, and that the right of redemption had expired when the deed of trust was given.

It follows, therefore, that error was committed in adjudging this deed of trust to be void, and the decree to that effect is reversed, and the cause is remanded, with directions to the court below to enter a decree in accordance with this opinion.

HALL v. ADAMS.

Opinion delivered March 19, 1917.

1. EVIDENCE—MALICIOUS PROSECUTION—TESTIMONY AT EXAMINING TRIAL.—In an action for damages for malicious prosecution, evidence of statements of the defendant (in the malicious prosecution case) and his wife, made at the examining trial, are admissible.
2. MALICIOUS PROSECUTION—BASIS OF THE ACTION.—To maintain an action for malicious prosecution, the existence of malice and probable cause must be shown, but malice may be presumed from evidence showing the want of probable cause; but the suit is not maintainable where defendant acted upon the advice of counsel, based upon a full statement of all the known facts.
3. MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE.—In an action for malicious prosecution, *held,* that defendant acted without probable cause, and that malice would be inferred from the evidence.

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

Hal L. Norwood, for appellant.

1. It was error to permit witnesses for the plaintiff to testify as to what Mr. and Mrs. Hall testified in the examining trial.

2. There was no malice and Hall had probable cause or was advised that he had, after stating all the facts to his attorney. This was a complete defense. 100 Ark. 316; 71 *Id.* 351; 107 *Id.* 74; 64 *Id.* 453; 82 *Id.* 252; 69 *Id.*

439; 96 *Id.* 325; 33 *Id.* 316; 32 *Id.* 166. If there was an honest belief that an offense had been committed, there was no liability. 82 Ark. 252; 32 *Id.* 763.

3. There must be both malice and want of probable cause. 32 Ark. 166, 763; 33 *Id.* 316; 63 *Id.* 387.

Rector & Sawyer, for appellee.

1. The testimony of Mr. and Mrs. Hall in the criminal cause was admissible. 71 Ark. 352.

2. Malice and want of probable cause are shown. 100 Ark. 316; 122 *Id.* 382; 107 *Id.* 74.

HUMPHREYS, J. Appellee recovered judgment in the Montgomery Circuit Court against appellant for $100 on account of a malicious prosecution for obtaining goods under false pretenses. An appeal from said judgment has been duly prosecuted to this court.

(1) The first assignment of error insisted upon for reversal is that the court erred in permitting appellee to make proof of the testimony given by Mr. and Mrs. Hall, wherein appellee was charged with obtaining goods under false pretenses. The alleged incompetent testimony was that given by Mr. Hall to the effect that he was present in his place of business and heard the conversation between Mrs. Foster, Pauline Adams and his wife, Mrs. Hall, at the time Pauline Adams signed the contract as security for Mrs. Foster, who had purchased certain goods from Hall; and the statement of Mrs. Hall to the effect that her husband was not in his place of business at the time this conversation occurred. At the time this testimony was offered by appellee, Hall had not testified. It was contended that the testimony was not admissible for any other purpose than to contradict Mr. Hall, should he take the stand and give the same testimony in this case that was given by him in the criminal prosecution. We do not think the position taken by counsel for appellant is tenable. The issue in the case at bar was whether or not Hall's prosecution in the criminal case was in good or bad faith. If Mrs. Hall's testimony in the criminal prosecution was correct on this point, then the testimony given

by Mr. Hall was incorrect, and admissible as a circumstance to show whether or not his prosecution of appellee in the criminal case was in good or bad faith.

(2) The second assignment of error insisted upon for reversal is that there was no testimony tending to show that appellant was actuated by malice or that he had no probable cause to have appellee arrested. The law applicable to malicious prosecutions is clearly laid down in the case of *Price* v. *Morris,* 122 Ark. 382. In that case, the court decided that malice and want of probable cause must exist, but that malice might be inferred from the evidence showing the want of probable cause; also that where the defendant acted upon the advice of learned counsel, based upon a full statement of all the known facts, a suit for malicious prosecution would not lie. It becomes necessary to review the facts in order to ascertain whether appellant had probable cause for instituting the criminal prosecution against appellee; and whether the facts tending to show a want of probable cause are also sufficient from which to infer malice.

(3) The facts in the case are substantially as follows: Mrs. Foster purchased and received a suit and furs from W. H. Hall on December 30, 1914, on the installment plan, and signed a combination receipt and contract providing that the title to the property should not pass until the purchase price should be paid. Mrs. Kleeman signed the contract as security for Mrs. Foster. In April following, Mrs. Kleeman desired to be released from the obligation, and appellee signed the contract as surety for Mrs. Foster. W. H. Hall required all sureties on these contracts to be owners of furniture. Appellant's testimony tended to show that at the time appellee signed the contract, she stated to Mrs. Hall that she ran a rooming house at 224 Court Street, and owned her own furniture. Appellee denied making the statement. There is a sharp conflict in the evidence in this regard. Mrs. Foster paid $14 on the contract before appellee signed, and $4 thereafter, leaving a balance of $11 due Hall in May, when Mrs. Foster left the city of Hot Springs, tak-

ing her suit and furs. On the 25th day of May, appellee and a lady friend started to California. She was arrested on the train at Benton and brought back to Hot Springs, where she was prosecuted by W. H. Hall for obtaining the suit and furs under false pretenses. On the trial she was acquitted. During the prosecution, W. H. Hall testified that he was present at the time appellee signed the contract, and heard her tell Mrs. Hall that she was the owner of furniture. The witnesses were under the rule, and Mrs. Hall squarely contradicted him on this point. Hall did not testify in the case at bar. Before Hall made affidavit and procured the warrant for appellee, he consulted the constable, two justices of the peace, and either just before or just after, consulted his attorney, V. S. Ledgerwood. They all advised arrest and prosecution. In stating the case to his attorney over the telephone, Hall never mentioned the contract. The substance of his statement to them all was that appellee had bought or leased goods from him, either for herself or some one else, and was leaving the city with the goods; that at the time the goods were obtained, appellee represented that she was the owner of furniture at 224 Court Street, and that he had ascertained the representation to be false. From the above statement of facts, it is apparent that there was sufficient evidence in the record to support the finding of the jury that the prosecution was without probable cause; also, ample evidence from which the jury might infer malice. It is true the record discloses the fact that Hall acted on the advice of counsel, but in order to justify on that account, he must have made a full disclosure of all the facts to his counsel at the time he received the advice upon which he acted.

The judgment is affirmed.

FORD v. COLLISON.

Opinion delivered March 19, 1917.

1. IMPROVEMENT DISTRICTS—MISAPPROPRIATION OF FUNDS—RIGHT OF TAX-PAYER.—A citizen and tax-payer may institute an action to restrain the board of directors from accepting and paying for a school

building then in process of erection on the grounds that same is improperly constructed and of collusion between the contractor and the board, and such action is cognizable in equity.

2. ACTIONS—WRONG FORUM—DEMURRER.—Where an action is brought in a law court, and is properly cognizable in a court of equity, a demurrer to the complaint should be treated as a motion to transfer to equity.

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

John E. Miller, for appellants.

1. Plaintiffs have a legal right to maintain this suit. Taxpayers have a right to sue where officers fail to discharge their duty. 78 Ark. 118; 123 *Id.* 258; 98 *Id.* 38; 52 Ark. Law Rep. 415; 95 Ark. 26; 205 N. Y. 4; Ann. Cas. 1913 C. 881, and note 884 to 923; 79 Oh. St. 9; 36 L. R. A. (N. S.) 1; 86 N. E. 519.

2. The contract was voidable. Collusion was charged. 98 Ark. 38; 49 *Id.* 94.

3. A cause of action was stated. 28 N. W. 650; 85 *Id.* 369; 99 *Id.* 603; 122 S. W. 522. The acceptance of the building is no defense. The contractor is still liable.

Brundidge & Neelly, for appellees.

1. The appellants have no right to maintain this suit, especially in a court of law. 45 Ark. 121; 43 *Id.* 62; 137 Ga. 153; 72 S. E. 1021; 144 Ind. 114; 43 N. E. 13; 88 Ill. 422; 44 Mont. 429; 120 Pac. 485. The school district by its directors are the only parties who could bring this suit. Kirby's Digest, § 7541; 49 Ark. 94.

2. The demurrer was properly sustained. The complaint does not state a cause of action. 99 Ark. 172; 73 *Id.* 523; 110 *Id.* 518; Cyc., under the head of "Schools and School Districts," p. 949, par. 4, and 967, § 1.

McCULLOCH, C. J. Appellants, who were plaintiffs below, allege in their complaint that they are citizens and taxpayers of Bald Knob Special School District in White County, and the action, as originally instituted, was to restrain the board of directors from accepting and paying for a school building then in process of erection by J. Col-

lison, one of the appellees. Collison and the sureties on his bond and all of the members of the board of directors were joined in the action as defendants.

It is alleged in the complaint that the school district, acting through its directors, entered into a contract with Collison for the erection of a school building according to the plans and specifications of an architect employed by the board, and that the building was then in process of construction, and was not being built in accordance with the plans of the architect, but was defective to an important extent in workmanship and material, and that notwithstanding the said defects, the board of directors was about to accept the building in that condition and pay the contract price. The defects and damages resulting therefrom were described in the complaint, which then set forth the following allegations: "That, notwithstanding the fact that the defendant directors on the said date decided, after due examination, that the said work was not in accordance with the plans and specifications, they have not required and now fail and refuse to require the removal of said inferior brick work and are about to receive and accept said work in its inferior condition to the great damage of the plaintiffs and other patrons of the said school district; that the said inferior work consists in practically one-half of the brick work of said buildings, and, notwithstanding the work is inferior and some of it of its own weight has fallen, the above named board of directors are now about to accept the same and to discharge said Collison and his bondsmen from all liability in accordance with the contract and the plans and specifications."

In other portions of the complaint the allegations were sufficient to constitute the charge of collusion between the members of the board and the contractor. The prayer of the complaint was that the board of directors should be restrained from accepting said building as completed under the contract and from releasing the contractor and his bondsmen from the obligations of the contract and

bond. The complaint was filed on April 12, 1916, and it does not appear from the record that any action was taken thereon in the way of granting a temporary injunction, but when the court convened for the June term appellants filed an amendment to the complaint, alleging that since the institution of the suit the board of directors had accepted the building and paid to the contractor the balance of the contract price and the further sum of $740.70 in excess of the contract price. It is further alleged that the building was accepted in its defective condition as set forth in the original complaint, and that by reason of those defects the school district sustained damages in the sum of $5,000. The said defective work is fully described in the amended complaint as was done in the original complaint. The prayer of the complaint, as amended, was that appellants as taxpayers recover of the contractor and the sureties on his bond, for the use of the school district, the sum of $5,740.70, as damages sustained by the district. Appellants moved the court to transfer the case to the circuit court of White County and the court made the order for the transfer. Appellees filed in the circuit court a demurrer to the complaint on the ground that appellants had no legal right to maintain the action, and also on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the complaint, and an appeal has been prosecuted to this court.

The complaint may not be sufficiently specific, but that defect should have been met by a motion to make more definite and certain rather than by demurrer. Treating the allegations of the complaint in their strongest sense they amount to a charge that the contract for the construction of the building had been violated, but notwithstanding the violation of the contract, the board of directors in fraudulent collusion with the contractor had wrongfully accepted the building and paid the contract price and more, to the injury of the district in the sum mentioned in the complaint. The charge in the com-

plaint of collusion on the part of the representatives of the district with the contractor was sufficient to establish the right of taxpayers to maintain the suit. *Seitz* v. *Meriwether,* 114 Ark. 289, 119 Ark. 271. That was a suit by owners of property in a drainage district to restrain the board of directors from fraudulently paying out funds to a contractor and to recover the funds so misappropriated, and it was there held that the suit could be thus maintained. In the opinion it was said: "It is true there is a provision in the Constitution to the effect that any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever (Constitution of 1874, sec. 13, art. 16). And it has been held by this court that the provision gives authority to a taxpayer to prevent the illegal disbursement of moneys by counties and municipalities. That provision of the Constitution does not include improvement districts, but the principle is the same, and it is the duty of the court of equity to mold a remedy for taxpayers whose interests are involved in the operation of improvement districts." * * * "In all cases where the district itself had the right to maintain an action to prevent the misappropriation of funds or to recover misappropriated funds, the taxpayers had a complete remedy in the event of the refusal of the board to institute such an action."

The chancery court ought not to have transferred the cause, but should have retained jurisdiction on the allegations of the complaint as amended. However, the cause reached the circuit court, and it was improper for that court to sustain a demurrer, notwithstanding the fact that appellants had chosen the wrong forum in which to seek relief. It was the duty of that court to treat the demurrer as a motion to transfer to the chancery court and to have made the order accordingly. *Moss* v. *Adams,* 32 Ark. 562; *Newman* v. *Mountain Park Land Co.,* 85 Ark. 208; *Grooms* v. *Bartlett,* 123 Ark. 255.

The decree is, therefore, reversed with directions to the circuit court to overrule the demurrer and to transfer the cause to the chancery court of White County for further proceedings not inconsistent with this opinion.

THE GEORGIA MARBLE FINISHING WORKS v. MINOR.

Opinion delivered March 19, 1917.

1. SALES—DELIVERY—TITLE.—A delivery, either actual or constructive, is essential to the consummation of a sale of chattels, and title does not pass until there has been such a delivery.
2. SALES—DELIVERY TO CARRIER—TITLE.—A delivery of goods to a common carrier, in pursuance of the directions of the purchaser, constitutes a delivery to the purchaser, and consummates the sale; but delivery depending largely upon the intention of the parties, it may be shown that consummation of the sale by delivery was not intended.
3. SALES—SHIPMENT ON OPEN BILL OF LADING—PROOF OF INTENTION.—Although goods were consigned to plaintiff on an open bill of lading, it was competent for the shipper to prove that there was no intention to deliver, and proof that the bill of lading was held by the shipper is admissible to show absence of intention to deliver.
4. SALES—SHIPMENT ON OPEN BILL OF LADING—INTENTION TO DELIVER.—Where goods were shipped to the consignee on an open bill of lading, which was retained through the error of the consignor's shipping clerk, under the evidence, *held*, the consignor intended a delivery to the consignee.
5. SALES—STOPPAGE BY SHIPPER—DAMAGES.—A. shipped goods to B. but stopped same in transit, because it believed B. to be insolvent; it appearing that B. was not insolvent B. could recover from A. the amount he was required to pay for storage of the goods due to A.'s act, but under the facts was not entitled to other damages.

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

Hinton & Rogers, for appellant.

1. Plaintiff never had an action of replevin against defendant, and if he did he failed to prove special ownership as alleged. There was a failure of proof. (1) Wrong action. (2) Appellee failed to prove special ownership as alleged. 35 Cyc. 333; 50 Ark. 20; 79 *Id.* 353; Burdick on Sales, § 403; 66 Ark. 135; 34 Cyc. 1396-7; Tiffany on Sales, 354; 21 Mo. App. 150; 63 Fed. 62; 36 Cyc. 523; 18

Tex. App. 434; 5 Cyc. 171; Cobbey on Replevin, § 101; 13 Enc. of Ev. 650; 50 Ind. 339; 21 Ark. 298. Title must be shown—either general or special ownership must be proven. 4 Ark. 94; 67 *Id.* 135; 87 *Id.* 641; 34 Cyc. 1388.

2. The sale was incomplete for want of delivery. The right of *stoppage in transitu,* where the consignee is insolvent, is unquestioned. 35 Cyc. 495; 16 Md. 122; 7 Am. Dec. 284. Insolvency was proved. 80 Ark. 388; 180 S. W. 512, etc.

3. The court erred in its instructions as to the measure of damages. Wells on Replevin, § 573; 20 Col. 57; 53 N. Y. 211; 15 Ill. 490; 52 Mich. 633; 48 *Id.* 428; 34 Ark. 184; 36 *Id.* 260; 59 L. R. A. 542, etc

4. The burden of proof was on the plaintiff. Shinn on Replevin, § 447; 90 Mass. 83; 167 Mass. 581; 29 Ark. 270; 74 *Id.* 557; 87 *Id.* 641.

5. In conclusion, if appellee had an action it was for breach of contract; the appellee's proof did not follow his pleadings; insolvency was shown and the measure of damages was improperly submitted to the jury. The burden was unmistakably on the appellee.

John W. Wade, for appellee.

1. The property was delivered to appellee. Delivery to the carrier was delivery to the consignee. 53 Ark. 196; 111 *Id.* 521; 56 N. J. L. 617; 86 N. W. 454; 100 U. S. 124; 21 Ill. 530; 34 U. S. App. 638; 73 Fed. 624; 35 Ark. 304; 102 *Id.* 344; 102 *Id.* 531.

2. Appellee was correctly found solvent. The railroad can deliver to consignee with sight draft attached. 64 Ark. 169; 79 *Id.* 456. The established facts do not constitute *stoppage in transitu.* 5 Den. (N. Y.) 629; 8 Atl. 470.

3. The court gave the correct measure of damages. Kirby's Dig., § 6868; Cobby on Replevin, p. 451; 51 S. E. 1044; 131 N. W. 449; 93 Ark. 342; 80 *Id.* 388.

McCULLOCH, C. J. This is an action to recover possession of a lot of finished marble which had been shipped

by railroad from Canton, Georgia, to Little Rock, Arkansas, consigned by defendant, the Georgia Marble Finishing Works, to plaintiff, W. W. Minor. On the trial of the case below there was a verdict in plaintiff's favor for the recovery of the property sued for and damages in the sum of $50, judgment was rendered therefor and defendant has appealed.

The plaintiff was engaged in Little Rock in the business of preparing and selling monuments and tombstones. He purchased the material from concerns engaged in the business of quarrying and finishing marble and he put the inscriptions on the stones after receiving them at his marble yard in Little Rock. He purchased material from the defendant, which is a corporation engaged in that line of business in Canton, Georgia. His first transaction with the defendant in the way of purchases were under agreement to pay the price on delivery of the marble by the carrier, but later he made arrangements for a line of credit and the material was to be shipped to him by direct consignment on open bill of lading. A line of credit to extend to the sum of $200 was arranged for, and he ordered a bill of marble which amounted to a little more than that sum, and defendant consigned it to him in three shipments, only a few days apart. The shipments were consigned to plaintiff on open bill of lading, and according to the undisputed evidence it was the intention of managers of defendant's business to have the bills of lading made direct to the plaintiff, but failed to so instruct the shipping clerk, and the latter attached a draft to the bills of lading and forwarded the same to a bank in Little Rock in accordance with the custom in former transactions with plaintiff. Plaintiff took up one of the bills of lading and paid the draft attached thereto and received the material and used it, but refused to pay the drafts attached to the other two bills of lading, for which the invoices aggregated $188. Correspondence took place between the parties immediately, and the plaintiff reminded the defendant of the agreement to give a line of credit, and there-

upon the manager of defendant's business replied that the mistake would be corrected if he would have the bank return the bills of lading. Before the bills of lading could be returned defendant received unfavorable information concerning the financial condition of the plaintiff and then refused to surrender the bills of lading or allow the material to be delivered to plaintiff without payment of the price. This action was then instituted against the railroad company and defendant, the Georgia Marble Finishing Works, but after the latter had appeared in the case and filed an answer the case was dismissed as to the railroad company and the action proceeded to judgment between the two parties to the original contract of sale.

(1) It is first contended on the part of defendant that according to the undisputed evidence the judgment is erroneous for the reason that there was no delivery of the property, that the sale was, therefore, incomplete, and that the remedy of the plaintiff, if any, was an action for breach of the original contract of sale. This contention would be entirely sound if the record disclosed the consignment of marble to have been to the shipper's own order. In that case there would have been no delivery so as to consummate the sale, and, as contended, the remedy of the plaintiff would have been a suit to recover damages on account of a breach of the contract. A delivery, either actual or constructive, is essential to the consummation of a sale of chattels and the title does not pass until there has been such a delivery. *Hodges* v. *Nall,* 66 Ark. 135; *Deutsch* v. *Dunham,* 72 Ark. 141.

(2) The evidence adduced in the case as brought forward in the abstract is that the marble was shipped on open bills of lading and consigned to plaintiff, and that brings the case within the rule that a delivery of goods to a common carrier, in pursuance of the directions of the purchaser, constitutes a delivery to the purchaser, and consummates the sale. *Burton* v. *Baird,* 44 Ark. 556; *Hope Lumber Co.* v. *Foster,* 53 Ark. 196; *Gottlieb* v. *Rin-*

aldo, 78 Ark. 123; *Bray Clothing Co.* v. *McKinney,* 90 Ark. 161; *Roberts Cotton Oil Co.* v. *Grady,* 105 Ark. 53.

(3-4) The question of delivery depends largely, however, upon the intention of the parties, and notwithstanding the delivery to the carrier, it may be shown by other proof that consummation of the sale by a delivery of the property was not in fact intended. *Gibson* v. *Inman Packet Co.,* 111 Ark. 521. In the present case, notwithstanding the fact that there was a consignment to plaintiff on an open bill of lading, it was competent for the shipper to prove that there was no intention to deliver and the fact that the bill of lading was not forwarded to plaintiff, but on the contrary was held in the control of the shipper, was admissible in evidence for the purpose of showing that there was no intention to deliver. The undisputed testimony is that the retention of the bill of lading by the shipper was entirely through the mistake of the shipping clerk and that there was in fact an intention to consummate the sale by delivery to the carrier. At least this state of facts was sufficient to warrant the inference of an intention to consummate the sale by delivery, and as the instructions of the court are not abstracted it is assumed that the question was properly submitted to the jury on correct instructions, and we must treat that issue as settled by the verdict of the jury.

(5) It is also contended that under the evidence adduced in the case the defendant had the right to exercise its privilege, as the vendor, to stop the material while in transit and before final delivery by the carrier to the consignee; but that depended upon the fact of insolvency of the purchaser, and there is a conflict in the testimony which we must treat as settled in plaintiff's favor by the verdict of the jury. The evidence adduced by the defendant was sufficient to warrant the finding that plaintiff was insolvent and unworthy of the credit extended to him under the contract of sale, but that testimony conflicted with that adduced by the plaintiff which tended to show that he was perfectly solvent at the time. We are of the opin-

ion, however, that the court erred in its instructions on the measure of damages, and also that the verdict was not supported by the evidence. The court told the jury in the instructions that the measure of damages was "the value of the time lost and the amount of storage he (plaintiff) was compelled to pay by reason of said stoppage." Plaintiff paid out the sum of $7.20 for storage charges and he is entitled to recover that amount by way of damages, but the evidence is not sufficient to warrant an assessment of damages in any further amount.

Plaintiff was in the monument business and there was delay of a few weeks in the delivery of this material, and in the meantime there was correspondence between the parties concerning the delivery. As soon as the defendant refused outright to make the delivery without payment of the draft this suit was instituted. Plaintiff testified that he had about $800 worth of material and equipment in his shop, and it does not appear that his business was shut down on account of the failure to receive the bill of material. If there had resulted any loss on sales, the profit of which plaintiff would have been deprived, that would have been an element of damages, but the evidence does not show that there was any injury of that kind. Plaintiff could not sit down and wait for delivery of the material and charge up his lost time against the defendant, for as soon as it refused to deliver the material he ought to have instituted his action for the recovery of possession of the property, or ordered it elsewhere. The judgment will, therefore, be modified so as to reduce the amount of recovery of damages down to the sum of $7.20.

CURTIS v. HAYNES SPECIAL SCHOOL DISTRICT H.

Opinion delivered March 19, 1917.

1. SCHOOL DISTRICTS—DISSOLUTION.—Under Act 66, p. 82, Acts of 1895, county courts have jurisdiction to dissolve special school districts as well as common school districts (*Hughes* v. *Robuck*, 119 Ark. 592).

The power of the Legislature is plenary, subject only to the limitation that it shall not impair the contracts or obligations of the districts.

2. SCHOOL DISTRICTS—DISSOLUTION—PAYMENT OF OUTSTANDING DEBTS.—When a school district is dissolved, its outstanding bonds become due, and there is no obligation upon the district to pay more than the face of such bonds, with the interest that has accrued at the date of the order dissolving the district.

3. SCHOOL DISTRICTS—DISSOLUTION—APPORTIONMENT OF INDEBTEDNESS.—An order dissolving a school district and apportioning its assets and obligations between two districts adjoining it, *held* valid.

4. SCHOOL DISTRICTS—ANNEXATION OF TERRITORY.—Where all of the territory of a school district is taken and annexed to another district, the former goes out of existence, and is no longer a school district.

5. SCHOOL DISTRICTS—DISSOLUTION—DISPOSITION OF TERRITORY.—School District H was formed by the taking of all of the territory of School District No. 39 and some territory from District No. 1. District No. 39 thereupon went out of existence. Thereafter the county court undertook to dissolve School District H, and apportion its territory between district No. 39 and No. 1. *Held*, the order was invalid, since district No. 39 had ceased to exist, it could not be re-established by an order of court without compliance with the terms of the statute for the creation of school districts.

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

D. S. Plummer, Smith & McCulloch and *Daggett & Daggett*, for appellants.

1. The judgment of the county court was without authority and therefore voidable; it was, at least, an abuse of discretion, and should have been corrected on appeal. Kirby's Digest, § § 7548, 7544; Act April 8, 1887. The trial in the circuit court was *de novo*. It was incumbent on petitioners to show a majority of the electors signed the petition and that every step in the statutory procedure was complied with. 104 Ark. 145; 50 Ark. Law Rep. 472; 119 Ark. 592.

2. The petitions are not sufficient to warrant the dissolution order. 104 Ark. 145. There is absolutely nothing to show how many of the qualified electors resided in the territory in June, 1914. The evidence of W. S. and Ross Hughes and J. W. Grant was not admissible, as there was a permanent record. Kirby's Digest, §

2767; Acts 1895, 682; Acts 1909, 942. A majority was necessary. 104 Ark. 145.

3. The court erred in striking the intervention of the board of directors and in refusing to allow the directors to show that a valid contract was existing for a sale of the bonds at the date of the dissolution of the order. 104 Ark. 145; 111 *Id.* 379; 164 S. W. 1130. The action of the county court was arbitrary. The order is vague and indefinite, and no provision is made for liabilities. It creates a new district without petition therefor, without directors and absolutely useless to the community. It should be set aside.

James B. McDonough, for H. C. Speer.

1. The district was legally organized. Acts 1909, as amended by Acts 1911, page 141.

2. It had the power to borrow money. Acts 1909, § 3, Acts 1911, § 8, p. 144; Kirby's Digest, § § 7696-7-8; Acts 1905, 652; 105 Ark. 77. The contract is protected by art. 1, § 10, Const. U. S.; Harris on Mun. Bonds, 188 to 194; 167 U. S. 646; Abbott on Publ. Sec., § § 23, 23a; Haines on Pub. Sec., § 32, and cases cited. Speer had a right to appear and be heard. The district can not be legally dissolved, except by positive act of the Legislature, and then due provision must be made for its contracts, obligations and liabilities. The county court has no such power—the Legislature has not given it. Mansf. Dig., § 7548; Acts 1909, 947; Acts 1911, 141; 102 Ark. 401; 102 *Id.* 411; 106 *Id.* 306; 112 *Id.* 439; 107 *Id.* 411; 177 S. W. 900; *Ib.* 937.

3. There is no law for the dissolution of a special school district as was done in this case. 119 Ark. 592, does not settle this case. But if so, it should be overruled.

Where a district is dissolved its property and its obligations go to its successor. Its obligations can not be impaired. 167 U. S. 646.

4. The money collected was for a building fund. 102 Ark. 264. Taxes collected in a special school district can not be turned over to a common school district. The

dissolution of the district violates sec. 10, art. 1, Const. U. S., and sec. 1 of the Fourteenth Amendment. Cases, *supra.*

STATEMENT BY THE COURT.

This appeal is from a judgment of the circuit court dissolving the Haynes Special School District No. H. A petition was filed in the county court by citizens and electors residing within the special school district of Haynes asking the county court to dissolve the district and that the indebtedness due by it and the funds on hand to its credit be proportioned according to law. The county court entered a judgment dissolving the district, and reciting, among other things, "that the portion of the territory comprising Special School District No. H taken from School District No. 1 (describing it) be restored to and become a part of School District No. 1 and the remaining territory embraced in said School District No. H be transferred to School District No. 1 and School District No. 39 in proportion to the said territory allotted to each of said school districts."

This judgment was quashed on a writ of certiorari issuing out of the circuit court, and on appeal from the judgment of the circuit court to this court the sole question presented was whether or not the county court had jurisdiction to dissolve the special district, and we held that the county court had such jurisdiction. *Hughes* v. *Robuck,* 119 Ark. 592. After that decision the case which was then on appeal to the circuit court from the judgment of the county court dissolving the district was heard in the circuit court, and the circuit court rendered the following judgment: "It is further ordered and adjudged that that portion of the territory composing said special district "H" taken from School District No. 1, towit, the strip of territory in sections 3, 10, 15, 22, 27 and 34, in township 3 north, range 3 east, be restored to and become a part of School District No. 1, and the remaining territory embraced in said school district "H" be transferred to School District No. 39."

Special School District No. H, of Haynes, was made up of certain territory taken from part of Common School District No. 1 and also embraced the whole of the territory constituting Common School District No. 39. While the cause was pending in the circuit court on appeal, H. C. Speer filed what is designated as an "intervention" in which he set up that he was a bond buyer, having an office in Fort Smith and Little Rock, Ark., and engaged in the business of buying and selling bonds; that Special School District No. H of Haynes (which we will hereafter designate as District H), borrowed the sum of $8,500, receiving the money and issuing its separate bonds in the sum of $500 each, dated June 5, 1914, and bearing interest at the rate of 6 per cent. per annum, payable semi-annually, amounting in the aggregate to $8,500. The first of the bonds was due the first of August, 1917, and the last on the first of August, 1933. He alleged that the bonds were outstanding and owned by himself and others; that he received and paid for the bonds on the 8th of April, 1915, but had previously entered into a valid and binding contract to purchase the bonds on June 5, 1915; that the payment was made on April 8, 1915, and he authorized the bonds to be sold upon a guaranty of legality, and that he was liable to the purchasers if the bonds were finally held to be void; that such bonds as were not sold were deposited with Speer & Sons Co. for sale, but that such bonds as were not sold were owned by H. C. Speer, and he was not able to state how many of the bonds had been sold; that the order of the county court dissolving the district was void because it was made without the notice required by law and because it made no disposition of the debts and liabilities of District H and no provision for the payment of the bonds or interest thereon. That the bonds were contracts which District H had obligated itself to pay, and that the dissolution of the district would impair the obligation of those contracts and deprive the intervener and the other bond holders of their property without due process of law; that the proceeding was void

because it was an attempt to create new districts without preserving and taking care of the obligations and liabilities of District H.

The petition signed by citizens and electors within the territory of District H was introduced in evidence, and the petitioners prayed that District H be dissolved and that the indebtedness due by it and the funds on hand to its credit be proportioned according to law.

The interveners and remonstrants offered testimony to prove the allegations of the intervention in regard to the borrowing of the money and the issuance of the bonds. And the interveners also offered evidence to prove the identity of the contract entered into by the directors of District No. H and Speer & Dow for the sale of the bonds, which the court refused to permit, to which ruling exceptions were duly saved.

WOOD, J., (after stating the facts). This proceeding was begun in the county court under the authority of the act of April 1, 1895, Act 66, page 82, which provides: "Section 1. The county courts of this State shall have power to dissolve any school district now established, or which may hereafter be established in its county, and attach the territory thereof in whole or in part to an adjoining district or districts, whenever a majority of the electors residing in such district shall petition the court so to do." Section 2 provides for notice to be given. Section 3 provides: "Whenever, under this act, any district shall be abolished, any indebtedness due by it or funds on hand to its credit shall be proportioned by the court among the districts to which its territory has been attached, according to the value of the territory each received, of which action of dissolution and distribution of indebtedness or funds, as the case may be, the clerk of the court shall give due notice to directors of each district affected, showing the territory attached to their district, and amount of indebtedness adjudged against it, or funds credited to it, as the case may be."

(1) As already set forth in the statement, in the recent case of *Hughes* v. *Robuck,* 119 Ark. 592, we held that under this statute county courts had jurisdiction to dissolve special school districts, as well as common school districts.

It appears from the recitals in the judgment that the intervention was presented on the day and at the time when the court took up the matter for final hearing. The recitals also show that at the same time there was a motion to strike and a demurrer filed to the intervention, which the court sustained. The judgment further recites that "all indebtedness due by Special School District H and all funds on hand held by it be proportioned between said District No. 1 and said District No. 39 in proportion to the value of the territory received by said common school districts," and the clerk of the county court was directed to give due notice to the directors of each of the districts affected by the judgment of the territory attached to their respective districts.

Appellant Speer contends that the allegations set forth in his intervention, which the court disposed of on demurrer and motion to strike, were sufficient to show that he was the owner of valid and subsisting obligations of the district amounting in principal and interest to the full time of maturity, in excess of $14,000, and that these allegations were conceded by the demurrer and motion, and that therefore the court, on these facts, had no power to dissolve the district. The ground of his protest goes to the power and jurisdiction of the county court to render a judgment dissolving the district rather than to any error in the judgment of the court as to the apportionment of the indebtedness of the district. He argues that the Legislature did not intend to confer upon county courts the jurisdiction to dissolve special school districts because a dissolution of such districts would have the effect to impair the obligations of its valid subsisting contracts, and that the act, when thus construed, is unconsti-

tutional and void. This court held otherwise in *Hughes* v. *Robuck, supra,* and it adheres to that decision.

In the above case we recognized the doctrine that special school districts could not be dissolved if such dissolution had the effect to impair the obligations of their contracts. We there say that "the legislative control over the creation and boundaries of school districts is plenary, subject only, however, to the limitation that such action shall not impair the contracts or obligations of such districts."

But in the judgment dissolving the district the court adjudged that all indebtedness due by the special school district and all funds on hand by it be proportioned between District No. 1 and District No. 39 in proportion to the value of the territory received by each of said common school districts. Moreover, in *Special School Dist. No.* 2 v. *Special School Dist. of Texarkana,* 111 Ark. 379, we held that, "the Legislature has unrestricted power over the formation of school districts, and the making of boundaries thereof; and legislation on the subject is not affected by a failure to adjust the equities between the old and new districts."

Now learned counsel for appellant Speer concedes in his brief that the amount received from the bonds, towit, the sum of $8,500, "is now in the hands of the district and under the control and management of the board of directors." While Speer alleged that some of the interest on the bonds was then past due and unpaid, he does not anywhere specifically allege what the amount of that interest is, and in response to the motion to make his complaint more definite and certain, he alleges that he did not know the names of the owners, or the amounts and numbers of the bonds that were held by other owners, nor could he state how many of the bonds were sold and how many unsold. In the prayer of his complaint he does not ask for judgment for the $8,500 with accrued interest thereon up to the date of the judgment dissolving the district, but he only prays that the petition for dissolving

the district be dismissed and that the district be not dissolved.

(2) If upon the order of the county court dissolving the district, the $8,500 that had been furnished the district had been returned to the owners, with interest that had accrued thereon, this would be all that the district was obligated to pay. Speer and the bondholders contracted with the district with reference to the laws of the State, and they must be held to have known, if we are correct in our construction of the act of April 1, 1895, that such districts could be dissolved by the county court, and that such dissolution would necessarily have the effect to destroy any executory contracts of the district. When the district was dissolved, *ipso facto* its outstanding bonds became due, and there was no obligation upon the district to pay more than the face of such bonds with the interest that had accrued at the date of the order dissolving the district. There are no allegations in Speer's intervention asking that this be done or alleging facts showing that such relief would have been impracticable.

(3) Moreover, as we have already seen, the court adjudged that all indebtedness due by the Special School District H and all funds on hand by it be proportioned between District No. 1 and District No. 39. If these districts, Nos. 1 and 39, were adjoining districts to District H, which was dissolved, then the judgment of the court not only did not impair the obligations of the contracts of District H, but, on the contrary, expressly recognized these obligations and provided for their payment by Districts Nos. 1 and 39 in proportion to the value of the territory received by each of said common school districts.

It was not an abuse of discretion or an error for which a judgment of the court dissolving the district should be reversed because it did not undertake to ascertain and fix the amount of the obligations then outstanding against Special District H and adjudge the proportional sums of the indebtedness that the adjoining common school districts should pay. That is a matter that

could be ascertained and worked out in the future. The only limitation upon the power of the court to dissolve the district is that it "shall not impair the contracts or obligations of such district."

The county court was correct in treating the intervention of Speer as a protest against the jurisdiction of the court to dissolve District H, and did not err, from this viewpoint, in holding that Speer was not a proper party and in sustaining the demurrer to his intervention.

While the intervention alleges that the order of the county court is illegal and void because the same is not in compliance with the statutes of the State of Arkansas, and is illegal and void because no notice of the petition to dissolve was given as required by law, this allegation is not argued in the brief, and therefore is treated as abandoned.

II. The other appellants who joined in the intervention and remonstrance with Speer against the dissolution of the district contend that the county court abused its discretion and erred in apportioning the territory that was embraced in the district before it was dissolved. District No. H was formed by taking all the territory of Common District No. 39 and a part of the territory embraced within Common District No. 1, and in the order dissolving the district the county court restored to Common District No. 1 that part of the territory taken from it and the remainder of the territory it transferred to Common District No. 39, and also Common District No. 1.

This court held, in *Hughes* v. *Robuck, supra,* that the statute does not require that the petition for dissolution shall state the disposition to be made of the territory of the dissolved district, in order to give the county court jurisdiction of the subject matter. But we did not hold that the court could exercise its jurisdiction to dissolve in any other manner than that required by the statute.

(4) Appellants further contend that the court, after having acquired jurisdiction of the subject matter, must proceed in the exercise of that jurisdiction according to

the requirements of the statute, and that its failure to do so is error for which the judgment must be reversed. Now when all of the territory of Common School District No. 39 was taken in the creation of District H, Common School District No. 39 went out of existence and was no longer a common school district.

The statute authorizing the county court to dissolve any school district requires that the territory that constituted such special school district be attached "in whole or in part to an adjoining district or districts."

(5) In the opinion of a majority of the court, when the county court, and the circuit court on appeal, entered an order dissolving District H, it could not attach in whole or in part the territory of District H to Common District No. 39, for at the time of the order of dissolution there was no Common District No. 39. Having passed out of existence in the creation of Special District H, it could not be re-established in proceedings for the dissolution of District H. Having once been absorbed in the special district, and therefore abolished as a common district, in order for the same territory to be re-established into a common district numbered 39, it will be necessary for a majority of the electors residing upon the territory constituting the district to be formed, to petition for such district. Act of April 8, 1887, Kirby's Digest, § 7544.

Common School District No. 39, having been abolished in the order creating District H, a new common school district composed of the same territory could not be re-established under the statute without such petition. A petition of a majority of the electors residing in District H for the dissolution of that district might not constitute a majority of the electors residing in the territory that formerly constituted Common School District No. 39. The petition for the dissolution of a district is entirely different from one to create a district. The power to dissolve a special district and to attach the territory thereof, in whole or in part, to adjoining districts did not include also authority to establish new common school districts

without any petition therefor signed by a majority of the electors residing upon the territory to be included in such new district.

Now the effect of the order of dissolution was to reestablish a new Common School District No. 39, composed of all the territory embraced in the old District No. 39 and to add to the new District No. 39 other territory, without any petition asking that same be done, and the effect of the order, as shown by the boundaries of the new District No. 39 as created without a petition shows that it is composed of noncontiguous territory. In other words, a narrow strip of the territory of District No. 1 lies between and separates District No. 39 into two parts.

Five of the six directors of Special District H filed what is designated their intervention or remonstrance, setting up that "the order and proceedings are void for the reason that there is no authority conferred on the county court, under the petitions filed therein, to create a new school district, and that the order of the court is therefore void and without legal effect."

It is also urged that there was no competent evidence to show that the petition for dissolution contained the requisite majority of electors. Inasmuch as the cause must be reversed and remanded for the error indicated, we deem it unnecessary to dispose of this issue, for if the proof was not made by competent evidence it is a matter that can be easily corrected by a production of the record showing the number of electors residing on the territory of the special school district on a new trial.

The court erred in dissolving the District H without attaching the territory thereof to adjoining districts, and since there was no common school district No. 39 it necessarily follows that the court also erred in not apportioning the indebtedness of District H as required by the statute, and for these errors the judgment is reversed and the cause remanded for a new trial.

SMITH, J., concurs in the judgment.

McCULLOCH, C. J., dissenting. The record does not show that the interveners, Speer and others, were creditors of the special school district sought to be dissolved. They had, it appears, a contract with the district to sell bonds, but until the money was borrowed and the bonds issued and delivered there were no enforceable obligations to be protected from impairment. *Hopson* v. *Hellums,* 111 Ark. 421. For that reason, as well as for the very excellent ones stated in the opinion of the majority, I think that the interveners have shown no authority for obstructing the dissolution of the district. Now as to the ground on which the majority decided to reverse the judgment of the circuit court, I think that was concluded by the decision in this case on the former appeal. We had before us then the same record as now, so far as relates to the disposition of the territory of the dissolved district, and it was contended then, as now, that the judgment of the county court was void because the statute conferred no authority to dissolve a district, except by attaching the territory to adjoining districts. That contention was answered by this court by saying:

"The statute does not require the petition for the dissolution of a district to designate the districts to which the petitioners desire the territory attached. This act of 1895 does not require the county court to dissolve the district upon the filing of a proper petition therefor. It merely confers upon the county court the authority to do so. A discretion abides with the court in passing upon the petition; but the court has no authority to dissolve any particular district except upon the filing of a petition conforming to the requirements of the act above quoted. The assignment of the territory of the dissolved district is one of the things to be taken into account by the county court in determining how this discretion shall be exercised, and if the prayer of the petition is granted, the discretion of the court in the assignment of this territory is limited only by the duty of adjudging against the terri-

tory so distributed its *pro rata* part of the indebtedness of the district of which it was originally a part."

The court also cited, as analogous, the decision in *School District No.* 45 v. *School District No.* 8, 119 Ark. 149, holding that only a petition of the electors *in the divided district* was required.

If the judgment of the county court was valid on its face, as we held in the former decision, it is difficult for me to perceive how the same judgment rendered by the circuit court can be erroneous. If the disposition of the territory is, as we held on the former appeal, a matter of judicial discretion, there is nothing whatever in the present record to show an abuse of discretion. In fact, nobody contended in the trial below that the territory should be attached to existing districts rather than to attach a part of it to a new district re-established by the same judgment. The disposition of the territory follows under the statute as an incident to the dissolution of a district and the statutory authority is, I think, broad enough to empower the court to attach the territory to adjoining districts or to create a new district for that purpose when found desirable. At least, such was the effect of our former decision which became "the law of the case," and we should not depart from it on a second appeal.

If, as stated in the opinion of the majority, "the power to dissolve a special district and to attach the territory thereof, in whole or in part, to adjoining districts did not include also authority to establish new common school districts without any petition therefor signed by a majority of the electors residing upon the territory to be included in such new district," then the former decision of this court was erroneous, for we upheld the judgment which showed on its face that the court had attempted to exercise the very power which the majority now say can not be exercised. I think we ought to feel bound by the former decision, whether we think it was correct or not.

HAWKINS *v.* GRAY.

Opinion delivered March 19, 1917.

1. GIFTS—CONVEYANCE TO MEMBER OF FAMILY—ADVICE OF THIRD PARTY NOT NECESSARY.—The advice of a third person to a donor is not a necessary condition to the validity of a conveyance between parties occupying confidential relations toward each other.
2. GIFTS—DEED TO LAND—UNDUE INFLUENCE.—Deceased, an old man, and blind from cancer, deeded certain property to his daughter, appellant, with whom he was living. *Held,* under the evidence that the deed was valid and not brought about by undue influence.

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

W. P. Strait, for appellant.

1. Mr. Gray's mental capacity to execute the deed was completely established by uncontradicted testimony. 95 Ark. 159; 87 *Id.* 273; *Ib.* 148; 49 *Id.* 367; 78 *Id.* 420; 85 *Id.* 363; 119 *Id.* 468; 2 Pom. Eq. Jur. (3 ed.), § 947, etc.

2. There was no undue influence nor coercion. 78 Ark. 420; 49 *Id.* 367.

3. No independent advice was needed or necessary. 49 Ark. 367; 78 *Id.* 425; 86 *Id.* 363; 95 *Id.* 523; 119 *Id.* 466; 129 U. S. 663; 173 *Id.* 17; 16 L. R. A. (N. S.) 1087. There was ample consideration proven and the deed should be sustained.

Sellers & Sellers, for appellees.

1. There are unexplained indications of actual and intentional fraud on the part of appellant. At least bad faith is shown. The evidence shows mental incapacity also. 17 Cyc. 808; 21 How. (U. S.) 493; 45 Am. St. 94; 43 Mo. 395; 12 La. Ann. 401; 35 *Id.* 873; 46 Mo. 423.

2. Mr. Gray was suffering from senile dementia. 5 Pepper's System of Medicine, 174; 15 S. E. 146; 46 Am. Law Rep. 439; 39 *Id.* 484.

3. The relationship of the parties was such that appellant could not accept the deed, although he was wholly incompetent as the proof shows. 26 Ark. 605; 40 *Id.* 28; 15 *Id.* 597; 69 L. R. A. 393; 72 Atl. 973; 114 Pac. 246; 93

N. Y. S. 192; 78 N. W. 1011; 161 S. W. 535; 9 Cyc. 456; 38 Am. Rep. 388, note; 89 Am. St. 203-4, notes; 76 Fed. 907, 908; 75 N. W. 400; 78 *Id.* 1009; 10 So. 129; 156 N. Y. 341, 353; 80 N. W. 686; 36 Atl. 177; 33 S. E. 519; 60 Am. Rep. 175; 100 Am. Dec. 314-15, 322; 2 Am. St. 359; 45 Atl. 767; 66 N. Y. S. 24; 132 Pac. 543; 28 Pac. 786-7. Independent, disinterested advice must be given. Cases, *supra;* 13 Enc. Ev. 359; 59 Atl. 466-7-8-9, etc.; 18 N. W. 922; 75 Ala. 566. See also 15 Ark. 555; 40 *Id.* 28; 102 *Id.* 232; 123 *Id.* 134.

HART, J. Both appellant, Minnie Hawkins, and appellees, Annie Gray, John Gray, Fannie Humphries and Nellie Watson, are children of Jesse Gray, deceased. This bill was filed in the chancery court by appellees against appellant to set aside a conveyance of a house and lot to her by her father.

Jesse Gray died on January 20, 1916, and was eighty-three years old at the time of his death. He was a man of limited education, but of considerable force of character. At one time he had owned a valuable river bottom farm, which had fallen into the Arkansas River by reason of that river having changed its course. Gray had property of the value of about $7,000, which consisted of a business house and two residences situated in the town of Morrilton, Arkansas. The larger residence, which is the subject-matter of this litigation, was his homestead, and its value was variously estimated at from one thousand to one thousand five hundred dollars. He lived with Mrs. Minnie Hawkins, the appellant, about eleven years prior to his death. She kept house for him before she was married. During most of this time he was afflicted with a cancer upon his face which gradually grew worse until, something like two years before his death, it destroyed his eyesight. After he became blind, or nearly so, his daughter, Annie Gray, took charge of his business and collected his rents. The sum of $10 per month was paid to appellant toward the support of their father.

About two months before his death, Jesse Gray made a deed to his homestead to the appellant. The chancellor found that the deed was invalid and entered a decree canceling and setting it aside. The case is here on appeal.

It is first sought to uphold the decree of the chancellor on the ground that the facts recited created a confidential relation which made the deed *prima facie* void because the grantor did not have independent advice at the time he executed the deed. In other words, it is claimed that the deed should be held void merely because Jesse Gray had not independent advice at the time he executed it.

(1) The cases on the subject in this State do not go to the extent of rendering void all gifts between parties occupying confidential relation to each other where the donor did not receive independent advice. The question of whether or not such advice was given is a material one to be considered with other surrounding facts and circumstances, such as the nature and purpose of the gift, and the condition and relation of the parties; but the advice of a third person to the donor is not a necessary condition to the validity of a conveyance between parties occupying confidential relations toward each other. *Giers* v. *Hudson,* 102 Ark. 232; *Rogers* v. *Cunningham,* 119 Ark. 468; *Boyd* v. *Boyd,* 123 Ark. 134; *Boggianna* v. *Anderson,* 78 Ark. 420.

In *Giers* v. *Hudson,* a daughter, twenty-two years of age and unmarried, but who had always lived with her father, conveyed property to him. The conveyance was upheld, although she had no independent advice. The court adopted the general rule that in such cases the circumstances attending the transaction should be jealously and carefully scrutinized by the court in order to ascertain whether there had been undue influence in procuring it, and the court held that unless it was found to have been made voluntarily and with a full understanding of the facts, it would be invalidated.

In the later cases of *Rogers* v. *Cunningham* and *Boyd* v. *Boyd,* the gift was from parent to child, and while there was no formal discussion of whether or not the lack of independent advice made the gift avoidable, the effect of both decisions was to hold that the deeds should not be declared void merely because the donor had not independent competent advice on the subject. Whatever may be the rule elsewhere, it is the settled law of this State that independent advice is not necessary to the validity of a deed of gift between parties occupying confidential relations.

(2) This brings us to the question of whether or not Jesse Gray had sufficient mental capacity to execute the deed and as to whether or not its execution was procured by undue influence on the part of the appellant, his daughter. After a careful consideration of the testimony we have come to the conclusion that there is an entire absence of undue influence in procuring the deed and that the grantor was capable of understanding the nature and effect of conveying his property to his daughter.

It is true that according to the testimony of the appellees themselves and that of one of his grandchildren, Jessie Gray was not mentally capable of understanding what he was doing when he executed the deed to his daughter. They all stated that the cancer had so progressed that it destroyed his eyesight about two years before he died, and from that time on he suffered severe pain and was not capable of transacting any business. None of these children, however, resided with him or visited him except at infrequent intervals. They also stated that appellant had told them on the occasions they did visit their father that his mind was not good and that he was incapable of transacting business. Appellant denies this, however, and states that her father fully understood what he was doing when he conveyed the property to her. She stated that on other occasions before that time he had wanted to make the deed but that she and her hus-

band had objected because they feared that the other children would not like it.

It is certain that appellant waited on her father faithfully during all the time that he lived with her. She said that during his blindness she was paid $10 a month out of his rents in order that she might secure household help so as to be able to devote more time and attention to her father. It was necessary that his eye be bathed several times during the day, and his daughter was required to wait upon him constantly. Offensive odors emanated from the cancer, so that it was necessary to constantly use disinfectants in the house. Appellant was very devoted to her father throughout his long years of suffering and gave him every care and attention that would tend to promote his comfort or insure his happiness. That he appreciated the care and attention his daughter had given him is shown by the fact that he had on other occasions wanted to deed her the house and lot in question. This fact is established not only by appellant's own testimony, but by that of other disinterested witnesses.

The justice of the peace, who took Gray's acknowledgment to the deed, had known him for many years. He stated that Gray had told him about six months before that he wished to convey his home place to his daughter in appreciation of her care for him in his sickness and old age.

Another friend of the family who had known Gray for the greater part of his life, testified that he had told him the same thing several years before his death. Four women who were neighbors to him testified that they had, during the time Gray resided with appellant, made frequent visits to the house and knew that appellant had given him every care and attention that was necessary for his comfort. They said that although he suffered severe pain at times from his cancer, that when he was free from pain that his mind was clear and that he took an active interest in what was going on in the world and was fully capable of transacting business.

The justice of the peace who took his acknowledgment to the deed in question and the deputy sheriff who accompanied him, both stated that Gray fully understood what he was doing at the time he executed the deed. Complaint is made that the justice of the peace brought a witness with him when he came to acknowledge the deed. The record does not show why he did this, but it is not shown that he did it from any bad motive. Be that as it may, both the justice of the peace and the deputy sheriff who accompanied him testified that although the old man was blind and ill, that they talked with him sufficiently to know that he fully realized what he was doing and that he wished to make the conveyance to his daughter.

Another friend of Mr. Gray, who had known him all his life, testified that although a man of but little education, he was a good business man. He stated that his mind was perfectly clear up to within a few days of his death, and that he was fully capable of transacting business at the time he executed the deed in question. This is the witness referred to above as stating that Gray expressed to him several years before his death that he wished to deed the house and lot in question to appellant as a token of his appreciation of her care for him.

The family physician of appellant testified that when called there he frequently saw Gray and talked with him, that he was fully capable of transacting business at the time he executed the deed in question. He stated that he talked with Gray a few days before his death and at that time he still retained his mental faculties and was able to tell about his condition and appreciated it. Three other physicians who knew Gray were propounded the hypothetical question based upon the evidence and stated that they were of the opinion that he fully understood what he was doing when he executed the deed in question.

We think a preponderance of the evidence shows that there was no undue influence on the part of appellant in procuring the deed and that Gray fully understood what he was doing when he executed the deed and that he was

only carrying out a preconceived plan on his part which had existed in his mind for several years prior to its execution. The conveyance was reasonable to the grantee and just to the grantor.

It follows that the decree of the chancellor will be reversed and the cause remanded with directions to dismiss the complaint of appellees for want of equity. It is so ordered.

GEORGIA STATE SAVINGS ASSOCIATION *v.* DEARING.

Opinion delivered March 12, 1917.

1. DEEDS—GRANT TO A. AND HEIRS OF HER BODY, IN FEE SIMPLE.—A husband deeded property to his wife M., the habendum clause reading, "to the said M. and her heirs by me of her body born, or that may be hereafter to us born, in fee simple forever." *Held,* M. took a life estate.
2. DEEDS—OFFICE OF HABENDUM CLAUSE.—The office of the habendum clause of a deed is to explain or define the extent of the grant, and is rejected only where there is a clear and irreconcilable repugnancy between the granting and habendum clauses in the deed.
3. MORTGAGES—MORTGAGEE OF LIFE ESTATES.—A mortgage executed by the owner of a life estate ceases with the life tenant's death, and the mortgagee has a claim only against the life tenant's estate.
4. ADMINISTRATION—STATUTES OF NONCLAIM.—A claim not probated against an estate within one year after the deceased's death, is barred by the statute of nonclaim.
5. CONTRACTS—RIGHTS OF STRANGER.—A stranger to a contract between others in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise (no consideration from the stranger, and no duty or obligation to him on the part of the promisee), cannot recover thereon.

Appeal from Union Chancery Court; *J. M. Barker,* Chancellor; affirmed.

R. L. Floyd, for appellant.

1. As the statute of nonclaim had run prior to the accruing of the cause of action under the covenants of warranty, plaintiff had a valid claim against the heirs to the extent of such amounts as they may have received from the estate of their ancestors. 14 Ark. 246; 32 *Id.* 714; 78 *Id.* 531. Each of the heirs received an amount

from the estate in excess of plaintiff's claim. Defendants assumed the debt and a deduction was made from the price or consideration *pro rata,* and all became personally liable. 42 Ark. 197, 301; 47 *Id.* 317; 59 *Id.* 280; *Ib.* 453; 63 *Id.* 268; 99 *Id.* 618; 110 *Id.* 70; 118 *Id.* 192.

2. The deed conveyed a fee simple estate to Minnie I. Dearing. Kirby's Digest, § 733; 1 Washb. Real Prop. (5 ed.) 82, 93. If not a fee tail the rule in Shelley's Case will apply. Kirby's Digest, § 735; 1 Washb. Real Prop. (5 ed.) 98-100; 58 Ark. 303. The latter case is conclusive.

3. If Mrs. Dearing only took a life estate, the heirs are personally liable on the covenants of warranty. But irrespective of the estate held by the widow, the heirs are personally liable by the assumption of the debt recited in the deeds to them.

W. E. Patterson, for appellees.

1. The deed created an estate tail, and under section 735, Kirby's Digest, Mrs. Dearing took only a life estate. At her death her children became seized in fee simple. 44 Ark. 458; 49 *Id.* 125; 58 *Id.* 303; 67 *Id.* 517; 72 *Id.* 336; 75 *Id.* 19; 95 *Id.* 18; 94 *Id.* 615; 98 *Id.* 570. The habendum clause does not add to or take from the estate granted or limited to "bodily heirs" or "heirs of the body." 98 Ark. 570; 95 *Id.* 18; 94 *Id.* 615.

The habendum clause does not enlarge the estate. Cases *supra.* When Mrs. Dearing died her deed of trust was a nullity, as she took only a life estate. 16 Cyc. 636, 641; 49 Ark. 130.

2. The heirs were not liable and the claim was barred. 33 Ark. 640; 74 *Id.* 348; 97 *Id.* 492; 94 *Id.* 60; 18 *Id.* 334; Kirby's Digest, § 5399, as amended by Act No. 260, Acts 1911; 32 Ark. 714; 31 *Id.* 234; 56 *Id.* 445.

3. The heirs received nothing from the mother's estate.

4. There was no consideration for the assumption of plaintiff's debt. 110 Ark. 70; 27 Cyc. 1355. They are not estopped.

Mahony & Mahony, for appellees, Sanders and Mahoney, executors, adopt the above brief for appellees.

STATEMENT BY THE COURT.

Appellant instituted this action in the chancery court against appellees to recover judgment for a balance alleged to be due it and to have the same declared a lien upon the land described in the complaint. The material facts are as follows:

On the 6th day of December, 1892, H. L. Dearing, Jr., executed a deed to certain lands in Union County, Arkansas, and also one acre in the town of El Dorado. The consideration recited in the deed was the love and affection which he bore his beloved wife, Minnie I. Dearing. The granting clause is as follows:

"Do hereby grant, bargain, sell and convey, unto Minnie I. Dearing the following lands lying and situated in Union County, Arkansas, and described as follows, to-wit: (Here follows a description of the lands.) To have and to hold the aforegranted premises to the said Minnie I. Dearing and her heirs by me of her body born, or that may be hereafter to us born, in fee simple forever."

H. L. Dearing, Jr., died leaving surviving him his widow, Minnie I. Dearing, and three children, namely: H. L. Dearing, Irene Garrett and Annie Dearing (Annie Dearing afterward married W. G. Grace). His widow, Minnie I. Dearing, subsequently married Patrick McNalley, and on the 27th day of June, 1911, executed a mortgage on the one-acre tract in El Dorado above referred to, to secure a loan to her by appellant of $1,000. She died intestate on February 3, 1913, and at the time of her death there was a balance due on said mortgage. After her death, her son-in-law, Charles S. Garrett, became administrator of her estate. Later on J. H. Alpin became administrator in succession of her estate.

In July, 1914, H. L. Dearing conveyed an undivided one-third of the land to W. G. Grace. In December, 1914, W. G. Grace and Annie Dearing Grace conveyed an undi-

vided two-thirds of the land to R. A. Hilton. The consideration in the deed is "$1,000; * * * part of the above shall be an assumption of our *pro rata* due the Georgia State Savings Association."

In April, 1915, R. A. Hilton and wife conveyed a two-thirds interest in the land to J. W. Sanders. The conveyance recited that the "consideration was two-thirds of $1,400. The said two-thirds of $1,400 to be the assumption to the Georgia State Savings Association $748.01, cash, $652.99." In April, 1915, Irene Garrett conveyed to J. B. Sanders an undivided one-third of the land. The deed recited the consideration to be "one-third of $1,400. The said one-third of $1,400 to be the assumption to the Georgia State Savings Association $748.01 and cash $652.99." In August, 1915, J. W. Sanders and wife conveyed the land to C. H. Murphy for the consideration of $616.30. The record shows a number of payments on the obligation due appellant by Minnie I. McNalley, the last being on November 7, 1912. After her death her children made a number of payments, amounting to something over $350. The balance due appellant on January 7, 1916, was $734.52. Appellants did not probate their claim against the estate of Minnie I. McNalley after her death.

The chancellor found the issues in favor of appellees and dismissed the complaint of appellant for want of equity. The case is here on appeal.

HART, J., (after stating the facts). (1) It is first contended by counsel for appellant that under section 733 of Kirby's Digest the deed from H. L. Dearing, Jr., conveyed to Minnie I. Dearing a fee simple title in the acre of land in El Dorado involved in this suit. The granting clause in the deed was to Minnie I. Dearing and the habendum clause was "to the said Minnie I. Dearing and her heirs by me of her body born or that may be hereafter to us born, in fee simple forever." They claim that the granting clause is to Mrs. Dearing and that there

are no appropriate words limiting her estate and that therefore she acquired a fee simple title under the deed. They rely on the case of *Hardage* v. *Stroope,* 58 Ark. 303, as being conclusive of their contention. We do not think that case sustains their contention. The clause upon which the rights of the parties in that case hinge is as follows:

"To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if at her death there are no heirs of her body to take the said land, then and in that case to be divided and distributed according to the laws of descent and distribution in this State." There the limitation was to the heirs generally and Tennessee M. Carroll acquired a fee simple title.

(2) In the present case the effect of the clause in the deed was not to create a limitation to the heirs of Minnie I. Dearing in general, but the limitation was to the heirs of her body and she took a life estate. The office of the habendum clause of a deed is to explain or define the extent of the grant, and is rejected only where there is a clear and irreconcilable repugnancy between the granting and habendum clauses in the deed.

In the construction of deeds it is the duty of a court to harmonize the different parts so as to give effect, if possible, to each part. The language of the clause of the deed in question does not bring it within the rule in Shelley's case, so as to convey an estate in fee simple to Minnie I. Dearing, subsequently Minnie I. McNalley. In conformity to the rule of construction in *McDill* v. *Meyer,* 94 Ark. 615, she took only an estate for life.

It is contended that the words "in fee simple forever" in the habendum clause enlarges the estate to a fee simple in Minnie I. Dearing. We do not think the habendum clause in the present deed enlarges the granting clause, but that the words "in fee simple forever" mean that the heirs of the body of the life tenant take the remainder in fee simple. This is the construction put upon

a similar clause in the case of *Dempsey* v. *Davis,* 98 Ark. 570.

(3) Thus it will be seen that under the deed of Harry L. Dearing, Jr., to the land involved in this suit, Minnie I. Dearing, afterward Minnie I. McNalley, took a life estate, and their children, Harry L. Dearing, Annie Grace and Irene Garrett, took the remainder in fee simple. Minnie I. Dearing could only mortgage her interest in the land to appellant. At her death the mortgage ceased to be in force, and appellant only had a claim against her estate.

(4-5) An administrator of her estate was appointed on February 15, 1913, and appellant did not probate its claim against her estate within one year after the appointment of her administrator. Hence appellant's claim against her estate is barred by the statute of nonclaim. At the death of Minnie I. McNalley a fee simple estate in the mortgage premises vested in her three children above named. There was no contractual or other relation between them and appellant. They conveyed the land by deed to other parties, and in the deed it was recited that the grantee would assume a certain part of the mortgage to appellant. There was no contractual relation between their grantees and appellant, the beneficiary of the promise, and no consideration moved from appellant either directly or indirectly to the promisors. The rule in this State is that a stranger to a contract between others in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise (no consideration from the stranger, and no duty or obligation to him on the part of the promisee), can not recover thereon. *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27; *Little Rock Ry. & Elec. Co.* v. *Dowell,* 101 Ark. 223; *Kramer* v. *Gardner,* 104 (Minn.) 370, 22 L. R. A. (N. S.) 492, and case note, and *Fry* v. *Ausman* (S. D.), 39 L. R. A. (N. S.), 150.

It follows that there was no liability on the part of the defendants and the mortgage was not a lien on their

interest in the land. The chancellor was right in dismissing the bill of appellant for want of equity, and the decree will be affirmed.

AETNA LIFE INSURANCE COMPANY v. TAYLOR.

Opinion delivered March 19, 1917.

1. REVIVOR—CONSENT OF DEFENDANT.—When a plaintiff dies a revivor may be made in the name of his representatives forthwith, whether the defendant consents to it or not.
2. ACCIDENT INSURANCE—PLEA OF SUICIDE—BURDEN OF PROOF.—Deceased, who carried an accident policy in appellant company, was discovered dead, shot through the head, and with a pistol in his hand; *held*, under the policy, the burden was on the plaintiff (in an action to recover under the policy) to prove that the death of the insured resulted directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means; but plaintiff is not required to prove that the death of the insured did not result from suicide, which by the terms of the policy, would relieve the appellant from liability.
3. ACCIDENT INSURANCE—SUICIDE—PRESUMPTION.—Where one is found dead, there exists a presumption that deceased did not commit suicide, and such presumption stands until overthrown by evidence.
4. ACCIDENT INSURANCE—DEATH—PRIMA FACIE SHOWING.—Under proof that the insured was found dead with a pistol wound through his head, and that that caused his death, a *prima facie* case of liability is made out on a policy insuring deceased from death from accidental means.
5. ACCIDENT INSURANCE—PLEA OF SUICIDE—BURDEN OF PROOF.—In an action on an accident policy, where the defendant plead that deceased had committed suicide, the burden is upon the defendant to prove that fact, where under the terms of the policy, suicide is a defense to the policy.
6. ATTORNEYS FEES—ACTION TO COLLECT ON ACCIDENT POLICY.—In an action on a policy of accident insurance, a verdict for $8,000 was rendered for the plaintiff. *Held*, an allowance of $1,000 attorney's fees to the plaintiff was proper.

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

M. Danaher and *Palmer Danaher*, for appellant.

1. The case should not have been revived. Kirby's Digest, § § 6303 to 6306. It was improperly revived. No order was served on defendant.

2. It was error to give the second instruction for plaintiff. The burden of proving suicide was not on defendant. 55 N. E. 540; 182 Ill. 496; 4 Cooley on Insurance, 3258.

3. The attorney's fee is excessive.

Gustin, Gillette & Brayton and *Taylor, Jones & Taylor,* for appellee.

1. The suit was properly revived. Kirby's Digest, § § 6603 to 6307, 6314, 6317; 76 Ark. 122.

2. The burden was on appellant to prove suicide. 80 Ark. 190; 95 *Id.* 456; 113 *Id.* 502. There is no error in the giving or refusal of instructions. 78 Ark. 241; 84 *Id.* 81; 92 *Id.* 472; 93 *Id.* 509; 96 *Id.* 184.

3. The attorney's fee is not excessive.

M. Danaher and *Palmer Danaher,* for appellant, in reply.

Where a policy insures against bodily injuries effected solely through external, violent and accidental means (suicide, sane or insane, not included), the burden of proof rests upon plaintiff * * * to prove that the death occurred through accidental means, and the fact that defendant pleaded suicide does not alter the rule. 73 Mo. App. 38; 147 Pac. 1175; 1 Corpus Juris, 496; § 284; 4 Cooley's Briefs on Insurance, 2358; 240 Ill. 205; 175 Ill. App. 511; 215 Mass. 32; 149 N. Y. 45; 28 N. Y. Sup. 951; 209 Pa. 632; 169 Mo. 272; 82 N. W. 326.

STATEMENT BY THE COURT.

This is an action by an administrator to recover on a policy of accident insurance.

The plaintiff alleges that the Aetna Life Insurance Company insured Edgar P. Sears in the sum of $5,000 against death resulting directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means. That the policy itself and the accumulations from renewals amounted to $8,000, and that Ella S. Sears, the wife of the insured, was the beneficiary.

That on the evening of November 25, 1914, during the life of the policy, Edgar P. Sears received a pistol wound in the head at the hands of an unknown person which resulted in his immediate death.

In its answer, defendant denied that the death of the insured was accidental within the meaning of the policy. It avers that by the terms of the policy it did not agree to insure Sears against death resulting from his own intentional act. The answer further alleges that Sears committed suicide by shooting himself, and that no person other than himself was responsible in any manner for his death. The material facts are as follows:

Edgar P. Sears had carried an accident policy with the defendant company for sixteen years prior to his death. The policy which was in force at the time of his death insured him against disability or death resulting, directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means, suicide (sane or insane) not included. The policy was for $5,000 and contained a clause for an increase of the amount of the policy by consecutive renewals until the accumulations should amount to 50 per cent. of the principal sum.

The insured was found dead in the city of Pine Bluff on the morning of the 26th of November, 1914. His death was the result of a gunshot wound through his head, which, the physicians who examined his body testified, caused immediate death. The bullet went into his head about an inch in front and above the right eye and came out about one inch and a half above and behind the left ear. There were no powder marks or burns of any nature on his body; his flesh was not charred, nor was his hair singed. Sears was a good sized man, weighing about two hundred pounds. His body was found near a cotton platform and a folding pocketbook with some of his papers in it was lying on a bale of cotton on the platform. He was lying on his back with one leg straight out and the other drawn up. His left arm was lying down by his side

and his right arm was lying over his breast with his hand on a .38 caliber pistol. The pistol had been fired twice. The ground was dusty and there was no evidence of a struggle or even of any other tracks around there.

It was also shown by the defendant that the insured had formerly been a man of means and had always made a good deal of money until about a year before his death, when misfortune overtook him. The defendant's evidence also tended to show that the insured was making very little money just prior to his death and had been unable to even pay his board; that he was drinking heavily and was very much depressed. Other circumstances tending to show death by his own hand were adduced in evidence.

The testimony on the part of the plaintiff tended to show that the deceased had not been drinking heavily prior to his death; that he was in good spirits and had sent his wife a small amount of money, writing a cheerful letter.

The jury returned a verdict for the plaintiff, and the defendant has appealed.

HART, J., (after stating the facts). This action was commenced by Ella S. Sears, the beneficiary named in the policy. During the pendency of the action and before the case was tried she died and the suit was revived in the name of Dan Taylor, as special administrator of her estate. This was done over the objection of the defendant. The motion to revive was accompanied by the affidavit of three persons showing that Ella S. Sears had died at Salt Lake City, Utah, and that no administration upon her estate had been had. There was no error in the action of the court in this regard.

In *Anglin* v. *Cravens,* 76 Ark. 122, the court said: "When the plaintiff dies during the pendency of the action, any person interested in the further prosecution thereof may have a revivor in the name of the administrator or executor, if there be such, and the right of action be

one that survives in favor of the personal representative; and if there be no general administrator or executor, the revivor shall be in the name of a special administrator appointed by the court in which the action is pending. The order to revive may be made forthwith—as soon as the court in which the action is pending convenes after the death of the plaintiff, and must be made within one year after that time, except by consent of parties. The limitation of time in the statute applies equally where there is no general administrator or executor as where there is one, because in such event the persons interested may have a revivor in the name of a special administrator."

(1) Again, in *Keffer* v. *Stuart,* 127 Ark. 498, the court held that under our statute when a plaintiff dies the revivor may be made in the name of his representatives forthwith, whether the defendant consents to it or not. The court further said that the statute does not require that the defendant be consulted until after the expiration of a year from the time when the order of the revivor might have been first made, but that after that time, the order of revivor could not be made without the consent of the defendant.

The court also gave at the request of the plaintiff, among others, the following instructions:

"1. If you believe from the evidence that the deceased came to his death as the result of a pistol shot fired by some person other than himself, your verdict will be for plaintiff.

"2. The burden is upon the defendant insurance company to establish by a preponderance of the evidence that the deceased committed suicide, and unless you so find, your verdict will be for the plaintiff."

It is insisted that the court erred in giving instruction No. 2.

(2) The burden was on the plaintiff to establish that the death of the insured resulted directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental

means; but he was not required to prove that the death of the insured did not result from suicide, which by the terms of the policy would relieve the company from liability thereunder.

(3-4) When the plaintiff proved that the insured was found dead with a pistol wound through his head and that this caused his death, he had made out a *prima facie* case under the policy. The reason is that there is a presumption that one does not commit suicide. Such a presumption being one of evidence, stands until overthrown by evidence. As stated by Judge Agnew in *Allen* v. *Willard,* 57 Pa. 374, "The natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motive, feeling and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries."

(5) The defendant claimed that the insured had committed suicide, which is made an exception to the risk of the policy. This was a defense and the law cast upon the company the burden of proving it.

The policy insures against death to Sears by external, violent and accidental means. It is made subject to a condition that the defendant is not liable in case of the suicide of the insured. The occurrence of this condition operates to defeat the policy, and this fact should be shown by the party relying on it. 1 Cyc. 289; 1 Corpus Juris, § § 278 and 284, pp. 495 and 496; 14 R. C. L., § 416, pp. 1235 and 1236; *Travellers Ins. Co.* v. *McConkey,* 127 U. S. 661; *Coburn* v. *Travelers Ins. Co.,* 145 Mass. 226; *Starr* v. *Aetna Life Ins. Co.* (Wash.), 4 L. R. A. (N. S.) 636, and case note; *Cronkhite* v. *Travelers Ins. Co.,* 75 Wis. 116, 17 Am. St. Rep. 184; *Meadows* v. *Pac. Mut. L. Ins. Co.,* 129 Mo. 76, 50 Am. St. Rep. 427; *Fetter* v. *Fidelity & Casualty Co.,* 174 Mo. 256, 97 Am. St. Rep. 560; *Ins. Co.* v. *Bennett,* 90 Tenn. 256, 25 Am. St. Rep. 685; *Wilkinson* v. *Aetna Life Ins. Co.,* 240 Ill. 205.

In a case note to 9 A. & E. Ann. Cas. at page 921, it is said that accident policies generally contain a clause, the purpose of which is to relieve the insurer from responsibility in case of death of the insured caused by intentional injuries inflicted by the insured or some third person, or caused by disease, or caused by voluntary exposure to unnecessary danger, etc.; and that where the insurer sets up the breach of one of these conditions as a defense, the burden is of course upon it to prove by a preponderance of the evidence that death was caused by a breach of one of these conditions.

The rule, we believe, is not only supported by the better reasoning but is in accord with the great weight of authority as shown by the cases cited in the note just referred to. This general rule is also in accord with the trend of our decisions bearing on the question.

In *Grand Lodge of Ancient Order of United Workmen* v. *Banister,* 80 Ark. 190, it was held that where, in a suit upon a benefit certificate, the insurer claims nonliability upon the ground that the insured committed suicide, the burden of proving that fact is upon the defendant. It is true this was an action on a life insurance policy and that there is a difference in the amount of proof required to recover on a life insurance policy and on an accident policy. In the former, all that is necessary for the plaintiff to show to make out a *prima facie* case is the contract and death. In the latter, in addition to this, the plaintiff in order to recover must prove that the death or injury was accidental within the meaning of the terms of the policy. This difference, however, does not in any manner affect the reasons for the rule casting upon the defendant the burden of proving suicide when that is alleged as a defense to the policy. Both in actions on life and accident insurance policies, the plaintiff must first make out a *prima facie* case, and when that is done, the defendant having set up a breach of a condition of the policy as a defense, the burden is upon it to prove by a preponderance

of the evidence that the death was caused by a breach of this condition.

In the present case it is shown beyond question or dispute that the insured came to his death by external and violent means. The only controverted question of fact in the case is as to whether or not he committed suicide. This being the case under the principles of law above announced, the court did not commit reversible error in giving the instruction complained of.

(6) The jury returned a verdict for the plaintiff in the sum of $8,000, and there is no claim that the plaintiff was not entitled to recover this sum under the terms of the policy. The court fixed the attorneys' fee at $1,000. It is claimed that this is excessive, as being evidently made upon the basis of a contingent fee. We do not agree with counsel in this contention. We have held that the court should only allow a reasonable fee for legal services performed and that this should not be made on the basis that the fee was contingent. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554. In that case the policy sued on was $10,000 and the court allowed a fee of $2,000. We held that this was unreasonable and that $1,000 would have been a reasonable fee. Here the recovery was for $8,000 and we do not think, when all the circumstances of the case are considered, that a fee of $1,000 was excessive. Three attorneys who testified on the question stated that $1,500 would have been a reasonable fee, but we think that the court properly fixed it at not exceeding a thousand dollars.

The judgment will be affirmed.

PLANTERS MERCANTILE COMPANY *v.* PLANTERS COTTON COMPANY.

Opinion delivered March 19, 1917.

RENTS—FORECLOSURE—TO WHOM PAYABLE.—Lands subject to a mortgage were sold to appellant under foreclosure. A receiver meantime had been appointed, the lands rented, and the receiver ordered to pay

taxes and other charges against the property. *Held,* under the facts that the excess of the rents, over the accounts required to be paid for taxes, etc., would be applied to the mortgage debt, and would not go to the purchaser at the sale.

Appeal from Mississippi Chancery Court, Osceola District; *Chas. D. Frierson,* Judge; affirmed.

Hughes & Hughes, for appellant.

1. Appellant was entitled to the rents. 92 Ark. 315; 10 *Id.* 9; 24 Cyc. 64; Jones on Mortg. (7 ed.), § 1659; Underhill on Landl. & Ten., § § 32, 322; 185 U. S. 354, 361; 45 Iowa, 670; 119 Ark. 543, etc. But this case is ruled by 123 Ark. 18, 22-3-4. There was no reservation of the rents at the sale, and they were not due until after the sale. They passed to the vendee at the sale. Cases, *supra;* 17 A. & E. Enc. L. (2 ed.) 1015; 45 Ia. 670; 4 Baxter, 227; 185 U. S. 354; 31 Atl. 1050; 100 S. C. 324; 27 N. D. 100; 67 Wash. 135; 80 Ky. 501; 10 Leigh, 317; 59 Oh. St. 540; Wiltsie on Mortg. Forecl. (3 ed.), § 718, etc.

Caruthers Ewing, of Memphis, Tenn., and *J. T. Coston,* for appellees and cross-appellants.

1. The case in 123 Ark. 18 is not in point. There the commissioner did not state that the purchaser would *not* get the rents. Here the commissioner stated, at least, that it was uncertain who would get the rents. The purchaser got just what the commissioner told it it would get.

The recitals in the notice of sale advised appellant that the rents were reserved. 69 S. W. 1084; 43 Md. 560; 3 Ky. Law Rep. 469.

2. Contend that the sale was void, but the authorities are not cited as the validity of the sale is not questioned by the court in its opinion. As to the rents, the decree should be affirmed.

HART, J. On September 16, 1916, appellant purchased a tract of land under a mortgage foreclosure sale, and the sale was confirmed by the chancery court on September 20, 1916. From the decree of the chancellor denying him the right to the rents, the appellant prosecutes

this appeal. This is the second appeal in the case. The opinion on the former appeal is reported in 124 Ark. 360, under the style of *Coffin* v. *Planters Cotton Company.* The original suit involved the priority of the mortgages of appellee and other parties and also a foreclosure of the same. On January 17, 1915, the parties consented to the appointment of a receiver for the lands involved in the action. The receiver was ordered to rent the farm for the best price obtainable for the year 1915, and was further authorized to discount any of the rent notes and to apply the proceeds to the payment of taxes and drainage and levee assessments against the property.

Some time in the summer of 1915, the court rendered a decree in which it settled the priority of the mortgages on the lands and ordered a sale of the lands to satisfy the mortgage indebtedness. The decree of foreclosure provided that the sale should be made without equity of redemption and that the purchaser should be entitled to the possession on January 1, 1916, if the sale be made before that date, and if the sale be not made before that date that the purchaser shall have immediate possession. An appeal was taken from the decree to this court and for that reason a sale of the premises under the decree was not had. The receiver had been appointed by the court as special commissioner to make the sale. The decree of the chancellor was affirmed in an opinion delivered by this court on June 12, 1916. In March of that year the receiver had rented the land again, and in the rent contract it was provided that the rents should be payable on November 15, 1916. The mandate of the Supreme Court was issued on the 21st day of July, 1916. It is not shown on what day the mandate was filed in the chancery court, but the record does show that notice of the mandate was waived.

The special commissioner advertised the lands for sale under the original decree by the chancery court and fixed September 16, 1916, as the day for the sale. The notice stated that the sale would be in bar of the equity

of redemption and that the purchaser would be entitled to the possession on January 1, 1917. The land sold for $19,000 and the Planters Mercantile Company became the purchaser. Exceptions to the report of sale were filed in the chancery court and were acted on on the 20th day of September, 1916. On that day the court confirmed the sale and the purchaser having elected to waive the time and pay the purchase price in cash, the commissioner was ordered to make him a deed. In the order of confirmation, the court held that the Planters Mercantile Company was not entitled to the rents for 1916, and decreed the same to belong to the Planters Cotton Company, one of the mortgagees and a party to the suit. The receivership was continued with directions to the receiver to collect the rent for 1916, and pay out of it all taxes and assessments which may have accrued and remained unpaid upon the land.

The special commissioner testified that on the day of the sale there was a difference of opinion between the parties interested as to whether the purchaser would get the rents for the current year. He stated that he announced to the bidders that the sale would be made on the supposition that the rents would not go to the purchaser and they could bid accordingly. On cross-examination he was asked that, if instead of making this statement, he did not say it was uncertain as to what would become of the rents and he said it was uncertain, and therefore the bidders would bid with the understanding of a possibility of the rents not going with the land.

It is the contention of appellant, the purchaser at the sale, that it is entitled to the rents under the authority of *Gailey* v. *Ricketts,* 123 Ark. 18. Under the facts of that case there was no reservation of the right to the rents and the court held that the deed of the commissioner conveyed to the purchaser that interest which a deed from the heirs as of that date would have conveyed. In that case the commissioner himself did not make any announcement about any reservation of the rents. The notice of sale

contained a clause that possession would be given to the entire premises November 1, 1914, and for fall sowing October 15, 1914. There was a tenant in possession of the property and the court held that the notice only undertook to say when and for what purpose the purchaser might share possession with the tenant. The court further said that the decree of foreclosure made no reservation of the rents and that the authority of the commissioner related to its provisions. Here it may be said that the facts are essentially different. A receiver had been appointed in the early part of January, 1915, and had been given authority to rent out the land and take rent notes therefor. He was directed to discount the rent notes and pay certain taxes and assessments against the lands.

A final decree was entered of record in the latter part of the summer in which the priority of the mortgages was settled and the mortgages ordered to be foreclosed. The decree of foreclosure provided that the sale should be made without equity of redemption and that the purchaser should be entitled to possession on January 1, 1916, if the sale was made before that date, and, if afterward, the purchaser should have immediate possession. This indicates that the court had in mind that he had already directed the receiver to rent out the lands and to discount the rent notes in order that he might pay certain fixed charges against the land and that it intended to reserve the rents from the sale. It was evidently intended that the sale should be made during the fall of 1915, or in any event during the first part of 1916. No sale was made as contemplated by the decree because an appeal was taken to this court. The record shows that the receiver rented out the land again for the year 1916. This court affirmed the decree of the chancellor on June 12, 1916, and its mandate was issued on July 21, 1916. After the mandate was filed in the chancery court, it appears that the special commissioner advertised the lands for sale without any further directions from the court. The notice of sale provided that it should be in bar of the

equity of redemption and that the purchaser would be entitled to possession on January 1, 1917. It will be remembered that the special commissioner was also the receiver in the case. It is evident then that the recital in the notice just referred to was in conformity with the decree and not contrary to its provisions. The evident purpose of the decree was to reserve the rents from sale because they had already been sequestered by the appointment of a receiver to collect them and dispose of them under orders of the court. On account of the appeal to this court the sale was postponed for about one year and the commissioner in his notice of sale stated that the sale would be in bar of the equity of redemption and that the purchaser would be entitled to possession on January 1, 1917, instead of saying January 1, 1916, as literally directed in the original decree. The evident purpose of the language of the original decree was to reserve the rents from the sale regardless of when the sale should be made. This reservation of the rents no doubt was made because of the appointment of the receiver and the disposition ordered to be made of them by him. Therefore, under the circumstances of this case we think there was an express reservation of the rents from the sale and that the court properly directed them to be applied to the mortgage debt instead of giving them to the purchaser under the foreclosure sale.

It follows that the decree must be affirmed.

SELIG v. BOTTS.

Opinion delivered March 12, 1917.

CONTRACTS—AGREEMENT TO FURNISH PUMP—REMAND OF CAUSE—PRACTICE.—Appellant agreed to drill a rice well for appellee. The well was not a success until appellee purchased a new pump, whereupon the well performed satisfactorily and delivered the amount of water contracted for. Appellant sued for the balance due. *Held*, appellant was entitled to compensation for what he had done, and a judgment for the defendant was reversed, and the cause remanded. *Held*, also, that since the appellee recovered judgment in the court below on an

erroneous theory, upon a reversal and remand of the cause, he will be permitted to develop the case in accordance with the law as announced in this opinion.

Appeal from Arkansas Circuit Court, Southern District; *Thomas C. Trimble,* Judge; reversed.

O. M. Young, Lee & Smith and *June P. Wooten,* for appellant.

1. Placing a reasonable construction on the appellee's testimony, there was a literal compliance with the contract by the installation of the Layne pump. Appellant was entitled to recover, on the contract, upon a substantial compliance therewith, or an acceptance of the work, notwithstanding defects therein, the contract price, less the cost of correcting such defects. 105 Ark. 353; 97 *Id.* 278; 86 *Id.* 570; 79 *Id.* 506; 64 *Id.* 34. Judgment should have been given for appellant, for at least $300. 33 Ark. 751; 114 *Id.* 330; 120 *Id.* 152. The jury were properly instructed, but they ignored the instructions.

2. Appellant repaired the pump every time he was notified to do so, and supplied all defects, thereby carrying out his contract. The court erred in refusing instruction No. 3, asked by appellant. 102 Ark. 152.

3. The instructions were misleading and hurtful testimony was admitted.

J. W. Moncrief and *C. L. O'Daniel,* for appellee.

1. Appellant did not seek to recover on *quantum meruit* below, and questions not considered and determined in the lower courts will not be reviewed in this court. This court does not assume to try new issues, nor try them *de novo.* 53 Ark. 163; 64 *Id.* 499; 71 *Id.* 214-427. Nor can a party assume a position in this court inconsistent with the one taken in the lower court. 66 Ark. 126; *Ib.* 219. A party not asking relief below can not obtain it on appeal. 68 Ark. 71. He sued on the written contract and objected to all proof as to damages.

Most of the cases cited on *quantum meruit* are suits on binding contracts where the rule is different. 64 Ark.

34-38; 102 *Id.* 152; 3 *Id.* 324; 86 *Id.* 570; 118 N. W. 789; 146 *Id.* 347; Kirby's Digest, § 5028; 151 Pac. 649.

2. There can be no recovery on *quantum meruit* on account of his wrong, and appellee was damaged more than he was benefited. 25 N. E. 418; 85 N. Y. Supp. 713; 70 Hun. 222; 25 Pa. 382; 66 Ill. 467; 69 N. H. 466; 33 Vt. 35; 72 Ark. 525; 3 Ark. 324. There was no error in the court's instructions.

3. The burden of proof was on appellant. 166 S. W. 566; 93 Ark. 472; 88 *Id.* 422.

4. The terms of a contract are to be construed most strongly against the party drafting it. 73 Ark. 338; 74 *Id.* 41; 90 *Id.* 88.

5. The contract determines the rights of the parties, and both are bound by its terms, and the damages were fixed by it. 14 Ark. 315, 327; 122 *Id.* 308.

6. The instructions really were too favorable to appellant. The verdict was against appellant on disputed facts, and it is sustained by a great preponderance of the evidence. If there was any error, it was invited error.

SMITH, J. The parties to this litigation entered into a contract wherein Selig, who was the plaintiff below, and is the appellant here, agreed to drill a rice well for Botts, who was the defendant below and is the appellee here, with a flow of water of 800 gallons per minute, when tested, and to install a centrifugal pump, to be completed and tested on or before May 15, 1914, for a total consideration of $1,650, of which $1,200 was to be paid upon completion of the well, and a note given for the balance, bearing 8 per cent. interest from date, and maturing December 1, 1914. There was a written contract in which Selig guaranteed that the well would produce the stipulated amount of water at the time of test, if pumped with proper power and speed, and Selig also agreed that, after the test and acceptance, he would furnish, free of cost to Botts, during the pumping season of 1914, "any defective parts of pump, or parts that should become worn out, same having been properly lubricated, for above stated

period." The parties agree that a test was made, and Selig says it was satisfactory to Botts, except that it appeared that sufficient engine power had not been provided. Certain notes were given after the test, and a $500 payment was made on June 1, and on July 14 an additional cash payment of $286 was made. In addition to the $786 paid in cash, Botts incurred expenses amounting to $39 in the attempt to operate the pump, making a total expenditure of $825. Botts testified that the pump did not work satisfactorily, and, after Selig had attempted several times to adjust it, he abandoned that pump and purchased another at a cost of $525. Thereafter there was no further trouble, and Botts admitted that he got a pipe full of water, amounting to 800 gallons per minute. Botts denied any liability, and filed a cross-complaint, in which he prayed judgment for damages to compensate the partial loss of the crop of rice, which he says was occasioned by the insufficient supply of water during the time he was attempting to operate the Selig pump. The case, however, was submited to the jury upon the question of the performance of the contract to drill the well and furnish the pump.

A large number of instructions were given, which we will not set out. One, given at the request of Selig, told the jury, in effect, that, if the failure to fulfill the guaranty of the contract was not due to Botts' failure to furnish proper power, but to the defective pump, the liability of Selig on this account would be $525.

An instruction, given at the request of Botts, however, told the jury that "If you find that plaintiff has failed to comply with said contract, as above stated, then plaintiff is indebted to defendant in the sum of $825, and you should so find."

The jury returned the following verdict: "We, the jury, find for the defendant judgment in the sum of $825, and relieve defendant from any further payment on said well, and notes are to become void."

Notwithstanding the evidence of Selig that the pump was tested and accepted, and needed only proper propelling power, which he was under no duty to furnish, and certain small repairs and adjustments which he made, and offered to make, we must assume, from the verdict of the jury, that the pump was worthless. It does not follow, however, that the judgment must be affirmed on that account. The new pump was installed the last of July, 1914, and its installation completed the contract. Had Selig put this last pump in, instead of the one he did put in, he would have been entitled, under the contract, to a payment, either in cash or interest-bearing notes, of $1,650. But as Botts was required to expend $525 to get the thing which he had contracted for, that sum must be deducted from the contract price. It follows, therefore, that Selig should have had judgment for $300, and judgment will be entered here in his favor for that amount, with interest from July 31, 1914.

It is strongly insisted by learned counsel that no judgment should be rendered against Botts, because the jury has found that the contract was not performed, and we are cited to cases holding that there can be no recovery, *quantum meruit,* on the partial performance of an indivisible contract. But this is not that kind of a contract. The well is there, and is now in use, and meets the contract specifications. Only a proper pump was needed to comply with the provisions of the contract, and only its cost should be deducted from the contract price. *Thomas* v. *Jackson,* 105 Ark. 353, and cases cited. *Ensign* v. *Coffelt,* 119 Ark. 1.

The judgment is reversed, and judgment will be rendered here in favor of Selig for $300 with interest.

SMITH, J., on rehearing. Appellee calls attention to the fact, in his motion for a rehearing, that he prevailed in the trial of this cause in the court below, and that he tried his case upon the theory that there could be no recovery by appellant, unless he had substantially complied with his entire contract, which required him not only to

furnish a well answering the contract specifications, but a pump also. He insists now that, in view of our decision that the appellant should be allowed to recover the contract price for the completed contract, less the sum expended by appellee in completing the contract, he should be permitted to develop more fully his defenses to the suit, when tried upon that theory. He says, in this connection, that the pump installed by him was not of equal value to the one to which he was entitled under the contract, and that he incurred expenses in the installation of the new pump for which we have not given him credit, and which were occasioned by the failure of appellant to install the kind of pump to which appellee was entitled under his contract.

Inasmuch as appellee recovered judgment below upon an erroneous theory, we will grant the rehearing to the end that he may develop his case in accordance with the law as announced in the original opinion.

And as the cause is to be remanded for a new trial, we take occasion to say that the court properly refused to allow appellee to prove damages alleged to have been sustained to his rice crop as being indirect, and not within the contemplation of the parties under the terms of the contract.

NIXON ET AL., RECEIVERS ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. FULKERSON.

Opinion delivered March 19, 1917.

1. EVIDENCE—MEDICAL EXPERTS—QUALIFICATIONS.—A person to qualify as a medical expert must be possessed of such experience, skill or science in the particular subject or inquiry as entitles his opinion to pass for scientific truth. His knowledge must be knowledge acquired either from actual study or long experience in the particular field toward which the inquiry is directed.
2. EVIDENCE—MEDICAL EXPERTS.—Medical experts may give their opinions, if skilled in the science and practice of medicine.
3. EVIDENCE—PERSONAL INJURIES—MEDICAL EXPERT—COMPETENCY.—In an action for damages from personal injuries, the testimony of a physician of the mechanotherapist school, who had practiced eight or nine years, claimed by education and practice to be familiar with

diseases of the muscles and bones, and dislocations and such matters, and was the graduate of a medical college, is admissible as expert testimony.

4. NEGLIGENCE—PERSONAL INJURIES—SPEED OF RAILWAY MOTOR CAR—OPINION OF WITNESS.—Plaintiff alleged that his horse was frightened by a railway motor car which passed him at a high rate of speed, emitting loud sounds, which caused the horse to run away, causing the damage complained of. *Held,* it was proper to permit plaintiff to testify that if the motor car had been running at a reasonable rate of speed, that he could have gotten out of the way and saved himself from injury, there being other competent testimony showing the high speed of the motor car.

5. NEGLIGENCE—OPERATION OF RAILWAY MOTOR CAR AT DEPOT.—Unless timely notice of its approach is given, it is the duty of a railway company to exercise ordinary care in the operation of a motor car on its tracks, so as to prevent injuries to persons and property likely to be at its depots when such motor cars pass.

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

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

1. Doctor Fagan's testimony was inadmissible. He was not an expert. 23 Ark. 730. The company was not compelled to regulate the speed of its car so as not to frighten a horse behind a car that could not be seen, and the first instruction for plaintiff was error. The court should also have given Nos. 1, 3 and 4 for defendant. 63 Ark. 177; 54 *Id.* 431; 10 A. & E. Ry. Cases (N. S.) 100; 4 A. & E. (N. S.) 483.

2. The issue as to loud and exciting noises made by the car should not have been submitted to the jury. No unnecessary noise was proven to have been made by the car. Besides, the company was not liable for frightening a horse of one upon the premises for the purpose of delivering freight to be shipped, by the necessary noises of a passing car. 58 S. E. 705; 51 A. & E. Ry. Cases, 37 and notes; 46 *Id.* (N. S.) 259-60, etc.; 15 *Id.* 448-9, 455; 11 *Id.* 275; 111 N. W. 281.

3. The company owed no duty to appellant, unless they had discovered his danger, or that his horse was in a position to be or was frightened. 13 A. & E. Ry. Cases, 632; 123 Ark. 515.

4. The operation of the car was not the proximate cause—the breaking of his line was. A peremptory instruction should have been given for defendant. 144 Fed. 56; 69 *Id.* 808; 101 *Id.* 315-322.

H. L. Pearson, for appellee.

1. Doctor Fagan was competent. 94 Ark. 538-44.

2. A high and reckless rate of speed was negligence *per se* when a car is running through a populous town. 129 S. W. 558; 121 *Id.* 648; 79 Ark. 248; 89 *Id.* 261; 100 *Id.* 232; 106 *Id.* 492, 503; 164 Fed. 785; 66 So. 633.

3. No contributory negligence is shown. 71 Pac. 371; 71 *Id.* 371.

4. Due care must be used—the speed must be regulated. 6 Ind. 141; 7 *Id.* 553. A railroad is liable to a trespasser for a failure to moderate its speed in a town or city. 54 So. 179. See, also, 30 So. 285.

5. The question of noise was properly submitted to the jury. 56 Ark. 387.

6. There was no contributory negligence, and the breaking of a line was not the proximate cause, but the reckless speed and unnecessary noise. 56 Ark. 387. There is no error in the instructions.

HUMPHREYS, J. Appellee brought suit in the Washington Circuit Court against appellant, seeking to recover damages in the total sum of $2,950 for injury to himself and property, on account of the alleged negligence of appellant in running a motor car at an unusual, reckless and negligent speed, and for causing said motor car to emit unusual and loud noises, so as to frighten his horse and cause him to run away. Appellee alleged that at the time the runaway occurred, he was in his buggy engaged in directing the loading of a car of wheat about a hundred yards west of the passenger depot near a sidetrack paralleling the main track in Prairie Grove, Arkansas.

Appellant filed a demurrer; also an answer denying each material allegation in the complaint.

The cause was heard upon the issues and oral evidence adduced, and a verdict returned by the jury in favor of appellee for $50, upon which judgment was rendered.

It is contended that Dr. H. G. Fagan did not sufficiently qualify to give expert testimony as to the nature and extent of the injury suffered by appellee. Doctor Fagan had studied and graduated from a school unknown to the skilled surgeon and learned counsel of the railroad company, towit: The American College of Methanopy, Chicago. He asserted that by profession he was a "mechanotherapist." Further explanation revealed the fact that a "mechanotherapist" is known to the laity as a "drugless healer," or a "rubbing doctor." This physician claimed by education and practice to be familiar with "diseases of muscles and bones, and dislocations and such matters."

(1) The rule with reference to experts is that the witness must be "possessed of such experience, skill, or science in the particular subject or inquiry as entitles his opinion to pass for scientific truth. The knowledge contemplated by the rules is knowledge acquired, either from actual study or long experience, in the particular field toward which the inquiry is directed." 6 Thompson on Negligence, § 7753.

(2) This court has fixed the test that medical experts may give their opinions if skilled in the science and practice of medicine. *Tatum* v. *Mohr,* 21 Ark. 349; *Thompson* v. *Bertrand,* 23 Ark. 730.

(3) Doctor Fagan testified that in addition to being a graduate of a medical college, he was a practitioner of eight or nine years' experience, thereby bringing himself well within the rule laid down by Mr. Thompson and the two Arkansas cases *supra,* with reference to the competency of experts. No error was committed in admitting the evidence of the "rubbing doctor."

In any event, no prejudice resulted to appellant by reason of this expert testimony. The testimony of the

lay witnesses as to the extent of damages sustained by appellee to his person and property exceeded in value $50.

(4) Complaint is made that appellee was permitted to testify that if the car had been running at a reasonable rate of speed, he could have gotten out of the way and saved himself the injury, for the reason, it is said, that it is opinion evidence. Appellee was in his buggy at the car door, facing west, when he discovered the motor car coming toward him from the west. He described as best he could the entire situation, and then stated that if the car had been running at an ordinary speed, or if he had had any warning, he could have gotten out and saved himself. We can not concur with learned counsel that this is opinion evidence. It was a statement of fact, rather than opinion. He stated it as a fact, and not as an opinion.

Appellant insists that there was no evidence showing that the motor car was being operated at a high, unusual, reckless and negligent speed.

J. A. Nugent, who had been around trains many years, testified touching the speed of this motor car at the time of the injury. These are some excerpts from his testimony: "It was running a good swift gait; there was no doubt about that. According to the way I saw it, it made as good time as any passenger train I ever saw on that track. My judgment would be this: It was as fast as any passenger train runs on that track, at least. It came from behind that depot that way (indicating) just like my hat coming, that is all there is to it." Mr. Nugent first saw the car seventy-five or eighty yards west of the depot, and noticed it last seventy-five or eighty yards east of the depot.

Otto Bollin first noticed the motor car when it was opposite, and again after it passed the depot. The following interrogatories and answers appear in his evidence:

Q. You saw it after it passed the depot?

A. Yes, sir.

Q. How was it running?

A. It was running fast.

Q. How far could you see it after it passed the depot until it passed out of your sight?

A. Well, it was a good piece.

Q. I will ask you to state to the jury the speed that this motor car was running with reference to the fast speed of other trains or other motor cars.

A. Well, I don't know; it seems to me like it was going as fast as it could be, and stay on the track.

Q. Did you, in your judgment, ever see any motor car or train run faster?

A. No, sir; not on this road.

The following questions and answers appear in the testimony of W. T. Edminston:

Q. Did you see the motor car coming before it got to the depot?

A. Yes, sir.

Q. How far back did you see it?

A. Something like three hundred yards from the depot.

Q. When you first noticed it?

A. Yes, sir, coming toward the depot.

Q. Did you see it pass right on through?

A. Yes, sir, it came right by me.

Q. Mr. Edminston, you have seen trains and motor cars run lots of times, haven't you?

A. Yes, sir; I have.

Q. I will ask you to state how fast this motor car was running, whether slow or fast.

A. Well, sir, I don't see how it could run much faster unless it had wings. It was going "some."

Q. Was it going that way when you first saw it?

A. I couldn't pay much attention to it until it got close to the depot; when it come up, it come up right then, and went on by, right then; I thought it would jump the track when it struck the switch, but they seemed to know more than I did; it didn't.

H. E. Morton and J. H. Tharp gave testimony of like tenor on the question of speed.

The appellee, J. M. Fulkerson, referred to the speed of the car in the following manner: "I seen the car coming from the west like lightning. They were coming so fast and making such a racket I tried to get away, but before I could get started, they come whizzing by like lightning, scared my horse and he started to run. I never seen nothing coming like it did, in my life. I have seen trains run sixty miles an hour. It was—"

At this point, attorney for appellant interrupted with an objection, and after quite a difference between counsel as to the manner of examining the witness, the court inquired:

"State whether or not it was unusual speed."

"A. I say, most emphatically, it was. It was running like—"

Appellant's testimony tended to show that the car was coasting through at the rate of about fifteen miles an hour. Prairie Grove has about eight hundred or a thousand inhabitants. This was a hand-car propelled by motor power, and its maximum speed rate was eighty miles an hour. Hand-cars have no bells or whistles with which to signal their approach. Appellee was examining a car of wheat his hands had been loading to see if it was ready for shipment. The car had been placed on the sidetrack near the depot to be loaded by appellee. He was there by invitation, and in no sense a trespasser. While engaged in loading and inspecting the car, it was incumbent upon the appellant carrier to exercise ordinary care for his safety. A great many people go to depots to transact business, in buggies, wagons, etc., and it is the duty of railroad companies to use ordinary care in running their trains or cars into or by places of this character, either by signaling their approach in time for people to protect themselves and their property or by reducing the rate of speed so that the train or car can be stopped and prevent injury to person or property. Whether such

care was used is a question for the jury in each particular case. In the instant case, there was ample evidence to warrant the submission to the jury of the question whether the car was being operated at a high, unusual, reckless and negligent speed.

Instruction No. 1, asked by appellee, is in accord with law, and it was proper to give it. Instructions 1, 2, 3 and 4, asked by appellant, are predicated on the idea that hand-cars propelled by motor power can be run at any speed when approaching depots, regardless of conditions. The instructions are erroneous as applicable to the facts in this case, and were properly refused.

(5) Likewise, there was evidence tending to show that in the operation of the car, loud and exciting noises were emitted, calculated to frighten a horse. Appellant produced evidence tending to show that no such noises were made. Unless timely notice of the approach of such a car is given, it is the further duty of carriers to exercise ordinary care in the operation of such car so as to prevent injury to persons and property likely to be at depots; and it is a question for the jury to say whether such care was exercised. There is ample evidence in the record to warrant the submission of this issue to the jury. Instruction No. 2, asked by appellee and given by the court, properly submitted this question to the jury. Instruction No. 5, asked by appellant and refused by the court, assumes that railroad companies are not compelled, in the operation of motor cars at any time or place, to exercise ordinary care to regulate the noise so as to avoid frightening a horse that is not seen or known to be in close proximity to the track. In this assumption, the instruction is erroneous and the trial court properly declined to give it. Instruction No. 6, asked by appellant and refused by the court, is erroneous in that it assumes that without warning or notice, when approaching or passing depots, all noises incident to operation may be emitted. However, instruction No. 1, given on the court's own motion, fully covered instruction No. 6, asked by ap-

pellant, so no prejudice could have resulted by refusal to give the instruction.

It is insisted that the breaking of the driving line by appellee was the proximate cause of the injury. We do not think so. All the evidence tends to show that the horse was frightened and ran away on account of the operation of the motor car. If the car was operated by the railroad company in a negligent manner, which was a question for the jury, then the company was responsible for all the consequences resulting directly from this negligence. The breaking of the line was an incident to the runaway. The line was broken in an effort to hold the horse after he began to run. *Railway Co.* v. *Roberts,* 56 Ark. 366.

In the last place, it is contended that the undisputed evidence showed that appellee was guilty of contributory negligence, and that the trial court should have given the peremptory instruction asked by appellant on this question. We think there was a sharp conflict in the evidence on this issue, and instruction No. 3, given by the court on its own motion, properly submitted the question.

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

RUCKER v. ARKANSAS LAND & TIMBER COMPANY.

Opinion delivered March 26, 1917.

1. PROPERTY—DESCRIPTION—"FRACTIONAL."—The abbreviation "Frl." in the description of lands has reference to a term commonly used indicating a section or part of a section according to the government surveys. The word "fractional" is not synonomous with the word "part."
2. TAX SALES—VALIDITY OF DESCRIPTION.—The description of lands under a tax sale, as "Frl. S½ of NW¼ 18-16-14, 53 acres," *held* sufficient; the word "frl." indicating that the subdivision is a fractional subdivision of a section.

Appeal from Union Chancery Court; *James M. Barker*, Chancellor; affirmed.

J. K. Mahony, for appellant.

1. The description "Frl S½ of NW ¼, 53 acres" is uncertain and indefinite, and the tax sale, tax deed and confirmation are void. 64 Ark. 580; 43 S. W. 977; 99 Ark. 154; 83 *Id.* 154; 85 *Id.* 4; 106 S. W. 1169.

2. The confirmation decree is void for other reasons. 71 Ark. 211; 84 *Id.* 1. Appellant acquired title by limitation. Kirby's Digest, § 656, etc.

McCULLOCH, C. J. This is an action instituted in the chancery court of Union county by appellant John G. Rucker to confirm, under Kirby's Digest, sec. 649, *et seq.*, the title to numerous tracts of land, and to cancel the tax title under which appellees hold a tract described as the Frl. S½ of NW¼, sec. 18, tp. 16 south, range 14 west. Appellees were made defendants to the suit and the complaint was dismissed for want of equity as to the above described tract of land. This appeal only brings into review the ruling of the court concerning the title to that tract. It is alleged in the complaint that appellees had claimed title under a tax sale in the year 1895 for the taxes of 1894; that said sale was void on account of the description of the land sold being too indefinite to identify it and that appellees had, subsequent to the sale, secured a decree of confirmation under the same description, which decree was also void for the same reason. Other questions are argued in the brief, but the record is not sufficiently abstracted to call for a review of any other question, save the one mentioned above concerning the identity of the tract of land involved as described on the tax books. The description on the tax book is as follows: "Frl. S½ of NW¼ 18-16-14, 53 acres." The contention is that the abbreviation "Frl." for the word "Fractional" is synonymous with the word "part" and merely indicates an unidentified portion of the subdivision mentioned, which renders the description void for uncertainty. This is an incorrect interpretation of the meaning of the abbreviation, for it has reference to a term

commonly used indicating a section or part of a section according to the government surveys. A description used on tax books, like a description used elsewhere, has reference to government surveys and a mere specification of the section or subdivision thereof is sufficient. If it is in fact a fractional section or subdivision it is so indicated on the government survey and it is unnecessary to use the word "fractional" as a descriptive word, and, on the other hand, the improper use of the word, when the section is not fractional, does not invalidate the description. The fact that the acreage is stated incorrectly does not lessen the certainty of the description. In the case of *Chestnut* v. *Harris*, 64 Ark. 580, Judge Battle, speaking for the court, said: "The statutes of this State provide that each tract or lot of real property shall be so described in the assessment thereof for taxation as to identify and distinguish it from any other tracts or parts of tracts; and the same shall be described, if practicable, according to section, or subdivisions thereof, and congressional townships. They recognize the survey of the United States, and the division of lands, according thereto, into townships and ranges, and sections and parts of sections, and that a description according to such survey will be good and sufficient. For this reason it has been held that a description of land for assessment by the abbreviations commonly used to designate government subdivisions would be sufficient." In the case of *Little Rock & Fort Smith Railway Co.* v. *Evins*, 76 Ark. 261, there was involved the question of validity of a tax sale of lands described very much the same as in the present case by the use of the abbreviation "Fr." indicating the word "fractional" and the court held that it was a good description. In the opinion it was said: "We understand from this description that the land meant is the northeast fractional quarter of the northeast quarter of section twenty-two, in township eight north, and in range twenty-two west, situated in the county of Johnson, in the State of Arkansas. This description is

sufficient." The word "fractional" used in a description cannot be construed to indicate a part of a subdivision without specifying more definitely the particular part to be described, for when so construed it would mean no more than the use of the word "part," but where it is used as in the present case, it would merely indicate that the subdivision is a fractional subdivision of a section. Our conclusion, therefore, is that the description was sufficient and that the attack upon the validity of the sale is unfounded.

Decree affirmed.

SPEER *v.* WOOD.

Opinion delivered March 26, 1917.

1. PROSECUTING ATTORNEYS—REMOVAL—JURISDICTION OF CIRCUIT COURT.—The Legislature is without power to authorize the circuit court to suspend from office a prosecuting attorney who is under indictment.
2. PROSECUTING ATTORNEYS—REMOVAL FROM OFFICE.—The Act of March 1, 1917, amending Kirby's Digest, § 7992, giving circuit courts authority to remove from office a prosecuting attorney under indictment, *held* invalid.

Prohibition to Garland Circuit Court; *Scott Wood*, Judge; writ ordered.

Rector & Sawyer and *C. T. Cotham*, for petitioner.

1. The circuit court had no jurisdiction to remove petitioner from office; its action was without authority and void. The Act March 9, 1877, is unconstitutional and void. Impeachment and address are the only means for removing State officers. Art. 7, § 27, Const.; *Ib.* Art. 15; 85 Ark. 89; 32 Cyc. 689; Throop on Pub. Officers, par. 341-3, 392; 3 Metc. (Ky.), 237; 11 La. Ann. 437; 6 Bush, (Ky.) 1; 79 Ky. 42; Cooley Const. Lim. (7 Ed.) 99; 29 Cyc. 1414; Wharton on Cr. Law, Vol. 3 (11 Ed.), 2088; Mechem on Public Officers, par. 475; 3 Brew. 526; 85 Minn. 41; 23 A. & E. Enc. 431; 54 Ala. 226; 3 Cowan, 703; 54 N. H. 154.

2. The new statute authorizing suspension is an *ex post facto* law as applied to petitioner. 3 Dall. 386;

33 So. 209; Sedgw. on Stat. & Const. Law, 557, 909; Pomeroy Const. Law, 532-5; 90 N. Y. S. 134; 170 U. S. 351. See also 49 Ark. 503; 54 Ala. 599.

Martin, Wootton & Martin, for respondent.

The Act is not unconstitutional. The Act merely amends Kirby's Digest, §§ 7992-4. Art. 15, § 1, etc.; Kirby's Digest, § 2449, etc; Art. 27, § 7, Const.; *Ib.* Art. 3, § 2; Art. 6, § 12; Art. 6, § 22; Art. 3, § 6; Kirby's Digest, § 3452.

The Legislature has all powers not expressly or by necessary implication, taken from it. 6 R. C. L., §§ 43, 45. To justify a court in declaring an Act unconstitutional the case must be clear. 6 R. C. L., § 73. The Act does not conflict with Art. 15, Constitution. One mode of removal does not exclude all others. Impeachment and address are not the only mode. 70 So. 61; 68 *Id.* 621; 1 Miss. 146; 79 Ky. 42; 3 Brev. 526; etc.

Like legislative Acts have been sustained under similar constitutional provisions. 159 Pac. 985; 15 Am. Dec. 322; 91 S. W. 477; Am. Ann. Cases, 1916, A-1148; 42 Am. Rep. 135.

The Act is not in conflict with Art. 7, § 27, Const., and is not an *ex post facto* law. Suspension is a mere incident to the right of removal upon conviction. 81 Ark. 60; 32 *Id.* 242; 36 Pac. 502; 104 S. W. 1058; 6 R. C. L., § 26, 34; 81 Ark. 60-2; 94 Neg. 445; 50 L. R. A. (N. S.) 277; Am. Ann. Cases, 1914 B. 519. Under these authorities the petitioner has no right of property in the office from which he was suspended, and the Act of suspension takes away from him no legal rights, nor imposes upon him a legal burden or inflicts a penalty. The Act is valid.

McCULLOCH, C. J. The petitioner, G. H. Speer, is prosecuting attorney in and for the Eighteenth Judicial Circuit, and is under indictment returned by the grand jury of Garland county charging him with criminal misconduct. The circuit court is about to enter an order suspending the petitioner from office during the

pendency of the indictment, and a writ of prohibition is sought to restrain the court from entering the order. The power to suspend petitioner from the office of prosecuting attorney is asserted under the terms of a statute approved March 1, 1917, amending sec. 7992 of Kirby's Digest, which before being amended read as follows: "Whenever any presentment or indictment shall be filed in any circuit court of this State against any county or township officer for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance or nonfeasance in office, such circuit court shall immediately order that such officer be suspended from his office until such presentment or indictment shall be tried. Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the court is continued on the application of the defendant." The amendment merely incorporates the words "prosecuting attorney" so as to make the provisions of the Act apply to that officer. The indictments against petitioner were returned by the grand jury prior to the enactment of the statute referred to, and it is contended that even if the statute is valid so far as it operates prospectively it cannot be given retroactive effect so as to apply to proceedings instituted prior to its passage. We pretermit discussion of the question of retroactive effect of the statute and also the suggestion that the indictments against petitioner each fail to charge a public offense, and we turn immediately to the real question at issue, whether the statute is valid in attempting to authorize the removal of a prosecuting attorney by judgment of the circuit court.

The contention of the petitioner is that the Constitution provides adequate methods for the removal of public officers, which are exclusive and do not contain authority for the circuit court to remove a State officer, and that it is beyond the power of the Legislature to confer such authority. It is contended on the other hand by the respondent that the constitutional pro-

visions on the subject only have reference to removal from office, and not being exclusive, leave the Legislature possessed of full power to provide for removal of officers as a part of the punishment for crime. The Constitution of 1874, art. 15, provides for the impeachment of State officers before the senate sitting as a court of impeachment, the sole power of initiating the proceedings being vested in the House of Representatives. It is provided that the impeachment "whether successful or not, shall be no bar to an indictment." There is a further provision in that article for the removal of State officers by the governor upon the joint address of two-thirds of the members elected to each house of the General Assembly. Those provisions, it is to be observed, apply only to State officers, and it has been decided by this court that prosecuting attorneys are State officers within the meaning of the constitutional provisions. *Griffin* v. *Rhoton*, 85 Ark. 89. Sec. 27, art. 7, of the Constitution of 1874, reads as follows: "The circuit court shall have jurisdiction upon information, presentment or indictment to remove any county or township officer from office for incompetency, corruption, gross immorality, criminal conduct, malfeasance, misfeasance or nonfeasance in office."

It is thus seen that there is a constitutional scheme provided for the removal of all officers, State, county and township. It is true that the method of impeachment before the General Assembly is a peculiar one, not analogous to other proceedings in civil or criminal jurisprudence, and the Constitution expressly provides, as before stated, that an impeachment shall not constitute a bar to indictments for any crime involved in the charge. The provision for impeachment of State officers might, if standing alone in the Constitution, be susceptible to the construction that it is not intended as an exclusive method of removal of such officers, but when considered in its relation to the other provisions prescribing a different method of removal of county and township officers, it is evident that the framers of the

Constitution intended to erect an exclusive scheme of dealing with the subject of removals from office. The other provision with respect to the power of the circuit court was not intended merely as a method of removal, but also for the purpose of adding, to that extent, to the punishment of the criminal offense committed by the public official. Such is the construction placed on that section by this court. *Haskins* v. *State*, 47 Ark. 243. In that case the proceeding was against a county officer, but it was sought to remove him by information filed by the prosecuting attorney, and this court held that when the alleged cause of removal constituted an indictable offense, the proceeding must be by indictment, and not by information. That construction of the constitutional provision necessarily stamps it as one for the punishment of crime by removal from office. Unless we treat the provisions referred to as exclusive, then there is no effect at all given to the one concerning the jurisdiction of the circuit court to remove county and township officers, and it may as well have been omitted. The circuit court is, under the Constitution, the general residuum of all jurisdiction not otherwise vested, and in the absence of any constitutional provisions on the subject the Legislature would have power to authorize the circuit court to remove county and township officers. That section was, therefore, inserted, not merely as a grant of power, but also as a limitation, and we must so construe it to give it any effect at all. If, in other words, the framers of the Constitution had intended to leave intact the legislative power to remove officers both State and county as a punishment for crime, it would have been unnecessary to incorporate sec. 27 of art. 7. Judge Cooley laid down as one of the rules of construction "that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases." (Cooley's Const. Lim. 7th Ed. p. 99). That rule of construction

has been followed in many decisions, notably by the Kentucky court of appeals in the case of *Lowe* v. *Commonwealth*, 3 Met. 241, where it was said "that wherever the Constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the Legislature to remove or suspend him from office for any other reason or in any other mode than the Constitution itself has furnished." To the same effect see *Commonwealth* v. *Williams*, 79 Ky. 42; *State* v. *Wiltz*, 11 La. Ann. 439; *State* v. *Dunson*, (La.) 70 Sou. 61. The same rule is stated by Mr. Throop in his work on Public Officers (p. 343) as follows: "It is well settled that where the Constitution creates or recognizes an office, and declares that the incumbent may be removed in a specified manner or for specified reasons, the Legislature can not constitutionally provide by statute for his removal for any other reason or in any other manner." Sec. 2450, Kirby's Digest, a part of the criminal code enacted in 1868, provides that "where justices of the peace, sheriffs, coroners, surveyors, jailers, county assessors, prosecuting attorneys, constables, city or police judges, clerks, and marshals shall be convicted upon an indictment for malfeasance or misfeasance in office, or for wilful neglect in the discharge of their official duties, or for any offense, which, by the statute law or Constitution, creates a forfeiture of their offices, the court shall render a judgment of removal from office, in addition to the other penalties and punishment prescribed by law." That section has no application to suspension, but refers only to final judgments of removal from office, but it is argued in the brief for respondent that the inclusion of the office of prosecuting attorney within the terms of the statute shows a legislative determination of the power of that body to provide for the removal of that officer by judgment of the circuit court. The statute thus referred to was enacted under the Constitution of 1868, and we need

not determine whether it was valid at that time, for if it is found to be in conflict with the Constitution of 1874, it must be held to have been displaced, although valid at the time it was enacted. It is worthy of notice that Kirby's Digest, sec. 7992, *et seq.* which were amended by the recent statute under which the circuit court of Garland county is attempting to proceed, were enacted by the Legislature of 1877, which assembled less than three years after the adoption of the Constitution of 1874, and contained members of the constitutional convention, and that the statute was made to apply only to county and township officers, and this leads to the view that the Legislature at that time determined that it had no power to provide for the removal of any but county and township officers. Our attention is called to certain other provisions of the Constitution with respect to forfeitures of office by reason of commission of specific offenses, and that no method is prescribed for the enforcement of those forfeitures. For instance, it is provided in sec. 6, art. 3, that persons convicted of fraud, bribery and other corrupt and wilful violations of the election law of the State shall be disqualified from holding any office of trust or profit; and in sec. 9, art. V, that persons convicted of embezzlement of public money, bribery, forgery or other infamous crime shall not be eligible to the General Assembly or capable of holding any office of trust or profit in this State; and in sec. 2, art. 19, that no person who may fight a duel or assist in the same as second or send or accept or knowingly carry a challenge therefor shall hold any office, etc. We do not have to deal with those provisions of the Constitution in disposing of the case now before us, but when the question is presented it may be found that the power is implied for the Legislature to provide for a method ascertaining and declaring the forfeiture. Those additional provisions, however, rather strengthen the conclusion that the Constitution makers intended to provide a complete scheme for declaring forfeitures of offices and of removing officers. At any

rate, the majority of the court reach the conclusion that the two provisions of the Constitution referred to in the outset were intended to operate exclusively, and that there is no power in the Legislature to provide for judgments of removal of State officers otherwise than by the court of impeachment. It follows that since the Legislature has no power to authorize the circuit court to remove a prosecuting attorney by final judgment of the court, it could not authorize the temporary suspension during the pendency of the indictments, for to do so would be to provide temporarily a greater punishment than was authorized by the Constitution. We hold, therefore, that the statute approved March 1, 1917, is void, and that the court can not proceed under it. The writ of prohibition is accordingly awarded to restrain the circuit court from proceeding beyond its jurisdiction and authority.

HART, J. (concurring).

It seems to me that the opinion of the majority misapplies a well known and salutary rule of construction, and for this reason I feel impelled to express my views on the question. The divergence of our views in applying a cardinal rule of construction will doubtless call to mind the motto of Mr. Sedgwick, "Great is the mystery of judicial construction." Article 15 of our Constitution provides for the impeachment of certain officers, and the procedure thereof. Sec. 1 reads as follows:

"The governor and all State officers, judges of the Supreme and circuit courts, chancellors and prosecuting attorneys, shall be liable to impeachment for high crimes and misdemeanors, and gross misconduct in office; but the judgment shall go no further than removal from office and disqualification to hold any office of honor, trust or profit under this State. An impeachment, whether successful or not, shall be no bar to an indictment."

Sec. 2 provides that the House of Representatives shall have sole power of impeachment and all impeach-

ments shall be tried by the Senate. Sec. 3 provides that the Governor, upon the joint address of two-thirds of the members elected to each house of the General Assembly, for good cause, may remove certain officers, including the prosecuting attorney.

Sec. 27 of art. 7, provides that the circuit court shall have jurisdiction upon information, presentment or indictment, to remove any county or township officer from office for incompetency, corruption, gross immorality, criminal conduct, malfeasance or misfeasance in office.

In construing this section, the court has held that county and township officers may be removed for incompetency, upon information filed by the prosecuting attorney. *State* v. *Jackson*, 46 Ark. 137. But if the removal is sought for an indictable offense, the proceeding must be by indictment. *Haskins* v. *State*, 47 Ark. 243. The Jackson case recognized the rule that if the removal is for criminal conduct the crime is punishable in a separate proceeding. The impeachment of the prosecuting attorney is provided in art. 15. The proceedings for the removal of the officers named in Art. 15 do not seek to have such officers punished for their misconduct, but merely to remove them from office and are of a civil note. See note to 20 A. & E. Ann. Cas. at page 112. That the proceedings are of a civil nature only was recognized by the framers of the Constitution, for they provided that an impeachment, whether successful or not, should be no bar to an indictment. Sec. 6395 of Kirby's Digest provides that prosecuting attorneys may be indicted for any misdemeanor in office or neglect of duty, and punished by fine, not less than fifty, nor more than one thousand dollars. This section was a part of the Revised Statutes.

Section 2450 of Kirby's Digest, which is a part of our criminal code, provides that where justices of the peace, sheriffs, coroners, surveyors, jailers, county assessors, prosecuting attorneys, constables, city or police judges, clerks and marshals shall be convicted

upon an indictment for malfeasance, or misfeasance in office, or for wilful neglect in the discharge of their official duties, or for any offense which by the statute law or Constitution creates a forfeiture of their offices, the court shall render a judgment of removal from office in addition to the other penalties and punishment prescribed by law. Thus it will be seen that this section provides as part of the punishment that if the prosecuting attorney or other officers named shall be convicted of an offense which creates a forfeiture of their office, the court in addition to the other punishment shall render a judgment of removal from office. This section in no manner is in conflict with the Act of March 9, 1877, providing for the suspension of the officer pending his trial and for his removal after his conviction. That Act applies only to proceedings for the removal of officers under sec. 27 of art. 7. It is a practice act passed for the purpose of carrying into effect that provision of our Constitution and has no application whatever when the officer is indicted for a crime in a separate proceeding. *Allen* v. *State*, 32 Ark. 241; *State* v. *Whitlock*, 41 Ark. 403. So it will be seen that the two acts were passed for different purposes and do not in any manner conflict with each other. Besides prosecuting attorneys cannot be removed under sec. 27, art. 7 of the Constitution and the Act of March 9, 1877, first referred to could in no sense be repugnant to sec. 2450 as far as prosecuting attorneys are concerned.

Again it is insisted that art. 15 of the Constitution having provided how the officers named therein shall be removed, its provisions are exclusive. It is a cardinal rule of construction that whenever a State Constitution prescribes a particular manner in which a power of removal shall be executed, it prohibits every other mode of exercising that power. The object sought to be accomplished by art. 15 of the Constitution is to protect the people from unworthy or corrupt officials and not to punish the offender. The article having prescribed a method for the removal of the officers therein

named, that method is exclusive, and such officers may not be removed from office in any other way when that is the prime object of the proceedings. The Constitution is the paramount law, and an Act of the Legislature can not conflict with it. The same article provides for the indictment or criminal prosecution of the officers named as a part of the punishment upon conviction. Section 2450 provides that the prosecuting attorney is to be removed from office in addition to the other punishment fixed by the Legislature. It is true the removal of the officer is accomplished in each instance; but there is no conflict in the two cases. In impeachment proceedings, the removal of the officer is the sole object to be accomplished and that can only be done in the manner provided by the Constitution. When the offender is indicted and prosecuted in the criminal courts, his removal upon conviction is made by the Legislature a part of his punishment, and his removal is only incidental to the purpose to be accomplished. If the opinion of the majority is to obtain, an official designated in art. 15 might be convicted of malfeasance in office in the criminal courts and yet could not be removed from office unless the Legislature was in session and would present impeachment proceedings.

I think the views I have expressed are in accord with the principles announced in *State ex rel. Thompson* v. *Crump*, (Tenn.) L. R. A. 1916 D-951. The Constitution of Tennessee contains a provision relative to the impeachment of State officers similar to our Constitution. It also provides that the offender shall be liable to indictment. A subsequent section provides that justices of the peace and other civil officers not before named, for crimes or misdemeanors in office shall be liable to indictment in such courts as the Legislature may direct; and upon conviction, shall be removed from office by said court and shall be subject to such other punishment as may be prescribed by law.

The Legislature passed an Act having for its purpose the removal of certain officers by civil proceedings.

A bill was filed in the chancery court under it to remove from office the mayor of the city of Memphis for misconduct in office. Objection was made that the act was in conflict with the section of the Constitution of Tennessee last referred to. The Supreme Court of Tennessee held that it was not, and affirmed the decree of the chancery court removing the mayor from office under the Act. The court said that the vice of the argument consisted in the assumption that the section designs primarily to provide a method for the removal of the civil officers therein mentioned, and that such was not the real object of the section. The court said that the dominant purpose of the section was to provide for the indictment or criminal prosecution of the civil officers indicated and that the removal of the officer is incidental. The court held that inasmuch as the Constitution had not undertaken to regulate proceedings for the removal of officers when such proceedings are civil in character that it was competent for the Legislature to formulate a scheme of its own. There the removal of the officials could be accomplished by each proceeding. Here we have the converse of the proposition, and in the application of the principles above announced I am of the opinion that the Legislature had the authority to provide for the indictment and prosecution of the officers named in art. 15, and as part of the punishment upon conviction to give the court power to remove the accused from office. In my judgment the opinion of the majority lays down a rule which might cause great embarrassment in the administration of our criminal laws; and for this reason I have ventured to express at length my dissent to the opinion of the majority although for reasons hereinafter stated I concur in the judgment.

I concur in the judgment because I do not think the act under which the court acted in the temporary suspension of the prosecuting attorney is valid. The act is amendatory of the act of March 9, 1877, providing for the suspension of any county or township officer. As we have already seen that act applies only to

prosecutions for removal from office under sec. 27, art. 7 of the Constitution. *Allen* v. *State*, *supra*, and *State* v. *Whitlock*, *supra*. It is a practice Act when removals from office by indictment are sought under that section of the Constitution. It will be remembered that when the alleged cause of removal under that section is for an indictable offense, the proceeding must be by indictment. The prosecuting attorneys of the State do not come within the provisions of that section and the power of suspending them can not be conferred by amending an Act regulating the practice under that section. That the Legislature had the power to give the court the authority to suspend the prosecuting attorney during the pendency of an indictment against him by an independent Act passed for that purpose is settled by the reasoning of the court in *Allen* v. *State*, *supra*, and *Griner* v. *Thomas*, 101 Tex. 36, 16 A. & E. Ann. Cas. 944. I do not think, however, the Legislature could confer this power by amending the practice Act above referred to by inserting in it the prosecuting attorney along with the officers designated by sec. 27, art. 7, of the Constitution.

Again it is insisted that the power of temporary suspension is included in the power to remove. In *State* v. *Peterson*, 50 Minn. 244, 52 N. W. 655, the court in discussing this question said, "But, says respondent, authority to provide for the removal does not carry with it the power to provide for the suspension of an officer. Whether the power to suspend is included generally in the power to remove, so that the former may be exercised independently of the latter, we need not consider. But we are very clear that the power of temporary suspension, so far as necessary and ancillary to the power to remove, is included in the latter. This is under the familiar doctrine of implication, that, where a Constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. Cooley Const. Lim. 78." See also *Griner* v.

Thomas, 101 Tex. 36, 16 A. & E. Ann. Cas. 944. It will be noted, however, that in both of those cases the paramount object to be accomplished was the removal from office of an officer guilty of malfeasance in office and the court held that the power to remove includes the power of temporary suspension pending the trial of the officer. That principle does not apply here, however, for the removal of the officer is not the primary object sought to be accomplished, but it is only incidental. The primary object to be accomplished here is the punishment of the defendant and his removal from office only follows after conviction as a part of the punishment. In such a case the suspension of an officer pending his trial for malfeasance or misconduct in office is not included as necessarily ancillary to the power to remove from office after conviction. As we have just seen the power of removal is a part of the punishment and to include in it the power of temporary suspension would be to punish the offender before conviction.

Therefore, it is only where the power to remove from office is the primary object that it includes the power of temporary suspension pending the trial of the officer.

Mr. Justice Wood authorizes me to state that he concurs in the views I have herein expressed and for the reasons just given we concur in the judgment while we express our dissent to the opinion of the majority.

CO-OPERATIVE STORES COMPANY v. MARIANNA HOTEL COMPANY.

Opinion delivered March 26, 1917.

1. APPEAL AND ERROR—FAILURE TO PLEAD DEFENSE—PRINCIPAL AND AGENT.—A principal, when sued in an action growing out of the acts of his agent, can not avail himself of his agent's lack of authority, where he failed to plead that lack of authority in his answer.
2. PRINCIPAL AND AGENT—ACTS OF GENERAL MANAGER OF A CORPORATION.—A corporation will be liable for the Acts of its general agent done within the apparent scope of his authority.

3. PRINCIPAL AND AGENT—UNAUTHORIZED ACT OF AGENT—LIABILITY OF CORPORATE PRINCIPAL—ACCEPTANCE OF BENEFITS.—Where a corporation accepts the benefits of an unauthorized act of its agent, it impliedly ratifies the unauthorized act, if the same is one capable of ratification by parol.
4. LANDLORD AND TENANT—BREACH BY TENANT—DUTY OF LANDLORD.—Where a tenant abandons his lease, it is the duty of the landlord to use reasonable diligence to re-lease the premises, in order to reduce the damages.

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

H. F. Roleson, for appellant.

1. The evidence, if legally admissible, is not sufficient to sustain the verdict. No authority in Morris was shown to make the lease or ratify it. The proof only shows that Morris was general manager. A verdict should have been instructed for defendant.

2. The testimony of Dudley and Pate in the motion for new trial was not legally admissible to show that Morris was the general manager.

3. The court erred in giving and refusing instructions, and such error was prejudicial. 105 Ark. 111, 114; 92 *Id.* 315; 104 *Id.* 150.

Daggett & Daggett, for appellee.

1. Appellant not having specially plead want of power in itself to make the contract, or want of power in its agent Morris to bind it, can not avail itself of that defense. 80 Ark. 65; 6 Thompson on Corp., § 7617; 7 R. C. L., § 628; 89 Ark. 435.

2. Appellant held out Morris as its general manager and is bound by his acts. 96 Ark. 493; 79 *Id.* 338; 89 *Id.* 435.

3. Having accepted the benefits of the contract and paid rent thereunder, appellant is estopped to deny liability. 7 R. C. L., §§ 663, 666-7.

There is no error in either giving or refusing instructions.

STATEMENT BY THE COURT.

The Co-operative Stores Company, hereafter for convenience called Stores Company, is a Tennessee corporation, having its domicile in the city of Memphis, and is engaged in the sale of groceries. The Marianna Hotel Company is an Arkansas corporation, having its situs at Marianna, Arkansas. The Stores Company furnished groceries for sale to one of its branches located at Marianna, Arkansas.

The Hotel Company instituted this suit against the Stores Company and one Dudley and Ollie Pate, alleging that it rented a store house located in the southeast corner of its hotel building to the Stores Company for a period of one year for the sum of $300.00, to be paid monthly at the rate of $25.00 per month; that the Stores Company took possession and paid rents for four months, and after that time it refused to pay the rent and abandoned the contract, to the damage of the hotel company in the sum of $200.00, for which it prayed judgment.

The answer denied the contract and denied that it was indebted to the plaintiff in any sum.

The testimony tended to show that on the 15th of December, 1914, R. L. Dudley came to Marianna and was the local manager there of the Stores Company; that Morris was the general manager of the Stores Company in Tennessee; that Morris authorized Dudley to rent the store for a year. The Stores Company occupied the building for four months, until the 15th of April, when it vacated it because it had sold out to S. D. Johnson. In the business of the Stores Company each store sends in to the general office at Memphis a daily report and sends a check for the amount of goods sold. The Stores Company furnishes each store the goods to sell. Dudley did not know whether Morris had authority to make the lease or not. Dudley had stock in the company, and he bought the stock from Morris and paid the money to him. He bought the stock from the corporation, but Morris was the man he had the

dealings with. Morris was the general manager. Morris told Dudley to come to Marianna and authorized him to rent a building for a year and pay the rent in advance. Dudley was not doing business at Marianna for himself, but for the Stores Company. He was a partner in the business and had an interest in it and was supposed to get a salary and a per cent. of the profits. In his trade with the Stores Company they were liable for the rent. Dudley was not personally liable. He got his salary and was not liable for any loss except as a stockholder in the company. He put $2,000.00 in the Stores Company and they shared in the profits and losses of the business. The business was sold to one Johnson for cash.

After the suit was filed the Hotel Company rented the building for the months of October and November, 1915, and at the trial admitted the collection of rent for those two months and reduced its claim to $150.00.

The court instructed the jury, in substance, that if they found from the evidence that Morris was the general manager of the Stores Company and authorized the making of the lease, and that afterward the defendant company accepted the benefits accruing under such lease and paid the rents on the building, that it could not deny the authority of Morris to bind the corporation, and that its act in accepting the building, retaining the same and paying the rents thereon would be a ratification of the acts of their agent Dudley in renting the building.

It further instructed the jury that before they were authorized to find for the Hotel Company they must find from a preponderance of the evidence that Morris was the general manager of the Stores Company and had authority to make the lease in question, or held himself out as representing the Stores Company as general manager.

The court refused prayers for instructions on the part of the appellant, in effect telling the jury that unless they found from the evidence that the making of the

lease contract for one year was expressly authorized by the Stores Company through one who had the authority to authorize such contract, then it must appear from the testimony that the lease for a year was necessary in order to promote the interest of the Stores Company and for the carrying out of the business of such company, and that it was not sufficient that the Act of the agent was advantageous to or convenient for the principal, or even effectual in transacting the business; that it must appear from the evidence that Morris had authority to authorize the making of the contract, and that the burden was on the Hotel Company to establish such authority; that if they found from the evidence that the Hotel Company, or its lessee, after the abandonment of the same by the Stores Company, used the store room for a sample room the burden would be on the Hotel Company to show the extent of such use and the Stores Company would be entitled to credit for a reasonable amount therefor, and unless the Hotel Company could show the exact use to which the store was put after the abandonment it was not entitled to recover.

There was a verdict and judgment in favor of the Hotel Company in the sum of $150.00.

WOOD, J. (after stating the facts).

(1) The answer contained only a general denial of the contract and the indebtedness. It does not raise the issue of the agency of Morris or of his authority to make the contract. The answer did not deny that appellant was a corporation. On the contrary, it expressly admitted that it was a corporation. So the only issue tendered by the answer was as to whether or not there was a contract and an indebtedness.

The uncontradicted evidence on the part of the appellee was to the effect that Morris was the general manager of the appellant and that as such he authorized the contract upon which the suit was instituted. The undisputed evidence also shows that Dudley, as local agent and manager of the appellant, went into posses-

sion of the store under the contract and occupied the same for a period of four months and then sold out the business and abandoned its contract. Upon the issues thus made by the pleadings and the undisputed evidence, the instructions of the court were correct. The appellant having tendered no issue as to the authority of its agent to make the contract, it was not entitled to have such issue presented to the jury in its prayers for instructions.

In *Simon* v. *Calfee*, 80 Ark. 65, 67, we said: "But a corporation can not avail itself of a want of power or lack of authority of its officers to bind it unless the defense is made on such grounds." See also 6 Thompson on Corporations, sec. 7617.

The name "Co-operative Stores" is suggestive of the business that the undisputed evidence shows that appellant was engaged in, that of conducting co-operative stores, and that Morris was the general manager and authorized Dudley, the local manager to enter into the contract with the appellee. Even if the authority of Morris or Dudley had been challenged, and even if it had been shown that they had no express authority to make such contract, still the making of such contract was within the apparent scope of the authority of such agents, and the company would be bound by such contract.

(2) In 7 R. C. L., p. 628, it is said: "At the present time the general business of corporations is frequently entrusted to the management of a general manager and it is well recognized that the corporation is bound by the acts of such manager within the apparent scope of his authority." Again, "the manager or superintendent of a department stands in the same relation to his department as does the general manager or superintendent to the general affairs of the corporation and the corporation is liable for his acts within the apparent scope of his authority."

(3) The appellee having shown that Morris was the general manager of the appellant, and that the

contract was made under his direction, it will not be presumed that as general manager he made the contract without authority from his company to do so. See *Walnut Ridge Merc. Co.* v. *Cohn*, 79 Ark. 338, 345. Moreover, even if it had been shown that Morris and Dudley were without authority to make the contract, nevertheless the undisputed evidence shows that the appellant knew of the lease and accepted the benefits thereof, having transacted its business in the store under the contract for four months, when it sold out to another. Under these circumstances the appellant was undoubtedly liable for the indebtedness incurred under this contract. See *Arkansas Amusement Co.* v. *Higgins*, 96 Ark. 493.

In 7 R. C. L., sec. 667, it is said: "As a general rule if a corporation with knowledge of its agent's unauthorized act received and enjoys the benefits thereof, it impliedly ratifies the unauthorized act if it is one capable of ratification by parol."

(4) The appellant contends that after the store room was abandoned by appellant the appellee made no effort to lease it, but that the store nevertheless was occupied by appellee's tenant. The president of the Hotel Company testified that since the appellant vacated the store appellee had received rent for it for the months of October and November, 1915; that it was vacant the balance of the time; that he did not have an opportunity to rent it before the fall season came on. He made no special effort to rent the building until he rented it to the tenant in the fall.

On this branch of the case the court instructed the jury that if they found from the evidence that the defendant abandoned the store in April, 1915, it would be the duty of the plaintiff to use reasonable diligence to lease the building; that before it can recover, plaintiff must show that it exercised such diligence. The appellant asked the court to instruct the jury that if the store room was used by the Hotel Company, or its lessee with its consent, for any purpose, the duty de-

volved upon the Hotel Company to show accurately the amount received and the exact use to which the store was put or it could not recover. The court refused this prayer.

There was no error in the ruling of the court on this branch of the case. The testimony tended to prove that the appellee rented the building as soon as practicable after appellant vacated the same, and there was no evidence tending to prove that the building was occupied by the appellee or any one with its consent until it was rented by appellee in the fall for the months of October and November, and appellant got the benefit of a reduction of appellee's claim for these two months.

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

HALE & SCOTT v. LUSK ET AL., RECEIVERS ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered March 26, 1917.

1. APPEAL AND ERROR—AMENDMENT TO INSTRUCTION—INJURY AT RAILWAY CROSSING.—In an action for damages growing out of personal injuries, the court gave an instruction on its own motion. Appellant requested the addition of a certain clause thereto, which the court added with the remark that the clause "may be added to the instruction given." *Held*, the effect of the appellant's request and of the court's ruling granting the same was to embody the language of the clause requested in the instruction given by the court.
2. RAILROADS—INJURY TO TEAM AT CROSSING—FAILURE TO SOUND WARNING.—An instruction which declared that if there was a failure to give the warning signal as required by the statute, that as a matter of law the appellee railway company was liable, without submitting the issue of whether such failure contributed to or caused the injury, is not subject to objection on appeal by the appellant who was plaintiff below.

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

J. T. Coston, for appellants.

The court erred in giving instructions 3, 4 and 5 of its own motion and in refusing plaintiff's request

for No. 3. Kirby's Digest, § 6595; 94 Ark. 270; 99 *Id.* 377; 76 *Id.* 224; 74 *Id.* 585; 185 *Id.* 118.

W. F. Evans and *W. J. Orr*, for appellee. *Lamb & Rhodes*, of counsel.

1. There is no error in the instructions. 84 Ark. 275.

2. The jury believed the proper signals were given. The evidence sustains the verdict.

WOOD, J. The appellants instituted this suit against the appellees to recover damages to a wagon and team caused by a collision with a train of the railroad company at a public crossing south of Luxora, January 10, 1916. The pleadings are not abstracted, but appellants concede that the evidence was sufficient to sustain the finding in favor of the appellees on the facts. Appellants contend, however, that there was also evidence that would have warranted the jury in returning a verdict in their favor, and they insist that the court erred in granting and refusing prayers for instructions.

We gather from the evidence set forth in appellant's abstract and the instructions given by the court that the negligence upon which the appellants predicated their cause of action was the alleged negligence of the employees of appellants in failing to keep a lookout as required by the statute and in failing to give the warning required by the statute on approaching public crossings.

Among other instructions, the court gave the following: "Under the record here, gentlemen, as made up from the evidence in this case, your verdict should be for the plaintiff unless you find that at the time of the alleged injuries and damages, the employees in charge of the train which struck these mules and wagon, killing one mule, injuring another one, and demolishing the wagon, were at the time keeping an efficient lookout, as required by the laws of this State, and that after discovering the property in a dangerous position at or

near the track the employee in charge of the engine exercised every means at his command consistent with his own and the safety of the other employees upon the train to avoid the injury to the property and was unable to do so. If you so find, your verdict should be for the defendants, unless you further find, gentlemen of the jury, that just before the injury complained of here the employees in charge of the train had failed to comply with a certain statute of this State, which requires all railroad companies to give warning at a distance of eighty rods from public crossings, such warning to be either by ringing the bell or sounding the whistle. *That it was not only the duty of the employees of the railway train to sound the whistle the distance—or ring the bell—a distance of eighty rods north of the crossing but it was their duty to continue to give the warning until they reached the crossing.* It is contended by the plaintiffs in this case that such warning was not given by either ringing the bell or sounding the whistle. If you so find from a preponderance of the evidence in this case, then, notwithstanding the fact that an efficient lookout was maintained by an employee, or the employees, upon the train, your verdict should be for the plaintiffs. But if you find that such warning was given, either by ringing the bell or sounding the whistle at the distance mentioned, and just prior to the injury complained of that an efficient lookout was maintained at the time and by the exercise of the degree of care mentioned to you in an instruction given to you, and the use of the means at the command of the engineer, the damage could not be avoided, your verdict should be for the defendants."

(1) The instruction was given by the court on its own motion, and the first draft of the court's instruction did not contain the words, "That it was not only the duty of the employees of the railway train to sound the whistle the distance—or ring the bell—a distance of eighty rods north of the crossing but it was their duty

to continue to give the warning until they reached the crossing."

The language last above quoted was given at the appellant's instance, the court remarking that this clause "may be added to the instruction given." The effect of the appellant's request and of the court's ruling granting the same was to embody the language of the clause above quoted in the instruction given by the court.

Appellant further complains because the court refused to add to the above instruction, in effect, the following: That if the employees in charge of the railway train failed to sound the whistle or ring the bell a distance of eighty rods north of the crossing and to continue to give the warning until they reached the crossing, and thereby contributed to the injury, the verdict will be for the plaintiff.

Counsel argue "that it was useless to tell the jury that it was the duty of the defendant to give the signal a distance of eighty rods and to continue to give it until the crossing was reached if the failure to do so did not affect the liability of the defendant," and that therefore the court erred in not granting the prayer "that if they failed to do so and thereby contributed to the injury the verdict would be for the plaintiffs."

In *Prescott & N. W. Railway Co.* v. *Henley*, 124 Ark. 118, we said: "In this class of cases, contributing to the injury on the part of a tortfeasor is, in the eye of the law, precisely the same as causing it. No gradation is tolerable. * * * If the acts of negligence contribute to cause the injury, it was precisely the same, in legal effect, as saying, 'if they caused the injury.'" But, while this is true, the court did not commit prejudicial error in refusing to grant appellant's prayer containing the words "contributed to the injury" for the court plainly told the jury, in its instruction, that if appellee's employees failed to give the statutory signals their verdict should be for the plaintiffs. This was tantamount to telling the jury that if there was a failure to

give the signals as required by the statute, that this, under the circumstances, caused the injury. The instruction in this form certainly was as favorable to appellants as they had the right to ask, and they are not prejudiced by the ruling of the court in refusing their request, for if it had been granted it could not have made the instruction any stronger in appellants' favor.

(2) Under the instruction, if there was a failure to give the warning signals as required by the statute, the jury were not left to determine whether such failure contributed to, or caused the injury, but the court declared as a matter of law that if there was such failure the appellee railway company was liable. Surely appellants have no cause to complain of an instruction like that.

The judgment is therefore correct and it is affirmed.

WILLIAMS *v.* ELROD.

Opinion delivered March 26, 1917.

EVIDENCE—RES GESTAE—STATEMENTS OF EMPLOYEE OF CARRIER CONCERNING LOSS.—Plaintiff delivered a trunk to be sent to a railway station to a drayman in defendant's employ, he giving her a claim check therefor. The trunk was lost. In an action for damages against defendant, *held*, evidence of statements made by defendant's employee as to his disposition of the trunk were inadmissible.

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

G. C. & Joe Hardin, for appellant.

The statements of Jesse Hughey, after the delivery of the trunk were not admissible in evidence as to the disposal thereof. It was not *res gestae*. 66 Ark. 500; 69 *Id.* 558; 78 *Id.* 381; 100 *Id.* 269; 105 *Id.* 247; 80 *Id.* 528; 82 *Id.* 324; 85 *Id.* 300, 479; 88 *Id.* 451; 58 *Id.* 179; 97 *Id.* 420; 114 *Id.* 267; 78 *Id.* 381; 14 *Id.* 86; 97 *Id.* 420; 68 *Id.* 225; 67 *Id.* 147; 100 *Id.* 269; 105 *Id.* 247; Jones on Ev., § 357; 49 Ark. 207; 125 Pa. St.

259; Mechem on Agency, § 714; 96 Ark. 393; 66 *Id.* 221; 47 *Id.* 247; 10 *Id.* 638; 16 *Id.* 628.

Oglesby, Cravens & Oglesby, for appellee.

1. Hughey's statements were admissible. 38 Am. Rep. 617; Fetter on Carriers, 1547. The contract for delivery was admitted and the verdict is right and sustained by the evidence.

HART, J. Appellant operates a baggage and transfer business in the city of Fort Smith, under the trade name of the Pony Express Company, and was employed by Mrs. Elrod in this capacity on the afternoon of December 24, 1915, to haul her trunk from her residence to the Midland Valley Railroad Company's depot, to be there delivered into the custody of that carrier. The driver of the wagon who took the trunk to the depot was a man named Hughey and, upon receipt of the trunk from Mrs. Elrod, he gave her a claim check, in accordance with the custom of the transfer company, which was intended to enable her to identify and claim her baggage. Mrs. Elrod had intended to leave on Christmas morning to pay a visit to her husband, who was working in Oklahoma, but he came home on that day, and the trip was abandoned. On the morning of the 26th she sent her husband, with the claim check, to the Pony Express Company's office for the trunk, but it could not then be found. Thereupon she sued that company, and, upon her motion and against the objection of the appellant, the railroad company was made a party defendant.

At the trial, the railroad company was permitted, over the objection of appellant, to prove that the trunk was never delivered into its custody, but that Hughey, the driver of the wagon, had stated that, when he reached the depot, he found both the baggage room and the ticket office closed, and that, upon the suggestion of a bystander, who had no connection with the railroad company, he placed the trunk on a truck standing on the platform. The testimony does not show what

became of the trunk. Hughey was not present, and did not testify.

It is insisted that error was committed in the admission of the statements of Hughey in regard to his disposal of the trunk. That such statements were not part of the *res gestae*, and that, at the time said statements were alleged to have been made, Hughey then had no duty to discharge in regard to the care or delivery of the trunk to its owner, and that he, therefore, had no authority to speak for the company, nor to make admissions binding it. We think appellant is correct in this contention. The rule in such cases is stated in the case of *River R. & H. Con. Co.* v. *Goodwin*, 105 Ark. 247, in which case we quoted from section 357 of Jones on Evidence, the following statement of the law:

"The declaration of an employee or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration did not accompany the act from which the injuries arose and was not explanatory of anything in which he was then engaged, but that it was a mere narrative of a past occurrence." See also *Pfeifer Stone Co.* v. *Shirley*, 125 Ark. 186.

In opposition to this view, we are cited to sec. 648 of Fetter on Carriers, where it is said: "We have seen that the general rule is that declarations or admissions made by an agent or employee are admissible against his principal only when they relate to a transaction in which the agent or employee had real or apparent authority to act for the principal, and only when they are made during that very transaction, and thus constitute a part of the *res gestae*. On this principle, it has been held that the acts and declarations of an agent in charge of a baggage room, with respect to a

passenger's baggage, on application by the passenger for its delivery to him, are competent evidence for the passenger in an action against the company for its loss. So, where a passenger on a sleeping car places a valise in charge of the company's servants while she is asleep, their declarations, explanations, and suggestions, as to what had become to it, made the next morning, when the passenger inquired for it, are admissible against the company."

A substantially similar statement of the law is found at page 539 of Thompson on Carriers.

The cases cited, as well as others, support the text, but it will be observed, in the language quoted, that the learned author states that the declarations of the agent, or employee, are admissible against his principal only when they relate to a transaction in which the agent, or employee, had real, or apparent, authority to act for the principal, and only when they are made during that very transaction. In the cases cited, it will be observed that each agent, or employee, whose declarations were received, had some duty to perform in regard to the delivery of the article to the person entitled to its possession, and that the evidence admitted related to the discharge of this duty. Hughey was not in possession of the trunk at the time of making the statements objected to, nor did he then have any duty to perform in regard thereto, and his admissions of negligence under the circumstances are not distinguishable, in principle, from those of any other servant whose conduct forms the subject-matter of the inquiry after the termination of his conduct which is alleged to constitute the actionable negligence.

Other assignments of error are argued in the brief, but we do not find them of sufficient importance to require discussion.

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

MIELLMIER v. TOLEDO SCALE COMPANY.

Opinion delivered March 26, 1917.

1. APPEAL AND ERROR—REQUESTS FOR INSTRUCTED VERDICT.—Where both parties request peremptory instructions only, their action is tantamount to a submission of the cause to the court.
2. FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATE LAWS—DEFENSE.—In an action on a contract by a foreign corporation if defendant pleads that it has failed to comply with the laws of the State, the burden is cast on the plaintiff to show that it has complied with the State laws.
3. FOREIGN CORPORATIONS—DOING BUSINESS IN STATE—FAILURE TO COMPLY WITH LAWS.—Under the facts *held*, that plaintiff, a foreign corporation, was doing business in the State, and that it had not complied with the laws of the State, so as to entitle it to bring an action to enforce a contract made here.

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

The appellant *pro se*.

1. The court erred in refusing to direct a verdict for appellant. Plaintiff was doing business within this State without complying with its laws. This was alleged in the answer and is not denied. 20 Ark. 204-7; 12 *Id.* 769; 10 Cyc. 1359; 90 Ark. 73; 15 *Id.* 156; 115 *Id.* 166.

Geo. W. Dodd, for appellee.

1. Both parties moved for an instructed verdict. This waived a trial by jury and left it to the court to decide. 100 Ark. 71; 105 *Id.* 25.

2. There was no proof that plaintiff had not complied with the laws of this State and there is no proof that it had transacted business in this State except this one sale. The burden was on defendant. The law presumes that a foreign corporation doing business here has complied with the laws. 55 Ark. 163. See also 66 Ark. 314; 62 *Id.* 63.

HART, J. Toledo Scales Company sued W. H. Miellmier to recover the purchase price of certain computing scales.

The complaint alleges that plaintiff is a corporation domiciled at Toledo, Ohio, and that defendant is a resident of the Greenwood District of Sebastian county; that it entered into a written contract with defendant for the sale of scales to be used in his grocery business, and that defendant owes it the balance of the purchase price in the sum of $125.00. The defendant in his answer stated that he did not deny that the plaintiff is a corporation organized under the laws of Ohio but asserts that the contract was entered into in the State of Arkansas and that plaintiff has failed and refused to comply with the laws of the State in regard to foreign corporations doing business within the State. The defendant for further defense alleged that the contract for the sale of the scales was not an absolute one and averred that under it, he had a right to return the scales if they proved unsatisfactory. He stated that he did offer to return the scales and the plaintiff refused to receive them.

The plaintiff introduced in evidence the written contract which was absolute in its terms. The defendant testified that Campbell, the sales agent for the plaintiff, first exhibited to him a contract absolute in its terms and that he refused to sign it and that there was attached to it a written contract whereby it was agreed that he should have sixty days within which to try the scales and that if they did not prove satisfactory he might return them at any time within the sixty days; that the scales were delivered to him at his place of business in the State of Arkansas, by the plaintiff's agent at the time the contract was executed; that the scales proved to be unsatisfactory and that he offered to return them to the plaintiff within sixty days as provided in the contract and that the plaintiff refused to accept them; that the scales were subsequently destroyed by fire without his fault, and the contract was destroyed by the same fire, which burned down his place of business.

The defendant was corroborated by the sales agent of the plaintiff in all respects. He testified that he sent in the contract to the district manager of the plaintiff at Fort Smith and that the contract sent in was in all respects as testified to by the defendant. At the conclusion of the testimony each party asked the court for a directed verdict. The court directed a verdict for the plaintiff and the defendant has appealed.

(1) The effect of our decisions is that where both parties request peremptory instructions and do nothing more, they thereby assume the facts to be undisputed and submit to the trial judge the determination of the inferences proper to be drawn from them. *St. L. Sw. Ry. Co.* v. *Mulkey*, 100 Ark. 71, and *St. L., I. M. & S. R. Co.* v. *Ingram*, 118 Ark. 377. Under this rule the direction of the verdict by the court must have been sustained had there been no issue raised by the appeal except as to whether the sale was an absolute one or was made with right of the defendant to return the property if the scales were not satisfactory.

The answer of the defendant, however, alleges that the plaintiff had failed and refused to comply with the laws of the State of Arkansas in regard to doing business in this State. Before authority is granted to any foreign corporation to do business in this State it must file with the Secretary of State a resolution adopted by its Board of Directors consenting there that service of process upon any agent of such company in the State or upon the Secretary of State shall be a valid service upon said company in any action brought in this State. It is also required to file a copy of its charter, duly certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall designate its general office in this State and name an agent upon whom process may be served. Acts of 1907, p. 744. The Act also provides that any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as provided cannot make any con-

tract in this State which can be enforced by it either in law or in equity.

In the case of *Lehigh Valley Coal Co.* v. *J. K. Gilmore et al.*, 93 Minn. 432, vol. 2 A. & E. Ann. Cas. 1004, it was held that a foreign corporation doing business within a State will be presumed to have complied with the statutes thereof prescribing the condition upon which such corporations may do business within the State, and in an action brought by a foreign corporation, where its failure to comply with the statutes does not appear upon the face of the complaint, the defendant must plead such failure or it will not be available to him as a defense. The failure of a foreign corporation to comply with the law of the State before it may maintain an action goes to its capacity to sue and unless it complies with the law, it has no capacity to sue. A note to the case just cited states that the reported case is in accord with the weight of authority. See also note to 9 A. & E. Ann. Cas. at p. 492.

In a case note to 13 A. & E. Ann. Cas. at p. 69, it is said that compliance by a foreign corporation with domestic statutes will be presumed unless the failure to comply therewith appears on the face of the complaint and that the failure to comply with such statute is held to be a defense which must be taken advantage of by answer. See also 12 R. C. L., sec. 79, p. 101.

In the present case the complaint did not show on its face the failure of the plaintiff to comply with the domestic statutes in regard to foreign corporations doing business in this State but the answer of the defendant pleaded this as a defense to the action. This cast upon the plaintiff the burden of showing its right to maintain the action. It was a matter which related to the plaintiff's right to sue and having been put in issue by the defendant's answer the burden was upon the plaintiff to establish it. There was no proof in the record tending to show that the plaintiff had complied with the statutes of Arkansas in regard to filing its certificate with the Secretary of State as provided by

the Act of 1907 above referred to, but it is contended by counsel for plaintiff that it did not do business within the meaning of the statute just referred to. The agent of the plaintiff who made the sale of the scales and the defendant himself, both testified that the contract for the sale of the scales was made at the defendant's place of business in the State of Arkansas and that the agent had the scales with him and delivered them to the defendant at the time. The agent also testified that he sent the contract to the district manager of the defendant at Fort Smith, Arkansas. Under this state of facts it might have been found that the plaintiff was doing business in the State within the meaning of our statute on the subject. *Clark* v. *The J. R. Watkins Medical Co.*, 115 Ark. 166.

It follows that the court erred in directing a verdict for the plaintiff and for that error the judgment will be reversed and the cause remanded for a new trial.

BELOATE v. NEW ENGLAND SECURITIES COMPANY.

Opinion delivered March 26, 1917.

1. LIENS—JUDGMENT—EFFECT OF FILING STAY BOND.—The stay of a judgment for six months by the filing of a bond under Kirby's Digest, §3250, does not suspend a judgment lien on the lands of the defendant held under Kirby's Digest, §§ 4438 and 4439.
2. JUDGMENT LIENS—LIMITATIONS—STAY BOND.—The filing of a stay bond does not affect a judgment lien on lands, unless it extends beyond the period of limitations, in which event the judgment creditor will be given a reasonable time in which to levy an execution after the expiration of the stay bond.

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

H. L. Ponder, for appellant.

1. The judgment was rendered April 4, 1913, and stay bond filed June 10, 1914. This stayed the judgment and lien for six months and the same had not expired when this suit was filed. The case in 75 Ark. 45 is not in point. It is not the law, but the law is stated

clearly in 23 Cyc. 1402. A stay of execution or judgment suspends even the running of the statute of limitations. 89 Am. Dec. 193; 45 Ind. 329; 69 Fed. 193; 2 Fed. Cases, No. 944; 2 Brock, 252; 66 N. C. 556. The stay bond extended the lien of the judgment. See 16 Am. Dec. 494; 89 *Id.* 193; 31 Cal. 395; 33 Ark. 72. A voluntary stay by a judgment creditor does not destroy the lien of the judgment. 89 Am. 193; 69 Fed. 193. The lien is extended for the time of the stay. 69 Fed. 193.

The stay bond suspended the lien for six months and the lien of the judgment had not expired when the answer and cross-complaint were filed. 1 Black on Judgments, § 471 and cases *supra.*

E. G. Schoonover, for appellee, J. S. Fry.

Contends that appellants are not entitled to any marshaling of assets that would in any way affect the homestead rights of Fry, and his homestead was properly exempted. 26 Cyc. 936; 72 Ark. 412; 34 Cent. Dig., par. 3, "Marshaling Assets"; 40 Ark. 102; 31 *Id.* 203; 18 *Id.* 85; 58 *Id.* 292.

J. J. Lewis, for N. E. Securities Co., appellee.

Adopts the brief filed by E. G. Schoonover for appellee Fry.

HART, J. This was a suit begun in the Randolph Chancery Court in which the New England Securities Company and T. C. Alexander, as trustee, were plaintiffs, and Jas. G. Fry, W. T. Fry, Isabel Fry, U. S. Fry, Willie Fry, J. S. Fry and Fannie Fry, and the United States Fidelity and Guaranty Company and the American Bonding Company, as assignees of W. A. Cunningham, guardian, and the directors of the Ravenden Special School District and Lone Rock Bank of Ravenden, were defendants.

The complaint alleged that the defendants, James G. Fry, W. T. Fry, Isabel Fry, U. S. Fry and Willie Fry on the first day of March, 1909, executed a mortgage to certain lands in Randolph and Lawrence counties to

the New England Securities Company for the purpose of securing said company in the sum of $7,000 and the accrued interest; that defendants had defaulted in the payment of said indebtedness and owed plaintiff the principal and the accrued interest.

The prayer of the complaint was for judgment for the amount of the debt and interest and for a foreclosure of the mortgage.

J. S. Fry filed a separate answer in which he admitted the execution of the deed of trust but set up a state of facts which he claimed entitled him to have the land in Lawrence county first sold for the payment of $2,615.90 of the indebtedness.

Appellants also filed an answer in which they admitted the execution of the mortgage and that the amount for which it was given to secure was due and unpaid, but set up a state of facts which they say entitles them to have the Randolph county land first sold for the payment of the indebtedness to the New England Securities Company. The facts relied on by appellee, Jas. G. Fry, and by appellants will be more particularly set out in the statement of facts.

The facts are practically undisputed and the material facts as found by the court are as follows:

On the first day of March, 1909, the defendants, Jas. G. Fry, W. T. Fry, Isabel Fry, U. S. Fry and Willie Fry executed to the New England Securities Company their promissory note in the sum of $7,000 due on the first day of March, 1916, bearing interest from date until paid at the rate of 6% per annum. They executed a mortgage on certain real estate situated in Randolph and Lawrence counties in the State of Arkansas to secure said indebtedness. Default was made on the interest that became due on March 1, 1915, and under the terms of the mortgage the company was entitled to declare the whole indebtedness due, that on the date of the rendition of the decree herein said parties owed said Securities Company the sum of $8,004.25. On November 28, 1914, Jas. G. Fry, W. T. Fry, Isabel Fry, U. S.

Fry and Willie Fry executed a deed to the Randolph county land on which the New England Securities Company had the mortgage to J. S. Fry. The conveyance to J. S. Fry was made subject to the lien of the New England Securities Company. J. S. Fry undertook and bound himself to pay of this indebtedness the sum of $5,000 and interest thereon from March 1, 1915, which at the date of the decree aggregated the sum of $5,388.35. The grantors in the deed to J. S. Fry agreed that they would pay, and that the Lawrence county land should be liable as between them and J. S. Fry, to the payment of the remainder of said mortgage and indebtedness. J. S. Fry as part of the consideration on his part executed to James G. Fry and the other grantors a deed to certain lands in Lawrence county, including his homestead. As soon as the conveyance was made J. S. Fry moved from Lawrence county to Randolph county and took possession of the Randolph county lands and established his homestead on one hundred and sixty acres of them.

On April 4, 1913, W. A. Cunningham, as guardian, obtained judgment in the Lawrence Circuit Court for the Eastern District, against J. N. Beakley, the United States Fidelity & Guaranty Co., and the American Bonding Company for the sum of $1,286.09. This judgment was duly transferred to W. E. Beloate and W. M. Ponder, as trustees for the said United States Fidelity & Guaranty Company and the American Bonding Company. On June 10, 1914, said judgment was stayed by a bond executed in conformity with the statutes by W. T. Fry, A. S. Fry and J. G. Fry and filed in the office of the circuit clerk of Lawrence county. The stay bond was conditioned for the payment of the judgment within six months from May 15, 1914. A copy of the stay bond was filed with the circuit clerk of Randolph county on December 16, 1914. The judgment which was stayed was not paid off.

The complaint in the present suit was filed on February 3, 1916. The answer of J. S. Fry was filed on

the 7th day of March, 1916. The answer and cross-complaint of appellants was filed on April 17, 1916, more than three years after the rendition of the judgment in the circuit court in favor of Cunningham as guardian against Beakley and others. The court rendered judgment against Jas. G. Fry, W. T. Fry and U. S. Fry, for the sum of $8,004.25, in favor of the New England Securities Company and declared it to be a first lien on the lands embraced in the mortgage situated in both Lawrence and Randolph counties.

It was decreed that the mortgaged lands situated in Lawrence county be first sold for the payment of $2,615.90 as agreed between J. S. Fry and W. T. Fry and the others who executed the mortgage to the New England Securities Company and that the Randolph county lands be sold for the payment of the balance of said indebtedness not discharged by the sale of the Lawrence county land.

The cross-complaint of appellants was dismissed for want of equity.

The Ravenden Special School District filed a separate answer and cross-complaint in the case but subsequently took a nonsuit and that district is not concerned with the further proceedings in the case.

Appellants alone have prosecuted an appeal from the decree of the chancery court. The appellants base their right to relief under the stay bond. It will be remembered that Cunningham as guardian obtained a judgment in the circuit court of Lawrence county on April 4, 1913, against Beakley and others. The stay bond was filed on the 15th of May, 1914, and appellants claim that this had the effect of lengthening the time their judgment was a lien on the lands in Lawrence county.

(1-2) Under section 4438 of Kirby's Digest a judgment is a lien on the real estate owned by the defendant in the county in which the judgment was rendered from the date of its rendition. Section 4439 provides that the lien authorized by the preceding sec-

tion shall continue in force for three years from the date of the judgment. We do not think the filing of a stay bond suspended the running of the three years limitation of the judgment lien. The stay bond was filed on May 15, 1914, and the six months would expire long before the three years' limitation of the judgment lien expired. We think the effect of the decision in *Cook* v. *Martin*, 75 Ark. 40, is to hold that the lien of the judgment is continued in the stay bond, and this lien relates back to the rendition of the judgment, so as to protect the judgment creditor against subsequent liens or conveyances by the judgment debtor. The stay of judgment for six months under section 3250 of Kirby's Digest did not suspend the judgment lien under sections 4438 and 4439 of Kirby's Digest. The judgment was a lien on all the land of the defendant in the county during the whole six months. The judgment was stayed by the filing of the bond under the statute and the judgment creditor, as we have already seen, could not have been in any wise prejudiced by the filing of the stay bond, for the reason that there was ample time within which to levy an execution and sell the defendant's real estate under it after the six months had expired. If the stay bond had been filed at a period of time which would have extended beyond the date of the three years' limitation of the judgment lien, the judgment creditor would have been entitled to a further reasonable time within which to have caused his execution to be issued and levied upon the real estate of the defendant in the county and sold thereunder. Not having been prejudiced by the filing of the stay bond in the present case, they are not entitled to an extension of the three years' limitation provided by the statute. It follows then that they had no lien upon the mortgaged property at the time they filed their cross-complaint and the chancellor was correct in holding that their lien having expired before they became a party to the suit they were not in a position to ask for a marshaling of

the securities and were not entitled to any relief in the action.

They did allege in the answer that J. S. Fry purchased the Lawrence county lands in fraud of their rights as creditors, but no attempt was made by them to establish this by proof. On the other hand J. S. Fry testified that he was a purchaser in good faith of the Randolph county lands for a valuable consideration and further stated that at the time he exchanged his Lawrence county lands for them he did not have any actual notice of the judgment rendered in the Lawrence Circuit Court under which appellants sought to assert their priority.

It follows that the decree of the chancellor was correct and will be affirmed.

GREEN v. McCULLAR.

Opinion delivered March 26, 1917.

BILLS AND NOTES—FAILURE OF HOLDER TO SUE MAKER—SURETY NOT RELEASED.—A surety on a note is not released by the failure of the holder to promptly sue the maker.

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

The appellant *pro se*.

1. The court erred in not sustaining appellant's demurrer to the answer, for the answer did not aver that the release plead was made upon any consideration, nor even that it was in writing. A consideration is essential and must be pleaded. 31 Ark. 728; 121 *Id.* 194; 34 Cyc. 1095.

2. A parol agreement to release a party from liability on a note, unsupported by any consideration, cannot be enforced. 96 Ala. 454, 11 So. 410.

3. The court erred in refusing to instruct that unless they found that defendant had complied with §§ 7921-2 Kirby's Digest as to notice, they should find for plaintiff. This is not the law. 7 Ark. 360;

15 *Id.* 132; 35 *Id.* 469; 82 *Id.* 413. Mere inactivity, delay or passivity does not discharge a surety. Kirby's Digest, §§ 7921-2. The defendant was liable.

HART, J. W. C. Green sued John F. McCullar before a justice of the peace to recover on a promissory note which had been transferred to him for a valuable consideration in the usual course of trade.

The justice found the defendant not liable on the note and the plaintiff appealed to the circuit court. In the circuit court there was again a verdict and judgment for the defendant and the plaintiff has appealed to this court. The material facts are as follows:

On February 2, 1914, L. G. Riles, J. J. Watson and J. F. McCullar executed a promissory note to John Whitsett, or bearer for $59.50, due ten and one-half months after date with interest at the rate of ten per cent. per annum from date until paid. Whitsett transferred the note in the ordinary course of business to W. C. Green for a valuable consideration. The note was given by Riles and Watson to Whitsett for a shingle mill, and McCullar signed the note as surety. After the note had become due, McCullar had a conversation with Whitsett about the payment of the note. No preparations that he knew of had been made by either Watson or Riles to pay the note. Watson had left the country but Riles was still there. The shingle mill for which the note was given was also still there and in possession of Riles. McCullar told Whitsett that he wanted him to try to recover his money on the note. He said that he would no longer stand surety on the note. Whitsett told McCullar that he should not be hurt or put to trouble over it.

Subsequently Riles left the country. He left the mill, standing right where it was, which was about one-quarter of a mile from McCullar's house, and took with him a cow and a yearling. This was the version of the matter testified to by McCullar. He did not speak of Riles having any other property except the shingle mill and cow and calf.

Whitsett testified that he did not at any time release McCullar from the payment of the note and that McCullar did not notify in writing or otherwise his intention to institute proceedings to collect the note.

In the case of *Sims* v. *Everett*, 113 Ark. 198, it was held that at common law, a surety could not compel the creditor to sue the principal debtor, and become discharged by the failure of the creditor to do so, and Kirby's Digest, sections 7921 and 7922, giving the surety that right, is in derogation of the common law and should be strictly construed. The court after reviewing and discussing the authorities on the question, said that the statute on the subject controls, and unless complied with, the surety is not discharged by mere inactivity on the part of the creditor or failure or refusal to sue the principal.

Professor Daniel states the rule as follows: "Mere delay and passivity of the creditor does not discharge a drawer or indorser, or other surety, even when the delay and subsequent insolvency of the principal deprives him of all means of reimbursement, and unless authorized so to do by statute, he cannot, by request or notice, compel the creditor to sue the principal debtor." Daniel on Negotiable Instruments, 6th ed., vol. 2, sec. 1326, p. 1493. See also 3 Ruling Case Law, sec. 504, p. 1274.

Under the facts of this case the court was wrong in holding that the defendant was not liable on the note. For that error the judgment will be reversed and the cause will be remanded for a new trial.

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

Opinion delivered March 26, 1917.

1. RELEASE—FALSE STATEMENT BY PHYSICIAN.—A person injured by the negligence of a railroad company is not bound by a release executed by him, and induced by false statements of the company's physician.

2. NEGLIGENCE—PERSONAL INJURIES.—A verdict for the plaintiff, in an action for damages resulting from personal injuries, *held* warranted by the evidence.
3. NEGLIGENCE—PERSONAL INJURIES—FALSE REPRESENTATIONS—RELEASE.—Plaintiff, in a railway accident sustained an injury to her wrist and executed a release to the company upon the assurance of the company's physician that the injury was slight. The injury proved not to be serious, but did cause plaintiff some inconvenience and disfigurement, and could be cured only by an operation. *Held*, a finding by the jury that the defendant's physician had made false statements was not contrary to the evidence.
4. RAILROADS—JUDGMENT AGAINST—LIEN.—Kirby's Digest, § 6661, giving a lien against the property of railroads, is limited to property belonging to the railroad company within this State, and to persons obtaining judgment against the company upon causes of action arising within this State.

Appeal from Crittenden Circuit Court; *W. J. Driver*, Judge; modified and affirmed.

T. S. Buzbee and *H. T. Harrison*, for appellant.

1. This case falls squarely within the rule laid down in 115 Ark. 123. There is nothing in the testimony that plaintiff was mentally incapacitated—she was aware of what she was doing, and knew she was signing a release.

2. Plaintiffs are not entitled to the statutory lien. 80 Ark. 395, 405; 78 N. Y. 30; 79 S. W. 1130-1144; 72 Mo. 664.

Hughes & Hughes, for appellees.

1. The release is not binding. She signed it under the belief that the injury was trivial and that belief was induced by the statements of the company's physician. The facts bring this case clearly within the rule laid down in 87 Ark. 614; 121 *Id.* 433, 438. The release was a nullity.

2. Misrepresentations, amounting to fraud vitiate a release. 34 Cyc. 1064; L. R. 2 Eq. 587; 6 Beav. 503; 61 Hun. 356; 15 N. Y. Supp. 911; 156 S. W. 1155.

SMITH, J. R. E. Smith and Bessie C. Smith, who are husband and wife, recovered judgments against the appellant railway company to compensate an injury

sustained by Mrs. Smith in a wreck in the State of Kansas, while she was a passenger on one of appellant's trains. A few hours after her injury, and while she was still en route to her destination, she compromised and settled her claim for damages for the sum of $10.00, and executed a full release. Shortly after the train was derailed, a physician and surgeon representing the railway company examined all of the injured passengers, and gave them such treatment as their condition required and the opportunity afforded. Mrs. Smith sustained an injury which later developed into hernia, and an injury to her wrist, which immediately gave her considerable pain, but, upon being examined by the doctor, she told him only about her wrist, which he bandaged for her and told her she had only sustained a sprain, which was not serious, and that it would soon be entirely well. She testified that she was made sick at her stomach, but that the other pain which she suffered was not to be compared to the pain caused by her arm. Some hours later, and while still pursuing her journey, a claim agent representing the railway company, asked to see, and was shown, her hand. This gentleman told Mrs. Smith that he had talked with the doctor, and had been assured by him that "her hand would be all right." He then said he wanted to pay her something on account of the delay she had sustained, and she told him she did not want any pay if her hand got well, and that she signed a paper, the exact nature of which she did not understand, except that she knew it was a release of some kind. There was some conflict in this evidence, but this is the purport of the testimony offered by appellees. This release is a full acquittance for any damages.

After Mrs. Smith reached her home, the hernia developed, and a bursa, or tumor, developed on her wrist, which she still had at the time of the trial thirteen months subsequent to her injury. Her doctor testified that this tumor was not serious, and could be permanently cured by a surgical operation, and that, if the

operation was not performed, she would suffer but little inconvenience, except the disfigurement, and that many persons would prefer to go through life without having it removed.

There was a judgment in favor of Mrs. Smith for $1,500.00, and in favor of her husband for $250.00, and a lien was declared in favor of each under Section 6661 of Kirby's Digest, and this appeal has been duly prosecuted.

It is earnestly insisted, under the authority of the case of *Kansas City So. Ry. Co.* v. *Armstrong*, 115 Ark. 123, that this cause of action is barred by reason of the release executed by Mrs. Smith. While it is admitted that the testimony in regard to the hernia makes a case which would support a judgment for the full amount recovered, it is insisted that that is one of those consequences the possibility of which the parties must be held to have had in mind when the settlement was effected.

(1-3) Mrs. Smith made no statement to the doctor in regard to the injury which developed into the hernia, and, consequently, his statement to her that she would soon be well cannot be considered as applying to that injury, and, as serious as this injury has proved to be, we would be compelled, under the above cited case, to hold that the sum of money which constituted the consideration for the release compensated that injury, had the doctor's representations in regard to her other injury proven true. Upon the assurance of the doctor, and the reiterated assurance of the claim agent that he had, himself, talked with the doctor, and the belief inspired thereby that she had sustained only a slight and temporary injury to her wrist, Mrs. Smith made this settlement.

Now, had these representations proven true, there could be no recovery, although she sustained other more serious injuries, because no representations were made by the company doctor in regard to such injuries, and her action in treating them as inconsequential in

making the settlement was uninfluenced by any representations made to her by the company doctor.

It is said that the injury to Mrs. Smith's wrist is slight, that the operation, if one was performed, to remove the bursa, is not a serious one, and that no great inconvenience or disfigurement would result, if an operation was never performed. But the jury may have thought otherwise. A skilled and busy surgeon, like the one who testified in this case, might regard slightly, and as of only trivial importance, an operation of the kind which would have afforded Mrs. Smith complete relief; yet the thought of it might excite such trepidation, and especially in the mind of a nervous person, as to make preferable the permanent inconvenience and disfigurement attendant upon a failure to have an operation performed; and we cannot, therefore, say that the jury was not warranted in finding that the doctor's representation was false when he stated to Mrs. Smith that her injury was only slight, and that her recovery would be speedy and complete, and, if there were such untrue statements, she was not bound by her release. *Griffin* v. *St. L., I. M. & So. Ry. Co.*, 121 Ark. 438; *St. L., I. M. & S. Ry. Co.* v. *Hambright*, 87 Ark. 614.

It is, no doubt, true that in making up the verdict the jury awarded a larger amount for the hernia than for the bursa; but the contract of release was an indivisible one. If it was binding at all, it barred any action, and if it was not fully binding, it did not bar any part of the cause of action; and it is not claimed that the damages are excessive, if there is any cause of action.

It is insisted that the court erred in declaring a lien under provisions of Section 6661 of Kirby's Digest. And we think appellant is correct in this contention. By this section it is provided that every person who performs any work, or furnishes any material, for the construction, or operation, of any railroad, or "who shall sustain any loss, or damage, to person or property, from any railroad, for which a liability may exist at

law, * * * shall have a lien * * * for such damages, upon the roadbed, buildings, equipments, income, franchise, right-of-way, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, and beneficiaries under trusts, or owners."

(4) This section does not expressly say that this lien shall be only against the property there described which is situated in this State; but the language must be interpreted as having that meaning, for the Legislature could not give an extra-territorial effect to a statute of this kind. Likewise, it must be assumed that this lien is intended for the benefit of the class of persons there named whose cause of action and right to a judgment arises in this State. It is true that appellee's cause of action was a transitory one, and has been reduced to judgment within this State. But it did not arise here, and it is not to be assumed that it was the legislative intention to confer the benefits of this lien upon any person whose cause of action was such that it might be brought in the courts of this State. To so hold would, in a very large measure, deprive persons, whose cause of action originated within this State, of the benefit of such liens, if they were required to share such benefits with all persons who might obtain judgment for any of the causes of action specified in that section.

This construction of the statute, not only comports with the general construction given such statutes, but is in accordance with our own decision in the case of *Midland Valley Rd. Co.*, 80 v. *Moran Bolt & Nut Co.* Ark. 399. In that case the Bolt & Nut Company, which was a Missouri corporation, had furnished material of the kind, for the contract price of which a lien is conferred under Section 6661 of Kirby's Digest, and suit was brought to enforce a lien in its favor for the total amount due it for such supplies. It appeared, however, that only a portion of such materials had been used in this State. It was there held that the lien could

be enforced only to the extent of the materials which went into the construction of the railroad in Arkansas. This court quoted with approval from the case of *Birmingham Iron Foundry* v. *Glen Cove Starch Mfg. Co.*, 78 N. Y. 30, the following statement of the law:

"'Such a lien does not exist at common law. It is no part of the contract to be enforced where that can be enforced. It is purely the creature of the statute. The statute has no extra-territorial force. It was intended for the protection of those who performed labor or furnished materials within this State. When this engine was brought into this State and put into this factory, it belonged to this defendant. The plaintiff did not furnish any material in this State. It cannot, therefore, have the benefit of the statute.'"

The court there met the argument that the railroad must be treated as an entirety, with this statement:

"It is argued that, because the railroad must be treated as an entirety and not sold in parcels in the enforcement of liens against it, the whole debt could be enforced in this suit. The rule of treating the railroad as an entirety extends only to the roadbed and easements within the State."

It follows, therefore, that the judgment of the court below, declaring a lien in favor of appellees, must be modified as indicated, and as thus modified will be affirmed.

HARRISON v. FULK.

Opinion delivered March 26, 1917.

1. ATTACHMENTS—DAMAGES FOR IMPROPER SEIZURE.—Where a party is totally deprived of his property by an attachment thereof, the measure of his damage is the value of the property taken, at the time of the seizure, with interest from the date of the levy up to the time of trial.

2. ATTACHMENTS—DAMAGES—REMEDY—ELECTION.—Where plaintiff's property has been improperly attached and sold, and the attachment

is discharged, plaintiff is entitled to the remedy prescribed in Kirby's Digest, § 381, under which the court or jury assesses his damages and judgment shall be given on the attachment bond, or in Kirby's Digest, § 380, under which plaintiff may recover the proceeds of the sale in the sheriff's hands. Plaintiff can avail himself of but one of these remedies, and having elected to act upon one he cannot invoke the other also.

3. MANDAMUS—JUDICIAL ACT—IMPROPER REMEDY.—The failure of a court to render a proper judgment is an error to be corrected by appeal and not by mandamus.

Mandamus to Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; writ denied.

Dunaway & Chamberlin, for petitioners.

1. Mandamus will lie; the duties of the court are merely ministerial. Kirby's Digest, § 380. There is no other adequate remedy. It was the duty of respondent to enter the order directing the sheriff to turn over the $350.00 to petitioners. Kirby's Digest, § 380.

2. This court has jurisdiction to compel an inferior court to *exercise* his discretion, and perform his duty. 35 Ark. 298; 80 *Id.* 350; 4 *Id.* 302; 99 N. E. 606.

3. Appeal is not the remedy. Kirby's Digest, § 380; 94 Ark. 214.

John D. Shackelford, for respondent.

1. The pleadings in this cause and the conduct of petitioners sustain the order, and it is correct. Their claim is inconsistent.

2. Mandamus will not lie; the remedy was by appeal. 95 Ark. 118; 94 *Id.* 214; 77 *Id.* 101; 80 *Id.* 61; 82 *Id.* 483; 84 *Id.* 156; 98 *Id.* 505; 101 *Id.* 29.

SMITH, J. This is a petition for mandamus, directed against the Hon. Guy Fulk, as judge of the second division of the Pulaski circuit court.

The case arises out of the proceedings had in that court upon the suing out of the mandate from this court in the case of *Nothwang* v. *Harrison*, decided January 1, 1917, and reported in 126 Ark. 548, 191 S. W. 2. As appears from the opinion in that case,

Nothwang had attached a lot of shingles belonging to Harrison Bros., and after a mistrial of that cause and pending another trial the court made an order directing the sale of these shingles, and, pursuant thereto, the shingles were sold to Nothwang for $350.00. In due time, and before the first trial of that cause, the defendant in the attachment case filed an answer and cross-complaint, in which the material allegations of the complaint were denied, and a cause of action in their own favor set up, in which it was alleged that damages in the sum of $719.50 had been sustained. After this sale, the defendants filed an amendment to their cross-complaint, reciting the sale of the shingles, and stating their value, at the time they were attached, to be $742.59, and judgment was thereupon prayed in the sum of $1,462.09, which sum included the alleged value of the shingles and the amount of damages for which judgment had been originally prayed.

These questions were gone into at the original trial, and, at the request of the defendants, the court gave an instruction on the measure of damages, in which the jury was told that, "In this connection, if you find against the plaintiff, and for the defendants, you will ascertain, from the evidence, the value of the shingles attached, at the time attached, and render a verdict for defendants for the amount so found, with interest at 6 per cent. per annum from May 18, 1915 (the date of the attachment). Further, in ascertaining this value, you will not consider, or be guided by, the amount plaintiff paid for said shingles at the sheriff's sale."

A judgment was returned in favor of defendants for the sum of $500 and this judgment was affirmed by us on appeal.

The cause was further heard on January 20, 1917, by the court below, on the mandate from this court, at which time defendants prayed the court to render judgment against Nothwang and his sureties in the sum of $500, with interest from date of the judgment appealed from, and, in addition, that the court order

the sheriff to pay to them the $350 for which the shingles sold. The court refused to make this order, but on the contrary, directed the sheriff to turn over to defendants the said $350, "to be by them applied on the judgment of $500 secured by them against Nothwang, et al." Whereupon, this petition for mandamus was filed, to require the court to make the order prayed below.

The prayer of this petition must be denied for two reasons. The first is that the petitioners have had their day in court on the question of the value of the shingles. They had the right to treat the $350 as representing the value of the shingles, but they were not required to do so. Had they done so, they would have been entitled, under section 380 of Kirby's Digest, to this money upon the dissolution of the attachment. This section provides that the attached property, or its proceeds, shall be returned to the defendant upon the dissolution of the attachment. Defendants elected, however, to amend their cross-complaint to allege the value of the shingles was not $350, but was $742.59, and that issue has been passed upon by the jury.

(1) In C. J. Vol. 6, 420, it is said: "Where plaintiff was totally deprived of his property, the measure of damages is the value of the property taken, at the time of the seizure, with interest from the date of the levy up to the time of trial." The cases of *Perkins* v. *Ewan*, 66 Ark. 175, and *Straub* v. *Wooten*, 45 Ark. 112, are there cited to support that statement of the law.

(2) This rule is in accordance with our statute upon the subject. Section 381 of Kirby's Digest provides that, in all cases of attachment in which the attachment is discharged, the court or jury trying such attachment shall assess the damages sustained by reason thereof, and judgment shall be rendered against the plaintiff, and his sureties in the attachment bond, for the amount of such damages, and the cost of the attachment.

The practice under this section has been defined in the following cases: *Rogers* v. *Coates*, 103 Ark. 191; *Holliday* v. *Cohn*, 34 Ark. 710; *Boatwright* v. *Stewart*, 37 Ark. 614; *Goodbar* v. *Lindsley*, 51 Ark. 382; *Poppewell* v. *Hill*, 55 Ark. 622; *Blass* v. *Lee*, 55 Ark. 329; *Scanlan* v. *Guiling*, 63 Ark. 540; *Norman* v. *Fife*, 61 Ark. 33; *Walker* v. *Fetzer*, 62 Ark. 135.

Defendants might have availed themselves of the benefits of section 380, in which event, upon the dissolution of the attachment, they would have been entitled to the proceeds of the sale of the attached property in the hands of the sheriff. But, as has been said, they had the right to proceed under section 381 of Kirby's Digest, and have the jury find the value of the property which had been sold, and, having done this, they can not also avail themselves of the provisions of section 380. The positions are inconsistent.

(3) Moreover, mandamus will not lie, because the action of the court was a judicial, and not a ministerial, one, and, if it be assumed that the court erroneously refused to render judgment for the $350, by directing the payment of the $350 to petitioners, to apply on their judgment, then the error was one to be corrected by appeal, and not by mandamus. *Maxey* v. *Coffin*, 94 Ark. 214; *Rolfe* v. *Drainage District*, 101 Ark. 29, and cases cited.

The petition for mandamus is therefore denied.

TRIPLETT *v.* WESSON.

Opinion delivered March 26, 1917.

1. APPEAL AND ERROR—CREDIBILITY OF WITNESS—WEIGHT OF TESTIMONY—SUFFICIENCY OF THE EVIDENCE.—It is the jury's province to pass upon the credibility of witnesses. The weight to be given the testimony is a jury question. A verdict will not be disturbed by appeal if supported by substantial testimony.
2. APPEAL AND ERROR—MISCONDUCT OF JUROR—PROOF.—Where it is not claimed that a verdict was reached by lot, their misconduct in arriving at a verdict can not be established by the statements of certain of the jurors, and the affidavit of another witness containing hearsay evidence of a juror.

Appeal from Prairie Circuit Court, Northern District; *Thos. C. Trimble*, Judge; affirmed.

Emmet Vaughan, for appellant.

1. There is absolutely no evidence to support the verdict. It is wrong.

2. The misconduct of the jury calls for a reversal. 157 Mass. 579; 32 N. E. 955; 32 Kans. 419; 62 Me. 362; 52 Minn. 329; 54 N. W. 187; 68 Me. 362; 24 Atl. 470; 89 Wisc. 38; 120 N. W. 626; 158 S. W. 1194; 112 Me. 289.

W. A. Leach, for appellee.

1. The evidence is sufficient. There was substantial evidence to support it. 104 Ark. 260; 103 *Id.* 260; 97 *Id.* 486; 97 *Id.* 438; 87 *Id.* 109; 104 *Id.* 162.

2. There was no misconduct of the jury. It was not established. 15 Ark. 403; 29 Cyc. 981, note 97. A juror can not be examined to establish a ground for a new trial, except to show that the verdict was by lot. Kirby & Castle's Digest, § 2595; 97 Ark. 193; 96 *Id.* 400; 67 *Id.* 226; 59 *Id.* 132; 48 *Id.* 396; 35 *Id.* 109; 29 *Id.* 293; 15 *Id.* 403; 37 *Id.* 519.

HUMPHREYS, J. Appellee brought suit against appellant before a magistrate in Calhoun township, Prairie county, to recover possession of four shoats. The cause was tried in White River township on change of venue from Calhoun township, and judgment rendered in favor of appellee. The cause was appealed to Prairie circuit court for the Northern District thereof. The result of the trial in the circuit court was favorable to appellee, and an appeal has been prosecuted to this court.

(1) The first assignment of error is that there is no substantial evidence to support the verdict. The appellee and his son testified positively that the shoats belonged to appellee. They identified them by flesh marks and by resemblance to appellee's sow. The evidence of several other witnesses shows that these shoats ran on the range with appellee's sow. It is

within the province of the jury to pass upon the credibility of witnesses. The weight to be given the testimony is a question for the jury. A verdict will not be disturbed on appeal if supported by substantial testimony. *Vaughan* v. *Cooper*, 103 Ark. 260; *Rhea* v. *State*, 104 Ark. 162.

(2) The second assignment of error is that the court erred in refusing to give a new trial on account of the alleged misconduct of certain jurors in viewing the sow and shoats when permitted to separate and before rendering a verdict. The only evidence produced to establish the fact that the jurors looked at the sow and shoats while the case was under consideration is the affidavit of Emmett Vaughan to the effect that R. A. Patterson, one of the jurors, told him that he saw the sow and pigs during the trial of the case and the evidence of O. C. Baugh, R. A. Patterson and Malcom Bacon, all members of the jury, to the same effect. Section 2423 of Kirby's Digest is as follows: "A juror can not be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot."

This court said in the case of *Osborne* v. *State*, 96 Ark. 400: "If the verdict is not decided by lot, and it is claimed that it was decided in any other manner than by a fair expression of opinion by the jurors, such claim must be established by witnesses other than the jurors." What was said in *Osborne* v. *State*, *supra*, has been reaffirmed in the case of *Capps* v. *State*, 109 Ark. 193.

No proof having been offered to establish the alleged misconduct of the jury, other than the statement and testimony of certain jurors, and the affidavit of Emmett Vaughan containing hearsay evidence of a juror, no error was committed by the trial court in refusing to grant a new trial.

The judgment is affirmed.

RAPP v. PARKER.

Opinion delivered March 26, 1917.

LIBEL AND SLANDER—SPECIFIC LANGUAGE MUST BE SET OUT.—In a complaint charging slander, the defamatory words must be set out specifically.

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

X. O. Pindall and *Lewis Rhoton*, for appellant.

It is not necessary to set out the defamatory words, the specific language. In a case like this the substance, tenor and effect are sufficient. Here it was impossible to set it all out except by verbal description. The actions and movements described are slander *per se*, even if no words were spoken. 3 Am. L. Rep. 466; 25 Cyc. 447; 9 S. W. 753; 51 N. E. 191; 91 U. S. 225; 52 Atl. 1010; 57 *Id.* 84; 119 Ark. 220; Newell on Dafamation, Libel and Slander, p. 268-9, § 34, p. 366; 51 N. E. 191; 41 *Id.* 122.

F. M. Rogers, for appellee.

1. The complaint only sets up the substance of the slander. It is necessary to set out in the complaint the defamatory words *in haec verba*. 13 Encl. Pl. and Pr., p. 45; 25 Cyc. 434; 24 Ark. 603; 92 *Id.* 486.

HUMPHREYS, J. This suit was instituted in the Desha circuit court, by appellant J. C. Rapp, against J. L. Parker, appellee, for damages on account of slander.

It is alleged that the appellee on several occasions, without right, truth or authority, did unlawfully and maliciously slander and speak wrongfully and falsely of appellant, as follows:

"1st. That on or about October 15, 1915, the said defendant, in Desha county, Arkansas, did falsely charge and utter to and in the presence of Hilliard Miles, that the said plaintiff had been guilty of a dishonest and unlawful transaction, towit: the act of voting twice in an election held in Desha county, towit: An election for the office of drainage commissioners of the Cypress Creek Drainage District on the ——Monday of April,

1915, by voting once for Ed Warrington and at the same election voting for one Scott McGehee, unlawfully and in violation of law. The effect of which charge so falsely made was to injure the business standing and bring into disrepute the good name and character of this said plaintiff.

"2nd. And further, about the 15th of September, 1915, a previous slander of like kind was made by this defendant against this plaintiff as follows: On said date in Desha county, Arkansas, the said defendant did invite one Ed Warrington into his private office in the court house in Desha county, Arkansas, and then and there did lock the door, draw the blinds and turn on the light and in the presence of two friends and associates of the said defendant, towit: F. M. Rogers and C. C. Hemingway, open a ballot box and take therefrom a tally sheet and poll book of the election held for drainage inspectors of Desha county, Arkansas, on the—— Monday of April, 1915, and exhibit said tally sheet with the pretended name of this plaintiff appearing thereon as a voter at said election for Scott McGehee and did then and there assert, utter and charge that the said plaintiff had at said election unlawfully voted twice for drainage inspector, once for Ed Warrington and once for Scott McGehee, unlawfully, in violation of law, and attempt to prove the said charge by exhibiting the said tally sheet to the said Warrington with the name of this plaintiff falsely appearing thereon. The effect of which charge was to injure the business standing and bring into disrepute the good name and character of this plaintiff.

"3rd. And on other and further occasions within the year 1915, the said defendant did falsely charge and utter the same slander in the presence of Frank Bond and later in the presence of Sam Defer. That each of the said charges so made against this plaintiff was false and untrue, recklessly and maliciously made."

Appellee filed a motion to require appellant to make his complaint more definite and certain, as follows:

"Comes the defendant and moves the court to require plaintiff to make the complaint herein more definite and certain, and for cause says:

1. That the first paragraph of the complaint does not set out the language alleged to have been addressed to Hilliard Miles, but only the substance thereof.

2. That second paragraph of the complaint does not set out the language alleged to have been addressed to Ed Warrington in the presence of F. M. Rogers and C. C. Hemingway.

3. That the third paragraph of the complaint does not set out the language alleged to have been addressed to Frank Bond.

4. That the fourth paragraph of the complaint does not set out the language alleged to have been addressed to Sam Defer.

5. That the complaint does not specify the name of the precinct of which the ballot box, tally sheet and poll book therein referred to purport to evidence the returns of said election."

The trial court sustained the motion because the appellant had not set out the exact language used by appellee toward and about appellant.

Appellant declined to plead further and the court entered final judgment dismissing the complaint at appellant's cost.

The sole question in the case is whether in charging slander it is necessary to set out the defamatory words. The reasoning of the cases decided by our own court, on the various phases of slander and libel, unerringly point to the conclusion that a slander by words must be charged by setting out the specific words used. This court said in the case of *Jackson* v. *Williams*, 92 Ark. 486, that "In actions for slander or libel the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people

would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them." Unless the words used were set out, it would be impossible for judge or jury to properly construe them. In the case of *Laster* v. *Bragg*, 107 Ark. 74, this court took occasion to say in substance that it was not necessary to prove all the words alleged as spoken by a defendant, but it was necessary to prove a sufficient number of the words to sustain the cause of action. It was clearly pointed out in that case, as well as in the later case of *Waters* v. *Moore*, 122 Ark. 250, that there must be no material variance between the defamatory words alleged and the proof thereof. The great weight of authority is to the effect that the defamatory words must be set out *in haec verba*. See case note to 9 A. and E. Ann. Cas. at p. 495. The decisions of this court on the necessity of particularity of allegation in slander and libel suits seem to be in line with the weight of authority. The whole trend of the complaint was to charge the substance and effect of the language used instead of pleading the specific language and the setting thereof. The language, its setting, and circumstances under which used, are matters of allegation and proof—effect and conclusions are questions for judges and juries.

Treating the complaint as a cause of action defectively stated, a motion to make more definite and certain was the proper pleading to file; and when said motion was sustained, if the plaintiff refused to make the complaint more definite and certain in the manner required by the court, the only course open to the court was to dismiss the complaint. Treating the complaint as stating no cause of action, it was within the province of the court, when plaintiff failed to state a cause of action, to treat the motion as a demurrer and dismiss the complaint.

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

EAST ARKANSAS LUMBER COMPANY v. SWINK.

Opinion delivered March 26, 1917.

1. BUILDING CONTRACTS—RIGHTS OF PARTIES IN THE EVENT OF BREACH—A contract between a school district and a building contractor provided, (1) that if the latter failed to perform his contract that the district might do so, and charge the cost thereof to the contractor, and (2) that if the building was not completed by a certain date that the contractor "forfeit the sum of $10.00 per day as liquidated damages." The building was not completed on the day named and the district completed the same, charging the contractor with the cost. *Held,* the two provisions of the contract provided for separate and distinct remedies for different breaches, and not for the same breach, and that both provisions could stand.
2. BUILDING CONTRACTS—CONTRACT FOR LIQUIDATED DAMAGES.—A building contract provided that if the building was not completed by a certain time that the contractor agreed to forfeit the sum of $10.00 per day as liquidated damages. *Held,* the contract provided for liquidated damages, and not a penalty.

Appeal from Lawrence Chancery Court, Eastern District; *Geo. T. Humphries,* Chancellor; affirmed.

Basil Baker and *Horace Sloan,* for appellant, Ruth Less.

1. The alleged provision for liquidated damages can not be enforced for the reason that the contractor was discharged prior to the completion of the building. Sutherland on Damages, § 280; 138 N. Y. 480; 34 N. E. 201; 115 S. W. 6, 12; 184 N. Y. 543, 76 N. E. 1110; 91 N. Y. Supp. 582; 20 L. R. A. (N. S.) 350.

2. The provision for damages is a penalty and will not be enforced in equity. The district could only recover actual damages and none were shown. 122 Ark. 235, 241; 112 *Id.* 126, 133; 87 *Id.* 545; 104 *Id.* 9; 72 Mo. App. 673; 6 Cyc. 114; 14 Ark. 329; 40 Barb. 175; 55 Ark. 376, 381; Sutherland on Damages, § 283, p. 729; 46 S. W. 1061. The contract itself settles the amount of recovery. Art. 5. The school district has at least $716.89, which should be paid to appellant.

H. L. Ponder, for East Arkansas Lumber Co. and Pfeifer Stone Co.

1. We adopt the able brief for Ruth Less, but in addition call the court's attention to two matters. The district took charge and assumed the debts. The materials were sold to the district and it is liable as trustee.

2. Swink contracted with Snelling and all the directors assented to the contract and signed it. This was a waiver of the damages or penalty for delay.

3. The bond was sufficient and binding. 46 L. R. A. (N. S.) 326; *Ib.* 698; 27 *Id.* 578; 68 Pac. 576.

4. The money held by the district is a penalty and not liquidated damages. 13 Cyc. 94; 183 U. S. 642; 104 Ark. 9-16; 73 *Id.* 432; 122 *Id.* 163, 235.

No judgment was taken against Swink. In all fairness the district should not be permitted to keep this money to the loss and damage of these material furnishers.

W. P. Smith and *G. M. Gibson,* for appellees, School District et al.

1. The district never agreed to pay the bills. It acted within its rights when it retained 15 per cent. of the contract price, and is entitled to hold it as liquidated damages incurred by the delay. 122 Ark. 255; 14 *Id.* 315; 183 U. S. 642. Contracts for liquidated damages have been upheld in many cases. 112 Ark. 126; 121 *Id.* 45; 87 *Id.* 545; 122 *Id.* 163; 69 *Id.* 114; 56 *Id.* 504; 57 *Id.* 168; 108 U. S. 436; 72 Ark. 525; 83 *Id.* 114, 364; 87 *Id.* 52; 93 *Id.* 371. The rule is well settled in Arkansas and is sustained by the great weight of authority, citing many cases. The damages stipulated were reasonable. 56 Tex. 594; 112 Ark. 126; 183 U. S. 642; 122 Ark. 163, etc.

2. It is immaterial what the parties call it, whether "penalty," "forfeit" or "liquidated damages," the intention of the parties governs. 48 Pa. St. 450; 152 Mich. 386; 116 N. W. 193; 125 Am. St. 418.

3. No testimony as to the actual damages to the school board was necessary. The damages were stipulated. 56 Ark. 504; 56 Tex. 594; 121 Fed. 818; 57

Ark. 168; 10 Wisc. 30; 53 N. Y. App. 628; 59 N. E. 1125; 6 Cyc. 21. The sum is reasonable. 1 Sutherland on Damages, § 283; 122 Ark. 163. The burden was on the plaintiff to show that the provision was a penalty. 30 S. W. 558.

4. Swink's contract was properly terminated for noncompliance with section 5 of the contract. This section and section 6 should be read together and the district can recover. 46 S. W. 1061; 19 Fed. 239; 29 S. W. 467; 140 Fed. 465.

5. The decree is in all things correct. The district never agreed to pay the bills for freight, labor, materials, etc. The new contract with Snelling did not release Swink. No judgment against Swink was necessary, as the board under the contract had a right to retain the money now held as liquidated damages.

6. The appeal as to the East Ark. Lumber Co. and Pfeifer Stone Co. should be dismissed for failure to comply with Rule 9. The bond is not set out in the abstract.

W. E. Beloate, for Swink and the U. S. Fidelity Co.

1. No damages whatever were proven. 87 Ark. 52.

2. The right to liquidated damages was lost by the discharge of the contractor prior to the completion of the building. 46 S. W. 1061.

3. Only actual damages were contemplated by the contract, not liquidated damages. 115 S. W. 6.

4. The lumber company had no right to sue. 107 Ark. 501. The provisions of the bond were for the benefit of the district and not for laborers or material men. The bond is not set out in the abstract. The bonding company is not liable. There was no fund subject to garnishment.

HUMPHREYS, J. W. E. Swink entered into a contract with the Portia School District, on the 28th day of August, 1914, to erect a two-story brick school building, in accordance with plans and specifications, for the consideration of $6,675.00.

Article 5 of the contract is as follows: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action the owner shall also be at liberty to terminate the employment of the contractor for said work and to enter upon the premises and take possession for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expenses shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for furnishing the work, and any damages incurred through such default shall be audited and certified by the architect, whose certificate thereto shall be conclusive upon the parties."

Article 6 of the contract is as follows: "The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, towit:

"All work to be completed on or before the 20th day of January, 1915. In case of failure of contractors to complete building within the time above mentioned he agrees to forfeit the sum of $10 per day as liquidated damages."

W. E. Swink had contracts elsewhere and could only be present a part of the time during the construction of the building. He appointed a foreman and arranged with the secretary of the school board to pay his freight, material and labor bills, when O. K'd by himself or his foreman, out of the advances that might be due him from time to time, according to the architect's estimate. He also executed a bond to the Portia School District with the United States Fidelity & Guaranty Company of Baltimore, Md., as his surety. His bond was filed with the circuit clerk, as required by law. It was the intention of the parties to give a bond required by chapter 101, subdivision 2, of Kirby's Digest of the Statutes of Arkansas. On January 20, 1915, the secretary of said school board notified W. E. Swink in writing that the building was not completed and ready to be accepted. The work progressed on the building until Febuary 12, 1915, at which time W. E. Swink sublet the completion of the building to J.H. Snelling, for the sum of $250, by and with the consent of the school board. The work to be done by the sub-contractor was to be to the satisfaction of Clyde A. Ferrell, architect on the building. The building not having been completed by the sub-contractor, on April 12, 1915, the school board, through its secretary, on that day notified W. E. Swink that he had often violated article 5 of the original contract and that under the advice of the architect, the school board intended to take charge and complete the building, and according to said notice did take charge of said building on the 19th day of April, following, and completed it at an expense of $299.36. After completing the building, the school board sold the balance of the material on hand for $121.94.

East Arkansas Lumber Company furnished materials for the construction of this building, upon which there was a balance due of $2,243.34 when the building was completed. Pfeifer Stone Company furnished materials used in the construction of said building, upon which there was still due $123 when the building was completed.

W. E. Swink was indebted to Ruth Less in the sum of $875, for which amount she had obtained a judgment in the circuit court for the Eastern District of Lawrence county, Arkansas. Under the terms of the contract, the school board withheld fifteen per cent. of the contract price, or the sum of $1,016.25, and applied $299.36 of said amount to labor and materials in completing the building, and now has $716.89 of the contract price in hand and claims the right under the contract to appropriate it as liquidated damages on account of the failure of the contractor to complete the contract on January 20, 1915.

On the 28th day of April, 1915, Mrs. Ruth Less brought a suit in the chancery court for the Eastern District of Lawrence county, Arkansas, setting up her judgment as the basis of her action, alleging that on account of the insolvency of Swink, she had been unable to collect same; also alleging that the fifteen per cent. of the total contract price was wrongfully withheld by the school district, same being the property of W. E. Swink. She prayed that equitable garnishment be directed and the fund be impounded and applied to the payment of her judgment.

On November 25th, following, the East Arkansas Lumber Company and the Pfeifer Stone Company brought suit against W. E. Swink, United States Fidelity & Guaranty Co. of Baltimore, Md., school district of Portia, and J. E. McCall, E. B. Ivie, Whit Matthews, T. W. Petty, W. I. Moore and James Hatfield, directors of Portia school district, alleging as a basis for their action the amounts due for materials furnished in the construction of said school building; also that the

fifteen per cent. of the total contract price withheld by the school board was without right or authority and that it was an amount justly due from the school board to Swink; that Swink was insolvent; and asked that the amount be applied to the payment of their claims. They also alleged that Swink had executed a bond in compliance with chapter 101, subdivision 2 of Kirby's Digest of the Statutes of Arkansas with the United States Fidelity & Guaranty Company as bondsman, but that by mutual mistake, the Portia school district was named as obligee in the bond instead of the State of Arkansas, and prayed a reformation of the bond and for judgment against the bondsman, United States Fidelity & Guaranty Company, for their claims.

The Portia school district answered the complaint of Mrs. Less and denied that it was indebted to W. E. Swink in any sum growing out of the contract to erect a school building; also answered the complaint of the East Arkansas Lumber Co. and Pfeifer Stone Co., admitting the execution of the contract with W. E. Swink to erect a school building for the amount alleged, but denied it owed W. E. Swink any balance under the terms of the contract; admitted that Swink executed the bond to it for the faithful performance of the contract, but denied it was executed in accordance with law; denied that Swink owed the East Arkansas Lumber Company $2,243.34 or the Pfeifer Stone Co. $123.00 for materials used in erecting the school building; and denied the insolvency of Swink.

W. E. Swink answered the complaint of the East Arkansas Lumber Company and Pfeifer Stone Company, denying any personal liability on account of materials furnished, stating that if any sum was due them for materials used in the erection of the school building the school board owed it. He admitted making the contract for the erection of the building and the execution of a bond for the faithful performance thereof, but alleged he was released from the contract

and that the Portia school district had declined to accept the bond he offered it.

The United States Fidelity & Guaranty Company answered that under the terms of the bond it was released.

These cases were consolidated and tried as one case by the chancellor, which resulted in the dismissal of the complaints of Pfeifer Stone Company and Ruth Less for the want of equity, and the dismissal of the complaint of the East Arkansas Lumber Company against all appellees except the Portia school district, and as against it a decree was rendered in favor of East Arkansas Lumber Company for $121.94, on account of materials sold after the building was completed. The cause is here on appeal.

(1) Counsel for Ruth Less insist that articles 5 and 6 of the contract provide alternative remedies for damages in the event of failure to complete the building in accordance with the terms of said contract, and that the election of the remedy provided in article 5 estopped the Portia school district from asserting the remedy provided in article 6. Their construction is that the remedy provided in article 6 could be insisted upon in the event that the contractor personally finished the building, and not otherwise, and the contractor having been discharged, and the contract completed by the Portia school district, no right remained in said district to enforce its claim for liquidated damages on account of delay in the completion of the building. We cannot agree with learned counsel in this construction of the provisions in question. We see no conflict whatever between the two sections. Article 5 permits the school district to take charge of said building and complete it at the expense of the contractor in case he should refuse and neglect to supply a sufficiency of properly skilled workmen, or materials of the proper quality, or failed in any respect to prosecute the work with promptness and diligence, or failed in the performance of any of the agreements contained in the contract. Article 5 clearly

refers to any breach of the contract not otherwise specifically provided for in the contract. Article 6 provides that the work shall be completed by the 20th day of January, 1915, and in case the contractor fails so to complete the building by that time, then that he will pay the sum of $10 per day as liquidated damages for the time he is delinquent. Articles 5 and 6 of the contract provide for separate and distinct remedies for different breaches, and not the same breach. We have examined the following cases cited by appellee in support of this construction of like provisions in contracts and find them in accord with our views: *Watson et al.* v. *DeWitt County*, 46 S. W. 1061; *Texas & St. L. Ry. Co.* v. *Rust*, 19 Fed. 239; *Collier* v. *Betterton*, 29 S. W. 467; *Fruin-Bambrick Const. Co.* v. *Ft. Smith & W. R. Co.*, 140 Fed. 465.

(2) The paramount issue presented in this case is whether article 6 of the contract is for a penalty or liquidated damages. This court has been frequently called upon to construe sections of this character in contracts, and the general rule deduced from all the cases is, that if at the time of making the contract it would be difficult to anticipate and definitely arrive at the amount of actual damages that might result from a failure to complete the building within the time specified, and if the amount fixed in the contract is not greatly out of proportion to the amount of damages that might be sustained, and if inferable, from the situation of the parties at the time of making said contract, and the language used, that they intended to agree upon a definite or fixed amount for damages; then, the provision will be construed as an agreement for liquidated damages and not for a penalty. *Lincoln* v. *Little Rock Granite Co.*, 56 Ark. 384; *Nilson* v. *Jonesboro*, 57 Ark. 168; *Young* v. *Gaut*, 69 Ark. 114; *Blackwood* v. *Liebke*, 87 Ark. 545; *Kimbro* v. *Wells*, 112 Ark. 126; *Nevada County Bank* v. *Sullivan*, 122 Ark. 235; *Montague* v. *Robinson*, 122 Ark. 163; *Pine Bluff Hotel Co.* v. *Monk & Ritchie*, 122 Ark. 308.

In the case of *Pine Bluff Hotel Co.* v. *Monk & Ritchie, supra*, this court recently said: "The courts are more and more disposed to follow the obvious intention of the parties as expressed in the contract, by upholding a stipulation of this sort as being one for liquidated damages unless it is clear that it was intended as a penalty in disguise." The facts in the instant case are to the effect that this school building was being constructed on the same block of land upon which the old school building was situated; that the school building was being built for school purposes and that there was no intention whatever to rent it. In fact, there is nothing in the record from which it might be inferred that it could be rented for any purpose, and so it is apparent that the rental value could not be taken as a criterion for measuring damages. The contract itself provides that the amount of $10 a day shall be paid the school board by the contractor as liquidated damages in case of his failure to complete said building upon said date.

In applying the test laid down in the cases cited above to the facts in this case, it can be stated that the actual damages the school district might have sustained would have been hard to anticipate and definitely prove; the situation of the parties at the time, together with the language used in the contract, indicates that the intention of the parties was to provide for liquidated damages and not a penalty; the amount fixed is not greatly out of proportion to the damages that might have been sustained.

Learned counsel for East Arkansas Lumber Company and Pfeifer Stone Company not only joined in the contentions made by counsel for Ruth Less but further contend that their clients are entitled to recover on the bond. The bond is not abstracted by them nor by counsel for Ruth Less. We are precluded by a familiar rule of this court from construing the bond. The answer of the United States Fidelity & Guaranty Co. stated that it was released on the bond because no

notice was given it of the failure of the contractor to complete the building on January 20, 1915, as provided by the terms of the bond. We explored the record far enough to ascertain whether the bond required that notice be given it within a certain time of the failure of the contractor to finish the building by January 20, 1915, and found that it did. We presume the failure to abstract the bond is due to the fact that the bond on its face verifies the defense pleaded by the bonding company.

The decree of the chancellor is in all things affirmed.

SEWER IMPROVEMENT DISTRICT NO. 1 OF WYNNE *v.* FISCUS.

Opinion delivered March 26, 1917.

1. SEWERS—BAD ODORS—INJURY TO LAND.—A land owner may recover from a sewer improvement district, damages for a pollution of the air with bad odors, arising from the sewer, and passing over his land.
2. SEWERS—BAD ODORS—POLLUTION OF AIR—MEASURE OF LAND OWNER'S DAMAGE.—The rule controlling the measure of a land owner's damage for the pollution of the air in the vicinity of his land is that he must suffer a direct and substantial injury peculiar to himself and not suffered by the general public.
3. SEWERS—BAD ODORS—FAULTY CONSTRUCTION OF SEWER.—A sewer district will be liable for damages to land owners caused by the emission of bad odors from the sewer system, although the system was constructed in accordance with the engineer's plans.
4. SEWERS—BAD ODORS—DAMAGE TO LAND OWNERS.—Where land is damaged by bad odors arising from a sewer, the damage will be treated as permanent, in the absence of a showing that the sewer system will be remodeled.

Appeal from Cross Circuit Court, First Division; *W. J. Driver*, Judge; affirmed.

S. W. Ogan, for appellant.

1. The district was not liable. There is no evidence to show damage because the tank was placed near appellee's property. The only injury complained of was due to the sewage that passed and the odor therefrom. A district is not liable for injuries arising

from defects in the plans adopted. It was not an injury to real estate. The instructions do not state the law. 125 Wisc. 546; 4 A. and E. Ann. Cases, 1086; 63 Wisc. 518; 4 Allen, 41; 118 U. S. 19; 2 Dillon Mun. Corp. (4 ed.), § 1051; 165 Ill. 371. If the injury is due to the wrongful operation of the tank, or the system in general, the appellant is not liable. 113 Ark. 239.

2. The property owners were not entitled to compensation. 103 Cal. 614; 107 Mo. 83; 108 Va. 259; 85 Ga. 138; 186 Ill. 480. In the absence of a physical taking or trespass, appellant is not liable for odors alone. 10 Rul. C. L., § 149.

3. The court erred in instructing the jury. 106 Ark. 111; 57 *Id.* 387; 61 Mo. 359. A district is not liable for injuries not involving an unconstitutional taking of private property, by defects in its plans. 125 Wis. 546; 4 A. and E. Ann. Cas. 1086; 63 Wisc. 518; 4 Allen 41; 118 U. S. 19; 2 Dill. Mun. Corp. (4 ed.), § 1051; 165 Ill. 371. The odor was due solely to a defect in the plans.

4. The property owners are not entitled to compensation. 103 Cal. 614; 107 Mo. 83; 108 Va. 259; 85 Ga. 138; 186 Ill. 480.

In the absence of an actual physical taking or trespass, appellant is not liable for odors alone. 10 R. C. L., § 149. The injury was not permanent. 106 Ark. 111; 61 Mo. 359; 57 Ark. 387.

Mann & Mann, for appellees.

The instructions given are in line with the decisions of our court. 45 Ark. 429; 107 *Id.* 442; 155 S. W. 910; 47 L. R. A. (N. S.) 137; Art 2, § 22 Const.

The evidence sustains the allegations of the complaint and the instructions are correct.

HUMPHREYS, J. E. A. Fiscus owned lots 1 and 2 in block 4, and lots 1 and 2 in block 1 in Minnie Mack addition to the city of Wynne, Ark. Thomas Day owned blocks 2 and 3 in the same addition, and Mollie V. Garrett owned lot 12, block 1 in the same addition.

Appellant, under proper authority, constructed a sewer system in the city of Wynne, Arkansas, in accordance with plans and specifications furnished by an engineer, for the purpose of conveying the sewage out of the city. On the east side of the city, the sewage was discharged through a septic tank into a stream. The stream did not flow through or touch appellee's lands. The tank was constructed in the middle of Mulberry street, which ran east and west through the addition in which the property of appellees was located; the property was in the vicinity of the tank but not adjacent thereto. Noxious and offensive odors escaped from the tank and the stream into which the effluent from the tank was deposited. These odors pass onto the lands of appellees and impregnate the atmosphere to such an extent as to greatly impair the lands for residence purposes to which use they were and are adapted.

Appellees brought separate suits in the Cross county circuit court against Sewer Improvement District No. 1 of Wynne and the city of Wynne, seeking to recover damages on account of constructing the sewer system in such manner as to emit noxious odors and pass them over the lands of appellees.

The city of Wynne filed a demurrer which was conceded, and said city passed out of the case.

Appellants filed separate answers denying the material allegations of the complaint and by way of further defense pleaded that the sewage mains and septic tank were constructed according to plans of competent engineers, and if odors escape from the tank and stream it is the fault of defective plans.

The causes were consolidated and tried as one case, resulting in a verdict and judgment in favor of E. A. Fiscus for $315.00; Thomas Day for $225.00, and Mollie V. Garrett for $175.00.

The proper proceedings were had and an appeal embracing the three cases in one has been lodged in this court.

(1) The controlling issue presented by this appeal is whether or not there must be a physical invasion or spoliation of one's lands before he can maintain an action for damages for taking private property for public use without compensation. Our Constitution provides that private property shall not be taken, appropriated or damaged without just compensation to the owner. Appellant strenuously insists that the placing of a septic tank in the near vicinity of one's land from which noxious odors emanate and pass onto the land is not an injury to real estate within the meaning of section 22, art. 2 of the Constitution of Arkansas. In the cases of *McLaughlin* v. *City of Hope*, 107 Ark. 442, and *City of Eldorado* v. *Scruggs*, 113 Ark. 239, this court held that the turning of sewage into, and polluting a stream which flowed across the lands of a property owner to his injury, was within this constitutional provision and actionable. The reason assigned was that the lower riparian owner had a right to have the water uncontaminated by sewage, and such right was a real tangible property right which could not be appropriated without just compensation.

It is just as important to the owner of land to have unpolluted air as uncontaminated water. "The right to pure air is property, and to interfere with the right for public use is to take property." Lewis Eminent Domain, vol. 1, 3rd ed., sec. 236.

In the same section, Mr. Lewis uses some vigorous language in emphasizing the property right to air free from "artificial impurities." His language is so apt the writer is constrained to quote the following sentences: "The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water. It is an incident to the land and necessary to and a part of it, and it is as sacred as my right to the land itself." The text is amply supported by authority.

(2) In arriving at the damage and the amount thereof to property in this class of cases, some just limitation or rule must be enunciated. We think the rule announced in *Czarnecki* v. *Bolen-Darnell Coal Company*, 91 Ark. 58, should be applied. The substance of the rule is that the property owner must suffer a direct, substantial injury peculiar to himself and not suffered by the general public. In the instant case, the injuries were direct, substantial and peculiarly affected the lands in question.

(3) The evidence in this case tends to show that the noxious odors, escaping from the tank and stream into which the effluent passed, were caused by defective plans. C. B. Bailey, an engineer, testified that two dosage chambers should have been installed when the tank was constructed; that had some artificial chemical action been installed it would have entirely eliminated the odors.

The evidence further shows that the system was constructed upon the whole in accordance with the plans. In the case of the *City of Eldorado* v. *Scruggs*, *supra*, it was held that the sewer district was responsible for damages resulting to the property owner on account of construction of the system in accordance with the plans.

It is unnecessary to discuss the instructions, given and refused by the court, more than to say that the instructions given were in accord with the law announced in this opinion and limited the recovery to damages incident to the defective construction; and that the instructions refused were based on the theory that damage resulting to the property owner on account of noxious odors was not a damage within the meaning of section 22, article 2 of the Constitution of Arkansas.

(4) It is further insisted that the injury resulting from defective construction is not a permanent injury. The placing of the tank and the general manner of construction of this system was in keeping with the plans, and so far as this record disclosed, is a permanent structure. There is no evidence tending to show that the

sewer district intends to, or will, remodel the system. Damage must necessarily result to this property by reason of the construction of the septic tank in accordance with defective plans, and by reason of the close proximity of the property to the tank. The decrease of the market value of the land on this account is not speculative and conjectural, but can be reasonably ascertained and definitely estimated. The facts in the case bring it well within the test laid down in the case of *C. R. I. & P. Ry. Co.* v. *Humphreys*, 107 Ark. 330, and the cases cited therein.

The judgment is affirmed.

KOCHTITZKY *v.* BOND.

Opinion delivered March 26, 1917.

NEGLIGENCE—DRAINAGE DITCH CONTRACTOR—BREAKING OF DAM—LIABILITY.—A contractor, constructing a drainage ditch will be liable for damages occasioned by the breaking of a dam erected by him, for his own convenience to facilitate the passage of his dredge boat.

Appeal from Poinsett Circuit Court, First Division; *W. J. Driver*, Judge; affirmed.

S. L. Gladish, for appellant.

1. Appellant was not liable (1) because he was an independent contractor on public work and complied with every requirement of the law in performing his contract and (2) because appellee did not make any effort to prevent damages to his property. The dam was necessary for the completion of his work.

The instructions given were not the law; besides they were conflicting. 122 Ark. 272.

The dam was necessary and was not negligently constructed. 110 Ark. 416; 118 *Id.* 1; 170 S. W. 1012.

2. It was an extraordinary rainfall—not to be anticipated. 64 S. W. 149; 6 L. R. A. (N. S.) 252; 6 N. W. 789; 67 Ind. 236. The dam did not increase the flow of water. Gould on Waters (3 ed.), 412-14.

3. It was the duty of appellee to take the proper precautions to save his logs. 8 R. C. L. 442-6; 102

Ark. 246; 105 U. S. 224; 67 Ark. 371; Sutherland on Damages, 90; 44 Mo. 303; 79 Ark. 484.

Lamb, Turney & Sloan, for appellee.

1. Appellant's requests were properly refused. The dam was not necessary for the construction of public work, but if so it was negligently constructed and appellant was liable. The river was a navigable stream. 178 S. W. 312; 39 Ark. 403. But if non-navigable, the right to erect dams can only be exercised in the manner prescribed by § § 2966-2991 of Kirby's Digest.

The dam was an unlawful obstruction. 95 Ark. 298; 93 *Id.* 46; 99 *Id.* 132; 110 *Id.* 416. It was not essential to improvement. 118 Ark. 1; 50 S. W. 1049; 70 S. E. 126; 29 Cyc. 1198-9.

The rain was not unprecedented. 95 Ark. 297; 61 Ark. 381. The dam was at least a contributing cause to the injury. 95 Ark. 297; 89 *Id.* 581; 92 *Id.* 573; 101 N. Y. 736; 182 S. W. 1161; 89 Ark. 590.

The doctrine of contributory negligence does not apply. 12 Cal. 555; 80 Ga. 291; 4 S. E. 885; 122 Mass. 419; 123 *Id.* 254; 47 Pac. 194; 80 Ind. 379.

The jury were properly instructed and the evidence sustains the verdict.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages alleged to have been sustained by the breaking of a dam constructed by appellant across Tyronza River. Appellee was engaged in getting out saw logs and floating them down Tyronza River to market, and he placed a large quantity of logs on the bank of Tyronza River preparatory to loading them in the river when the stage of water should become favorable for rafting and floating. The logs were placed at the dumping ground in the month of October, 1914, and remained there until they were washed away by a flood of high water on January 31, 1915. Appellant and another ditch contractor constructed a dam across the river a short

distance above the dumping ground occupied by appellee in piling his logs, and an unusually heavy rain occurring on January 30 and 31 caused the dam to break. It is alleged in the complaint that when the dam broke the accumulated water, by reason of the obstruction and of the excessive rainfall, caused an unusual rush of water down the river which washed the logs away from the high bank. Many of the logs were lost entirely and others recovered at considerable expense. The jury assessed damages in favor of appellee in the sum of $425.56, and it is not contended that the amount awarded is excessive. The trial court in its charge to the jury stated that it was undisputed that appellant participated in the construction and maintenance of the dam, and that the only issue to be determined was whether or not the loss complained of by appellee was caused by the maintenance and breaking of the dam. It is contended that the court was wrong in this instruction and that further issues should have been submitted to the jury to determine whether or not the construction and maintenance of the dam constituted negligence and whether or not appellant, under the circumstances, was responsible for the injury. Appellant defended on the ground that the construction and maintenance of the dam was an essential part of the construction of a certain improvement undertaken by him under his contract with the drainage district, and that the drainage district, rather than the contractor, was responsible for any injury which resulted.

Grassy Lake and Tyronza Drainage District No. 9, Mississippi county, was a district formed for the purpose of constructing a system of ditches, and appellant entered into a contract with the district to dig two of the ditches embraced in the system, one being designated as Ditch No. 1 and the other as Ditch No. 40. Ditch No. 40 emptied into Tyronza River on the east side a short distance above the place where the dam was constructed. Ditch No. 1 began at the foot of Spear

Lake about two miles west of Tyronza River, and thence ran southwesterly and emptied into the St. Francis river. The ditches were constructed by means of a large dredging boat, and when appellant finished the construction of Ditch No. 40 it was necessary to find means to transport the boat to the point where Ditch No. 1 was to begin at the foot of Spear Lake. The head of Spear Lake is about one-half mile from Tyronza River and there is a small bayou which connects the two bodies of water. The only way to get the boat from Tyronza River over to the beginning of Ditch No. 1 was to raise the water in Tyronza River so that there would be enough water for the boat to dredge its way through the bayou into Spear Lake and thence through Spear Lake to the beginning point of Ditch No. 1. The engineer of the drainage district procured from the owners of the land through which the bayou ran a right of way for the use of the bayou in getting the dredge boat through, and appellant used the way under that license. The dam in question was built pursuant to the aforementioned plan for getting the boat over to the place where the work on Ditch No. 1 was to be commenced. The contention of appellant is that the state of facts related above brings the case within the rule that a contractor for the construction of a public improvement under contract with an improvement district or other public agency is only liable for negligence or unskillfulness in the performance of his work, and is not responsible for injury inflicted by acts which constitute "an essential part of constructing the work contemplated by the organization of the district." We do not think that the facts of the case bring it within that rule, but on the other hand that the construction and maintenance of the dam was solely for the convenience of the contractor in transporting his equipment. If injury resulted from the damming of the stream the contractor alone is responsible. In *Foohey Dredging Co.* v. *Mabin*, 118 Ark. 1, we said: "An independent contractor is not liable except for negligence or unskillfulness in the

performance of his work, and if he confines himself to a skillful performance of the work he has contracted to do, he is not responsible for damages which necessarily result from the construction of the work. He can not, however, escape liability merely on the ground that the method of construction was necessary for his own convenience in performing the contract. Now, the contract in this case shows that there was a time limit for its performance, but appellant could not justify itself for damages inflicted solely on account of that feature of the contract. In other words, it could not assume an obligation which of itself would justify the doing of an injury to someone else. If the instruction had been confined solely to the issue as to whether or not the damming of the ditch was an essential part of constructing the work contemplated by the organization of the district, it would have been correct and should have been given. The jury might have understood from it that the mere fact that it was necessary to construct a dam across the Wilson ditch in order to comply with the contract within the time specified constituted a defense."

The jury might have found in that case that the damming up of the Wilson ditch was an essential part of the construction of the improvement which the defendant had contracted to perform, and we held, therefore, that it would have been proper to submit that question to the jury. In the present case there is no ground upon which a finding could be sustained that the damming of Tyronza River was a part of the construction of Ditch No. 1 or Ditch No. 40. It was a mere means of transporting the dredge boat from one ditch to another, the two ditches not being continuous or in any way connected together. Even though the engineer of the district obtained the right of way for the dredge boat to pass through the bayou and into Spear Lake, this was done merely for the convenience of the contractor, and the damming of Tyronza River was also for his convenience in supplying water to use in dredging

through the bayou. The trial court was, therefore, correct in eliminating that issue from the jury. Nor was there any question of negligence involved in the act, for if the breaking of the dam was the cause of the injury to appellee, who was rightfully using the bank of the stream, the person who constructed and maintained the dam was liable for the damages inflicted, and this is true whether the stream was navigable or non-navigable. *L. R., M. R. & T. Rd. Co.* v. *Brooks*, 39 Ark. 403; *St. L., I. M. & S. Ry. Co.* v. *Magness*, 93 Ark. 46; *St. L. S. W. Ry. Co.* v. *Mackey*, 95 Ark. 297; *Taylor* v. *Rudy*, 99 Ark. 128.

The only question in the case, therefore, was whether or not the breaking of the dam caused the injury, and that question was settled by the jury upon legally sufficient evidence. It is insisted that the evidence is not sufficient to show that the injury resulted from the breaking of the dam, but after careful consideration we are of the opinion that the jury was warranted in reaching that conclusion from the evidence adduced. There was an unusually heavy rainfall, and the evidence warranted the finding that but for the damming up of the waters the flood would have passed away without reaching sufficient height to wash away the logs piled by appellee on the bank, and that the damming up of the river and the sudden rainfall together caused such a great rush of water when the dam broke that the logs on the bank were washed away.

Judgment affirmed.

MOLINE LUMBER COMPANY *v.* HARRISON.

Opinion delivered March 26, 1917.

CONTRACT OF EMPLOYMENT—DURATION.—Where the matter of duration in a contract of employment is not specified in words, the hiring being at a specified rate or a specific sum per year, the contract will be construed as a hiring for the full year's period.

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

Gaughan & Sifford, for appellant.

1. The language of the contract constituted a hiring at will and not of employment for a year. It was an indefinite term or period of time and at a certain rate *per year* and constituted a hiring at will. 64 Ark. 398; 25 L. R. A. (N. S.) 529; 173 U. S. 1; 156 Fed. 241; 18 *Id.* 703; 69 N. W. 492; 173 S. W. 4; 172 *Id.* 67; 171 *Id.* 703; 35 Ark. 156; 43 *Id.* 184; 15 *Id.* 444, 477.

2. Incompetency or insubordination on the part of a servant is sufficient cause for dismissal. 26 Cyc. 897, 992.

3. The court erred in its instructions. Cases *supra.*

MCCULLOCH, C. J. This is an action instituted by the plaintiff Harrison against his employer to recover wages alleged to be due under a contract which the defendant had broken. The plaintiff alleges that he was employed by defendant Moline Lumber Company to work for the latter as woods foreman for a period of one year at a salary of $1,800.00 a year, payable monthly, and that after working for the defendant for something over three months he was discharged without cause. Plaintiff further alleges that for the greater portion of the unexpired period of the contract he was unable to secure employment elsewhere, and that by reason of the discharge he sustained damages to the extent of the unpaid wages or salary for the remainder of the period. Plaintiff sued to recover the sum of $1,240.00, and on the trial of the case the jury rendered a verdict in favor of the plaintiff for the sum of $749.00. The evidence shows that plaintiff was unable to secure employment for the whole of the remaining period of the alleged contract, but that he did secure employment for a portion of the time, and it is manifest that the jury only allowed for the time during which the plaintiff was actually out of employment. The only question involved in this appeal is whether or not the evidence is sufficient to sustain the finding that there was a

contract of employment entered into between plaintiff and defendant to cover a period of one year. There is very little conflict in the testimony on the material points so far as the case is presented here. Defendant, in dealing with plaintiff, was represented by its manager, Mr. W. R. Day, and on a certain day in June, 1914, plaintiff talked with Mr. Day over the telephone from a lumber camp, with regard to employment as woods foreman. Plaintiff's version of the contract was that after a few preliminary remarks passing between them concerning the matter of the work to be done he asked Day "how much the job paid" and that Day replied "the job pays $1,800.00 a year." Day testified that during the telephone conversation described, plaintiff asked him what the job paid, and he replied as follows: "Well, we paid Mr. Goss $1,900.00 a year and I will pay you $1,800.00, at the rate of $150.00 per month, and Mr. Harrison said that is satisfactory." They agree that nothing else was ever said between them concerning the terms of the employment. It was agreed in the conversation referred to that plaintiff was to go to Malvern to see Mr. Day and look over the timber land to ascertain the character of the work and that he went up there to see Mr. Day about a week later and that they went out together to look over the ground, that nothing was said about the terms of the employment. Plaintiff went to work on the 8th of June, 1914, and after working until June 17, he received a note from Mr. Day in the following words:

"6-17-14.

Mr. Harrison:

You should have Mr. Lee to arrange div. of supt. and clerks salaries so as to include your salary at $150.00 per month. W. R. D."

There is no proof of custom or usage with reference to the period of employment for this character of service, and we are left entirely to the somewhat indefinite words of the contract to determine whether or not it constituted a contract for a period of service for a year

or whether it was merely an employment at will. The question is by no means free of doubt, and the authorities, though very numerous, are sharply conflicting. In a note to the case of *Warden* v. *Hinds*, 25 L. R. A. (N. S.) 529, the authorities on the subject are collated, and it is said that the conflict is such as to leave doubt as to which view is better supported. One line of cases holds that "a hiring at so much per year, month, or week is, in the absence of other circumstances controlling its duration, an indefinite hiring only, terminable at the will of either party"; whereas the other line of authorities holds to the view that where the matter of duration of a contract of employment is not specified in so many words, a hiring being at a specified rate per year, month or week imports a hiring for the full period named. The cases are carefully reviewed by the Supreme Court of Massachusetts in *Maynard* v. *Royal Worcester Corset Co.*, 200 Mass. 1, and the weight of authority is declared to be in favor of the rule that a hiring at so much a year, month or week is, in the absence of any other consideration impairing the force of the circumstances, sufficient to sustain a finding that the hiring was for that period. There are many English as well as American cases sustaining that view, among which the following are cited: *Emmens* v. *Elderton*, 4 H. L. Cas. 624; *Foxall* v. *International Land Credit Co.*, 16 L. T. (N. S.) 637; *Buckingham* v. *Surrey & Hants Canal Co.*, 46 L. T. (N. S.) 885; *Horn* v. *Western Land Association*, 22 Minn. 233; *Smith* v. *Theobald*, 86 Ky. 141; *Moss* v. *Decatur Land Improvement & Furnace Co.*, 93 Ala. 269; *Chamberlain* v. *Detroit Stove Works*, 103 Mich. 124; *Kellogg* v. *Citizens Ins. Co.*, 94 Wis. 554; *Norton* v. *Cowell*, 65 Md. 359; *Beach* v. *Mullin*, 34 N. J. L. 344; *Magarahan* v. *Wright*, 83 Ga. 773.

That is, we think the best view of the matter, for where a unit of time is described in mentioning the compensation without any other reference to time it is fairly inferable that the parties intended to contract for that period of time. Of course, the terms thus

specified are to some extent indefinite and may be controlled by the circumstances of any particular case, but in the absence of countervailing circumstances we think that a trial court or jury is warranted in construing the terms of the contract to be for a hiring for the unit of time specified in fixing the wages or salary. The language of the contract now before us is even stronger in that view than that used in some of the cases cited. In fact, we think that the testimony of Mr. Day, the defendant's manager, makes out a stronger case than does the statement of the plaintiff himself, for he states the terms at $1,800.00 a year, and follows with the specifications "at the rate of $150.00 a month," indicating that the period of hiring was to be for a year, but that the payments were to be made in monthly installments. It is earnestly insisted by counsel for defendants that two of the early decisions of this court place the court in line with authorities which hold to the view that a specification of the compensation for a certain period is not sufficient evidence of a contract to hire for that period. *Wright* v. *Morris*, 15 Ark. 444; *Haney* v. *Caldwell*, 35 Ark. 156. In the case first cited (*Wright* v. *Morris*) the contract was one for the hire of an overseer "to oversee for Wright that year at the rate of $500.00 per annum; that Trulove was to make a fair average crop, and if he failed to do this he was to forfeit his wages." This court said that the language used did not constitute a special contract for a definite time at a fixed price, but that it was a contract to oversee at the rate of $500.00; not for $500.00. Trulove was discharged before the crop was made and gathered, and the question was whether he was entitled to specified compensation of $500.00 for the year, or for the making of the crop, and this court held that there was no agreement as to the length of time Trulove was to serve, as the contract only fixed the rate instead of the period of time and that "it must necessarily have been intended that the engagement should continue until after the crop was made." That case, therefore, has no

application to the contract involved in the present case, nor is there any analogy between the facts of this case and those in *Haney* v. *Caldwell*, *supra*, where the contract of employment was evidenced by a letter in which Caldwell stated to Haney that "you are hereby employed to act as my engineer in connection with my contract for the completion of the Little Rock & Fort Smith Railroad, at a salary of $2,500.00 per annum." Haney served for more than a year. The court held that this was not a contract for a definite time at a fixed price. The reason for that ruling is plain, for there was a specification of employment as engineer "in connection with my contract for the completion of the Little Rock & Fort Smith Railroad," which shows that the employment was not for a year but merely at the rate per annum mentioned in the letter. We do not regard either of those cases as being against the views which we express in the present case. From this view of the matter the evidence was sufficient to sustain the finding, and, as that is the only grounds urged for the reversal, it follows that the judgment must be affirmed, and it is so ordered.

BLOODWORTH v. TIMES PUBLISHING COMPANY.

Opinion delivered March 26, 1917.

LIBEL AND SLANDER—SUFFICIENCY OF COMPLAINT.—Appellee published an article entitled "The Knocker's Prayer." Plaintiff brought an action for libel against appellee, setting out that the word "knocker" referred to him, and that the meaning and intent of the article was that it called plaintiff a liar, a coward and a thief. *Held*, a demurrer to the complaint should have been overruled.

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

C. T. Bloodworth, for appellant.

It was error to sustain the demurrer. The case in 85 Ark. 79 is not in point. See 30 S. W. 807; 25 Cyc. 578. The article was libelous *per se*.

No brief filed for appellee.

STATEMENT BY THE COURT.

C. T. Bloodworth instituted this suit against the Times Publishing Company. He alleged that the defendant is a corporation under the laws of Arkansas; that it is engaged in the business of printing and publishing a newspaper of general circulation in Corning and Clay county, Arkansas, and was so engaged about the 12th day of February, 1915; "that plaintiff is a citizen of Corning, Clay county, Arkansas; that on or about the 12th of February, 1915, the defendant wrongfully, unlawfully and wilfully and maliciously, with the intent to libel and injure this plaintiff in the good opinion of his fellow citizens and friends and expose him to public satire, contempt and ridicule, printed, published and circulated in Corning and in Clay county, about the plaintiff, the following article, towit:

"'The Knocker's Prayer. Lord, please don't let this town grow. I've been here for many years, and during that time I have fought every public improvement. I've knocked on everything and everybody. No firm or individual has established a business here without my doing all I could to put them out of business. I've lied about them, and would have stolen from them, if I had the courage. I am against building a new church, even though I gave nothing. I am against the electric light franchise being granted to George Booser, George Washington, or George Jim Tom. It pains me, oh Lord, to see that in spite of my knocking the town is growing. Then, too, more people might come here which would cause me to lose some of my pull. I ask, therefore, to keep this town at a standstill, that I may continue to be one of the chiefs. Amen.'

"Plaintiff further states that said article was published in the Clay County Times, a newspaper of general circulation in Corning and Clay county, Arkansas, and owned, printed and published by said defendant; that the defendant, by the word 'Knocker,' meant this plaintiff and directly referred to this plaintiff in the

same issue of his paper as a 'Knocker,' and stated that this plaintiff 'had knocked on every enterprise that came along'; that wherever the word 'I' is used in said article, as above set out, they refer to this plaintiff; and that the general public and friends and acquaintances of this plaintiff so understood that said article referred to this plaintiff; that the meaning and intent of said article and the understanding conveyed to the public in general, was that it called the plaintiff a liar, a coward and a thief; and that said article is false and a libel on this plaintiff.

"Plaintiff further states that by reason of the said wilful, malicious and false publication and circulation among his friends and acquaintances, as aforesaid, he suffered great humiliation and mental anguish to his damage in the sum of five thousand dollars.

"Plaintiff further states that the said publication and circulation was wilful and wanton and done with malice and intent to injure this plaintiff, and therefore asks as punitive damages therefor the sum of five thousand dollars. Wherefore, he prays judgment against said defendant for the sum of ten thousand dollars and for all proper relief."

The defendant filed a general demurrer to the complaint, which the court sustained, and entered a judgment dismissing the complaint, from which this appeal comes.

WOOD, J. (after stating the facts). In the case of *Comes* v. *Cruce*, 85 Ark. 79, we held that a publication reflecting upon a class of people is not libelous if there is nothing in the article that by proper inducement and colloquium can be shown to be personal to one who sets up such publication in a suit against the publisher for the libel. In that case the article of which complaint was made referred to a certain killing as the result of "wine joints that are now in operation in the city of Morrilton"; and stated, that the wine sold was adulterated and calculated to inflame the passions of negroes and cause them to commit any crime. The plaintiff

in that case was engaged in the growing of grapes and making wine therefrom and legally selling the wine thus made to the citizens of Morrilton and vicinity. He brought suit for libel against the newspaper that published the article referring to "wine joints" and it was upon these facts that we held that the complaint did not state a cause of action, because there was nothing in the article by way of inducement or colloquium that applied personally to the plaintiff.

In the case at bar, however, the facts alleged in the complaint were entirely different. The article designated "The Knocker's Prayer," containing the libelous matter, refers to a class, and if the complaint had only alleged that the article was intended to and did refer to the plaintiff, then the case at bar would have been like the case of *Comes* v. *Cruce*, *supra*. But the complaint under review here goes further and alleges not only that the defendant, by the word "Knocker" meant to refer to the plaintiff, but it also alleges that the defendant "directly referred to this plaintiff in the same issue of his paper as a 'knocker' and stated that this plaintiff had knocked on every enterprise that came along; that wherever the word 'I' is used in said article, as above set out, they refer to this plaintiff; that the meaning and intent of said article was that it called the plaintiff a liar, a coward and a thief."

These latter allegations expressly put the plaintiff in the class designated as "knocker," and furnish the necessary colloquium, showing that the libelous words in the article were intended to and did apply to the plaintiff.

In *Comes* v. *Cruce*, *supra*, we said: "The publication, as a whole, affects only a class, and no malice or ill will of any kind could be legitimately construed to be indulged toward any individual of that class and directed toward him." But here the allegations of the complaint show that the plaintiff was referred to as a "knocker" and thus put in a class designated in the article as "knocker," which, if proved as alleged, con-

tains matter that if false constituted a libel on the plaintiff.

The complaint therefore stated a cause of action, and the demurrer should have been overruled. The judgment is therefore reversed and the cause is remanded with directions to overrule the demurrer.

THWEATT v. THE GRAND TEMPLE AND TABERNACLE OF THE INTERNATIONAL ORDER OF THE TWELVE KNIGHTS AND DAUGHTERS OF TABOR OF ARKANSAS.

Opinion delivered March 26, 1917.

JUDGMENTS—DEFAULT—SICKNESS OF COUNSEL.—Under Kirby's Digest, § 4431, seventh subdivision, a court may set aside a judgment taken by default against a defendant, where defendant's only attorney, at the time of the rendition of such judgment, is unable to be in attendance upon the court on account of sickness.

Appeal from Prairie Circuit Court, Northern District; *Thos. C. Trimble*, Judge; affirmed.

C. B. & Cooper Thweatt, for appellant.

1. The court erred in setting aside the judgment by default, after the lapse of the term. 33 Ark. 459; 53 *Id.* 318; Kirby's Digest, § 4431. No unavoidable casualty or misfortune was shown.

A party is bound by the negligence of his attorney and mere negligence of an attorney is not sufficient to justify the setting aside a judgment. 104 Ark. 45; 66 *Id.* 183; 97 *Id.* 117.

Emmet Vaughan and *Scipio A. Jones*, for appellee.

The action of the court in vacating the judgment and reinstating the cause to be tried upon its merits is supported by all the authorities in like cases, and by the proof. Acts 1915, Act 290, § 9; Kirby's Digest, § 6188; 59 Ark. 162; 32 *Id.* 717; 85 *Id.* 385; 73 *Id.* 286; 75 *Id.* 425.

WOOD, J. The appellee brought suit against the appellants, and alleged in its complaint that on September 9, 1915, appellants obtained a judgment by default against the appellee for $250.00; that when

summons was served on the appellee it notified its regular attorney, Scipio A. Jones, and instructed him to defend the suit, which it believed he was doing when the case was called for trial, and that it did not know of the rendition of the judgment by default until after the expiration of the term at which the same was rendered; that it had been informed and verily believed that its attorney was sick and unable to attend court when the case was called for trial, and that it had no knowledge of such fact at the time of the trial; that the complaint upon which judgment was rendered against it by default was for services said to have been rendered one F. J. Betton and appellee, and that it had a valid defense to said suit. The appellee prayed that the judgment be set aside and that it be permitted to file answer and try the case on its merits. A copy of the default judgment and of the complaint on which the same was rendered and defendant's answer thereto were attached and made a part of the complaint herein.

The appellants answered, denying the material allegations of the complaint.

Jones testified that he was an attorney and had been the regular attorney for the appellee for seven or eight years; that he was employed to represent it in all suits. He did not appear when the case against the appellee was set for trial because he was sick at the time. He called over the phone for other attorneys and failed to get them and finally, late at night, called the judge and asked him to continue the case and the judge said that he would do it. He did not learn that a judgment had been rendered against the appellee until execution was issued on the same, when he engaged counsel to bring the present suit. The case was docketed against Betton and others, and that was probably how the mistake occurred, as there was another suit against the appellee and it was continued.

On cross-examination he stated that he talked to the judge he thought the day before court adjourned. He was sick two or three days before he talked to the

judge. He had malaria; was up a little and able to talk over the telephone. There was not any great deal of preparation to make for the defense of the suit. He talked with some witnesses and Mr. Betton about it. All witness had to do was to go there and try it. No witnesses were subpoenaed and no answer was filed. The reason he did not mail his answer to the clerk, or have some one file the same by noon the first day of the term, was because he was sick at the time, and thought he was given until the third day to file the answer. Doctor Robinson attended him in his sickness. He called up the judge the day before default day.

The appellants introduced certified copies of the court orders, showing that the court met September 6 and adjourned September 14; also summons showing that service was had May 15, all in the year 1915, and that the judgment in question was rendered September 9.

One of the appellants testified that he did not ask for judgment until the 4th day of the term as a courtesy to any attorney living away that might be representing the defendant. On that day, his business at court being through, he asked for the judgment. The court stated that he had gotten a 'phone from Jones. Witness did not know what Jones it was; and the court said he would grant the judgment, but if the attorney appeared before court adjourned and filed an answer, the judgment would be set aside and the party given a trial. Witness is sure the judge said nothing about Jones being sick. As witness understood, Jones wanted the case set down for a day and the court was not willing to do that.

This suit was brought under section 4433 of Kirby's Digest, authorizing suits to be instituted by complaint for the purpose of vacating a judgment after the expiration of the term at which the judgment was rendered for certain causes, which are specified in section 4431 of the Digest, and one of the causes that are specified is

"*Seventh.* For unavoidable casualty or misfortune preventing the party from appearing or defending."

A court will be justified, under the authority of the above statute, in setting aside a judgment taken by default against a defendant where the only attorney of the defendant at the time of the rendition of such judgment is unable to be in attendance upon the court on account of sickness. Sickness that prevents an attorney from being in attendance upon the court is an unavoidable casualty. *Leaming* v. *McMillan*, 59 Ark. 162; *Capital Fire Ins. Co.* v. *Davis*, 85 Ark. 385.

Moreover, what was said by the court while considering the case and in explanation of its ruling in vacating the judgment shows that the court was misled and misled counsel for the appellee, and that the judgment by default was rendered through a misapprehension on the part of the court that Jones was not the attorney for the appellee in the case in which judgment was rendered against it by default. It appears that the court was of the impression that Jones, the attorney for the appellee, was not in the case, and the court understood one of the appellants to say at the time the case was called for a default judgment that Jones was not an attorney in the case. The court frankly stated, "I did not know he was referring to this case at the time I let him take judgment by default. It seems that this is the case and I reckon I am to blame and probably was misled."

It thus appears that the reason the court allowed the judgment taken by default was that the court was under the impression, obtained by answer to an inquiry addressed to one of the appellants, that Jones was not the attorney in the case in which judgment by default was asked, the court being of the impression that the case in which Jones was the attorney had been continued.

"An Act of the court shall prejudice no man, is a maxim founded," says Mr. Broom, "upon justice and good sense." Broom's Legal Maxims, p. 99. And while the facts may not bring the present case tech-

nically within this ancient maxim, the principle it announces should, by analogy at least, be and is applied here to sustain the judgment of the court, which is accordingly affirmed.

RAWLINGS v. BERRY.

Opinion delivered April 9, 1917.

1. WILLS—LOST DOCUMENT—PROOF.—A lost will must be established and proved by clear, positive and satisfactory testimony.
2. WILLS—LOST INSTRUMENT—CONTEST.—A will was offered for probate, and contested on the ground that a subsequent will had been executed. *Held*, where the court charged the jury to find for the contestants if the second will had been executed, but against them if it had not, it was not error to refuse to instruct upon the issue of the loss or distruction of the second instrument.

Appeal from Garland Chancery Court; *E. H. Wootton*, Special Chancellor; affirmed.

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

1. The only issues are: (1) Did Corley execute the will? And, if so, (2) Was he mentally capable of executing a will?

The testimony shows that he did execute the will, thereby revoking all former wills. This will was executed in the latter part of 1910, or early in 1911. He was mentally capable. The instructions should have been limited to these two issues.

2. The instructions given for contestant state the law of the case accurately and clearly, so far as they go. But the court should have gone further and given those refused. Kirby's Digest, § § 8014, 8023. No. 6 should have been given and the court erred in defining the quantum of proof necessary to establish a lost will. 93 Ark. 312; 189 S. W. 355; 67 Am. Dec. 62; 32 N. Y. Sup. 1112; 24 N. Y. Sup. 121; 2 Words & Phrases (1 ed.), 1388.

A. J. Murphy, for appellee.

1. The will relied on by contestant was never shown to have been in existence. Kirby's Digest, § 8065.

2. There is no error in the giving or refusal of instructions. The rule is that lost wills must be established by the clearest, most conclusive and satisfactory proof. 73 Ark. 20; 110 Am. St. 458, 463. The refusal of No. 6 was proper, as No. 5 was given. The judgment is right, and should be affirmed. There was no error in the admission of testimony.

SMITH, J. This case involves a contest over the will of J. D. Corley, which was executed on September 20, 1895. This will was duly admitted to probate, and Mrs. Rawlings prosecuted an appeal to the circuit court from that order. Upon the trial anew in the circuit court, evidence was offered tending to show that, in the latter part of 1910 or the early part of 1911, Corley executed another will, thereby revoking his former will, but that this subsequent will had been lost or destroyed. On behalf of the proponents of the 1895 will, it was denied that any subsequent will was ever executed, and there was testimony to the effect that Corley was not of sound mind and disposing memory at the time of the alleged execution of the last will. Appropriate instructions submitted to the jury the tests of testamentary capacity.

On behalf of the contestant, Mrs. Rawlings, it is insisted that prejudicial error was committed in defining the quantum of proof necessary to establish a lost will. In one of the instructions on this subject, the jury was told that the will must be established by "clear, positive and satisfactory testimony," and, in another instruction, that it must be by "clear, strong and positive testimony."

It is also strongly insisted that error was committed in the refusal to give, at contestant's request, an instruction numbered 6, which reads as follows:

"If Mr. Corley properly executed a will relied on by Mrs. Rawlings, and it revoked the will relied on by Mr. and Mrs. Berry, and afterward destroyed the will relied on by Mrs. Rawlings, then such destruction of the Rawlings will will not revive the will relied on by Mr.

and Mrs. Berry, no matter what the purposes of Mr. Corley may have been. In such case the Berry will can only be revived by re-execution of the Berry will."

We will discuss these assignments of error in their order.

(1) We think no error was committed in defining the quantum of proof necessary to establish and prove a lost will. In the case of *Nunn* v. *Lynch,* 73 Ark. 20, Chief Justice Hill, speaking for the court, quoted with approval from the case of *Rhodes* v. *Vinson,* 9 Gill. (Md.) 169, 52 Am. Dec. 685, the following statement of the law:

"The policy of the law has thrown around last wills and testaments as many, if not more, shields to protect them from frauds, impositions and undue influence than any mode of conveyance known to the law. Can there be a doubt that in cases like the present, where the object is to establish the contents of a paper which has been destroyed, as and for a last will, that policy does require the contents of such paper to be established by the clearest, the most conclusive and satisfactory proof? We think not." See, also, Underhill on the Law of Wills, vol. 1, sec. 275, and 14 Ency. of Ev., p. 465.

We are also of the opinion that no prejudicial error was committed in the refusal to give the instruction numbered 6, because the court gave an instruction numbered 5, which reads as follows: "If you believe from the evidence that J. D. Corley made a will, as contended by Mrs. Rawlings, but that, at the time he was for any reason, incompetent to make a will, or that he made it from intimidation or fear, you will find against said contestant. If you believe from the evidence that J. D. Corley made a will to Mrs. Rawlings, with an intelligent purpose and desire that she should have all of his property as against Mrs. Berry, his own niece, and other blood relatives, you will find for contestant, Mrs. Rawlings; otherwise, you will find for proponent, Mrs. Berry."

This instruction, in effect, tells the jury that, if the Rawlings, or second will, was executed, to find for con-

testant, and, under this instruction, it became immaterial to instruct the jury on the effect of its subsequent loss or destruction, as, under this instruction numbered 5, the jury was required only to find that Corley made this last will, before finding for contestant.

Other questions are discussed in the briefs, but they have become immaterial in view of our decision upon what we regard as the controlling questions in the case.

The judgment is, therefore, affirmed.

CAMPBELL v. STATE.

Opinion delivered April 9, 1917.

1. APPEAL AND ERROR—MOTION FOR CONTINUANCE—FAILURE TO SET OUT IN RECORD.—Where a motion for a continuance does not appear in the record it will be presumed that the trial court properly overruled the same.
2. LIQUOR—SALE—SUFFICIENT EVIDENCE.—The evidence held sufficient to warrant a verdict of guilty of the illegal sale of liquor.

Appeal from Nevada Circuit Court; *Geo. R. Haynie,* Judge; affirmed.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

1. The testimony is conflicting, but the verdict of the jury is conclusive. 104 Ark. 192; 103 *Id.* 4; 101 *Id.* 51; 100 *Id.* 330.

There is no error in the record.

HART, J. Appellant prosecutes this appeal to reverse a judgment of conviction for selling intoxicating liquors.

(1) One of the grounds of his motion for a new trial is that the court erred in overruling his motion for a continuance. The motion does not appear in the record, and the presumption is that the action of the court was correct. *Kinslow* v. *State,* 85 Ark. 514.

The only remaining ground in appellant's motion for a new trial is that the evidence is not sufficient to support the verdict.

(2) A witness testified that he twice bought a pint of whiskey from appellant on the Saturday night before the third Sunday in June, 1916, at his residence in Nevada County, Arkansas, and each time paid him seventy-five cents therefor. Another witness testified that he was with the defendant when he bought one of the pints of whiskey. The constable of the township and another person testified that they were in hiding near by and saw the witness purchase the whiskey from appellant, as testified to by him. The appellant testified in his own behalf, and denied that he sold the witness any whiskey, and stated that the witness came to his house to get some matches, and to ask him to go to a dance with him.

The testimony of the witnesses for the State was sufficient to warrant the verdict, and the judgment will be affirmed.

WHITE RIVER LAND & TIMBER COMPANY v. HAWKINS.

Opinion delivered April 2, 1917.

1. UNLAWFUL DETAINER—RELATION BETWEEN PARTIES.—The relation of landlord and tenant must subsist between the plaintiff and defendant in order to support the action of unlawful detainer, the mere right of possession being insufficient to support the action.
2. UNLAWFUL DETAINER—DAMAGES.—In an action for unlawful detainer, in the absence of a statutory provision expressly authorizing it, damages cannot be recovered by either party.
3. UNLAWFUL DETAINER—DAMAGES.—Under the statutes, defendant, in an action for unlawful detainer, where his occupancy is without right, can not recover damages from the true owner. It is only where defendant disputes the right of possession that he can introduce before the jury evidence showing that he has sustained damages by being dispossessed.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson*, Judge; reversed in part; affirmed in part.

J. F. Summers, for appellant.

1. It was error to instruct a verdict for appellee, and to find the value of the rents. The right to the land is conceded, and no rents were recoverable. Kirby's Di-

gest, § 3646. Plaintiff was the owner of the land, and defendant was not entitled to recover rents. The judgment should be reversed. The court erred in its instructions to the jury and in its rulings as to the questions and answers of witnesses.

E. M. CarlLee and *F. E. Wilson,* for appellee.

1. In an action of unlawful detainer, it is necessary to establish the relationship of landlord and tenant. 105 Ark. 635; 104 *Id.* 322; 44 *Id.* 444; 33 *Id.* 682; 31 *Id.* 296; 18 *Id.* 284.

2. The instructions as to the measure of damages embody the law.

McCULLOCH, C. J. This is an action under the statute for unlawful detainer of land. Possession was delivered under the writ to the plaintiff at the commencement of the action. The facts are undisputed, so far as they relate to plaintiff's right to recover possession of the land, and the court gave a peremptory instruction in favor of the defendant on that issue, but submitted to the jury the question as to the rental value of the land during the pendency of the action. The jury returned a verdict in favor of the defendant, and assessed damages in the sum of $120, and judgment was rendered on the verdict in defendant's favor, from which plaintiff has prosecuted this appeal.

(1) Defendant Hawkins was originally the owner of the land and executed a deed of trust to one Stacy, as trustee, to secure a debt due to T. D. Wilkes. The deed was foreclosed under the power therein contained, and Wilkes purchased the land at the sale and conveyed it to the plaintiff. It is alleged in the complaint that the defendant occupied the land as tenant of plaintiff, and had refused to deliver possession thereof. Plaintiff attempted to prove at the trial that defendant attorned to it as landlord after the purchase from Wilkes, but the effort to make such proof was a failure, and the court gave the peremptory instruction to the jury on the theory

that there was no proof that the relation of landlord and tenant subsisted between the plaintiff and defendant. The instruction was correct, for it is well settled that the relation of landlord and tenant must subsist between the plaintiff and defendant in order to support the action of unlawful detainer, the mere right of possession being insufficient to support the action. *Dortch* v. *Robinson,* 31 Ark. 298; *Necklace* v. *West,* 33 Ark. 682.

(2) There is, however, no dispute about the plaintiff's right of possession, and the question arises whether, under those circumstances, defendant is entitled to judgment over, for the amount of the rents of the premises accruing during the pendency of the action. The form of the action is purely statutory, and the right to recover damages, either by the plaintiff or defendant depends upon the language of the statute which creates the remedy. In the absence of a statutory provision expressly authorizing it, damages can not be recovered by either party. 19 Cyc., p. 1169.

The statute provides that in actions of forcible entry and unlawful detainer "where the defendant disputes the plaintiff's right of possession, it shall be lawful for such defendant to introduce before the jury trying the main issue in such action evidence showing the damage he may have sustained in being dispossessed of the lands and premises mentioned in the writ and declaration in the cause, and the jury, if they find the issue for the defendant, shall at the same time find what damage the defendant has sustained by being dispossessed under the provisons of this act." Kirby's Digest, section 3646.

(3) According to the undisputed evidence in this cause the defendant was not entitled to the possession of the land in controversy, and the failure of the defendant to recover possession was due entirely to the form of action in which he sought relief. Plaintiff was the owner of the land under his purchase from Wilkes, who held title by purchase under the mortgage executed by the defendant. Under those circum-

stances, the defendant's occupancy being without right, he is not entitled to recover damages from the true owner. The statute does not authorize it, for it is only where the defendant disputes the right of possession that he can introduce before the jury evidence showing damages he has sustained by reason of being dispossessed. The judgment in defendant's favor should, therefore, have only been for the restitution of possession of the property and for recovery of the cost of the action. To that extent only will the judgment be affirmed, and the judgment for recovery of damages will be reversed. It is so ordered.

WHITE RIVER LAND & TIMBER COMPANY v. BROOKS.

Opinion delivered April 2, 1917.

1. LABORERS' LIENS—FELLING TIMBER AND FILING SAWS.—Plaintiff was employed to cut timber and also to file saws during certain hours; *held*, filing the saws being an incident to the main employment, that it was within the statute giving liens to laborers on the production of their labor.
2. LABORERS' LIENS—EXTENT OF OWNER'S LIABILITY.—The owner of the property is responsible for all the labor debts entering into the manufacture of the article or property, for an amount equal to the contract price, provided that he had notice or knowledge that the laborers were engaged in work on said property.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson*, Judge; affirmed.

J. F. Summers, for appellant.

1. The court erred in giving the peremptory instruction and in refusing to give No. 2, asked by defendant. Had No. 2 been given, the jury would have considered the value of the work in cutting logs and would not have considered the matter of filing saws, a class of labor which gave appellee no lien. 54 Ark. 524.

2. It was also error to refuse No. 3, asked by defendant. 71 Ark. 397; 75 *Id.* 104.

Harry M. Woods, for appellee.

1. Instruction No. 2 was properly refused. Under the facts of this case, Brooks had a lien for cutting the timber and filing the saws used. Kirby & Castle's Digest, § 5924; 71 Ark. 338. In 54 Ark. 524, the filing of saws was not connected with the work of *production,* and was not within the statute. See 25 Cyc., pp. 1582 to 1585.

2. Instruction No. 3 was properly refused. It is not the law of this case. 71 Ark. 338. The work was done under contract with Noble, the contractor of appellant, and shows knowledge and consent of the company. 75 Ark. 104; 25 Cyc. 1585, citing cases from this court.

3. There was no conflict of testimony necessitating submission to a jury.

HUMPHREYS, J. Appellee instituted suit in a magistrate's court by specific attachment to enforce a laborer's lien on logs, cut by him and other laborers, under the 3d subdivision of chapter 101, of Kirby's Digest of the Statutes of Arkansas. He secured judgment for $97.87, from which appellant prosecuted an appeal to the circuit court for the Northern District of Woodruff County. In the circuit court, a judgment was rendered in favor of appellee for $64.50. An appeal from that judgment has been lodged in this court.

The facts are that appellant was the owner of certain timber, and made a contract with W. K. Noble to manufacture the standing timber into logs. W. K. Noble employed appellee to assist in the manufacture thereof at $3 per day and board. Before beginning work in the morning, at noon and after quitting in the evening, appellee filed saws used in cutting the timber. Appellant knew that he was working in the timber. W. K. Noble collected what was due under the contract, and left without paying the laborers. Appellant paid all the laborers except appellee. The laborers were paid different amounts—some $2, and some $2.50 per day without board, and appellee $3 per day with board; his wage being larger on account of filing the saws. Fifty-eight

dollars and fifty cents was due him for nineteen and one-half days' labor under the contract. He also cut some timber by the thousand, and a balance of $6 was due him under that contract. The trial court gave a peremptory instruction, excluding from his original claim the amount of $31.35, covering the time of hauling timber, but instructed the jury to return a verdict for $64.50.

(1) Appellant contends that the court erred in giving the peremptory instruction and refusing to give instruction No. 2, asked by defendant, which is as follows: "The court instructs the jury that if you find for the plaintiff, you will find an amount equal to the value of the work done, and in arriving at the amount, you will consider the value of the labor actually performed in cutting the logs." It is contended that instruction No. 2 is correct, because it excludes from the consideration of the jury the services for filing saws. It is insisted that that portion of the services can not be considered as services coming within the meaning of the statutes giving laborers' liens on the production of their labor. The undisputed evidence is that appellee was to receive $3 per day for cutting the timber and filing saws. The main employment was cutting timber, and incident thereto, before and after working hours and during the noon hour, appellee filed saws that were used in felling the standing timber and sawing same into logs. Filing the saws being an incident to the main employment, we are of opinion that it entered into and became a part of the production of the logs, and is clearly within the statute giving liens to laborers on the production of their labor.

Appellant has cited the case of *Van Etten* v. *Cook,* 54 Ark. 522, in support of its contention that filing saws is no part of the labor in producing the logs. In that case, the main employment of J. G. Bony was to file the saws at the mill where shingles were produced. He was superintendent of the work. What little work he did in the production of the shingles was incidental to his main employment as superintendent and saw filer. The view

expressed in the instant case in no way conflicts with the construction given the statute in *Van Etten* v. *Cook, supra.*

(2) Appellant contends that the court erred in refusing to give instruction No. 3, asked by defendant, which is as follows: "The court instructs the jury that if you find from the testimony that at the time of the institution of this suit, the defendant was not indebted to W. K. Noble, your verdict will be for the defendant."

It was said by Mr. Justice RIDDICK, in the case of *Klondike Lumber Co.* v. *Williams,* 71 Ark. 334, in referring to work done by a laborer, "If it is done under a contractor who has a contract with the owner for the performance of the work, that sufficiently shows the consent of the owner, though in such a case a lien could not exceed the amount agreed to be paid by the owner to the contractor for the performance of the work." In the instant case, we are left entirely in the dark as to what the contract price was between appellant and the contractor, W. K. Noble. Neither are we enlightened as to whether the amount paid the other laborers, together with the amount claimed by appellee, exceeded the contract price. Our construction of the statute is that the owner of the property is responsible for all the labor debts entering into the manufacture of the article or property for an amount equal to the contract price, provided he had notice or knowledge that the laborers were engaged in work on said property. Under this view of the law, it is immaterial whether appellant had paid the entire amount to W. K. Noble, the contractor, and therefore the court would have committed error by giving instruction No. 3, requested by appellant.

The judgment is affirmed.

URQUHART *v.* THE MARION HOTEL COMPANY.

Opinion delivered April 2, 1917.

INCOME TAX—INTEREST ON CORPORATE BONDS.—Bonds issued by a corporation on June 1, 1906, provided: "The M. Co., for value received,

hereby promises to pay the bearer hereof, at the office of....., without deduction from either such principal or interest, for any tax or taxes, which the M. Co. may be required to pay or retain therefrom, under any present or future law, the M. Co. agreeing to pay such tax or taxes." Appellant owned bonds and her income exceeded the statutory exemption. *Held*, the amount of income tax levied on the interest on these bonds was required to be paid by appellant, and not by the M. Co.

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

George A. McConnell, for appellant.

1. The tax clause in the bonds obligated the appellee to pay the interest coupons without deduction. Federal Income Tax Law, Fed. Stat. Annotated, Supplement, 1914, p. 185, ch. 16; 38 Stat. at Large, p. 114, sub-sec. E; Foster's Income Tax (2 ed.), 1915, p. 27, 415, 417; *Ib.* 1458. The hotel company should pay the tax.

Morris M. and *Louis M. Cohn*, for appellee.

1. Appellee was not liable for the income tax. Acts Congress, Oct. 3, 1913; U. S. Comp. Stat., vol. 3, § § 6319, 6323, § 2; 3 *Id.*, § 6325; 17 Wall. 322, 326-7; Black, Income Tax, § 360; 6 Wall. 15; 17 *Id.* 322; 137 U. S. 355, 363; Kirby's Digest, § § 6922-3; Cooley on Taxation (1 ed.), p. 403; 17 Wall. 322, 326-7; 137 U. S. 363.

The income tax law imposed a tax on appellant a personal obligation. 137 U. S. 363. The hotel company never agreed to pay this tax, and properly deducted it.

SMITH, J. Appellant is the owner of certain bonds issued by the Marion Hotel Company on June 1, 1906, which contain the following clause:

"The Marion Hotel Company, for value received, hereby promises to pay to the bearer hereof, at the office of the Bank of Commerce, Little Rock, Ark., without deduction from either such principal or interest, for any tax or taxes, which the Marion Hotel Company may be required to pay or retain therefrom, under any present or future law, the Marion Hotel Company agreeing to pay such tax or taxes."

The interest on these bonds was made payable at the Bank of Commerce, in the city of Little Rock, where appellant applied for the payment of matured coupons owned by her. Pursuant to the requirement of the Federal Income Tax Law, she filed her certificate, in which she declared that "I do not now claim exemption from having the normal tax of 1 per cent. withheld from said income by the debtor at the source," but, notwithstanding this certificate, she demanded payment of the full amount of interest due, without deduction of the one per cent., the demand therefor being based upon the theory that the corporation, and not herself, was liable for the tax. It is argued that the very terms of the bond itself required the company to pay any tax, or taxes, which it (the company) might be required to retain. We are of the opinion, however, that the provision of the Income Tax Law requiring the withholding of the tax at its source is a mere provision intended only to facilitate the more convenient and certain collection of the tax upon income. That the tax in question is not levied upon the bonds, nor primarily upon the interest accumulating thereon. The thing taxed is the income of the holder of the bond, and it may, or may not, be true that the income from a particular bond will be subject to the tax. The condition governing the taxability of the accumulated interest represented by any particular coupon, depends, not upon the recitals in the bond contract, but upon the amount of income of the particular holder. And the provision of the law, for the collection of this tax at its source, rather than from the income taxpayer after the receipt of his dividend, will not change the contractual rights of the parties.

We are cited to no case where the exact question here involved has been decided; but the view we have expressed comports with the construction of such contracts expressed in Black on Income Taxes (2 ed., 1915), section 360. That learned writer there says:

"Sec. 360. Bonds of many corporations are issued under a contract by which they are made 'tax free,' that is, a contract by which the obligor undertakes to pay all taxes which may be assessed on the bonds. But apparently such a covenant does not bind the obligor to pay the income tax on the interest, unless it includes the income tax by name. Under a similar statute enacted by Congress at an earlier day, it was held that a provision in a corporation mortgage requiring the company to pay the debt and interest 'without any deduction, defalcation, or abatement to be made of anything for or in respect of any taxes, charges, or assessments whatsoever,' relates to taxes on the property mortgaged or on the mortgage debt, and does not refer to the periodical interest payments regarded as income of the bondholder, and hence does not require the company to pay the interest clear of the income tax (levied in 1864), which tax companies were 'authorized to deduct and withhold from all payments on account of any interest or coupons due and payable.' On the contrary, it was held, the company complies with its contract when it pays the interest less the tax, and retains the tax for the Government." In support of this text he cites: *Haight* v. *Railroad Co.*, 6 Wall. 15, 18 L. Ed. 818; *Baltimore* v. *Baltimore Railroad*, 10 Wall. 543, 19 L. Ed. 1043.

It was there further said: "The position of the treasury department on this question is one of indifference as between the bondholder and the corporation. It will exact payment of the income tax on corporate interest, in the usual manner, without regard to the existence of such a contract or covenant, leaving the question of ultimate responsibility to be settled by the parties themselves. The regulation declares that 'the stipulation in bonds whereby the tax which may be assessed against them or the income therefrom is guaranteed, is a contract wholly between the corporation and the bondholder, and in so far as the income tax law applies, the Government will not differentiate between coupons from bonds

of this character and those from bonds carrying no such guaranty. The debtor corporation, or its duly authorized withholding agent, will be held responsible for the normal tax due on the coupons on which no tax has been withheld in cases wherein no exemption is claimed.' "

We conclude that the tax in question is the personal obligation of Mrs. Urquhart, arising out of her possession of an income in excess of her exemptions, and that the provision of the law for the collection of this tax (thereby discharging this obligation) at its source, makes it none the less her obligation, and that the purpose and legal effect of the language quoted from the bond, was only to impose upon the hotel company the duty of paying all taxes, of any character, imposed upon the property mortgaged to secure the payment of the bonds, and to pay the taxes upon the bonds and coupons as such.

It follows, therefore, that the judgment of the court below, refusing to render judgment against the hotel company, for the amount of the tax so withheld, was a proper one, and it is affirmed.

McCULLOCH, C. J., and HART, J., dissent.

HUDDLESTON v. CRAIGHEAD COUNTY.

Opinion delivered April 2, 1917.

1. CRIMINAL LAW—CONVICTION OF FELONY—FEE OF PROSECUTING ATTORNEY.—One F. was charged with the illegal sale of liquor and plead guilty; the plea was entered of record and the cause continued for the term. The court thereupon adjudged F. guilty as charged, and ordered that the State recover from him all costs, and finding that F. had no money or property, ordered the clerk to certify the costs to the county for payment. *Held,* under this state of the record that the prosecuting attorney was not entitled to a fee for securing a conviction.
2. PROSECUTING ATTORNEYS—FEES IN FELONY CASES.—The fee allowed the prosecuting attorney is the compensation fixed by law to compensate the full and final discharge of the duty of the prosecuting attorney, to prosecute a felony charge, where the performance of that duty has resulted in the conviction of the person so charged.

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

Davis & Costen, Amici Curiae, on behalf of appellant.

An unconditional plea of guilty is a conviction within the meaning of Kirby's Digest, § 3488. The prosecuting attorney is entitled to his fee when a conviction is secured. The conviction is accomplished before the judgment assessing the penalty is entered and the fee is part of the costs. The court may render judgment for costs and continue the case or suspend sentence, assessing the penalty later. Black's Law Dictionary, 274; 9 Cyc. 865-6; 2 Words & Phrases, 1585; 109 Mass. 323; 12 Am. St. 699; 47 Ark. 444; 58 *Id.* 159, 167; 54 *Id.* 120; 85 Ark. 382; 19 *Id.* 220; 70 *Id.* 65; 94 *Id.* 198; 96 *Id.* 203; 58 *Id.* 167; 47 *Id.* 442; 61 *Id.* 17; 111 *Id.* 465; 12 *Id.* 122; 27 Atl. 867; Kirby's Digest, § 2446.

Basil Baker and *Horace Sloan,* for appellant.

A conviction was had and the prosecuting attorney was entitled to his fee to be paid as costs by the county. Kirby's Digest, § 2446, 2471, 3488; 151 Pa. St. 200; 31 Am. St. 738; 86 Ark. 317; 106 *Id.* 29; 63 Wisc. 304; 27 Atl. 867; 179 Mass. 108; 8 Pac. 879; 3 Cald. (Tenn.) 98, 100; 29 Ark. 246; 47 *Id.* 442; 57 *Id.* 209; 44 *Id.* 31; 41 *Id.* 486; 107 *Id.* 115; 73 *Id.* 600.

Lamb, Turney & Sloan, for appellee.

1. No judgment against defendant for costs. 107 Ark. 421; 23 Cyc. 901.

2. The costs could not be collected prior to the rendition of a judgment or sentence of defendant. 102 Ark. 43; Kirby's Digest, § § 2469, 2471, 2446; 41 Ark. 486; 107 *Id.* 117.

3. The entry of a plea of guilty is not a conviction. 86 Ark. 317; 106 *Id.* 29; 36 Penn. St. 349; 53 Ill. 311; 15 East. 570; 35 So. 397; 46 Fla. 109; 106 N. W. 107; 73 Atl. 427; 24 L. R. A. (N. S.) 431; 88 Pac. 301. No final judgment was entered—the case was continued.

SMITH, J. This appeal involves the right of a prosecuting attorney to the fee allowed by law for a felony conviction in a case in which the following order was entered:

State of Arkansas, Plaintiff,

v. No.....

Jim Float, Alias Heavy, Defendant.

Plea of guilty selling liquor. Cause continued.

Now, on this day, this cause coming on to be heard, came the State of Arkansas by M. P. Huddleston, prosecuting attorney, and comes the defendant, per person, and by his attorney, J. H. Hawthorne, and the defendant, after being advised of the nature of the charge and its penalty, elects in open court to enter a plea of guilty to the charge of selling liquor since January 1, 1916, which plea of guilty is by the court hereby accepted and entered of record, and this cause is by the court, on its own motion, continued for the term.

It is therefore by the court considered, ordered and adjudged that the defendant be, and he is hereby, adjudged guilty of the crime of selling liquor since January 1, 1916, and that the State of Arkansas do have and recover of and from the defendant, Jim Float, alias Heavy, all costs herein expended, and the court further finds that the defendant, Jim Float, alias Heavy, has no money or property out of which said costs can be collected, and that Craighead County is therefore liable for said costs, and the clerk of this court is hereby ordered and directed to properly certify said costs to the county court of Craighead County for payment.

The county court refused to allow the fee, and the circuit court, upon appeal, made a similar order, and this appeal has been prosecuted to reverse that judgment.

The question to be decided is, whether the plea, upon which the judgment set out above was entered, constitutes a conviction within the meaning of section 3488 of Kirby's Digest. And we answer the question in the negative.

The fee allowed is the compensation fixed by law to compensate the full and final discharge of the duty of the prosecuting attorney to prosecute a felony charge, where the performance of that duty has resulted in the conviction of the person so charged.

We concur in the view of the trial judge, in the opinion rendered by him in the court below, that the above section, allowing this fee, should be read in connection with sections 2446 and 2471 of Kirby's Digest. Section 2446 reads as follows:

"Section 2446. In judgments against the defendant, a judgment for costs, in addition to the other punishments, shall be rendered, which shall be taxed by the clerk for the benefit of the officers rendering the services, and, in case of failure by the defendant to pay said costs, they shall be paid by the county where the conviction is had."

Section 2471 provides that the county shall not be liable for costs, when the defendant is convicted, until execution shall have been issued against the property of such *convict,* and returned unsatisfied for the want of property to satisfy the same, unless the court in which the trial was had shall certify that, in the opinion of the court, the costs can not be made out of the property of the defendant. Notwithstanding his *conviction,* by the verdict of a jury, or a plea of guilty, the accused does not become a *convict* until there has been a judgment and sentence by the court. *Owen* v. *State,* 86 Ark. 317; *Michigan-Arkansas Lbr. Co.* v. *Bullington,* 106 Ark. 29.

In the case of *Barwick* v. *State,* 107 Ark. 115, there was a plea of guilty and a continuance of the case under the direction that the fine be imposed at the pleasure of the court, but that the costs should be immediately paid by the defendant. It was there said:

"It may well be doubted whether the costs should be collected until final judgment was rendered against appellant."

It was not necessary to decide in that case whether it could be done or not. However, we are now called upon

to confirm the doubt there expressed; and we do now so hold. The judgment rendered is not a final one. Evidently it was in the contemplation of the court that some further order might be entered. The defendant might be brought in under this plea at some subsequent term, and the punishment then imposed which the plea authorized. On the other hand, such plea might be withdrawn at the discretion of the court at a subsequent day, and a trial thereafter had. Upon such trial, the officer then prosecuting would also demand a fee if a conviction was secured; and, if there was an acquittal, we would have the situation of a fee paid by the county where the accused had been acquitted.

A fee is essentially a creature of the statute, and can not be charged except where express power for its allowance is found; and we think the statute does not allow compensation for securing a provisional order like the one set out above; and the judgment of the court below is, therefore, affirmed.

THE ARKANSAS-DENNING COAL COMPANY *v.* YOCUM.

Opinion delivered April 2, 1917.

APPEAL AND ERROR—EXCEPTIONS TO GIVING INSTRUCTIONS.—Exceptions to the action of the trial court in giving or refusing instructions must be made during the trial and brought into the record by bill of exceptions, and can not be reserved by merely assigning them as grounds of a motion for a new trial.

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

J. H. Evans, for appellants.

It was error to refuse to give the instructions in writing when requested to do so. Art. 7, § 23, of the Constitution is mandatory, not directory merely. 47 Ark. 407; 34 *Id.* 257; 95 Ind. 170; 51 Ark. 177; 13 *Id.* 705; 72 *Id.* 398; 125 Ark. 248.

Partain & Crocker, for appellees.

No prejudice resulted from the failure to reduce the instructions to writing. 47 Ark. 407; 188 S. W. 407; 51 Ark. 181.

No exceptions were saved.

STATEMENT BY THE COURT.

Various plaintiffs below, appellees here, brought separate suits before a justice of the peace against the defendants on account for labor. Nonsuits were taken in the circuit court in all except six of the cases, and these were consolidated and tried by a jury. After the testimony was adduced tending to support the contentions of the respective parties, the record recites: "The defendants, prior to the giving of the instructions by the court to the jury, asked the court to give the instructions with reference to the body of the case in writing. The court failed to grant said request of defendants and instructed the jury orally over the request of the defendant to instruct in writing. The court required the court stenographer to take down the instructions of the court to the jury which were delivered orally to the jury. The court stenographer took down in shorthand the instructions of the court, but they were not transcribed in longhand by the stenographer and read to the jury by the court. The only instructions given by the court in the case to the jury were oral. The defendant requested certain instructions of the court in writing which were by the court refused."

There was a verdict and also a judgment for the appellees. The second ground of the motion for a new trial is that "the court erred in refusing requests of defendants, through their counsel, J. H. Evans, to reduce his instructions in the case to writing, and erred in giving the instructions orally after being requested by J. H. Evans, counsel for defendants, to instruct in writing." The court overruled the motion.

WOOD, J., (after stating the facts). The appellants contend that the case should be reversed because of the

refusal of the trial judge to give the instructions in writing after being requested to do so by the defendants. The record does not show that any objections were made and exceptions saved to the ruling of the court in refusing the request of appellants to reduce the instructions to writing and in instructing the jury orally.

"Exceptions to the action of the trial court in giving or refusing instructions must be made during the trial and brought into the record by bill of exceptions, and can not be reserved by merely assigning them as grounds of a motion for a new trial." *Cammack* v. *Southwestern Fire Ins. Co.*, 88 Ark. 505; *Plumlee* v. *St. L. S. W. Ry. Co.*, 85 Ark. 488.

The judgment is correct, and it is therefore affirmed.

MARTIN *v.* VAUGHT.

Opinion delivered April 2, 1917.

APPEAL AND ERROR—INSTRUCTION ON PREPONDERANCE OF THE TESTIMONY.—In an action to recover the possession of personal property it is error for the court to refuse to give at defendant's request, an instruction that the preponderance of the evidence is not necessarily determined alone by the number of witnesses testifying, but that in determining the preponderance, the jury should consider the opportunities or occasions of the witnesses for seeing or remembering what they testify to or about, the probability or improbability of its truth, the relation or connection, if any, between the witnesses and the parties, their interest in the result of the case, and their conduct and demeanor while testifying.

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

The appellant *pro se.*

The court erred in refusing instructions 2 and 3, asked by defendant. Shinn on Replevin, § 447; 77 Ark. 299; 87 *Id.* 641; 93 *Id.* 272; 1 Greenl. on Ev., § 74; 1 Elliott on Ev., § 132; 25 Ark. 482.

It was error to refuse instruction No. 5. It was the law of the case, for two of plaintiff's witnesses were her

own sons. The suit was not brought within three years. Kirby's Digest, § 5064; 46 Ark. 489; 44 *Id.* 29.

J. I. Alley, for appellee.

There was no error in giving or refusing instructions. No exceptions were saved. Kirby's Digest, § § 6221-2; Kirby & Castle's Digest, § § 7660-1.

The objections were general. 87 Ark. 614; 75 *Id.* 181.

HART, J. Mrs. E. J. Vaught instituted this action against W. A. Martin, as constable, to recover the possession of two cows. There was a verdict and judgment for the plaintiff in the justice court where the suit was commenced, and the defendant appealed to the circuit court. In the circuit court there was again a verdict and judgment for the plaintiff and the defendant has appealed to this court. The material facts are as follows:

Mrs. E. J. Vaught owned a homestead in Montgomery County, Arkansas, upon which, among other personal property, there were the two cows involved in this suit. Her son, Garland Vaught, and Liza Vaught, his wife, resided on the place, and the cows in controversy were in their possession for several years. Garland Vaught died and at the time had an account for merchandise with W. C. Green. After his death Mrs. Liza Vaught assumed the account of her dead husband and continued to trade with Mr. Green. When the account became due she refused to pay it. Mr. Green sued her and obtained judgment against her for the amount of the account. An execution was issued on the judgment and placed in the hands of W. A. Martin, constable of the township in which she resided in Montgomery County. He levied the execution on the cows involved in this suit as the property of Mrs. Liza Vaught, and Mrs. E. J. Vaught instituted an action in replevin against the constable to regain possession of the cows.

According to the testimony of Mrs. E. J. Vaught, she owned the cows and had loaned them to her son Garland,

who resided on her place. She stated that he did not own the cows and never claimed to own them.

Another son also testified that she owned the cows and only permitted her son Garland to keep them for their milk, and that he did not claim the cows at all.

Evidence was adduced by the defendant tending to show that the cows had been in possession of Garland Vaught and his wife for more than five years and that he had mortgaged the cows every year and had always claimed to be the owner of them. Other circumstances were adduced in evidence tending to show that the cows belonged to Garland Vaught.

In rebuttal, Mrs. E. J. Vaught testified that she signed a mortgage with her son at one time. She denied knowing that he had ever mortgaged the cows any other year. It was shown by her son that she had paid taxes on the cows.

The defendant claimed that he was entitled to a verdict under section 3661 of Kirby's Digest, which provides in substance that a pretended loan of chattels for five years without demand shall be void unless such loan was in writing as required by the statute. The court properly submitted the theory of the defendant to the jury and there was sufficient evidence to sustain the verdict for the plaintiff. The defendant asked the court to give instruction No. 5 to the jury, which is as follows:

"No. 5. The court instructs the jury that the preponderance of the evidence is not necessarily determined alone by the number of witnesses testifying to any fact or facts, but in determining where the preponderance is, you may also take into consideration the opportunities or occasions of the witnesses for seeing or remembering what they testify to or about, the probability or improbability of its truth, the relation or connection, if any, between the witnesses and the parties, their interest in the result of the case, and their conduct and demeanor while testifying."

The court refused to give the instruction and error calling for a reversal of the judgment is predicated upon the ruling of the court. We think the assignment of error is well taken. An instruction in all respects similar to the refused instruction was approved by the court in *Newhouse Mill & Lumber Co.* v. *Keller,* 103 Ark. 538. In the present case the court did not give any instructions on this phase of the case. Two of the witnesses for the plaintiff were her sons, and they were material witnesses in her behalf and their testimony strongly tended to corroborate her testimony. Hence it was prejudicial error not to give any instruction on this question. The defendant having asked a correct instruction, it was prejudicial error to refuse to give it.

The defendant also asked for a reversal of the judgment because the court failed to give an instruction asked by him that the burden of proof was upon the plaintiff. The instruction asked for was correct, but if this was the only assignment of error relied upon for a reversal of the judgment, the court would not reverse it because the instructions of the court in effect cast upon the plaintiff the burden of proof in the whole case. It would have been better, however, for the court in plain terms to have told the jury that the burden of proof was upon the plaintiff and that it devolved upon her to establish her case by a preponderance of the evidence.

For error in refusing instruction No. 5, asked for by the defendant, the judgment will be reversed and the cause remanded for a new trial.

ROSE v. NICHOLSON.

Opinion delivered April 16, 1917.

1. RECEIVERS—AMOUNT OF FEES—DISCRETION OF CHANCELLOR.—*It is* a matter for the exercise of the chancellor's discretion as to what fees shall be allowed a receiver.
2. RECEIVERS—EXCESSIVE FEES.—A receiver was appointed to take charge of and sell certain mortgaged chattels; *Held,* under the evidence, that a fee of $500 allowed by the chancellor was excessive, and that a fee of $150 would be adequate.

Appeal from Mississippi Chancery Court, Chickasawba District; *C. D. Frierson,* Chancellor; modified and affirmed.

Lamb & Rhodes, for appellant.

The fee allowed the receiver was excessive. 94 Ark. 183; 101 Ill. App. 256. He was under salary and was interested.

The appellee *pro se.*

There is no question of law; only one of fact. Kirby's Digest, § 6352. The court fixed the fee after hearing all the testimony. It is not unreasonable.

McCULLOCH, C. J. Appellant, R. C. Rose, owned a plantation in Mississippi County, Arkansas, which he leased to one Johnson, and he also took mortgages from Johnson on the crop for the year 1914 and the farming equipments. A controversy arose between Rose and Johnson, and the former instituted suit to foreclose said mortgages and also instituted an action of unlawful detainer against Johnson to recover possession of the leased premises. On January 19, 1915, while those suits were pending Rose and Johnson entered into a written contract whereby appellee, Lexie Nicholson, should be appointed receiver to take charge of the ungathered crop and other mortgaged property of Johnson, and gather and gin the crop and ship it to W. A. Gage & Co, at Memphis, Tennessee, who held the mortgage notes by assignment from Rose. It was further stipulated in the contract that Rose should pay the expenses of the receivership, including the fees of the receiver. Nicholson accepted the appointment and gave bond in the amount fixed by the chancellor. The evidence shows that the bond of the receiver was made by Rose. The farming tools and other equipment were, it appears from the evidence, sold before Nicholson took charge as receiver.

Nicholson had been working for Rose for several years as bookkeeper, and on the day after his appointment as receiver he and Rose and one Catchings entered

into a contract of copartnership for the operation of the farm theretofore held by Johnson under his lease, and it was stipulated in the contract that Rose should receive rent on the land at the price per acre mentioned in the contract, and that Catchings and Nicholson should each receive a salary of $75 per month. The remainder of the crop was gathered and shipped by the receiver, which ended his duties, and he made his final report.

The present controversy arose over the allowance to Nicholson of his fee as receiver. The court fixed the fee at the sum of $500. It is contended by appellant that Nicholson was in his employ and it was understood that he was to receive no additional compensation for his services as receiver. Nicholson testified that Rose's attorneys told him at the time he was approached on the subject of accepting the appointment as receiver that Rose would pay his fee.

Nicholson was engaged only a short while in performing his duties as receiver, and what he did was in connection with his duties as a member of the partnership in which Rose was interested. We are of the opinion that when the relation of the parties, the amount of work done by the receiver and its relation to his other duties are all considered, the fee allowed by the chancellor is excessive. It is, of course, a matter in the fair discretion of the chancellor as to what fees should be allowed for services as receiver, but we think that the sum of $150 will be ample compensation for the services rendered. The decree will, therefore, be modified so as to reduce the allowance to that sum.

MANLEY CARRIAGE CO. v. FOWLER & HILL.

Opinion delivered April 16, 1917.

BILLS AND NOTES—PAYMENT TO PERSON OTHER THAN HOLDER.—Payment by the maker of a note to some one other than the *bona fide* holder thereof, does not discharge the same.

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

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

The note has never been paid. Appellant was an innocent purchaser for value and without notice.

D. D. Glover, for appellees.

The evidence shows payment.

McCULLOCH, C. J. This is an action instituted by the Manley Carriage Company against Fowler & Hill, a copartnership, to recover the amount of a negotiable note in the sum of $40, executed by defendants to the Embree Carriage Company, and by the latter transferred before maturity to the plaintiff. The trial of the cause before a jury resulted in a verdict in favor of the defendants, and the plaintiff has prosecuted an appeal to this court.

The plaintiff is a Missouri corporation engaged at the city of St. Louis, in the business of manufacturing and selling carriages and buggies, and the defendants reside at Malvern, Arkansas, where they are engaged in the livery business. In the spring of the year 1914 defendants purchased buggies and other articles from one J. G. Embree, who was also engaged in the buggy business in St. Louis under the style of the Embree Carriage Company, the aggregate price of the purchases being the sum of $160, and defendants executed therefor four negotiable notes, each in the sum of $40, dated April 1, 1914, and payable to the Embree Carriage Company on April 15, June 15, August 15 and October 15, 1914, respectively. Embree had an arrangement with the plaintiff to the effect that when he sold buggies or other articles manufactured by the plaintiff the latter would fill the order for him and re-

ceive from him the cash and notes obtained in settlement from the purchasers. The sale to defendants was handled in this manner, and on May 22, 1914, Embree delivered three of the notes to plaintiff properly endorsed and also paid over to them the sum of $37.35, which he had received from the defendants. Subsequently the defendants paid off two more of the notes, and this suit is on the note payable October 15, 1914; the last note of the series.

Defendants pleaded payment and undertook to prove that they paid off each of the four notes. The testimony adduced by the defendants tends to show that the four payments were made. They testify that Embree came to Malvern on or about April 15, and that they paid him the sum of $33 in discharge of the first note, after a deduction was made for freight charges; that they paid the amount of another note to Embree in the city of Malvern on May 15, 1914, this payment being made by check on a local bank; that they paid the third note on July 6, 1914, and paid the last note on April 22, 1915.

The testimony adduced by the plaintiff is that on May 22, 1914, Embree mailed to the plaintiff from Malvern $37.35, received from defendants, and the three notes due respectively June 15, August 15 and October 15, 1914. The two payments respectively of July 6, 1914, and April 22, 1915, were made to the plaintiff. The first of those notes was forwarded to a bank at Malvern and collected there. The second one was collected by Mr. Duffie, an attorney at Malvern, to whom the notes were sent for collection. Two notes were sent to Mr. Duffie and defendants paid one but refused to pay the other—the one now in suit.

The contention of fact between the parties arises over the alleged payment made by the defendants to Embree on April 15, 1914. The evidence was sufficient to warrant the jury in finding that that payment was made as contended by defendants, but it was a payment in discharge of the first note, which was never assigned to the plaintiff and was never surrendered to the defendants, ac-

cording to their testimony. No information was given to the plaintiff concerning that payment, if it was in fact made to Embree, as claimed by the defendants. They testify that they paid Embree $33, but there is no testimony tending to show that the amount was ever paid over to the plaintiff. The amount of the second payment, which was made on May 15, was sent in to the plaintiff as a cash payment when the three notes were assigned and delivered to the plaintiff. Defendants claim that that payment was made in satisfaction of the second note, but they did not demand the surrender of the note and Embree assigned it to the plaintiff before maturity together with the other two notes.

Plaintiff was an innocent purchaser of the notes, and the payment by the defendants without surrender of the notes was not effective as a satisfaction against an innocent holder. There is not the slightest thing in the record to impeach the good faith of the plaintiff in the transaction, or to show that it was not an innocent purchaser. It is undisputed that the plaintiff received the notes for value, and the burden was on the defendants to show that the plaintiff received notice of the alleged payment to Embree before they delivered the notes. Notwithstanding the fact that there is sufficient evidence to warrant a finding that payment was made to Embree in April, we are of the opinion that the verdict of the jury is not supported by the testimony as to the payment covering the last note, now sued on. There appears to have been some confusion about the numbering of the notes in the series, but it is undisputed that the note payable October 15, 1914, is the one now in suit, and is the only note held by the plaintiff, the other two having been surrendered when paid. The first note, which became due on April 15, 1914, does not appear in the record, it never having been assigned to the plaintiff and defendants did not produce it. They say that Embree did not surrender it to them.

It follows, therefore, that the defendants have failed to sustain their plea of payment, and that the verdict in

their favor was unsupported by the evidence. The judgment is, therefore, reversed, and the cause is remanded for a new trial.

STARNES v. STATE.

Opinion delivered April 16, 1917.

1. CONTINUANCES—ABSENT WITNESS—DISCRETION OF COURT.—Where defendant was indicted January 21, 1916, and tried January 16, 1917, it is proper for the trial court to refuse a continuance on the ground of the absence of a witness, when the witness was not subpoenaed until two days before the trial, and the motion recited that he was only absent for a period of a few days.
2. APPEAL AND ERROR—FAILURE TO OBJECT TO INSTRUCTION.—An objection to an instruction will not be considered on appeal, when not incorporated in the motion for a new trial.
3. CRIMINAL LAW—SUFFICIENCY OF THE EVIDENCE—REASONABLE DOUBT.—The State is not required to prove each circumstance tending to show guilt, beyond a reasonable doubt; the evidence is legally sufficient for that purpose if, upon a consideration of it as a whole, it is sufficient to convince, and does convince, the jury, beyond a reasonable doubt, of the guilt of the accused.
4. CRIMINAL LAW—TRIAL—IMPROPER ARGUMENT—The State's counsel improperly remarked in argument that defendant had not testified, but *held*, the trial court by its instructions removed any prejudice resulting from the remark.
5. LARCENY—SUFFICIENCY OF EVIDENCE.—The evidence held sufficient to warrant a conviction for the larceny of certain hogs.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley*, Judge; affirmed.

C. T. Bloodworth, for appellant.

1. A continuance should have been granted. 71 Ark. 180.

2. The court erred in its instructions. 122 Ark. 259.

3. The prosecuting attorney's remarks were prejudicial.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. A motion for continuance is addressed to the sound discretion of the court and there was no abuse. 61 Ark. 88; 71 *Id.* 62; 82 *Id.* 203; 101 *Id.* 405; 94 *Id.* 538. No diligence was shown. 94 Ark. 169, 538; 19 *Id.* 590; 71 *Id.* 62.

2. The objections to instructions are not set up in the motion for new trial. They are waived. 73 Ark. 455; 80 *Id.* 345; 75 *Id.* 534; 78 *Id.* 374; 103 *Id.* 307; 101 *Id.* 120; 95 *Id.* 363.

3. The instruction asked had already been given. 103 Ark. 352; 101 *Id.* 569; 92 *Id.* 481.

4. Any improper remarks by the prosecuting attorney were cured by the instructions of the court. 110 Ark. 538.

SMITH, J. This appeal is prosecuted to reverse a judgment sentencing appellant to the penitentiary for the period of one year, for the crime of grand larceny, alleged to have been committed by stealing certain hogs, the property of one Abe Brown; and we discuss the assignments of error in the order in which they are presented in appellant's brief.

(1) It is first said that error was committed in refusing to grant a continuance for the purpose of securing the attendance of one Frank Pickard, who, according to the recitals of the motion for a continuance, would have given material evidence in support of appellant's plea of not guilty. It appears, however, that appellant was indicted January 21, 1916, and that the case was not called for trial until January 16, 1917, and there is no intimation that appellant did not have practically all this time to prepare for his defense, and the subpoena for this witness was issued in this case only two days before the trial. A subpoena, however, had been issued in the case of Barley Starnes, who was also indicted for the larceny of the same hogs, but this subpoena was only placed in the hands of the sheriff of the county five or six days before the trial, and, from recitals in the motion for a continuance, it appears that appellant knew the witness had departed for

another county, but it was alleged that he was then only temporarily absent, and would return in about four days, as the affiant was informed and believed. We can not say, under these circumstances, that the court abused its discretion in holding that appellant had not made a sufficient showing of diligence to entitle him to a continuance. *Baldwin* v. *State,* 119 Ark. 518.

(2) Appellant complains of the action of the court in giving an instruction numbered 7. But he has failed to incorporate in his motion for a new trial an objection to this instruction; and we can not now consider this assignment of error. *Mabry* v. *State,* 80 Ark. 345; *Burris* v. *State,* 73 Ark. 453; *Ince* v. *State,* 77 Ark. 418.

It was shown at the trial that witnesses Tyler and Catt had helped appellant drive certain hogs, which Brown claimed to own, to appellant's house, it being the theory of the State that the appellant got the hogs to his house in this manner. Appellant requested the following instruction:

"If, after a full consideration of all the evidence, you have a reasonabe doubt that the hogs which the witnesses, Quinn Tyler and Oliver Catt, say they helped the defendant drive from the field of Abe Brown, were the property of Abe Brown, then you should find the defendant not guilty."

(3) The refusal to give this instruction is assigned as error. We think, however, that this was not prejudicial, because the State is not required to prove each circumstance tending to show guilt beyond a reasonable doubt. The evidence is legally sufficient for that purpose, if, upon a consideration of it as a whole, it is sufficient to convince, and does convince, the jury, beyond a reasonable doubt, of the guilt of the accused. *Lasater* v. *State,* 77 Ark. 468.

An instruction was given which very plainly told the jury to acquit the accused, if, upon a consideration of all the evidence in the case, a reasonable doubt was entertained as to his guilt, and no error, therefore, was com-

mitted in the refusal to give the instruction requested by appellant.

(4) Appellant did not testify at his trial, and, in the concluding argument, the prosecuting attorney said:

"The defendant has not denied a single allegation of the indictment."

Whereupon objection was immmediately made to this argument, and the court was requested to rebuke counsel in the presence of the jury for having made the remark quoted. This was not done, but the court gave an additional instruction to the following effect:

"No. 12. The statute of this State confers upon one accused of crime the right to testify in his own behalf, if he so desires; but if he does not see fit to take advantage of the right given to him, you are not to infer his guilt on account of that. You will determine the question of his guilt or innocence from all the facts and circumstances in proof before you. After having determined the facts, you will then apply the instructions applicable to the facts as you may find them, and render your verdict accordingly."

The court had previously given an instruction numbered 2, which reads as follows:

"No. 2. To this indictment the defendant pleads not guilty, and this plea puts in issue all the material allegations of the indictment. The indictment in itself raises no presumption of guilt against the defendant, but it is only an accusation for you to try. On the contrary, the defendant is presumed to be innocent until his guilt is established by the evidence, beyond a reasonable doubt, and the burden of so establishing such guilt is upon the State."

It is, of course, improper, and presumptively prejudicial, for the prosecuting attorney to call the attention of the jury to the failure of the accused to testify. But the instructions given before this remark was made, and the instructions set out above given immediately thereafter, were sufficient, in our opinion, to remove any prejudice

resulting from this remark. These instructions made it plain that the defendant was not required to deny his guilt, and that no inferences of guilt could be drawn from his failure to testify. *Ingram* v. *State,* 110 Ark. 538.

The appellant requested an instruction on this subject, which the court refused; but as it embodied substantially the idea set out in the instruction quoted, no error was committed in refusing that instruction, as the court is not required to multiply instructions upon the same issue, when the ones given fully and fairly declare the law applicable to the issue.

(5) It is finally insisted that the evidence is insufficient to sustain the verdict. But this can not be, if the testimony offered in behalf of the prosecution is accepted as true; and this we must, of course, do in testing the legal sufficiency of the evidence. Brown testified that he owned two litters of pigs, the smaller of which averaged about 100 to 125 pounds in weight. That the older ones were marked, but the younger ones were not. That, upon missing his hogs, he made inquiry for them, and went in search of them to the home of John Starnes, the father of appellant. That he found no hogs in Starnes' pen, but found that hogs had been kept in this pen, and traces of blood were found there. He found the hogs in his field coming from the direction of Starnes' place. All of the hogs were then marked, the mark of the older hogs having been altered to conform to the mark of the younger ones. Tyler testified that he helped drive two litters of hogs to appellant's house, and that appellant drove the hogs to John Starnes' house, and put them in a pen, and appellant marked them. Catt corroborated this statement, and gave a description of the hogs in respect to their size, number and color, which tended to identify them as the property of Brown. Other circumstances were testified to which tended to corroborate the testimony offered in behalf of the prosecution, and to contradict that offered by the defense, which need not be set out here. It suffices to say that the evidence is legally suffi-

cient to warrant the finding that appellant drove, and assisted in driving, the hogs in question to the home of his father, and there confined them in a pen, while he marked some of them and altered the marks of the remainder, and that this was done with the intention of depriving the true owner of his property. The judgment of the court below is, therefore, affirmed.

KARR v. BOWEN.

Opinion delivered April 16, 1917.

1. APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE—TEST.—In testing the sufficiency of evidence to support a verdict, the highest probative value will be given the evidence, of which it is susceptible, together with all inferences reasonably deducible therefrom.
2. NEGLIGENCE—SETTING BUILDING ON FIRE.—The evidence held sufficient to sustain a verdict in plaintiff's favor, where he brought an action against defendant for damages for the negligent setting on fire of plaintiff's house.
3. NEGLIGENCE—SETTING OUT FIRES—PROOF.—Proof of setting out fires may be made by the proof of circumstances from the existence of which the origin of the fire may be reasonably inferred.

Appeal from Mississippi Circuit Court, Osceola District; *J. N. Thomason,* Special Judge; affirmed.

The appellant *pro se.*

1. No negligence is shown, hence no liability. The liability of appellant for damages under the court's instructions can only lie after the jury has found that the house was destroyed by a spark from the smoke stack of the boat and that the emission of said spark from the boat was due to negligence on the part of appellant. The evidence does not justify the verdict.

S. L. Gladish, for appellee.

There is evidence that the sparks from the engine caused the fire; that due diligence was not used. The jury were properly instructed. There is no error. 81 Ark. 13; 64 *Id.* 307; Thompson on Negl. 742; 90 N. C. 374; 30 Mich. 181; 109 *Id.* 1; 41 La. Ann. 992.

SMITH, J. This appeal questions only the sufficiency of the evidence to support the verdict returned in appellees' favor to compensate the damages sustained as the result of the burning of a tenant house alleged to have been set on fire by the emission of sparks from a dredge-boat operated by appellant's employees. It is conceded that the instructions correctly declared the law, and they were as favorable to appellant as he could have asked. It is only contended that the jury disregarded these instructions in their application to the facts of the case. In testing the sufficiency of the evidence to support the verdict, we, of course, give it the highest probative value of which it is susceptible for that purpose, together with all inferences reasonably deducible therefrom.

It is said that the undisputed proof shows that appellant had been a builder of engines and was an experienced operator of dredge boats, and that he had used an engine of the kind in use on the dredge boat in question for twenty years without having ever set out a fire, and that the exhaust from the engine was so slight that the draft in the smokestack was insufficient to throw off sparks, and it had been found unnecessary prior to this fire to use a spark arrester, although it was shown, without objection, that one was placed over the top of the stack immediately after the fire. In support of the judgment, however, it was shown that the house was burned about noon, and that no one had been in the house since early in the morning and that there had been no fire in the house after the departure of the occupants. That the wind was blowing from the direction of the dredge boat towards the house, and that the fire was first discovered on the corner of the porch on the side next to the dredge boat. A witness testified that before the spark arrester was put in use, he had seen sparks flying from the stack, and the dredge boat was shown to have been only seventy-five feet from the house when the house burned.

While no witness testified that he saw any sparks flying from the smokestack which fell on the roof of the

house, we think the circumstances recited above warranted the inference that the fire had originated in this manner. And proof of setting out fires may be; and frequently is, made by the proof of circumstances from the existence of which the origin of the fire may be reasonably inferred. *Chicago Mill & Lbr. Co.* v. *Ross,* 99 Ark. 597, and cases cited.

The judgment is, therefore, affirmed.

HOLUB v. TITUS.

Opinion delivered April 16, 1917.

IMPROVEMENTS—COLOR OF TITLE—GOOD FAITH.—Where appellant claimed to hold land under a quitclaim deed, and sought to recover the value of improvements made thereon, he will not be permitted to do so, when it does not appear whether he made the alleged improvements before or after receiving the quitclaim deed, or whether they were made under the honest belief of ownership.

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

Mann & Mann, for appellant.

The court erred in finding that defendant neither alleged nor testified that he made the improvements under color of title, believing himself to be the owner. He so alleged in his answer, and brought himself squarely within the statute. The pleadings and testimony support his claim for betterments. Appellants made improvements necessary to the use and enjoyment of the property of the value of $1,493.50, and his claim should have been allowed. On the former appeal (120 Ark. 620), it was held that appellee was not entitled to rents, and he did not appeal.

Walter Gorman, for appellee.

The court properly found against appellant on his claim for improvements. The decree is right and should not be disturbed. It is not shown when the improvements

were made, whether prior or subsequent to the quitclaim deed, nor does it appear that they were made under the honest belief of ownership.

SMITH, J. This is the second appeal in this case. The opinion upon the former appeal is reported in 120 Ark. 620. It appears, from the opinion there found, that this was a suit in ejectment, which, upon motion, was transferred to equity, and there tried. At the trial from which the first appeal was prosecuted, Titus, who was the plaintiff below, undertook to read certain depositions taken to show the value of improvements made by him; but the court refused to consider these depositions and made no finding on the question of improvements, and the cause was remanded on that account.

It was contended by Holub, upon the former appeal, that he was entitled to the value of any improvements made by him at any time after his entry upon the land pursuant to a parol contract of purchase; but we held that he had no color of title until he secured his quitclaim deed, and any recovery for improvements would be limited to the value of improvements made subsequent to the date of this deed. Titus insisted, upon this former appeal, that a quitclaim deed did not constitute color of title; but we held against him in that contention. He also insisted there could be no recovery because Holub did not make the improvements in good faith, believing himself to be the owner of the property improved, and, in support of this plea, it was pointed out that the deed to Holub was executed in June, 1902, whereas his grantor had, in May, 1895, executed a deed to the land to Titus, and that this deed had been placed of record two days after its execution. We said, however, that the constructive notice of a deed following its registration was not conclusive of the question of good faith; that actual notice of the outstanding paramount title, or the existence of circumstances from which the court or jury might fairly infer that the occupant had cause to suspect the invalidity of his title, was the test. Having thus announced the law, the cause

was remanded for further hearing upon the question of improvements made since the date of the quitclaim deed. Upon the remand of the cause, Holub filed the following amendment to his answer:

"Comes the defendant, Frank E. Holub, and again offers to amend his answer herein, and for such amendment to answer to the complaint, says:

"That, acting under the deed herein from D. D. Titus to Joseph Holub, Sr., under date of June 19, 1902, this defendant and those under whom he claims placed valuable improvements on said property of the value of fifteen hundred dollars, and should the court decree the possession of the land to the plaintiff, that such possession be not delivered up to the plaintiff until the value of the improvements placed thereon by the defendants be paid."

There was a prayer for the value of such improvements, and for general and proper relief.

Titus filed a reply to this amendment, containing a general denial of its allegations, and, in addition, alleged that the improvements Holub had placed upon the land were suitable only for general headquarters for a stock farm, such as barns for housing large numbers of cattle and horses, and storing feed for same, in connection with other lands owned by Holub, and added nothing to the value of the land, except for the purposes for which Holub intended to use it. Appellant has abstracted only the depositions of witnesses Kaufmann and Brown. These witnesses testified as to the improvements, which they described as a dwelling house, a pig pen, a chicken coop, a barn, a corn crib, a dipping tank, and certain sheds, catalpa posts, a pump, three and a half acres of cleared land, and a five-acre orchard, some fence, and a few other similar items. These witnesses did not undertake, however, to state when these improvements were made, nor to what extent they had enhanced the value of the land. Moreover, Holub did not testify. If it be said that the allegation of Holub's amended answer that, in making the improvements, he had acted under the deed to him from D.

D. Titus, dated June, 1902, was a sufficient allegation to admit proof of good faith in making improvements, it still does not appear that any testimony was offered in support of that allegation. It is only by inference that we can say the amended answer contains this allegation, and the testimony as abstracted does not support the allegation. The questions before the court upon the trial from which this appeal was prosecuted were: When were the improvements made? To what amount did they enhance the value of the land? And were they made by Holub while he believed himself to be the owner of the land?

From the testimony as abstracted it does not appear whether the improvements were made prior to the execution of the quitclaim deed to Holub, or since that date; nor does it appear from the testimony abstracted whether they were made under the honest belief of ownership. Under this state of the record, we can not say that the finding of the court that "it still appearing that the defendant neither, in pleading or testimony, brings himself within the terms of the statute, in that, he neither alleged nor testified that he made the improvements believing himself to be the owner," is clearly against the preponderance of the evidence, and the decree of the court below, disallowing the claim for improvements, is, therefore, affirmed.

LUSK ET AL., RECEIVERS, ST. LOUIS & SAN FRANCISCO RD. CO. v. JONES.

Opinion delivered April 16, 1917.

1. RAILROADS—PAYMENT OF WAGES TO DISCHARGED EMPLOYEE—PENALTY.—In order for an employee of a railway company to avail himself of the penalty provided in Kirby's Digest, § 6649, as amended by Act 210, Acts of 1905, he is required to request his foreman or timekeeper to send his money or check therefor to some station where a regular agent is kept; else, after expiration of seven days from the date of his discharge, he is required to demand his money from some one authorized to pay the wages due him.

2. RAILROADS—DISCHARGED EMPLOYEE—WAGES—NOTICE TO COMPANY.—The discharged employee is not relieved of the duty set out above, because his foreman or timekeeper knew that he was in the habit of receiving his pay check at a certain station.
3. RAILROADS—DISCHARGED EMPLOYEE—WAGES.—In order for an employee of a railway company to avail himself of the penalty provided by Kirby's Digest, § 6649, as amended by Act 210, Acts of 1905, he must comply strictly with the statute.

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver,* Judge; reversed.

W. F. Evans, W. J. Orr and *Lamb, Turney & Sloan,* for appellant.

1. A discharged employee is not entitled to recover the statutory penalty automatically because he is discharged and wages are not paid then and there. Kirby's Digest, § 6649; 87 Ark. 132; 88 *Id.* 277; 188 S. W. 836; 102 *Id.* 206. No request for wages was made. 82 Ark. 377; 102 S. W. 206.

The appellee, *pro se.*

1. The employee was discharged—his wages were not paid, although demand was made. Kirby's Digest, § 6649, Acts 1905, p. 537; 132 S. W. 911; 75 Ark. 138; 120 S. W. 970; 87 Ark. 132; 188 S. W. 836. The company is liable.

HUMPHREYS, J. Appellee brought suit against appellant before J. B. Nichols, a justice of the peace in Jonesboro township, Craighead County, Arkansas, to recover the sum of $28.50, an alleged penalty due him under Act 210 of the Acts of Arkansas, 1905. Judgment was rendered in favor of appellee, from which an appeal was prosecuted to the Craighead Circuit Court, Jonesboro District, First Division, where the case was tried by the court sitting as a jury, upon the following statement of facts:

Appellee was regularly and legally employed by the officers of appellant, as a pumper at the station at Jonesboro, Arkansas, at the rate of $1.50 per day, or night, and on the 14th day of December, 1915, W. M. Bailey, the

water service man, discharged him and refused to give him an identification, or pay check, or any other check, or money for his time wages then due him, he calling upon said company's office in the city of Jonesboro, Arkansas, every day or two for his money, and said pay check did not arrive, and was not delivered to him until on the 1st day of January, 1916; that said appellee did not notify his foreman or timekeeper where to send his pay check, but his foreman knew that plaintiff had received his pay checks, previously, through the agent at Jonesboro.

The circuit court found as a matter of law, under the above statement of facts, that appellee should recover the amount of $28.50, together with his costs, from the appellant, and rendered a judgment in accordance with that finding. Proper steps were taken and an appeal from that judgment has been lodged in this court.

The only question presented by this appeal is whether appellee brought himself within section 6649 of Kirby's Digest as amended by Act 210 of the Acts of the Legislature of 1905, *supra,* which provides that laborers may recover a penalty upon discharge in case the employee "requests of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach said station within seven days of the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of discharge or refusal to further employ, at the same rate until paid." This section has been before this court for construction frequently. In the case of *St. L., I. M. & S. R. Co.* v. *Bailey,* 87 Ark. 132, Mr. Justice BATTLE, in rendering the opinion of the court in referring to the act, said: "Under this act the wages of the discharged servant becomes due when he is discharged, and no penalty accrues unless he requests his foreman or the keeper of his time to have the money due him, or a valid

check therefor, sent to a specified station where a regular agent is kept, and the money or check does not reach such station within seven days of the date it is requested."

In the case of *St. L., I. M. & S. R. Co.* v. *McClerkin,* 88 Ark. 277, handed down by this court November 30, 1908, in construing the statute in question, the court said: "Before appellee can recover the penalty claimed by him under the statute quoted above, he must show that he has strictly complied with the terms, for the statute is highly penal. The appellee does not show that he made a request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept."

Appellee insists that because he demanded his past due wages from his employer on the date of his discharge, and because he called at the railroad office in Jonesboro every day or two for his pay that he fully complied with the requirements of the statute. This contention is opposed to the construction placed upon this statute in the cases above referred to. In order for an employee of a railroad company to avail himself of the penalty provided in this statute, he is required to request his foreman or timekeeper to send his money or check therefor to some station where a regular agent is kept; else, after the expiration of seven days from the date of his discharge, he is required to demand his money from some one authorized to pay the wages due him. The record is silent as to whether the local agent had any authority to pay appellee his wages. We can not presume that the local agent at Jonesboro had such authority.

Appellee failed to bring himself within this statute by notifying his foreman to send his money, or check, to a station where a regular agent was kept; or by failing to demand his pay after the expiration of seven days from the date of his discharge from an officer or agent of the railroad authorized to pay his wages.

But appellee further insists that because his foreman or timekeeper knew that he had been receiving his pay check at the Jonesboro station it was unnecessary for him to give the notice required by the statute. The court adheres to its former construction that in order for an employee of a railroad to avail himself of the penalty, he must comply strictly with the statute.

It appearing from the agreed statement of facts that the case has been fully developed, the cause is reversed and dismissed.

FOSTER v. STATE.

Opinion delivered April 23, 1917.

APPEAL AND ERROR—CRIMINAL APPEAL—AFFIRMANCE WHERE BILL OF EXCEPTIONS HAS BEEN STRICKEN FROM THE RECORD.—In a criminal appeal, the bill of exceptions was stricken out upon motion of the Attorney General on the ground that it was not filed within the time allowed by the trial court. *Held,* the judgment will be affirmed where the only assignments of error relate to matters which must appear in the bill of exceptions in order to be brought up for review, there being no contention that the indictment was defective or that the trial court was without jurisdiction.

Appeal from Nevada Circuit Court; *George R. Haynie,* Judge; affirmed.

W. F. Denman, for appellant.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

Per Curiam. There is no bill of exceptions in this case—the one appearing in the record having been stricken out by order of this court, made on motion of the Attorney General on the ground that it was not filed within the time allowed by the trial court. The only assignments of error relate to matters which must appear in a bill of exceptions in order to be brought here for review. Since the bill of exceptions was stricken out,

nothing is left in the record to call for review by this court.

It is not contended that there is any defect in the indictment, or any other defect in the record which would affect the integrity of the court's jurisdiction. The judgment is, therefore, affirmed.

WALKER v. MATHIS.

Opinion delivered April 23, 1917.

1. MORTGAGES—CONVEYANCE OF MORTGAGED PROPERTY—ASSUMPTION BY PURCHASER.—When mortgaged property is conveyed by warranty and, the deed stipulating that the property was subject to a mortgage which the grantee agreed to pay, *held*, by the acceptance of the deed the law implies a promise by the grantee to pay the mortgage and if the mortgagee cannot make the amount of the debt out of the mortgagor and the foreclosure of the mortgage, the grantee, having assumed the debt, and having agreed to pay it, stands in the position of surety of the mortgagor.
2. MORTGAGES—SALE WITH ASSUMPTION OF DEBT—PAYMENT BY MORTGAGOR—RIGHT AGAINST GRANTEE.—Under the facts above, if the mortgagor had paid the mortgage debt, he would be entitled to judgment against the grantee for the amount of the mortgage debt.
3. MORTGAGES—SALE OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT—RIGHTS INTER SE OF SEVERAL PURCHASERS.—One V. owned 80 acres of land subject to a mortgage for $300. He sold 40 acres to one W., who agreed to pay the entire mortgage. He sold the other 40 acres to one M. The mortgage was foreclosed, W. purchasing his 40 acres for $160, and M. purchasing the other 40 acres for $224. *Held*, M. was subrogated to V.'s right against W. under W.'s agreement to pay the entire mortgage, and could recover from W. the amount paid by him.
4. MORTGAGES—PURCHASE OF EQUITY OF REDEMPTION.—Where a subsequent owner of the equity of redemption (if not the mortgagor) pays a prior mortgage, the payment does not operate as an extinguishment of the first mortgage to the prejudice of any existing rights of the purchaser, but the transaction will be treated simply and purely as an assignment of the first mortgage.

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

John E. Miller, for appellant.

1. Mathis voluntarily assumed the payment of the Neal notes to Vincent, which are not yet due. He is not the grantee of Walker. No personal judgment should have been rendered against him. 46 Ark. 132; 31 *Id.* 155; *Ib.* 411; 49 *Id.* 457; 51 *Id.* 205; 64 *Id.* 627; 85 *Id.* 59. Mathis was not a party to the contract. 9 Cyc. 380; 6 R. C. L., § § 274-5; 65 Ark. 29. See also 65 Ark. 29, 30; 86 *Id.* 218; 101 *Id.* 226; 110 *Id.* 589; 122 *Id.* 414.

2. There was no privity of contract between the parties. Bouvier's Law Dict., Vol. 3, p. 2722; 3 Words & Phr. (2 ed.), 1217 to 1221; 122 Ark. 414.

3. All the deeds were warranty deeds. The covenant is not one that runs with the land and is broken as soon as a conveyance is made. It is only a chose in action and does not pass with the land to the assignee. 5 Conn. 497; 60 Mass. 124; 137 *Id.* 151; 57 *Id.* 318; 147 Pa. St., 23 Atl. 560; 155 Mass. 79, 28 N. E. 1132; 11 Cyc. 1087; 1 Ark. 313, 334; 7 *Id.* 144; 74 *Id.* 348; 95 *Id.* 438; 42 Pac. 257.

4. Mathis was not subrogated to any right against Walker. 5 Elliott on Const. 872-3; 51 Ark. Law Rep. 69.

The appellee, *pro se.*

1. Appellee is entitled to equitable subrogation. 27 Cyc. 1349. Walker was personally liable. *Ib.* 1353; 80 Ind. 443; 29 W. Va. 840.

2. Appellee was not a volunteer—he was forced to pay to protect his land, and is clearly subrogated. 27 S. W. 40; 124 U. S. 534; 59 N. Y. Supp. 789, 791; 53 Pac. 472; 59 Kan. 470; 177 Ind. 551; 19 N. E. 199; 78 N. W. 303; 57 Neb. 717.

HART, J. On the 18th day of June, 1910, J. H. Vincent executed a mortgage on two forty-acre tracts of land adjoining each other in White County, Arkansas, to the New England Securities Company for the sum of $300 with certain interest coupons. On the 8th day of November, 1912, J. H. Vincent conveyed the north forty acres to Z. M. Walker, for the consideration of $100 cash in hand

paid, and the further sum of $300 for which vendor's lien was retained to be paid to the New England Securities Company on December 1, 1914. On the 28th day of October, 1913, Z. M. Walker and wife conveyed this tract of land to James Will Dowen for the sum of $400, one hundred dollars of which was paid in cash, and the further sum of $300 to be paid to the New England Securities Company for which vendor's lien was retained. On the 8th day of November, 1912, J. H. Vincent conveyed to C. A. Neal the south forty acres in consideration of the sum of $500, for which vendor's lien was retained, payable at the rate of $100 annually for the next succeeding five years. On the 24th day of November, 1913, C. A. Neal and his wife conveyed said forty acres to Y. H. Mathis for the sum of $500, which was paid. The mortgage debt of the New England Securities Company was not paid, and it instituted an action to foreclose its mortgage. J. H. Vincent and his subsequent grantees were all made parties to the suit.

Y. H. Mathis filed a separate answer to the plaintiff's complaint and a cross-complaint against Z. M. Walker. He asked that the land conveyed to Z. M. Walker be first sold for the payment of the mortgage debt, and in effect asked that he be subrogated to the rights of the mortgage company.

Walker filed an answer in which he denied that Mathis should have a judgment against him or that his land be first sold for the payment of the mortgage debt. The mortgage debt amounted to $327.58. At the sale, the land which had been conveyed to Z. M. Walker was sold for $160 and Walker became the purchaser thereof. The land which had been conveyed to Mathis was sold for the sum of $224, which was necessary for the payment of the balance of the mortgage debt and the costs. Mathis bid in his land. In the subsequent term of court the chancellor entered a decree in favor of Mathis against Walker for said sum of $224. Z. M. Walker has appealed.

In addition to the foregoing facts, it may be stated that the deeds from Vincent to Y. H. Mathis and the other parties named above are warranty deeds; that James Will Dowen is dead and his estate is insolvent; that J. H. Vincent is insolvent and that C. A. Neal is a nonresident of this State and has no property in it.

We think the decision of the chancellor was correct. In *Felker* v. *Rice,* 110 Ark. 70, the mortgagor conveyed the mortgaged premises by warranty deed and the deed contained a stipulation that the property was subject to a mortgage which the grantee agreed to pay. It was held that, by the acceptance of the deed, the law implied a promise by the grantee to pay the mortgage, and if the mortgagee could not make the amount of the debt out of the mortgagor and the foreclosure of the mortgage, the grantee, having assumed the debt, and having agreed to pay it, stood in the position of a surety to the mortgagor.

In the instant case, Walker was the grantee of Vincent the mortgagor. Vincent conveyed forty acres of the mortgaged property to Walker and Walker assumed to pay off the mortgage debt. This was recited in the deed. So in the application of the rule laid down in *Felker* v. *Rice, supra,* Walker became the surety of Vincent. The record shows that Mathis was a purchaser in good faith for value of part of the mortgaged premises and that his immediate grantor, C. A. Neal, was a nonresident of this State and had no property in it; that Vincent was insolvent and that Walker had assumed to pay $300 of the mortgage debt. Under these circumstances, Mathis was not a volunteer but discharged the mortgage debt in order to protect his own interest, and he is entitled to be subrogated to the rights of Vincent, his grantor. This is in application of the maxim that, equity regards that as done which ought to be done, and looks to the intent rather than to the form. Vincent, if he had paid the mortgage, would be entitled to a judgment against Walker for the amount of the mortgage debt, which Walker in his deed assumed to pay, and Mathis having

paid off a part of the mortgage debt in order to protect his own interests, was entitled to be subrogated to the rights of Vincent.

It is, also, a well-settled rule in equity that, where a subsequent owner of the equity of redemption (if not the mortgagor) pays a prior mortgage, the payment shall never operate as an extinguishment of the first mortgage to the prejudice of any existing rights of the purchaser, but the transaction will be treated simply and purely as an assignment of the first mortgage. Merwin on Equity & Equity Pleading, § 628, 3 Pomeroy's Equity Jurisprudence, § § 1211 and 1212. Several well considered cases are cited in support of the text. So it may be said in the application of this equitable rule that Mathis would be entitled to be subrogated to the rights of the New England Securities Company, the mortgagee.

It follows that the decree will be affirmed.

COX INVESTMENT COMPANY *v.* MAJOR STAVE COMPANY.

Opinion delivered April 23, 1917.

PLEADING AND PRACTICE—OBJECTION TO JURISDICTION—NOT WAIVED WHEN.—A defendant does not waive its objection to the jurisdiction of the court over it, where in an action against it, it objects on the threshold to the jurisdiction of the court, and maintains its objection in every pleading it may thereafter file in the case.

Appeal from Polk Circuit Court; *Minor Pipkin,* Special Judge; affirmed.

J. I. Alley, for appellant.

The appellee entered its appearance (1) by filing affidavit and bond for appeal; (2) by filing an answer and (3) by cross-examining witnesses. 122 Ark. 278; 85 *Id.* 431; 87 *Id.* 230; 29 *Id.* 85; 95 *Id.* 302; 90 *Id.* 316; Kirby's Digest, § 4666.

A. D. Dulaney, for appellee.

Defendant only entered its appearance *specially* and not for all purposes or generally. The cases cited are

not in point, but this case is ruled by 77 Ark. 412; 85 *Id.* 236.

HUMPHREYS, J. Appellant instituted this suit against appellee before S. H. Smith, a magistrate, in Center township, Polk County, on June 13, 1916, to recover $90 on an account for sixty thousand staves, property claimed by appellant and alleged to have been wrongfully purchased from Jones & Lovett and appropriated to the use of appellee.

An attempt was made to serve appellee under Act 98 of the Acts of Arkansas, 1909.

Appellee appeared for the sole purpose of filing the following motion to quash the summons, towit:

"Comes the defendant in this cause, and appears solely for the purpose of this motion, and for no other purpose, and moves the court to quash the service of summons upon the defendant herein, and for causes states: That the defendant is a corporation organized under the laws of the State of Arkansas, with its domicile and principal place of business in Ashdown, Little River County, Arkansas, and has no principal office, branch office or place of business in Polk County, Arkansas, and its chief officer does not reside in Polk County, Arkansas; and that it does not maintain a branch office or other place of business, or any employee in charge of any office or place of business or other place of business in Polk County, Arkansas, and did not so maintain any such office or place of business as aforesaid in Polk County, Arkansas, at the time of the filing of this suit, or the service of the pretended summons herein, or since that time.

"Further states that the summons, as shown by the return thereof in this cause, was served upon W. H. Conger, who is simply one of the field men or traveling employees of this defendant, and not such a person that service may be had upon as against this defendant in this cause in said county.

"Wherefore, premises considered, prays that the service of summons be quashed herein and this cause dismissed."

Upon hearing, the motion was overruled and appellee filed its answer to the merits, reserving in the answer its rights under the motion to quash service in the following language, towit: "Comes the defendant (referring to appellee) and without waiving its motion to quash service herein, or any of its rights thereunder, but renewing and insisting upon the same, for its answer states. * * *"

A. D. Dulaney, attorney for appellee, cross-examined witnesses introduced in behalf of appellant who testified in regard to the merits of the cause.

A judgment was rendered by the magistrate in favor of appellant against appellee for $60, whereupon appellee immediately filed its affidavit and bond for an appeal from said judgment to the circuit court of Polk County.

The transcript of the proceedings before the magistrate was filed in the circuit court, and on the 17th day of the October, 1916, term thereof the court heard and sustained appellant's motion to quash the service.

Proper proceedings were had, and the cause is here on appeal.

It is insisted that appellee entered its appearance:

First, by filing an affidavit and bond for an appeal from the judgment of the magistrate.

Second, by filing an answer in the magistrate's court, joining issue on the merits of the cause.

Third, by a cross-examination of the witnesses on the trial upon the merits in the magistrate's court.

In support of appellant's contention, the following cases are cited: *Harrison* v. *Trader,* 29 Ark. 85; *Holloway* v. *Holloway,* 85 Ark. 431; *Carden* v. *Bailey,* 87 Ark. 230; *Dunbar* v. *Bell,* 90 Ark. 316; *Foohs* v. *Bilby,* 95 Ark. 302; *Bixler* v. *Taylor,* 122 Ark. 278. None of the cases are in point.

The case at bar is ruled by *Spratley* v. *Louisiana & Ark. Ry.*, 77 Ark. 412. It was said by the court in that case, "There is no doubt but that where a party who has not been served with summons, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest he can not be said to have waived his objection to the jurisdiction of his person."

In the instant case, only two pleadings were filed by appellee. These were its motion to quash service, and the answer. In the motion to quash service, the pleading filed at the threshold, appellee objected to the jurisdiction of his person. In the answer filed by it, the protest was preserved.

The rule laid down in *Spratley* v. *La. & Ark. Ry. Co., supra,* was reaffirmed in the case of *C., R. I. & P. Ry. Co.* v. *Jaber,* 85 Ark. 232.

This being the only question presented, the judgment of the circuit court was correct and is affirmed.

RITTER *v.* BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

Opinion delivered April 2, 1917.

1. LEVEE DISTRICTS—DEEDS TO LAND.—Under the conveyance to the levee district in Act 1893, p. 172, the levee district took only the title the State had, and could itself convey only such title.
2. LEVEE DISTRICTS—AUTHORITY OF BOARD.—The Board of Directors of the St. Francis Levee District has only such powers and authority as is expressly conveyed by statute or by necessary implication.
3. LEVEE DISTRICTS—POWERS OF BOARD.—Where the statutes confer only special powers on a levee board, they can be exercised only in the manner and to the extent prescribed by the statute.
4. LEVEE DISTRICT—POWERS OF BOARD AND PRESIDENT—CONVEYANCES.—The president of the Board of Commissioners of a levee district has no more power under Act 1893, p. 172, than the secretary, in making conveyances.

5. LEVEE DISTRICTS—AUTHORITY OF BOARD—CONVEYANCES.—Although the president of the Board of Commissioners of a levee district has, under Act 1893, p. 172, authority to make a deed, he can not make covenants of warranty nor agree to refund the purchase price if title failed.
6. LEVEE DISTRICTS—CONVEYANCE OF LAND—REFUND.—Where the deed of a levee district contained warranties not authorized to be made, an agreement to refund the price if title failed will require a new consideration to bind the district, being independent of the main transaction.

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

Lamb, Turney & Sloan, for appellants.

1. The evidence justified the reformation of the deeds. There was a contract for a fee simple title and warranty deeds. There was a mutual mistake which a court of equity should correct. 98 Ark. 23; 51 *Id.* 390; 13 *Id.* 129; 28 L. R. A. (N. S.) 785, and notes; Pomeroy, Eq. Jur., § § 843-5; 49 Ark. 425; 46 *Id.* 167.

2. The levee board had the power and right to execute warranty deeds. Acts 1893, p. 172; 79 Ark. 14. The president had the right to execute the conveyances and the board was bound when the title failed. 79 Ark. 14; 47 *Id.* 269; 81 *Id.* 244; 58 *Id.* 270; 61 *Id.* 402; 81 *Id.* 143; 96 U. S. 341; 93 *Id.* 490; 67 Ark. 236.

3. The action is not barred. 59 Ark. 629; 86 Fed. 251; 95 Ark. 438.

L. C. Going and *Hughes & Hughes,* for appellees.

1. The president of the board had no authority to make warranty deeds. Acts 1893, p. 172; 93 Ark. 496-7; 82 *Id.* 531; 81 *Id.* 244; 86 *Id.* 221.

2. The deeds are only quitclaims. 59 Ark. 299; 121 Ill. 130; 18 Iowa, 12; 59 Me. 157; 46 *Id.* 152; 82 Mass. 332; 104 *Id.* 249; 150 *Id.* 171; 22 N. E. 888; 35 W. Va. 155. Reformation should be denied. 43 N. J. Eq. 377; 113 N. C. 123; 18 S. E. 165.

3. There was no mistake. 46 Ark. 167; 49 *Id.* 425; 56 *Id.* 320; 171 N. Y. 451; 23 N. E. 3; 16 Ill. App. 368.

If so, it was one of law. 159 Pa. St. 184; 28 Atl. 219; 50 *Id.* 673; 29 Barb. 697; Kerron, Fraud & Mistake, 428.

4. Appellant is barred. 32 Ark. 714; 65 *Id.* 103; 74 *Id.* 350; 33 *Id.* 593, 597-8, etc.

5. The title was in the U. S. 47 Ark. 351. Laches are imputable to plaintiffs. 120 Ark. 105; 189 S. W. 654; 83 Ark. 385. The decree is correct.

McCULLOCH, C. J. Appellants purchased from the board of directors of St. Francis Leveee District on April 4, 1906, certain large tracts of land situated in Mississippi and Poinsett counties, and the president of said levee district executed to appellants on that date two deeds conveying to appellants and their heirs and assigns forever "all of the right, title and interest of said body politic and corporate in and to" the real estate described. The deeds recited the consideration to be paid in cash. The lands described in the deed were unsurveyed swamp lands which had never been patented to the State by the United States Government, and it is conceded in the present litigation that the levee district had no title to or interest in the land to convey, but that the title was still held by the United States.

This action was instituted by appellants against said levee district on July 16, 1915, in the chancery court asking for a reformation of said deed in order to incorporate therein clauses warranting the title to the lands attempted to be conveyed and to recover upon the broken covenants of warranty thus incorporated the total sum of $35,186.67, which is the amount of the purchase price of the lands and interest thereon and the taxes, State, county and levee taxes, paid out.

It is alleged in the complaint that at the time of the purchase the president of the levee board agreed to incorporate in the deeds full covenants of warranty of title, and that when the deeds were prepared special clauses were inserted warranting the title, but, either by mistake or by design on the part of the president, the said clauses were omitted from the deeds at the time

they were executed. It is further alleged in the complaint that on February 12, 1909, appellants first ascertained that the deeds delivered to them by the president of the levee district were only quitclaims and contained no covenants of warranty and that said president upon their request executed to them an instrument of writing reciting the terms of said purchase and undertaking on the part of the levee board, that in the event title to said lands, or any part thereof, should fail or be found not to have been in the levee district at the time of said conveyances, the levee district should refund to appellants the purchase price so paid, together with interest and all taxes paid out on the lands. Appellee in its answer denied that there was any agreement with appellants to execute deeds containing covenants of warranty or that there was any error or mistake in the execution of the deeds, and the answer also pleaded lack of authority on the part of the president to enter into any such agreement. The answer also contains the plea of the statute of limitations. The chancery court denied the relief prayed for, and entered a decree dismissing the complaint for want of equity, from which decree an appeal has been duly prosecuted to this court.

There is a conflict in the testimony on the issue of whether there was any mistake in the form of the deeds executed by the president of the levee board and as to the agreement concerning the same, but we pass that question and proceed to determine the next one presented in order, whether or not the president of the levee board is clothed with legal authority in conveying the lands of the district to enter into covenants of warranty of title. The levee board derived title to all of its lands (except those purchased at its own foreclosure sales) from the State under a statute which went into effect March 29, 1893, which also prescribes the terms and method of sale by the levee board. Acts of 1893, page 172. The preamble of that statute reads as follows:

"That for the purpose of assisting the citizens of the State to build and maintain a levee along the St. Francis front in this State, and in consideration of the general good of the State; that all the lands of this State lying within said levee district except the sixteenth section school lands, and all the right or interest the State has or may have within the next five years, by reason of forfeiture for taxes or to any lands within said levee district except said sixteenth section school lands, is hereby conveyed to said levee district under the following restrictions and limitations."

Section 1 of the act provides that "said levee district represented by its board of directors shall make a descriptive map of said lands, showing the location and character of same. That lands shall be graded into first, second and third grades, with reference to their relative elevation and timber, and a description of the land and timber given. The said levee district may sell said lands for the minimum prices of $2.50, $1.50 and 50 cents per acre as to grade," and that "the treasurer of the levee board of said district, upon the receipt of payment of any part or parcel of said lands, shall certify the same to the president of said board, who shall execute a deed in the name of said corporation to the purchaser of said lands, the money arising from such sales or issuance of bonds to be applied solely to the construction and maintenance of the levee of said levee district." In a subsequent section it is provided that the president of the levee board shall make a bond to the State in the sum of $50,000 "conditioned upon the faithful and honest appropriation of the proceeds of the aforesaid lands to the building and maintaining the levee of said district."

(1) It is seen from the terms of this statute that no particular lands were conveyed by the State, but that "all the right or interest the State has or may have within the next five years" in any lands, except said sixteenth section school lands, was transferred to the levee district, and it necessarily follows that there was no

authority conferred upon the levee district to undertake to convey anything more than the interest of the State which was thus transferred. The president of the district was authorized to execute a deed, but that authority could extend no further than the execution of an instrument conveying the interest which the district had received from the State. A covenant of warranty embraced in a deed is not a part of the conveyance itself, and the authority to execute a deed does not carry with it authority to enter into covenants of warranty.

(2) The board of directors St. Francis Levee District is a *quasi*-public corporation, a sub-agency of the State, and its officers are clothed with only such authority as is expressly conferred by statute or by necessary implication. *Carson* v. *St. Francis Levee District,* 59 Ark. 513; *Altheimer* v. *Board of Directors of Plum Bayou Levee District,* 79 Ark. 229.

(3-6) The officers of the State in dealing with lands of the State are not clothed with any greater authority than that of conveying the State's interest in the lands it holds, and there is no language found in the act now under consideration which manifests an intention on the part of the Legislature to confer any other or greater authority on the president of the levee district. Where special authority is conferred by statute it must be exercised only in the manner and to the extent prescribed. It is insisted that the decision of this court in the case of *Board of Directors St. Francis Levee District* v. *Myers,* 79 Ark. 14, leads to the conclusion that there was authority on the part of the president to warrant the title of lands which were attempted to be conveyed. The decision on that question was, however, expressly pretermitted in the opinion. In that case there was a special clause in the deed whereby the levee district undertook to refund the purchase price upon failure of title to the lands conveyed, and it was said in the opinion that even if there was no power on the part of the president to bind the district by express

covenants of warranty of title, yet the district having received the funds pursuant to the terms of that contract were bound to refund them in the event of the failure of title. The decision was based entirely on the doctrine of estoppel, presumably on the ground that the levee board itself had either authorized the execution of the contract or had accepted the proceeds of the sale with knowledge of its execution. This is made clearer by the opinion in the later case of *St. Francis Levee District* v. *Cottonwood Lumber Co.,* 86 Ark. 221, where it was held that the district was not bound by the unauthorized promise of the secretary of the board to refund the proceeds of the sale of lands where the title failed. The statute in this respect confers no greater authority upon the president than it does upon the secretary. It provides that the funds shall be paid to the treasurer and that the president "shall execute a deed in the name of said corporation to the purchaser of said lands." The authority to execute a deed, as we have already said, not embracing the authority to enter into a covenant of warranty, the president was without power to enter into a special contract to refund the money, but the effect of the decision in the two cases just referred to is that where the levee district, through its board of directors, received the funds with knowledge of the contract to refund in the event of failure of title it is estopped to dispute the authority to enter into the contract. Now, in the present case it is shown affirmatively that there was no knowledge on the part of the levee board of any special contract being entered into with respect to refund of the money. On the contrary, it appears in the report of the secretary to the board of directors that the title to the lands was in a state of doubt and that the district had, by the sale, gotten rid of lands to which the title was uncertain. The special contract alleged to have been entered into later by the president with appellant does not appear to have been made by the authority of the board, and in addition it is essential

that it should have been based upon an independent consideration in order to bind the district, for the reason that it was not a part of the original transaction.

It is unnecessary to discuss the further question presented concerning the statute of limitations and of laches on the part of appellants for the reason that we have reached the conclusion that there was no authority on the part of the president to warrant the title to the land attempted to be conveyed, or to enter into the special contract with respect to refunding the proceeds of the sale.

The decree of the chancery court is, therefore, affirmed.

GREER *v.* VAUGHAN.

Opinion delivered April 2, 1917.

1. QUIETING TITLE—EVIDENCE—PLAINTIFF'S TITLE.—The plaintiff can prevail, in an action to quiet title, only on the strength of his own title, and not on the weakness of the defendant's title.
2. ADVERSE POSSESSION—SUFFICIENCY OF THE EVIDENCE.—The evidence held sufficient to establish that plaintiff's predecessor obtained title to certain land by adverse possession.
3. ADVERSE POSSESSION—PROOF.—Proof of intermittent possession of land for seven years, *held*, under the evidence, insufficient to give title by adverse possession.

Appeal from Prairie Chancery Court, Northern District; *John M. Elliott,* Chancellor; reversed.

W. A. Leach, for appellant.

1. Appellant has established his title by actual adverse possession. The land was fenced and actually occupied for the statutory period. 1 Cyc. 1146, 1153, 1137-8; 38 Ark. 181; 34 *Id.* 534, 547; 2 Corp. Jur. 256.

2. Appellee did not acquire title by adverse possession. 68 Ark. 551; 40 *Id.* 366. He is only entitled to a refund of his taxes paid.

Emmet Vaughan, for appellee.

1. The evidence fairly preponderates in favor of appellee. He held adverse possession and paid all the

taxes from 1899 to 1914. He had no notice of any adverse claim. The possession of appellant was not ad verse. 83 Ark. 74; 80 *Id.* 444; 100 *Id.* 555; 59 *Id.* 626; 77 *Id.* 201; 111 *Id.* 604; 1 Cyc. 1038, and cases cited. No color of title is shown in Greer—the only muniment is possession. Possession alone never ripens into title. Claim of title is necessary. 187 S. W. (Tex.) 1078.

2. To establish title by adverse possession one must show open, notorious, continuous, exclusive, uninterrupted and adverse possession for the statutory period. 177 S. W. 865. The issues are principally of fact, and the findings of the chancellor are sustained by the evidence.

McCULLOCH, C. J. This is an action instituted by appellant to quiet title to a tract of land containing fourteen and two-thirds acres in the southeast corner of the northwest quarter of the southeast quarter of section 14, township 4 north, range 5 west, in Prairie County, of which he is in possession, and is more particularly described as follows:

"Beginning at the southeast corner of the said northwest quarter of the southeast quarter of said section 14 and run thence north 836 feet to Beine creek; thence up Beine creek to a point 844 west of said east line; thence south to quarter section line running east and west between the northwest quarter of the southeast quarter and the southwest quarter of the southeast of said section 14, and thence east to point of beginning, containing fourteen and two-thirds acres more or less."

Two other small tracts adjoining the one described above were embraced in the complaint, but appellee in his answer disclaimed any assertion of title or right thereto, and those two tracts were thus eliminated from the controversy. Appellee claimed title to the aforedescribed tract, and presented a cross-complaint, asking that his title be quieted and that possession be awarded to him. On the final hearing the chancery court dismissed the complaint of appellant as to this tract of

land and granted the prayer of appellee's cross-complaint. Neither of the parties set up any claim of title except by adverse possession, but both attempt to establish title in that way.

Appellant asserts title under deed from the heirs of Wm. M. Warner, who died in possession of the land, prior to the year 1890, the precise date not being disclosed in the record. Warner occupied three small contiguous tracts of land aggregating twenty-eight acres, including the tract involved in this controversy. One of the tracts contained seven and one-third acres in the southwest corner of the northeast quarter of the southeast quarter of section 14; and the other tract contained six acres in the northwest corner of the southeast quarter of the southeast quarter of said section 14. The land was under fence and in cultivation, and Warner occupied the land, claiming it as his own, up to the time of his death, and after his death his heirs remained in actual occupancy under claim of ownership by inheritance until they removed from the place in the year 1890. From that time until the Warner heirs conveyed to appellant in the year 1911 the land was looked after for them by agents who resided at Des Arc. There is no attempt on the part of appellant to deraign title back of the occupancy of Wm. M. Warner, but, as before stated, the sole attempt was to establish title by Warner's adverse possession for more than seven years.

On October 30, 1899, A. L. Erwin executed to appellee a deed conveying land under the following description: "All that part of the following described tract of land which lies north of Beine creek, towit: Commencing 418 feet north of the southeast corner of the northwest quarter of the southeast quarter of section 14, township 4 north, range 5 west; thence run north 602 feet, thence west 724 feet; thence south 602 feet; thence east 724 feet to place of beginning. All that part of above description which lies north of Beine creek is hereby conveyed, which contains six acres more or less."

Appellee testified that at the time of said conveyance he owned all of the northwest quarter of the southeast quarter of section 14 north, of Beine creek, and believing that Erwin conveyed to him all of that subdivision lying south of Beine creek, he took possession of the land in controversy which lies south of said creek, and proceeded to inclose and occupy the same. He claims title by adverse possession for more than seven years.

(1-2) The first question presented is whether or not appellant has established his title, as asserted, by actual adverse possession on the part of Wm. L. Warner, the father of his grantors, for it is a principle too well settled for further controversy that plaintiff must gain relief, if at all, in suits of this character on the strength of his own title, and not on the weakness of the title of his adversary. We are convinced, however, that appellant has fully established his title by showing that Wm. L. Warner was in actual occupancy of the land in controversy for more than twenty years, claiming to be the owner thereof, and that he died while holding such possession. While there is a little conflict in the testimony as to the extent of Warner's possession, there is scarcely any room for substantial controversy that he did in fact occupy the whole of the tract and held it within the boundaries of the fences which he erected. One of the witnesses, the credibility of whose testimony is unchallenged, states that Wm. L. Warner occupied this land and cultivated it as far back as 1878. Warner's house was situated on the tract in the northeast quarter of the southeast quarter of section 14, but the cleared land included the tract in controversy. The testimony of appellee himself shows that shortly after he received a deed from Erwin and looked at the land he found the old fences, or some of them, which inclosed this land.

(3) It being conclusively established that Warner acquired title by adverse possession, the next question presented is whether or not that title was wrested from

the Warner heirs by adverse possession on the part of appellee, who attempts to prove that he took actual possession of the land in the summer of the year 1900, and occupied the whole tract continuously until the year 1913 or the year 1914. Appellee stated emphatically in his testimony that he took possession of every foot of the land immediately after his purchase on October 30, 1899, and that he continued to occupy it until appellant entered upon the land as above stated, but a careful examination of his testimony as set forth in the record shows that he was not in a position to testify emphatically concerning the actual occupancy of the land. He states that he was engaged in his official duties as circuit clerk from the date of his deed up to 1904, and saw very little of the land himself, but left it to others to look after for the reason that it was of very little value. Appellee's deed from Erwin did not in fact describe any of the lands in controversy, for it only purported to convey land north of Beine creek. Appellee claims that there was a mistake in drafting the deed, and that it should have read south instead of north of the creek, but, even giving that construction to the language of the deed, it did not purport to convey all of the lands in controversy, but only about six acres of it. Appellant shows very clearly that appellee did not occupy the land in controversy, at least during some of the years covered by the period of his alleged occupancy. Appellant shows by the testimony of witnesses, one of whom at least is conceded to be unimpeachable, that appellee did not occupy this tract at all, but that on the contrary the land was continuously occupied by tenants of the Warner heirs.

There is considerable conflict in the testimony as to the actual occupancy of the land throughout the years which followed the conveyance by Erwin to appellee, but we think the conflicts are reconcilable upon the theory that each party, through tenants, occupied the lands at different times during that series of years. It was of

very little value and most of the time was not in cultivation. In fact, the evidence fails to show that it was in cultivation any considerable length of time. Appellee repaired or rebuilt the fences, or at least part of them, and pastured stock on the land, part of the time putting his own stock there and at other times permitting others to do so.

The testimony of the appellant, on the other hand, is quite convincing that the agents of the Warner heirs rented this land for different years during that period and that the same was occupied by the tenants to whom the land was rented. Appellee's occupancy is not shown to have been continuous for the period of seven years. It was a fitful or intermittent possession, which was insufficient to ripen its title. *Scott* v. *Mills,* 49 Ark. 266; *Brown* v. *Bocquin,* 57 Ark. 97; *Driver* v. *Martin,* 68 Ark. 551; *Wagner* v. *Head,* 94 Ark. 490.

It was not sufficiently notorious, for it does not appear that the agent of the Warner heirs, who lived in Des Arc, but a short distance away, was ever advised of appellee's occupancy of the land though the agent was looking after it for the heirs.

Our conclusion is, therefore, that the evidence fully establishes appellant's title by limitation under the Warner occupancy, and fails to show that appellee acquired title by adverse possession. Appellee does not assert title of any other character. The chancellor erred in rendering the decree in favor of appellee, and the same is reversed and the cause remanded with directions to enter a decree in favor of appellant quieting his title to the land in controversy.

SIMMONS v. LUSK et al., RECEIVERS OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered April 2, 1917.

1. APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.—Where the bill of exceptions recites that plaintiff introduced evidence to establish the allegations of his complaint, and that defendant intro-

duced evidence to disprove the same, and this is followed by the instructions given, it will be *held* to show sufficiently that it contains all the evidence heard.

2. CARRIERS—PASSENGER—REPRESENTATION AS TO MOVEMENT OF TRAIN.—A carrier is bound by the representations of a trainman to a passenger, where the trainman told the plaintiff that her ticket was good on that train, and that it would stop at the station named on her ticket, in the absence of a showing of knowledge of the passenger to the contrary.

3. CARRIERS—PURCHASE OF TICKETS BY PASSENGERS—REASONABLE REQUIREMENTS.—A carrier may require passengers to purchase tickets before boarding trains, provided a reasonable opportunity to do so is afforded the passenger.

4. APPEAL AND ERROR—CONFLICTING INSTRUCTIONS.—The giving of conflicting instructions, *held* prejudicial.

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

Oglesby, Cravens & Oglesby, for appellant.

1. The testimony established that plaintiff was put upon and entered a train which did not stop at her destination on account of the negligence of the employees and on account of this negligence she suffered the injuries complained.

The instructions given for plaintiff were correct, but rendered worthless by defendant's instruction No. 7. 45 Ark. 256; 47 *Id.* 74; 78 Mo. 610; 52 Ark. 406. It was unsound, abstract and contradictory to the correct instructions given, and confused the jury.

W. F. Evans of Missouri and *B. R. Davidson,* for appellees.

1. The bill of exceptions does not set out all the evidence. 42 Ark. 29-35; 74 *Id.* 551-3; 54 *Id.* 162; 44 *Id.* 74; 94 *Id.* 115; 81 *Id.* 327; 91 *Id.* 443.

2. It was plaintiff's duty to ascertain whether the train stopped at her destination before she entered it. 45 Ark. 256; 47 *Id.* 74; 57 Fed. 481; 99 Ark. 248; 40 *Id.* 298; 45 *Id.* 256. There was no duty on behalf of the conductor to stop and no negligence. 45 Ark. 256-263; 47 *Id.* 74; 99 *Id.* 248; 57 Fed. 481. The instructions state the law correctly.

STATEMENT BY THE COURT.

Mrs. Frank Simmons sued the receivers of the St. Louis & San Francisco Railway Company to recover damages for refusing to stop one of its passenger trains, on which she was a passenger, at Mountainburg, Arkansas.

The complaint alleged a state of facts substantially as follows: On the 15th day of October, 1916, plaintiff purchased a ticket at Wichita, Kansas, over defendant's road to Mountainburg, Arkansas. She arrived early in the morning at Monett, Missouri, a station on defendant's line of road, where she changed cars. One of defendant's south-bound passenger trains was waiting there, and under the rules of the railway company it had porters or other employees at the entrance of the train to inspect the tickets of passengers and see if their tickets called for passage on that train. The plaintiff exhibited her ticket to Mountainburg, Arkansas, to the member of the train crew stationed at the entrance of the train. He examined her ticket and permitted her to enter the train without telling her that it did not stop at Mountainburg, although he knew by its schedule that it did not stop there. The fact that the train did not stop at Mountainburg was not known to the plaintiff and she relied upon the fact that she had exhibited her ticket to a member of the train crew whose duty it was to inspect it and he permitted her to take passage on the train. After the train had gone a considerable distance the conductor took up her ticket and informed her that the train would not stop at Mountainburg. He refused to stop the train at Mountainburg and compelled her to leave the train at Winslow with her two small children and hand baggage. She had to go out in the weather with her children and climb up the mountain to reach a place where she could stay until she could get to Mountainburg. She was a stranger in the place and by reason of the excitement and worry caused by being compelled to

leave the train she became seriously ill, and suffered a miscarriage.

The answer of the defendant denied the allegations of the complaint. The plaintiff introduced testimony to establish the several allegations of her complaint. The defendant introduced testimony to disprove each and every allegation of plaintiff's complaint.

The jury returned a verdict for the defendant and from the judgment rendered the plaintiff has appealed.

HART, J., (after stating the facts). (1) Counsel for the defendants seek to uphold the judgment by invoking the rule that where the bill of exceptions does not affirmatively show that it contains all the evidence and there is no language from which it is naturally and necessarily inferred that it contains all the evidence, the rulings of the court upon the evidence and instructions are presumed to be correct. *Bowden* v. *Spellman,* 59 Ark. 251. In that case the bill of exceptions began as follows:

"Be it remembered that, on the trial of this cause, evidence was introduced tending to show the following state of facts." The court held that the statement was not conclusive that there were not other facts shown on the trial which if brought before this court would sustain the rulings and judgment of the lower court. In other words, the court held that the bill of exceptions in that case only showed by implication that there were no other facts shown. Here the bill of exceptions is essentially different. We quote from the bill of exceptions as follows:

"On the trial of the above cause at the June, 1916, term of the above styled court, the following proceedings were had:

"The plaintiff introduced testimony to establish the several allegations of her complaint.

"The defendants introduced testimony to disprove each and every allegation of plaintiff's complaint.

"On the trial of the cause, the court gave the following instructions on behalf of the plaintiff."

This is not as definite and certain as a bill of exceptions ought to be where a reversal is sought for a failure of proof. It is true that the bill of exceptions does not follow the proper practice by expressly stating that it contains all the evidence introduced, but it does appear with reasonable certainty that no other evidence was introduced. It states that the plaintiff introduced testimony to establish the several allegations of the complaint. That the defendant introduced testimony to disprove each and every allegation of the plaintiff's complaint. Then follows the instructions given by the court. From this the natural inference would be drawn that no other testimony was introduced than that referred to, and we think the bill of exceptions was sufficient to present the errors for which a reversal of the judgment is sought. *Overman* v. *State,* 49 Ark. 364; *Hibbard* v. *Kirby,* 38 Ark. 102; *Leggett* v. *Grimmett,* 36 Ark. 496; *Walker* v. *Noll,* 92 Ark. 148.

It is next contended that the court erred in giving instruction No. 7, which is as follows:

"If you find from the evidence that the plaintiff was invited to get on this train at Monett and was required to leave the train at Winslow because it did not stop at Mountainburg, and that this caused the injury complained of, this would not be the proximate cause of the injury, unless a man of ordinary care and prudence would, or should, have anticipated injury to her from allowing her to ride on this train as far as Winslow."

(2-4) We think the court erred in giving this instruction. A railroad company may make a rule to require passengers to purchase tickets before entering the cars, provided reasonable opportunities are offered to comply with it. *St. Louis & San Francisco Ry. Co.* v. *Blythe,* 94 Ark. 153; *St. L. S. W. Ry. Co.* v. *Hammett,* 98 Ark. 418. Here the railroad company had a rule requiring the passengers to exhibit their tickets to the

train porter or brakeman before they were allowed to enter the car. The train man was placed there by the company to enforce its rules and prevent passengers from entering a train upon which they did not have transportation. It was in the line of his duty to give information and to make representations in reference to the rights of passengers holding tickets entitling them to transportation over its line of road. It would be a strange state of affairs if the agent had authority to prevent the passenger from entering a train, who did not have proper transportation, and still not have the authority to give reasonable and proper information concerning trains upon which such tickets might be used and the places where the train would stop and discharge passengers. When the train man told plaintiff her ticket was good on that train and that the train would stop at Mountainburg to allow her to get off, the company was bound by his representations in the absence of knowledge on the part of the passenger that the information given was not correct. *C., R. I. & P. Ry. Co.* v. *Blundell,* 127 Ark. 82; *Hutchinson* v. *Southern Ry. Co.,* 140 N. C. 123, 6 A. & E. Ann. Cas. 22; *Louisville & Nashville Rd. Co.* v. *Scott,* 141 Ky. 538, Ann. Cas. 1912, C-547, and case note. This principle was also recognized in *St. L., I. M. & S. Ry. Co.* v. *Atchison,* 47 Ark. 74, where the court held that where a passenger is misled by an agent authorized to speak for the company, he has his action against the company for the misdirection, and also in *Railway Company* v. *Adcock,* 52 Ark. 406. A reading of instruction No. 7 shows that it is in direct conflict with this rule. It is true at the instance of the plaintiff correct instructions on this phase of the case were given, but the court has uniformly and repeatedly held that it is error to give conflicting instructions. We need only cite a few cases on this rule. *Brunson* v. *Teague,* 123 Ark. 594; *Chicago Mill & Lumber Co.* v. *Johnson,* 104 Ark. 67; *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140; *McCurry* v. *Hawkins,* 83 Ark. 202.

For the error in giving instruction No. 7 the judgment must be reversed and the cause remanded for a new trial.

HAYDEN v. HILL.

Opinion delivered April 2, 1917.

1. TITLE—RECOVERY OF LANDS—LIMITATIONS—RIGHT OF REMAINDERMAN.—Although Kirby's Digest, § 2745, provides that in order for a plaintiff to recover land it shall be sufficient to show that at the commencement of the action the defendant was in possession, the right of entry, and therefore the right of action to secure possession, does not accrue to the remainderman, within the statute of limitations, until the death of the owner of the particular estate, here a doweress, to whom the dower had been assigned.
2. REMAINDERS—LIMITATIONS.—The remainderman alone can protect possession prior to the assignment of dower; and as the remainderman is entitled to immediate possession, the statute will begin to run against him.

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

Moore, Vineyard & Satterfield, for appellants.

1. The court erred in declaring the law to be that the cause of action did not accrue until after the death of the widow, Rebecca T. Williams, in 1913, and that the possession of John Hayden was not adverse until the death of said widow; and further erred in refusing to declare that limitation began to run from the time defendant entered into possession in 1896. The cause of action was barred. Kirby's Digest, § § 5056, 2745; 16 Cyc. 659; 93 Ark. 392; 94 *Id.* 306; 105 *Id.* 646; 111 *Id.* 305; 67 *Id.* 84, 95-6; 51 *Id.* 235.

2. Actual notice is not necessary where there are actual overt and notorious acts of exclusive and adverse ownership. 90 Am. Dec. 451; 59 Pac. 257; 1 Cyc. 1073.

H. R. Boyd of Memphis and *Bevens & Mundt,* for appellees.

1. The statute did not commence to run until the termination of the life estate. 126 Ark. 1; 117 Ark. 366; 116 *Id.* 233; 115 *Id.* 359; 53 *Id.* 403; 9 Mass. 508; 1 Pick.

318; 6 Cush. 34; 10 Pick. 359; 15 Mass. 471; 69 Ark. 539; 97 *Id.* 33; 60 *Id.* 74; 58 *Id.* 512; 35 *Id.* 84.

2. The reversioners had no notice. 2 Wend. 357; 15 Mass. 471; 5 Cow. 96; 15 Am. Dec. 433; 55 N. Y. 446; 13 Barb. 147.

3. Until the termination of the precedent estate, no possession is adverse to the remainderman. 120 N. Y. 267; 96 N. C. 164; 130 Ill. 525; 65 Ark. 90. The *Organ case,* 67 Ark. 84, is not in point. 51 Ark. 591; *Ib.* 235; 69 *Id.* 104; 87 *Id.* 117.

The reversioners were not barred.

HUMPHREYS, J. Appellees brought ejectment in the Phillips County Circuit Court on the 30th day of August, 1915, against appellant, to recover possession of the following described real estate in the county of Phillips and State of Arkansas, towit:

Begin 2.64 chains west of southeast corner of section 27, township 3 south, range 3 east, Phillips County, Arkansas; thence south 89¾ degrees west, 31.05 chains; thence north 50 degrees west, 3.42 chains; thence north 71¾ degrees east, 4.79 chains; thence south 87½ degrees east, 4.18 chains; thence south 70 degrees east, 4.91 chains; thence north 54½ degrees east, 2.51 chains; thence north 1¾ degrees east, 4.40 chains; thence north 12¼ degrees east, 3.49 chains; thence north 8¾ degrees east, 4.08 chains; thence south 84¼ degrees east, 1.10 chains; thence south 57¾ degrees east, 5.41 chains; thence south 54½ degrees east, 3.93 chains; thence south 57¼ degrees east, 4.51 chains; thence south 47¾ degrees east, 4.44 chains; thence south 51 degrees east, 2.59 chains; thence south 22½ degrees west, 2.96 chains to place of beginning, enclosing 22.98 acres in south part of southeast quarter of section 27, 3 south, 3 east, which is a part of the south half, southeast quarter of section 27, township 3 south, range 3 east.

The case was tried upon the complaint, answer and amendment to the answer, and an agreed statement of facts. The trial judge, sitting as a jury, found for ap-

pellee and rendered judgment accordingly. From that judgment this appeal is prosecuted.

Appellees are the record owners of the said real estate, subject to the dower of Rebecca T. Williams. This entire tract was assigned to her in 1880 as a part of her dower interest in the lands of her husband, who died on the ..... day of November, 1879. The appellee, John Hayden, entered into possession of said lands in 1896, and has held such possession continuously since that time. On the ..... day of October, 1913, Rebecca T. Williams died. The possession of appellee from the time he went into possession down to the time of Rebecca T. Williams' death was adverse to the possession of said Rebecca T. Williams. His possession during all this time was actual, exclusive, peaceable, adverse, continuous, hostile, open and notorious, but appellees nor any one in the chain of their title had knowledge that appellant was in possession, claiming title thereto, and appellees had paid taxes thereon for more than thirty years. The rental value of the land for the years 1914 and 1915 was $200.

It is contended by appellant that the statute of limitations began to run against appellees when appellant took possession of said lands in 1896. Appellees contend that the statute of limitations did not begin to run against them until the death of the life tenant, Rebecca T. Williams.

Section 5056 of Kirby's Digest prohibits any one from maintaining a suit for the recovery of lands seven years after the right of action accrued, with a saving clause in favor of infants, *femme coverts,* and persons *non compos mentis.*

Appellees are remaindermen, hence the only question presented to this court for determination by this appeal is, When does the right of action to recover possession of lands accrue to reversioners and remaindermen?

The general rule that the right to bring suit accrues to remaindermen upon the death of the life tenant is

conceded by learned counsel for appellant, but they insist that this case comes within an exception to the general rule, that the remainderman's cause of action accrues before the death of the life tenant if he is expressly authorized by statute to bring suit during the period of life-tenancy. In support of such right in remaindermen, section 2745 of Kirby's Digest is cited. The section is as follows:

"To entitle the plaintiff to recover, it shall be sufficient for him to show that at the time of the commencement of the action the defendant was in possession of the premises claimed, and that the plaintiff had title thereto, or had the right to the possession thereof."

The statute referred to is not a statute of limitations. It is a practice act, and has reference to the sufficiency of the evidence in the trial of causes. Even if it were a statute of limitations, it could have reference only to present and not postponed titles.

(1) This court has held in a long line of cases that the right of entry, and therefore the right of action, does not accrue to the remainderman or reversioner, until the death of the owner of the particular estate. *Banks et al.* v. *Green et al.,* 35 Ark. 84; *Kessinger* v. *Wilson,* 53 Ark. 400; *Moore* v. *Childress,* 58 Ark. 510; *Ogden* v. *Ogden,* 60 Ark. 70; *Gallagher* v. *Johnson,* 65 Ark. 90; *Morrow* v. *James,* 69 Ark. 539; *Watson* v. *Hardin,* 97 Ark. 33; *Martin* v. *Conner,* 115 Ark. 359; *Rogers* v. *Ogburn,* 116 Ark. 233; *LeSieur* v. *Spikes,* 117 Ark. 366; *Neely* v. *Martin,* 126 Ark. 1.

It is true, as argued by counsel, that in many of these cases, the claimant, through adverse holding, had obtained possession by contract with the life tenant. The principle, however, is the same. It is based on the same reasoning, that is to say, the remainderman or reversioner has a right to attribute the holding to some character of contract with the life tenant. Until the death of the life tenant, no duty in law is imposed on a remainderman to inquire from the party in possession

whether he is a disseisor. During the life tenancy he has a right to treat the occupant of the land as a licensee. In the instant case, it is conceded that appellees did not know the appellant was in possession of the real estate.

It is contended that the rule has been abridged by this court in the cases of *Crowder* v. *Fordyce Lumber Co.,* 93 Ark. 392, and *King* v. *Booth,* 94 Ark. 306. Not so, for those were cases clearly within a well known exception to the rule. They involve the question of injury and damage to the reversionary or remainder interest in the real estate or to the freehold. The remainderman or reversioner in those cases was directly and necessarily injured in his estate for which he was entitled to immediate compensation.

(2) Our attention has been called to the cases of *Fletcher* v. *Josephs,* 105 Ark. 646, and *Brinkley* v. *Taylor,* 111 Ark. 305, as cases favorable to the contention that the remainderman's right of action against one in possession claiming title may accrue before the death of the life tenant. These are dissimilar cases from the instant case, because they deal with unassigned dower interest in lands. Until dower is assigned, the heirs have a right to possession and a right to maintain an action therefor. Unassigned dower is only an inchoate right in real estate, or, as was aptly said in *Fletcher* v. *Josephs, supra,* "a mere thing in action." The doweress or life tenant can not maintain a suit in ejectment against a third party claiming possession of real estate until dower is assigned, hence the possession can be protected by a remainderman alone, and the remainderman being entitled to the immediate possession, the statute of limitations would begin to run against him.

In the instant case, appellant did not take possession until after dower in the land in question had been assigned to Rebecca T. Williams.

No error appearing in the record, the judgment is affirmed.

BODINE *v.* PENN LUMBER COMPANY.

Opinion delivered April 9, 1917.

1. APPEAL AND ERROR—ISSUES SHOULD BE SUBMITTED TO JURY, WHEN.—Where the testimony is conflicting, or the legitimate inferences to be drawn therefrom are conflicting, the case should be submitted to the jury.
2. BROKERS—REVOCATION OF AUTHORITY TO SELL.—The authority to a broker to sell may, in good faith, be revoked at any time, in the absence of a stipulation to the contrary.
3. BROKERS—COMPENSATION—REVOCATION OF AUTHORITY—SALE BY OWNER.—Where a broker, with authority to sell defendant's timber lands, failed to do so, the owner will not be liable to the broker for commissions, where the owner, after the lapse of a year, sold the timber to a party whom the broker had introduced to him.

Appeal from Clark Circuit Court; *Geo. R. Haynie,* Judge; affirmed.

McMillan & McMillan, for appellant.

1. It was error to direct a verdict for defendant. 89 Ark. 372. There was a contract, and under it a partial sale was consummated. 80 Ark. 247.

2. The case should have been submitted to the jury with instructions. 84 Ark. 462-7; 53 *Id.* 49; 89 *Id.* 195, 207-8; 110 *Id.* 140; 121 *Id.* 534.

3. Plaintiff was the procuring cause of the sale. He brought the parties together and turned the purchaser over to the defendant.

4. The question of the good faith of defendant in calling the deal off was for the jury. 95 Ark. 144.

John H. Crawford and *Dwight H. Crawford,* for appellee.

1. On the facts the court properly directed a verdict. All of plaintiff's propositions fell through, and the deal was declared off. There was nothing for a jury.

2. The agency was revoked in good faith more than twelve months before the sale was made. 84 Ark. 462; 106 *Id.* 536, 544; 72 W. Va. 195; 103 Ala. 641; 83 N. Y. 387; 19 Cyc. 192; 38 Am. 441; 15 So. 900; 49 L. R. A. (N. S.) 985.

3. The contract was indivisible. 24 Minn. 354; 125 *Id.* 179; 51 L. R. A. (N. S.) 254. No recovery can be had on a *quantum meruit.* 181 S. W. 11. Under no theory could plaintiff recover.

McCULLOCH, C. J. The plaintiff, L. A. Bodine, alleges that he was employed by the defendant to sell certain property, the latter to pay a commission on the sale, and that he produced a purchaser to whom the defendant subsequently sold a portion of the property. This is a suit to recover the amount of commissions alleged to have been earned on the sale.

(1) Defendant, Penn Lumber Company, is a corporation operating a mill at Beirne, Clark County, Arkansas, and owned a sawmill, logging railroad, cars, locomotives and a large body of timber lands. In February, 1914, defendant entered into a contract with the plaintiff authorizing him to sell certain property and agreed to pay plaintiff a commission on the sale. The property specified to be sold embraced 9,000 acres of timber land, a sawmill, eight miles of steel railroad, ten logging cars, two locomotives, tenant houses, store and office buildings. The timber was estimated at 55,000,000 feet of gum, oak, hickory, cypress, ash and elm. The price specified was $180,000, and defendant agreed to pay plaintiff a commission of $10,000 on the sale. The contract stipulated that there was to be "a prompt sale only." All the negotiations between the two parties were by written correspondence through the mails, and there is no dispute as to the contents of the correspondence or as to what was done thereunder. The trial court directed the jury to return a verdict in favor of the defendant, and the only question with which we are concerned now is as to the correctness of that direction. If there was a conflict in the testimony or as to the legitimate inferences which might have been drawn therefrom, then the case ought to have been submitted to the jury for a determination of the issue.

The correspondence between the parties began on February 7, 1914, and on February 12, 1914, plaintiff, in a letter to defendant of that date, made the following inquiry: "You say in your letter you will pay me a commission of $10,000 if I furnish you a customer who buys per the enclosed proposition. I understand this to mean I am to get this same commission if I furnish a party who buys at any proposition agreed on between you and him. Is this correct?" Defendant replied by letter as follows: "We have yours of the 12th. Yes, we will expect to pay you the commission of $10,000 if you furnish us a buyer for the property as per ours of the 7th and we make him a different trade. You to accept the same terms on your commission as we accept on the trade in the same proportions. However, we would not consider a price any less than we have named."

The plaintiff opened up negotiations with the McLean Hardwood Lumber Company, a concern located and doing business at Memphis, Tenn., and in March a representative of that corporation accompanied plaintiff to the locality where the property in question was situated and was introduced to defendant's representative as a prospective purchaser. They looked over the property together and the plaintiff left the proposed purchaser in the hands of defendant's representative to make a sale. The McLean Hardwood Lumber Company sent its representative on a number of trips to inspect the property, and negotiations continued up to the month of August, 1914, when they were entirely broken off by a letter to the defendant in which the definite statement was made that the McLean Hardwood Lumber Company would "drop the matter entirely, for we could not expect you to hold the proposition open indefinitely for us." Defendant immediately addressed a letter to plaintiff as follows:

"Beirne, Ark., 8/22, 1914.

Mr. L. A. Bodine, Huttig, Ark.:

Dear Sir: We have decided to take our property off the market and are compelled to call our deal with you off. The interest account is so heavy we expect to operate a little heavier if business will let us.

The McLean H. L. Co. have called the deal off.

The writer is leaving for the North to be gone three weeks, and while I am gone expect to make other arrangements for operating.

Thanking you for the interest you have taken and regretting we could not make the deal, we remain,

Yours very truly,

Penn Lumber Company,

Per J. G. Greene, Secy-Treas."

There were no further negotiations or dealings between plaintiff and defendant thereafter, except that several times plaintiff inquired by letter about the sale of hickory timber on the land. Nor were there any further negotiations between the defendant and the McLean Hardwood Lumber Company for a year, but after a year had elapsed defendant's agent went to Memphis and took the matter up again with the McLean Hardwood Lumber Company and made a sale of the oak, ash and cypress timber on the land embraced in the negotiations with the plaintiff and certain other lands in another county, the price on that sale being $50,000, and the contract also embraced an agreement on the part of the defendant to do the logging in getting the timber out.

(2) The contention of the plaintiff is that he was the procuring cause of the sale and is entitled to a commission, notwithstanding there was a cancellation or withdrawal of the agency long before the sale was made. We do not think this contention is well founded. There was no length of time specified in the contract between plaintiff and defendant, and the authority to sell was revocable at any time, subject only to the limitation that it should be done in good faith. The *Addressograph*

Co. v. *The Office Appliance Co.,* 106 Ark. 536; *Greenspan* v. *Miller,* 111 Ark. 190; *Murray* v. *Miller,* 112 Ark. 227.

(3) There was, according to the undisputed testimony in the case, an unconditional withdrawal of plaintiff's authority to sell in August, 1914, and there were no further negotiations between the parties concerning the sale to the proposed purchaser, nor is there any dispute in the testimony which relates to the good faith of the defendant in withdrawing the offer. The jury could not have reasonably drawn the inference that the agency was withdrawn in bad faith for the purpose of depriving the plaintiff of his commission upon the resumption of the negotiations with the proposed purchaser. There was, in other words, a complete severance of relations between the defendant and the proposed purchaser, and it was more than a year before the negotiations were resumed, and then they were taken up and concluded upon an entirely different basis. Now, the cases just cited declare the law to be that an owner who has given authority to a party to sell his property has a right to withdraw the offer if done in good faith, and the mere fact that the agent has been instrumental in the introduction of a proposed purchaser does not necessarily give him the right to a commission on a sale subsequently made by negotiations between the owner and the purchaser. Of course, the owner has no right to withdraw the authority for the purpose of preventing the agent from making a sale, but if a reasonable opportunity has been given to the agent to make a sale and he has failed to produce a purchaser who is ready, willing and able to purchase on the terms specified, then the owner has the right to withdraw, and if he subsequently makes a sale he is not liable for a commission, even though it be a purchaser who was originally introduced by the agent. The test, in other words, is good faith on the part of the owner in withdrawing the authority from the quondam agent, and that question should, of course, be submitted to the jury where there is a conflict in the

testimony or where the circumstances are such that different inferences might be reasonably drawn, but in the present case there is not the slightest testimony that would justify the inference that the offer was withdrawn in bad faith. A verdict in favor of the plaintiff on that issue would have been entirely unsupported by evidence, and, therefore, the court was correct in refusing to submit the issue to the jury. There is nothing in the cases cited by learned counsel for the plaintiff which militate against the views here expressed. They rely principally on the case of *Scott* v. *Patterson,* 53 Ark. 49, but in that case there had, according to the accredited evidence, been no withdrawal of the authority to sell and a sale was finally made by the owner to a purchaser who had been introduced by the agent or broker, and this court in deciding the case said that "if the agent introduces the purchaser or discloses his name to the owner, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner." Another case relied upon is that of *Branch* v. *Moore,* 84 Ark. 462, but the facts of that case were entirely different from those in the present case. In that case the facts were that the agent had procured a purchaser "ready, willing and able," but the owner declined to consummate the sale on the grounds that his wife would not sign the deed, and a few days later made the sale to the same purchaser whom the agent had introduced. This court decided that there was enough evidence to warrant a verdict in favor of the agent, and that he was entitled to his commissions, and in disposing of the matter the court said: "Appellant contends that he had the right to revoke the agency of appellee at any time before the sale. This is true, if done in good faith. But he could not do so for the purpose of depriving him of his reward and appropriating his services without compensation. He could not make the revocation a pretext for defrauding appellee."

Counsel for defendant submit other reasons why the judgment should be affirmed, but it is unnecessary to discuss the matter any further, for the decision of the court was a correct one upon the grounds already stated.

Affirmed.

FEGAN v. ANDERSON.

Opinion delivered April 9, 1917.

1. EXCHANGE OF LAND—FALSE REPRESENTATIONS—RESCISSION.—The evidence held sufficient to show that defendant, who had exchanged lands with plaintiff, had made false representations to the latter, and that plaintiff had relied thereon.
2. EXCHANGE OF LANDS—FALSE REPRESENTATIONS.—Where defendant made false representations as to the value of his property, which he exchanged with the plaintiff, he will not be heard to say that the plaintiff should not have relied thereon, but should have made an independent investigation.
3. EXCHANGE OF LANDS—FRAUD.—In a contract to exchange lands, the evidence *held* to show defendant guilty of fraud in dealing with plaintiff's deed to him in having it prematurely recorded.
4. EXCHANGE OF LAND—LAND IN ANOTHER STATE—JURISDICTION OF EQUITY.—Defendant, on an agreement to exchange lands, fraudulently obtained a deed to himself of plaintiff's lands in another State. *Held*, the chancery court could compel him to reconvey, or to restore the deed wrongfully appropriated.

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

John Mayes, for appellants.

1. The findings of the chancellor are persuasive merely. Here they are clearly against the preponderance of the testimony. Fraud is never presumed, but must be proven by clear and convincing testimony. No fraud, misrepresentations or deceit were proven. 11 Ark. 66; 19 *Id.* 528; 47 *Id.* 164; 71 *Id.* 91; 95 *Id.* 375; 101 *Id.* 608; 112 *Id.* 499; 116 *Id.* 443.

2. The testimony shows that the deeds were actually delivered and the trade completed. The deeds were good, if not acknowledged. 30 Ark. 111.

3. Failure to stamp does not render a deed or note void. They could be properly stamped afterward. 26 Ark. 398.

4. Edmiston was appellees' agent.

Walker & Walker, for appellees.

1. The transaction was properly rescinded for fraud, misrepresentations and deceit. 112 Ark. 489; 71 *Id.* 91; 116 *Id.* 448; 120 *Id.* 330. The findings of the chancellor are sustained by the evidence. *Supra;* 70 Ark. 385; 91 *Id.* 69; 84 *Id.* 429; 95 *Id.* 523. Here there was oral testimony.

McCULLOCH, C. J. Appellees owned a farm in Matagorda County, Texas, containing 149.10 acres of the value of about $8,000, and on June 29, 1916, they entered into an agreement with appellants to exchange said farm for two tracts of land in Washington County, Arkansas, containing in the aggregate 558 acres, then owned by appellants. Deeds were exchanged between the parties conveying to each the respective lands to be received. The contention of appellees is that the deeds were not delivered in consummation of the agreement, but merely to be held by each party for the inspection of their respective attorneys and until abstracts of title could be furnished; that appellants, by willful misrepresentations concerning the location and character of lands to be conveyed, deceived them and thereby fraudulently induced them to enter into the bargain, and that as soon as they discovered the fraud they offered to return to appellants the deed executed for the Washington County lands and demanded the surrender of the deed executed by appellees to the Texas lands.

This action was instituted by appellees in the chancery court of Washington County on July 5, 1916, to compel appellants to accept a surrender of the deed to the Washington County lands and to restore to appellees the deed executed by them to the Texas lands, or to require appellants to execute to appellees a deed reconvey-

ing the Texas lands. Appellants contend, and so allege in their answer, that there was no fraud or misrepresentation practiced by them on appellees; that the bargain was entered into and consummated by them in good faith, and without any misrepresentations concerning the land, and that the deeds were not, as alleged in the complaint, merely handed over to be held until the abstracts of title should be completed, but were delivered in consummation of the bargain. The chancellor on the final hearing of the cause decided in favor of appellees and rendered a decree requiring appellants to execute to appellees a deed reconveying the Texas lands.

It is seen from the above recital of facts that this suit was commenced with unusual promptness after the alleged cause of action arose, and that it was heard in the chancery court and decided without delay. The chancellor heard the testimony of the witnesses, delivered orally at the bar, and reached the conclusion that gross fraud had been perpetrated and granted appropriate relief. The question presented for us is whether or not the finding of the chancellor is against the preponderance of the evidence.

Appellees, A. L. Anderson and wife, resided in Texas, where their farm was situated, but sought a new home on account of the ill health of the wife. Through the suggestion of some one, Anderson went to Washington County, Arkansas, to find a home, and was directed to a man in the town of Prairie Grove, in that county, who was engaged in the real estate business, and who it appears had the lands of appellants listed for sale. Those lands consisted of a farm containing 198 acres a few miles distant from Prairie Grove, and a tract of wild land containing 360 acres situated about fifteen miles from Prairie Grove. Anderson left his wife at Benton, Arkansas, and visited Washington County alone without having any acquaintances there. Appellants, Fegan and wife, resided at Prairie Grove, and the negotiations were conducted by Fegan through a real estate

agent, Edmiston, the man to whom Anderson was directed. Anderson was turned over to Edmiston and was taken out to see the 198-acre tract, which he found to be satisfactory, but he did not see the other tract. He testified that Edmiston stated to him that the other tract contained 100 acres of good tillable land lying in the valley, and was covered with good merchantable saw timber, the timber being reasonably worth $12 an acre and could be readily sold for $7 per acre—that an offer of $5 per acre had been made for it. He testified also that Fegan told him that the 360-acre tract was covered with good timber—that part of the timber consisted of large trees which might be a little worm-eaten, but that there was plenty of good merchantable timber on the land. This occurred during the early part of June, somewhere between the 5th and 9th of that month, and a tentative agreement was entered into for the exchange of the properties, conditioned upon Fegan becoming satisfied after making inquiry concerning the Texas land owned by the Andersons. Anderson testified that he entered into this agreement without going to see the 360-acre tract in reliance upon the representations made to him by Edmiston and Fegan. Proceedings were suspended until Fegan could inquire about the Texas lands, and Anderson went back to Benton, Arkansas, to rejoin his wife. There was correspondence between Edmiston and Anderson, in which Anderson appeared anxious to make the trade and Edmiston urged him to hurry up, and to do so for the reason that, as he stated, the oil men were seeking leases on the 198-acre tract and that sawmill men were seeking to buy the timber on the 360-acre tract, and that Fegan might back out of the trade; that being thus urged, Anderson wrote to Edmiston to close the trade and that he would forward his deed to a bank at Prairie Grove to be held until he got there. The Andersons went to Prairie Grove, reaching there on June 29, and Fegan, having satisfied himself about the Texas land, agreed to proceed with the bargain. They went to

the office of an attorney in Prairie Grove, who prepared the deeds, and the Andersons executed the deed to the Texas land and handed it over to Fegan, but they testify that the execution of the deed was not acknowledged and that the deed was not delivered in consummation of the bargain, but to be held until each party could have the deeds examined by their respective attorneys, and abstracts of title could be furnished. The Andersons both testified that on this occasion the aforesaid misrepresentations concerning the character of the 360-acre tract were renewed by both Edmiston and Fegan, who assured them that the land contained about 100 acres of good tillable land and was covered with valuable merchantable timber. After the deeds were passed the suggestion was made to the Andersons by a man in Prairie Grove, to whom the prospective trade was mentioned, that they had better make a trip out to see the 360-acre tract, for it was thought to be of little or no value. After the Andersons reached Prairie Grove they made a trip out to see the 198-acre tract and were satisfied with that, but they had not seen the other tract. As soon as this suggestion was made to them, however, they drove out to see the land. This was on June 29, the same day on which the deeds were exchanged. They found the tract of land to be worthless, that it contained practically no tillable land at all, and that all of the merchantable timber had been removed. The testimony shows conclusively that the tract of land had no timber on it of any value and that the tract of land itself was of very little value, containing scarcely any tillable land. It is shown to be exceedingly rough and hilly or mountainous. In fact, appellants do not attempt to show that this land had any substantial value, but their contention is that there were no misrepresentations, but that this tract was merely thrown into the bargain, the principal element of the trade being the 198-acre tract. As soon as the Andersons returned from inspecting the land they went to Fegan's office and informed him that they had ascer-

tained the truth about the condition of his land and offered to surrender the deed thereto and demanded a surrender of their own deed to the Texas land. This was the next morning after the execution of the deed, and Fegan informed them that he had already forwarded the deed to Texas to be recorded and refused to comply with the request of the Andersons, or to accept the surrender of the deed to the Arkansas lands. The Andersons then employed attorneys, and this litigation followed a few days thereafter.

Appellants deny that there were any misrepresentations, and they offer testimony which tends to support their contention. Edmiston and Fegan both deny that they made any representations at all concerning the character of the land, except as to the 198-acre tract which the Andersons examined for themselves. Edmiston testified that he introduced Anderson to Fegan for the purpose of bringing about the exchange of 198-acre tract, which was known as the Jones land, and that after Anderson and Fegan had conversed about the matter off to themselves Anderson returned greatly pleased and said that he and Fegan had about "fixed it" and that he (Anderson) wanted to go and see the Jones tract the next morning. He testified that he did not know at the time that the 360-acre tract was to be considered in the bargain, but that after they had returned from inspecting the other tract Anderson said something about the 360-acre tract, and he merely replied that he did not know that that place was to be in the bargain, stating to Anderson at the time that "if you get that place you are that much ahead." He testified that after they went back to Fegan's office he remarked to Fegan in the presence of Anderson and Hale, the attorney, that he had told Anderson "that it was a devil of a rough proposition." He testified that he said this to Anderson: "You will have to go through this man's field; that you will have to go down a terrible mountain; you will think you are going down to China when you get there; you will

have to go down this way a while and down that a while; there is a little two-room house, barn and a good garden spot, then you turn back to the small place."

Fegan denied that he made any representations at all to Anderson concerning the large tract. He said that he had recently purchased the land and had never seen it. He and the attorney both testified that Anderson stated that "he guessed it would make a good goat ranch and asked if it would be good to raise goats on."

There is a very sharp conflict in the testimony so far as the number of witnesses is concerned, but there are many circumstances which strongly corroborate appellees in their narrative of the facts. The written correspondence between Edmiston and Anderson affords strong corroboration of the latter's testimony. Edmiston was urging him to close the trade and gave no reason for it except that oil men were trying to lease the 198-acre tract and sawmill men were trying to buy the timber on the larger tract—a statement which finds very little support in the record. In fact, the very conclusive proof that there was no merchantable timber at all on the large tract absolutely refutes the statement that there was any one trying to purchase the timber on the land. Appellants contend that Anderson was anxious to exchange his Texas land for the 198-acre tract and gladly went into the bargain merely for that tract without placing any substantial value on the larger tract, all of which is denied by Anderson, and the proof shows that just as soon as he received the suggestion from a responsible party that this land was probably of no value he hurried out to look at it, and when he found out the true situation he went to Fegan and demanded a rescission. It is not contended that the suggestion was made to Anderson by the man at Prairie Grove with any desire to interfere with the trade, and the circumstances give no color to the claim that the Andersons merely changed their minds and used this as a pretext to rescind the bargain. They acted very promptly, not only in go-

ing out to inspect the land and demanding a return of the deed, but also in instituting this action to get relief from the fraud which they say has been practiced upon them. Their promptness is undoubtedly a strong circumstance in support of their contention that misrepresentations were made to them concerning the value of the land, and that they relied upon those representations, and would not have entered into the bargain if they had not accepted the representations as the truth. It is true that appellees could have visited the land before they entered into the bargain, but they were, according to the testimony, induced not to do so on account of the fraudulent representations made to them concerning the character of the lands and the quantity of timber thereon.

(1-2) We think the evidence clearly establishes the fact that those misrepresentations were made and relied on and it does not lie in the mouths of appellants to say that appellees should not have relied upon the statement, but should have looked to satisfy themselves concerning the truth of the representations. *Neely* v. *Rembert,* 71 Ark. 91; *English* v. *North,* 112 Ark. 489.

(3-4) The evidence also supports the contention of appellees that the deeds were not finally delivered but that appellants, wrongfully and in violation of the agreement, hurried off the deed to Texas without furnishing abstract to the Arkansas land. The chancery court of Washington County had no jurisdiction to adjudicate the title to the Texas land, but it had jurisdiction over the appellants themselves with power to require restitution of the deed wrongfully misappropriated, or to require the execution of a reconveyance to appellees as evidence of their title. *Pillow* v. *King,* 55 Ark. 633; *King* v. *Pillow,* 6 Pickle (Tenn.) 287; *Carpenter* v. *Strange,* 141 U. S. 105.

The decree of the chancery court is found to be correct in all things, and the same is, therefore, affirmed.

HUMPHREYS, J., disqualified.

ELKINS v. JOHNSON.

Opinion delivered April 9, 1917.

EXCHANGE OF LAND—ACTION TO RESCIND—ABSENCE OF FRAUD.—In an action to rescind an exchange of land on the grounds of fraud, the plaintiff failed to show fraud on the part of the defendant in failing to perfect his title, and *held*, under the evidence, the defendant was entitled to a reasonable time in which to perfect the same.

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

McGill & Lindsey and *Homer L. Pearson*, for appellant.

1. On the issue of fraud and misrepresentation, the court found the issues for appellant. Elkins substantially complied with his contract, and if in any particulars he failed, they were waived. Time was not of the essence of the contract. Elkins is now willing and offers to perform his contract and make his offer good. He should be permitted to do so. 36 Atl. 78; 115 N. W. 325. No damage is proven. The decree should be reversed and appellant given a chance to make his offer good by fulfilling his contract.

Walker & Walker, for appellee.

Elkins's deed is a nullity. He totally failed to comply with his contract. His offer comes too late. There was no waiver. It is out of his power to fulfill his contract. 103 Ark. 212 is not in point. The decree is correct.

McCULLOCH, C. J. This action involves a controversy between the plaintiff and defendant concerning an exchange of certain lands. The plaintiff, W. W. Johnson, owned a farm in Washington County, Arkansas, containing 204 acres, and defendant, H. D. Elkins, owned a farm in Texas County, Oklahoma, consisting of 520 acres, of which 360 acres were originally school lands sold by the State, and on which the State still held a lien for the sum of about $950. Each of the parties had crops on their respective farms, and also live stock and farming

implements, and they entered into a written contract on July 30, 1914, for the exchange of their respective properties. The contract recited an undertaking on the part of the plaintiff Johnson to "give a warranty deed and abstract showing the same to be free and clear from any and all incumbrances of whatsoever nature, except a $1,000 mortgage" to the mortgagee whose name is specified; and also contained a recital of the undertaking on the part of defendant Elkins to furnish a "warranty deed and abstract showing the above lands all free and clear of all incumbrances" except two mortgages, one in favor of the State of Oklahoma for the sum of $950, and the other for $1,100 in favor of a certain loan company. The contract did not specify the time within which the respective conveyances were to be executed and abstracts of title to be furnished, but it is undisputed that plaintiff Johnson was to have sufficient time to go to Oklahoma for the purpose of inspecting the lands to be conveyed by defendant. At that time the defendant was in Washington County and had inspected the property which he was to receive in the exchange, but plaintiff Johnson had not at that time seen the Oklahoma property. They afterward exchanged conveyances and each party took possession of the respective properties conveyed.

This action was begun in the Washington Chancery Court in November, 1914, by plaintiff Johnson to require a rescission of the bargain and a cancellation of the conveyance which he had made to the defendant of the Washington County property. The alleged grounds upon which relief was sought were, that defendant had pointed out to the plaintiff the wrong lines of the Oklahoma property, and that defendant had failed to properly transfer the school lands on which the State of Oklahoma had a lien. The defendant in his answer denied that he had made any misrepresentations, or that he had failed to execute and deliver a proper assignment of the certificate under which the school lands were held, but in his answer offered to execute a transfer of the certificate and pro-

cure through the proper department of the State of Oklahoma a new certificate to the plaintiff. The statement of the answer concerning the certificate covering the school lands reads as follows: "The defendant further answering, says that at the time said deed to the Arkansas lands was delivered to this defendant, he informed the plaintiff that he was ready and willing to assign the certificate as required by law, and surrender the same for cancellation and did so as alleged by the plaintiff when the plaintiff called on him for said certificate, and if said assignment and transfer of said certificate is not properly made, that this defendant stands ready, and does hereby now, in open court, to procure from the Government of the State of Oklahoma, a proper certificate and deliver the same to the plaintiff herein for said school lands as complained of by him."

Proof was taken concerning the alleged misrepresentations of the true boundary lines of the Oklahoma lands, but on final hearing of the cause the chancellor found against the plaintiff on that issue. The very decided preponderance of the testimony is that there were no misrepresentations in that regard, and it is not now insisted on behalf of plaintiff that the allegations on that ground are supported by the testimony. The only issue, therefore, in the case relates to the failure of the defendant to comply with the Oklahoma law with respect to the assignment of the State's certificate of the purchase of the school lands, and when the chancellor announced his decision on that issue, the defendant renewed his offer to procure a new certificate and also to cause the discharge of the mortgage recited in the contract, which was on the school lands as well as the other lands. This offer was rejected by the court, and the defendant has appealed from the decree cancelling the said deed executed by the plaintiff to him conveying the Washington County lands.

Defendant held the school lands under a certificate of purchase from the State, which had been issued to another party prior to that time, and which had been

properly transferred to the defendant with the approval of the State of Oklahoma. The certificate, which is exhibited in the record, contains many conditions which have no bearing on the present controversy, but it contains the following stipulation with reference to an assignment of rights thereunder: "The holder hereof shall have the right to transfer or assign all his rights, title and interest in and to said land and improvements, but no transfer or assignment thereof shall be valid or of any force or effect unless made in conformity with the rules and regulations of the commissioners of the land office of said State, and recorded in the office of said commissioners at the Capitol of said State."

The rules and regulations of the commissioner of the Oklahoma Land Office provide, among other things, as follows:

"No transfer will be valid or accepted unless made on the form printed on this certificate and filed with the department within thirty days after the execution thereof, and this certificate surrendered for cancellation." * * * "No transfer or mortgage will be valid or accepted when the vendor is indebted to the State on deferred payments or for taxes past due." * * *

"After the transfer is approved by the commissioner of the land office, and upon the payment of the next deferred payment with interest in full thereon, and upon surrendering of the certificate of purchase transferred, and upon the execution by the transferee of a new certificate of purchase not for the deferred payments, a new certificate of purchase will be issued and delivered to said transferee." * * *

"No transfer can be made or will be accepted if the land and improvements are covered by mortgage. Proper release of mortgage shall accompany transfer."

After the execution of the contract, which was done at Springdale, Arkansas, the plaintiff accompanied the defendant back to Oklahoma, and made a thorough inspection of the property he was to receive. They closed

the trade there, and the deeds were prepared and duly executed. Defendant was living on the Oklahoma lands and remained there several days after the execution of the deed. Plaintiff lived in the house with the defendant during the time he was inspecting the place, and until defendant left there to come to Arkansas to take possession of the Washington County property. The plaintiff contends that nothing was said to him about it being essential to procure a transfer of the certificate of purchase of the school lands with the approval of the State department, but we think that the decided preponderance of the testimony is against him on that issue. Three witnesses, who apparently have no interest in this controversy, testified that it was fully explained to the plaintiff that it would be necessary to transfer the certificate and obtain the approval of the Commissioner of State Lands in Oklahoma. One of those witnesses, the cashier of a bank in Oklahoma, before whom the deeds were acknowledged, does not appear to have had the slightest interest in the controversy, and his testimony is unimpeached. The plaintiff's testimony on that issue stands alone, and even he does not state with any certainty that he had no information on the subject of the requirements about transfers of certificates of school lands. He states in his testimony that he did not remember that the cashier of the bank or the other parties told him of those requirements.

Defendant's wife was in ill health at the time of these transactions, and when he came to Arkansas after consummating the exchange with plaintiff, he stopped at Bentonville, where he executed a transfer of the certificate to the school lands. He testified that his wife was extremely ill at that time, and that he got a notary public in Bentonville to take her acknowledgment notwithstanding her extreme ill health, but that her condition was so desperate at that time that he laid the certificate aside and forgot to mail it to the plaintiff. His wife died four or five days later, and defendant testified that there was nothing to recall to his mind the fact that he had not

mailed the certificate until November 14, which was more than sixty days after the date of its execution, and too late under the rules of the land department of Oklahoma to file without an extension of time being granted by the Commissioner. In sending the certificate of transfer to the plaintiff, defendant wrote him a letter in which he expressed his regret that the mistake had been made of not attending to it earlier. Plaintiff made no response at all, and did not make any request of the defendant to take steps to obtain the approval of the Commissioner of State Lands or to execute a new certificate of transfer.

The rules of the land department of Oklahoma require that the certificate must be presented for surrender and cancellation within thirty days after execution, but the officers of that State connected with the department testified that it was not uncommon for the time to be extended upon a sufficient cause being shown for the delay, or that a new certificate might be issued.

We think the chancery court erred in requiring a rescission of the bargain, and in cancelling the conveyance to the defendant. Time was not of the essence of the contract, and plaintiff did not suffer the slightest injury by the delay. In fact, he made no request for compliance with the contract with respect to the method of passing title to the Oklahoma lands, but he instituted this action and prosecuted it upon the groundless charge that there had been fraudulent misrepresentations with respect to the other lands. When the defendant came in with promptness and offered to comply strictly with the contract with respect to the school lands plaintiff still failed to accept that offer, but continued to prosecute the suit upon the other ground. The defendant not only made this offer in his answer, but renewed it at the end of the litigation when the plaintiff had exhausted his efforts to sustain his unfounded charge as to false representations. He not only did that, but he offered to discharge the mortgage on these lands which he was not under the contract required to do, for the contract recites that the deal was

made subject to the recited incumbrances on the several properties which were the subject-matter of the exchange. Under the principles announced by this court in *Evans* v. *Ozark Orchard Co.*, 103 Ark. 212, and *Mays* v. *Blair*, 120 Ark. 69, we think the chancery court ought to have allowed the defendant a reasonable time within which to procure the cancellation of the old certificate or the issuance of a new one to the plaintiff. Any other course in the matter would result in permitting the plaintiff to profit by his fruitless effort to establish a charge of fraud, which is unsupported by the evidence in the case, and this course permits a performance of the contract without injury to either party. The decree is, therefore, reversed and the cause is remanded with directions to the court to fix a reasonable time for the defendant to comply with his contract with respect to the transfer of the certificate to the school lands, and if that is done within the reasonable time prescribed, the plaintiff's complaint will be dismissed for want of equity. Otherwise, the deed to defendant will be cancelled.

HUMPHREYS, J., disqualified.

NATIONAL UNION FIRE INSURANCE COMPANY *v.* DICKINSON, AUDITOR.

Opinion delivered April 9, 1917.

1. INSURANCE—FIRE INSURANCE—CHARACTER OF THE BUSINESS.—The fire insurance business is subject to franchise and police regulation, but it is not of so public a nature that the public can demand from fire insurance companies the same service as it may demand of purely quasi-public corporations or agencies.
2. MONOPOLIES—INSURANCE—AGREEMENT IN RESTRAINT OF TRADE.—An agreement between certain members acting under Act of 1913, p. 675, creating the Actuarial Bureau, which would result in favoring certain fire insurance companies and working to the detriment of others, would be subject to equity jurisdiction at the instance of the attorney general, or an aggrieved company, to restrain the operation of such agreement.
3. INSURANCE—FOREIGN INSURANCE COMPANIES—CONTROL OF BY STATE.—Foreign insurance companies, under Kirby's Digest, § 4345, are authorized to do business in the State only upon the doing of

certain required things, and are creatures of the State, and cannot individually or collectively, do acts affecting injuriously the public interest, or the interest of other insurance companies authorized to do business in this State.

4. INSURANCE—FIRE INSURANCE—ACTUARIAL BUREAU—RATES.—The Arkansas Actuarial Bureau, was organized under Acts 1913, p. 675, its business being the fixing of rates in the State. *Held,* the bureau's method of assessing fire insurance companies for its support was not arbitrary or unreasonable.

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

Hill, Fitzhugh & Brizzolara, for appellant.

1. Fire insurance is a *quasi*-public business subject to regulation by legislation and courts.

2. Such regulation must be reasonable. Act 159 is an adoption by this State of a policy of regulating fire insurance and unreasonably applied it tends to create a monopoly.

3. Plaintiff is entitled to membership in the Actuarial Bureau upon complying with the reasonable regulation thereof, and the bureau is not the judge of what a reasonable regulation is, but the courts. The second assessment is unreasonable and arbitrary. 197 Fed. 435; 184 Ill. 438; 48 L. R. A. 568; 76 N. E. 100; 3 L. R. A. (N. S.) 153; 32 Hun. (N. Y.) 4; 42 *Id.* 454; 127 Ill. 152; 2 L. R. A. 410; 74 N. J. Eq. 372; 29 L. R. A. (N. S.) 1194; 2 Wyman on Publ. Service Corp., secs. 865, 1401; 73 Ark. 205.

Cockrill & Armistead, for appellees.

1. The chancery court has no jurisdiction. 197 Fed. 435, and others.

2. The bureau is a public agency established by law, and the sole question is whether the methods and rules are uniform and not discriminatory. 21 A. & E. Enc. 808, 924; 207 U. S. 251; 92 Ark. 1; 93 *Id.* 612; 85 *Id.* 464; 102 *Id.* 205; 25 Cyc. 608; 22 *Id.* 1390; 94 Ill. 364; 50 S. W. 35; 93 N. Y. 313; 40 N. E. 967; 48 *Id.* 682.

3. The bureau's method is neither arbitrary nor discriminatory. It is fair and reasonable.

STATEMENT BY THE COURT.

In 1913 the General Assembly passed an act, the second section of which provides: "All companies, corporations or associations authorized to transact business of insurance in this State shall file with the Auditor or Insurance Commissioner, a schedule of rates of premiums to be charged and collected therefor, on contracts of insurance or indemnity proposed to be affected by said company, corporation or association, which, in all cases, shall be a fixed percentage of the amount insured, and such companies, corporations and associations may employ a common expert to inspect individual risks and advise the premium to be charged in accordance with schedule of rates on file with the Auditor or Insurance Commissioner, and such premiums shall be uniform for all risks rated under the same schedule." Acts 1913, Act 675.

The act contained other provisions that are not material to this controversy. Section 5 of the act provides a penalty for a failure to comply with its provisions, and authorizes the Auditor or Insurance Commissioner to suspend the authority of any company to transact business until after it has complied with the conditions of the act.

Nearly all of the insurance companies doing business in Arkansas entered into an organization which they designated "The Arkansas Actuarial Bureau" (hereafter, for convenience, called "Bureau"), and employed J. S. Speed as the local manager thereof.

The bureau was under the supervision of a committee of seven of the managing officials of seven of the leading companies that were doing business in the State. The members of this committee resided at the headquarters of their respective companies in the East. This committee was assisted by a local advisory committee of nine members, who were general and special agents representing the original companies who organizd the bureau. After about a year, the advisory committee was

abolished and the entire supervision devolved upon what is called the Eastern or "New York" committee.

Under the plan of the organization, the companies of the bureau employed Speed as their common expert to inspect individual risks and advise the premiums to be charged, in accordance with the schedule of rates filed with the Insurance Commissioner. Such premiums, under the act, had to be uniform for all risks rated under the same schedule.

Appellant was one of the members of the bureau, and by its power of attorney authorized Speed to act for it, and to file with the Auditor its schedule of rates of premiums as required by the law under which the bureau was organized.

The bureau first adopted as a basis schedule for fixing the rates a system known as "Dean's Analytical Schedule." Originally there were filed with the Auditor for the companies, thirty-seven schedules, and subsequently eight special schedules. Schedule 26 was divided into two parts. One is the charges and credits, terms, privileges, riders and conditions affecting the cost of fire, lightning and windstorm insurance, and the other contained an abstract of general basis schedules for making relative estimates of fire insurance in the unprotected towns and localities where no specific estimates have been publishd by the bureau. The local agents make rates under this schedule.

The bureau entered upon the work of inspecting individual properties with a view of fixing individual rates of insurance. The principal part of the expense of the bureau was in making inspections of individual risks, and rating same in accordance with the basis schedule, in keeping an individual account of risks, and issuing schedules. The expenses of the bureau were about $75,000 for the first year, $50,000 for the second year, and $35,000 for the third year. These expenses are borne by the companies who constitute the bureau.

Speed, the manager, acting under the directions of his supervisory committee, on May 1, 1913, levied an assessment of one per cent. based on the net premiums reported to the Auditor for the year 1912, amounting to $103,647.61, except on farm, marine, tornado, steam railway and bale cotton contracts, which amounted to $60,041.27, and reduced the net premiums to $43,606.34. The appellant paid one per cent. of this sum, amounting to $436.06, without protest. After the bureau had been in operation about three months, it levied a second assessment of one per cent. on the total premiums on all business done in the State, towit, $103,647.61, without making any deductions or exceptions for farm or other special kinds of insurance. This assessment amounted to $1,036.47. The appellant thereupon, by letter, inquired of the bureau as to why the second assessment should not be based on the same conditions as the first, and the bureau answered that the change was made by reason of the fact that the very large percentage of deductions under the first assessment demonstrated that unless the change was made, the usefulness of the bureau would be seriously crippled or the percentage of the assessment would be unreasonably high. The appellant responded to this, saying that the proposed assessment, without excluding the farm and other special kinds of insurance, as was done under the first assessment, was not equitable in view of the fact that the premiums on the other kinds of insurance do not come within the scope of the bureau, and should have no bearing in determining the rate of the assessment. Appellant stated that the rate of assessment should be increased, as the companies would then bear their relative proportion of the burden, based on the services actually performed, and that this was the only method that could be adopted without discriminating against the interested companies. The appellant enclosed a check for $436.06, instead of the amount levied by the committee of the bureau. Speed accepted this check subject to the action of the Arkansas Supervisory Committee in New York.

This led to further correspondence between the bureau and appellant, in which the appellant insisted that the report of the bureau showed, and that it was a fact, that the actual services performed by the bureau were in connection with ratings on town and manufacturing property only, and that therefore the assessments should be based alone upon premiums on such property. Or, in other words, that the assessments should be based on premiums on such classes of risks as actually required the services of the bureau; that this fact was recognized in the first assessment by excluding therefrom premiums on tornado, farm, steam railway, and per bale cotton contract insurance.

The bureau, on the other hand, insisted that all these classes of insurance were within the scope of the bureau, and that it was necessary to include these in the second assessment because the deductions made by the various companies under the first assessment plan had been so heavy that the bureau could not secure the necessary funds to carry on its work; that accordingly, the bureau had made the assessment upon the net premiums as reported to the Auditor of State, upon various classes of insurance transacted by the subscribers to the bureau; that the burden had been equally as heavy, in proportion to the services rendered, on the other members of the bureau, and that all had paid the assessment without objection except the appellant. The bureau insisted that it was not the intention of the supervisory committee to make assessments for the operation of the bureau on the basis of the second assessment, but to continue to make deductions along the line of the first assessment, and that it was on account of the heavy cost of the organization that all interests were called upon to contribute to pay for the work.

It stated in one of its letters, in substance, that if it recognized appellant's protest, and should exempt from the assessment the classes of insurance that appellant insisted on that such a course would result in confusion and

uncertainty respecting the means of support for the bureau to such an extent as to make it impracticable to carry on the work at all. In this letter the bureau directed attention to the fact that it was called on very slightly, if at all, to devote attention to many other classifications, such as dwellings, cotton gins, cross-road stores, schools, churches, etc., but that the other subscribers, who wrote heavily on such classes of insurance, had contributed on the uniform basis of assessment on their whole premiums; that if the bureau should eliminate the assessment on premiums upon the classes of insurance insisted upon by appellant other companies writing other classes of insurance would also object to paying their proportion of the expenses of the bureau on the plea that they did not write business in certain towns and localities, and should not be called upon to contribute toward the expense of inspecting and estimating rates in places where those companies maintained no agencies; that therefore the insistence of the appellant would lead to discriminatory methods that would result in conceding to some individual subscribers more advantageous terms than the uniform assessment as prescribed by the committee. The bureau concluded this letter by stating that it would be unable to extend the services of the bureau to any company refusing to pay according to the assessment adopted, and its manager would decline to act as the delegated expert or adviser of such company and leave it to make its own arrangement for compliance with the law other than through the medium of the bureau.

In one of its letters the appellant reminded the bureau that it had acted upon the latter's suggestion and had incurred the expense of printing and publishing the rates of insurance on tornado risks and farm property, and that the bureau had been put to no expense in connection with its farm rate schedules except such fee as may have been necessary for filing them with the Insurance Commissioner. In this letter appellant states: "After reviewing the case, we think you will agree that

it would be entirely inequitable to request the National Union to pay a heavy expense to the bureau on premiums on farm insurance, when, in the circumstances, the bureau was subject to practically no expense in that connection so far as this company is concerned."

In answer to this, the bureau stated that it had to publish the schedules because agents of other companies wanted them for comparison.

In one of its letters appellant called attention to the fact that the increase in the assessment against which it protested amounted to 137.7 per cent., and asked what the average increase of this assessment was upon the other companies, and in reply to this the bureau stated that the average increase in assessment on the other companies was about 20 per cent. The appellant, in answer to this, stated that the average increase over the first assessment on the other companies being only 20 per cent. confirmed its opinion that the basis upon which the second assessment was levied was unfair to and discriminatory against appellant. In this letter appellant enclosed its check for $87.21, representing its share of the average increase, and notified the bureau that if it insisted on withdrawing its services from appellant that the latter would take steps to protect its rights.

The bureau, in another letter, called attention to the fact that other companies had paid their assessment on tornado premiums, and that many had paid far in excess of the amount returned by the appellant. In answer to this, appellant replied that on tornado premiums covering farm property it could not be assessed, inasmuch as it had filed and distributed its own rates on all farm business, both fire and tornado, in accordance with its rights under the law, and the bureau was subject to no expense in connection with the farm insurance business of appellant.

Speed then notified appellant that it was necessary for him to resign his power of attorney as its agent.

In the last letter written to Speed, the appellant, among other things, says: "The principle involved for which we have all along been contending remains unchanged, namely, that the company could not be assessed in connection with farm business by reason of the fact that the bureau was under no expense in connection with this class, and that consequently the present mode of apportioning expense is incorrect and discriminatory, and that if the percentage of assessment to meet the outlay of the bureau is insufficient for its needs, the ratio of assessment should be accordingly increased. This company would, of course, have no objection whatever to meeting its pro rata of the expense so calculated, even if the increase was considerable."

Speed answered this, stating that no exception could be made in favor of appellant.

The bureau, through its manager, Speed, notified appellant's agents that appellant was no longer a subscriber to the bureau, and thereafter not to use any information or supplies which emanated from the bureau in the transaction of the business of appellant. The Auditor, as Insurance Commissioner, notified appellant that it was not complying with the act of 1913 in the filing of its schedules of rates on urban property; that only a schedule of rates on farm property had been filed, and that it would be necessary for it to file its rates on other classes of property in order to comply with the act of 1913.

Appellant then instituted this suit against the Auditor, as Insurance Commissioner, and J. S. Speed. It alleged, among other things, that it was the duty of the bureau and the common expert employed by it to serve all insurance companies desiring to do business in Arkansas on similar terms; but that the bureau, utilizing the common expert, is conducting its business by making arbitrary rules which will operate to exclude companies from doing business in the State unless they pay excessive and discriminatory assessments to become members thereof; that appellant was the only company doing a

farm insurance business direct, and that it did the same on the installment plan, and not through its urban agents; that the rules of the actuarial bureau required the appellant to pay assessments of approximately $1,200 a year in addition to what it would be required to pay on its urban business, and therefore this was a discriminatory charge against appellant for the benefit of companies doing urban business, since practically all of the expenses of the bureau were incurred in urban business; that appellant insisted that it had the right to be a member of the bureau and to have the benefit of its services upon the payment of one per cent. assessment upon all of its premiums except its farm insurance, which it had offered to pay, and also any other proper assessment charged against it, to continue its membership in the bureau; that the appellant had filed its own schedule of rates on farm insurance, and made its own inspection, and had never asked nor desired any services or information from the bureau on its farm business; but the bureau was exacting of appellant a charge of approximately $1,200 a year more than its just proportion of the expenses of maintaining the bureau in order that appellant may obtain the information and estimates made by the bureau which are essential to enable appellant to conduct an urban insurance business; that this arbitrary rule adopted by the bureau requires the appellant to pay more than $2 to $1 paid by the companies doing an exclusive urban business in order to obtain the services of the bureau. Appellant prayed that the Auditor be enjoined from ousting it from doing business in the State, and that he be required to issue licenses to the agents of appellant, and that Speed, as manager of the bureau, be enjoined from maintaining arbitrary and unreasonable rules as conditions of membership in the bureau, and be enjoined from excluding appellant as a member thereof.

Speed answered, denying all of the material allegations of the complaint, and setting up substantially, among other things, that out of the eighty-five companies

represented by Speed, appellant alone had complained of the method of assessment; that the method was as fair, equitable and uniform to all companies as can be conceived; that no method will fail to cause some companies to contribute proportionally a little more than for services actually rendered; that the assessment can not be made with mathematical nicety so that it will not result in some inequality somewhere; that it rests upon a reasonable basis, is not essentially arbitrary, and is the exercise of a fair discretion, even if said bureau be regarded as a public service bureau or an agency of the State; that the assessment was made in good faith with no view of discriminating against or unduly charging appellant, and has been affirmatively approved by all of the members of the bureau except appellant; that he is willing to represent appellant as its agent or attorney in fact on the same terms and conditions applying to all other subscribing companies, *i. e.*, an assessment based on the net premiums for the year 1914-1915 reported to the Auditor, but that he was unwilling and refused to make any exceptions of appellant, or to change the entire plan of assessment, and endanger the continuance of the bureau because of the unwarranted dissatisfaction of one company.

The court dismissed the appellant's complaint for want of equity. From that decree this appeal comes. Other facts stated in the opinion.

WOOD, J., (after stating the facts). (1) I. The business of fire insurance so affects the public interest that it is generally held to be a proper subject-matter for franchise and police regulation by the State. Generally speaking, fire insurance is regarded as a commercial necessity. 14 R. C. L. 857, sec. 25. See *Citizens Ins. Co.* v. *Clay,* 197 Fed. Rep. 435; *McCarter, Attorney General,* v. *Fire Ins. Co.,* 74 N. J. Eq. 372, 18 Ann. Cas. 1048. The public are so largely affected by it that the State undertakes to supervise the business by prescribing the conditions upon which it may be done. But while the business is impressed with a public use, and is therefore of a *quasi-*

public character and subject to license and regulation, it is not so entirely of a public nature that the public have a right to demand service of the companies authorized to do business in the State as they may do of purely *quasi*-public corporations or agencies.

(2) If the majority of the members of the bureau, through its governing committees or its manager, should undertake to formulate rules, as conditions precedent to membership therein, that would have the effect to eliminate competition and create a monopoly of the insurance business by certain favored companies to the prejudice of the public seeking insurance, or to the detriment of other insurance companies authorized to do business in the State, it would undoubtedly be within the jurisdiction of a court of equity, at the instance of the Attorney General, or other insurance company injuriously affected by such conduct on the part of the bureau, to restrain the making or the enforcement of such rules. This the courts would have the power to do, not because the statute authorizing the creation of the bureau constitutes the same a public agency, but upon the broad ground of public policy and the power of the court to inhibit companies doing an insurance business from conducting such business in such a manner as to injuriously affect the public.

(3) Since insurance companies are only authorized to do business in the State upon the certificate of the Auditor that they have complied with all the laws affecting them, they are creatures of the State. Kirby's Digest, sec. 4345. Hence the companies constituting the bureau must conform to the laws and the general policy of the State and do no act, either individually or in concert, that has a tendency to injuriously affect the public or the interest of any other insurance company that is authorized to transact business in the State. See *Inter-Ocean Pub. Co.* v. *Associated Press,* 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568; *Western Union Tel. Co.* v. *State,* 76 N. E. 100.

Therefore, if appellant has shown that the bureau is conducted by its manager or governing committees under

such arbitrary rules as to exclude from the State companies engaged in the dual business of urban and farm insurance, and in a manner to create a monopoly in favor of the other insurance companies and to the exclusion of appellant, as alleged in its complaint, then appellant would be entitled to the relief sought, whether the bureau, under the act, be treated as the mere private agency of its constituent members or as a *quasi*-public agency under whose rules and regulations the business of insurance shall be conducted.

II. This brings us to the consideration of the question as to whether the rules adopted by the bureau for assessing its members to meet the expenses incident to maintaining the same are so arbitrary and unreasonable as to unjustly discriminate against appellant in favor of other companies, and to virtually preclude appellant from enjoying the benefits of the bureau, and by so doing to practically preclude it from doing business in the State on the same or equal terms with other companies. The contentions of the respective parties on this issue and the facts mainly relating thereto are reflected in the correspondence set forth in the statement.

It will be observed that the act under which the bureau was organized does not prescribe any rules for assessing its members to meet the expenses of maintaining the organization. So far as any statutory limitations are concerned, the bureau is left entirely free to adopt its own rules. The purpose of this statute, as all other insurance laws, primarily, is to protect the public who are seeking insurance, and not to confer any private advantage or benefit upon companies doing an insurance business disconnected with the interests of the public.

It was shown that these bureaus are created in most of the States of the Union, the purpose of such organizations being to place the business of fire insurance on a scientific basis, so that the premiums might be fixed according to the actual risks undertaken, and by thus making rates commensurate with the true hazards the design

was that the public should get the benefit of reduced rates growing out of a scientific and systematic conduct of the business.

Several of the States, in 1915, adopted the recommendation of the National Convention of Insurance Commissioners and enacted what is designated a "Model Rating Bureau Bill." Act 76, Acts of Michigan, 1915; Acts of Missouri, 1915, pp. 313-320; Laws of Pa. 1915, Act 401; Laws of Minn., 1915, chap. 101. These acts require all insurance companies to maintain or become a member of a rating bureau. The Arkansas act permits the companies to employ a common expert, but it does not require that any company shall employ such expert. The model bill adopted by these States contains a provision that the expenses of the bureau "shall be shared in proportion to the gross premiums received by each member during the preceding years, to which may be added a reasonable fee." The act under review, as we have seen, does not prescribe the manner in which the expenses shall be paid by the members of the bureau. But it was shown that the Arkansas Bureau adopted the same plan as that prescribed in the acts of those States adopting the model rating bureau bill. True, several of the States (Iowa, Oklahoma, Kentucky and Kansas) have enacted rating bureau bills which provide for deducting farm insurance premiums, and in some of them the premiums on other insurance, in making the assessment to meet the expenses of the bureau. But the fact that the method adopted by the Arkansas bureau is modeled after a bill that was recommended by the National Convention of Insurance Commissioners and enacted into law in several of the States is a cogent argument in support of the contention of the appellees that the method of the Arkansas bureau is not arbitrary and unreasonable.

The principal basis of appellant's contention, that premiums on farm business should not be taken into consideration in making the assessment for expenses, is that

the farm business is essentially different from urban business; that the companies who compete for that class of business operate a farm department, with men who devote a lifetime to farm insurance business in charge, and that the actuarial bureau rendered no services that are needed by a farm insurance business; that, on the other hand, the urban business requires that rates be made along scientific lines by experts who must consider each class of risk from the standpoint of "occupancy, exposure, protection, processes of manufacture," etc., elements that do not enter into consideration on farm property.

The testimony of the secretary tended to prove that the principal expense of the bureau was incurred in the inspection of urban property and the classification of the same in order to fix a basis of rates for insurance. On the other hand, the testimony of Speed tends to show that the bureau issued a general basis schedule for farm property, and that some service was furnished companies who were members and who were doing a farm, as well as an urban, business. His testimony showed that dwelling houses in cities and towns, like dwelling houses on farms, were not individually rated by the bureau, but were rated by the agents themselves by applying the basis schedule; that most of the risks in towns of less than five hundred people were not individually rated, and that therefore more than 50 per cent. of the risks in cities and towns were not so rated. It was shown that dwellings in cities and towns constituted about 35 per cent. of all the insurance; that farm insurance constituted 7 per cent.; that various other classes of risks in cities and towns, such as tornado, steam railway, per bale cotton contracts, cotton gins, etc., were not individually rated. So Speed testified that it was impossible, with respect to the service the bureau renders, to divide insurance into urban business on the one side, and farm business on the other. He stated that there was practically no difference between the situation of farm risks and the various other unrated risks so far as the service of the bureau was concerned.

He further testified that if premiums on farm business were excepted that it would logically follow that all other exceptions that received no benefit from the services of the bureau so far as specific rating was concerned would also have to be excepted, and that it was impossible to devise any plan of assessment that would enable the bureau to pro rate the expense of maintaining same according to the services actually performed to its various members.

(4) Without pursuing the question of fact further, we are convinced that the method of making the assessments as adopted by the bureau was not an arbitrary and unreasonable discrimination against the appellant. On the contrary, we are convinced that the evidence shows that the plan adopted was the fairest and most equitable that could have been devised when the interests of all the subscribers to the bureau were considered. It is manifest that if exceptions were allowed on farm insurance, then exceptions would have to be allowed also on other classes of business similarly situated, or else the companies writing these other classes of insurance could claim that the assessment was an unjust discrimination as to them. Thus the plan of the organization for raising the necessary funds to meet its expenses and to preserve its efficiency would be subject to perpetual change, and the bureau could have no settled plan at all. Any plan should have in view the interests not of one or a small number of subscribers doing a certain kind of insurance. but a plan that would operate most equitably upon all the subscribers. The plan adopted was within the discretion of the bureau, and appellant has no right to continue as a member therein and enjoy its benefits without conforming to the rules, which, so far as the proof shows, the remaining eighty-four members acquiesced in, as the best plan that could be established for maintaining the work of the bureau. The decree is therefore correct, and it is in all things affirmed.

McCULLOCH, C. J., and SMITH, J., concurring in the judgment.

SCHOOL DISTRICT NO. 44 *v.* RURAL SPECIAL SCHOOL DISTRICT NO. 10.

Opinion delivered April 9, 1917.

1. SCHOOL DISTRICTS—ANNEXATION—PARTIES.—Under Kirby's Digest, § 7695, authorizing the annexation of contiguous property to a school district, the school district which includes the territory to be annexed, is made, by the statute, a party to the record.
2. SCHOOL DISTRICTS—ANNEXATION OF TERRITORY—POWER OF DIRECTORS.—The directors of a school district may, under Kirby's Digest, §§ 7614 and 7626, resist proceedings to annex a portion of their property to another district.
3. SCHOOL DISTRICTS—ANNEXATION OF TERRITORY—WHO MAY APPEAL.—When it is sought under Kirby's Digest, § 7695, to annex certain territory of one school district to another, the district whose territory is to be annexed may, under Kirby's Digest, § 1487, appeal from a judgment of the county to the circuit court, without its board of directors first appearing in the county court.

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

W. Prickett, for appellant.

1. The court erred in dismissing the appeal. Appellant was the party aggrieved and had the right to appeal, and an appeal was prayed and granted. Kirby's Digest, sec. 1487; 49 Pac. 5; 39 Am. Dec. 716; 3 N. E. 180; 100 N. Y. 243; 45 S. E. 498; 118 Ga. 684; 88 Ill. 490; 3 Corp. Jur. 620; 45 N. E. 706; 128 Mass. 592; 28 Ark. 478; 30 *Id.* 578; 64 *Id.* 349; 66 *Id.* 82; 90 *Id.* 219; 95 *Id.* 385; 109 *Id.* 11.

2. Taking an appeal is a general appearance. 4 C. J., sec. 37; 1 Ark. 55; 2 *Id.* 195; 42 *Id.* 268; 53 *Id.* 181; 68 *Id.* 561; 85 *Id.* 431; 87 *Id.* 230.

Minor Pipkin, for appellee.

1. The record showed no cause pending between the two school districts.

2. The affidavit for appeal was not sufficient. 2 Corp. Jur. 341, sec. 57; Kirby's Digest, sec. 1487.

3. District No. 44 was not a party. Kirby's Digest, secs. 7695, 1487; 77 Ark. 586. Nor was it aggrieved.

HART, J. On January 19, 1916, a petition was filed in the county court of Polk County, Arkansas, to annex certain territory of School District No. 44 to Rural Special School District No. 10. The petition was signed by the directors of Rural Special School District No. 10, and by certain qualified electors residing in the territory to be annexed. A map was annexed to the petition, and it shows that about fifteen hundred acres of land was asked to be taken from Common School District No. 44, and that there was left in it only about eight hundred acres of land. The petition was filed under section 7695 of Kirby's Digest, which provides that the county court shall annex contiguous territory to single school districts under the provisions of the act when a majority of the legal voters of said territory and the board of directors of said single district shall ask by petition that the same shall be done. On the same day the petition was presented to the county court and the prayer of the petition was granted and the territory described in the petition and plat was ordered annexed to Special School District No. 10 as prayed for.

In *Rural Special School District No.* 17 v. *Special School No.* 56, 123 Ark. 570, the court held that the language of section 7695 was not mandatory. On July 14, 1916, two of the directors of School District No. 44 filed their affidavit for appeal in statutory form. The county court entered an order allowing the appeal and directing its clerk to file a transcript of the papers and the proceedings in the case with the clerk of the circuit court, which was done.

In the circuit court, Rural Special School District No. 10, through its directors, filed a motion to dismiss the appeal on the ground that School District No. 44 was not a party to the proceedings in the county court, and had no right to appeal under the statute. The circuit court sustained the motion and ordered that the appeal be dismissed. The directors of School District No. 44 have appealed to this court.

Article 7, section 33, of the Constitution of 1874, provides that appeals from all judgments of county courts may be taken to the circuit court under such restrictions and regulations as may be prescribed by law. To carry this provision of the Constitution into effect, the Legislature enacted section 1487 of Kirby's Digest, which provides that appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court at any time within six months after rendition of same by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the court in which the appeal is taken. The record shows that an affidavit and prayer for appeal was filed within the time prescribed by this statute by the directors of School District No. 44, and that the county court granted the appeal.

It is the contention of counsel for appellee, however, that because School District No. 44 was not formally made a party to the proceedings in the county court by an order of the county court that it is not "the party aggrieved" within the meaning of section 1487 of Kirby's Digest. To support this contention, they rely on *Casey* v. *Independence County,* 109 Ark. 11; *Phillips* v. *Goe,* 85 Ark. 305, and *Turner* v. *Williamson,* 77 Ark. 586.

The *Casey* case was where a citizen and taxpayer was allowed to intervene in proceedings in the county court for the designation of a county depositary. In the *Phillips* case, the revocation of a prohibitory order of the sale of liquors was involved. In the *Turner* case the question of granting a ferry license was in issue. In each of these cases and in other cases of like character, where a citizen and taxpayer whose interest is not directly affected by the special proceedings, desires to appeal from the order of the county court, he must appear in that court and be made a party to the proceedings. In no other way could the record show his interest in the proceeding or his right to appear and be made a party thereto. After the order in the case is made, the proceedings are at an end so far as the county court is concerned; unless it

should exercise its right of setting aside the order during the term for cause shown. So the proceedings being at an end in that court, the county court could not determine whether the party seeking to appeal was directly interested in the subject-matter of the litigation and he is not a "party aggrieved" within the meaning of the statute.

Here the facts are essentially different. School District No. 44 is a party to the record by virtue of the statute under which the proceedings were instituted and its right to test the validity of the proceedings by appeal is clear. By the terms of the statute its right to the property asked to be taken from it and annexed to the special school district was to be established or divested by the judgment of the county court. It had no other time, place or forum in which to determine its rights in the matter. If the petition was granted, its rights to the property were lost, and if the petition was rejected, the property remained its own. We think the right of the directors of the district to appeal is analogous in principle to that of the county judge where the interests of the county are involved. We have a statute which provides that when appeals are prosecuted in the circuit court or Supreme Court, the judge of the county shall defend same. This court held that by imposing this duty upon him, the statute incidentally and necessarily invested him with the right to appeal in behalf of the county. *Ouachita County* v. *Rolland,* 60 Ark. 516.

In the later case of *Ex parte Morton,* 69 Ark. 48, where the adult inhabitants residing within three miles of a schoolhouse filed a petition in the county court asking the county court to make an order prohibiting the sale of intoxicating liquors within three miles of a schoolhouse, the county court refused to make the order and the petitioners appealed to the circuit court. The circuit court granted the prayer of the petition and made an order forbidding the sale of intoxicating liquors within the territory named. The record then recites that thereupon the county judge asked that the county be made a party,

which request the court refused. He then prayed an appeal to the Supreme Court, which was granted. The Supreme Court held that the county judge had the right to appeal from the order of the circuit court.

Mr. Justice RIDDICK, speaking for the court, said: "Our statute provides that when appeals from the orders and judgments of a county court are prosecuted in the circuit or Supreme Court, the judge of the county court shall defend the same. Sand. & H. Dig., 1270. This, as heretofore decided, includes the right to take an appeal. *Ouachita County* v. *Rolland,* 60 Ark. 516, 31 S. W. 144. Nor do we think it was necessary that either the county or the county judge should be made a party to the proceedings in the circuit court, in order to exercise this right. The circuit judge did not err in refusing to make the county a party, but the county judge still had the right to appeal by virtue of the statute, and the motion to dismiss the appeal must therefore be overruled."

We think the rule there announced applies with equal force here. Section 7541 of Kirby's Digest provides that each school district shall be a corporate body, and under its name may sue and be sued in any of the courts of this State having competent jurisdiction. Section 7614 provides that the directors of the school district shall have charge of the schoolhouse and grounds and other property belonging to the district, and shall carefully preserve the same. Section 7626 provides that the school directors, in all suits and actions at law brought by or against their district, shall appear for and in behalf of said district.

Thus it will be seen that the trend of our decisions is that "the party aggrieved" by the judgment must appear by the record. In application of this rule to the present case a citizen or taxpayer of School District No. 44 would not be allowed to take an appeal from the judgment of the county court unless he had been made a party to the proceedings in that court or had asked to be made a party upon proper showing. The reason is that

his interest in the judgment would not appear by the record, and he would not be a "party aggrieved" within the meaning of the statute. On the other hand proceedings under section 7695 necessarily involve the school district from which the property is sought to be taken and annexed to the special school district and by force of the statute it is an interested party just as much as the county is an interested party when an order affecting its interest is made. As shown by the record in the present case, the greater part of its territory is sought to be taken away. In any case the schoolhouses and other property of the district might be situated on the ground asked to be annexed to the special school district. By the statute it is made the duty of the directors of the school district to protect its property and to represent the district in all suits by or against it. This undoubtedly carried with it the right of the directors to have appeared in the county court and resisted the proceedings in the present case. The power given by the statute also gave them the right to appeal without first having appeared in the county court with just as much reason as the statute making it the duty of the county judge to defend for the county gave him the right to appeal from the judgment of the circuit court without first having formally made the county a party to the proceedings in the circuit court. In short, our views are that under section 7695, the school district from which territory is sought to be taken and annexed to a special school district is made a party to the proceedings by virtue of the statute, and the directors of such school district may take an appeal from the proceedings without first having appeared in the county court and asked to be made a party to the proceedings therein.

For the error in dismissing the appeal of School District No. 44, the judgment must be reversed and the cause will be remanded for further proceedings according to law.

McCULLOCH, C. J., (dissenting). A proceeding under the statute to annex territory to a school district is not an adversary one, but it may become such by any interested person appearing and making himself a party on permission of the court. The school district whose territory is about to be invaded may, perhaps, be made a party for the purpose of remonstrating against the change, but it is, I think, a mistake to say that such district becomes a party *ipso facto,* upon the institution of the proceedings. The statute is not mandatory, and in order to reach a conclusion as to the propriety of annexing the territory, the court may and should, when so requested, allow interested property owners, or perhaps the invaded school district, to be made parties. *School District No.* 45 v. *School District No.* 8, 119 Ark. 149; *Rural Special School District No.* 17 v. *Special School District No.* 56, 123 Ark. 570.

The statute provides that territory may be annexed "when a majority of the legal voters of said territory and the board of directors of said single district shall ask by petition that the same shall be done." Kirby's Digest, sec. 7695. There is no statutory provision whatever for parties defendant, and the proceeding is in no sense a contest between two school districts. If it had been so intended, provision would have been made for notice, as in all other adversary proceedings.

No one is, therefore, aggrieved by the judgment unless it be one who has actually been made a party to the record. The cases relied on by appellees and cited in the opinion of the majority fully sustain that proposition. There is no analogy, I think, between the duties of school directors and of a county judge in regard to appeals. This court held that a county judge could appeal from a judgment of a circuit court rendered on an appeal from the county court, for the reason that the statute provides that when appeals are prosecuted in the circuit court from orders of a county court, "the judge of the county court shall defend the same" (Kirby's Digest, section

1493), which was construed as making the county court a party to all appeals to the circuit court from its orders. There is no such provision as to the duties of school directors. They act for the district when sued, but the district is not sued when the electors of part of its territory petition the county court to be annexed to an adjoining single school district, for the county court acts, pursuant to its statutory authority over the school system of the county, upon the petition of the electors, and not in adjustment of a controversy between two districts.

My view of the matter is that the circuit court was correct in dismissing the appeal for the reason that School District No. 44, not having been made a party to the proceeding, was not aggrieved by the judgment of the county court within the meaning of the statute.

BRIGGS v. MOORE.

Opinion delivered April 9, 1917.

1. DEEDS—FRAUD IN PROCUREMENT—ACTION TO SET ASIDE.—In an action to set aside a deed for fraud, *held*, the evidence did not show that plaintiff was induced by fraud to execute the deed.
2. ADVERSE POSSESSION—ACQUISITION OF TITLE.—One A. placed his daughter and her husband in the possession of land. They claimed title as their own and paid the taxes, and occupied the land seven or eight years before A.'s death and two years thereafter, and then sold the land to B. *Held*, title was acquired by adverse possession, and that A.'s wife could not assert a dower right against B.
3. ESTOPPEL—GIVING POSSESSION OF LAND—EQUITABLE ESTOPPEL.—A. and C., a husband and wife, put their daughter in the possession of certain land, verbally giving her the same. When the daughter remained in possession about nine years, C., the wife, after A.'s death, is estopped from setting up an interest in the lands, as against her daughter's grantee.

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

Woodson Mosley and *S. J. Hunt*, for appellant.

1. Upon the death of S. R. Briggs, appellant was entitled to homestead and dower. 58 Ark. 298. The deed to Rogers was signed to convey the interest of the Peets.

She did not know she was signing away her interest. No consideration was paid her. The deed should be set aside as to her interest. 38 Ark. 429; 40 *Id.* 28; 84 *Id.* 493; 17 Ann. Cases, 992. She was old and absolutely dependent upon her children, and was not on an equal footing. 101 Ark. 141.

2. The deed to Moore was a mortgage. 13 Ark. 116, 125-6; 103 *Id.* 485, 494; 11 Ann. Cases, 313. It was usurious and void. 41 Ark. 331; 95 *Id.* 501. Appellant still had her interest, homestead and dower, and it is void as to her. Kirby's Digest, sec. 5393; 53 Ark. 457; 55 *Id.* 321.

3. As to the 100 acres, appellant is entitled to 40 as part of her homestead; also to dower. She is not estopped nor guilty of laches. 82 Ark. 367; 97 *Id.* 49; 89 *Id.* 23; 94 *Id.* 110; 96 *Id.* 545; 100 *Id.* 399, 402, 403; 77 *Id.* 43. She can not be deprived of dower except in the way provided by statute. Kirby's Digest, sec. 2702.

4. She is entitled to rents. 60 Ark. 478. Appellee is not entitled to pay for his improvements made after commencement of the action. Kirby's Digest, sec. 2574; 92 Ark. 189. A mortgagee in possession is not entitled to pay for permanent improvements. 97 Ark. 404. See also, 98 Ark. 320, 323, and cases cited.

M. Danaher and *Palmer Danaher,* for appellee.

1. No fraud was shown. 13 Cyc. 754. No false representations were proven. 97 Ark. 15; 71 *Id.* 305; 95 *Id.* 523; 13 Cyc. 583. Mrs. Briggs does not testify that she did not read the deed, and her means of information were equal to those of Rogers or any one else concerned. 95 Ark. 523. If representations were made, they were mere expressions of opinion as to the legal effect of the deed, and as to matters of law, and were not fraudulent.

2. Appellee was an innocent *bona fide* purchaser for value without notice. 6 Cyc. 319.

3. She is estopped. 14 Cyc. 963; 62 Mo. 485, 175; 16 Cyc. 757; 149 Cal. 589; 65 Fed. 742; 87 Tenn. 89; 122 Ark. 78.

4. A parol gift to a child by a parent is valid. 29 Cyc. 168.

5. No usury is shown. 39 Cyc. 1050. If so, it was personal to the borrower. 68 Ark. 8; 66 *Id.* 121.

6. By executing the deed, appellant abandoned the rents. 105 Ark. 646. See also 66 Ark. 259.

HART, J. Mrs. M. O. Briggs instituted this action in the chancery court against I. E. Moore to cancel and set aside certain deeds which she claimed were executed with the intention to defraud her of her dower and homestead interest in the lands embraced in the deeds.

The chancellor found the issues in favor of the defendant and entered a decree dismissing her complaint for want of equity. She has appealed to this court. A part of the facts are undisputed and are as follows:

S. R. Briggs died intestate on the 8th day of November, 1905, in Cleveland County, Arkansas, and at the time of his death owned and occupied as his homestead one hundred and twenty acres of the lands involved in this suit. He was survived by his widow, Mrs. M. O. Briggs, the plaintiff in this action, and by W. R. Briggs, a son and Etta Poteet, his daughter. After his death, while the plaintiff resided with her daughter and her husband, they all executed a deed to their interest in the homestead to Lee Rogers. The latter in turn executed a deed to the homestead to W. R. Briggs. A few months thereafter, W. R. Briggs executed a deed to the defendant, I. E. Moore, to said lands.

Mrs. Briggs resided with her daughter at the time they executed the deed to Rogers, but soon afterward went to live with her son and lived with him on the homestead at the time he conveyed it to the defendant Moore. Prior to his death, S. R. Briggs had given the hundred acres involved in this suit to his daughter, Etta Poteet, and she and her husband took charge of the land and occupied the same until February, 1907, when they executed a deed to the defendant Moore. No deed was ever executed by S. R. Briggs and his wife to Etta Poteet to

the hundred acres involved in this suit. Dower has never been allotted to the plaintiff in either of the tracts involved in this suit. On the 13th day of September, 1912, she instituted the present action asking that the deeds to the defendant Moore to both of the said tracts of land be cancelled and set aside, and that her dower and her homestead interest therein be assigned to her in the one hundred and twenty-acre tract.

(1) Mrs. Briggs testified that she never sold her interest in this land or received anything of value as consideration for signing the deed at the time her daughter Etta Poteet and her husband, Frank Poteet, executed the deed to Lee Rogers. She stated that she signed the deed believing that it was necessary to do so in order to enable Frank Poteet to convey his interest therein; that she was not informed that the deed conveyed her interest in the land until about two years after she had signed it; that soon after she signed the deed she left the residence of her daughter and went on the one hundred and twenty acre tract to live with her son.

She said, on cross-examination, that she had never received any rents from the place and knew that the defendant Moore had had charge of the place ever since the year 1908, and that Lee Rogers had the place during that year. She admitted that her son worked the land a part of that time and paid the rent to Mr. Moore.

Her daughter, Etta Poteet, and her husband, Frank Poteet, both testified that just before they conveyed their interest in the one hundred and twenty acres of the land known as the homestead tract, that W. R. Briggs came to see them and wanted them to sell their interest in it to him, and that they refused to do so because W. R. Briggs had refused to help out Frank Poteet in a trade just before that time; that they then made the trade with Lee Rogers and conveyed their interest in the land to him; that Mrs. Briggs fully understood what she was doing when she signed the deed; that they spoke to her about it a week or two after the deed was executed, when they

found that Rogers had made a deed to the land to W. R. Briggs; that the plaintiff laughed and said that she knew at the time she signed the deed that Rogers was buying it for her son.

The justice of the peace who took the acknowledgment of the plaintiff to the deed testified that he explained to her that she had conveyed her interest in the old home place, and that she was selling the land; that about a year before this time he had taken her acknowledgment to an oil deed on the same land, and that he explained to her the difference between the two deeds and told her that she was signing a deed to the land itself the last time.

W. R. Briggs admitted that he conveyed the land to the defendant Moore for $220, and stated that at the time he borrowed about $215. He stated that at that time the land was worth about $360, and that he thought that the transaction was intended to be a mortgage instead of an absolute sale from him to Moore.

On the other hand, Moore testified that the sale was an absolute one and that no effort was ever made by Briggs to pay back to him any money. He stated that after the sale was made he agreed to a resale of the land to Briggs upon the payment of $220 by Briggs on the first day of November, 1908; that no effort had been made by Briggs to pay him that amount; that he had inclosed the whole one hundred and twenty acres with a wire fence, making two separate fields of the land; that he had cleared and put into cultivation seventy-five or eighty acres and had built a little barn, at a cost of $900; that only about twenty-five acres had been cleared when he got possession of the land.

Lee Rogers testified that he bought the old home place for W. R. Briggs, and that the plaintiff knew that he was going to buy the place a week or two before the deed was signed; that she signed the deed without any representation on his part to mislead her, but does not know whether she signed it because she thought she was

going to finally get the title to it or because she thought her son was going to get the title to it.

Under these circumstances we think the chancellor was justified in finding that no fraud was practiced upon plaintiff to induce her to execute the deed to Lee Rogers. It is true she had a homestead interest in the land without executing that deed; but it seems to have been her purpose to give the fee in the land to her son. She does not herself testify as to any misrepresentations made to her by Lee Rogers to induce her to execute the deed. It will be remembered that she lived with her daughter and her husband at the time she executed the deed, and that soon after Rogers made the deed to her and her son took possession of the land, she went there to live with him. Her daughter and her husband both testified that when they found out Lee Rogers had executed a deed to W. R. Briggs in about a week after they had executed their deed to Rogers, they spoke to Mrs. Briggs about this fact, and she seemed pleased to know that her son had acquired title to the land and said that she had known that the land was to be conveyed to him by Rogers before she signed the deed. According to the testimony of Rogers, he bought the land either for Mrs. Briggs or her son, but did not know which. It is evident that he made no misrepresentations to the plaintiff, and thought that the plaintiff and her son had an understanding about the matter. This view is also borne out by the testimony of her son. He stated that his mother knew that he had acquired title to the land and had conveyed it to the defendant Moore. So it seems that she signed the deed in question in order that her son might eventually acquire title in fee to the land. This was a sufficient consideration and we are of the opinion that the chancellor did not err in holding that she was not induced by fraud to execute the deed to the hundred and twenty acre tract.

In this view of the case, it does not make any difference whether the sale from W. R. Briggs to Moore was an absolute or conditional sale. W. R. Briggs is not a

party to this suit, and his rights in the land are not in issue. The interest of the plaintiff in the land was divested out of her by the deed to Lee Rogers, and she is not concerned in the transaction between W. R. Briggs and the defendant Moore.

(2-3) According to the testimony of Etta Poteet and her husband, her father in his lifetime first gave her sixty acres of land, and she and her husband went into possession of it. Subsequently her brother Charles died, and her father gave her an additional forty acres, making one hundred acres in all; that no deed was ever executed by S. R. Briggs and his wife to their daughter or her husband, but that they lived on this land for over seven years before S. R. Briggs died; that the land was regarded as belonging to them, and they continued to live on it for about two years after the death of S. R. Briggs until they conveyed it to the defendant Moore.

The plaintiff admitted that they had given to their daughter eighty acres of land and permitted her and her husband to go on it, and that they had lived on it and claimed it as their own for seven or eight years. This eighty acres referred to by her was part of the hundred-acre tract involved in this lawsuit.

The defendant Moore testified that he paid Etta Poteet and her husband the full value of the land at the time he purchased it; that he asked the plaintiff if the land belonged to them, and that she, her daughter and her daughter's husband all said that the land belonged to Etta Poteet; that he asked W. R. Briggs if the land belonged to Etta Poteet, and he said that it did and that his father had given her the land; that he knew that Etta Poteet and her husband had lived on the land ten or twelve years, and had sold the timber off of it before the death of S. R. Briggs; that he had constructed a good wire fence all around the hundred-acre tract and had cleared thirty-five acres of it and repaired buildings; that the value of the fences built by him on this tract is $375, and the value of all the improvements is $450.

It is true that plaintiff denied that she told Moore that the hundred acre tract belonged to her daughter. She stated that Moore asked her one day if she and her husband had ever made a deed to the land to the Poteets, and that she replied that they had not; that she told him that the Poteets did not have any title and that she did not know when they would get one. Be that as it may, as we have just seen, the plaintiff admitted that they had given to their daughter eighty acres of this land, and that she had occupied it with her husband for seven or eight years before S. R. Briggs died. They paid taxes on the land during all the time they occupied it and in every respect treated it as their own with the knowledge of S. R. Briggs and his wife, the plaintiff in this case. They sold the timber off of the land during the lifetime of S. R. Briggs.

Under these circumstances we think the chancellor was right in holding that the plaintiff was not entitled to have the deed from Etta Poteet and her husband to the defendant Moore set aside. A preponderance of the evidence shows that S. R. Briggs and his wife gave the hundred acre tract to the Poteets and put them in possession of it. Defendant was a purchaser of the land for a valuable consideration in good faith from the Poteets and under these circumstances the plaintiff would be estopped from asserting an adverse title thereto.

The decree will be affirmed.

SCOTT v. MCCRAW, PERKINS & WEBBER COMPANY.

Opinion delivered April 9, 1917.

1. APPEAL AND ERROR—ADMISSION OF TESTIMONY—FAILURE TO OBJECT BELOW.—Where no objection to the admission of evidence was made in the court below, its competency will not be reviewed on appeal.
2. FRAUDULENT CONVEYANCES—LIABILITY OF GRANTEE—SUFFICIENCY OF THE EVIDENCE.—A finding of the chancellor, that a wife fraudulently received money from her husband, in order to defraud his

creditors, and that she received the benefit thereof, will not be sustained where it appeared that she was mentally feeble, and that the husband used the funds for his own purposes.

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

John W. Wade, for appellant.

1. The law does not authorize the charging of appellant's separate estate because of the influence and control of her husband. 95 U. S. 3; 97 *Id.* 304; 120 *Id.* 78; 154 *Id.* 631; 97 Kans. 279; 92 N. W. 923.

2. The mortgagor justly owed her more than the amount of these deposits. 108 N. Y. Sup. 54. Appellees never had any lien on or claim against her property and lost nothing. 35 Ala. 483; 82 *Id.* 503; 17 B. Mon. (Ky.) 268; 93 Va. 341.

3. Appellant was not a party to any fraud. 20 Cyc. 465.

4. None of this property, nor its proceeds, was ever under her control, and she was not liable. 20 Cyc. 633; 58 N. H. 529; 13 N. Y. Supp. 231; 2 P. & H. (Va.) 532.

5. Nor did she or her estate receive any benefit from this property or its proceeds.

6. Appellant was incurably insane. 40 Cyc. 1007. Insanity revokes all agencies. 109 N. C. 508; 21 Cyc. 1424.

7. The decree is contrary to the great preponderance of the testimony. 119 Ark. 492; 109 *Id.* 151.

Riddick & Dobyns, for appellees.

1. Appellant can be held personally liable. 119 Ark. 492. A fraudulent grantee is liable to account for property as a trustee for creditors. 12 R. C. L. 645-6; Wait on Fraud. Conv., sec. 117 *et seq.;* 21 Ark. 22; 52 *Id.* 458; 115 Ga. 385; Wait, Fraud. Conv. (3 ed.), sec. 180.

2. The proceeds went into appellant's possession and her estate received it. *Supra.*

3. She was not insane. 14 R. C. L. 622-623; 26 Ark. 334; 54 *Id.* 588.

4. Former decrees are not conclusive. 81 Fed. 73; 94 U. S. 608. They conclude only as to such matters as were in fact raised by the pleadings. Appellant's estate received the funds and the decree of the chancellor is sustained by the evidence and should be affirmed.

SMITH, J. Dr. S. A. Scott was, for several years, a customer of appellees, who are commission merchants in the city of Memphis, and, during that time, he borrowed a large amount of money from this firm, which was repaid in part by the shipment of cotton. A dispute which arose over the balance due led to the litigation which is reported in 119 Ark. 133.

Doctor Scott had control of his wife's property, and sold a number of lots belonging to her, and invested portions of the proceeds of these sales in other property, the title to which was taken in his own name. He made other uses of other portions of this property. Finally he executed a deed of trust to certain property for the alleged purpose of securing and repaying the money he had used which belonged to his wife. This conveyance was attacked upon the ground that it had been executed in fraud of creditors, and the chancery court canceled it upon that ground. The decree appealed from in that case was affirmed by us in an opinion appearing in 119 Ark. p. 492. Property there uncovered was sold, but the proceeds of the sale proved insufficient to discharge the original judgment against Doctor Scott, and this suit was brought against Mrs. M. Scott, the wife of Doctor Scott, upon the theory that Doctor Scott had sold certain portions of the property so fraudulently conveyed, and had placed the proceeds of such sales to the credit of Mrs. Scott in banks, where accounts were carried in her name. Such accounts were kept with the Bank of Commerce, and the England National Bank, in Little Rock, and with the Merchants & Planters Bank of Eudora.

It appears, from the testimony of Doctor Scott, taken both in this and in the former litigation, that he placed in these banks proceeds of the sale of property covered

by the deed of trust which was adjudged to have been executed in fraud of creditors. It is said, therefore, that, inasmuch as Mrs. Scott has derived the benefit of the proceeds of the sale of the property so fraudulently conveyed to her, she is liable to the creditors of Doctor Scott to the extent of the money so received.

Doctor Scott was examined and cross-examined at great length, without objection, by both court and counsel, and the court found that Mrs. Scott had received enough of the proceeds of the sales of land uncovered in the second suit to pay the balance due on the original judgment, and adjudged that she held said money as trustee for the benefit of the judgment plaintiff, and a decree was rendered against her separate estate upon that theory, and this appeal has been prosecuted to reverse that decree.

Mrs. Scott's defense was made by a guardian who was appointed upon the allegation made in her behalf that she was an insane person. It is insisted in her behalf that she is insane, and that she had no knowledge of, nor part in, the transactions which have been carried on in her name. Physicians of eminence testified that Mrs. Scott is now, and for a number of years past has been, insane, and there is other evidence strongly corroborating this expert testimony. At any rate, it is undisputed that she is a confirmed invalid, and has been for many years, and that, as a result of this illness, she has but little mentality, and we are left in much doubt, under the evidence in this case, whether she has sufficient intelligence to comprehend the purpose and effect of her actions. The notary public, who took her acknowledgments to the conveyances executed by her, stated that she answered intelligently the question he asked her each time when the acknowledgments were taken. However, he said he had no conversation with her on any of these occasions, and he testified that he did not have an opinion as to her sanity, for he thought nothing about this question when called upon to take the acknowledgments.

The officers of the banks where the deposits were made testified that they did not know Mrs. Scott, and could not say whether there was such a person, as she made none of the deposits, and never drew a check against the accounts. It is undisputed that, while the accounts were opened in the name of M. Scott, the deposits were made by Doctor Scott, and all the checks against the accounts were drawn by him. These checks were offered in evidence, and Doctor Scott explained the purpose for which the checks were drawn where that purpose did not appear from the face of the checks themselves. A consideration of this evidence makes it clear that these funds were not withdrawn for the use or benefit of Mrs. Scott, and we are even more certain that she knew nothing whatever about any of these transactions. It appears, from these checks, and the evidence explaining them, that the funds they represented were used by Doctor Scott in various enterprises in which he was engaged, and all for his own purposes and uses.

It is said, however, that this proof is made by Doctor Scott, and that his evidence is incompetent, inasmuch as he could not be the agent of his wife in the misappropriation of her funds, and that, if this testimony is excluded, there is no evidence to show the uses made of a sufficiently large amount of these funds to discharge appellee's debt; and that, in the absence of such evidence, the presumption must be indulged that funds deposited in the name of Mrs. Scott were, in fact, applied for her benefit. It appears, however, that no objection to the testimony of Doctor Scott was offered in the court below, and that much of this evidence was brought out by appellees in the examination of Doctor Scott as a witness for the purpose of explaining these transactions; that Doctor Scott gave testimony tending to establish a necessary part of appellee's case, and no objection to the competency of other portions of his evidence having been made in the court below, such objection can not now be considered here. *Fidelity-Phenix Fire Ins. Co.* v. *Friedman,* 117 Ark. 80.

There is no inherent incompetency in this testimony, and no objection was made to the competency of the witness.

No contention is made in this case that credit was extended to Doctor Scott upon any mistaken assumption of ownership of Mrs. Scott's separate property. The theory upon which the case was tried, and upon which the decree was based, is that Mrs. Scott was a fraudulent grantee, and had been the beneficiary of the sales of property so fraudulently conveyed to her. We think, however, that the finding to this effect is clearly against the preponderance of the evidence. There has been a sale under the directions of the decree upon the second appeal in this litigation, in which the conveyance from Doctor Scott to his wife was held to have been made in fraud of his creditors, and, at this sale, the property so fraudulently conveyed, which was then on hand, was sold; the proceeds of the said property previously sold form the subject-matter of this litigation; and we are of opinion that Mrs. Scott had no information in regard to these transactions and derived no benefit from them. Doctor Scott explains his failure to make, in the second suit, some of the explanations made here by saying that he was then unwilling to disclose his wife's mental condition, and that she never, in fact, knew anything of the former litigation, and that he directed the sheriff to make return of service of the summons in that case when the summons had only been delivered to him, and that he did this because of his apprehension of the disquieting effect the service of process would have upon his wife. He did not tell the sheriff of her condition, however, and made no issue as to her sanity in that case, and he testified that he does so now only because of the attempt here being made to subject her individual estate to the payment of his personal obligations. However that may be, and whatever his motive may have been, for making now a defense which he failed to make in the former case, we are of opinion that the testimony does not show that Mrs. Scott received the

benefit of the sale of lands in question, or that she had any knowledge of the transaction in regard thereto, and the decree of the court below will, therefore, be reversed.

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

ZEIGLER v. DANIEL.

Opinion delivered April 9, 1917.

1. FRAUDULENT CONVEYANCES—PROOF OF FRAUD.—*Held,* no fraud shown in the insertion of the name of one T. in a deed executed by the deceased.
2. ADMINISTRATION—SALE OF LAND—NOTICE OF TITLE.—Where the record title is not in the deceased, a purchaser at an administrator's sale is put upon inquiry.
3. LIS PENDENS—NECESSITY FOR NOTICE—KNOWLEDGE OF PARTIES.—Where all the parties interested in a purchase of land have actual knowledge of the condition of the title, Kirby's Digest, § 5149, providing for the filing of *lis pendens* notice has no application.
4. ESTOPPEL—PURCHASER AT ADMINISTRATOR'S SALE.—A purchaser at an administrator's sale, with knowledge of the title he is buying, can not invoke the doctrine of equitable estoppel, as against a person who has not misled him to his injury.
5. DEEDS—DELIVERY.—The act of the grantor in giving a deed to a third person for record is a sufficient delivery to the grantee.

Appeal from Garland Chancery Court; *E. H. Wootton,* Special Chancellor; affirmed.

W. A. Ratteree and *J. H. Evans,* for appellant.

1. The deed was never intended as a gift to J. W. Daniel, but as a resulting trust for T. R. Daniel.

2. T. R. Daniel did not act as agent of his nephew J. W.

3. The mere fact of plaintiff filing a suit, or petition, in the probate court, without summons or notice, was not notice.

4. Under section 5149, Kirby's Digest, there was no *lis pendens* notice. 183 S. W. 955; 184 *Id.* 852.

5. Plaintiff is estopped.

6. The rents and purchase money have been marshalled and paid out. 107 Ark. 405, etc.

Cites 83 Ark. 416; 102 *Id.* 324; 183 S. W. 955; 134 *Id.* 948; 35 *Id.* 376; 37 *Id.* 47; 75 *Id.* 228, etc.; 107 *Id.* 405.

A. S. McKennon, for appellee.

1. The only way the estate of T. R. Daniel could have any interest would be on the theory that a trust resulted because he paid the consideration. The doctrine of resulting trusts is designed to carry into effect the intention of the parties, not to defeat it. 27 Ark. 77-88; Pom. Eq. Jur. (3 ed.), 2000.

2. The deed was not void as to creditors. 77 Ark. 60; 135 Am. 330; 77 Am. Dec. 203; 67 *Id.* 401.

3. The chancellor found the issues for appellee and his findings are not against the weight of the evidence. The evidence of appellants tending to rebut a gift consists of statements of deceased which are self-serving and incompetent. 96 Ark. 171, 175; 87 *Id.* 496; 77 *Id.* 309. Besides the evidence is contradictory and unreasonable.

4. Courts require clear and satisfactory proof of fraud. 11 Ark. 378; 82 *Id.* 20; 92 *Id.* 509.

5. T. R. Daniel was not insolvent and appellee is not estopped. 99 Ark. 260; 66 Id. 287; 2 Pom. Eq. Jur., sec. 804.

6. The *lis pendens* statute has no application. The sale by the administrator was void. 135 Am. St. 326. None of the parties are injured by the decree, and it should be affirmed.

HUMPHREYS, J. This suit was instituted on November 30, 1914, in the Garland County Chancery Court by appellee against appellant, to cancel a deed executed by Mary S. Zeigler, administratrix of the estate of T. R. Daniel, deceased, conveying to Benjamin W. Zeigler the following described real estate in Garland County, Arkansas, towit: the west half of the southeast quarter, the northeast quarter of the southeast quarter and the southeast quarter of the northeast quarter in section 32,, township 2 south, range 17 west; and for the cancellation of a mortgage executed by Benjamin W. Zeigler and Mary S.

Zeigler, his wife, to J. R. Ewing on the 16th day of March, 1914, to secure a note for $200; and to recover the possession from Mary S. Zeigler of the deed for said real estate executed on the 17th day of October, 1908, by W. H. LeCroy, Octavia LeCroy, J. A. LeCroy, Iona LeCroy and Mrs. J. F. LeCroy to appellant; and to recover the possession of said real estate from Benjamin W. Zeigler, and for rents.

Appellee alleged that he was the owner of said real estate by virtue of a deed executed by W. H. LeCroy *et al.* to appellee on the 17th day of October, 1908, and delivered to his uncle for him.

Benjamin W. Zeigler answered in substance, that the deed, under which appellee claims, had never been delivered to him and never passed any title to him, but whatever title it did pass, if any, was in trust for the uncle, T. R. Daniel; that T. R. Daniel died on the 22d day of November, 1909, the owner of the beneficial interest in said real estate; that it was sold by order of the probate court to pay probated claims against the estate of T. R. Daniel, deceased; that Albert W. Jernigan purchased the land at the sale, and that for valuable consideration he procured the certificate of sale, and on the 12th day of May, 1913, procured a deed to said real estate from Mary S. Zeigler, his present wife, who was the widow of T. R. Daniel, and the administratrix of the estate of the said T. R. Daniel; that he immediately entered into possession of said real estate under his deed, made valuable improvements thereon; that appellee knew of the proceedings in the probate court, failed to object and is estopped; that he afterward borrowed $200 from J. R. Ewing and gave a mortgage on said real estate to secure the indebtedness, and asked that J. R. Ewing be made a party.

Ewing was made a party and answered, setting up his mortgage and pleaded that appellee, by word and conduct, led him to believe that appellee intended to claim no interest in said real estate and is thereby estopped from claiming an interest therein as against his mortgage.

The cause was heard by a special chancellor upon the issues joined and the evidence in the form of depositions and exhibits, from which the court found that the plaintiff, J. W. Daniel (now appellee) is the owner of said real estate; that he acquired his title by deed from W. H. LeCroy *et al.*, and that Mary S. Zeigler is in the wrongful possession of the deed; that T. R. Daniel did not own said real estate at the time of his death; that the deed from Mary S. Zeigler, who was formerly Mary S. Daniel, administratrix of the estate of T. R. Daniel, deceased, to Benjamin W. Zeigler, passed no title, and that the Zeigler's mortgage to J. R. Ewing created no binding lien against said land. The court, in accordance with the findings, decreed a cancellation of Zeigler's deed, Ewing's mortgage, and surrender of the deed from LeCroy to appellee and the delivery of possession of said real estate to him.

From this decree an appeal has been lodged in this court and the cause is here for trial *de novo*.

The record is voluminous and it is impracticable to set out the evidence even in condensed form in this opinion. Suffice it to say we have read the evidence with great care and can not say the findings of fact by the learned chancellor are clearly against the preponderance of the evidence. In fact, we are of opinion that the findings of fact by the chancellor are supported by the weight of the evidence.

T. R. Daniel lived for years in the home of appellee's father. He was the uncle of appellee, and they were associates and close friends. T. R. Daniel was a cripple, and the appellee, as a boy growing up in the family, waited on his uncle for years. In fact, he was so very fond of his nephew that in the year 1902, prior to his marriage, he made a will devising and bequeathing practically all his estate to him. The business affairs of each were entrusted to the other and this confidential and friendly intercourse continued after the marriage of T. R. Daniel and until his death. It is quite natural that the

uncle should give his nephew a part of the real estate, even after his marriage.

(1) The bone of contention is that T. R. Daniel purchased this land from the LeCroys in consideration of a mortgage held by him against the land, and had them make a deed to his nephew to cover up his estate and defeat his creditors. This is largely inferred from the fact that the deed was executed during, or just after, a general money panic in this country, together with some self-serving statements made by T. R. Daniel tending to establish a fraudulent purpose in having the name of appellee inserted in the deed. As against this contention, the natural desire exists on the part of the uncle to reward his nephew for valuable services and kindnesses, love, affection and in addition a close business relationship existed between them; Mrs. Iona LeCroy, J. A. LeCroy and R. W. Daniel all testified to the effect that appellee's name was ordered to be inserted in the deed by his uncle, who at the time stated that he wanted to make a gift of said land to his nephew because he had been of great assistance to him, and had done much for him when sick and afflicted; and the evidence of T. C. Williams, the justice of the peace who took the acknowledgment to the effect that he handed the deed to T. R. Daniel, who said he would hand it to his nephew; as well as the evidence of W. F. Daniel to the effect that T. R. Daniel gave him the deed to have it recorded.

The facts and circumstances in this case are not sufficient to establish a fraudulent purpose on the part of T. R. Daniel in conveying this property to his nephew.

(2-3) On the record before us, there could be no question of innocent purchaser. All parties interested had actual knowledge of the existence of the deed from the LeCroys to J. W. Daniel. If they had not known of the deed, the record title was not in T. R. Daniel, but in the LeCroys, and that would have been sufficient alone to put parties purchasing upon inquiry, and by inquiry the real facts concerning the title could have been ascer-

tained. Appellant relies upon section 5149 *et seq.*, Kirby's Digest, known as the *lis pendens* statute. This statute has no place or application in the case before us for the reason that all interested parties had actual notice of the condition of the title.

(4) It is urgently insisted that the cause should be reversed for the reason that appellee knew of the proceedings in the probate court, and failed to stop them. In other words, appellant insists upon the equitable doctrine of estoppel. The evidence in this case does not meet the rule of equitable estoppel laid down by Mr. Pomeroy and adopted by this court in the case of *Geren* v. *Caldarera,* 99 Ark. 260. The rule there approved is as follows: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." The chancellor must have found in this case that appellee's attorney attended the sale and objected thereto and informed those present of appellee's title. Benjamin W. Zeigler had actual notice of the character of title he was buying, and could not have been misled.

J. R. Ewing, one of the appellants, also invoked the doctrine of equitable estoppel and insists that he inquired directly from appellee concerning his title, and that appellee informed him that he did not intend to assert any claim to the land; and that on the strength of this representation he loaned $200 to Benjamin W. Zeigler and took a mortgage on the real estate in question to secure the payment of the note evidencing such indebtedness. We have examined the evidence of appellant, J. R. Ewing, and appellee, J. W. Daniel, on this point. Upon this point, J. R. Ewing testified as follows:

"Q. State whether or not you ever had any conversation with J. W. Daniel concerning these lands for the purpose of ascertaining if he made any claim to them, and, if so, please state in your own way the conversation you had with him and the purpose for which it was had?

A. Yes, sir; I had a conversation with Mr. Daniel in regard to the land. I asked him if he had the deed to this land, and he told me no, he did not have it, that he could have got it once, but he did not get it, and I asked him if he was going to try to get the land, and he said he did not know that it had been so long that he did not know whether he could get it or not. I told him that I wanted to know that I was thinking of taking a mortgage on this land for $200, and if he was going to try to get it, or had the deed to it, I did not want to have anything to do with it. That was all we said concerning the land.

Q. Did you have this conversation with him for the purpose of ascertaining whether or not he made any claims on these lands?

A. Yes, sir.

Q. You state as a matter of fact, that the conversation you had with J. W. Daniel, the plaintiff herein, at the time hereinbefore mentioned was for the purpose of ascertaining whether or not he claimed any interests in these lands, and at that time he gave you to understand that he had made some effort to claim them previous to the conversation, but at the time he talked to you he made no claim to them?

A. That is the way I taken it from his conversation that he did not have any claim on them then."

And upon the same point, J. W. Daniel testified as follows:

"Q. Do you know one Raymond Ewing that lives at Lonsdale, Arkansas?

A. Yes, sir.

Q. Did he ever have a conversation with you with reference to these lands?

A. Yes, sir.

Q. I will ask you if he asked you whether or not you had any claim on them?

A. I don't remember just exactly what he did ask me, but something to that effect; I told him I did, the reason I said it was that he told me that Mr. Zeigler, Mr. Benjamin W. Zeigler, wanted to borrow two hundred dollars and wanted to let the place stand good for the money.

Q. Do you know if he asked you about these LeCroy lands for the purpose of ascertaining whether or not you had any claim to them?

A. That is what I considered that.

Q. And wasn't it for the purpose of ascertaining your claim to these lands as he didn't wish to loan Ben W. Zeigler any money on the lands that you had any claim to, if you had any claim to them?

A. I don't know.

Q. The conversation had with you and Raymond Ewing was with reference to his loaning Ben W. Zeigler two hundred dollars and to secure the loan on these lands, was it not?

A. Well, that is what he—I allowed that was it; well, he told me that he wouldn't let him have it, I am pretty sure, on that land, I don't know for certain, but I am just pretty sure he wouldn't let him have it on that land."

There is a sharp conflict in the testimony of these witnesses. The burden was upon Ewing to establish his allegation that J. W. Daniel had waived any claim to the real estate or had misled him. His proof does not meet this burden. Ewing's own testimony admits that J. W. Daniel told him he did not know whether he would contend for the land. J. W. Daniel states positively that he told Ewing that he had a claim on the land. The chancellor found the issue on this point against Ewing, and the finding is not contrary to the weight of the evidence.

(5) It is contended that the deed was never delivered to J. W. Daniel and for that reason never passed title to him. The evidence is undisputed that T. R. Daniel gave the deed to W. F. Daniel to be placed of record. This was a sufficient delivery to J. W. Daniel in order to pass the title.

The decree is affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *v.* COLE.

Opinion delivered April 2, 1917.

RAILROADS—CHARTERED TRAINS—TARIFF.—Under the tariff for special trains fixed by the Interstate Commerce Commission, the charge for a special train from Harrisburg, Poinsett County, Ark., to Wynne, Cross County, held to be $75.

Appeal from Poinsett Circuit Court; *W. J. Driver,* Judge; reversed.

Troy Pace and *Gordon Frierson,* for appellant.

1. The act of the agent in accepting an amount less than that fixed by the published tariff was without effect as to the amount actually due. Kirby's Digest, § 6722; 71 Ark. 552; 100 *Id.* 22; 103 *Id.* 37. An agent of a railway company has no authority to fix by contract a rate less than the published rate to be paid by the public. Authorities *supra.*

2. The court erred in holding the minimum rate to be $50 instead of $75. The establishment of a different basis for special train service is not unreasonable.

H. P. Maddox, for appellee.

Section 7 of the tariff sheet does not control here, but exception No. 1, and $50 is the fee, and this was paid.

WOOD, J. The appellant sued the appellees to recover the sum of $25 alleged to be due it on account of

a special engine and train furnished appellees. The suit was instituted in the justice court, where judgment was rendered in favor of the appellees. An appeal was taken to the circuit court, where the cause was tried by the court, sitting as a jury, upon an agreed statement of facts. For the purpose of this appeal these facts are sufficiently reflected in the findings and judgment of the trial court, which are as follows:

"The court finds the facts to be that on February 27, 1915, the St. Louis, Iron Mountain & Southern Railway Company, at the request and for the use of the defendants, furnished a special train and engine from Harrisburg, Poinsett County, Arkansas, to Wynne, Cross County, Arkansas, and the said defendants and others were transported on said special train between the stations mentioned.

"Thereafter the agent of the St. Louis, Iron Mountain & Southern Railway Company, at Harrisburg, presented to the defendant, W. D. Tillory, a bill for $50 for such train service, and the defendant, W. D. Tillory, paid such amount, believing and intending the same to be in full for such service.

"On February 27, the date such equipment and service were furnished, the charge for special trains between such stations, as fixed in the published tariff sheet, was, according to the plaintiff's contention, a minimum of $75, and, according to the defendant's contention, a minimum rate of $50.

"The paragraphs of the tariff sheets covering the service were as follows:

"CHARGES FOR SPECIAL TRAINS.

"Section 7. (a) In emergency, special passenger trains may be run for the exclusive accommodation of individual or special parties, subject to the company's ability to furnish the necessary power and equipment, on the following terms:

"One hundred full fares or the equivalent thereof as shown in current interstate commerce commission tariffs, for a party of 100 persons or less and one additional adult for each person in excess of 100 (two half fares counting one adult fare). The total collection in no case to be less than $75. See Exceptions 1 and 2.

"Exception 1. Intrastate between stations in Illinois; between St. Louis, Mo., and stations in Illinois; between St. Louis, Mo., and Memphis, Tenn.; between St. Louis, Mo., and Helena, Ark.; between St. Louis, Mo., and Natchez, Miss.; between Memphis, Tenn., and Natchez, Miss.; between Helena, Ark., and Natchez, Miss.; the minimum charge for special train movements will be seventy-five adult one-way fares, or the equivalent, for parties of seventy-five persons or less, additional fares or fare, whole or half, as the case may be for each person in excess of seventy-five. Minimum collection, $50.

"Exception 2. Intrastate between stations in Louisiana the minimum charge will be fifty adult fares as shown in the current interstate commerce commission tariffs for a party of fifty persons or less, one additional adult fare for each person in excess of fifty persons (two half fares counting as one adult fare) charge of not less than $1.50 per train mile or fraction thereof for distance traveled. The total collection in no case to be less than $50.

"The court finds that the above tariff sheets control the question of charge for services rendered, and that the act of the agent in collecting any amount is without effect in law.

"The court further finds that the service involved in this case is covered by and is included in exception No. 1, above quoted, and that the minimum charge of $50 was the amount properly payable, and that this amount has been paid by the defendants to the plaintiff."

The court thereupon rendered judgment dismissing the appellant's complaint. The court was correct in

holding that the act of the agent of appellant in accepting $50 in full settlement of the tariff due appellant for the service rendered did not bind the appellant nor preclude it from suing for the amount due according to the schedule of rates governing the charges for such service, as shown by the published tariff sheets approved by the Interstate Commerce Commission. But the court erred in holding that the service, and charges for which suit was brought, are controlled by Exception No. 1, and in holding that the minimum charge of $50 was the correct amount to be paid appellant.

The rate to be charged for the services herein rendered is fixed by the general provisions of section 7 (a), set out in the findings of the court. Under this section the minimum charge required for such service is $75. The minimum charge of $50 specified in Exception 1, so far as intrastate stations are concerned, only applies between intrastate stations in the State of Illinois. If it had been the purpose of the Interstate Commerce Commission to make the minimum collection of $50, specified in section 1, apply between intrastate stations in Arkansas this intention doubtless would have been expressed just as it was between intrastate stations in Illinois and in Louisiana. The fact that these States were singled out, and the rates specified in Exceptions 1 and 2 made to apply between intrastate stations in Illinois in Exception 1, and between intrastate stations in Louisiana in Exception 2, shows that the commission had intrastate stations in the States named in mind, and as the tariff sheet does not plainly express that a minimum charge of $50 is authorized between intrastate stations in Arkansas, the court has no right to give it such construction. To do so would be usurping the functions of the Interstate Commerce Commission. Exception No. 1 plainly expresses that a minimum collection of $50 is authorized between St. Louis, Mo., and Memphis, Tenn., and between St. Louis, Mo., and Helena, Ark. While it is true that the

stations of Harrisburg and Wynne are on the railway line between St. Louis and Memphis, and St. Louis and Helena, there is nothing in the tariff sheets to indicate that the railway company, in furnishing special train service between these stations, could be required to do so for less than $75, the rate specified in section 7, subdivision (a).

Under the provisions of section 7, subdivision (a) and exception 1, the total collection in no case is to be less than $75, unless the service is rendered between intrastate stations in Illinois, and between St. Louis, Mo., and stations in Illinois, and between the other interstate division points or terminal stations expressly named in exception 1. Intrastate stations in Arkansas are not so named in exception 1, and therefore it does not apply.

It is unimportant to enter upon a discussion of the reasons that actuated the commission in allowing a $50 minimum collection between the stations mentioned in exception 1, but which does not apply to stations in Arkansas lying between the terminal stations or division points mentioned in exception 1. The reason that might have actuated the commission is very well expressed in the brief of counsel for the appellant, as follows:

"If a railway company is called upon to furnish a special train out of some small station along its line, in order to comply it must run empty cars from some terminal or division point to the station making the call, and this equipment will earn no revenue until after it has reached the point where it is to be put into service. On the other hand, such service out of terminals and division points, or out of points in the vicinity of such, begins to earn revenue as soon as the equipment is set in motion. Furthermore, special train service between small towns or stations along the line involves an empty haul back to the terminal at the end of the service, as well as the empty haul above mentioned at the beginning of the service." But, whatever may have been the reason, it suffices

to say that the rate is so expressly fixed, and it is not within the province of the court to change it.

The court therefore erred in dismissing appellant's complaint, and for this error the judgment is reversed, and judgment will be entered here in favor of the appellant for the sum of $25, as prayed in its complaint.

CARPENTER v. HAZEL.

Opinion delivered April 9, 1917.

1. ATTORNEY'S FEES—LIEN.—Act 1909, p 892, giving a lien for attorney's fees has no application to suits by an administrator for the benefit of an estate or a decedent.
2. ADMINISTRATION—ATTORNEY'S FEES—SUIT FOR ADMINISTRATOR.—An amount paid to an attorney for conducting litigation for the benefit of an estate is a part of the expenses of administration and payment of the amount is a distribution of a part of the assets of the estate. It is a part of the jurisdiction of the probate court, which is exclusive over that subject, and no other court can invade that jurisdiction.
3. ADMINISTRATION—CONTRACT WITH ATTORNEY.—A contract by an administrator with an attorney to bring an action for the estate, constitutes the administrator's own undertaking, for which he alone is responsible, although it is within the province of the probate court to make an allowance to the administrator as a part of the expense of administration.
4. ATTORNEY'S FEES—SUIT FOR ADMINISTRATOR—JURISDICTION OF CIRCUIT COURT.—The circuit court is without jurisdiction to adjudicate the amount due an attorney who has brought an action for an administrator for the benefit of the estate, or to declare a lien in the attorney's favor.
5. ADMINISTRATION—SUIT FOR BENEFIT OF ESTATE—FUNDS COLLECTED—ATTORNEY'S FEES.—The administrator of an estate employed an attorney, C., to bring an action in his name for the benefit of the estate. C. recovered judgment and certain funds were paid to the clerk of the circuit court. *Held*, these funds belonged to the estate and could be distributed only by the probate court.

Appeal from Poinsett Circuit Court, First Division; *W. J. Driver*, Judge; affirmed.

C. T. Carpenter and *H. P. Maddox,* for appellant.

The circuit court had jurisdiction to enforce the lien. The statute is conclusive. Kirby's Digest, § 4458.

J. G. Waskom and *Mardis & Mardis,* for appellee.

1. The circuit court had no jurisdiction to enforce the lien. Section 4458, Kirby's Digest, is not applicable here. 61 Ark. 410; 62 *Id.* 223; 65 *Id.* 437; 64 *Id.* 438; 34 *Id.* 204.

The attorney must look to the administrator who employed him for compensation. Cases *supra.*

McCULLOCH, C. J. Mary Person, a negress, was killed at Marked Tree, Arkansas, by a train operated by the receivers of the St. Louis & San Francisco Railroad Company, and letters of administration on her estate were issued by the clerk of the probate court of Poinsett County to J. B. Phillips, who gave bond and took charge of the estate. Phillips, as such administrator, entered into a written contract with appellant C. T. Carpenter, an attorney at law, to bring suit against the operators of the railroad and recover damages sustained by the estate on account of the death of said decedent, and in the contract stipulated that appellant should receive a certain portion of the amount recovered as compensation for his services. Appellant instituted the action in the name of the administrator to recover damages for the benefit of the estate, and a consent judgment was rendered in favor of the plaintiff against the defendant receivers of the railroad to recover damages in the sum of $1,750, which sum was by the receivers paid over to the clerk of the circuit court, where the judgment was rendered.

The contract between appellant and the administrator was not authorized nor approved by the probate court, nor did the probate court approve the issuance of letters of administration to Phillips, but on the contrary, when the action of the clerk came up for confirmation at the next term, the probate court rejected the appointment made by the clerk in vacation and made an order

appointing M. W. Hazel as administrator of said estate. The suit against the receivers had, however, been prosecuted to a consent judgment in the name of Phillips as administrator. At a subsquent term of the circuit court, while the funds paid over to the clerk on the judgment still remained in the hands of that officer, appellant filed a petition setting forth his contract with Phillips as administrator and praying that a lien be declared in his favor for the amount earned under the contract, and that the clerk be ordered to pay his portion of the recovery over to him. Hazel as administrator intervened for the purpose of resisting the prayer of appellant's petition and upon the hearing the circuit court decided that it had no jurisdiction to enforce the lien of the attorney against the estate and ordered the clerk to pay over the funds to Hazel as the administrator of said estate. An appeal from that order has been duly prosecuted.

We have no question before us of the right of an attorney to enforce in the circuit court a lien for services for recovering judgment in an action brought by an administrator for the benefit of the next of kin pursuant to the provisions of section 6290, Kirby's Digest, the statute patterned after Lord Campbell's Act. We find it unnecessary to express an opinion on that question. The record before us, as abstracted, shows that the action was instituted by the administrator for the benefit of the estate. The only suggestion in the record about the next of kin having an interest in the result of the action is that before the appointment of the administrator "a family council" was held and the heirs of Mary Person agreed that Phillips should be appointed administrator and S. M. Anderson should be appointed as guardian of an infant heir, and that appellant should be employed as attorney. We accept, however, the unqualified statement in the record that the suit was for the benefit of the estate, and can not assume that it was in whole or in part for the benefit of the next of kin. Nor is there any question involved here of enforcing a lien where the heirs of a

deceased intestate have paid the debts of the estate and sue to enforce liability in favor of the estate. The statute giving the right of the heirs to maintain an action under those circumstances is expressly limited to cases where "all persons interested as distributees of the estate of such intestate are of full age." Kirby's Digest, § 15. The statute is exclusive, and an action can only be maintained when the distributees are of full age. *Chisholm* v. *Crye,* 83 Ark. 495.

The statutes of this State provide that the compensation of an attorney for his services shall be "governed by agreement, express or implied, which is not restrained by law;" that from the commencement of the action or proceedings the attorney has a lien upon his client's cause of action which attaches to the judgment or final order in his client's favor, and that the court "before which said action was instituted, or in which said actoin may be pending at the time of said settlement, compromise or verdict * * * shall determine and enforce the lien created by this act." Arkansas Act, May 31, 1909, page 892.

(1-2) In *May* v. *Ausley,* 103 Ark. 306, it was decided that a lien created under the statute just referred to must be enforced in the trial court and that this court has no jurisdiction to entertain a petition for the enforcement of such lien. We are of the opinion that this statute has no application to suits by an administrator for the benefit of an estate of the decedent, for to give it that effect would constitute an invasion of the exclusive jurisdiction vested in probate courts by the Constitution. An amount paid to an attorney for conducting litigation for the benefit of an estate is a part of the expenses of administration, and payment of the amount is a distribution of a part of the assets of the estate. It is necessarily a part of the jurisdiction of the probate court which is exclusive over that subject, and no other court can invade that jurisdiction. *Hankins* v. *Layne,* 48 Ark. 544; *Ferguson* v. *Carr,* 85 Ark. 246; *Coppedge* v. *Weaver,* 90 Ark. 444.

(3) The statute does not authorize an administrator, without the consent of the probate court, to enter into a contract so as to bind the estate, and a contract made by an administrator constitutes his own undertaking for which he alone is responsible, although it is within the province of the probate court to make an allowance to the administrator as a part of the expenses of administration. *Reynolds, Admr.*, v. *Canal & Banking Co.*, 30 Ark. 520; *Tucker* v. *Grace*, 61 Ark. 410.

In *Tucker* v. *Grace, supra*, Judge RIDDICK, speaking for the court, said: "An administrator has no power to enlarge, by his contract, the liability of the estate that he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent, and he incurs a personal liability. An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him."

(4-5) The doctrine of the case last cited is, we think, decisive of the case at bar, and the circuit court was correct in holding that it had no jurisdiction to adjudicate the amount payable to the attorney and to declare a lien on the amount recovered from the defendants in the original action. The funds recovered in that action and paid over to the clerk belong to the estate of the decedent and can only be distributed by the probate court. The judgment is, therefore, affirmed.

DENNIS v. LONG.

Opinion delivered April 9, 1917.

1. CANCELLATION OF INSTRUMENTS—FAILURE OF TITLE.—Appellant purchased land with covenants of warranty from appellee, and finding that appellee held under a will, which appellant believed limited the title purchased, brought an action to rescind the purchase. *Held*, the action was such that equity would take cognizance thereof, and that a demurrer thereto was improperly sustained.

2. WILLS—CONSTRUCTION—EQUITY.—Equity will not entertain a bill brought solely to construe a will.
3. COVENANTS OF WARRANTY—ACTION ON.—An action will not lie for breach of covenant of warranty until eviction.
4. RESCISSION OF CONTRACTS—FAILURE OF TITLE TO LAND.—To entitle a vendee of land to rescind the purchase for failure of title under a covenant of warranty, he must be deprived substantially of the benefits of his purchase, and rescission will not be decreed for a partial failure which can be compensated in damages.

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

Davies & Davies, for appellant.

1. The court erred in sustaining the demurrer to the complaint. A clear case for equitable relief was stated. 121 Ark. 482. Where both parties are under a mistake as to the vendor's title, which was supposed to be perfect, but proves void, a court of equity will grant relief. 46 Ark. 337, 349.

2. The complaint stated a good cause of action for equitable relief. The title should have been quieted, or the contract rescinded and plaintiff placed in *statu quo,* with an accounting for rents and profits, improvements and taxes. 121 Ark. 482; 37 *Id.* 286; 87 *Id.* 206; 97 *Id.* 588.

Mann & Mann, for appellees.

1. The demurrer was properly sustained. 88 Ark. 1; 3 Pom. Eq. (3 ed.), § 1156.

2. There was no eviction under paramount title. 65 Ark. 495; 17 L. R. A. (N. S.) 1181, and notes. No breach of warranty is alleged nor that the possession of plaintiff is threatened. 121 Ark. 482, is not a case in point. No cause of action is stated.

HUMPHREYS, J. Appellant, James W. Dennis, brought suit in the St. Francis County Chancery Court against E. A. Long and E. A. Long, Jr., for the purpose of cancelling a deed executed by E. A. Long, Sr., on the 6th day of July, 1903, to him for lots 5 and 6 in block 27, in the original town site of Forrest City, Arkansas, and

for the purpose of obtaining a judgment against said Long for $1,700, the consideration paid by him to said Long for the real estate; and for the further purpose of obtaining a construction of the will by which Long obtained title to said real estate.

Appellant alleged that he was the owner of the real estate under deed of warranty from E. A. Long, Sr., and had been in possession thereof since the date of purchase; that at the time he purchased the land, E. A. Long represented that he was the sole owner in fee simple of the land and was willing and did warrant the title to same, but that he was now claiming that he only owned a life estate therein, and that E. A. Long, Jr., was claiming to own the reversionary interest therein, he being the only child of E. A. Long, Sr. Appellant offered to deed the property back to Long and to account for rents upon payment for improvements and repayment of the purchase money with interest. The bill also contained a prayer to have his title quieted as against E. A. Long, Sr., and E. A. Long, Jr., in case the court should hold under the will and deed that he obtained an indefeasible fee simple title to the real estate.

A general demurrer was filed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action against the appellees, or either of them.

The demurrer was sustained, and from the decree dismissing his bill appellant has appealed to this court.

Appellee insists that the bill is for the sole purpose of obtaining the construction of a will disposing of legal estates only, and which makes no attempt to create any trust relations with respect to the real estate in question. If this were the only purpose of the bill, the position of learned counsel for appellees would be sound, for it was said by Mr. Chief Justice HILL, in the case of *Frank* v. *Frank*, 88 Ark. 1, involving a question similar to the one involved here, that "in view of these authorities, and many more which may be found cited by the text writers

and reviewed in the cases mentioned, it was unquestionably the duty of the chancery court to refuse to entertain the bill; and, for the error in entertaining it and rendering a decree construing the will, the decree is reversed, and the cause remanded with instructions to dismiss the bill. * * *"

The sole purpose of this bill, however, is not to obtain a construction of the will. The gist of the bill is for the purpose of rescinding the contract of sale and purchase and for the cancellation of the deed.

The demurrer presents the further question of whether there are sufficient allegations in the bill to constitute a cause of action for rescission.

The main allegation in the complaint upon which appellant hinges his right to a rescission is as follows: "Plaintiff further alleges that at the time he purchased the said land of the defendant, E. A. Long, Sr., the said E. A. Long represented that he was the sole owner in fee simple of the land and was willing and did warrant the title to same, but plaintiff says that if said Long did not have such a title that the plaintiff was defrauded, or at least there was a breach of warranty of title if the defendant, E. A. Long, did not have a good title to said lands in fee simple. Plaintiff says that owing to the fact of the claim of the defendant, E. A. Long, Sr., that he had only a life estate, and the claim also made by the other defendant that he is the owner of the reversion, that the title of the plaintiff is clouded and he is unable to sell the land for any price owing to the uncertainty of his title."

This allegation does not meet the strict requirement of allegations necessary to set aside conveyances of real estate on the ground of fraud. The allegation, however, taken in connection with the allegations pertaining to the will and the relations of the parties, is a sufficient allegation charging that E. A. Long, Sr., or both E. A. Long, Sr., and the appellant, James R. Dennis, were mistaken as to the character of title Long obtained under the

will. The will devised a life estate only in the lands to E. A. Long, Sr. *Dempsey* v. *Davis,* 98 Ark. 570.

It is alleged that appellee represented to appellant that he owned a fee simple title to said real estate, and his covenant of warranty clearly indicates that he was attempting to convey a fee simple estate in the lands to appellant. It is apparent that this representation was made through a mistake of either or both appellee and appellant. A life estate only having passed from appellee to appellant under the will and by the deed, it is apparent that appellant is deprived of the fruits of his purchase, or, in the language of another, "the substance of the thing he bought." This court discussed the character of mistakes in matters of law and fact against which courts of equity would relieve, in the case of *Fitzhugh* v. *Davis, Admx.,* 46 Ark. 337. Many authorities were reviewed in that case, and the court said: "The rule is, To entitle a vendee of land, who has gone into possession under a deed with general covenants of warranty, to rescind on the ground of failure of title, the loss must be of such character as that he is thereby deprived substantially of the benefits of his purchase, but if the beneficial enjoyment of his contract be not materially taken away, and there is only a partial failure of consideration which can be compensated in damages, there is no cause for rescission."

The same principle was recognized in the well considered case of *Reggio* v. *Warren et al.,* 20 Am. & Eng. Ann. Cas. 1244, and 207 Mass. 525. In that case, it was said by Mr. Justice Sheldon: "But it is now well settled that this rule is not invariably to be applied. In some cases where great injustice would be done by its enforcement, this has been avoided by declaring that a mistake as to the title to property or as to the existence of certain particular rights, though caused by an erroneous idea as to the legal effect of a deed or as to the duties or obligations created by an agreement, was really a mistake of fact and not strictly one of law, and so did

not constitute an insuperable bar to relief. Again, the learned Justice said: "In other cases, sometimes as a ground of decision and sometimes merely in discussion or argument, it has been said that there is no established rule forbidding the giving of relief to one injured by reason of a mistake of law, but that whenever it is clearly shown that parties in their dealings with each other have acted under a common mistake of law and the party injured thereby can be relieved without doing injustice to others, equity will afford him redress." The rule laid down in *Reggio* v. *Warren, supra,* is supported by the great weight of authority.

Since the will in question vested a life estate only in appellant, the two lots for which he paid $1,700 are rendered almost valueless. It would be next to impossible to ascertain his damages. In fact, a suit will not lie for damages on the covenant of warranty until eviction, and there can be no eviction until after the death of appellee. *Thompson* v. *Brazile,* 65 Ark. 495.

He has no remedy at law unless it be a remote, uncertain remedy. His title is clouded by a reversionary interest and rendered of little or no value and almost unsalable.

The case comes clearly within the equitable doctrine of rescission laid down in the cases referred to in this opinion.

The decree is reversed with instructions to overrule the demurrer and reinstate the bill.

SCHNEIDER *v.* FAIRMON.

Opinion delivered April 9, 1917.

1. COURTS—JURISDICTIONAL AMOUNTS—MUNICIPAL COURT—SERIES OF NOTES.—Appellant sold an automobile to appellees for $450; $100 was paid in cash, and appellees executed to appellant a series of seven notes for $50 each. None of the notes were paid. *Held,* jurisdiction in an action on the notes was in the municipal court.

2. COURTS—PLEA OF COUNTER-CLAIM—JURISDICTIONAL AMOUNT.—In an action on several promissory notes, defendant interposed a counter claim. *Held,* under the evidence that the latter was within the jurisdiction of the municipal court.
3. CONTRACTS—WARRANTY—COUNTER-CLAIM.—Where an action is brought for breach of warranties in a contract, an affirmation of the contract is implied with a *prima facie* liability for the contract price, less the damages sustained in consequence of the breach of warranty.
4. COUNTER-CLAIM—AMOUNT OF—ACTION ON NOTES.—In an action on certain notes given for the purchase of an automobile, the defendant plead a counter-claim in a certain sum, in instructing the jury, the court should limit the amount to be recovered by the defendant on his counter-claim, to the amount pleaded by him.
5. CONTRACTS—SALE OF CHATTEL—PROOF OF WARRANTY.—Where a contract for the sale of a chattel is not reduced to writing, a warranty on the part of the seller may be shown by parol.
6. SALES—EXPRESS WARRANTY—CAVEAT EMPTOR.—The rule of *caveat emptor* is not applicable to sales of articles under express warranty.
7. EVIDENCE—OPINION OF WITNESS.—Testimony that A. and B. were in the witness's opinion partners, is inadmissible.

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

Gardner K. Oliphint, for appellant.

1. There was no warranty of the case, but if there was it became merged in the notes and defendants are estopped. 38 Ark. 334, 346; Benjamin on Sales, § 261; 45 Ark. 284, 289. The doctrine of *caveat emptor* applies. 7 Ark. 167, 171.

2. The municipal court had jurisdiction. 45 Ark. 346; 24 *Id.* 177; 27 *Id.* 508; 1 *Id.* 55; 29 *Id.* 173, 181; 122 *Id.* 227; 113 *Id.* 126; 123 *Id.* 40. The question of jurisdiction can not be raised here for the first time. Each note was a separate demand and determined the jurisdiction. 108 Ark. 540; 119 *Id.* 263; 111 *Id.* 350; 103 *Id.* 142; 38 Ark. 334.

3. The contract was executed and no breach of warranty, if any, was shown, nor any fraud or concealment of defects. Both parties examined the machine, and it was thoroughly overhauled by an expert machinist. 93 Ark. 454, 457; 27 L. R. A. (N. S.) 915; 2 Mechem on Sales,

§ 816; Tiedeman on Sales, § 197; 24 Am. & E. Enc. Law, 1109; 27 L. R. A. (N. S.) 925, 932.

4. The court erred in its instructions as to damages and as to the rescission of the contract. 27 L. R. A. (N. S.) 925; 34 S. W. 299; 81 Wis. 399; 51 N. W. 572; 100 Ark. 17; 110 U. S. 108; 23 Ark. 734; 95 *Id.* 488; 88 Ark. 26; 46 *Id.* 148.

5. No fraud is shown. 47 Ark. 148; 99 *Id.* 438; 101 *Id.* 95; 77 *Id.* 56; 51 *Id.* 1; 78 *Id.* 87; 75 *Id.* 266; 100 *Id.* 565. Where the means of information are equally accessible to both parties, they will be presumed to have informed themselves, and if not they must abide the consequences. 95 Ark. 131, 136; 95 *Id.* 523, 527. Defendants knew the condition of the car after personal inspection. They had no right to rely on the statements of any one. 95 Ark. 131, 523; 100 U. S. 108; 38 Ark. 334.

6. Smith was not plaintiff's agent. Defendants were required to ascertain the extent of his authority at their peril. 105 Ark. 113; 119 *Id.* 51.

7. Plaintiff was entitled to judgment for the amount of the notes, $350, but if not, to the difference between $350 and the amount expended in making necessary repairs. A "straight out" verdict for defendants was not justified by the law or evidence. 107 Ark. 476.

8. It was error to admit that part of Fairmon's deposition as to his impressions. 111 Ark. 134.

9. The trial court violated article 7, section 23, of the Constitution. 51 Ark. 147; 73 *Id.* 568; 123 *Id.* 446. All objections and exceptions were properly reserved. 52 Ark. Law Rep. 570.

Will G. Akers, for appellees.

1. The verdict is supported by the evidence. Smith was appellant's agent and warranted the car. The verdict is right.

2. Parol evidence was admissible—the whole contract was not in writing. Joyce on Comm. Paper, 326;

2 Paige on Cont., 1850-4, § 1203; Kirby & Castle's Digest, § 6968.

3. The rule of *caveat emptor* does not apply here. 38 Ark. 334.

4. The court had jurisdiction of the suit and the counter-claim. 1 Ark. 252; 85 *Id.* 213; 111 *Id.* 350; 85 *Id.* 213; 83 *Id.* 372; 78 *Id.* 595; 111 *Id.* 350; 95 *Id.* 43.

5. There is no error in the instructions. 38 Ark. 338, 342.

6. The objections to the deposition of Fairmon are not tenable. Kirby & Castle's Digest, § § 3503-8.

HUMPHREYS, J. Appellant brought suit in the municipal court of the city of Argenta against appellees on seven promissory notes for $50 each, or a total sum of $350 and interest. Appellees answered in substance to the effect that the notes were executed for a balance due on an automobile sold by appellant to appellees; that appellant, through his agent, W. T. Smith, represented and guaranteed that the automobile was, or would be, put in first-class running condition; that neither before nor at the time of the delivery did appellant put the car in running condition; that immediately upon discovering the defective condition of the automobile, appellees offered to rescind the contract and return the car, and demanded a return of their notes; that appellant refused to rescind; that thereafter appellees were compelled to expend $225 to put the car in such order as would enable them to make use of it.

Appellees prayed that appellant take nothing by their action and that they have judgment against him for the sum of $225.

Appellant recovered a judgment of $365, from which an appeal was taken to the circuit court, and there the cause was tried and judgment rendered in favor of appellees, from which an appeal has been prosecuted to this court.

On April 29, 1914, appellant sold a second hand automobile to appellees for $450. Appellees paid $100 cash, and for the balance of the purchase money executed seven promissory notes of date April 29, 1914, for $50 each, with interest at the rate of 8 per cent. per annum until paid. The last note became due seven months after date. There is a conflict in the evidence as to whether appellant guaranteed that the car was or should be put in good running condition by appellant; also as to whether W. T. Smith was the agent of appellant in making the sale of the car to appellees; also as to the extent the car was used by appellees after they purchased it.

A short time after the sale and purchase, appellees offered to rescind the contract, claiming that appellant had not complied with his guarantee, and appellant refused to rescind, claiming that he had made no guarantee.

Many assignments of error are insisted upon for reversal.

(1) First, it is said the municipal court had no jurisdiction of this cause, because the amount involved exceeds $300. These notes are numbered from one to seven, inclusive, made payable to the same party and signed by the same parties. The numbers indicate that the notes are of a series, but it was said by this court, in the case of *Brooks* v. *Hornberger,* 78 Ark. 595, that "the fact that the notes were of a series secured by chattel mortgage, and that all were due on default of one at the election of the holder, does not change the rule in the least. The basis of the rule is that each note is a separate cause of action, and the mere fact that several notes may be joined in one suit, instead of a separate suit for each, does not change the nature of the cause of action, or in any way affect anything except the mere procedure." It was settled in that case that the separate demand on each note and not the aggregate amount determined the jurisdiction of the court. The municipal court had jurisdiction of appellant's cause of action.

(2-3) It is insisted that the counter-claim, interposed by appellees as a defense, is in excess of the jurisdiction of the court. The amount specified in the second paragraph of the counter-claim was for $225, an amount within the jurisdiction of the court. The alleged guaranty or warranty to the effect that appellant agreed to place the automobile in first-class condition and the alleged failure to do so was referred to and pleaded as a defense in the first paragraph of the answer, but no amount was mentioned. The same subject matter was pleaded as a defense in the second paragraph of the answer and the first paragraph of the answer was referred to and specially made a part of the second paragraph, and the amount of damages alleged to be sustained by reason of the breach of warranty was $225. Treating the first and second paragraphs as one so far as they refer to and plead the same subject matter as a defense, the amount claimed on account of breach of warranty is within the jurisdiction of the court. An attempt was made to plead rescission in the first paragraph of the answer and cross-complaint. This plea was inconsistent with the plea for damages on account of breach of warranty. Inconsistent remedies can not be pursued by a buyer. 30 Am. & Eng. Enc. Law (2 ed.), 199.

"The bringing of an action on a warranty for damages implies an affirmation of the contract of sale and a *prima facie* liability for the contract price, less the damages sustained in consequence of the breach of warranty." 30 Am. & Eng. Enc. Law (2 ed.), 197.

Treating the answer and cross-complaint as a defense on account of breach of alleged guaranty or warranty, thereby eliminating the inconsistent plea of rescission, no verdict could have been claimed in excess of the amount of damages claimed, towit, $225, an amount within the jurisdiction of the court.

(4) It is insisted that the court erred in submitting the question of rescission to the jury. We are of opinion

that the oral instructions, fairly interpreted, did not submit the question of rescission to them. The real issue submitted was whether there had been a breach of warranty or guaranty. The language of the court with reference to a rescission in the connection used eliminated that issue. We do not think the reference made to rescission in the instruction could have misled the jury. The court plainly told the jury that the real issue in the case was the alleged breach of warranty or guaranty, but we think the instruction on the measure of damages was erroneous. The maximum amount claimed in the plea for damages on account of the breach of warranty was $225. In instructing with reference to the measure of damages, the court said: "If the amount required to place it (referring to the car) in good running condition was less than the notes, it should be credited on the notes; if it was equal to or more than the notes, it would be a complete defense." The instruction should have limited the maximum amount that could be recovered in any event as a credit on the notes, to the maximum amount pleaded as damages in the counter-claim, which was $225.

This error will necessarily work a reversal of the cause, and ordinarily it would be unnecessary to consider the other assignments of error, but as the points raised may be called in question on a new trial, we deem it best to pass on those of most importance.

(5) Appellant insists that the court committed reversible error in permitting oral evidence tending to establish a warranty or guaranty to the effect that the automobile was in good running condition, or would be put in such condition, and in giving an instruction on that question based on the oral evidence submitted. The case of *Hanger et al.* v. *Evins & Shinn,* 38 Ark. 334, is cited in support of appellant's position. The record in that case showed that all the contract was included in the notes and a bill of sale. Mr. Justice EAKIN, in rendering the opinion, announced the familiar rule, that when the entire contract is reduced to writing, additional matter can not

be incorporated by parol evidence. In the instant case, the entire contract was not reduced to writing. The alleged warranty was by parol agreement, hence provable by parol evidence. The court did not err in admitting oral evidence tending to show the alleged warranty, nor in giving an instruction on that issue.

(6) Appellant also cites *Hanger et al.* v. *Evins & Shinn, supra,* to sustain him in the contention that a warranty is of no value as against patent defects in the automobile. The evidence in the instant case does not show that the defects in the automobile were patent. It rather tended to show that after diligent search the defects could not be found and remedied by skillful machinists. The rule of *caveat emptor* is invoked and argued as applicable to this case. Appellees tried the cause on the theory that appellant, through W. B. Smith, his agent, expressly warranted the car to be in good running condition or that it would be put in good running condition before the sale was consummated. The rule of *caveat emptor* is not applicable to sales of articles under express warranty.

It is insisted that the court committed reversible error in submitting to the jury the question of whether or not W. B. Smith was the agent of appellant in making the sale of the automobile to appellees. The express warranty, if made, was made by W. B. Smith. If he was not appellant's agent, a warranty made by him would not be binding upon appellant. There was sufficient evidence in the record tending to show W. B. Smith was appellant's agent, upon which to base and submit an instruction on the issue of agency.

(7) It is also insisted that the court erred in permitting that portion of the deposition of Seth Fairmon to be read wherein he testified: "My impression was they were partners, as I understood they had been partners, but nothing was said about it." (Referring to appellant and Smith by the use of the word *they.*) The evidence in this form was objectionable. Witnesses are not permitted to give their conclusions, they should state

the facts and permit the jury to draw inferences or conclusions from them. The issue as to whether Smith was appellant's agent in the sale of the automobile was sharply drawn, and it may be this evidence was prejudicial to appellant.

It is also insisted that the court expressed an opinion on the weight of the evidence by the use of the following language: "It seems from the evidence that Mr. Smith had some connection with the transaction—the relation, if any, that existed between Mr. Smith and Mr. Schneider is a question for you to determine." W. B. Smith had participated in effecting the sale of the car to appellees, and the relationship between appellant and Smith became an issue in the case. The language quoted clearly submits the question of agency to the jury, and is far from an expression of opinion that Smith was appellant's agent. The language used is not susceptible of such construction.

On account of errors indicated, the judgment is reversed and the cause remanded for a new trial.

IZARD v. CONNECTICUT FIRE INSURANCE COMPANY.

Opinion delivered April 23, 1917.

1. CONTRACTS—STATUTE OF FRAUDS.—A contract cannot rest partly in writing and partly in parol, for, unless the writing is complete on its face, the undertaking is dependent upon the terms of the oral contract, although statements in writing may be admissible to prove the oral contract.
2. CONTRACTS—EMPLOYMENT—STATUTE OF FRAUDS.—Appellee agreed orally to employ appellant for a year to begin in the future, and then made a note undertaking to confirm the same. *Held*, the contract was within the statute of frauds, and that the writing did not take it out of the operation of the same.
3. STATUTE OF FRAUDS—CONTRACT—DEMURRER.—Where a complaint sets forth the character of a contract, whether written or oral, as required by our statute on the subject of pleading, the statute of frauds may be raised by general demurrer to the complaint, if the allegations disclose a contract which falls within the terms of the statute.

4. CONTRACTS—STATUTE OF FRAUDS—EMPLOYMENT.—Where a contract of employment sued on is within the statute of frauds, there is no presumption that the employment continued under the terms specified with respect to length of service, and the contract becomes one of service during the will of the parties.

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

Mann & Mann, for appellant.

The contract was not within the statute of frauds. 103 Ark. 79. Besides, the contract was performed by the parties. 2 Elliott on Contracts, § 1213; 8 L. R. A. 410; Wood on Master & Servant, § 96; Mecham on Ag., § 212; 26 Cyc. 976; 125 Ark. 503.

R. J. Williams, for appellee.

The demurrer was properly sustained. The contract was within the statute of frauds and void. A contract can not rest partly in writing and partly in parol. 9 Ark. 506; 1 Powell on Contracts, 259; 3 Starkie on Part., 1008; 13 Ark. 125; *Ib.* 598; 20 *Id.* 305; see also 46 *Id.* 84; 103 *Id.* 80; 6 Rul. Cas., § 282, p. 895; 9 L. R. A. (N. S.) 1184; 175 Fed. 321.

McCULLOCH, C. J. This is an action instituted by appellant against appellee to recover balance due under alleged contract of employment. The court sustained a demurrer to the complaint and dismissed it, appellant having declined to plead further.

It appears from the allegations of the complaint that appellee, an insurance corporation, employed appellant as its special agent in the State of Arkansas at a monthly salary of $150, and that appellant worked in that capacity from January 1, 1912, to May 31, 1914, when he was discharged from appellee's service. The theory of appellant is that he was employed by the year at a salary of $150 per month for the year 1912; that the contract continued from year to year under the same terms, and that he was wrongfully discharged during the third year of service, and is entitled to recover his salary for the re-

mainder of the year. Appellees filed a general demurrer predicated on the theory that the alleged contract was not in writing, and, not being one to be performed within a year from the date it was entered into, was within the statute of frauds, and void. In the original complaint, appellant stated that in the month of December, 1911, "the plaintiff entered into a contract with the defendant, under the terms of which the plaintiff was to be the special agent for the defendant in the State of Arkansas, for one year," at a salary of $125 per month, and subsequently his salary was raised to $150 per month. There was an amendment to the complaint in which it was stated that on the 28th day of December, 1911, an oral contract was entered into "under the terms of which the plaintiff was to be special agent for the defendant during the year 1912, and was to receive a salary commencing at the rate of $125 per month, and said salary was to be increased, if the services of the plaintiff were satisfactory to the defendant, to the sum of $150 per month."

The complaint then sets forth a letter written by appellees to appellant dated January 2, in part as follows:

"Confirmatory of our conversation in Memphis last Friday, it is our understanding that you are to enter the service of the Connecticut Fire Insurance Company as special agent, commencing on the first of this year, and at a compensation of $125 per month and necessary traveling expenses."

(1-2) It is observed from the consideration of the allegations of the complaint that it sets forth an oral contract entered into during the month of December, 1911, for services to be rendered throughout the year 1912, and it fell within that provision of the statute of frauds which requires that in order to charge any person upon any contract, promise or agreement not to be performed within one year from the making thereof, the contract must be in writing. Kirby's Digest, § 3654, subdiv. 6. The letter written subsequently was not sufficient memoran-

dum to take the case out of the operation of the statute of frauds, for it did not specify the terms of the employment for one year. So far as the writing evidenced the contract, it merely tended to show an agreement for services by the month. *Moline Lumber Co.* v. *Harrison,* 128 Ark. 260. The contract can not rest partly in writing and partly in parol, for unless the writing is complete on its face, the undertaking is dependent upon the terms of the oral contract, although statements in writing may be admissible to prove the oral contract. The substance of the allegation in the complaint, taking it as a whole, is that an oral contract was made in December to begin in the future, and the writing incorporated in the complaint is only evidence in part of the oral contract alleged to have been previously made, so it is after all an oral contract which the complaint attempts to set forth, and that contract is within the statute of frauds. The writing set forth in the complaint was not sufficient to take it out of the operation of the statute.

(3) Where a complaint sets forth the character of the contract, whether in writing or oral, as is required by our statute on the subject of pleadings, the statute of frauds may be raised by general demurrer to the complaint if the allegations disclose a contract which falls within the terms of the statute. Browne on Statute of Frauds, § 509; 10 Standard Encyclopedia of Procedure, p. 73; 20 Encyclopedia of Law, p. 312; *White* v. *Levy,* 93 Ala. 484; *Putnam* v. *Grace,* 161 Mass. 237; *Linn-Boyd Tobacco Warehouse Co.* v. *Terrill,* 13 Bush (Ky.) 463.

(4) The original contract set forth in the complaint being within the statute of frauds, there is no presumption that the employment continued under the terms specified with respect to length of service, and the contract became one of service during the will of the parties. Appellant does not rely on the letter set forth in the complaint as an employment by the month so as to entitle him to recover a month's wages on account of discharge without notice, and it is conceded in the complaint that ap-

pellant is indebted to plaintiff on items growing out of the contract for amounts largely in excess of a month's salary.

The judgment of the circuit court was correct, and the same is affirmed.

HALL v. BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered April 23, 1917.

ESTOPPEL—APPROPRIATION OF PROPERTY—FAILURE TO OBJECT—REMEDY.—Although one may arrest the first step toward the appropriation of his property until compensation is made, he does not forfeit his right to compensation because he takes no action until the appropriation has actually been made; but, if he stands by and fails to exercise the precedent right of being compensated for his property before it is taken, he can thereafter only have compensation for his damages.

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

Davies & Davies, for appellants.

1. Injunction is the proper remedy and will lie in this case. The evil is a continuing one and the acts of the railroad in closing the streets both a public and a private nuisance. 77 Ark. 221. The ordinances granting the power to close up the streets were void. A suit at law for damages is not an adequate remedy. 80 Ark. 489; 85 *Id.* 520; 91 *Id.* 350; 58 *Id.* 142; 24 *Id.* 102; 51 *Id.* 491; 68 *Id.* 62; 103 *Id.* 326. This is a plain case for equitable intervention. 66 Ark. 40; 35 *Id.* 497.

2. The decision of the Railroad Commission settled nothing.

E. B. Kinsworthy and *W. R. Donham,* for appellees.

1. Defendants can not be compelled to open the streets. The only remedy is a suit at law for damages, if any. 45 Ark. 429; Kirby's Digest, § § 2939, 2960; 35

Ark. 497; 66 *Id.* 40; 50 *Id.* 466; 40 *Id.* 83; 14 A. & E. Ann. Cases, 27; Kirby's Dig., § 5648; 3 Elliott Cont., § 2487, etc.

2. Appellants are estopped. 67 Ark. 84; 74 *Id.* 126; 103 *Id.* 326; 65 *Id.* 410; 119 *Id.* 239; 77 *Id.* 221; 89 *Id.* 175; 51 *Id.* 500.

3. The injunction was properly refused and appellants remitted to their remedy at law, or petition to the Railroad Commission. 76 Am. Dec. 265; 84 Ark. 364; 51 *Id.* 235, 264; 69 *Id.* 104; 40 *Id.* 83; 85 *Id.* 12; 97 *Id.* 473; 99 *Id.* 1; 113 *Id.* 384; 119 *Id.* 239; 85 *Id.* 12, etc.

4. The action of the Railroad Commission is binding on plaintiffs.

SMITH, J. Appellants sought, by injunction, to compel the appellee railway company to open certain streets in the city of Hot Springs at the junction of Valley Creek, Elm Creek and Olive streets, upon which the property of appellants abutted. It was alleged in the complaint, which appellants filed, that on July 7, 1914, the city of Hot Springs had passed an ordinance granting to the railway company a right-of-way over certain streets, and closing portions of these streets to public travel; that, pursuant to this ordinance, and without condemnation proceedings, the railway company had taken possession of the portions of the street mentioned in the ordinance, and had erected depots, fences, sheds, tracks, embankments, and other permanent structures in said streets, and had torn out a bridge which had been used as a public crossing, thereby damaging the property of appellants by rendering it less accessible and inflicting upon them a damage not sustained by the public in common with themselves.

The answer contained a general denial of the allegations of the complaint, and specifically alleged, by way of defense, that appellants had stood idly by while the railway company built its depot and laid its tracks, wherefore they should not now be heard to ask the relief prayed, and that a complete remedy at law existed to

compensate any damages sustained by appellants which had not been sustained in common with the public. It was further alleged that the city council had passed ordinances in 1894 and in 1899, granting the right to use these streets to another railroad company, the predecessor of the appellee railway company, and had passed the ordinance of July 7, 1914, "granting said streets to defendant railway company and vacating same." As a further defense, it was alleged that, upon a petition filed for that purpose, the Railroad Commission had, in August, 1915, refused to grant the prayer of the petition that the street crossings in question be opened.

Considerable testimony was taken, and the learned chancellor prepared an elaborate opinion, containing numerous findings of fact, and, among other findings, that the railway company had made extensive and expensive improvements, of a permanent nature, which were necessary for the safety and dispatch of the company's business.

It is earnestly insisted by the railway company that appellants have not sufficient title to maintain this suit, and that they have not sustained any special damages for which they are entitled to sue; but the record contains the following agreement in regard to damages: "It is agreed that any finding that the court may make with reference to damage to the plaintiffs shall not be binding upon the defendants in future litigation with reference to same; it being agreed that the question of damage shall remain in abeyance to be passed on in the future; it being understood that the question of damages may be settled independently of the finding of the court as to the right or wrong of the company in erecting the structures in the street; in other words the defendants do not agree that plaintiffs, or any of them, are damaged; but it is understood that the witness (W. H. Hall) has testified that all of the plaintiffs have received some damage from the acts complained of."

We will consider, therefore, only the question of appellants' right to the relief prayed in the court below.

The chancellor denied the relief prayed upon two grounds. The first was that appellants were remitted to their action for damages. And the second was that the action of the Railroad Commission, in failing to grant the relief prayed, is decisive against the right of relief by injunction.

We will not stop to consider the correctness of the court's action in denying injunctive relief insofar as that action is predicated upon the finding of the Railroad Commission and its refusal to grant the relief prayed.

We agree with the chancellor in his finding on the first ground, and base our decision, in affirming his decree, upon that ground alone.

The court found that three separate ordinances had been passed by the city council in regard to the streets in question. The first ordinance was passed in 1894; the second in 1899; and the third in 1914. That these ordinances granted to the railway company, and its predecessor, the right to the use of the streets for railroad purposes, and the rights so granted were immediately used, and that depots, shed, tracks, and other improvements, of an expensive and permanent nature, had been erected, and that, under the ordinance of 1914, the grade line of the railroad tracks had been changed and three new tracks had been laid, and a new depot built, in the year 1915, during all of which time appellants took no action, except to correspond with the railway company in regard to a claim for damages, until the filing of this suit on March 1, 1916.

Under the facts stated, we must hold that appellants are remitted to their suit at law for damages to compensate any injury sustained by them. Although one may arrest the first step toward the appropriation of his property until compensation is made, he does not forfeit his right to compensation because he takes no action until the appropriation has actually been made. But, if he

stands by and fails to exercise the precedent right of being compensated for his property before it is taken, he can thereafter only have compensation for his damages. Such is the effect of the decisions of this court in the cases of *Organ* v. *Memphis & L. R. Rd. Co.*, 51 Ark. 235; *Reichert* v. *St. Louis & S. F. Ry. Co.*, 51 Ark. 491; *Ashley* v. *Little Rock*, 56 Ark. 370; *Beebe* v. *Little Rock*, 68 Ark. 62; *McKennon* v. *St. Louis, I. M. & S. Ry. Co.*, 69 Ark. 104; *Warren & Ouachita Valley R. Co.* v. *Garrison*, 74 Ark. 136; *Ark., La., & G. R. Co.* v. *Kennedy*, 84 Ark. 364; *Union Sawmill Co.* v. *Felsenthal L. & T. Co.*, 87 Ark. 117; *Cook* v. *St. Louis, I. M. & S. Ry. Co.*, 103 Ark. 326; *Dobbs* v. *Town of Gillett*, 119 Ark. 398; see also Lewis on Eminent Domain (3 ed.), § 929, and cases there cited.

It follows, therefore, that the decree of the court below must be affirmed.

ADAMS v. WOODS.

Opinion delivered April 30, 1917.

1. ACTIONS—PARTIES—NOTICE.—A partition suit was brought and appellant was named as party plaintiff with others; although he had not authorized the suit, he will be estopped to assert that the decree and sale were void, where he learned of the pendency of the action, in ample time, and acquiesced in its prosecution.
2. COMMISSIONER'S SALE—OBLIGATION OF PURCHASER—CO-TENANCY.—Land was sold at a commissioner's sale, and the interest of one of the plaintiffs purchased by one W. *Held*, the fact that W. was an attorney, and represented his own interests, did not impose upon him any duty with reference to his co-tenants.

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

Williams & Seawell, for appellant.

1. The original suit was instituted and the name of J. G. Adams was used as party plaintiff without his knowledge or consent, and the decree and sale made without notice to him are void. Kirby's Digest, § 4424; 71 Ark. 318; 69 *Id.* 587; 2 S. W. 195; 4 Cyc. 927; 23 *Id.* 683. Mere knowledge of the suit is not sufficient. 4 C. J. 1330.

2. Woods' assumed relation as attorney precluded him from purchasing at the sale and he should have been declared a trustee as to appellant's interest. 30 Ark. 44; 33 *Id.* 575; 42 *Id.* 25; 54 *Id.* 627; 90 *Id.* 166.

3. If Woods be held a trustee, his grantee is chargeable with notice and holds title subject to the equities of appellant. 103 Ark. 425-9; 50 *Id.* 323. A trustee can not deal with the trust property for his own benefit. 32 Ark. 56; 67 *Id.* 340; 40 *Id.* 393; 41 *Id.* 104.

4. No laches can be charged to appellant. 73 Ark. 575.

S. W. Woods, for appellee.

1. Woods never represented appellant as attorney; he appeared in his own behalf.

2. Appellant authorized the suit and ratified it after it was brought in such manner as to bind him. The findings of the chancellor are not clearly against the testimony and this court will not disturb them. 89 Ark. 309; 104 *Id.* 9; 73 *Id.* 489.

3. If the court should find that Woods acted as attorney for appellant, and that his purchase was in trust, still his purchase was not void, but voidable only, and before appellant can recover he must offer to do equity. 87 Ark. 232; 75 *Id.* 40; 2 R. C. L. 972, § 48; 56 Miss. 541.

4. Appellant's claim is stale. He had full knowledge of the suit, sale and purpose of the suit, and is estopped. 87 Ark. 232; 75 *Id.* 40; 103 *Id.* 484; 60 *Id.* 50; 55 *Id.* 85; 2 R. C. L. 972; 10 *Id.* 395-7.

5. Even if Woods was a trustee, appellant can not recover, for Millard was a purchaser for value, *bona fide* and without notice. 122 Ark. 445.

McCULLOCH, C. J. Appellant, J. G. Adams, instituted this action in the chancery court of Marion County to set aside a former decree of that court for the partition and sale of a certain tract of land, and also to cancel a sale of the land made by the commissioner of the court pursuant to that decree.

Appellee, S. W. Woods, was the purchaser under the decree, and subsequently sold an interest in the land to appellee Millard, and both of them were made parties defendant in the present action.

The tract of land contains 40 acres and was originally owned by the heirs of Lynn Adams, but at the time the partition suit was instituted the land was owned by John Q. Adams, J. G. Adams, G. W. Wickersham, Homer Hudson, Marvin Gilley and Ella Gilley. John Q. Adams owned an undivided one-third of the tract, being one of the heirs of Lynn Adams, and having purchased the shares of two other heirs. J. G. Adams was one of the heirs of Lynn Adams and owned an undivided one-ninth of the land by inheritance. G. W. Wickersham owned an undivided one-third by purchase of the shares of three of the Lynn Adams heirs. Homer Hudson owned an undivided one-ninth as one of the heirs of Lynn Adams, and the other one-ninth interest was owned by Marvin and Ella Gilley, two of the heirs. The partition suit was instituted in the name of John Q. Adams, J. G Adams and G. W. Wickersham on January 15, 1903, by an attorney who was employed by John Q. Adams and Wickersham. The contention in the present case is that appellant J. G. Adams did not authorize the employment of the attorney or the use of his name as plaintiff, and that he was not apprised of the fact that he had been made a party to the suit. The other owners, Homer Hudson and Marvin and Ella Gilley, were made defendants in the original action.

The chancery court, at the February term, 1903, rendered a decree for the sale of the land for partition and directed a sale, but fixed a minimum price. There was no sale made under that order, and the case remained on the docket until there was a sale under a new order reducing the minimum price in the year 1911. During the pendency of the action and before the sale, appellee, S. W. Woods, purchased the undivided one-third of John Q. Adams, one of the plaintiffs in the original action, and he appeared before the court asking for a renewed order

of sale at a reduced minimum price. The order was made and at the sale Woods purchased the land and the commissioner executed a deed to him which was done by order of the court on June 5, 1911. After Woods sold to Millard, improvements in the way of developments of the land as mineral land were begun, and there was considerable advance in value on that account prior to the institution of the present suit. The case was heard by the chancellor upon the evidence adduced, and there was a decree dismissing the complaint for want of equity.

(1) Conceding that the original suit for partition was instituted without authority from appellant, there is abundant evidence in the record establishing the fact that during the pendency of the action appellant was apprised of its pendency and acquiesced in its prosecution. At any rate, he took no steps to repudiate or discontinue the action which he knew was being prosecuted in his behalf as one of the plaintiffs. Under those circumstances, he is estopped, after the decree and sale of the land, to claim that the decree is void because he had not authorized the institution of the suit.

(2) It is next insisted that Woods should be held to account as trustee for the reason that he was an attorney at law and appeared in the action for the purpose of procuring the order of sale. The answer to that contention is that Woods did not appear as attorney in the action, but as one of the litigants. He was not the attorney who instituted the action originally, but he purchased the interest of John Q. Adams, one of the plaintiffs, and thereafter appeared in his own behalf. He was merely one of the tenants in common and owed no duty to his cotenants with respect to the sale of the land. In other words, he had a perfect right to buy at the commissioner's sale, and the fact that he was an attorney at law who represented his own interest afforded no reason why he should be held as trustee for the other owners.

There was no equity in the complaint and the chancery court was correct in dismissing it.

Affirmed.

HUMPHREYS, J., not participating.

CASTLEMAN *v.* SCHUHARDT.

Opinion delivered April 30, 1917.

SALES—SALE OF WORK MARES—CAVEAT EMPTOR.—Appellee purchased three mares from appellants, the latter making false representations as to the mares' qualities, upon which appellee relied, and so relying forwent a test of the animals before purchase; *held*, under the facts the doctrine of *caveat emptor* did not apply.

Appeal from Woodruff Circuit Court, Southern District; *J. M. Jackson*, Judge; affirmed.

C. F. Greenlee, for appellants.

1. The contention of plaintiffs is fully sustained by the evidence. No fraud was perpetrated nor fraudulent misrepresentations made. Defendant saw the mares, inspected them and was offered the opportunity to test them. The doctrine of *caveat emptor* clearly applies. Tiedeman on Sales, 159, 158, 187-8; 35 Cyc. 68-9; 38 Ark. 334; 95 *Id.* 131-6; 31 *Id.* 170; 108 *Id.* 32.

2. The court did not submit the issues to the jury fairly and squarely, and the verdict is not sustained by the evidence. The burden was on appellee. 35 Cyc., § 485, 559-566.

3. The court erred in refusing plaintiff's instructions. Cases *supra*.

Roy D. Campbell, for appellee.

1. The questions in dispute were submitted to the jury on proper instructions, and their verdict settles it.

2. There is no error in the instructions given or refused. Defendant relied upon the false representations of appellants and the doctrine of *caveat emptor* does not apply. 98 Ark. 48; 108 *Id.* 34; 47 *Id.* 338. The judgment is right.

McCULLOCH, C. J. Appellants instituted this action in the circuit court of Woodruff County to recover the sum of $300, the price of three mares, sold and delivered to appellee, who defended on the ground that the purchase of the mares was induced by fraudulent misrepresentations made by appellants. The cause was tried before a jury and the trial resulted in a verdict in favor of appellee, from which an appeal has been prosecuted to this court.

Appellee was a farmer living near Hunter, Woodruff County, and appellants were engaged in the sale of horses at Brinkley. Appellee purchased three mares from appellants for the aggregate price of $300, and the mares were sent to Hunter for delivery to appellee, who after trying to work the animals, claimed that they were unfit for work and offered to return them. Appellants refused to take the mares back, and sued for the price.

Appellee testified that he went to appellants to purchase stock because he had known them first in this country, and they had been instrumental in his buying the farm on which he lived. He stated that he told appellants he wanted good work stock and preferred brood mares; that he told appellants that he wanted stock that would work single or double, "and to anything that I put them, and horses that will not balk." He testified further, that Mr. Castleman assured him that the mares would work anywhere, and offered to hitch them up to try them, but that he (appellee) told him that was unnecessary, and that he would take Castleman's word for that.

The testimony tends to show that two of the mares were balky, and would not work at all. Castleman denied that he made any misrepresentations to appellee concerning this stock, and said that he told appellee that one of the mares was "cold-collared," and that he would have to be careful with her, but made no further representations, and, on the contrary, insisted on appellee exercising his own judgment, and trying the mares before he

bought them. There was other testimony adduced by each of the parties tending to support their several contentions with respect to the condition of the mares and the representations made concerning them.

The testimony was, we think, sufficient to warrant the jury in finding that the qualities of the animals were misrepresented by the appellants for the purpose of deceiving the appellee, and that the appellee bought on the faith of those representations without first testing the qualities of the animals. That issue was submitted to the jury on correct instructions.

It is insisted, however, by counsel for appellants, that the defense of false representations is not available because appellee had the opportunity to test the qualities of the mares. This would be true if the defects were open and obvious, but if appellee was induced by the false statements to forego a test of the qualities of the animals he is not precluded on the doctrine of *caveat emptor* from setting up the fraudulent misrepresentations as a defense. This subject was reviewed in the case of *Hunt* v. *Davis,* 98 Ark. 44, where we said:

"Although a purchaser must act with prudence and diligence in seeking the avaliable means of ascertaining the truth, yet if the seller having peculiar knowledge of the matter, by any misrepresentation or artifice, induces the buyer to rely on his false statement, then the seller will not be heard to say that the buyer could have ascertained the truth. The very representations relied upon may have caused the purchaser to forbear from making *further* inquiry. If the false representations are made with the intent to induce the other party to act thereon, ordinary prudence does not require the party to test the truth of such representations where they are within the knowledge of the party making them or where they are made to induce the other party to refrain from seeking further information." For further discussion on the subject, see opinion in *Boren* v. *Bettis,* decided today, *infra,* page 457.

Appellee admits that appellants suggested to him to hitch up the mares and test their qualities, but he told appellants that he did not care to do so, because he would take the latter's word. This tended to show that appellee relied upon the representations made by appellants. The suggestion made by Castleman to appellee tended to show good faith on the part of the former, and that the representations, if made, were not with the intent to deceive, but that was a question for the jury, and we must treat the issue as settled by the verdict. The evidence was sufficient, not only to show that the false representations were made, but also, that they were made with intent to deceive.

Counsel for appellants earnestly insist that the court erred in refusing to give instruction No. 1, which they requested, but that instruction was in conflict with the views we have expressed concerning the law of the case and the court was, therefore, correct in refusing to give it.

It is also contended that the first instruction requested by the appellee was incorrect, and that the court erred in giving it, but that instruction was in conformity with the law as here stated.

Judgment affirmed.

BUSH, RECEIVER OF ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. STATE.

Opinion delivered April 30, 1917.

RECEIVERS—RAILROADS—GIVING SIGNAL AT PUBLIC CROSSING.—Kirby's Digest, § 6595, which provides that a certain signal shall be given at least 80 rods from the place where the railroad shall cross any other road or street, and providing a penalty for failure to observe the statute, which shall be paid by the corporation running the railroad, *held* to be applicable to a receiver operating a railroad in his capacity as receiver.

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

Troy Pace, for appellant.

1. The act, July 23, 1868, Kirby's Digest, § 6595, is penal, strict construction is required, and no one can be brought within its terms unless the words of the statute, in their ordinary acceptation comprehend such person. 87 Ark. 409; 114 *Id.* 47; 88 *Id.* 277; 6 Wall. 395; 5 Wheat. 76.

2. The receivers are not the owners of the railroad nor within the terms of the statute. 78 Fed. 290; 85 *Id.* 533; 177 U. S. 305; 18 S. W. 578; 60 Fed. 176; 23 S. W. 317; 25 *Id.* 1076; High on Receivers, 553; 33 Cyc. 683. Kirby's Digest, § 6732, does not apply to receivers, and has no application.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

1. The statute, Kirby's Digest, § 6595, was intended to apply to every person owning, controlling or operating trains over any railroad in this State, and receivers are subject to its penalties. 79 Minn. 372; 44 Conn. 291; 45 Oh. St. 577; 57 Minn. 345; 98 Ark. 200; 33 Conn. 237; High on Receivers, 553; 169 Mass. 398; 110 N. Y. 250; 46 Mo. App. 466, 469; 84 Ark. 409. While the statute is penal, it is also highly remedial to protect persons and property. It should be liberally construed. *Supra.* 84 Ark. 409.

WOOD, J. Section 6595 of Kirby's Digest provides that a bell of at least 30 pounds in weight or a steam whistle shall be rung or blown at the distance of at least 80 rods from the place where the railroad shall cross any other road or street and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of $200 for any neglect, to be paid by the corporation owning the railroad.

The only question presented by this appeal is whether or not the above statute, is applicable to a receiver operating a railroad in his capacity as such receiver. The intention of the Legislature was to prevent, as far as possible, accidents that might otherwise occur

if travelers at the crossings of a railroad with other roads were not warned of the approach of the train at such crossings. The statute was leveled at whoever should be operating the railroad rather than the corporation who might have the technical ownership thereof. Any one operating a railroad, whether as the technical owner, or as the lessee or receiver, who, for the time being, has the road in charge, and is operating the same, is comprehended within this statute and comes within the purpose of the lawmakers in enacting the same.

In 1879 the Legislature of Pennsylvania enacted a law requiring, among other things, the owners of factories to provide and cause to be affixed to every such building permanent fire escapes under a penalty not exceeding $300. A tenant who had leased a factory was sued for damages caused by a failure to provide a fire escape as required by the statute. In passing on the question as to whether or not the tenant was an owner within the terms of the statute, the Supreme Court of Pennsylvania said: "It is certainly a highly penal statute. It imposes a duty unknown to the common law, and punishes a neglect of that duty in the manner above stated. It is almost needless to say that such an act can not be extended by implication to parties who do not clearly come within its terms." Then the court held that, for all practical purposes, the tenant in possession was the "owner" until the end of his term. *Schott* v. *Harvey*, 105 Pa. 222.

In statutes prescribing certain duties to be performed by the "owners" of railroad companies and providing a penalty for failure to perform those duties, it is held that the word "owners" is used in the popular, rather than in the technical, sense, and the word is construed "so as to include all who are operating the railroad, whether as owners of the property or as lessees, receivers or the like." *State* v. *Corbett*, 57 Minn. 345, 353; *The State of Missouri to the Use of Ray County* v. *St. Joseph, St. Louis & Santa Fe R. Co.*, 46 Mo. App. 466.

In the last case the court, in construing a statute almost identical with ours except as to the amount of the penalty, among other things, said: "More than this, whether defendant was operating this railroad as absolute owner, lessee, or otherwise, it was liable for the violation by it of the provisions of this statute. It filled the requirement of 'owner' under this statute." See, also, *Baltimore & Ohio Rd. Co.* v. *Walker,* 45 Ohio St. 577.

Since the design of the Legislature in enacting this law was to protect travelers against accidents that might occur at crossings in the operation of trains, were not the precautions prescribed in the statute taken, it would not comport with its purpose to construe it so as to exclude receivers while operating railroads in this State.

In *Chicago, R. I. & P. Ry. Co.* v. *State,* 84 Ark. 409, the statute under consideration was before the court, and we said: "In the construction of statutes regard must be had to their various provisions, and such effect given them as the provisions indicate they were intended to have, and as will render the statute operative. We are of the opinion that the operating corporation is the 'corporation owning the railroad' within the meaning of the statute."

So it may be said here, that the receiver, while operating the railroad under the orders of the Federal Court, is the "owner" within the meaning of the statute.

In *Jordan* v. *Harris,* 98 Ark. 200, speaking of the relation of the receiver of an insolvent corporation, we held (quoting syllabus): "The receiver of an insolvent corporation stands in the place of the corporation, and has only such rights as it had, so that the rights of third parties are not increased, diminished or varied by his appointment." So here the receiver stands in the place of the corporation owning the railroad.

The judgment against appellant for a violation of the statute, as thus construed, is correct, and it is therefore affirmed.

SPENCER v. STATE.

Opinion delivered April 30, 1917.

1. FORGERY—VARIANCE BETWEEN INDICTMENT AND PROOF.—Immaterial variances resulting from clerical inaccuracies in transcribing and spelling the forged name are not fatal.
2. ACCOMPLICE—DEFINITION.—An accomplice is one who in any manner participates in the criminality of an act, whether he is considered, in strict legal propriety, as principal, or merely as an accessory before or after the fact.
3. APPEAL AND ERROR—ACCOMPLICE—FAILURE TO PROPERLY INSTRUCT.—In a criminal prosecution for forgery, it was material whether a certain witness was an accomplice; *held*, it was error for the court to refuse to instruct the jury on the issue of what constituted an accomplice, defendant having requested the court to instruct the jury as set out in 2 above.

Appeal from Faulkner Circuit Court; *Thomas C. Trimble*, Judge; reversed.

Robins & Clark, for appellant.

1. The verdict is contrary to the law and the evidence. Herbert Spencer testified and was not corroborated by any one. Evidence by an accomplice must be corroborated. 75 Ark. 540; 58 *Id.* 310; *Ib.* 353; 36 *Id.* 117; 120 *Id.* 128. See, also, 63 Ark. 310; 120 *Id.* 148.

2. An accomplice is one who in any manner participated in the criminal act. Wharton Cr. Law., § 982, A; 36 Ark. 126; Am. & Eng. Enc. Law (2 ed.), 390; 27 Ill. 152; 95 Am. Dec. 474.

3. The court erred in refusing to give instruction No. 2, defining an accomplice. Russell on Crimes, p. 26; Wharton Cr. Law, § 982-A; 36 Ark. 126; 45 *Id.* 547; 43 *Id.* 368; 50 *Id.* 544; 51 *Id.* 118; 95 *Id.* 236; 37 *Id.* 67; 26 S. W. 829.

4. It was error to refuse Nos. 1 and 3, asked by defendant. 63 Ark. 457, and cases *supra*.

John D. Arbuckle, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Instruction No. 1 was properly refused. 32 Ark. 203; 84 *Id.* 97; 100 *Id.* 184; 109 *Id.* 446.

2. The second merely defined an accomplice. There was no necessity for it, nor was there any evidence that Herbert Spencer was an accomplice in forging the check. Uttering a forged check and forgery are separate and distinct offenses. 1 Wharton Cr. Law (10 ed.), § 712; 48 Ark. 94; 116 Mo. 548; 87 Ky. 201; 67 Mich. 222; 59 Iowa 391; 31 Tex. Cr. 587; 71 Ark. 82. If the crimes are separate and distinct offenses, the persons are not accomplices. 73 Minn. 150; 102 Ga. 447; 152 Mo. 100; 75 Tenn. 124; 37 S. W. 423; 134 Cal. 301; Hughes Instructions to Juries, § 301.

3. The third was properly refused. 43 Ark. 367; 51 *Id.* 115.

4. The evidence is ample to support the verdict.

HART, J. C. H. Spencer prosecutes this appeal to reverse a judgment of conviction against him for the crime of forgery. The indictment charges him with having forged the name of Lee Mode to a check for $75 on the Farmers State Bank of Conway in favor of F. W. Morris.

Henderson Spencer testified that on the 2d day of March, 1916, C. H. Spencer gave him the check in question at Damascus, Faulkner County, Arkansas, and asked him to present the check to the bank at Conway in Faulkner County and return him the money; that he put the check in his pocket and went to town with his father and presented the check for payment; that he did not tell his father about having the check because he thought the check was all right; that he presented the check in payment, and the cashier of the bank refused to cash it and kept the check.

The assistant cashier of the bank testified that the $75 check in evidence was presented at the bank for payment by Henderson Spencer, and that he discovered that the signature to the check was not that of Lee Mode, and refused to pay it; that Henderson Spencer told witness his name was F. W. Morris, that he had sold Lee Mode $75 worth of cattle and the check was for the cattle.

Both the assistant cashier and the cashier of the bank testified that they had compared the check introduced in evidence which the defendant is charged with forging with another check which it is shown that the defendant signed and that in their opinion both the checks were written by the same man; that the defendant had done business with the Farmers State Bank, and that they were familiar with his signature. The check which it is shown that the defendant signed was on the Farmers State Bank, and was payable to Lee Mode and the witnesses pointed out the peculiar way in which the name Mode appears in each check; that the final "e" looked more like an "a" than it did an "e;" that the same person wrote the name of Lee Mode in both checks.

Lee Mode testified that he did not sign the check which the defendant is charged with having forged; that he never bought any cattle from C. H. Spencer or Henderson Spencer, and never gave the defendant a check for $75.

The defendant was shown the $75 check which he is charged with forging and stated that he had never seen it until it was handed to him at the trial. He testified that he did not give that check or any other check to Henderson Spencer and ask him to take it to the bank and cash it for him. He was shown the check which he admitted that he signed and stated that he wrote the name Lee Mode in the check; that the check was payable to Lee Mode. He stated that his custom in writing "e" at the end of a word was to make it a capital.

The evidence was sufficient to support the verdict, and no reversal of the judgment is sought on account of the insufficiency of the evidence. Neither were any exceptions saved to the instructions given by the court. The judgment is sought to be reversed because the court refused to give instructions asked by the defendant. The instructions read as follows:

"1. The court instructs the jury, if you find that the descriptive part of the indictment charges that the

check alleged to be forged was signed Lee Mode, then you are instructed that this constitutes a fatal variance, and you must acquit the defendant."

"2. The court instructs the jury that an accomplice is one who in any manner participates in the criminality of an act, whether he is considered, in strict legal propriety, as principal, or merely as an accessory before or after the fact."

"3. The court instructs the jury that the witness Henderson Spencer, is an accomplice under the evidence in this case, and you are further instructed that a conviction can not be had upon his testimony unless the same is corroborated by other evidence, which of itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the crime of forgery, and the corroboration is not sufficient if it merely shows the commission of the offense and the circumstances thereof."

There was no error in refusing instruction No. 1. Mr. Wharton, in discussing the difference between a material and immaterial variance, says, "The greater rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading." Wharton's Criminal Pleading and Practice (8 ed.), secs. 173 and 273.

(1) Following the rule there laid down in *State* v. *Duffield* (W. Va.), 38 S. E. 577, it was held that immaterial variances resulting from clerical inaccuracies in transcribing and misspelling, even of the name forged, are no longer necessarily fatal. To the same effect see *State* v. *Gryder* (La.), 32 Am. St. Rept. 358. So, too, Mr. Underhill recognizes that the trend of modern decisions is to permit a wider latitude in the proof and disregard unimportant discrepancies in names and dates, particularly if the names are *idem sonans*. Underhill on Criminal Evidence (2 ed.), § 421.

In *Joiner* v. *State,* 113 Ark. 112, the indictment charged that defendant stole property belonging to one

J. R. Reynolds. The proof showed his name to be J. B. Reynolds. It was held that there was no variance between the indictment and proof, if the jury believed beyond a reasonable doubt that the prosecuting witness, J. B. Reynolds, was the identical person named in the indictment as J. R. Reynolds. See, also, *Woods* v. *State,* 123 Ark. 111; and *Bridger* v. *State,* 122 Ark. 391.

In the instant case the proof shows that a man by the name of Lee Mode resided in the neighborhood; that his check at the bank was good, and that the defendant knew him. It was also shown that the final "e" in a word as written by the defendant, resembles the letter "a." The defendant himself admitted that he always made the final "e" in a word a capital letter, and this fact would account for the resemblance to the letter "a" if the letter "e" should be misshaped. Under these circumstances, we think the court correctly refused to instruct the jury as a matter of law, that there was a fatal variance between the indictment and the proof.

(2-3) We think the court erred in refusing to give instruction No. 2. The instruction as asked contains the definition of an accomplice as laid down in *Polk* v. *State,* 36 Ark. 117. No other instruction defining an accomplice was given by the court. It is true the court submitted to the jury the question of whether or not Henderson Spencer was an accomplice, and told it that if it found he was an accomplice, a conviction could not be had upon his testimony unless corroborated by other evidence, etc. But the defendant was entitled to have the jury told what constituted an accomplice. Without this word being defined, the jury might have thought that Henderson Spencer was a joint offender with the defendant, and that a joint offender was not an accomplice. They might have convicted upon his testimony alone. Under the facts as presented by the record the jury might have found that Henderson Spencer at the time of passing the check knew the same to have been forged and might have found that he was guilty of forgery, if he had been on trial for that offense,

though the forgery was not his handiwork. *Moulton* v. *State,* 105 Ark. 502. Hence they might have believed him to have been a joint offender with the defendant. Of course, it might have found that he was an accomplice, and arrived at its verdict from a consideration of his evidence, together with the corroborating evidence. We can not tell, however, from the record whether the jury arrived at its verdict by considering the evidence in connection with the proper definition of the word accomplice. Hence it was prejudicial error to refuse the instruction because no other instruction defining the word "accomplice" was given to the jury.

The court did not err in refusing to give instruction No. 3. Under the facts as presented in the record, it was a question of fact whether Henderson Spencer was an accomplice or not, and it was not error to refuse an instruction which assumed that he was an accomplice. *Simms* v. *State,* 105 Ark. 16.

For the error in refusing to give instruction No. 2, the judgment will be reversed and the cause remanded for a new trial.

BOREN v. BETTIS.

Opinion delivered April 30, 1917.

1. SALES—TRADE OF ANIMALS—WARRANTY—AGREEMENT TO RELEASE MORTGAGE.—Where appellant traded a mule to appellee for a horse, stipulating that the horse be clear of any encumbrance, and appellee warranting that the horse was clear, appellant was entitled to an unencumbered horse, and where the same was mortgaged, appellee will be held to have broken his warranty, although the mortgagee promised to release the mortgage.
2. SALES—TRADE OF ANIMALS—MISREPRESENTATION—RESCISSION.—Where appellant traded a mule to appellee for a horse, and appellee made a misrepresentation of a material fact concerning the horse, which was relied upon by the appellant, and understood by the parties as an absolute assertion concerning the title to the horse, appellant's right to rescind the trade is a question for the jury.
3. CONTRACTS—MISREPRESENTATIONS—RESCISSION.—Fraud in the procurement of a contract gives the party defrauded a right to utterly reject the same; and when a vendor is guilty of fraudulent mis-

representations, or concealment as to the essential inducement to the contract, upon discovery, the vendee may rescind the contract, although the contract contained no special authorization for a rescission.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; reversed.

C. A. Starbird, for appellant.

It was error to give the second and fifth instructions. The second left out of consideration the mortgage and false representations. The fifth expressly directs the jury to disregard the mortgage and the misrepresentations concerning it. The mortgage was never released. The judgment should be reversed for these errors. Appellant had a right to rescind, and this right should have been submitted to the jury by proper instructions.

SMITH, J. Bettis owned a horse, which he traded to Boren for a mule. According to Boren, the trade was induced by Bettis' false representation and warranty that the horse "was sound and clear of mortgage," when, in fact, the horse was not sound, and was mortgaged to the Commercial Bank of Crawford County. Bettis denied that the horse was unsound, or that he had made any warranty in regard to its soundness. He admitted it was under mortgage, but stated that the cashier of the bank had given him permission to trade the horse, and that he advised Boren of this fact before the trade. Boren denied that he had any knowledge of the mortgage until after the trade, and testified that, upon being so advised, he asked the cashier of the bank about the mortgage, and that officer told him the bank did have a mortgage on the horse, but would release it. The mortgage had not been released at the time of the trial in the court below. Boren testified that the horse was wind-broken and worthless, and that, upon discovering this fact, he carried the horse to Bettis' house, and turned him loose there. That his mule returned to his lot, and he took it up and had it in his lot when Bettis brought this suit in replevin to recover its possession.

The court submitted the cause to the jury, over appellant's objection, upon the single issue of the soundness of the mule, and, over appellant's objection, gave the following instruction:

"The defendant, James Boren, admits that the cashier of the Bank of Alma told him that he had given Bettis permission to trade the horse, and, the bank making no claim for the horse, you are, therefore, directed by the court not to consider the matter of the mortgage in making up your verdict."

There was a verdict and judgment for the plaintiff.

It is argued, as ground for the reversal of the judgment, that the court erred in giving the instruction set out above. This instruction is attacked upon two grounds. The first is, that it does not correctly state Boren's position, as he did not admit that the cashier had given Bettis permission to trade the horse, nor did he admit that the bank made no claim to the horse; that his admission was, that the cashier told him, after the trade, that he would release the mortgage, but that the cashier did not tell him that he had given Bettis permission to trade the horse. The second objection is, that the instruction withdrew from the jury any consideration of the falsity of the warranty against encumbrances.

(1) It appears that the instruction does not correctly state the position of appellant. It was Bettis, and not Boren, who testified that the cashier had given Bettis permission to trade the horse. Boren testified that he traded for a "clear horse," and this he did not get. While he did admit that the cashier told him he would release the mortgage, the mortgage had not been released. Boren had the right to demand a warranty that the horse be not mortgaged, and this he said he did. If there was a representation that the horse was not mortgaged, it was false, and a subsequent promise of the cashier to release the mortgage, which appears to have been made without consideration, does not satisfy the warranty. Boren's right to an unencumbered horse was not discharged by

the cashier's promise to thereafter satisfy the mortgage, which Bettis had said did not exist.

This case is not controlled by the case of *Mason* v. *Bohannan,* 79 Ark. 435. There it was said that the remedy for the breach of an express warranty against encumbrances, in the absence of fraud or concealment of fact, is to sue for the amount of damages sustained by reason of such encumbrances. That case was an action in replevin for a horse, brought upon the theory that a breach of a warranty against encumbrances entitled the purchaser to rescind the contract. But it was undisputed there that the purchaser knew of the encumbrance, and the issue of fact was, whether there was a warranty against this encumbrance. Here there is an allegation of fraud and concealment, and the affirmative statement is made by Boren that he would not have traded had he not been deceived by the false representation made him.

A similar case, and one which announces the principle which controls here, is that of *Parker* v. *Boyd,* 108 Ark. 32. We quote from the syllabus of that case the following statement of the law:

"In order to entitle plaintiff to rescind a trade of a horse on the ground of false representations by the defendant, there must appear some representation of a material fact concerning the horse upon which plaintiff relied and which was understood by the parties as an absolute assertion concerning the condition of the horse, and not the mere expression of an opinion."

It was there also said:

"In order to entitle plaintiff to rescind the trade, there must have been some misrepresentation of a material fact concerning the mare which the plaintiff relied upon and which was understood by the parties as an absolute assertion concerning the condition of the mare, and not the mere expression of an opinion."

(2) Here we have evidence that there was a misrepresentation of a material fact concerning the horse, which was relied upon and was understood by the parties as an absolute assertion concerning the title to the horse, and

the court should, therefore, have submitted the question of the right of rescission as the result of the false representation.

The facts in the case of *Merritt* v. *Robinson,* 35 Ark. 483, are very similar to the controlling facts of this case, and the principles there announced are controlling here. It was there said:

(3) "Where the vendor is guilty of fraudulent misrepresentation, or concealment as to the essential inducement to the contract, the vendee would, on discovery thereof, have a right to rescind the contract, although no special agreement were contained therein authorizing him to rescind; for fraud, in all cases, gives the party defrauded a right utterly to reject the contract. Story on Sales, § 420; Hilliard on Sales, p. 326; *Strayhorn* v. *Giles,* 22 Ark. 521.

"But if the vendee elect to rescind the contract, on discovering the fraud, he must offer to do so within a reasonable time. *Ib.*

"If a vendor sells goods which he knows to be mortgaged, without giving information thereof to the purchaser, the sale would be considered as fraudulent. (Story on Sales, § 181; *Arnott* v. *Biscoe,* 2 Vesey 95). Appellant should have made known to appellee, when he swapped him the pony for the mule, that the pony was under mortgage to Pierce. Fair, honest dealing required this. The suppression of the truth is equivalent to falsehood, when the vendor is under obligation, as he was in this case, to disclose the truth. Hilliard on Sales, p. 326.

"If appellant had frankly told appellee at the time of the swap, that the pony was mortgaged to Pierce, as he should have done, but that he had permission from Pierce to trade the pony, and appellee had thought proper to make the exchange of animals after being so informed, then there would have been no fraud in the transaction on the part of appellant."

It follows, therefore, that, for the error of the court in failing to submit the question of appellant's right of

rescission, the judgment must be reversed and the cause will be remanded for a new trial.

HARRISON v. CADDO VALLEY BANK.

Opinion delivered April 30, 1917.

1. EXECUTION SALE—TITLE OF PURCHASER.—A purchaser at an execution sale takes subject to prior equities of other parties.
2. VENDOR'S LIEN—NOTES—FORECLOSURE.—A bank took certain notes reciting a vendor's lien, as collateral security for a note. The maker of the note, defaulting in payment, and the bank being in the attitude of an innocent purchaser, it was entitled to a foreclosure of the vendor's lien, as against a judgment creditor of the maker of the note who had secured a sale of the property on execution.

Appeal from Montgomery Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

H. H. Thomas, for appellant.

1. Plaintiff was not the assignee of the four notes—there was no assignment of them. Joyce, Defenses to Com. Paper, § 358; 95 Ga. 75, 78; 10 N. D. 558-563; 77 Pac. 431.

2. The notes were wrongfully pledged by Jones—a fraud. 50 Ark. 320. The bank had notice. 1 Daniel on Neg. Inst. (5 ed.), § 799; 104 Ark. 394.

3. Did Barton and Witherspoon, by levy and sale, acquire a lien which a court of chancery will enforce against plaintiff? See 21 Ark. 80; 33 *Id.* 63; 34 *Id.* 503, 509; 139 Iowa, 511; 18 L. R. A. (N. S.) 1167-1175. The first note was due before it was pledged, probably the second. It would be a fraud on Harrison to render judgment for the full amount, as plaintiff was not an innocent purchaser for value. 14 Ballard, Real Property, § 164. The chancellor's findings are against the evidence.

Gibson Witt, for appellee.

1. The notes were assigned as collateral security, and the bank was an innocent purchaser for value, before maturity. 62 Ark. 216; Kirby's Digest, § 510. Appellee was not a party to any agreement between Jones and Harrison, and had no notice. There was no fraud.

2. Barton & Witherspoon are not innocent purchasers, but they had actual notice. 42 Ark. 170; 52 *Id.* 493; 53 *Id.* 509; 80 *Id.* 8. The findings of the chancellor are sustained by the evidence.

SMITH, J. This action was instituted by the appellee bank against appellants, for the purpose of enforcing a vendor's lien on certain town lots, which was reserved in the deed of conveyance. The consideration for this deed was four notes, each for $150, payable to the order of P. F. Jones, the vendor, and signed by A. C. Harrison, the purchaser. These notes were dated September 25, 1913, and were due, respectively, January 1, 1914, July 1, 1914, January 1, 1915, and July 1, 1915. The deed from Jones to Harrison was of even date with the notes, and was filed for record on November 27, 1914.

Jones borrowed $489.96 from the bank and made a note therefor, due ten days after date, and, upon the maturity of this note, he proposed, as a consideration for an extension of time, to deposit the four notes given him by Harrison, as collateral to his own note, and this was done.

Witherspoon & Barton recovered a judgment against Jones, upon which an execution was issued, and they became the purchasers of the lots in question at the sheriff's sale under this execution on November 28, 1914, for the sum of $580, and received from the sheriff a certificate of purchase reciting that fact. Upon failure by Jones to pay his note to the bank, this suit was brought for the purpose of foreclosing the vendor's lien reserved in favor of Jones in his deed to Harrison. It was alleged in this complaint that Witherspoon & Barton were asserting some interest in these lots, and they were made parties to this proceeding, and there was a prayer, as against them, that they be required to set out their interest in the lots. Separate answers were filed by both Witherspoon & Barton and by Harrison. In these answers it was alleged that Jones had sold the lots in question to Harrison, who had defaulted in his payments, whereupon it had been agreed between Jones and Harrison that the deed

should not be placed of record, but should be destroyed, and the notes cancelled, and that no authority existed for recording the deed, and that Jones and the officers of the bank had conspired together to defraud both Witherspoon & Barton and Harrison, and had placed the deed of record for that purpose. That Harrison had surrendered the possession of the lots, and Jones was in possession of them at the time of the delivery of the collateral notes to the bank, and that the bank was not an innocent purchaser of the notes, and that the notes had never been assigned to it. Issue was joined upon these allegations.

We need not consider the effect of the agreement, if one was made, between Jones and Harrison for the cancellation of the deed. It may be said, however, that, if there was an agreement for the destruction of the deed, it was never carried out, for the deed was not destroyed, but was delivered by Jones to the bank along with the notes which constituted the consideration for its execution. Harrison was notified when the first of these notes fell due, but he did not pay it, nor did he respond to the notice, and he made no demand for his notes, and the proof does not show that the bank was advised of any agreement between Harrison and Jones in regard to their cancellation.

The chancellor found that the bank was an innocent purchaser of the notes, and if this was true, its rights are not affected by any agreement between Jones and Harrison for the destruction of the deed of which it was not advised. Both Jones and the cashier of the bank testified that the notes were endorsed by Jones to the bank at the time they were deposited by Jones as collateral for the extension of his note to the bank. This would have accorded with the usual custom in such matters, and, upon a consideration of all the evidence in the case, we are unable to say that the finding of the court below to this effect is clearly against the preponderance of the evidence.

Witherspoon & Barton purchased at their own execution sale, and the amount of their bid is a credit upon

their judgment, and they, therefore, take the title subject to the prior equities of other parties. *Sturdivant* v. *Cook*, 81 Ark. 279.

If the bank was, in fact, an innocent purchaser of the notes, and we can not say that the chancellor's finding to that effect is clearly against the preponderance of the evidence, it follows that it is entitled to the benefit of the lien reserved in the deed from Jones to Harrison under section 510 of Kirby's Digest, which provides that "the lien or equity held or possessed by the vendor of real estate, when the same is expressed upon or appears from the face of the deed or conveyance shall inure to the benefit of the assignee of the note or obligation given for the purchase money of such real estate, and may be enforced by such assignee."

It follows, therefore, that the decree of the court below, ordering the foreclosure of the vendor's lien in favor of the bank. should be affirmed, and it is so ordered.

FEIGE v. STATE.

Opinion delivered April 30, 1917.

1. HOMICIDE—INVOLUNTARY MANSLAUGHTER.—Involuntary manslaughter is an involuntary killing, done without design, intention or purpose of killing, but in the commission of some unlawful act, or in the improper performance of some lawful act.
2. HOMICIDE—ACTS OF PHYSICIAN—INVOLUNTARY MANSLAUGHTER.—A physician is not criminally liable for a mere mistake of judgment in the selection and application of remedies resulting in the death of his patient; and whether one who assumes to practice medicine is grossly ignorant of the art or the selection of remedies or their application, or inapplication, or whether they are rashly applied, are all questions to be determined from the evidence.
3. EVIDENCE—TEXT BOOKS AS ORIGINAL EVIDENCE.—Excerpts from medical books cannot be read to the jury as original and affirmative evidence.

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

O. H. Sumpter, for appellant.

1. The court erred in instructing the jury and in refusing the instructions requested by the defendant. A

mere mistake or error of judgment, or a mere want of skill, where there is not gross negligence or ignorance, will not render a practitioner liable. 21 Cyc. 769; 38 Ark. 605. The first, second, third and fourth were error.

2. The fifth, as to the punishment, was error. Kirby's Dig., § 2408. The jury should have been left to fix the penalty. 12 Cyc. 611, 641-2.

3. It was error to refuse defendant's requests Nos. 1 to 10. 12 Cyc. 384-5, 621-2; 59 Ark. 431; 64 Mich. 693; 8 Am. St. 863; 21 Cyc. 769; 38 Ark. 605.

4. The court erred in admitting and excluding evidence. Extracts from standard medical works are admissible. 3 McFadden Physical Culture, 1224-8, 1237-9, 1243, 1270, 1275, 1283, etc, 1298-9, 1315-17.

5. The evidence was insufficient and the verdict contrary to the evidence. 3 Greenl., Ev., § § 129-9; 38 Ark. 605; Stewart Legal Medicine, p. 292-3, 57, 263-4.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

1. The instructions given were not erroneous. Kirby's Digest, § 1779, 5243; 64 Ark. 247; 69 *Id.* 558; 16 *Id.* 628; 78 *Id.* 132; 85 *Id.* 179; 82 *Id.* 64; 78 *Id.* 147. The remarks of the prosecuting attorney were not improper. 95 Ark. 321; 58 *Id.* 353; *Ib.* 473; 94 *Id.* 514. Nor were they prejudicial, and the court promptly cured any possible prejudice.

2. It was not error to refuse to permit to be read extracts from McFadden's Work on Physical Culture. It is not a recognized authority. 110 Ill. 219; 67 Cal. 13; 149 Mass. 68; 84 Mich. 676; 60 Miss. 460; 7 R. I. 336; 44 S. W. 513; 38 Md. 15; 77 N. C. 55.

3. The evidence fully supports the verdict, and the finding of the jury is conclusive. 95 Ark. 172; 104 *Id.* 162; 101 *Id.* 51; 100 *Id.* 330.

HUMPHREYS, J. Appellant was indicted at the March, 1916, term of the Garland Circuit Court for the crime of manslaughter, and at the September term

thereof was tried and convicted on said charge and his punishment fixed by the jury at imprisonment in the State penitentiary for a period of twelve months. He filed his motion for a new trial, which was overruled, after which judgment was rendered and sentence imposed, from which judgment and sentence he has appealed to this court.

J. R. Stratton, who had been stricken with paralysis, employed appellant to treat the disease according to a fasting and water cure, which was being practiced by appellant. The fasting and water cure, practiced by appellant on his patients, required the patient to totally abstain from the use of foods, and drink all the water possible. Appellant took J. R. Stratton through a thirty-five-day fast. Stratton was seized with a severe attack of hiccoughs during the last seventy-five hours of the fast, and in order to relieve him and prevent death therefrom, appellant placed a wide leather strap around his body and buckled it up as tight as he could draw it. Mrs. Stratton became alarmed and insisted upon calling in other physicians. Appellant protested and insisted that he be permitted to continue the fasting and water cure. After consulting friends, Mrs. Stratton decided to call in other physicians. Appellant reluctantly yielded, and when the physicians came, advised against the use of a stimulant or strong medicines and rich foods. Appellant was discharged and Doctors Cox and Smith were employed. When they took charge of the patient, he was in a semi-coma, his pulse was weak, fast and intermittent. They gave him a hypodermic of spartein and then treated him for hiccoughs and a weakened condition. He recovered from the hiccoughs but never recovered from the weakened condition and died at the expiration of five days.

The evidence on the part of the State tended to show that the treatment prescribed and administered to J. R. Stratton by appellant was irrational, unreasonable unscientific and was the proximate cause of his death.

The evidence on the part of appellant in a measure tended to show that the fasting and water cure, as practiced by him, was rational, reasonable and scientific and had wrought wonderful cures, and that it might have worked a cure on Stratton had he been permitted to continue the fast.

The cause was submitted to the jury on the theory that one who practices medicine for a remuneration would be guilty of involuntary manslaughter if death resulted to the patient on account of gross ignorance or lack of skill in selecting and administering the remedy. The instruction embodying this idea correctly declared the law as applicable to the theory advanced by the State.

The appellant's theory was to the effect that the remedy chosen was rational, reasonable and scientific; that the remedy chosen had been administered in a skillful manner; that the same remedy administered in the same way by him to other patients had greatly benefited and cured them; that this remedy had been selected and administered in good faith, believing it would cure the patient; that it was not the proximate cause of the death of J. R. Stratton, but if it were, that it was a mistake of judgment and not the result of gross ignorance and unskillful treatment on his part.

This court said in the case of *State* v. *Hardister and Brown,* 38 Ark. 605, quoting the syllabus: "For a mere mistake of judgment in the selection and application of remedies, resulting in the death of his patient, a physician is not criminally liable; but when death is caused by gross ignorance in the selection or application of remedies, by one grossly ignorant of the art he assumes to practice, he is criminally liable."

None of the instructions given clearly present the theory of appellant. Evidence was adduced at the trial showing that appellant possessed in a degree both knowledge of and skill in the use of the fasting and water cure, and that he had practiced it successfully. The evidence in the record warranted an instruction allowing for a

mistake in judgment. Appellant was at least entitled to an instruction defining the difference between a felonious lack of knowledge and skill, on the one hand, and a mere mistake of judgment, on the other. In other words, the jury should not have been left in a position to confuse a mistake of judgment with gross ignorance or lack of skill.

(1-2) The second instruction asked by appellant and refused by the court correctly presented the law applicable to the theory advanced by appellant, and to which he is entitled upon the whole record. That instruction is as follows:

"Involuntary manslaughter is the involuntary killing done without design, intention or purpose of killing, but in the commission of some unlawful act, or in the improper performance of some lawful act.

"For a mere mistake of judgment in the selection and application of remedies resulting in the death of his patient, a physician is not criminally liable, and whether one who assumes to practice medicine is grossly ignorant of the art or the selection of remedies or their application, or inapplicable or rashly applied, are all questions to be determined by the evidence."

It is insisted that the court committed error in declining to give instruction No. 9, on the presumption of innocence, requested by appellant. This subject is fully covered in the instructions given by the court to the effect that the burden of proof was on the State to prove defendant's guilt beyond a reasonable doubt.

It is also insisted that an error was committed because the prosecuting attorney referred to the fact that appellant did not have a license to practice medicine. The court indicated that it was an improper argument, as that issue was not involved in the case. It is unnecessary for us to comment upon it, as the prosecuting attorney will not likely repeat the statement on a new trial.

It is insisted that the court committed an error in using the words "unlawful act" in the first instruction.

It is pointed out by appellant that he was indicted for the commission of a lawful act "without due caution and circumspection." The court in giving instruction No. 1 defined involuntary manslaughter, and it is apparent that that portion of the instruction referring to a killing in the commission of an unlawful act was not intended as a direction to the jury in the instant case. It was merely used as a part of the statutory definition of manslaughter. It may have been just as well and perhaps better to have left it out, but no prejudicial error was committed by the court in the use of the words in the manner in which they were used in the instruction.

(3) It is strenuously insisted that the court erred in refusing to permit appellant to read excerpts to the jury from a book entitled "McFadden's Physical Culture." This court said, in the recent case of *Scullin et al.* v. *Vining,* 127 Ark. 124, 191 S. W. 924, that it is proper to read extracts from standard medical authorities upon the subject matter involved to an expert witness and to ask him whether he agrees or disagrees with the authorities to test the knowledge of the expert and to ascertain the weight of his testimony; and in that case clearly approved the rule that excerpts from such books can not be read to a jury as original and affirmative evidence.

It is insisted by appellant that instruction No. 13, given by the court, in effect told the jury the extent of punishment they should inflict if they found appellant guilty. Appellee concedes that the instruction was unfortunately worded. The court should have told the jury that in case they found appellant guilty, as charged, they should fix his punishment at some period in the penitentiary not to exceed one year. As the case will be tried again, it is unnecessary to go into the question of whether the instruction given by the court was so worded as to direct the jury to fix a certain punishment.

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

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. HAYS & WARD.

Opinion delivered April 30, 1917.

1. ATTORNEY AND CLIENT—AGREEMENT FOR FEES.—Appellees, attorneys for plaintiffs, brought suit against appellant, appellees and plaintiffs agreeing that the former's fee should be one-half of whatever was recovered above $500. Without appellee's knowledge, plaintiffs settled the case with appellant for $5,000. *Held*, under Act 293, Acts 1909, appellants were entitled to $2,250 as their fee, and that they had a lien on appellant's property for that sum.
2. ATTORNEY AND CLIENT—LIEN FOR FEES—ENFORCEMENT.—Under the facts as set out above, under § 2, Act 293, of Acts 1909, appellees may enforce their lien against appellant without service of process upon appellant. The act creates a lien upon the cause of action in favor of the attorneys and requires the defendant to take notice of the lien.
3. ATTORNEY AND CLIENT—RIGHT OF A CLIENT TO SETTLE.—The parties to a suit have the right to settle it, but in making the settlement, the act requires that they shall take into consideration the fact that the attorney has a lien upon the cause of action and provides for its enforcement in the action, to the end that the parties may not ignore his lien and deprive him of his rights under his contract with his client.
4. ATTORNEY AND CLIENT—LIEN FOR FEES—ROADBED AND EQUIPMENT OF RAILROAD.—Attorneys brought an action for plaintiffs against a railroad company, which the parties settled without the knowledge of the attorneys. *Held*, under Act No. 293, Acts 1909, and Kirby's Digest, § 6661, the attorneys had a lien for their fees upon the roadbed and equipment of the railroad company.
5. ATTORNEY AND CLIENT—FEES—LIEN—EXTENT.—The lien of an attorney for fees under Act 293, Acts 1909, is a lien on the client's cause of action in whatever form it may assume in the course of the litigation, and the act enables the attorney to assert his lien in the same manner as the client might assert his judgment.

Appeal from Yell Circuit Court, Dardanelle District; *A. B. Priddy*, Judge; affirmed.

Thos. B. Pryor and *W. P. Strait*, for appellant.

1. The petition to set aside, quash or vacate the judgment should have been sustained. Kirby's Digest, § 4457; Acts 1909, No. 293; 117 Ark. 504; 120 *Id.* 393; 98 *Id.* 529; 74 *Id.* 552; 71 *Id.* 327; 83 *Id.* 210; 117 *Id.* 515; Kirby's Digest, § 4424.

2. A judgment without notice is void. 58 Ark. 181; 65 S. W. 108; 71 *Id.* 318; *Ib.* 565; 70 *Id.* 418; 50 *Id.* 340; 51 *Id.* 341; 72 *Id.* 107; 122 *Id.* 72; 89 *Id.* 160.

3. It was error to declare the judgment a lien. Kirby's Digest, § 6661.,

4. The court was without jurisdiction. The statute fixes the venue. Kirby's Digest, § § 6067-8; 77 Ark. 415; 109 *Id.* 77. The judgment is null and void. If appellees had a cause of action for contingent fees, it was an independent cause of action, and in effect a new suit, and no service was had on appellant. The Yell Circuit Court had no jurisdiction.. The suit should have been dismissed.

Hays & Ward, for appellees.

1. The judgment was a final order and appealable. No motion for new trial was filed and no appeal was taken. The court properly refused to vacate the judgment. Kirby's Digest, § § 4431, 4434; 185 S. W. 774; 190 *Id.* 118. A general statement that petitioner had a valid defense is not sufficient. 102 Ark. 255.

2. Attorneys in this State have liens and the statute prescribes the manner of enforcing them. Act 293, Acts 1909, p. 893; 120 Ark. 392; 173 N. Y. App. 498. Appellees had a just lien under the act. 96 S. W. 512; 144 *Id.* 760; 117 Ark. 504; 120 *Id.* 389. It was properly enforced. *Supra.*

3. There is no error, as justice has been done. 97 Ark. 299; Kirby's Dig., § 6661. Appellant did not raise the question as to the lien in its petition and an issue not raised below will not be determined on appeal. 95 Ark. 593; 75 *Id.* 76; 81 *Id.* 561; 82 *Id.* 260; 88 *Id.* 189; 89 *Id.* 308. Absolute justice has been done and the case should be affirmed.

STATEMENT BY THE COURT.

Mary E. Burris, the wife of James R. Burris, was injured in a head-on collision between two passenger trains near Ozark on the 5th day of August, 1915. She employed A. S. Hays and J. B. Ward, a firm of attorneys,

to bring suit for damages, for the injuries sustained, against the St. Louis, Iron Mountain & Southern Railway Company. She sued for $50,000, and her husband for $10,000. At the November term, 1916, of the Pope Circuit Court, by agreement of the parties the two cases were consolidated and treated as one cause. There was a trial before a jury which failed to agree upon a verdict and mistrial was declared by the court. The consolidated cause was continued and reset for trial at an adjourned term of the court which convened January 4, 1916. On this day the defendant filed a motion for a change of venue properly supported by affidavits which the court granted, and the venue was changed to the Yell Circuit Court for the Dardanelle District. The case was set for trial on the third Monday in February, 1916. Between the date of the granting of the change of venue, and that set for trial, a compromise and settlement of the lawsuit was entered into between the parties, and the defendant paid Mr. and Mrs. Burris, together, $5,000 in full satisfaction and settlement, and received a written order from them acknowledging the satisfaction and payment of the amount agreed upon and ordering the consolidated case then pending in the Yell Circuit Court for the Dardanelle District to be dismissed. On the day set for trial in the Yell Circuit Court, the defendant appeared by its attorney and filed its motion to dismiss the cause in accordance with the settlement and written order signed by Mr. and Mrs. Burris. On the same day Hays & Ward appeared and objected to the dismissal of the suit. They filed their intervention, alleging that they had entered into a written contract with the plaintiffs for a contingent fee, and that by its terms they were to receive one-half of the whole amount recovered over $500. They asked for judgment for $2,250, and that this amount be declared a lien upon the roadbed and equipment of the defendant.

Counsel for the defendant representing it in the original suit declined to enter its appearance in the intervention of Hays & Ward. The above facts were shown by

Hays & Ward on the trial of their intervention, and the court, on motion, rendered judgment in favor of Hays & Ward against the defendant railway company in the sum of $2,250, and adjudged the same to be a lien on the defendant's roadbed, right-of-way and equipment.

The defendant did not file a motion for a new trial, and did not ask that the judgment be set aside at the term of court at which it was rendered. On the 17th day of July, 1916, in vacation, the defendant railway company filed its petition to set aside the judgment rendered in favor of Hays & Ward for $2,250, and on the 11th day of September, 1916, after hearing the cause, the circuit court rendered judgment dismissing the railway company's said petition. Thereupon the railway company filed its motion for a new trial which was overruled by the court.

The railway company has duly prosecuted an appeal to this court.

HART, J., (after stating the facts). It will be remembered that the attorneys entered into a contract with the plaintiffs for a contingent fee, that is to say, they were to receive a certain percentage of the amount recovered over $500. The plaintiffs, without consulting their attorneys and without their knowledge, compromised the suit with the railroad company and received in settlement the sum of $5,000. Pursuant to the agreement, the defendant moved to dismiss the cause of action, and the attorneys objected on the ground that their fee had not been provided for in the settlement. They filed their intervention, and the court allowed them the sum of $2,250, being the sum provided for in their contract. Their right to recover depends upon the construction to be given to Act No. 293 of the Acts of 1909, which is entitled "An Act to Provide for an Attorney's Lien and its Enforcement." The act reads as follows:

"Section 1. The compensation of an attorney or counsellor at law for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceed-

ing, or the service of an answer containing a counter-claim, the attorney who appears for a party has a lien upon his client's cause of action, claim, or counter-claim which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order.

"Section 2. The court before which said action was instituted, or in which said action may be pending at the time of settlement, compromise, or verdict, upon the petition of the client or attorney, shall determine and enforce the lien created by this act." Acts of 1909, page 893.

This act came up for construction in the case of the *St. Louis, Iron Mountain & Southern Railway Company* v. *Blaylock,* 117 Ark. 504. There the court held that the attorney did not have any interest in his client's cause of action, and for that reason the client might dismiss his cause of action, or might settle with the opposite party without consulting his attorney, but that when there were any proceeds from the litigation, derived by settlement, compromise, or final judgment, the attorney has a lien thereon, of which he can not be deprived by the parties to the lawsuit, by any settlement they may make.

In the subsequent case of the *St. Louis, Iron Mountain & Southern Railway Company* v. *Kirtley & Gulley,* 120 Ark. 389, the court recognized that this statute was taken from New York and applied the rule that the construction of a borrowed statute is adopted with it unless contrary to the settled policy of the State adopting the statute. In that case it was held that the acceptance of an honest settlement by the client liquidated the amount of the attorney's fees. So it may be taken as settled under the ruling in that case that if Hays & Ward are entitled to recover at all in the present proceedings, the amount allowed is correct.

The act again came up for construction in the case of *McDonald, Admr.,* v. *Norton, Admr,* 123 Ark. 473. In

that case the court held that the plain meaning of the statute is that an attorney of record shall have a lien upon his client's cause of action from the commencement of the suit thereon; that this lien continues upon the cause of action until merged, and then it attaches to the thing into which the cause of action is merged.

In the case of *Peri* v. *New York Central Railway Company,* 152 N. Y. 521, 46 N. E. 849, the court said:

"This language is very comprehensive, and creates a lien in favor of the attorney on his client's cause of action, in whatever form it may assume in the course of the litigation, and enables him to follow the proceeds into the hands of third parties, without regard to any settlement before or after judgment. This is a statutory lien, of which all the world must take notice, and any one settling with a plaintiff without knowledge of his attorney does so at his own risk. *Coster* v. *Greenpoint Ferry Co.,* 5 Civ. Pro. R. (N. Y.) 146, affirmed without opinion, 98 N. Y. 660. It is urged by the defendant's counsel that this construction of the section is against public policy, as the law favors settlements; that the plaintiff's attorney might refuse to disclose his lien, and thereby stand in the way of settlement, and compel parties to litigate who desired to compromise their differences. This criticism overlooks the fact that the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement. The client is still competent to decide whether he will continue the litigation, or agree with his adversary in the way. The lien operates as security, and if the settlement entered into by the parties is in disregard of it and to the prejudice of plaintiff's attorney, by reason of the insolvency of his client, or for other sufficient cause, the court will interfere and protect its officer by vacating the satisfaction of the judgment, and permitting execution to issue for the enforcement of the judgment to the extent of the lien, or by following the proceeds in the hands of third parties, who received them before or after judgment impressed with the lien."

(1) The statute under consideration plainly says that the attorney has a lien upon his client's cause of action which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come, and that the lien can not be affected by any settlement between the parties before or after judgment. This gives the attorney a lien for that percentage of the proceeds which his contract with his client entitled him to receive and an express statutory liability of a legal character was thereby created.

(2) The second section of the act provides a remedy for the enforcement of the lien in the same court before which the original action was instituted or in which the action may be pending at the time of the settlement or compromise. It was not necessary that the railroad company should again be served with process because the attorneys became a party to the original action by force of the statute, and the case might continue as a special proceeding to enforce the attorney's lien. This is on the same principle that the purchaser at a commissioner's sale in chancery becomes a party to the proceedings as far as his rights as purchaser are concerned and must thereafter take notice of all subsequent proceedings which affect his rights. The statute under consideration provides the remedy for the enforcement of the attorney's lien and the enforcement of the lien in the manner provided by statute is a special proceeding which was within the power of the Legislature to adopt. The constitutionality of similar statutes has been attacked because they allow the enforcement of the lien by petition or special proceeding in a law court thereby depriving the defendant of the right of trial by jury. In answer to this argument it has been said that the constitutional right of trial by jury applies only to rights that existed at common law before the adoption of the Constitution, and does not apply to new rights created by the Legislature since the adoption of the Constitution.

In re King, 168 N. Y. 53, 60 N. E. 1054; *O'Connor* v. *St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703; *Wait* v. *Atchison, etc., R. Co.*, 204 Mo. 491, 103 S. W. 60; *Standidge* v. *Chicago Railways Co.*, 254 Ill. 524, 98 N. E. 963, Ann. Cas. 1913 C-65.

(3) The act created a lien upon the cause of action in favor of the attorney, and requires the defendant to take notice of the lien and respect it. The parties to the suit have the right to make a settlement, but in making such settlement, the act requires that they shall take into consideration the fact that the attorney has a lien upon the cause of action and provides for its enforcement in the action to the end that the parties may not ignore his lien, and deprive him of his rights under his contract.

(4-5) Counsel for the defendant also insists that that portion of the judgment attempting to charge the roadbed and equipments of defendant with a lien to secure the judgment of appellees is without authority of law. The action of the court in this respect is based upon section 6661 of Kirby's Digest. That section, among other things, provides that every person who shall sustain loss or damage to person or property from any railroad for which liability may exist at law, shall have a lien on the railroad, its belongings, equipments, etc., for said loss or damage. It is conceded that under this statute the plaintiffs in the original case, Mr. and Mrs. Burris, would have a lien on the roadbed and equipments of defendant for any judgment obtained by them, but it is insisted that the statute is not broad enough to bring the attorney's lien under its provisions. The statute giving the attorney a lien upon his client's cause of action was passed subsequent to this statute and must be construed with reference to it. The section of our statute giving the lien to an attorney is remedial in character and must be liberally construed to effectuate the purpose sought to be accomplished by its enactment. The statute provides that the right to the lien in favor of the attorney can not be affected by any settlement between the parties before or

after judgment. The lien created in favor of the attorney is not a general lien, but is a specific lien on the subject-matter of the controversy. As we have already seen, it can be preserved only by permitting judgment in favor of the attorney where a settlement has been made without his consent between the parties before judgment. The attorney's lien was given to protect his compensation by charging it against the judgment or proceeds of settlement which had been secured to his client by his services. So if the attorney is entitled to have judgment awarded against the defendant for the amount of his compensation where there has been an honest settlement between the parties, we think it follows that this judgment should be a lien upon the roadbed and equipments of the railroad company, or else the very purpose of the statute will be defeated. We think the statute creates a lien in favor of the attorney on his client's cause of action in whatever form it might assume in the course of the litigation, and enables him to assert his lien in the same manner that his client could assert against the roadbed and equipments of the railroad company.

It follows that the judgment will be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* AYDELOTT.

Opinion delivered April 30, 1917.

1. CARRIERS—TIME FOR PASSENGER TO ALIGHT FROM TRAIN.—Carriers must stop at stations long enough to give passengers a reasonable opportunity for getting on and off their trains; a reasonable time is such time as a person of ordinary care and prudence should be allowed to take. In determining what is a reasonable time the carrier must take into consideration any special condition peculiar to any passenger and to the surroundings at the station, and to give a reasonable time under the existing circumstances, as they are known or should be known by its servants, for a passenger to get on or off its trains.
2. CARRIERS—TIME FOR PASSENGER TO ALIGHT FROM TRAIN.—Plaintiff, a passenger, sustained an injury while alighting from a train. *Held*, under the evidence the only question for the jury on the issues of negligence and contributory negligence was whether or not defendant exercised ordinary care to stop the train long enough to enable passengers, while exercising ordinary care on their part, to debark there-

from in safety. Ordinary care defined as the highest degree of care which one of ordinary prudence would exercise for the security of passengers reasonably consistent with the business of a common carrier by rail, and appropriate to the means of conveyance and the practical operation of the road.

3. CARRIERS—DUTY TO PASSENGERS AT STATIONS—LEAVING TRAINS.—In an action for damages resulting from an injury sustained while plaintiff was debarking from a train, where the testimony tends to show that the negligence consists only in a failure to exercise ordinary care to stop the train a sufficient length of time to allow passengers to get off in safety, the court's instructions to the jury should relate only to that issue, and should not undertake to define the duty of railway companies to their passengers under other circumstances and conditions.

4. TRIAL—FRAMING INSTRUCTIONS—DUTY OF TRIAL COURTS.—Trial courts must be governed by the principles of law announced by this court and frame their instructions in accordance with these principles, but must make them applicable to the facts of each particular case, as they may be developed.

5. NEGLIGENCE—PERSONAL INJURIES—INSTRUCTION ON AMOUNT OF DAMAGES.—An instruction told the jury that if they found for the plaintiff they should assess her damages at such sum not exceeding the amount sued for, "as will, in your judgment be a fair and just compensation. * * *." The court also instructed the jury that if they found for the plaintiff to assess her damages at whatever they think the proof has shown. *Held*, the instructions taken together were not improper on the measure of damages.

6. NEGLIGENCE—PERSONAL INJURIES—MEASURE OF DAMAGES—INSTRUCTION.—In an action for damages for personal injuries, an instruction on the measure of damages should be couched in general terms, allowing the jury to consider such injuries as plaintiff had sustained under the evidence, and to allow compensation therefor, but without specifying the particular part of the body alleged to have been injured.

7. TRIAL—REMARKS OF TRIAL JUDGE—PERSONAL INJURY ACTION.—During argument in a trial when damages for personal injuries were sought, counsel remarked that "the railway company was not guilty of negligence." The court interrupted him saying "I will instruct the jury that the railway company was guilty of negligence. * * *" *Held*, the remark of the court was prejudicial, as it was the province of the jury to determine that fact.

8. APPEAL AND ERROR—EXCEPTION—ABSENCE FROM BILL OF EXCEPTIONS.—An exception to the ruling of the trial judge will not be considered on appeal, when not brought into the bill of exceptions.

9. NEGLIGENCE—ACTION BY HUSBAND—LOSS OF CONSORTIUM.—The verdict of the jury, in an action by a husband, for loss of his wife's consortium, finding against the husband, sustained.

Appeal from Prairie Circuit Court, Southern District; *Thomas C. Trimble,* Judge; reversed as to Mrs. Aydelott; affirmed as to E. A. Aydelott.

Daniel Upthegrove, of Missouri, and *Hawthorne & Hawthorne,* for appellant in the Mrs. Aydelott case.

1. The first instruction for plaintiff, while copied from 52 Ark. 524, was inapplicable to this case and erroneous. It is abstract and misleading here. 41 Ark. 382; 99 *Id.* 367; 16 *Id.* 628; 55 *Id.* 588; 63 *Id.* 477; 102 *Id.* 205.

2. The second instruction given was also erroneous. 73 Ark. 548; 105 *Id.* 269; 54 *Id.* 25; 101 *Id.* 183.

3. The third is objectionable and erroneous. It tended to magnify the injuries. 58 Ark. 136; 78 *Id.* 374; 96 *Id.* 339; 57 Tex. 215; 195 Ill. 48.

4. It was error to give the fifth on exemplary damages. There was no evidence of wilful or wanton acts and no implication of malice. The fifth and sixth asked by defendant on contributory negligence and assumed risk should have been given. The remarks of the court were prejudicial and invaded the province of the jury. It is error to give inconsistent and contradictory instructions. 54 Ark. 602; 72 *Id.* 31; 83 *Id.* 202; 74 *Id.* 437; 89 *Id.* 217; 65 *Id.* 64.

5. The verdict is excessive.

Daniel Upthegrove, J. R. Turney and *Hawthorne & Hawthorne,* for appellee in the E. A. Aydelott appeal.

There is no abstract for Mr. Aydelott's case. Nothing to show that a motion for new trial was passed upon by the court. No exceptions were saved to the rulings of the court as to the admissibility of the testimony. 56 Ark. 594; 45 *Id.* 539.

2. There is no error in the instructions as to him. There is no proof as to expenses for doctor's bills and medicine, and he can not recover for assistance of his wife. Kirby's Digest, § 6017; 97 Fed. 837.

Jo. Johnson, for appellee, Mrs. Aydelott.

1. The instructions given for appellee were the law. 99 Ark. 366; 108 *Id.* 292; 87 *Id.* 531; 90 *Id.* 494; 73 *Id.* 548; 90 *Id.* 485; 116 *Id.* 334. The instructions should be considered as a whole. There was no contradiction in them. 97 Ark. 226; 78 *Id.* 132. Any error was cured by others given. 78 Ark. 147; 78 *Id.* 279; *Ib.* 22; 82 *Id.* 105.

2. Proof of injury makes a *prima facie* case. 73 Ark. 548, 552.

3. The instructions asked by defendant were properly refused. 92 Ark. 6.

4. There was no prejudice in the remarks of the court, and the instructions are not conflicting. Nor were they prejudicial.

5. The verdict is supported by the evidence, and is not excessive. 83 Ark. 437; 91 *Id.* 97.

Jo. Johnson, for E. A. Aydelott, appellant.

1. It was error to exclude appellant's testimony. Kirby's Digest, § 3095; 116 Ark. 334; 29 *Id.* 603; 43 *Id.* 307; 6 Enc. Ev. 901-3; 1 Greenleaf, Ev., § 254; 52 N. H. 221.

2. He was entitled to recover for the services and assistance of his wife. 116 Ark. 334; 84 *Id.* 617.

3. The court erred in its instructions. 87 Ark. 308; Kirby's Digest, § 1236; 39 Okla. 33, 44 to 50.

STATEMENT BY THE COURT.

This suit was instituted by the appellee, Mrs. Aydelott, and her husband, E. A. Aydelott, against the appellant. The first five paragraphs of the complaint purported to state a cause of action against the appellant in favor of the appellee, Mrs. Aydelott, in that she alleges that she was a passenger on appellant's train, and when the train stopped at her destination, the station of Lagrue, she started to debark with packages in her hand, and when she had reached the first step, the train was negligently started, and she was thereby thrown to the ground and greatly injured. She alleged that she had no assistance in debarking; that there was no step box fur-

nished her for alighting, and that on account of appellant's negligence she was permanently injured, and she prayed damages in the sum of $3,000.

Paragraphs 6 and 7 of the complaint purported to set up a cause of action in favor of E. A. Aydelott. He adopts the allegations of the appellee, Mrs. Aydelott, as to negligence; alleges that he was her husband, and that by reason of the injuries to her he had been "deprived of her assistance, companionship, and association as a wife," to his damage in the sum of $1,000; that he had incurred expenses for medicines and doctor's bill in the sum of $100; that the acts of negligence were committed wilfully and wantonly, and he therefore prayed exemplary as well as compensatory damages.

The appellant denied all the material allegations of the complaint as to negligence, and set up the defenses of contributory negligence and assumed risk.

The appellee testified that she was a passenger on appellant's train, returning from Hazen to her home at the station of Lagrue. When the train stopped, neither the conductor, brakeman nor porter made an appearance. She started to get off and opened the door and reached the platform of the coach and started to put her foot down on the first step, and the train pulled out and she fell to the ground. She had several packages in her hand when she fell. The train jerked her from the steps. She then describes her injuries in detail.

The conductor of the train on that day testified that the train stopped at Lagrue on that occasion about three minutes. The coach she was traveling in was an ordinary combination coach on the rear of the train. The train was a mixed train. He was sitting in a chair in the baggage department, and as he had no freight to unload, he did not get up out of the chair until they started. He did not send any of the train men out to see about the passengers getting off. He had forgotten that there was a passenger to get off; he had forgotten that she was on the train. When they started he looked out and saw Mrs.

Aydelott standing on the platform, and she turned and walked off. He did not know whether the train moved before she got off or not.

The engineer on the train that day testified that he stopped the train at Lagrue on that occasion three or four minutes.

The station agent at Lagrue testified that the train arrived at 8:32 and departed at 8:35.

The court, among others, granted appellee's prayer for instruction as follows: "If you find for Mrs. Aydelott, you should assess her damages at such sum, not exceeding the amount sued for, as will in your judgment be a fair and just compensation for her alleged injuries to her back, kidneys, body, ankle, leg, nerves, nerve centers, shock, mental and physical pain and anguish, or any thereof, if any, that you may find she suffered."

Other instructions were given which will be referred to in the opinion.

The record shows the following: "During the argument of the case by the counsel for the plaintiff and the defendant, the following exceptions were had:

"Mr. Hawthorne: The railroad company was not guilty of negligence.

"The Court: I will instruct the jury that the railroad company was guilty of negligence; the conductor himself says that he forgot that a passenger was on there, and that he never saw the passenger at all.

"Mr. Hawthorne: I want to except to the ruling and remarks of the court. You have given an instruction just to the contrary to that.

"The Court: The jury will take all of these instructions together, and not take any one by itself. They don't have to have a porter to look after every passenger there."

Other remarks made to the jury during the progress of the argument were objected to, but it is unnecessary here to set them out.

The jury returned a verdict in favor of the plaintiff, Mrs. E. A. Aydelott in the sum of $3,000, and returned a verdict in favor of the defendant railway company as against the plaintiff E. A. Aydelott. Judgment was rendered in accordance with the verdict and the railway company and E. A. Aydelott both appealed. Other facts will be stated in the opinion.

WOOD, J., (after stating the facts). (1) This court in *Barringer* v. *St. Louis, Iron Mountain & S. Ry. Co.*, 73 Ark. 548, 551, announces the law as to the duty of carriers to passengers while getting on and off trains as follows: "It is the duty of carriers to allow their passengers a reasonable opportunity of getting on and off their trains, and they must stop at stations long enough for that purpose. A reasonable time is such time as a person of ordinary care and prudence should be allowed to take. It is the duty of the carrier, in determining what is a reasonable time, to take into consideration any special condition peculiar to any passenger and to the surroundings at the station, and to give a reasonable time under the existing circumstances, as they are known, or should be known by its servants, for a passenger to get on or off its trains." See, also, *Hill* v. *St. Louis, I. M. & S. Ry. Co.*, 85 Ark. 529; *K. C. So. Ry. Co.* v. *Worthington*, 101 Ark. 128; *St. Louis, I. M. & S. Ry. Co.* v. *Trotter*, 101 Ark. 183, 190; *St. Louis, I. M. & S. Ry. Co.* v. *Wright*, 105 Ark 269.

(2) These are the principles which should have guided the court in its instructions in the instant case. Under the evidence the only question for the jury to determine on the issues of negligence and contributory negligence was whether or not the appellant had exercised ordinary care (that is, the highest degree of care which one of ordinary prudence would exercise for the security of passengers reasonably consistent with the business of a common carrier by rail and appropriate to the means of conveyance and the practical operation of the road),

to stop the train long enough to enable passengers, while exercising ordinary care on their part, to debark therefrom in safety.

(3) Where the testimony tends to show that the negligence consists only in a failure to exercise ordinary care to stop the train a sufficient length of time to allow passengers to get off in safety, the charge should relate only to that issue, and not undertake to define the duty of railway companies to their passengers under other circumstances and conditions.

(4) Instruction No. 1, given at the instance of the appellee, of which appellant complains, is open to the above objection. True, it is in the precise language which this court declared, in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wright, supra,* to be "the correct rule applicable to such cases." There, however, and in the cases of *St. Louis, Iron Mountain & S. Ry. Co.* v. *Purifoy,* 99 Ark. 366, and *Ark. Midland Ry. Co.* v. *Canman,* 52 Ark. 517, where the court announced the law generally as to the duty of railway companies to their passengers, the court did not approve this language as a correct instruction for a precedent to be given in all cases where there was an injury to a passenger regardless of the facts upon which the cause of action might be grounded. The law as announced is a correct principle defining generally the degree of care which railway companies must exercise toward their passengers. Trial courts should be governed by the principles of law announced by this court and frame their instructions in accordance with these principles, but make them applicable to the facts of each particular case as they may be developed.

Here there was no testimony tending to show that the roadbed, track, cars or any other subsidiary arrangement connected with the structure of the road and necessary to the safety of passengers were not provided. If appellant was negligent at all, its negligence consisted, as above stated, simply in a failure to stop the train a sufficient length of time to allow the appellee to debark in

safety. The instruction, therefore, covering these elements, was abstract in this case and calculated to lead the jury into the realm of speculation and to the consideration of issues not before them to the prejudice of the appellant.

(5-6) Instruction No. 3, given at the instance of the appellee, told the jury that if they found for the appellee, they should assess her damages at such sum, not exceeding the amount sued for, "as will, in your judgment, be a fair and just compensation for her alleged injuries to her back, kidneys," etc.

This court, in *Fordyce* v. *Nix,* 58 Ark. 136, 141, condemned an instruction in this form, saying: "Verdicts of juries in actions sounding in exemplary damages, while they can not exceed the amount claimed in the complaint, should, nevertheless, in each case be reasonable and commensurate with the wrong done, as shown by the evidence adduced. The amount claimed in the complaint is frequently so exorbitant and disproportionate to the facts proved as, of itself, to suggest prejudice, and to tell the jury in such cases that they might find in any amount, not exceeding amount claimed, would be tantamount to saying that they would be justified in finding an excessive verdict." The court, however, did not reverse the judgment in that case on account of the erroneous instruction because the verdict was less by $1,500 than the amount claimed in the complaint, and there was nothing to indicate that the jury could have been misled and the rights of the appellant prejudiced by the instruction.

Likewise, in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Holmes,* 96 Ark. 339, 343, we did not reverse the judgment for the error in giving an instruction in this objectionable form, because the verdict was less than one-half the amount asked in the complaint, "and was certainly not exorbitant."

In *St. Louis Southwestern Railway Co.* v. *Myzell,* 87 Ark. 123, 127, we again condemned an instruction in this

form, saying: "It tells the jury that they have the right to give the plaintiff exemplary damages, in addition to compensatory damages, in any sum which they believe proper, not exceeding $1,400. This is putting the assessment of exemplary damages at large, restrained only by what the jury may believe proper, when their assessment 'must be commensurate with the wrong done as shown by the evidence adduced.'" See, also, *St. Louis, Iron Mountain & S. Ry. Co.* v. *Boyles,* 78 Ark. 374, 380.

In *St. Louis, I. M. & S. Ry. Co.* v. *Snell,* 82 Ark. 61, 63, we said: "It is unnecessary and improper for the trial court to make reference in an instruction to the amount sued for in the complaint. The jury, having heard the complaint read, are presumed to know that their verdict should not exceed the amount asked for in the complaint; and if the verdict is in excess of that amount, the court should strike out the excess. But where an instruction containing such reference is properly limited by a direction to find only such amount as the evidence warrants, we do not hold it to be prejudicial error."

The instruction in the case at bar did not restrict the jury to a consideration of the amount of damages as shown by the evidence. The jury were at liberty, under the instruction, to return any amount their judgment might approve, only limited by the amount named in the complaint. The instruction, therefore, standing alone, and without reference to the other instructions, would be erroneous.

But, in another instruction, the court told the jury as follows: "If you find for the plaintiff, your verdict will be, 'We, the jury, find for the plaintiff, Mrs. Aydelott, and assess the damages at' so much, whatever you think the proof has shown. Instructions are to be considered as a whole, and when these instructions are considered together, the effect was to tell the jury that if they should find for the appellee, Mrs. Aydelott, they could find for her in any sum not exceeding the amount named

in the complaint, as they might think the proof had shown. There was no prejudicial error, therefore, in the ruling of the court in granting the prayer for instruction on the measure of damages, in the particulars above discussed.

The instruction was furthermore objectionable in singling out the particular injuries alleged in the complaint, and telling the jury that they could find a fair and just compensation for these alleged injuries, specifying the particular parts of the body that she alleged were affected by the injury. The instruction, in this particular, should have been couched in general terms, allowing the jury to consider such injuries as appellee had sustained under the evidence, and to allow compensation therefor, but without specifying the particular part of the body alleged to have been injured. The instruction, in this form, was argumentative, but we are not convinced that it had the effect to magnify the verdict. We have called attention to this instruction in order that on a rehearing the trial court may give an instruction on the measure of damages in correct form.

(7) The court erred in its remarks to the jury during the argument of counsel for appellant. Counsel for appellant had the right, under the evidence and the instructions of the court on the issue of negligence, to say to the jury that "the railway company was not guilty of negligence." That was an opinion which it was the privilege of counsel to express by way of argument, and the court erred in saying to the jury at this juncture, "I will instruct the jury that the railroad company was guilty of negligence. The conductor himself says that he forgot that a passenger was on there, and that he never saw the passenger at all." The remarks of the court were tantamount to an instruction that the railroad company was guilty of negligence. This was a question, under the evidence, for the jury to determine, and the instruction thus given at this time was in direct conflict with other instructions which correctly submitted the issue of negligence

for the jury's determination. These and the further remarks of the court in this connection, as shown in the record, constituted an improper interruption of the argument of counsel, and was a manifest encroachment upon his right and privilege to present his client's cause to the jury. It was also an invasion upon the province of the jury, whose duty it was to consider and determine the disputed issues of fact.

The judgment, therefore, in favor of the appellee Mrs. Aydelott is reversed for this error, and the cause will be remanded for a new trial.

Appellant, E. A. Aydelott, testified that since the 11th day of last April, the day on which the injury to his wife occurred, his wife had not been physically able to assist him in any way, and her companionship had not been what it should be. Before that time she had assisted him. Since her injury, there had been a disturbance of the companionship and society between himself and wife, including all of the private and delicate relations. Appellant testified that the disturbance by the injury was one "involving the sexual relations," "all assistance, and you might say, all pleasure was gone the way things existed."

(8) The record shows that the appellant presented the following prayer for instruction: "If you shall have found for Mrs. Aydelott, then you will consider whether her husband has, by reason of her injury, himself suffered injury by being deprived of her assistance, companionship and society as his wife, and for medicines and doctors for her, and, if so, you will find for E. A. Aydelott such damages as you may find he has sustained on either or all of said items, if any." The court modified the instruction by striking therefrom the word "assistance," and also the words 'and for medicines and doctors for her." And as thus modified, the court gave the instruction. The appellant excepted to the ruling of the court in refusing his prayer for instruction as offered, and in the ruling of the court in modifying and giving the same as

modified. But he did not bring his exceptions to the ruling of the court into his motion for a new trial, and therefore we can not consider this alleged error in the ruling of the court.

The appellant contends that the court erred in refusing to allow him to testify to his wife's injuries. The appellant, in the first six grounds of his motion for a new trial, assigns as error the rulings of the court in refusing to allow plaintiff to testify in regard to his wife's injuries, the nature, extent and cause thereof. But the record does not show that appellant reserved any exceptions to the ruling of the court in refusing to allow this testimony. Therefore, he can not complain here that the court erred in its ruling.

Appellant insists that the verdict was contrary to the evidence, contending that the jury should have found in his favor for doctor's bill for more than $75, and medicines more than $25.

It is alleged in the complaint that he incurred expenses in the above sums for doctor's bill and medicines. The answer denies these allegations, and there is no proof in the record to sustain them.

(9) Again, counsel for appellant urges that the verdict was contrary to the evidence in his favor, because the jury found that his wife was injured and returned a verdict in her favor on account of such injuries in the sum of $3,000, and from this he insists that it necessarily follows that he was injured by the loss of the society and companionship of his wife in some amount, and that the jury should have so found, and in not so finding their verdict is inconsistent.

While appellant testified that the injuries received by his wife disturbed their marital relations, and that on account thereof she was not physically able to assist him in any way, and that her companionship had not been what it should be, yet the jury returned a verdict against him, thus showing that they either did not believe and accept the testimony of the appellant as to the loss of con-

sortium, or else they found that the loss was so insignificant it had no pecuniary value. These were matters within the peculiar province of the jury and their verdict against appellant is conclusive, and the judgment based thereon is therefore affirmed.

FORSCHLER v. CASH.

Opinion delivered April 30, 1917.

1. JUDGMENTS—NONSUIT—RES ADJUDICATA.—A nonsuit, whether voluntary or involuntary, does not constitute a judgment upon the merits, and will not support a plea of *res adjudicata.*
2. JUDGMENTS—NON-SUIT AND DISMISSAL WITHOUT PREJUDICE.—Appellant brought an action against appellee and upon stipulation took a nonsuit, the cause being dismissed without prejudice. *Held,* the appellant could bring a suit upon the same cause of action if he acted within the period of limitation.

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

David L. King, for appellants.

1. The former suit was dismissed without prejudice and this suit filed in time. It was error to dismiss. Kirby's Digest, § § 5083, 6167; 121 Ark. 454; 47 *Id.* 120; 35 *Id.* 62; 36 *Id.* 383; Freeman on Judgments, § 261; Black on Judgments, § 703; 23 Cyc. 1151.

2. The matter was not *res adjudicata.* A new party plaintiff was added. 49 Ark. 100; 59 *Id.* 149; Kirby's Digest, § 6002 and cases *supra.*

John H. Caldwell and *Lehman Kay,* for appellee.

The case was properly dismissed. There is no bill of exceptions preserving the evidence, and there is nothing before this court. The judgment should be affirmed. 45 Ark. 492; 38 *Id.* 216; 33 *Id.* 830; 52 *Id.* 555; 96 *Id.* 175; 117 *Id.* 154; 41 *Id.* 225; 126 Ark. 469; 59 Ark. 110; 58 *Id.* 399. This is not a new suit, and they are estopped by their agreement and dismissal. The matter is *res adjudicata.* Evidence was heard on the motion to correct the judgment by order *nunc pro tunc,* but this is not preserved by

bill of exceptions. *Supra.* The presumption is that the judgment is right.

STATEMENT BY THE COURT.

In 1912, B. Forschler brought a suit against D. C. Cash and the Liverpool & London & Globe Insurance Company, to which, in 1913, C. H. Ellis, William Lytle and Abner Hargus were, by permission, made parties defendant. The suit was an action for tort, the complaint alleging that the defendants wantonly, unlawfully and for the purposes of unlawfully and wantonly intimidating and abusing and terrifying the plaintiff, called to their assistance certain well known outlaws and personal enemies of the plaintiff, and that these ruffians, in a threatening manner, proceeded to search for articles in and about the house and premises of plaintiff, and did, by force of arms, take clothing, household goods, watches and other articles belonging to the plaintiff; that the plaintiff was greatly frightened, humiliated and terrified by the outrageous and wanton acts of the defendants.

On the 19th day of July, 1913, the attorneys for the plaintiff and the defendants entered into the following stipulation: "For the purpose of avoiding the making additional costs and the subpoenaing of witness it is hereby stipulated by the parties hereto that the above action shall be dismissed by the plaintiff."

At the September term, 1914, the following order was entered: "On this day comes the parties to this action, by their attorneys, John H. Caldwell and Lehman Kay, and by leave of the court file their motion to dismiss plaintiff's complaint herein. Thereupon, the plaintiff, by his attorneys, Sam M. Meeks and D. L. King, elects to take a nonsuit herein without prejudice against the plaintiff in this cause, which is granted by the court. It is thereupon considered, ordered and adjudged by the court that the plaintiff's cause of action herein be dismissed without prejudice against him at the cost of the plaintiff."

On the 14th day of November, 1914, the present suit was instituted by B. Forschler and Katherine Forschler, his wife. There were no additional allegations to the original complaint that had been filed by B. Forschler, the only change being the addition of the name of his wife, Katherine, as a party plaintiff, and omitting the Liverpool & London & Globe Insurance Company as a party defendant. D. C. Cash did not appear and was not served with process. The other defendants, Ellis, Lytle and Hargus, appeared at the February term, 1916, and filed their motion and amended motion to dismiss the complaint. The court granted their motion to dismiss the complaint, as appears under the following order: "On this day the amended motion of the defendants to dismiss the cause of action herein coming on to be heard, comes the parties by their attorneys, and after hearing the argument of counsel and the examination of the record on this cause and the exhibits to said motion, and being fully and sufficiently advised as to the law arising on said motion, finds in favor of the defendants and sustains said motion to dismiss plaintiff's complaint. Is therefore considered, ordered and adjudged that the plaintiff's complaint and the cause of action herein be and the same is dismissed, and the defendants do have and recover of and from the plaintiff all their costs in this case, and to the ruling and judgment of the court in sustaining said motion and dismissing plaintiff's cause of action herein, the plaintiffs at the time objected and excepted, and to save their objections and their exceptions, asked and obtained leave of the court to have their exceptions noted of record and prayed an appeal from this court to the Supreme Court of the State of Arkansas, which is granted by the court."

Afterwards the counsel of the defendants moved for *nunc pro tunc* order to correct the above judgment of the February term, 1916. The court disposed of this motion for *nunc pro tunc* judgment by an order which recites in part as follows: "After hearing the evidence

and examining the court docket entries made by the presiding judge at said term and at the other terms of this court, and after examining the record judgment as entered of record herein, the court finds that said judgment record as entered of record at said February, 1916, term of this court does not accurately set forth and reflect the judgment of this court as it was rendered at said February, 1916, term, and therefore sustains said motion to correct said judgment record by ordering a *nunc pro tunc,* and hereby orders the following judgment record entered by way of *nunc pro tunc* order, as follows: "On this the 3d day of the February, 1916, term of the Fulton Circuit Court, the amended motion of the defendants to dismiss this cause of action coming on to be heard, and the parties by their respective atneys announcing ready, the court doth consider the same, and after examining the exhibits to said motion, together with the court judgment record and docket entries made and entered in this cause from term to term, and also after hearing the statements of the attorneys of record in this case relative to the merits of said motion and truthfulness of its allegations, together with the statements of the clerk of this court, all of which was considered as evidence in this cause and understood at the time that it was agreed to by both parties that same should be so considered, this court doth find: First, that this cause of action was filed by plaintiffs in 1912 against D. C. Cash and the Liverpool & London & Globe Insurance Company, and that later plaintiff amended his complaint, making Charles Ellis, William Lytle and Abner Hargus defendants thereto, and still later took a nonsuit at the August, 1914, term of this court, according to the agreement of counsel herein, as against defendants, Charles Ellis, William Lytle and Abner Hargus. The court further finds from the evidence, docket entries and court records herein that this plaintiff refiled this same suit again on November 14, 1914, despite the previous action of this court in dis-

missing said cause, and this is, in fact and in truth, the same cause of action. The court, therefore, sustains said motion herein to again dismiss this cause of action against defendants in accordance with said agreement and previous court judgment hereon. It is therefore considered, ordered and adjudged by the court that the plaintiff's complaint herein against these defendants, Charles H. Ellis, William Lytle and Abner Hargus, be and the same is hereby dismissed," etc.

The appellant duly prosecutes this appeal.

WOOD, J., (after stating the facts). While there is some confusion in the record entries, yet it appears from the judgment roll proper that B. Forschler had instituted a suit in which D. C. Cash, the Liverpool & London & Globe Insurance Company, C. H. Ellis, William Lytle and Abner Hargus were made parties defendant, and at the August term, 1914, the plaintiff by his attorneys elected to take a nonsuit and the cause was dismissed without prejudice and at his cost.

True, the record shows that at the August term, 1913, a stipulation was filed in a case styled "*B. Forschler, Plaintiff,* v. *The Liverpool & London & Globe Insurance Company, Defendants,*" in which the parties agreed that that cause should be dismissed by the plaintiff to save costs. The judgment entry of 1914 showing the disposition of the cause against the insurance company and Cash and the other defendants recites that it was a nonsuit and that the cause was dismissed without prejudice. At a succeeding term of the court the present suit was instituted, in which B. Forschler and Katherine Forschler, his wife, were named as parties plaintiff and the appellees were named as parties defendant. The defendants moved to dismiss the same, and the court, at the February term, 1916, dismissed the present suit under an order which recites as follows: "On this day the amended motion of the defendants to dismiss the cause of action herein coming on to be heard, comes the parties by their attorneys, and after hearing

the argument of counsel and the examination of the records of this cause and the exhibits to said motion, and being fully and sufficiently advised as to the law arising on said motion, finds in favor of the defendants and sustains said motion to dismiss plaintiff's complaint. It is therefore considered, ordered and adjudged that the plaintiff's complaint and the cause of action herein be and the same is dismissed."

Afterwards, on motion of the defendants, the court corrected this judgment by the *nunc pro tunc* judgment set forth in the statement. But appellees did not attempt to have the court correct the judgment of the court entered at a former term and which, therefore, had become final, showing that in the action which B. Forschler had originally instituted against the appellees a nonsuit had been taken and that cause dismissed without prejudice. The appellees contend that the present suit was the same suit and the same cause of action. and the court so finds in its *nunc pro tunc* judgment.

Conceding, for the sake of argument, that this contention and this finding is correct, it does not follow that B. Forschler would not have the right to maintain this suit. Because in the former action there was a nonsuit and the cause was dismissed without prejudice in August, 1914, and the present suit was begun in November thereafter.

(1-2) Therefore, even though the present suit be for the same cause of action and the same suit as the former, the appellant, B. Forschler, instituted it within the time allowed by the statute. (Sections 5083 and 6167 of Kirby's Digest.) This court has held that a nonsuit, whether voluntary or involuntary, does not constitute a judgment upon the merits and will not support a plea of *res adjudicata. Hallum* v. *Dickinson,* 47 Ark. 120, 125; *Floyd* v. *Skillern,* 121 Ark. 454.

Appellees contend that if a bill of exceptions had been preserved and filed by the appellants that such bill of exceptions would show that the present suit had been

dismissed at a former term by stipulation of the parties, but the appellees, themselves, by a *certiorari,* have brought into the record the judgment entry from which it appears, as already stated, that the original suit instituted by B. Forschler against the appellees was dismissed without prejudice to the plaintiff, plaintiff having elected to take a nonsuit. No bill of exceptions in the present case could have the effect to change that record. Appellees do not, and could not, by their motion to dismiss the present suit, change the effect of the judgment of nonsuit and dismissal without prejudice in the original suit. If this suit was dismissed at a former term by agreement of the parties based upon a consideration, and if this could avail appellees as a defense to the present suit it was a matter to be set up by answer and not by motion to dismiss.

In bringing the present suit, the appellants were clearly within their rights under the law, and the court erred in dismissing same. The judgment is, therefore, reversed and remanded with directions to overrule the motion to dismiss and to reinstate the cause.

SUMPTER v. BUCHANAN.

Opinion delivered April 2, 1917.

1. COUNTIES—AUTHORITY OF COUNTY COURT TO EMPLOY SPECIAL COUNSEL.—In matters of ordinary importance only, it is an abuse of the discretion of the county court to employ outside counsel to represent the county, unless the prosecuting attorney refused to act, or unless his time was so taken up with other matters that he could not act. But in cases of more than ordinary importance the county court may employ counsel to represent the county.
2. COUNTIES—GARLAND COUNTY—JUDGMENT AGAINST—EMPLOYMENT OF COUNSEL.—The county court of Garland County *held* not to have abused its discretion in employing counsel to represent the county in an effort to get the United States District Court to modify an improper order which it had made with reference to the taxes of the county, and in fixing a reasonable fee to be paid to said counsel.

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

O. H. Sumpter and *Chas. Jacobson,* for appellants.

1. The contract to employ additional counsel was not void under the decision in 179 S. W. 178.

2. The contract was reasonable. 122 Ark. 157. Plenary powers are vested in the county court. The compensation was just and reasonable, and no abuse of discretion is shown. 179 S. W. 178; Kirby's Digest, § 1375. The court, under the circumstances, had the power to make the contract. Cases *supra;* 122 Ark. 566.

Gibson Witt, for appellee.

1. The county court had no power to employ additional counsel. It was an abuse of discretion. The fee was properly disallowed. James P. Clarke was paid in full his fee. 1 Enc. Pl. & Pr. 148. It was an undertaking to do an illegal act. 95 Ark. 552. See also 7 A. & E. Enc. L. (2 ed.) 148; 94 Ark. 375; 122 Ark. 157. It was the prosecuting attorney's duty to render the services. 179 S. W. 178; 122 Ark. 562.

2. The findings of fact are conclusive on appeal. 68 Ark. 83.

HUMPHREYS, J. Artie K. Palmer obtained judgment in the United States District Court at Little Rock against Garland County for $123,000. The county made the following payments on said judgment: $28,361 in 1912; $20,091 in 1913; which left a balance of $74,000 due on said judgment on July 11, 1913. These payments were made out of a fund raised by a two mill levy on the dollar of the assessed valuation of the property of the county. This special two mill levy had been laid on the property of the county by the officers who were forced to make the levy by an erroneous order of the Federal court. The county could only levy a five mill tax for general revenue purposes, and after paying the amount raised by the two mill levy, it only left the amount raised by a three mill levy to conduct the general business of the county. The county had gotten behind and scrip was reduced in value to fifty cents on the dollar. The payment of about

$20,000 a year on these judgments had become very burdensome and greatly interfered with the affairs of the county. The finances of the county were in a deplorable condition. Being unable to compromise in any way with Artie K. Palmer, the county entered into a contract with Senator James P. Clarke and his associates, O. H. Sumpter and Charles Jacobson, to secure a modification of the erroneous judgment or order of the Federal court, and contracted with them to pay a fee of $6,000 in scrip as a contingent fee in case they could secure a modification of the judgment to the effect that one mill should be levied instead of two on the property of the county to pay said judgment. The contract provided that upon the contingency stated above $2,500 of said scrip should be issued immediately and $1,750 in one year and $1,750 in two years. The contract provided that the fee above mentioned should be paid, "in the event the party of the second part (referring to Senator James P. Clarke and his associates) succeeded by action in court, or in any other manner, in securing said modification or vacation of said judgment so Garland County will receive and retain for its general revenue fund one mill of the two mill levy made on November 25, 1914, to be applied and paid on said judgment, and so that Garland County will not hereafter be required to levy in any one year exceeding one mill to be applied and paid on said judgment."

On November 30, 1914, through the effort of Senator James P. Clarke and his associates, the United States court at Little Rock made an order, the material part of which is as follows: "It is considered and adjudged by this court that the order requiring a tax levy of two mills be, at the request of the relator, reduced to one mill on the dollar of the taxable property of Garland County. * * *"

Under the terms of the contract, Senator Clarke received the first payment of $2,500 in scrip, which covered his part of the $6,000 fee. When the next installment of $1,750 became due under the contract, a settle-

ment was reached by which Sumpter and Jacobson were allowed $3,000 in full settlement of the fee. From this order of allowance S. A. Buchanan, a taxpayer of Garland County, appealed to the circuit court. The circuit court, sitting as a jury, tried the cause, disallowed the claim, dismissed the petition of appellants, and adjudged the costs against them.

From the judgment dismissing their petition they have appealed to this court.

The first question involved in this appeal is whether the county court had authority to employ counsel to represent the county in securing a modification of the judgment in question. It is first contended that Sections 6392 and 6393 of Kirby's Digest preclude the county court from employing counsel to represent the county in litigation in State and Federal courts without consulting the prosecuting attorney, or unless the prosecuting attorney was requested to act and then neglected or refused to perform the service, or unless the prosecuting attorney's duties were such in character that he did not have time to properly represent the county. Said sections are as follows:

"Sec. 6392. Each prosecuting attorney shall commence and prosecute actions, both civil and criminal, in which the State or any county in his circuit may be concerned."

"Sec. 6393. He shall defend all suits brought against the State, or any county in his circuit, prosecute all forfeited recognizances and actions for the recovery of debts, fines, forfeitures or penalties accruing to the State in any county in his circuit."

These sections were under discussion in the case of *Oglesby* v. *Fort Smith District of Sebastian County,* 119 Ark. 567, and this court said: "We think the county court has power to employ additional counsel when in his judgment the interests of the county are of sufficient importance to demand it. * * *" The same sections of the

Digest were again before the court for consideration in the case of *Spence & Dudley* v. *Clay County,* 122 Ark. 157, when this court again said: "We held in the case of *Oglesby* v. *Fort Smith District of Sebastian County* that the county court, under our Constitution and laws, was empowered to employ other counsel when in its judgment the interests of the county were of sufficient importance to demand it. * * *" The last expression of this court on the point involved is found in the case of *Buchanan* v. *Farmer,* 122 Ark. 562. In that case the court said "in case where the interest of the county in some particular suit is of such magnitude and importance as to demand of the county court, in the exercise of such foresight and care as prudent business men bestow upon important matters, we have recognized the power of the county court to employ additional counsel. The presumption is that the county court will not put the county to the expense of extra counsel, unless such service is needed, but the action of the court in this regard is a matter in which its judgment and discretion is open to review of the appellate courts."

(1) The purport of the decisions just referred to is that under the Constitution of this State the county court, in the exercise of a sound discretion, may in cases of more than ordinary importance, employ counsel to represent the county. In matters of ordinary importance only it would be an abuse of the sound discretion of the court to employ counsel unless the prosecuting attorney refused to act or unless his time was so taken up with other matters that he could not act.

(2) The suit against Garland County for the enforcement of the large judgment erroneously entered against it was of such magnitude and importance as to require the employment of extra counsel. The business affairs of the county were greatly imperiled. The situation was not only a matter of grave concern to the county court but to the levying court. The levying court in session adopted a resolution urging the county court to

employ counsel to take the legal and necessary steps to the end that the order of the United States District Court might be vacated or modified in order that the county might be released from its intolerable and unbearable condition. Senator James P. Clarke was employed because it was believed the case would be carried to the Court of Appeals and because of his broad experience and familiarity with procedure in Federal courts. Under the undisputed facts in the case, it can not be said that the county court abused its discretion in employing counsel. The trial court, in rendering his opinion, found that "the matter of the reduction of the judgment was of such importance to the county that the court could not say that the county court would have abused his discretion by employing additional counsel." There is nothing in this record from which it might be inferred that the county court ignored the prosecuting attorney or that the prosecuting attorney was excluded by virtue of the employment of Senator Clarke and his associates from participating in or even directing the course to be pursued. The record is entirely silent as to the attitude assumed by the prosecuting attorney with reference to this litigation. This case may also be differentiated from the case of *Oglesby* v. *Fort Smith District of Sebastian County, supra,* for the reason that in that case the court found from the whole testimony that it was a contest between the outgoing and incoming county judge rather than a suit for the benefit of the county. In the instant case, the suit was clearly in the interest of and for the benefit of the county.

We think the learned trial court erred in declaring as a matter of law that the contract between the county and Senator Clarke and his associates was void for the reason that the prosecuting attorney was not consulted with reference to the course of litigation, and declaring as a matter of law that the effect of this contract was to ignore the prosecuting attorney or to confer the entire

management of the case upon other counsel to the exclusion of the prosecuting attorney.

It is again insisted that the contract was *ultra vires* and void for the reason that it was an indirect undertaking to pay interest upon the county indebtedness. The mere fact that the interest on deferred payments, if the levy could be reduced, was used as a basis upon which to estimate the amount of fee fixed, is in no sense a contract to pay interest.

The court in its sound discretion had a right, subject to review of appellate courts, to fix a reasonable fee commensurate with the importance of the litigation contemplated. The presumption is the court fixed a reasonable fee. Nothing appears to the contrary in the record before us. The importance of the litigation, the necessity of immediate relief and eminence of counsel employed point unerringly to the conclusion that the fee fixed by the court was reasonable in amount.

It is further contended that the intention of the contract was that Senator James P. Clarke and his associates should obtain an order not only reducing the enforced levy from two mills to one mill, but that the judgment should be to the effect that the Federal court would not again require the levy to be raised until the entire indebtedness had been paid. The facts are that under the order obtained, the county was not required to pay more than the one mill levy in 1914, and that thereafter without the knowledge or consent of said attorneys the county appeared under citation or application in the Federal court and consented that the levy be increased in said order from one mill to a mill and a half. It would be unjust and inequitable to permit the county to defend against this claim on this account. Good faith alone on the part of the county would require it to have notified these attorneys that an application had been made in the Federal court by Artie K. Palmer to raise the levy and to have requested them to defend against it.

It was error to disallow this claim and dismiss the petition of appellants. The judgment is, therefore, reversed and the cause remanded for further proceedings in keeping with this opinion.

STATE *ex rel.* ATTORNEY GENERAL *v.* BODCAW LUMBER COMPANY.

Opinion delivered March 12, 1917.

1. TAXATION—DOUBLE TAXATION.—There can be no double taxation, in the sense that the same property may be twice assessed for taxation. The rule against double taxation reaches to any form, and prohibits double taxation under different sovereignties.
2. TAXATION—DOUBLE TAXATION—PROPERTY OUTSIDE THE STATE.—An attempt on the part of this State to tax property permanently situated outside of its borders would constitute double taxation.
3. TAXATION — CORPORATIONS — CAPITAL STOCK — CONSTRUCTION OF STATUTES.—Under Kirby's Digest, § 6936, as amended by Act 1913, p. 615, and Kirby's Digest, §§ 6937 and 6902, providing for assessments for taxation by corporations the term "capital stock" *held* to mean the aggregate value of the corporation's stock in the hands of stockholders, and not the capital of the corporation as represented by its tangible assets, although the value of the shares of capital stock does not constitute the limit of taxation, and as the shares of stock in the hands of shareholders, and the property of the corporation do not contain the same elements of value, a tax on the capital stock of the corporation in addition to the tangible property thereof, does not constitute double taxation and is valid.
4. TAXATION—CONSTRUCTION OF TAX LAWS.—In discovering the intention of the law makers in tax legislation courts should look to the effect and result sought to be accomplished, rather than to mere form and the use of names in designating the scheme.
5. TAXATION—CAPITAL STOCK—SHARES.—Kirby's Digest, § 6936, as amended by Act 1913, p. 615, contemplates the assessment of the shares of stock themselves, or at least the separate elements of value which they represent, and the State has a right to impose the assessment at their value without deduction of property outside of the State.
6. TAXATION—CORPORATIONS—CAPITAL AND SHARES.—The valuation of the property outside of the State must be omitted when the property of the corporation itself is sought to be taxed, but when the effort is to assess the values of the shares of stock, it should not be deducted, for those shares of stock have a separate valuation existing here within the jurisdiction of the State and upon which the State has a right to take its toll of taxation.

7. PLEADING AND PRACTICE—STATEMENT OF CAUSE OF ACTION.—The character and effect of a pleading is to be determined from its statement of facts, and not from its name; and if the facts stated constitute a cause of action, the pleading is sufficient to call for relief, even though erroneous conclusions be drawn as to its effect.
8. TAXATION—BACK TAXES—CORPORATION.—Kirby's Digest, § 7204, authorizing the Attorney General to collect certain overdue taxes, reaches not only tangible property omitted from former assessments, but also back taxes omitted from assessments on capital stock of a corporation.

Appeal from Lafayette Chancery Court; *James M. Barker,* Chancellor; reversed.

Wallace Davis, Attorney General, *George Vaughan, Frank Pace* and *T. M. Seawel,* Special Counsel, for appellant.

1. The complaint stated a cause of action and should have been *answered.* If imperfect or incomplete in detail, or uncertain in its allegations, the objection should have been presented by motion—not demurrer. Kirby's Dig., § 6106; 72 Ark. 58; 93 *Id.* 371; 96 *Id.* 163; 101 *Id.* 350; 107 *Id.* 442.

2. Defendant is liable to a property tax upon its capital stock. Kirby's Digest, § § 6872, 837, 841, 6899, 6903-4, 6906, 6936, 6873; Const., art. 2, § 23, art. 16, § § 7, 5, 6; 46 Ark. 331; 2 *Id.* 291; 5 *Id.* 204; 25 *Id.* 289; 43 *Id.* 525; 46 *Id.* 312; 52 *Id.* 529; 62 *Id.* 461; 120 U. S. 97.

3. The "unit rule" of value is the true and exclusive statutory method for ascertaining the value of the capital stock for taxation purposes. Kirby's Digest, § § 853, 6872, 6972 (3), (7b), 6873, 6899, 6904, 6923, 6906, 6910-11-12-13, 6920, 6936. This rule has been sustained by the Federal courts.

4. Certain deductions from the gross value of the capital stock are permissible, but solely to the end that "double taxation" may be avoided. Kirby's Digest, § § 6936, subd. (4), (5), etc. The following deductions are *not* authorized. (1) Stock holdings in other corporations. 106 Ark. 552. (2) Property not taxable. 92 *Id.*

335. (3) Property *out of bounds.* No "double taxation" results from refusal to deduct value of real estate outside of the State. 82 N. E. 809; 97 Ark. 254, etc.; Kirby's Dig., § § 6936-7.

5. There is no double taxation. *Ib.*, § § 6902, 6936-7.

6. Section 6902 only exonerates shares in the hands of individuals *when* an equivalent value is "taxed at the source," under § 6936.

7. The back tax act of 1887 supports and is peculiarly applicable. Acts 1887, p. 33; Acts 1911, 324; Acts 1913, p. 724; 117 Ark. 606; 119 *Id.* 314, 328; 106 *Id.* 248, 256.

8. Capital stock is "personal property." Act April 12, 1869; Kirby's Digest, § 6872, par. (7); Morawetz, Priv. Corp., § 224; 1 Cook Corp. (7 ed.), § 12, p. 57; 4 Thompson on Corp. (2 ed.), § § 3465-71; 8 *Id.* (Supp.), § 3465; 10 Cyc. 346-5; 37 Cyc. 8221; 7 Rul. C. L. 196, 304; 27 Am. & E. Enc. L. (2 ed.) 935; 11 U. S. Enc. 187. The taxation of capital stock is mandatory. Kirby's Dig., § 6873; Burroughs, Tax. (1877), 188; 1 Desty on Tax. (1884) 355.

9. All property, real or personal, in this State is taxable, according to its value. Const., art. 16, § 5; Kirby's Digest, § § 6873, 6889, 6999, 6906, 6910, 6936, 6904; 106 Ark. 552. Under our statutes *all* the property of a corporation is reached only once for taxation. The corporation being required to list its personal property and capital stock; the stockholders are not required to assess their shares. Kirby's Digest, § § 6902, 6906, 6936; 90 Ky. 68; 13 S. W. 355-7.

10. Cite statutes and decisions from every State in the Union to sustain their contentions, but want of space forbids the citations. The brief is 288 pages long and must be abridged.

Henry Moore and *Henry Moore, Jr.,* for appellee.

1. Defendant can not be required to pay once on its property in Arkansas as tangible property, and then be

required to pay a second time on the same property under the guise of paying on capital stock. 76 Ill. 561; 161 *Id.* 132; 129 N. Y. 433; 89 Ala. 335; 95 U. S. 679; 46 Mich. 224; 74 Hun. 101; 24 Atl. 1107; 76 Ill. 561; 24 Wash. 351; 58 L. R. A. 514; 1 Cooley on Tax. (3 ed.) 396-7; 73 Ark. 517.

Double taxation is not allowed. 78 Ark. 192; 92 *Id.* 342; 94 *Id.* 238; 97 *Id.* 261; 54 U. S. (Law Ed.) 430; 57 L. R. A. 35; 2 *Id.* 255.

2. Property in another State can not be taxed in Arkansas. 119 Ark. 372; 198 U. S. 345; 7 Wall. 262; 14 Otto, 11; 117 U. S. 129; 141 *Id.* 18; 188 *Id.* 390; 182 *Id.* 558; 57 Cal. 594. Where the corporation itself pays taxes on the property that gives value to the shares, the capital stock is not taxable. 87 Ark. 484. Tangible property is subject to taxation by the State in which it is, no matter where the domicile of owner may be. 198 U. S. 306, 345; 199 U. S. 205; 222 *Id.* 68; 16 L. R. A. 56; 48 *Id.* 790; 105 N. C. 363.

3. The shares of stock are personal property and taxable at the residence of the owner. 9 Wall. 352; 18 *Id.* 206; 95 U. S. 697; 136 *Id.* 558; 177 *Id.* 1; 232 *Id.* 10; 198 *Id.* 229.

4. The tangible property of a corporation located in a State other than its domicile, can be taxed only in the State where located, and can not be taxed in the State of its domicile under the guise of taxing the capital stock of a corporation. 198 U. S. 341; 83 N. Y. Supp. 33; 199 U. S. 194; 69 L. R. A. 450, and note; 63 Ark. 586; 216 U. S. 146; 114 N. W. 565; 15 L. R. A. (N. S.) 143.

5. See also 87 Ark. 484; 92 *Id.* 344.

6. No cause of action is stated. The Back Tax Act does not apply, and gives no cause of action. 117 Ark. 606; 106 *Id.* 248.

McCULLOCH, C. J. The Attorney General instituted this action in the chancery court of Lafayette County against the Bodcaw Lumber Company, a domestic cor-

poration domiciled in that county, to recover taxes alleged to be due the State and its subdivisions by reason of the failure of said corporation to assess all of its property for taxation for certain years. The right to sue is predicated upon the authority of the statute embraced in Kirby's Digest, section 7204, *et seq.*, as amended by the act of May 30, 1911 (page 324), and further amended by the act of March 12, 1913 (page 724), providing that where it is made to appear to the Attorney General that "in consequence of the failure from any cause to assess and levy taxes or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned, or because of any inadequate or insufficient valuation or assessment of such property or under valuation thereof, or from any other cause, that there are overdue and unpaid taxes owing to the State * * * by any corporation upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid, that it shall become his duty to at once institute a suit * * * for the collection of the same," etc.

It is alleged in the complaint that the property of the Bodcaw Lumber Company consists of its capital stock represented by and invested in real and personal property situated in certain counties in the State of Arkansas and in the State of Louisiana, and that the said corporation had failed, during certain years, to make return of all its property for taxation as provided by the statutes of this State, in that it had made no return of its capital stock and had not assessed for taxation any of its property except the tangible property situated in the State of Arkansas. It is further alleged that the capital stock of said corporation is, and has been during the years mentioned, of very great value in the aggregate, after deducting the tangible property subject to specific assessment under the statutes of the State, and that there

is now due to the State the sum of $250,000, as the just proportion from said corporation to the State for the taxes on property which has thus escaped taxation. The court sustained a demurrer to the complaint and dismissed it for want of equity, and the Attorney General has prosecuted an appeal to this court.

(1-2-3) Learned counsel in the case have set forth in the abstract, by way of illustration, the exact financial condition of the Bodcaw Lumber Company for many years past and the *situs* and value of its tangible property, together with a statement of the amount of its capital stock, the number of shares and value thereof as taken from the reports filed by the president and secretary with the county clerk pursuant to statute, but that statement is not set forth in the complaint nor exhibited therewith, and we can not take notice of it. Nor do we deem it necessary to do so in order to dispose of the questions of law presented on the demurrer, for the complaint contains sufficient allegations to present for argument the questions discussed so thoroughly and ably by counsel in the respective briefs. Suffice it to say that the facts appearing from the complaint are that the Bodcaw Lumber Company has, during the years named, assessed for taxation its tangible property situated in the State of Arkansas, but it has not made any return of its capital stock for taxation, which, according to the contention of the State, is subject to taxation here without deduction of the value of property outside of this State which goes to make up the value of the stock. On the other hand, the contention of counsel for the defendant corporation is that only the tangible property of the corporation in the State is subject to taxation here and that the taxation of the capital stock, without deduction of the value of the tangible property outside of the State would be tantamount to indirectly taxing the property itself and would constitute double taxation. It must be treated as settled that there can be no double taxation in the sense that the

same property may be twice assessed for taxation. That is not contemplated by the Constitution and laws of this State. Nor does it matter, in considering the question of double taxation, whether property is doubly taxed partly in one State and partly in another, for the rule against double taxation reaches to any form, and prohibits the double taxation under different sovereignties. *Wright* v. *L. & N. Railroad Co.,* 195 U. S. 219. Therefore, an attempt on the part of the State to tax property permanently situated outside of its borders would constitute double taxation. It has been held by many of the courts that shares of stock in a corporation may be treated separate and apart from the stock and property of the corporation itself for the purpose of taxation, and that that does not offend against the rule prohibiting double taxation. *Kidd* v. *Alabama,* 188 U. S. 730; *Corry* v. *Mayor of Baltimore,* 196 U. S. 466; *Hawley* v. *City of Malden,* 232 U. S., p. 1. Such, however, is not the practice under the statutes of Arkansas, which contain an express provision that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investment in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Kirby's Digest, § 6902, Act 1883, § 15, p. 217. This court decided that the purpose of the law-makers in enacting the above statute was to provide against double taxation. *Dallas Co.* v. *Banks,* 87 Ark. 484; *Dallas Co.* v. *Home Fire Ins. Co.,* 97 Ark. 254.

A discussion of the questions presented involves an analysis of the statutes of this State relating to the assessment of the property of corporations for taxation. There are different classifications under the statutes for different kinds of corporations. There is a separate provision with reference to banks, which requires a return

to be made by the officials of the corporation, and we have decided that the scheme contemplates a taxation of the shares of stock in such corporation according to value and not of the property of the corporation itself, and that, therefore, the value of shares of stock in a national bank, when assessed for the purpose of taxation are not subject to deduction of value of property of the bank which is exempt from taxation. *First National Bank* v. *Board of Equalization,* 92 Ark. 335.

The defendant is a manufacturing corporation, which falls within the general class of corporations required to make returns for purposes of assessment in the following manner:

Such corporations shall, through their president, secretary, principal accounting officer, etc., annually during the month of July "make out and deliver to the assessor of the county in which such company or corporation is located or doing business, a sworn statement of the capital stock, setting forth particularly:

"*First.* The name and location of the company or association.

"*Second.* The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

"*Third.* The amount of capital stock paid up, its market value, and, of no market value, then the actual value of the shares of stock.

"*Fourth.* The total amount of all the indebtedness, except the indebtedness for current expenses, excluding from such indebtedness the amount paid for the purchase of improvement of the property.

"*Fifth.* True valuation of all tangible property belonging to such company or corporation; such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of State; and shall also show in what county such property is situ-

ated." Kirby's Digest, § 6936, as amended by act of March 11, 1913, p. 615.

The next section (6937) provides that if the officers of the corporation neglect or refuse to make the return as required above, then "the assessor shall from the best information he can obtain, make out and enter upon the proper assessment roll a list with the valuation of all tangible and intangible property belonging to such defaulting company or corporation subject to taxation by the provisions of this act with 50 per cent. penalty."

Now, the provision just quoted with reference to the method of assessment of corporation property must be read in connection with the statute already referred to, which provides that the owners of shares of stock in a corporation required to list its capital stock are not required to include such shares of stock in their personal assessments, and, when thus considered, it is seen that the legislative scheme provided is not merely to assess the property of the corporation itself, but to include the value of the shares of stock and tax them at the source. The words "capital stock" used in the statute means the aggregate value of the shares of stock in the hands of the shareholders, though the value of the shares of stock themselves do not constitute the limit of taxation. The purpose of the law-makers was to merge the separate valuation of the shares of stock into the aggregate valuations of the whole, and thus constitute the compound as a basis for fixing the valuation for taxation purposes, after deducting the value of the tangible property which is to be specifically assessed separately. In this way the law-makers have provided a scheme for taxation of all of the elements of value of this property one time, and only once, and the tax is levied at the source and paid there without any assessment being levied against the individual shareholders. The scheme absolutely excludes any idea of double taxation, but it does provide an adequate means of including all the elements of value contained in

the shares of stock and the tangible property of the corporation itself, merged into a composite whole. The assessment of the property is in name only against the corporation, for it includes the elements that go to make up the value of the shares of stock themselves. The assessment does not include both the shares of stock separately and the aggregate whole as represented by the capital of the corporation, for that would be double taxation, but the scheme does, as before stated, contemplate that all of the elements of value be considered in fixing a basis of value which will include every species of property involved. The two species of property, that is to say, the shares of stock held separately in the hands of the shareholders and the property of the corporation itself, do not contain the same elements of value. The capital of the corporation is represented by its tangible assets; whereas, the shares of stock contain only the element of market value, which may be increased or decreased by the value of the earning capacity of the corporation above or below the market value of the property owned by the corporation. The statute expressly provides that intangible as well as tangible values shall be taxed, and shares of stock represent the taxable intangible value, subject to reduction to the extent of the value of the tangible property in the State which is taxed separately. If the State should tax only the tangible property in the State, it would get no benefit whatever from the element of value represented by the earning capacity of the corporation and nothing in return would be received in the way of taxes for omitting from taxation the shares of stock in the hands of the individual holders, thus creating a complete exemption of that class of property.

(4) So when these different elements are considered together, we have a taxation scheme which embraces them all in making up the true valuation for assessment purposes. Such being the state of the law with respect to the method of assessment and the elements to

be considered, the question arises whether or not there should be a deduction of tangible property outside of the State, over which the State has no jurisdiction and which is taxed elsewhere. Our statute expressly provides that tangible property of the corporation shall be assessed separately, but this does not include, of course, the assessment of property outside of the boundaries of the State, for the power does not extend that far. But it does not necessarily follow that because the property owned by the corporation is in another State and is taxed there, that its value must be deducted from the blended valuations which are assessed for taxation in this State. That construction would lead to a partial exemption of the shares of stock from taxation, and we can not presume that the legislative scheme contemplates such a thing, for it is contrary to an express provision of the Constitution, which prohibits exemptions from taxation. *Dallas Co.* v. *Home Fire Ins. Co., supra.* The statute hereinbefore quoted which authorizes the omission from the personal assessment lists of shares of stock in a corporation is limited to such corporations as are required to list their property for taxation, and if it be held that the property of the corporation outside of the State is not to be listed, it would necessarily follow that the shares of stock themselves must be separately listed and taxed against the owners thereof. Such was obviously not the intention of the framers of the statute, even though the tangible property is situated beyond the limits of the State, for there is no provision for an assessment of the shares of stock against the owner in the cases where the corporation itself assesses its property partly in this State and partly in some other State. The State undoubtedly has a right to assess all the property of the corporation and its shareholders in this State and to consider all the elements of value in levying the assessments. It does not attempt to assess the property outside of the State, either directly or indirectly, nor

does it attempt to assess the capital of the corporation as represented by the value of property outside of this State, but what it has attempted to do in the statute hereinbefore outlined is to introduce into the assessment the elements of value attaching to the shares of stock themselves, even though it may be based on property of the corporation situated outside of the State, and thus "to require one tax on all attainable sources of value." *Wright* v. *L. & N. Railroad, supra.* This view of the statute prescribing the method of taxation reconciles the assessment without such deduction with those decisions of the United States Supreme Court, which hold that the assessment of the property of a corporation can not include property outside of the State, and also with those which hold that the shares of stock themselves can be assessed, even though property which goes to make up the value thereof is situated beyond the borders of the State. *Delaware L. & W. Rd. Co.* v. *Pennsylvania,* 198 U. S. 341; *Hawley* v. *Malden, supra.*

Learned counsel for the defendant earnestly rely on the decision of the Supreme Court of the United States in the first of the two cases just cited as sustaining their contention that this is in effect an attempt to indirectly tax tangible property outside of this State by including it in the assessment of the capital stock of the corporation. There is language found in that opinion which seems to bear out that contention. The court say:

"We can not see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property *eo nomine* or specifically when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capi-

tal stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of the capital stock or anything else which represents that property. Such a tax in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

It must be remembered that the above statement of the law was made in a case reviewing an assessment which did not contain the element of value going to make up the shares of stock of a corporation, but it related purely to an assessment of the capital as the property of the corporation itself. It does not appear that in the State of Pennsylvania, where that case arose, there was a statute such as we have here, requiring the corporation itself to return the value of the shares of stock and exempting individual stockholders from taxation. But on the contrary, it appears from the opinion that the assessment provided under the laws of Pennsylvania, constituted one against the property of the corporation itself, and, for aught that appears in the opinion referred to, the shares themselves were otherwise taxed.

(5-6) The statute which we deal with in the present case contemplates an assessment of the shares of stock themselves, or at least the separate elements of value which they represent, and the State has a right to impose the assessment at their value without deduction of property outside of the State. In other words, there is a clear distinction between an assessment solely of the corporation property and a composite assessment such as is provided under our statute for the taking into consideration of all of the elements of value, including the shares of stock therein. The Supreme Court of the United States so held in the case of *Commercial Bank* v.

Chambers, 182 U. S. 556, and the force of the decision is not impaired by the later case cited above. The statute, and the assessment which the State attempts now to make thereunder, is not an evasion of the rule against double taxation, as the court indicates was attempted under the Pennsylvania statute, but it constitutes merely an attempt to assess the valuation of property in this State and tax it only one time according to its true elements of value. In considering the validity of a taxation scheme, we look to the effect and to the result sought to be accomplished, rather than to the mere form or to the use of the name in designating the method of taxation, and when this is done we discover the intention of the law-makers to tax in the name of the corporation the shares of stock themselves, without deduction, as is our right, of the valuation of property outside of the State, which goes to make up the valuation of the shares of stock. The statute provides for a separate taxation of the tangible property of the corporation in the State, and the valuation of the property thus separately assessed must be deducted from the total valuation assessed against the corporation. *Hempstead County* v. *Hempstead County Bank,* 73 Ark. 515; *Harris Lumber Co.* v. *Grandstaff,* 78 Ark. 187; *Arkadelphia Milling Co.,* v. *Board of Equalization,* 126 Ark. 611; *Harvester Building Co.* v. *Hartley,* 160 Pac. (Kan.) 971. The deduction, however, can only be of the property in this State which is assessed here, for the sole object of the deduction is to prevent double taxation. *Hempstead County* v. *Hempstead County Bank, supra.* It should not include property outside of the State, for that is not taxed here. Upon other principles hereinbefore indicated, the valuation of the property outside of the State must be omitted when the property of the corporation itself is sought to be taxed, but when the effort is to assess the values of the shares of stock it should not be deducted, for those shares of stock have a separate valua-

tion existing here within the jurisdiction of the State and upon which the State has a right to take its toll of taxation.

Our conclusion, therefore, is that the State is correct in its contention that the failure of the defendant corporation to make return of its capital stock without deduction of the value of tangible property outside of the State was a violation of its duty, and that the property was and is subject to taxation. The allegations of the complaint are not altogether clear in the statement of the State's cause of action for recovery of taxes on unassessed property, and the language used indicates some confusion of the statutory terms referred to. This is particularly true in the amendment to the complaint defining the term "capital stock" as used therein. That term as used in the statute means shares of stock of the corporation in the aggregate, and not the capital of the corporation as represented by its tangible assets. The meaning of the law-makers in this regard is perfectly clear when the use of the term is considered in connection with a provision which follows, to the effect that the corporation is required to state in its return the number of shares "into which such capital stock is divided," and the "amount of capital stock paid up, its market value," etc.

(7) Counsel were in error in the definition given in the complaint of the term "capital stock," but that error does not destroy the force of the allegations as the statement of a cause of action. The character and effect of a pleading is to be determined from its statement of facts and not from its name, and if the facts stated constitute a cause of action the pleading is sufficient to call for relief, even though erroneous conclusions be drawn as to its effect. *Merrit* v. *School District,* 54 Ark. 468; *Fordyce* v. *Nix,* 58 Ark. 136.

Notwithstanding the erroneous definition contained in the complaint, it appears sufficiently from the allega-

tions that the corporation named and assessed only its tangible property in this State and failed to return its capital stock as expressly required by statute. From the statement of those facts the court itself must draw the proper legal conclusions, and determine whether or not taxable property has been withheld from assessment.

(8) The only remaining question is whether or not the statute authorizes the Attorney General to sue to recover back taxes omitted in this way from assessments. The contention of counsel for defendant is that this statute was only intended to reach tangible property omitted from former assessments and that the property involved in this controversy is not of that character. The statute relates to property "now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid," and which is now owned by a corporation. The property in controversy falls within the designation of the statute. It was at the time it should have been assessed, property of the corporation within the meaning of the taxation laws of the State, and is still owned by a corporation within that meaning. There is nothing in the language of the statute which warrants a contention that it relates only to tangible or corporeal property. The aggregate of the capital stock was assessable in the name of the corporation, and was, therefore, the property of the corporation within the meaning of the statute, which was designed to reach property which corporations were and are required to assess, even though it included the shares of stock in the hands of the individual shareholders.

Upon the whole, we are of the opinion that the complaint stated a cause of action against the defendant and that the court erred in sustaining the demurrer. The judgment is, therefore, reversed, and the cause remanded with directions to overrule the demurrer to the complaint and for further proceedings not inconsistent with this opinion.

SMITH and HART, JJ., dissent.

WOOD, J., (concurring). In the case of *State ex rel.* v. *K. C. & M. Ry. & B. Co.,* 117 Ark. 606, this court held that the act of 1887, as amended by the act of March 12, 1913, Act 169, p. 724 (the back tax act), was a valid enactment. Although I dissented in that case, I realize that until it is overruled by this court or declared unconstitutional by the Supreme Court of the United States, such decision is the law, and I am bound by it. Hence, I concur in the opinion and judgment now entered.

The present suit was brought under the above statute, and, treating the same as a valid law, there is no escape from the conclusion that under our taxing system corporations of the character of the appellee are required to return for taxation the shares of stock into which the capital stock is divided, and these shares, for the purpose of taxation, are treated as capital stock of the corporation. The shares of stock are not taxed as the property of the shareholders, but, under our statute, they are taxed under the designation "capital stock," and as the property of the corporation. As the shareholders are not required to tax their individual shares separately, the corporation is required to tax them in the aggregate under the head of "capital stock." *Dallas Co.* v. *Banks,* 87 Ark. 484; *Dallas Co.* v. *Home Fire Ins. Co.,* 97 Ark. 254.

The assets of the corporation of every character and wherever located may be taken into consideration by the assessing officers in ascertaining the value of the shares of stock. The *situs* of the shares of stock—capital stock—for the purpose of taxation, is the domicile of the corporation. The value of tangible property owned by the corporation beyond the jurisdiction of the State must be taken into consideration in determining the value of the shares of stock, for such property is one of the elements or factors giving value to the shares of stock, and the value of such property, in so far as it enters into the cal-

culation or estimate made in determining the value of the shares of stock in the aggregate can not be deducted from the sum thus ascertained to be the value of those shares, for this would be but climbing the hill and sliding back to the starting point. It would be tantamount to excluding the tangible assets of the corporation in other jurisdictions from consideration in the calculation necessary to determine the aggregate value of the shares of stock. It is not double taxation to adopt this plan for ascertaining the value of the shares of stock, or capital stock, for the reason that only the value of the shares of stock so ascertained is taxed in this State. The tangible property of the corporation outside of the State is not taxed here at all, and could not be, for that is taxed in the jurisdiction where it is located. But such property is only considered in so far as it contributes to give value to the shares of stock which the State has a right to tax, at their source, that is, the domicile of the corporation. But the rule is different as to tangible property within this State. The State has the right to tax the value of the shares of capital stock once, as ascertained by the method indicated, and, inasmuch as the tangible assets within the State have been considered once in making up this value, the rule adopted by this court to prevent double taxation is to deduct the tangible property taxed here as such, from the aggregate value of the shares of stock taxed as capital stock because that has to be considered and is embraced in the calculation making up the total value of the shares of stock. Not to deduct the local tangible assets, taxed as such, would be equivalent to taxing the value of such assets twice. But all of this is clearly set forth and argued in the opinion of the Chief Justice.

The conclusion reached by the majority of the court, it seems to me, is the only logical result to follow, conceding, as I do, that the act is now a valid law. However, in view of the far reaching consequences that it may have, I have concluded, while my mind is on the statute, to re-

cord here my views as to the constitutionality of the act, which I frankly concede it would have been more appropriate to record in the case of *State ex rel.* v. *K. C. & M. Ry. & B. Co., supra,* but which at that time I was unable to reduce to writing by pressure of other urgent court duties.

I am firmly of the opinion that the act under which this suit was brought is unconstitutional, because the Legislature, by striking out the words "or person" from the original Back Tax Act of 1887, and leaving the act to apply only to corporations, showed its deliberate purpose to discriminate against corporations and to favor natural persons. While it is well settled that the sovereign power may classify for taxation, it is equally well settled that such classification must have some basis in reason to justify a discrimination or distinction between taxpayers. The cases which recognize the right of the sovereign to classify, in stating the rule, also recognize the principle that if the classification be clearly unreasonable and arbitrary, and without any just distinction to rest upon, such classification comes within the inhibition of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. *Williams* v. *State,* 85 Ark. 464; *St. L., I. M. & S. Ry. Co.* v. *State,* 86 Ark. 518; *Mo. & N. Ark. Rd. Co.* v. *State,* 92 Ark. 1; *Ex parte Byles,* 93 Ark. 612; *Ozan Lumber Co.,* v. *Union County Bank,* 207 U. S. 251.

I contend that any law which shows on its face no other reason for classification than that one taxpayer is a corporation and the other an individual is based upon considerations that have no possible connection with the duties of citizens as taxpayers. Such a statute is purely arbitrary, capricious and oppressive, and is in plain violation of article 16, section 5 of our Constitution, requiring all taxes to be equal and uniform throughout the State. And by violating this provision it also violates the Fourteenth Amendment to the Constitution of the

United States, which prohibits the State from denying to any person the equal protection of the laws. 1 Cooley on Tax. 72, *et seq.*, 83; Judson on Tax., pp. 594, 606, 608, 618.

Such I understand to be the law as announced not only by the ablest authors of text books on the subject of taxation, but also by the State courts of last resort, and by the Supreme Court of the United States, where the question has arisen in the latter court, under State Constitutions having an equality and uniformity clause similar to ours. *State* v. *Loomis,* 115 Mass. 307, 314; *Russell* v. *Croy,* 164 Mo. 69; *South & North Alabama Railroad* v. *Morris,* 65 Ala. 193, 199; *Santa Clara Co.* v. *So. Pac.,* 18 Fed. R. 385; *North. Pac. Ry. Co.* v. *Walker,* 47 Fed. R. 681; *County of San Mateo* v. *So. Pac. Ry. Co.,* 13 Fed. 145, 150; *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 155; *Bell's Gap Rd. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 560; *Bradley* v. *Richmond,* 227 U. S. 477.

In *Fletcher* v. *Oliver,* 25 Ark. 289, 295, we said: "Taxation by uniform rule means by one and the same unvarying standard; uniformity not only in the rate of taxation, but uniformity in the mode of assessment by which the value is ascertained. There must be an equality of burden." In *Ex parte Fort Smith & Van Buren Bridge Co.,* 62 Ark. 461, we said: "When the property of a few is taxed according to its value and of all others at one-half its value, then the few are required to contribute double their proportion of the burden. This is manifestly wrong, and justice demands that it be redressed whenever it can be done in conformity to the laws."

Legislation for the collection of "back taxes" which seeks to lay the burden of paying those taxes upon only one class of taxpayers, while exempting all others, without any reason for such discrimination other than that the one class consists of corporations while the other is natural persons, is equally as obnoxious to the equality

clause of our Constitution as would be legislation making the same classification for the original assessment of taxes. The effect of such legislation in either case is to lay the burden necessary to meet the expense of government upon one class of property owners, while exempting others, based upon no other reason than a mere difference in ownership and in names of owners. Such legislation, in its last analysis, is but a flagrant discrimination against individuals who may have associated themselves according to law and for lawful purposes in order to transact their business in a common name by which the corporation is designated, and in favor of individuals who may transact precisely the same kind of business as natural persons without a corporate name. To illustrate, the Sunnyside Planting Company is a corporation engaged in the business of producing cotton in Chicot County, Arkansas. It owns two thousand acres of land in that county which is used for that purpose. Suppose it has failed to pay taxes on such lands for fifty years. John Jones has also two thousand acres adjoining the lands of the corporation, precisely the same character of land and used for the same purpose. He, too, has failed to pay the taxes on his land for fifty years. Or say each of these taxpayers has had on hand each year during all these years one hundred mules, ten thousand in money or other of the same kind of personalty which they have failed to return for taxation. Can any reason be suggested why a law should be enacted compelling the corporation to pay these back taxes and expressly exempting John Jones from liability therefor? Yet such is the effect of the statute under review. See *Wolff Chem. Co.* v. *City of Philadelphia,* 66 Atl. 344, 217 Pa. 215; *United States* v. *Milwaukee Refrig. Tr. Co.,* 142 Fed. 247.

The mandate of our Constitution requiring taxes to be equal and uniform forbids legislation that makes "fish of one and flesh of another" taxpayer who both stand in precisely the same relation to the government as to

their taxpaying duties. The act makes no attempt to classify as to any particular corporation or special kind of property that might furnish fit subjects for classification. It is but a bald discrimination between corporations in general and natural persons. Of course, when the sovereign power is fair and just, making no arbitrary and oppressive discrimination in the law itself by which it seeks to compel delinquent taxpayers to bear their proportion of the burdens of taxation, then, if by reason of defective administration of the law one delinquent is caught while another escapes, "it does not lie in the mouth of the one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."

In the recent case of *State ex rel.* v. *K. C. & M. Ry. & B. Co.,* 117 Ark. 606, this court to sustain its view that the act was valid, cited and relied principally upon *Weyerhaueser* v. *Minnesota,* 176 U. S. 550, and *Florida Cent., etc., Rd. Co.* v. *Reynolds,* 183 U. S. 471.

In the Minnesota case the legislation arose under a statute which operated alike upon all taxpayers. There was no classification, hence no discrimination on the part of the sovereign by which one class of delinquents, towit, corporations, could be made to pay while another class of delinquents, towit, individuals, who stood in precisely the same attitude as to the duty to pay taxes, was exempt.

The Florida case arose under a statute which provided for the collection of taxes "upon any railroads and the properties thereof for the years 1879, 1880, 1881." Here was a classification which all the authorities recognize as perfectly legitimate and reasonable for taxation purposes.

As is well expressed by Judge Caldwell, speaking for the court, in *Northern Pac. R. Co.* v. *Walker,* 47 Fed. R. 681, "The franchise of railroad companies, and their earnings, and railroad property, may well be classed by themselves for purposes of taxation and taxed by a dif-

ferent method or rule from that applied to other property." Of course, all that is said in the opinion in the above cases must be interpreted in the light of the facts upon which the opinion is based. The Constitution of Florida is unlike ours in that it provides only "for a unform rate of taxation." Not only was it reasonable that railroads should stand in a class by themselves, but the act specially mentions the years that such railroad had escaped taxation. On this feature of the act the court said: "A wrong intent can not be imputed to the Legislature. It may have found that the railroad delinquent tax was large" (for three years) "and the delinquent tax on other property was small and not worth the trouble of provision therefor." But it could hardly be said of the act under review that in 1913, when the Legislature made the act apply solely to corporations by striking out persons it did so for the reason that it found that corporations, during all the years they had been allowed to do business in this State, had been delinquent in the payment of taxes while individuals had not. The very fact that the Legislature, for all this long period, made a discrimination against corporations shows a deliberate purpose to cast upon them an unequal burden of taxation. Speaking of the effect of the Fourteenth Amendment on such a state of facts, the court further said: "Doubtless it would prohibit a State from selecting some obnoxious person and casting upon his property the sole burden of taxation, or a burden differing from that case upon others where property was similarly situated, but it does not prevent a State from exercising its judgment as to the property to be taxed and the modes of taxation, providing all property similarly situated is treated in the same way."

Therefore, I am unable to see how the Minnesota case and the Florida case, *supra,* have any application or give any support to the view that the "Back Tax" Act of 1887, as amended, is a valid enactment. As I stated in

the beginning, the act shows on its face that it is in plain violation of the "equal and uniform" clause of our Constitution, and, being so, is also in plain violation of the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States.

THE LIVERPOOL & LONDON & GLOBE INS. CO. LTD. v. PAYTON.

Opinion delivered April 16, 1917.

1. INSURANCE—STATEMENT IN APPLICATION—STATEMENT TO AGENT—ESTOPPEL.—In an application for a policy of fire insurance, where the insured stated the present value instead of the cost price, the company is estopped from avoiding the policy on that ground, where the insured explained the facts to the insurer's local agent, which latter inserted the figures in the application.
2. INSURANCE—STATEMENTS IN APPLICATION—OTHER INSURANCE.—The application for a policy of fire insurance asked the question whether the applicant had ever been denied insurance on the property in question. *Held*, the answer no to the question was correct, although a company which did not write this kind of business had refused to write it.
3. INSURANCE—STATEMENTS IN APPLICATION—ESTOPPEL.—Where an applicant for a policy of fire insurance explained the facts to the local agent of the insurance company, which agent inserted the answers in the application, the company can not defeat the policy on the ground that the applicant made false answers as to insurance having been refused by other companies.
4. INSURANCE—PROOF OF LOSS—WAIVER.—Necessity for the presentation of proofs of loss are waived when the insurance company's local agent told the insured that the claim would be paid, and an adjuster arranged a meeting for final settlement.
5. INSURANCE—WAIVER OF PROOF OF LOSS—AUTHORITY OF LOCAL AGENT.—A local agent with authority to solicit fire insurance, write and deliver policies, and collect premiums, and to notify the insurance company of losses, has *prima facie* authority to waive presentation of proof of loss.
6. INSURANCE—FIRE LOSS—STIPULATION IN POLICY CONFLICTING WITH STATUTE.—A provision in a fire insurance policy in conflict with Kirby's Digest, § 4375, is void.

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

J. A. Watkins and *S. M. Wassell*, for appellant.

1. No proof of loss was furnished the company or waived by it. 122 Ark. 357; 120 *Id.* 268.

2. There was a breach of warranty. The answers were untrue and voided the policy. 4 L. R. A. (N. S.) 607; 27 Mich. 429; 177 U. S. 519; 183 *Id.* 308; 22 Sup. Ct. Rep. 133.

3. No notice was given nor proofs of loss filed within the sixty days. 87 Ark. 171; 72 *Id.* 484; 84 *Id.* 224; 91 *Id.* 43; 88 *Id.* 120.

4. Instruction No. 7, asked by defendant, should have been given. 82 Ark. 401-2; 57 *Id.* 279; 58 *Id.* 565, 528; 261 U. S. 613; 14 L. R. A. 297; 16 *Id.* 33.

5. The contract limited the recovery to three-fourths of the cash value of the property destroyed.

Kimpel & Daily, for appellee.

1. Proof of loss was waived. 122 Ark. 357; 120 *Id.* 268.

2. The answers in the application were true, and the company can not take advantage of the mistakes of its agents in writing down incorrect answers. Each of the instructions requested by the insurance company ignores the rule that the knowledge and acts of the agent are those of the company, and the company is estopped. 52 Ark. 11; 64 *Id.* 253; 71 *Id.* 242; *Ib.* 295; 79 *Id.* 315; *Ib.* 270; 81 *Id.* 509, 206; 102 *Id.* 151; 108 *Id.* 261; 79 *Id.* 315; 52 *Id.* 11.

3. The policy was for $500 and the liability is for that amount. 72 Ark. 368; 75 *Id.* 409.

McCULLOCH, C. J. This is an action on a fire insurance policy where there was a total loss of the insured building and some of the insured contents and a partial loss of other property insured. The insurance policy was for $500 on gin house; $1,350 on machinery, such as gin stands, feeders, condensers, presses, elevator, etc., $300 on engine, boiler, smokestack, etc.; $75 on seed house, and $100 on cotton seed while contained in the seed house; making a total of $2,325.

There was a recovery below of the sum of $1,890.80, which included the full amount of insurance on the building, and the defendant insurance company has appealed. The company defended on the ground that there was a breach of warranty with respect to the statement of the assured in his application concerning the original cost of the personalty covered by the policy, and with respect to the statement of the assured to the effect that no other company had at any time declined to insure the property, or any part of it. Another defense presented is that proof of loss was not furnished within sixty days, as required by the terms of the policy. The issues were submitted to the jury on instructions, the correctness of which is not challenged on this appeal, but it is insisted that according to the undisputed evidence the issues should have been determined in favor of the defendant, and that a peremptory instruction should have been given to the jury.

The property covered by the policy was a gin outfit owned by the plaintiff, J. C. Payton, which was situated at Mansfield, Arkansas, and the policy was negotiated, written and delivered by Mr. W. R. Alexander, the local agent of the company. In the application for insurance there was a question and answer with reference to the building as follows:

"Q. What did they severally cost when erected?

"A. Gin house, $800."

There was another question and answer in the application with respect to the engine and boiler, as follows:

"Q. What did you pay for it?

"A. One thousand dollars."

It is contended that according to the undisputed evidence these answers were untrue and constituted breaches of the warranty. It is not correct to say that the testimony is undisputed as to the cost of the building, for one of the witnesses testified that it cost $900. The

evidence establishes the fact that neither the agent of the company, Mr. Alexander, nor Payton, the assured, understood that the question related to the original cost, but they thought that the inquiry was concerning the value of the articles at the time that the policy was written. Mr. Alexander was the agent at Mansfield and walked out to the gin to see the plaintiff about securing the insurance on the property. He testified that he discussed with Payton the question of value of the different items to be incorporated in the policy and made pencil memoranda of what was determined in the negotiations to be the values. It is undisputed that Payton stated to Alexander that the engine and boiler were second-hand articles which Payton had purchased and that as installed in the gin plant were then of the value of $1,000. The proof shows that the engine and boiler cost Payton less than that sum, but the jury were warranted in finding that the statement concerning the value of those articles properly installed in the gin was the amount stated in the application. After securing the data from which the application was to be prepared Alexander went back to his office and copied the amounts into the printed application and later presented the application to Payton, who signed it, and it was forwarded to the company.

(1) The evidence shows that Alexander alone was responsible for the mistake in inserting the present value of the articles into the blank for the answer concerning the actual cost. The undisputed evidence shows that Alexander knew that the engine and boiler had been bought second-hand by Payton and it was not claimed that they actually cost the amount inserted in the application. Under those circumstances the agent of the company was responsible for the mistake, and his knowledge was the knowledge of the company, and the company is estopped to plead the incorrect statement in the application as a breach of warranty. *People's Fire Ins. Assn. of Arkansas* v. *Goyne,* 79 Ark. 315.

Counsel for the defendant rely upon decisions of the Supreme Court of the United States holding in substance that an applicant for insurance can not plead estoppel, and thus escape responsibility for untrue statements of facts which he permits an agent of the insurance company to insert in the application by showing that the agent was responsible for the incorrect statement and was actually advised as to the true facts. The cases relied on were fully discussed by this court in the case cited above, and we declined to follow them and declared the law on that subject to be as follows (quoting from the syllabus): "An insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question or of any other breach of warranty or violation of the provisions of the application or policy, notwithstanding clauses in the application or policy provide that it shall not be bound by any such conduct of its agent."

The rule thus announced has been followed by this court in numerous cases which are cited on the brief of plaintiff's counsel. Those cases are absolutely decisive of the question now before us, and we are of the opinion that the evidence makes out a clear case of estoppel on the part of the insurance company to plead the breach of warranty caused by the conduct of its own agent.

(2-3) Another question in the application was this:

"Q. Has this, or any other, company or any other agent of this or any other company at any time declined to insure you on said property, or any part of it?

"A. No."

The facts as disclosed by the testimony were that Payton applied to another agent for this insurance and that an application was made out by the agent and sent in to one of the general agents in Little Rock, but later Payton was informed by the local agent that he had no company writing gin insurance. He then applied to Mr.

Alexander, stating to him what had occurred in the transaction with the other agent. In fact, Payton had previously declined to give the insurance to Alexander on the ground that he was going to give it that year to the other agent, Mr. Hodges, but that when informed by Hodges that his company would not take gin insurance, he turned to Alexander, who was soliciting the business. The testimony of Alexander, as well as that of Payton himself, shows that it was understood between them that the application had not been declined within the meaning of the question propounded, and the answer was inserted in the application by Alexander himself with full knowledge of all that had occurred between Payton and the other agent. We do not think that the answer was an incorrect one within the meaning of the question propounded, which manifestly related to a refusal by some company or agent engaged in that kind of insurance business. It did not refer to a refusal by a company not engaged in that business. Moreover, the actual knowledge of the truth of the matter possessed by the agent was the knowledge of the company, and it comes within the rule announced by this court in the *Goyne* case, *supra.*

(4-5) The contention of the plaintiff was that the failure to furnish proof of loss was waived by the company, and the facts concerning that branch of the case were as follows:

Alexander was what is ordinarily termed a recording agent, that is to say, an agent with authority to solicit insurance, write and deliver policies and collect premiums, and also with authority to notify the company when loss occurred. The next day after the fire occurred Payton and Alexander had a conversation concerning the matter, and Alexander agreed to notify the company, and stated that an adjuster would be sent to adjust the loss. Alexander sent in the notice to the company, and in two or three weeks the adjuster came and was introduced to Payton by Alexander. The details of

the fire and other matters concerning the settlement were discussed between the adjuster and Payton, and the adjuster asked particularly about a mortgage on the property to the Fort Smith Cotton Oil Company (which company is plaintiff in this action) and Payton answered the inquiry in the affirmative. The adjuster then asked Payton how it would suit him for them to meet in Fort Smith the following Thursday and "settle the matter up." Payton expressed satisfaction with that arrangement, and they parted with the understanding that they were to meet in Fort Smith on the day named, but before that day Payton was informed by Alexander that Mr. Wilson, the adjuster, had telephoned him that he could not be in Fort Smith on that day. Nothing further was heard from the adjuster, but a few weeks later Payton applied to Alexander for information concerning the settlement, and was assured by Alexander that the loss was known to be an honest one, and that payment would be made in due time. Alexander advised Payton not to employ a lawyer for the reason that there would be a settlement of the loss. Payton was working in the country at the time, and only came back to town about every two weeks. When he came back from his next trip to the country the time (sixty days) was about up for filing proof of loss, and when Payton made inquiry of Alexander about the matter he was again assured that settlement would be made with him in a short time. Nothing further was done, and about a week or ten days after the expiration of the time allowed for furnishing proof of loss Payton met the adjuster in Fort Smith and was told by the adjuster that payment of his policy would be refused.

These facts constitute a waiver of the proof of loss. The testimony was sufficient to show *prima facie* authority on the part of the local agent to waive proof of loss, and no testimony was introduced showing a limitation upon that authority. *Citizens Fire Ins. Co.* v. *Lord,* 100

Ark. 212; *Concordia Fire Ins. Co.* v. *Mitchell,* 122 Ark. 357. In addition to that the course of conduct of the adjuster was such as to lead Payton to believe that settlement would be made without requiring proof of loss, and it was incumbent on the company, if it intended to insist upon that requirement, to give notice to Payton of that fact. The adjuster came to Mansfield to meet Payton as promised by the local agent, and after going over the transaction fully they agreed to meet in Fort Smith to make a settlement, and that meeting was postponed indefinitely without any notice or without the slightest intimation to the plaintiff that he would be required to make out a proof of loss. On the contrary, he was assured by the local agent that payment would be made in due course of time, and that he need not go to any expense in employing counsel. The facts presented on that issue constituted no defense to a suit on the policy, and the court was correct in refusing to direct a verdict in favor of defendant.

(6) The only other question raised is that the court erred in instructing the jury that if they found for the plaintiff to find in the full amount of the policy on the building. The instruction was in accordance with the statute of this State, known as the Valued Policy Law. Kirby's Digest, § 4375. The stipulation of the policy in conflict with the terms of the statute was void.

Judgment affirmed.

GRAYLING LUMBER COMPANY *v.* HEMINGWAY.

Opinion delivered April 16, 1917.

1. LOGS AND TIMBER—CONTRACT TO HAUL.—Evidence *held* sufficient to go to the jury on the issue of the formation of a contract to cut and haul logs.
2. CONTRACTS—BREACH—RIGHT OF OTHER PARTY.—The obligations of a contract are mutual, and a breach by one party will relieve the other.
3. CONTRACTS—STRICT PERFORMANCE—WAIVER.—The strict performance of a contract according to its terms, may be waived.

4. CONTRACTS—BREACH—WAIVER.—An instruction on the question of waiver should be couched in general terms, and so framed as to submit the question to the jury to determine whether or not the appellant, by its conduct, as shown by the testimony, had waived an alleged breach of the contract on the part of the appellee.
5. TRIAL—INSTRUCTIONS—JURY QUESTION.—Where an instruction gives undue prominence to a particular fact and assumes that there was no breach of contract under such fact which is an issue for the jury, it will be held to invade the province of the jury.

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

Jack Bernhardt and *Samuel Frauenthal,* for appellant.

1. The law of this case was settled upon the former appeal. 51 Ark. Law Rep. 356. It was there decided that before there could be a binding contract, it was necessary that the terms of the contract should make it mutually binding upon both parties, and this must be gathered from the terms of the contract itself. There was no mutuality. 124 Ark. 354.

2. The court erred in its instructions to the jury. The breach by appellee released the appellant. 93 Ark. 472.

3. It is erroneous to single out and give improper prominence to particular facts or evidence. 75 Ark. 76.

4. The damages claimed were loss of profits. The testimony must be positive as to the amount of damages. and not left to speculation or imagination. 103 Ark. 584; 78 *Id.* 336; 91 *Id.* 427; 97 *Id.* 522; 105 *Id.* 421; 13 Cyc. 53.

5. The verdict is excessive.

F. M. Rogers, for appellee.

1. The question of mutuality, or lack thereof, was submitted to the jury, upon an instruction approved by this court on the former appeal. 124 Ark. 354. The fourth instruction was there approved.

2. The question of breach of contract by appellee was submitted upon proper instructions, and the jury found that there was no breach by appellee.

3. The jury, by its verdict, found for appellee; that he was not negligent in the performance of his work.

4. The loss of profits was established with reasonable certainty. 69 Ark. 219; 78 *Id.* 336.

5. The verdict is not excessive and is sustained by the evidence. There was no error in the instructions.

WOOD, J. I. This suit was instituted by the appellee against the appellant to recover damages for an alleged breach of a verbal contract. The appellee alleged, in substance, that appellant had employed him to haul logs, at varying prices according to varying distances, from February 15, 1915, during the balance of that year; that appellee entered upon the performance of the contract and delivered logs thereunder until the 13th day of May, 1915, when the appellant, without cause, refused to permit him to continue further in the performance of his contract and thereby broke the contract, to the damage of the appellee in the sum of $12,000, for which he asked judgment.

The answer denied all the material allegations of the complaint, and alleged that the appellant had paid plaintiff for all services that the latter had rendered in hauling logs, and that the appellee's services were unsatisfactory.

This is the second appeal in the case. The case, on the first appeal, is reported in 124 Ark. 354.

(1) On the second trial it was contended that according to the undisputed testimony of the appellee there was no binding contract entered into between the parties. On the former appeal we said: "It is a general principle in the law of contracts that an agreement entered into between parties to a contract in order to be binding must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality."

The appellee testified that he entered into a contract with appellant through its local manager, Terry, for the hauling of logs. His testimony concerning this is as follows: "In February, 1915, Terry came to me at the Kimball mill yard down here, and asked me to put my teams to help log the mill, and I told him that I would not put the teams in the mud and water and ice unless he guaranteed me work for the balance of the year, and he guaranteed to give me work, and then I went ahead and moved my teams out, with the understanding that I would not go unless he did give me the work for the balance of the year. Terry said that he would pay me the same prices that he did in 1914." Here witness specified the prices to be paid, showing varying prices for the varying distances that the logs were to be hauled.

Appellee stated that he moved his outfit, consisting of forty mules, eight wagons, and the balance of the equipment, and began work. Appellee was asked: "When you went on this work, was there any understanding or agreement that you could quit at any time that you saw fit before the first of the year?" and answered, "No, sir." He was then asked: "What was your understanding of the agreement with reference to that?" and answered, "My understanding was that I was under contract to go out there and help log the mill, and if I failed I was obligated as much as the Grayling Lumber Company was to fulfill this contract." Appellee was asked: "Did you know what would happen if you failed to fulfill your contract?" and answered, "Yes, sir; I would be liable to suit—to be sued for damages." He was then asked: "Suppose they had gotten judgment against you, what would that have meant to you?" and answered, "Well, at times we had from one hundred to two hundred, and sometimes three hundred thousand feet of logs on the yards unpaid for as a hold-back between pay days."

In addition to appellee's own testimony, other witnesses testified in his behalf to declarations of Terry, the

manager, in conversations with them which tended to prove the contract as alleged in the complaint.

Terry testified that he made no contract with the appellee; that he made an agreement with appellee's father, but there was no agreement that the father or any one under him should work for any stated time.

Giving this testimony its highest probative value in favor of the appellee, it tended to show that there was a contract between the appellant and the appellee, as alleged in appellee's complaint. The testimony of appellee tends to show what the terms of the contract were, and that these terms were mutually binding upon the parties. At least, the testimony was sufficient to justify the court in submitting that issue to the jury, which it did under correct instructions.

II. Among others, the court gave the following instruction: (4) "If you find from a preponderance of the evidence that plaintiff did leave some logs in the woods, but that he afterwards hauled and delivered those logs to defendant's agent, and that they scaled and accepted and paid for same, that this act alone would not constitute a breach on the part of the plaintiff."

A witness for the appellant testified that he was appellant's woods foreman, and as such laid out the strips of timber for the appellee to log on during the year 1915. It was wet when appellee commenced in February, and there were lots of logs left on the strips by appellee which had to be hauled off the strips, whereas, the rule was that the hauler should clear each strip as he went. Witness, as the woods foreman, directed the haulers to begin at the back end and haul the logs clean and when a strip was completed, the hauler was to notify him, and then he would lay off another strip. Witness had to send appellee back lots of times to haul logs off of the strips which he had left there. Sometimes appellee would report that he had a strip completed, and witness would go back and see if they were clean, and he would find logs on them and have to send them back. On one occasion witness had to

send them back a third time for the purpose of taking off logs, and they got more logs than he had really found that had not been hauled; and witness had to employ a man extra in order to haul some of those logs, and there were some logs still upon the last strip from which appellee hauled. Witness had trouble with the appellee about stacking the logs along the track. The appellee's services and labor were not satisfactory. The logs were usually culled in the yards. Sometimes when a cull was found in the woods, witness would write "Cull" on it, if it was a cull. Some were culled in the woods and some were culled on the track. Witness was asked why all the culling was not done at one place, and answered: "Well, the simple fact is that you put as many teams as I had to look after out there, the scaling and the laying out of those strips, I could not see the logs as fast as they laid them out. I had to get extra men to help me do that. The land was covered by very heavy undergrowth."

The answer does not specifically set up a breach of contract on appellee's part, but it does allege that the services which appellee rendered were unsatisfactory. And the appellant was permitted to introduce, without objection on the part of the appellee, the above testimony tending to prove that the appellee performed the services in such a careless and negligent manner as to warrant the submission of the issue to the jury as to whether or not he had breached his contract, and the court did submit that issue in an instruction given at the instance of the appellant, and without objection on the part of the appellee, as follows:

"The court instructs the jury that if they find that there was a contract between the parties, as alleged, and they further find from the testimony that the plaintiff performed his contract in an unskillful, careless and negligent manner, then the court instructs you that the defendant had the legal right to discharge the plaintiff and annul the contract, and if you so find, then your verdict should be for the defendant."

(2) If there was a contract, its obligations were mutual, and if the appellee failed to comply with the contract on his part, he could not hold appellant to a compliance on its part. As was said in *Mo. Pac. Ry. Co.* v. *Yarnell,* 65 Ark. 320, "The failure of one party to a contract to comply with its terms releases the other party from compliance with it." See, also, *Berman* v. *Shelby,* 93 Ark. 478, and cases there cited.

This testimony, tending to prove that the appellee left logs in the woods which under his contract he was required to haul, and that he failed to stack the logs along the track as the contract required, was sufficient to justify the court in submitting to the jury the issue as to whether or not there was a breach of contract on the part of appellee.

The evidence discloses that the work was done in strips. After one strip was completed by appellee, appellant assigned him another strip. If appellant, after discovering that appellee had left logs in the woods scaled, accepted, and paid for same, and then assigned appellee another strip to work, this would tend to prove that appellant had waived or condoned appellee's breach of contract to that time. But if appellant, after certain strips had been completed by appellee, refused to assign another strip and refused to further continue appellee after discovering the breach, this would tend to prove that there was no waiver or condonation.

The court, in connection with the last instruction set out above, should have presented also the theory and contention of appellee, that if there was a breach of contract on his part such breach was waived or condoned by the appellant. There was testimony to warrant the submission of this issue to the jury. One of the witnesses testified that when the appellee was dumping the logs behind the trees more than sixty feet from the track, in violation of the contract, that he called appellee's attention to it, and that appellee would sometimes go and get them, but would let them go for several days; that these logs were

finally scaled by the witness and turned in and paid for. When appellee left logs in the woods and witness told him to go back and get them, and he did so and brought them in, witness scaled them up and accepted them.

(3) The strict performance of a contract according to its terms may be waived.

But while the testimony was sufficient to warrant the court in submitting the issue of waiver on the part of appellant of a breach of contract, if any, on the part of the appellee, the court did not correctly submit that issue in instruction No. 4, *supra.* That instruction was calculated to confuse and mislead the jury. It was perhaps intended to cover the question of waiver, but really did not do so. It only directed attention to the single fact of leaving logs in the woods, and told the jury that if appellee did leave logs in the woods, but afterward hauled and delivered these logs, and that same were scaled, accepted and paid for, that this fact would not constitute a breach of contract on the part of appellee. The testimony disclosed other facts than the matter of leaving logs in the woods which appellant contended constituted a breach by appellee of his contract.

(4-5) Any instruction on the question of waiver should be couched in general terms and so framed as to submit the question to the jury to determine whether or not the appellant, by its conduct, as shown by the testimony, had waived any alleged breach of contract on the part of the appellee. The instruction was objectionable and prejudicial because it gave undue prominence to one particular fact and assumed as a matter of law that there was no breach of contract under the facts stated when this was an issue to be determined by the jury. *Western Coal & M. Co.* v. *Jones,* 75 Ark. 76. The instruction invaded the province of the jury.

III. We pretermit any discussion of the contention on the part of the appellant that the evidence was not sufficient to show the amount of damages on account of loss of profits, and that the verdict is excessive. These are not

necessary for the determination of the issues on a new trial.

For the error in giving instruction No. 4, the judgment is reversed and the cause remanded for a new trial.

VANNESS *v.* VANNESS.

Opinion delivered April 16, 1917.

1. JUDGMENTS—MAY BE SET ASIDE, WHEN—FRAUD.—A judgment may be set aside for fraud practiced by the successful party in obtaining the judgment or order.
2. DIVORCE—FRAUD—RESIDENCE OF PLAINTIFF.—In an action for divorce the residence of the plaintiff is a question of fact.
3. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—RESIDENCE OF CLIENT—DIVORCE SUIT.—An attorney was employed by plaintiff to bring an action for divorce in B. County. *Held,* when plaintiff thereafter dismissed this action and brought another in C. County, that the attorney was a competent witness to testify as to the place where plaintiff was residing during the bringing of these actions.
4. DIVORCE—DECREE—FRAUD IN PROCUREMENT.—A decree of divorce *held* to have been obtained by fraud, in that the plaintiff was not a resident of the county in which he brought the action, and that the affidavit executed by him for a warning order was false.
5. DIVORCE — FRAUD — SETTING ASIDE DECREE — LACHES.—A decree granting appellant a divorce from appellee, was obtained by fraud, and rendered January 26, 1915; appellant remarried on February 3, 1915; appellee learned of the divorce in the latter part of April, 1915, and on May 6, 1915, brought an action to have the decree set aside for fraud. *Held.* The decree would be set aside, and that appellee was not guilty of laches.

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

E. G. Mitchell, for appellant.

1. No fraud is shown. It is never presumed; it must be proven by clear and convincing evidence. Appellant believed his wife had moved to Kansas.

2. The present wife should have been made a party. Kirby's Digest, § § 6006-7; 37 Ark. 517; 28 *Id.* 171; Bishop on Mar. & Div., vol. 2, § 1533; 97 Ark. 122.

3. Appellant had remarried. 73 Ark. 281. Appellee was guilty of laches; her suit came too late. The delay was inexcusable.

The appellee pro se.

1. The decree was obtained by fraud on the court. 14 Cyc. 591-2; Kirby's Digest, § § 591-2, 6055.
2. No laches were shown.
3. Appellant's wife was not a necessary party.

STATEMENT BY THE COURT.

This suit was instituted by the appellee against the appellant to annul a decree of divorce obtained by the appellant against the appellee in the Cleburne Chancery Court. The facts are substantially as follows:

Appellant and appellee were married in 1885 and lived together until 1914. During the last six years of that time they resided in the city of Rogers, Benton County, Arkansas. The appellant left Rogers and took up his residence at Harrison, Boone County, Arkansas. The appellee did not accompany him, but continued to live at Rogers.

On the 21st of September, 1914, appellant instituted suit for divorce against the appellee in the Boone Chancery Court, and had summons issued which was served on appellee at her home in Rogers, Arkansas. Appellee answered the complaint in the Boone Chancery Court, denying the allegations of appellant's complaint and making her answer a cross-complaint, in which she alleged that the appellant had deserted her, and prayed for temporary and permanent alimony, and for suit money.

On the 13th of November, the appellant dismissed his suit for divorce in the Boone Chancery Court. On the 18th day of November, appellant filed another suit for divorce against the appellee in the Cleburne Chancery Court, and filed an affidavit for warning order, setting up that appellee was a nonresident of the State, which was issued and published, warning the appellee to appear and

answer in said case. An attorney *ad litem* was appointed to notify appellee of the pendency of the suit against her in Cleburne County and the nature thereof.

On the 26th of January, 1915, appellant was granted a decree of divorce by the Cleburne Chancery Court. On the 6th of May, 1915, appellee filed this suit in the Cleburne Chancery Court, alleging that the decree of divorce was obtained by fraud, in this, that the appellant represented that the appellee was a nonresident of the State, whereas she was then a resident of Rogers, Benton County, Arkansas, and that appellant concealed this fact from the attorney *ad litem;* that appellant also represented that he was a resident of Cleburne County, whereas, in fact, he never had been a resident of such county. Appellee also set up that she had a meritorious defense to the suit for divorce, in that she would be able to prove that at the time the appellant abandoned her and his home, and for a long time prior thereto, appellant had associated with lewd women, and was addicted to the habit of gambling; that he had been arrested and fined both for gambling and lewdness; that she and the daughters of appellant and appellee had written appellant to return to his home, which he had persistently refused to do; that she had no notice of the pendency of the suit for divorce against her; that the pretended service was not legal, and hence the decree divorcing the appellant from the appellee was obtained by fraud practiced on the court.

The appellant denied the allegations of the cross-complaint, and set up that as soon as he had procured a divorce he married again, and alleged that appellee's suit was not brought in good faith, but for the purpose of humiliating the appellant and bringing him into disrepute.

It could serve no useful purpose to set out and discuss the evidence in detail. Suffice it to say that the testimony on behalf of the appellee tended to prove the allegations of her complaint. One witness, W. N. Ivie, testified that he was an attorney at law, and in his capacity

as such he brought suit for Doctor Vanness against the appellee in the Boone Chancery Court; that at that time Doctor Vanness lived at Harrison. Witness understood from Vanness that before that time he had resided at Rogers, Benton County. The suit witness instituted for him was voluntarily dismissed in vacation some time in November, 1914. At that time Vanness was still residing at Harrison; at least, he had his office and business there. After his suit was dismissed, he asked witness if he could file another suit for divorce somewhere else. Witness told him that he could, but that it would do him no good unless he went outside of the State, as his wife would have a right to answer and would be served with summons if he filed it anywhere within the State, and Vanness remarked, in substance, that the next time he would go so far that it would be hard for them to find him when he filed his suit. Doctor Vanness claimed that his wife at that time was residing at Rogers, Arkansas.

The appellant, in his own behalf, testified that he brought suit against his wife in Boone County for divorce and his lawyer told him that he could not gain the suit because at that time he was a resident of Cleburne County. At the time he brought the suit in Cleburne County, he was a resident of that county. When he brought the suit in Cleburne he had been informed from reliable sources that his wife had gone to Kansas City to live, and had also heard from two different sources that she had taken up her residence at Wichita. His suit was in good faith and based on the truth. After he obtained his divorce, he married another woman. His marriage was public and the people of Rogers and Boone County knew of it. He later on moved to Harrison, Boone County, and made that his home. When his first wife brought suit to annul the divorce, the summons was served on him at Harrison. The further testimony of this witness is in regard to the unpleasant relations that existed between him and his first wife, and which, from appellant's viewpoint, were exceedingly reprehensible.

Appellant testified that she was continuously talking about him and giving him a bad name, and tried to make his children hate him. He gave her all the property she now holds, consisting of a house and three lots in Marble City, Oklahoma, for which appellant paid $1,800. He also turned over to her and the children certain personal property, valued by him at something over $2,500.

One witness on behalf of the appellant, testified that he lived at Rogers, Arkansas, and had written to Doctor Vanness at Harrison. He wrote him that he understood that his wife was going to move to Wichita, Kansas, but did not write him that she had gone there. This letter was written not long after Vanness had gone to Harrison.

There is testimony in the record tending to show lewdness and other immoral conduct on the part of the appellant before he instituted the first suit for divorce against the appellee.

The record shows that when the case was reached on its regular call, the appellant filed a motion to continue the cause, and also a motion to quash the deposition of W. N. Ivie on the ground that his testimony revealed confidential communications. There was also a motion to make May Vanness a party defendant. All these motions were overruled.

The court found that "the decree of divorce granted to J. R. Vanness was obtained by fraud practiced on the court," and entered a decree setting such decree for divorce aside.

WOOD, J., (after stating the facts). I. The statute provides that proceedings for divorce shall be in the county where the complainant resides, and that the process may be directed in the first instance to any county in the State where the defendant may reside. Kirby's Digest, § 2674.

It was held in *Wood* v. *Wood,* 54 Ark. 172, 174, that this statute contemplates actual, and not constructive, residence.

(1-2-3) One of the grounds for which judgments may be set aside is, "Fraud practiced by the successful party in obtaining the judgment or order." It was purely a question of fact as to whether the appellant was a *bona fide* resident of Cleburne County at the time he obtained the decree for divorce against the appellee. The testimony of Judge Ivie to the effect that at the time he dismissed appellant's suit for divorce pending in Boone County, the appellant was living in Harrison, Arkansas, was not in the nature of a confidential communication. Witness Ivie does not show that he received this information by reason of the relation of attorney and client.

In *Vittitow* v. *Burnett,* 112 Ark. 277, we held that "the statute rendering an attorney incompetent to testify concerning communications made to him by his client tends to prevent a full disclosure of the truth, and it should be strictly construed and limited to cases falling within the principle upon which it is based."

(4) Since information or knowledge of the residence of appellant is not shown to have been communicated to witness Ivie as a confidential communication, we must hold that his testimony concerning this issue was competent. When this testimony is considered, a finding to the effect that appellant was not a resident of Cleburne County at the time he obtained the decree for divorce is not clearly against the preponderance of the evidence. Before he could obtain such a decree it was necessary, under the statute, for him to show to the court that he was a resident of Cleburne County. Therefore, in so testifying or making such representation to the court when the same was not a fact, he perpetrated a fraud upon the court.

Moreover, the clear preponderance of the evidence shows that appellant perpetrated a fraud upon the court in representing that he had obtained service upon the appellee in his suit for divorce in Cleburne County. When appellant filed his complaint, in order to obtain a warning order against the appellee he filed an affidavit setting

forth that the appellee was a nonresident of the State, whereas a decided preponderance of the evidence shows that appellee was not a nonresident, and that appellant knew at that time that she resided at Rogers, Arkansas.

(5) II. Appellant contends that appellee is barred by laches. "It is generally conceded," says Cyc., "in all jurisdictions that public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner and for the causes prescribed by law." 14 Cyc., p. 578.

The application of this principle should cause a court of chancery to set aside a decree of divorce that has been obtained through fraud when the party entitled to such relief acts promptly to obtain it. Application of the same principle should likewise cause the court to refuse to annul a decree of divorce, even though obtained by fraud, where the injured party, upon discovery of the fraud, fails to act promptly to have the decree of divorce annulled.

Mr. Bishop gives an admirable statement of the policy of the law, which is quoted by us in *Corney* v. *Corney*, 97 Ark. 117, 122, as follows: "There are excellent reasons why judgments in matrimonal causes, whether of nullity, dissolution or separation, should be more stable, certainly not less, than in others, and so our courts hold. The matrimonal status of the parties draws with and after it so many collateral rights and interests of third persons that uncertainty and fluctuations in it would be greatly detrimental to the public. And particularly to an innocent person who has contracted a marriage on the faith of the decree of the court the calamity of having it reversed and the marriage made void is past estimation." Bishop on Marriage and Divorce, vol. 2, sec. 1533.

The record shows that the decree of divorce was rendered on the 26th day of January, 1915. The appellant married the second Mrs. Vanness on the 3d of February, 1915. The appellee testified that she did not know that

the suit for divorce had been filed against her in Cleburne County until the latter part of the month of April, 1915, and she instituted this suit to annul the decree on the 6th day of May, 1915. True, appellant testified that his marriage was public, so that the people in Rogers and Boone County all knew it; but this testimony does not tend to prove that the appellee knew it, and does not overcome her positive testimony that she did not learn of it until the latter part of April, 1915. After she learned of the decree in Cleburne County only a few days intervened before she instituted this suit to set it aside. She therefore acted promptly, and the court did not err, under the circumstances, in granting her the relief sought.

The second Mrs. Vanness was not a party to the fraudulent decree, and the motion filed by the appellant to make her a party does not set forth any facts to show any interest that she has that would make her either a necessary or proper party to the proceeding. All the defenses that could have possibly been set up to the suit for annulling the fraudulent decree were brought into the record by the pleadings and the testimony on the part of the appellant, and the court correctly held that these could not avail against the relief sought by appellee.

The decree is therefore affirmed.

ROBINSON v. INDIANA & ARKANSAS LUMBER & MANUFACTURING COMPANY.

Opinion delivered April 16, 1917.

1. CONSTITUTIONAL LAW — EXEMPTION FROM TAXES. — An exemption from taxes created by the Constitution will not be given a retrospective effect unless an intention that it shall have such an effect is clearly expressed, and *held*, Art. 16, § 5, Const. 1874, did not operate retrospectively.
2. ST. FRANCIS LEVEE DISTRICT—GOVERNMEN AL AGENCY.—The St. Francis Levee District is a quasi-corporation, to which has been delegated certain powers as a governmental agency.
3. TAXATION—EXEMPTION.—Under the Constitution of 1874, it is only when the property itself is actually and directly used for public charity, that it is exempt from taxation.

4. ST. FRANCIS LEVEE DISTRICT—PURCHASE OF LANDS AT OWN TAX SALE—EXEMPTION FROM TAXES.—Lands were sold for the non-payment of taxes due the St. Francis Levee District, and were purchased by the district, and sometime later the district sold them. *Held.* The levee district acquired the lands in the exercise of its governmental functions, and that during the interval between its purchase and resale of the lands, that they were not subject to taxation.

Appeal from Crittenden Chancery Court; *C. D. Frierson,* Chancellor; reversed.

R. C. Brown, of Memphis, for appellant.

1. These lands were not subject to taxation for State and county purposes after they were purchased by the levee district, a governmental agency. 105 Ark. 261. The lands are nontaxable. 93 Ark. 490, 495; 95 *Id.* 65; 105 Ark. 261; 59 *Id.* 513; 103 *Id.* 127, 138-9; 107 *Id.* 189, 198; 90 *Id.* 236, 239; 79 *Id.* 550; *Ib.* 565; 36 *Id.* 155, 23 L. R. A. 200; 49 L. R. A. (N. S.) 1026; 110 Ark. 416; Acts 1899, p. 48; Acts 1903, p. 58; 77 Ark. 519 is not applicable. 41 Ark. 45 has been overruled. 77 Ark. 177; 88 *Id.* 533. See, also, 93 Ark. 490.

2. The statute of limitations does not run. Nor is the State estopped. 39 Ark. 580; 42 *Id.* 118; 93 *Id.* 496; 95 *Id.* 65; 77 *Id.* 324; 105 *Id.* 261; 107 *Id.* 189, 198; 90 *Id.* 236; 3 L. R. A. (N. S.) 746, 748; 47 *Id.* 907; 21 L. R. A. 63; 16 *Id.* 145; 56 Ark. 339.

3. The exemption acts are constitutional. 19 Ark. 360, 372; 21 *Id.* 4058; 49 L. R. A. 604, 609; 38 L. R. A. (N. S.) 907; 12 *Id.* 1163; 10 L. R. A. 377; 16 L. R. A. (N. S.) 842; 103 S. W. 354; 27 So. 348; 110 La. 585; 4 Dillon on Mun. Corp. (5 ed.), 2436; 34 L. R. A. 146; 34 L. R. A. (N. S.) 143; 116 Tenn. 260.

4. Appellee has not paid taxes for seven years. 94 Ark. 122; 99 *Id.* 447; 114 *Id.* 376; 107 *Id.* 492; 89 *Id.* 296. The act of 1899 does not apply.

5. There has been no laches. 105 Ark. 268; 45 *Id.* 81; 68 Tenn. 129; 92 Ark. 497; 107 *Id.* 251; 105 *Id.* 663, etc.; 99 *Id.* 500; 103 *Id.* 251, 259, 260.

6. There is no element of estoppel. 93 Ark. 490; 105 *Id.* 268. The chancellor erred in his finding of facts and in holding that the lands were taxable. 78 Wash. 236; 139 Pac. 194; 145 *Id.* 458; 183 S. W. 1032; L. R. A. 1916-E 94, 97.

Daggett & Daggett, for appellee.

1. The title is barred by the act March 18, 1899. The lands were subject to taxation. 77 Ark. 519; 62 *Id.* 481; 57 *Id.* 445; 95 *Id.* 64. The attempted exemption is void. 55 Ark. 148; 69 *Id.* 284; 59 *Id.* 513; 58 *Id.* 151; 41 *Id.* 45; 93 *Id.* 490; 30 *Id.* 693; 40 *Id.* 34; 46 *Id.* 312; 120 U. S. 97; 62 Ark. 481; 57 *Id.* 445.

2. Appellant is barred by the seven years' tax act.

3. The district is estopped, and guilty of laches. 112 Ark. 467; 81 *Id.* 244; Acts 1901, p. 160, § 1, etc.; 90 Ark. 430; 95 *Id.* 6; 99 *Id.* 455. The decree is correct.

STATEMENT BY THE COURT.

J. L. Robinson instituted this action in the chancery court against the Indiana & Arkansas Lumber & Manufacturing Company to quiet the title to certain wild and unoccupied lands in Crittenden County, Arkansas. The lumber company defended on the ground that it had acquired title by the payment of taxes for seven years under the act of March 18, 1899, and that the plaintiff had been guilty of laches in bringing his suit.

The material facts are as follows: The lands in controversy were originally owned by Robert C. Brinkley, He died in 1878, and by the terms of his will the lands became the property of his children. The board of directors of the St. Francis Levee District instituted an action in the chancery court under our statute to enforce the collection of delinquent levee taxes for the year 1898. The whole of the northeast quarter of section 6, township 4 north, range 7 east, containing 409 acres in Crittenden County, Arkansas, was sold under the decree, and the levee district became the purchaser at its own sale. On September 11, 1899, the levee district conveyed to the

defendant along with 20,000 acres of other lands, lots 15, 16, 17 and 18 of the northeast quarter of said section 6, for the sum of $1.00 per acre. On the 17th day of February, 1916, the devisees under the will of R. C. Brinkley executed a quitclaim deed to the defendant for these lots as well as the lots herein sued for. On the 6th day of October, 1915, the levee district executed a deed to plaintiff to lots 1, 2, 7, 8, 9 and 10 of the northeast quarter of said section 6, containing 249.19 acres, and on the 22d day of December, 1915, plaintiff instituted this action against the defendant to quiet his title to said lots. The lots in controversy have greatly increased in value since they were purchased by the levee district at its sale for levee taxes. It was shown by the defendant that a purchaser at a tax sale for the taxes of 1887, which is conceded to be void, executed to it a warranty deed to said lots. It was also shown by the defendant that it had paid the taxes on said lands for seven years under the act of March 18, 1899, and that the lands have always been wild and unoccupied and have never been in the actual possession of any one.

The court held that the plaintiff was barred of relief by reason of the payment of taxes by the defendant for more than seven years under color of title and a decree was entered dismissing the plaintiff's complaint for want of equity. The plaintiff has appealed.

HART, J., (after stating the facts). The correctness of the decision of the chancellor depends upon whether or not the lands in controversy in this case were subject to taxation for county and State taxes after they were purchased by the levee district at its own sale for levee taxes. Article 16, section 5, of the Constitution of 1874, provides, that all property subject to taxation shall be taxed according to its value, provided that the following property shall be exempt from taxation; public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings

and apparatus; libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity.

Section 6 provides that all laws exempting property from taxation other than is provided in this Constitution shall be void.

(1) It is insisted by both parties that this question has already been decided in their favor by a previous decision in this court. Counsel for the defendant rely upon the case of *Bonner* v. *The Board of Directors of St. Francis Levee Dist.*, 77 Ark. 519. There the court said that the lands in controversy continued subject to taxation after they were acquired by the St. Francis Levee District. The levee district had purchased the lands in that case on the 24th day of January, 1898, for unpaid levee taxes and on the second Monday in June, 1898, Bonner purchased the same land at a sale for State and county taxes. There the assessment had been completed, and the State and county taxes had become a fixed lien on the lands before their purchase by the levee district, and the court simply meant to hold that a change in the use of the property after the State and county taxes had become a lien did not release the land from liability for such taxes. The reason is that to so hold would be to give a retrospective effect to the section of the Constitution above referred to. An exemption from taxes created by the Constitution will not be given a retrospective effect unless an intention that it shall have such an effect is clearly expressed and it is apparent that the section of our Constitution relating to this subject was not intended to operate retrospectively. *City of Philadelphia* v. *Pennsylvania Institution for Instruction of Blind,* 214 Pa. St. 138, 6 A. & E. Ann. Cas. 437, and case note. So it will be readily seen that the *Bonner case* is not an authority for the position taken by counsel for the defendant.

Counsel for plaintiff rely on the case of *Miller* v. *Henry,* 105 Ark. 261. There the court, at the end of an opinion, which was devoted almost exclusively to other

propositions, said the lands which had been bought in by the St. Francis Levee District at a sale for levee taxes were not subject to taxation while in the hands of the levee district, but no reason was given for such holding.

We now propose to take up the question and decide it anew for the reason that it is now earnestly insisted that such a holding is in direct conflict with the holding of this court in *School District of Fort Smith* v. *Howe,* 62 Ark. 481, and *Brodie* v. *Fitzgerald,* 57 Ark. 445.

(2) The St. Francis Levee District is a *quasi*-corporation to which is delegated certain powers as a governmental agency. *Carson* v. *St. Francis Levee Dist.,* 59 Ark. 513, and *Board of Dir. St. Francis Levee Dist.* v. *Fleming,* 93 Ark. 490. The correctness of the chancellor's holding depends upon whether the lands were acquired by the levee district in its proprietary capacity or in the exercise of its functions as a governmental agency. In the former case the lands would not be exempt and in the latter they would be exempt from taxation. This distinction, we think, has been recognized in our previous decisions relating to the question.

(3) In the case of *Brodie* v. *Fitzgerald,* 57 Ark. 445, the court held that the hospital buildings, grounds and materials, under our Constitution, were exempt from taxation, but that the property leased or rented was not exempt though the revenues were applied solely to the subject of the public charity. The reason is that under our Constitution it is only when the property itself is actually and directly used for public charity that the law exempts it from taxation.

In the later case of *Hot Springs School District* v. *The Sisters of Mercy,* 84 Ark. 497, we held that a hospital building with the grounds connected therewith which was used in the operation of a public charity was not excluded from constitutional exemption from taxation merely because patients who were able to do so paid for the attention and medicine which they received, if the profits derived therefrom were put back into the opera-

tion of the public charity. There was a mixed use, so to speak, of the property, but the dominant purpose was the operation of the hospital as a public charity and the receiving of pay patients was merely incidental to the main purpose. So we held that the property was still actually and directly used for public charity, and that the Constitution exempted it from taxation.

In the case of *School District of Fort Smith* v. *Howe*, 62 Ark. 481, a portion of the military reservation at Fort Smith was donated by act of Congress to the city of Fort Smith to be held in trust for the use of the free public schools of the city. The act provided that within ten years the land should be laid off into lots, and that the lots be sold at public sale and that the proceeds should be paid to the treasurer of the school board to be used for school purposes. Afterward our Legislature passed an act providing that the School District of Fort Smith be empowered and required to become a purchaser at said sales and to own, lease, control and sell the same. The property involved in that suit was acquired by the school district by purchase under the act. Most of the property consisted of unimproved city lots, but some of the lots had buildings upon them and were rented. The court in its opinion recognized that the property did not contain any school buildings or libraries and grounds used exclusively for school purposes within the meaning of article 16, section 5 of our Constitution, and proceeded to a discussion of the question of whether it was public property used exclusively for public purposes within the meaning of that section of the Constitution.

The court said that to justify it in holding that the property was exempt there must be found in the Constitution, itself, provision for its exemption. The court further said that it was conceded that the land was public property, but the question of its exemption from taxation was not determined alone by its character as public property, but also by the nature of its use. After a thorough discussion of the question, the court correctly held that

the property was not exempt from taxation under our Constitution because it was held by the school district solely for sale or rent, and for the sale for profit, and was not, in the meaning of the Constitution used exclusively for public purposes, and was therefore subject to taxation. The construction is in accord with the almost unanimous holding of the courts of last resort of other States having a provision of the Constitution similar to our own. The reason for so holding is clearly stated in a quotation by the Supreme Court of Ohio in *Benjamin Rose Institute* v. *Myers, Treasurer,* L. R. A. 1916D-1170, from *Academy of Richmond County* v. *Bohler,* 80 Ga. 159, as follows: "Property used to produce income to be expended in charity is too remote from the ultimate charitable object to be exempt. If property is allowed to be used as taxed property, it also is to be taxed. If it competes, in the common business and occupations of life, with property of other owners, it must bear the tax which their's bears."

There is a material difference between the use of property exclusively for public purposes and renting it out and then applying the proceeds arising therefrom to the public use. The property under our Constitution must be actually occupied or made use of for a public purpose and our court has recognized the difference between the actual use of the property and the use of the income. So it will be seen that in our own cases last referred to, the property itself was not directly occupied or made use of for public purposes, but only the income derived therefrom and for this reason the court held that the property was not exempt from taxation under our Constitution.

(4) In the present case the facts are essentially different. The St. Francis Levee District was created for the purpose of constructing and maintaining a levee along the Mississippi River on the eastern border of our State. To accomplish the purpose of its organization it was given the power of eminent domain and of taxation for levee purposes. The district was given the power to in-

stitute a suit to enforce the collection of delinquent levee taxes and to buy in the lands at a sale therefor when no one else offered to bid thereat, and then to again sell the land so acquired and to devote the proceeds to the use for which the levee taxes were intended. The lands in controversy were acquired by the levee district at a sale for levee taxes and were held by the levee district until it could dispose of them. Thus it will be seen that the levee district acquired the land in the exercise of its governmental functions, and during the interval between its purchase and resale of the lands, they were not subject to taxation. If the property should be taxed while so held by the levee district, new taxes must be levied to meet this tax. It is absolutely essential that taxes should be levied in order to carry out the purpose for which the levee district was organized, and if the property, which the levee district, to protect itself, purchased at a levee tax sale, was subject to State and county taxes while in its hands, the property owners of the levee district would have to pay additional taxes. The levee district only held the lands that it acquired at levee tax sale until it was practical to dispose of them again. They were not held for any purpose of gain or as income producing property. When sold, the proceeds took the place of the levee taxes, for the enforcement of which and the expenses incident thereto, they were sold, and in this way we think the lands were directly and immediately used exclusively for public purposes within the meaning of the Constitution, and were not subject to taxation.

Moreover, Judge Cooley says, that exemption from taxation of property which belongs to the State and its agencies, which are held by them for governmental purposes, rests upon implication. He said that to levy taxes upon such property would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the use-

less levy. Cooley on Taxation (3 ed.), vol. 1, pp. 263 and 264; *Re Hamilton,* 148 N. Y. 310, 42 N. E. 717.

Having held that the property is exempt from taxation, the defense of the defendant necessarily passes out of the case.

It follows that the decree will be reversed and the cause will be remanded with directions to grant the prayer of the complaint.

HUFFMAN, ADMR., *v.* SUDBURY, ADMR.

Opinion delivered April 16, 1917.

1. APPEAL AND ERROR—ORAL INSTRUCTIONS—GENERAL EXCEPTIONS—PRACTICE.—Where objections have been made during the trial, the trial court may conform to a practice adopted by it, to treat general exceptions as saved.
2. APPEAL AND ERROR—SPECIFIC OBJECTIONS—TIME FOR MAKING.—Specific objections to instructions given by the court can not be made after the conclusion of the trial.

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

J. T. Coston, for appellant.

1. This is the second appeal, and for the facts see 117 Ark. 628, 174 S. W. 1149.

2. Instruction No. 6 for defendant invades the province of the jury. It singles out the testimony of a particular witness and gives undue prominence thereto. 1 Blachfield on Instructions, etc., § 106; 37 Ark. 219; 57 *Id.* 520; 58 *Id.* 109; 117 S. W. 574; 62 Ala. 161; 162 U. S. 675; 145 S. W. 559, 1007; 57 Mo. 138; 107 Ala. 59; 95 Ga. 701; 84 N. W. 621, and others.

3. The said instruction No. 6 is argumentative. 188 S. W. 117; 31 Ark. 311.

4. Instructions 5 and 6 are further erroneous because they lay too much stress on the fact that the burden of proof is on the plaintiff. 61 Tex. 147.

Gravette & Rogers and *Coleman, Lewis & Cunningham,* for appellee.

1. Only a question of fact is involved. Instruction No. 6 was not error.

2. Only a general objection was made to it. 38 Cyc. 1790, note 20; Kirby & Castle's Digest, § 7661.

SMITH, J. The facts out of which the present litigation arises are stated in the opinion rendered upon the former appeal. 117 Ark. 628. Such of the facts as are material to an understanding of the questions raised on this appeal may be summarized as follows: Doctor Bugg sold a tract of land to Huffman and Hunter, for $21,400, of which $10,400 was paid in cash, and notes were executed for the balance. Hunter furnished his half of this cash payment, and, in addition, loaned Huffman $5,000, with which to pay his half, and, by way of security therefor, Huffman gave Hunter a note and executed a mortgage on his half interest in the land to secure the payment of the note. Subsequently Huffman conveyed his interest in the land to Doctor Bugg by a quitclaim deed, which recited a consideration of "One Dollar and other valuable considerations." Hunter sued Huffman on the note, and recovered judgment for the amount thereof, and interest, aggregating $9,322.41, and Huffman paid this amount to Hunter in satisfaction of the judgment. Huffman filed a claim against the estate of Doctor Bugg, who had died in the meantime, to recover this money, and alleged that the "other valuable considerations" referred to in his deed to Doctor Bugg was an agreement on Bugg's part to assume and pay Huffman's note to the order of Hunter. A verdict was directed by the court at the first trial, upon the ground that there was not enough testimony to warrant the submission of the question, whether Doctor Bugg agreed, as a part of the consideration for the conveyance to him by Huffman, to assume and pay off the note to Hunter. The judgment there rendered upon the verdict so directed was reversed, because, in our opinion, the evidence of a witness named Barber made a case for the jury. This witness testified that Doctor Bugg told him

that he (Bugg) had assumed and agreed to pay this note to Hunter, as a consideration for the execution of the deed to him.

Upon the remand of the cause, Barber gave substantially the same testimony, and was cross-examined at length for the purpose of developing alleged inconsistencies in his statements, which we need not consider here, as the reasonableness of his testimony was a question solely for the jury. It was shown that Huffman paid the judgment against him on February 4, 1911, and filed a claim therefor against the estate of Doctor Bugg on the same day. It was also shown that Doctor Bugg lived in Blytheville, and Huffman near there, and that Doctor Bugg lived for more than a year after the recovery of the judgment by Hunter against Huffman, during which time Huffman appears to have made no demand on Doctor Bugg to assume or pay this debt.

A number of instructions were given, and, among others, an instruction numbered 6, which reads as follows:

"6. You are instructed that although you may find from the evidence that Bugg informed one Barber that he had assumed Huffman's debt to Hunter, such evidence would not here be sufficient to charge the Bugg estate in this action. You must further find from such evidence that there was a consideration for the assumption of such indebtedness—if you find that such indebtedness was assumed—and the burden is on the plaintiff to show a consideration by such preponderance of the evidence."

This instruction was given orally, and appellee did not know that any objection had been made, or exceptions saved, to giving it, until the bill of exceptions came on for approval. At that time, counsel for appellant had incorporated in the bill of exceptions the following specific objections to this instruction:

"The plaintiff objects to the above instruction No. 6 generally on the ground that it is abstract, and is not the law. Plaintiff objects to said instruction No. 6 specific-

ally on the ground that it singles out the evidence of Barber. Plaintiff objects to said instruction No. 6 further on the ground that it is an instruction on the weight to be given to the evidence, and is therefore an invasion of the province of the jury. The plaintiff objects specifically to said instruction further on the ground that the language 'such evidence,' in the second paragraph of said instruction, limits the jury to the consideration of Barber's evidence alone to find a consideration for the promise of Bugg. Plaintiff objects to said instruction No. 6 further on the ground that it excludes from the consideration of the jury all evidence of a consideration for the promise of Bugg except the evidence of Barber. Plaintiff objects further to said instruction 6 on the ground that it emphasizes again the fact that the burden is on the plaintiff to show a consideration for the promise of Bugg, the jury having already been told three times in previous instructions that the burden is on the plaintiff."

A hearing was had before the court upon a motion to correct the bill of exceptions, at which time attorneys representing the opposing sides testified, and the judge himself made a statement, all of which evidence is incorporated in the bill of exceptions. From the evidence heard upon the matter of the correction of the bill of exceptions, the following facts appear: The instruction was given orally, whereupon, before making the opening argument to the jury, Mr. Coston, of counsel for appellant, approached the judge's stand, and said: "In keeping with the practice of this court, I presume all objections and exceptions to instructions are saved." And the court replied, "Certainly, such exceptions will be noted, and you may read same into the record." The bill of exceptions contains the following finding of fact made by the court:

"The attorneys for the defendant did not know that the attorneys for the plaintiff, or either of them, had saved any exceptions whatever to any part of the charge of the court. The court finds, however, that it has in-

dulged the practice of permitting attorneys to assume that objections and exceptions to instructions are made and saved without calling the attention to them at the time, the practice requiring that the objections and exceptions be subsequently written out and entered in the bill of exceptions. Nothing was said by either attorney for the plaintiff to either of the attorneys for the defendant during the term of court that would put them on notice that any objections had been made or exceptions saved to any part of the charge of the court."

It further appears that Mr. Coston did not limit his argument to Barber's e[illegible] [illegible]ussing the question of the consideration referred to in the deed to Doctor Bugg, and that, in this connection, he called attention to the other facts herein recited as showing there was a consideration for the assumption of this debt by Doctor Bugg, and his right to do so under the instructions given was not questioned. He now urges the specific objections set out above, and insists that the instruction excluded from the jury any evidence of a consideration for the promise of Doctor Bugg except the evidence of Barber. The court, however, made the following finding of fact:

"The court has no personal recollection whether the word 'such' which appears in the fifth line of instruction No. 6, given by the court to the jury, as the same now appears in the transcript of this cause in the Supreme Court, was used by the court instead of the word 'the' which should have been used. The court finds, however, that if the word 'such' was used at that place in the instruction instead of the word 'the' it was a mere inadvertence that escaped the attention of the court, and the attention of the attorneys for the defendant."

(1-2) Under this state of the record, we must treat this instruction as if only a general objection had been made to it. It was entirely proper for the court to conform to a practice adopted by it to treat exceptions as saved to oral instructions where objections had been made during the trial. The statute provides that this may be

done. Section 6222, Kirby's Digest. But it is a different matter to say that specific objections can be made after the conclusion of the trial. To so assert is a contradiction in terms. Such practice would defeat the very purpose of requiring specific objections. Such objections could serve no purpose if not made at the trial and opposing counsel have the right to be advised if such objections are made, and it is not contended here that counsel for appellee was so advised.

We conclude, therefore, that the instruction is not open to the objection that it limited the consideration of the jury to the evidence of Barber in determining whether there was a consideration moving to Doctor Bugg to assume the payment of Huffman's debt. We are made more certain of this when we read this instruction in connection with the other instructions given in the case, as we must do in determining the meaning of any particular instruction. Nor do we think the instruction is open to the objection that it is argumentative. It was, of course, proper for the court to tell the jury that Doctor Bugg's mere statement that he had assumed the payment of Huffman's debt was not binding unless there was, in fact, a consideration for this promise.

Nor do we think that error was committed by the repetition of the statement of the law upon the question of the burden of proof. This burden rested upon Huffman's administrator, not only to show a consideration for the promise to pay Huffman's debt, but the burden was upon the plaintiff upon the whole case, and we see nothing in the instruction, as a whole, which lays undue stress upon that fact.

Finding no prejudicial error, the judgment of the court below is affirmed.

TURNER v. STATE.

Opinion delivered April 23, 1917.

1. HOMICIDE—CONSPIRACY.—Evidence held sufficient to establish a conspiracy between defendant and his brother, resulting in the killing of one H. by the defendant.
2. EVIDENCE—HOMICIDE—EVIDENCE OF FORMER KILLING.—In a prosecution for homicide, evidence that defendant killed another man on a former occasion is admissible, when admitted with the privilege to the defendant to explain the circumstances, which he did.
3. HOMICIDE—EVIDENCE OF UNCOMMUNICATED THREATS.—Uncommunicated threats are only admissible in a homicide case as tending to show who was the aggressor, when that point is in doubt.
4. HOMICIDE—JUSTIFICATION.—In a prosecution for homicide, the killing being admitted, the following instruction approved: "The killing being proved, the burden of proving circumstances that justify or excuse a homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide, provided you find from the evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged."
5. CRIMINAL LAW—SELF-DEFENSE—DEFENSE OF BROTHER.—Defendant can not justify a homicide on the grounds that he acted in defense of his brother, when the latter had provoked the encounter with deceased, and had not attempted to retreat therefrom.

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

Powell & Smead, for appellant.

1. The court erred in permitting the State to prove that defendant had killed another man. 88 Ark. 579; 84 *Id.* 119; 72 *Id.* 586; 75 *Id.* 427; 100 *Id.* 321; 58 *Id.* 473; Kirby's Dig., § 3128, as amended by Acts 1905, 52; 91 Ark. 555; 87 *Id.* 17; 39 *Id.* 278; 73 *Id.* 262; 38 *Id.* 221; 168 N. Y. 264.

2. The court erred in admitting evidence as to a conspiracy. 101 Ark. 147; 87 *Id.* 39; 59 *Id.* 422; 45 *Id.* 132; 77 *Id.* 444; 12 Cyc. 442.

3. It was error to permit the witness Thomason to remain in the court room and assist the prosecuting attorney during the trial. 101 Ark. 155.

4. It was error to refuse to permit defendant to prove by Wilson that he had heard certain threats made by deceased, etc., and in refusing to permit defendant to prove by Funkhouser that he had heard deceased, Joe Hunter, make certain threats against Walter Turner. 72 Ark. 436; 108 *Id.* 124.

5. The court erred in its instructions. 76 Ark. 110; Kirby's Digest, § 2387; 100 Ark. 180.

John D. Arbuckle, Attorney General, and *T. W. Campbell,* Assistant, for appellee.

1. No error in the admission of testimony as to a previous homicide. It only went to his credibility as a witness on cross-examination. 88 Ark. 79; 100 *Id.* 324; 44 *Id.* 122; 74 *Id.* 397; 91 *Id.* 555; 58 Cal. 212; 65 Me. 234; 98 N. C. 599; 27 So. 864; 72 N. Y. 393; 46 Ark. 141; 8 N. D. 548; 58 Ark. 473.

2. Evidence as to the conspiracy was admissible. 98 Ark. 575; 79 *Id.* 594; 96 *Id.* 629; 101 *Id.* 147; 121 *Id.* 40.

3. There is no error in the court's charge to the jury. 72 Ark. 544; 70 *Id.* 43; 74 *Id.* 431; 93 *Id.* 409; 99 *Id.* 576; 95 *Id.* 428; 67 *Id.* 416; 47 *Id.* 196; 102 *Id.* 16, etc. See, also, 64 Ark. 247; 66 *Id.* 588.

4. No error in allowing witness Thomason to remain in court. Kirby's Digest, § 3142; 101 Ark. 155; 90 *Id.* 135; 77 *Id.* 603; 93 *Id.* 140.

5. The alleged threats were too remote. 17 Mo. 544; 64 *Id.* 368; Wharton on Homicide (3 ed.), 417. None of them were ever communicated. 84 Ark. 121.

6. Appellant failed to request other instructions. 67 Ark. 416; 47 *Id.* 196; 102 *Id.* 16.

McCULLOCH, C. J. The defendant, Collin Turner, was tried under an indictment charging the crime of murder in the first degree, and he was convicted of voluntary manslaughter. The defendant was charged with killing one Joe Hunter in the town of Tinsman, on July 12, 1915. The killing is not denied. Defendant admits it and attempts to justify it. He and his brother, Walter Tur-

ner, were separately indicted for the homicide and Walter Turner was convicted of manslaughter and the judgment of conviction was affirmed by this court. *Turner* v. *State,* 121 Ark. 40.

It appears that there was great excitement in Tinsman and vicinity concerning repeated burglaries which had been committed from night to night, and armed citizens patrolled the town, taking it by turns. Joe Hunter was on watch a certain night, and there was some sort of encounter between Walter Turner and a party composed of Hunter, and Wallingford, the town marshal, and Johnson, a deputy sheriff, in which Turner received a severe beating. Walter Turner reported the matter to Collin Turner, the defendant, and the next morning they both appeared on the street somewhat indignant, and according to the testimony made threats to whip everybody connected with the difficulty the night before. There was evidence introduced by the State sufficient to show concert of action between the defendant and his brother, Walter Turner, to assault and beat every man found to have been engaged in the previous night's difficulty. Hunter was one of the parties singled out by them as a participant in the affray, and threats were made to whip him. Hunter was a barber, and the evidence tends to show that when he came down that morning he avoided Walter Turner, and by a circuitous route went around to the back door of his shop to prevent coming in contact with Turner.

The killing of Hunter occurred about 10 o'clock in the morning, and prior to that time Walter Turner had engaged Wallingford, the town marshal, in a personal encounter and threw him down and beat him when he was finally pulled off. Wallingford had a pistol, which he drew in the affray, and it was taken from Wallingford by the defendant at Wallingford's request while the two combatants were struggling over it. Defendant states that that was the pistol that he used later when he shot

Hunter. The two combatants were separated, and shortly afterwards Walter Turner and Joe Hunter met on the street, and Walter Turner started toward Hunter, and the latter drew his pistol and began firing. He shot twice and one of the loads took effect in Walter Turner's arm. The pistol used by Hunter was a two-barrel derringer, and both loads were fired at Walter Turner. It does not appear that Walter Turner was armed, but at the close of this encounter, when Hunter was turning from it and walking into a drug store, he was shot in the back by defendant, Collin Turner, who came from across the street. Defendant testified that when he fired at Hunter the latter was out in the street with his pistol leveled at Walter Turner, but the testimony adduced by the State contradicts that statement, and shows that Hunter was retiring from the scene and had turned and walked into the drug store when he was shot by the defendant. The witnesses introduced by the State testify that while the difficulty was going on between Walter Turner and Hunter, the defendant started across the street toward them with his pistol in his hand; that when he came within twelve or fifteen feet of where Hunter was standing Hunter turned and walked into the building and the defendant fired at him just as he was going in the building.

(1) There was, as before stated, sufficient evidence to warrant the jury in finding that there was a conspiracy between the two Turners to do violence to the parties engaged in the fight, including the deceased, Joe Hunter, and that the defendant without provocation shot and killed Joe Hunter pursuant to that conspiracy.

Counsel for the defendant present numerous assignments of error, the first of which is that the evidence is insufficient to establish a conspiracy, but that assignment has already been disposed of.

(2) The next one is that the court erred in permitting the State to prove by defendant on his cross-examination that he had once killed another man in that county.

Defendant objected to that testimony, but the court admitted it with the privilege to the defendant of stating the circumstances under which the former killing occurred, which he did, showing that he was justifiable and that he had been acquitted. We think the testimony was competent as affecting the credibility of the witness in his own behalf. *Hollingsworth* v. *State,* 53 Ark. 387; *Younger* v. *State,* 100 Ark. 324.

(3) Again it is urged that the court erred in refusing to permit defendant to prove by two witnesses uncommunicated threats said to have been made by Hunter against the defendant. The offer was to prove by one of the witnesses that about six months before the killing Hunter had stated in his barber shop one day that the two Turner boys (defendant and his brother, Walter) "thought they had a right to run over everybody and carry a gun," but that he (deceased) wanted them to understand that he carried a pistol himself, and if he got a chance he was going to use it on them. The other offer was to prove that Hunter made a somewhat similar statement about four months before the killing. The undisputed evidence is that Hunter and the two Turners were closely related by marriage and that there was no unfriendliness between them up to the time the alleged encounter occurred the night before the killing. Defendant testified himself that there was no unfriendly feeling between himself and Hunter. He testified that he had no feeling of animosity toward Hunter; that Hunter had been renting a building from him, and that he had patronized Hunter's barber shop. Unaccompanied threats are only admissible in a homicide case as tending to show who was the aggressor when that point is in doubt. We think that the alleged statements of Hunter were too remote in point of time and apparent foundation to have had any bearing on the question as to who was the aggressor in this difficulty. No prejudice, therefore, re-

sulted in the refusal of the court to allow any testimony to go to the jury.

(4) It is earnestly insisted that the court erred in giving an instruction in the language of Kirby's Digest, section 2387, with a proviso attached making the whole instruction read as follows:

"The killing being proved, the burden of proving circumstances that justify or excuse a homicide shall devolve on the accused unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide, provided you find from the evidence in this case, beyond a reasonable doubt, that the defendant is guilty as charged."

We are of the opinion that this instruction was a very appropriate one in the present case, for the killing of Hunter by the defendant was admitted, and the statute was applicable making it devolve on the defendant to prove circumstances in justification or excuse. The rights of defendant were entirely safeguarded by the court in telling the jury in the same instruction that notwithstanding the statutory rule with reference to the burden of proof, it devolved upon the State to prove the guilt of defendant beyond a reasonable doubt. *Cogburn* v. *State,* 76 Ark. 110; *Walker* v. *State,* 100 Ark. 180.

(5) Two other assignments of error relate to the same subject covered by instructions Nos. 6 and 8, respectively, which were given by the court. In those instructions the court undertook to set forth the law with respect to the rights of one who had brought on a difficulty to invoke the rule of self-defense, and applied this rule to the difficulty between Walter Turner and Hunter, but concluded instruction No. 6 by a statement that no other person "had any greater right, under the law, to shoot and kill Joe Hunter under such circumstances than Walter Turner himself would have had." Instruction No. 8 on the same subject concluded with the statement

that "if the defendant, Collin Turner, knew at the time he fired and killed Joe Hunter that Walter Turner was going on to Joe Hunter for the purpose of provoking a difficulty with him and assaulting him, then neither Walter Turner nor the defendant would have been justified in shooting and killing Joe Hunter." Those instructions were in accordance with the law stated by this court in *Wheatley* v. *State,* 93 Ark. 409, as follows:

"A man can lawfully do for his brother, when threatened with death or great bodily injury, what he can lawfully do for himself under the same circumstances. If the brother is in fault in provoking the assault, he must retreat as far as he safely can before his brother would be justified in taking the life of his assailant in his defense."

The testimony adduced by the State tends to show that Walter Turner brought on the difficulty with Hunter pursuant to a conspiracy between him and his brother, Collin Turner, and that Walter Turner did not retire from the difficulty, but that on the contrary the defendant, Collin Turner, voluntarily came on the scene and engaged in the difficulty and fired the fatal shot at Hunter while the latter was retiring from the scene. We think the instructions were correct.

The defendant requested the court to give instruction No. 4, which reads as follows:

"You are instructed that if you find from the evidence that the deceased had shot Walter Turner, who was unarmed, with a pistol, and wounded him, and that Hunter was apparently in the act of again shooting Walter Turner with said pistol at the time defendant shot him, then you are told that the defendant was justified in shooting deceased, and you will find him not guilty."

The court refused to give the instruction as requested, but gave it as modified by the addition of the words "unless Walter Turner had brought on the fight." The instruction in the form requested by defendant was

erroneous for the reason that it ignored the question of who was the aggressor in the difficulty, and whether or not Walter Turner, if the aggressor, had attempted to retire, and the addition by the court tended to neutralize the evil effect in that respect. The modification had that effect, but it did not make a complete instruction, and if the court had been asked to do so it should have inserted the statement with respect to the right of self-defense to an aggressor after he had sought to retire from the difficulty. That idea was properly embraced in other instructions, but the defendant did not ask that it be incorporated in the one now under discussion but merely contented himself by asking an erroneous instruction and objecting to the action of the court in adding words which neutralized the evil effect of the instruction in the form that it was asked. We think, therefore, that defendant is not in a position to complain of the failure of the court to incorporate an element in the instruction which he did not ask for. The same may be said with reference to the assignment of error concerning the court's modification of instruction No. 6.

Upon the whole we find no prejudicial error in the record and the judgment is affirmed.

CHERRY v. DICKERSON.

Opinion delivered April 23, 1917.

1. PLEADING AND PRACTICE—DISMISSAL OF CAUSE—EFFECT OF REINSTATEMENT—INNOCENT PURCHASER.—An action was brought to declare certain land subject to a resulting trust, but was dismissed. Thereafter order was made modifying the dismissal to determine the equities of persons not made parties; *held* the latter order was not such a reinstatement as to the original parties as to prejudice the rights of one who innocently purchased the land after the dismissal.
2. LIS PENDENS—NATURE OF.—The common law rule as to *lis pendens* is based upon the necessity to give effect to the court proceedings and to prevent an alienation of the property, and does not rest on the theory of notice.
3. LIS PENDENS—DISMISSAL AND REINSTATEMENT OF CAUSE.—After the dismissal or abandonment of an action, without express reservation,

the *lis pendens* does not continue as constructive notice so as to affect the rights of parties intervening between the dismissal or abandonment and the reinstatement or commencement of the action anew.

Appeal from Crawford Chancery Court; *W. A. Falconer,* Judge; reversed.

Covington & Grant, for appellant, Cherry.

1. The case was improperly reinstated. Kirby's Digest, § 4431; 59 Ark. 162; 85 *Id.* 385; Kirby's Dig., § 4433; 14 Cyc. 462-3.

2. There was no express trust in favor of Dickerson. Kirby's Dig., § 3666; 45 Ark. 483; 50 *Id.* 76; 110 *Id.* 393.

3. Nor was there a resulting trust. 29 Ark. 612; 30 *Id.* 230; 70 *Id.* 149; 50 *Id.* 71; 105 *Id.* 323; 101 *Id.* 451; 105 *Id.* 323; 79 *Id.* 425.

4. There was no trust *ex maleficio.* 92 Ark. 55; 84 *Id.* 192; 73 *Id.* 310.

C. A. Starbird, for appellant, Davis.

1. The court erred in reinstating the cause at a subsequent term. 10 Ark. 186, 191; 26 *Id.* 95; 92 *Id.* 388; 93 *Id.* 234.

2. The *lis pendens* was a part of the suit, and when the action was dismissed the *lis pendens* had spent its full force, and the reinstatement did not revive it. Kirby's Digest, § 3666.

3. There was no trust. 45 Ark. 481; 57 *Id.* 632; 50 *Id.* 71.

Oglesby, Cravens & Oglesby, for appellee.

1. The case was properly reinstated. The court reserved jurisdiction in its order of dismissal.

2. Appellee's claim was not within the statute of frauds and a trust was created. 79 Ark. 69; 81 *Id.* 478; 98 *Id.* 452; 101 *Id.* 451; 105 *Id.* 318; 104 *Id.* 303; Jones on Ev. (2 ed.), § 420-1. Both Cherry and Davis had notice. The statute as to *lis pendens* was fully complied with. Kirby's Digest, § 3666.

McCULLOCH, C. J. The plaintiff, P. H. Dickerson, instituted this action in the chancery court of Crawford County, seeking to have the court declare a resulting trust in his favor in a quarter-section of land in that county, the title to which was then held by J. C. Davis, who was the sole defendant at the time the suit was originally instituted. The land in controversy was originally owned by Fred Wassmer and his wife, Elizabeth, who conveyed the same on July 13, 1914, to W. M. James. James conveyed the land to defendant, J. C. Davis, by deed, executed November 14, 1914, reciting a consideration of $4,000, paid in cash, and the action against Davis was instituted by plaintiff on January 12, 1915. *Lis pendens* notice was properly filed and recorded in the office of the recorder of that county in accordance with the terms of the statute. Kirby's Digest, § 5149, *et seq.*

The basis of plaintiff's claim of a resulting trust in his favor is that he furnished the consideration for the deed from the Wassmers to James pursuant to an agreement with James that he was to hold the title as trustee, and that James subsequently conveyed the land to Davis in violation of his trust, of which Davis is alleged to have had notice. The facts upon which plaintiff claims the right to have a trust declared need not be discussed for the reason that the case is to be disposed of on other grounds.

On November 1, 1915, the chancery court entered an order dismissing plaintiff's action against Davis for want of prosecution, but four days later, during the same term, the court entered the following order:

"The order of dismissal herein rendered on November 1, 1915, is modified so as to reserve jurisdiction herein to determine what equities Fred Wassmer and Elizabeth have herein as against plaintiff Dickerson and defendant J. C. Davis. A restraining order is directed to issue restraining Dickerson and Davis from conveying or encumbering the land herein until further orders of court."

The Wassmers had not been named in the complaint as parties to the suit, nor does the record show how they were brought in, except that an answer filed by them referred to the fact that they had been brought in by order of the court, and the answer disclaimed any interest in the litigation and asked to be discharged. On May 1, 1916, during a subsequent term of court plaintiff filed his motion to reinstate the cause and to make A. N. Cherry, who had in the meantime become the purchaser of the property from Davis, a party defendant; and on May 15, 1916, the motion was granted and an order was entered reinstating the cause and making Cherry a party. Cherry appeared and filed his answer on June 12, 1916, denying the allegations of the original complaint concerning the facts upon which the trust was sought to be declared, and setting up the fact that subsequent to the dismissal of the original action he had purchased the property in controversy from Davis without notice of any of the rights of the plaintiff and paid Davis a valuable consideration for the conveyance. The cause was heard by the court on oral evidence reduced to writing and made a part of the record, and the court rendered a decree in plaintiff's favor in accordance with the prayer of the complaint. Defendants Cherry and Davis have prosecuted an appeal to this court.

The evidence in the case shows that defendant Cherry purchased the land from Davis and paid a valuable consideration without actual notice of the pendency of the former action, and without actual notice of, or information concerning the claim of the plaintiff. His own testimony establishes that fact, and little, if any, effort was made by the plaintiff to show actual notice on the part of Cherry. Therefore, the only question involved on this appeal is whether or not the *lis pendens* notice filed during the former pendency of the action operated as constructive notice to Cherry, the subsequent purchaser, so as to bar his claim as an innocent purchaser.

(1) The order of the court entered November 1, 1915, dismissing the action for want of prosecution brought the action to an end, and the subsequent order during the term did not operate as a reinstatement. Notwithstanding that it modified the order of dismissal "so as to reserve jurisdiction herein to determine what equities Fred Wassmer and Elizabeth have herein as against plaintiff Dickerson and defendant J. C. Davis," there is, as before stated, nothing to show that the Wassmers had been properly made parties, but their answer shows that they disclaimed any interest in the litigation, and, without discussing the propriety of the court's order in holding the litigants in court for the purpose of determining the unasserted rights of the Wassmers, the order certainly did not have the effect of keeping the action alive so far as it related to the controversy between the plaintiff Dickerson and the defendant J. C. Davis. The order of reinstatement at a subsequent term of court operated merely as a commencement of a new action so far as Cherry was concerned. The former action having been completely ended, Cherry was not bound by any order of reinstatement unless he was brought in by process of the court.

(2) This brings us to a consideration of the effect upon Cherry of the *lis pendens* notice of the former action. The common law rule as to *lis pendens* was established to prevent alienation of property, and, while the pendency of the action was held as operative notice, that fact was not the basis of the rule.

"It is a misconception of the rule for the protection of suitors against *pendente lite* alienations of the property sued for," said the Kentucky court in the case of *Watson* v. *Wilson,* 2 Dana 407, "to suppose that it rests upon the principle, or upon any analogy to the principle, which protects the holder of an equity against the purchaser of the legal estate with notice. It is frequently said in the books that *lis pendens* is notice; but that is a

loose mode of expression, not warranted by the reason or spirit of the rule."

An illuminating exposition of the rule is found in the case of *Newman* v. *Chapman,* 2 Randolph 402, cited by the Virginia Court of Appeals, where the law on the subject was stated as follows:

"The rule, as to the effect of *lis pendens,* is founded on the necessity of such rule, to give effect to the proceedings of a court of justice. Without it, every judgment and decree for specific property might be rendered abortive by successive alienations. This necessity is so obvious, that there is no occasion to resort to the presumption of notice of the pendency of the suit, to justify the rule. * * * This principle, however necessary, was harsh in its effects on purchasers, and was confined in its operation to the extent of the policy upon which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit pending at the time of purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or a suit in chancery dismissed for want of prosecution, or for any other cause not upon the merits, although the plaintiff might bring a new suit for the same cause, he must make him who purchased during the pendency of the former suit a party; and in this suit the purchaser would not be at all affected by the pendency of the former suit at the time of his purchase. If a *lis pendens* was notice, then it should bind the purchaser, like actual notice in any subsequent suit prosecuted for the same cause; but this it does not. English judges and writers have carelessly called it notice, because in the one single case of the suit prosecuted to judgment or decree it had the same effect upon the interest of a purchaser as notice had, though for a different reason. But the courts have not in any case given it the real effect of notice."

(3) The authorities are practically in accord in holding that after the dismissal or abandonment of an action, without express reservation, the *lis pendens* does not continue as constructive notice so as to affect the rights of parties intervening between the dismissal or abandonment and the reinstatement or commencement of the action anew. 25 Cyc. 1470; *Hord* v. *Marshall,* 5 Dana (Ky.) 495; *Newman* v. *Chapman, supra; Whitfield* v. *Riddle,* 78 Ala. 99; *Davis* v. *Hall,* 90 Mo. 659; *Pipe* v. *Jordan,* 22 Col. 392; *Herrington* v. *McCollum,* 73 Ill. 476; *Ludlow* v. *Kidd,* 3 Ohio 541. The statute of this State on the subject of *lis pendens* notice is but declaratory of the common law, restricted to written notice of the pendency of the action which must be filed with the recorder of deeds. *Jones* v. *Ainell,* 123 Ark. 532.

It follows, therefore, that the court erred in enforcing a trust in favor of the plaintiff against defendant Cherry, who was an innocent purchaser of the property for value and without notice, either actual or constructive, of the alleged rights of the plaintiff.

The decree is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

FIRST NATIONAL BANK OF JONESBORO *v.* GLASS.

Opinion delivered April 23, 1917.

1. TIMBER—SALE—EXECUTORY CONTRACT WITH EQUITABLE MORTGAGE. G. conveyed the timber on certain land to H., the deed being absolute in form, and reciting the payment of a consideration. Simultaneously the parties entered into another agreement, reciting the above sale and that H. had loaned G. a certain sum, G. agreeing to cut and load bolts at so much per cord, a certain amount of which was to be credited on the loan. *Held,* the two instruments constituted in effect an executory contract for the sale and delivery of the timber, and an equitable mortgage on the timber for the repayment of the advanced purchase price.
2. TIMBER SALE—LIMITATIONS.—In a contract for the sale of timber, no time was specified for the delivery of the timber or the repayment of the purchase price; *held* the running of the statute of limitations would begin upon a demand and refusal to perform the contract.

3. TIMBER—SALE—LIMITATIONS.—H. purchased timber from G., G. agreeing to repay by a delivery of the timber to H., and the promise to pay being in writing, the five-year statute of limitations applies.
4. TIMBER DEED—EFFECT OF RECORD.—Where a timber deed is recorded, it constitutes constructive notice to subsequent purchasers, not only as to the existence of the conveyance, but also as to extension of time for removing the timber.

Appeal from Craighead Chancery Court; *Chas. D. Frierson,* Chancellor; affirmed.

Lamb, Turney & Sloan, for appellants.

1. The deed as limited by the contract is a legal mortgage. The two must be construed as one instrument. 117 Ark. 308; 1 Jones on Mortg. (1916 ed.), § 242; 103 Ark. 494; 41 Mich. 490; 63 Tex. 506; 117 Ark. 308; 63 *Id.* 51; 114 S. W. 763; 20 Mass. 484; 36 Ky. (Dana) 473; 112 N. Y. 467; 39 So. 1023; 48 Ala. 99.

2. As a legal mortgage it is barred by limitation. 87 Ark. 228; 61 *Id.* 118.

3. As an absolute grant, appellee's contingent legal title to the timber has terminated. No time was specified and the law only implies a reasonable time. 77 Ark. 116. The appellees lost their rights by abandonment and lapse of time. Their remedy expired with the debt. 28 Ark. 27, 510; 71 *Id.* 164; 43 *Id.* 469; 83 *Id.* 278; 123 *Id.* 161; 122 *Id.* 530; 53 *Id.* 367; 43 *Id.* 464; 28 *Id.* 267; 47 *Id.* 301; 53 *Id.* 367; 47 *Id.* 314.

4. The equitable remedy is unavailable against *bona fide* purchasers. 185 S. W. 784; 42 Ark. 362; 178 S. W. 390; 28 S. E. 336; 105 Pac. 252; 146 N. W. 343.

5. The equitable remedy is barred by acquiescence and laches. 13 S. W. 722; 86 *Id.* 574; 56 *Id.* 202; 84 *Id.* 412; 39 *Id.* 134; 83 *Id.* 500; 120 *Id.* 115; 103 *Id.* 254; Pom. Eq. Jur., § § 817-18.

6. The deed should be canceled. 106 Ark. 207; 120 *Id.* 115; 94 *Id.* 122.

Stayton & Stayton and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellees.

1. The deed and contract do not constitute a legal

mortgage. It was an absolute transfer of the timber. 1 Jones on Mortg., § § 60, 241, 242.

2. Williams had an equitable lien on the timber to secure repayment of the purchase money. 3 Pom. Eq., § 1263; 30 Ark. 686, 692; 69 *Id.* 442; 73 *Id.* 331; 75 *Id.* 336; 103 *Id.* 88; 118 *Id.* 192, 198. Plaintiff acquired its rights with full knowledge of the facts. 69 Ark. 442; 84 *Id.* 603; 86 *Id.* 202; 118 *Id.* 192; 2 Sum. 486; 51 Ark. 333, 338; 52 *Id.* 439; 60 *Id.* 595; 91 *Id.* 268, 272.

3. The claim is not barred. 83 Ark. 278, 281; 122 *Id.* 530; 123 *Id.* 161; 44 Oh. St. 210. Nor was the debt even barred, but if so the lien was not.

4. The timber deed had not expired. 77 Ark. 116; 77 *Id.* 116.

5. Appellant was not a *bona fide* purchaser without notice.

6. Appellee is not barred by laches nor acquiescence. 84 Ark. 603; 118 *Id.* 192.

McCULLOCH, C. J. J. M. Glass, one of the appellees, owned 3,000 acres of timber land in Arkansas, and on April 9, 1904, conveyed the white oak timber by deed, absolute in its terms, to the H. D. Williams Cooperage Company, a corporation, the deed reciting a consideration of $10,000, receipt of which was acknowledged in the deed. No time was specified in the deed for removal of the timber, but the chancellor found on hearing the cause, and it is now conceded in the briefs, that four years was not an unreasonable time within which to remove the timber. Simultaneously with the execution of the deed the parties entered into a contract in writing, which, after reciting the aforesaid sale and conveyance of the timber and that the H. D. Williams Cooperage Company had "loaned and advanced" to J. M. Glass the sum of $10,000, stipulated that Glass was to cut the timber into stave bolts and to haul the same and load on cars as directed by the cooperage company for $9 per cord, of which sum $3 per cord was to be credited on the

amount loaned and advanced aforesaid by the company to Glass. The contract further provided that in the event Glass should be unable to cut and haul the stave bolts as directed by the cooperage company then said company should proceed to have the cutting and hauling done at the expense of Glass. Said contract concluded with the following clause:

"7. It is understood between the parties hereto that the performance of the obligations of this contract assumed by the party of the first part (J. M. Glass) is not divisible, and that a refusal on his part to perform any of the duties devolving upon him by the terms hereof shall be deemed by the parties hereto as a refusal on his part to perform all and singular the terms of the contract devolving upon him."

J. M. Glass commenced work under the contract in the summer of 1904, but after continuing a short while stopped on account of labor troubles, and there was no further attempt made to cut or remove the timber. Correspondence took place between the parties year after year concerning the cutting of the timber, in which correspondence the cooperage company made requests of Glass that he proceed with the cutting and delivery of the timber, but it was agreed from time to time that on account of the years being wet ones it was impossible to cut the timber out. In the year 1908 the cooperage company moved its mill off the line of railroad to which the timber was accessible and notified Glass that because of that fact it would not be convenient for it to handle the timber, and it was orally agreed between the parties that Glass could sell the land and repay the sum advanced out of the proceeds of the sale. There was no further correspondence until February 7, 1912, when the cooperage company addressed a letter to Glass reciting the transactions of the past concerning the agreement for Glass to sell the property and repay the loan, and the letter concluded as follows:

"We have been disposed to meet your wishes in the matter of handling this contract during all these years, and our desire to help you has resulted in more than a little inconvenience and loss to us, and if you have no immediate prospects of disposing of the property in such a way that our advancement will be repaid to us, it seems to me that during this year, or as soon as the weather will permit, that we should disregard any further selling negotiations and proceed with the working of the timber under the contract as originally contemplated; and especially is this true as we understand you arranged for a sale of a portion of this land recently and reserved eighteen months to remove the timber. With this end in view, I am going to ask you to see that we are notified just as soon as the condition of the country will permit you operating on this land.

"If in the meantime you should have any proposition for the sale of the property, which will enable you to make us a firm offer for the release of our contract, we will, of course, consider it."

The reply of Glass to this letter is not in the record. He testified, however, that he replied to the letter, but fails to give the substance of his reply. Nothing further transpired between the parties, and nothing has ever been paid on the $10,000 advanced by the cooperage company to Glass.

Glass mortgaged the land to J. E. Franklin in July, 1913, to secure a loan of $17,500, and this mortgage was subsequently foreclosed by a decree of the chancery court. Appellant, First National Bank, became purchaser, deed being executed by commissioner with the approval of the court on February 10, 1915. On September 4, 1915, H. D. Williams Cooperage Company was adjudged a bankrupt, and H. A. Dinsmore was appointed trustee in bankruptcy. The H. D. Williams Cooperage Company had previously executed to the Mercantile Trust Company a mortgage embracing the timber in con-

troversy, and the mortgage was foreclosed under a decree in the chancery court, a sale of the timber was made by a commissioner to the Export Cooperage Company, conveyance being executed to the latter under order of the court.

This action was instituted by appellants on July 8, 1916, praying for cancellation of the timber deed to H. D. Williams Cooperage Company as a cloud on their title, alleging as a ground for the removal of the cloud that a reasonable time for the removal of the timber had expired. The Export Cooperage Company intervened as the successor of the title to the H. D. Williams Cooperage Company, and prayed that the timber deed be construed as a mortgage, and that it be foreclosed. The chancellor on final hearing dismissed the complaint of the appellants for want of equity, and rendered a decree in favor of the Export Cooperage Company on its cross-complaint, declaring that the timber deed from Glass to the H. D. Williams Cooperage Company, and the aforesaid contract between those two parties, constituted an equitable mortgage, and a decree to foreclose the same was rendered fixing four years from the date of the commissioner's deed as a reasonable time for the purchaser at the sale to remove the timber.

It is contended on behalf of appellants that the two instruments of writing between Glass and the H. D. Williams Cooperage Company should be construed together as one instrument, and that when so construed they constituted either an absolute and unconditional sale of the timber or a legal mortgage, and that in either event the rights of the grantee had been barred by lapse of time. The contention is that if the instrument be construed as an unconditional sale of the timber, the rights are barred because of the timber not being removed within a reasonable time; and that if the instrument be construed to be a legal mortgage, the debt secured is barred by the statute of limitation. We do not think that either of the

contentions of learned counsel is sound. It is correct to say that the two instruments being executed contemporaneously and covering the same subject matter should be construed together as one contract. *Dicken* v. *Simpson,* 117 Ark. 304. When thus construed, it is evident that the writing does not constitute an unconditional sale and delivery of the timber so as to require the purchaser to remove the timber within a reasonable time. To so construe the contract would be to ignore entirely the provisions of the second instrument whereby Glass undertook for the consideration named to cut the timber into stave bolts and to haul it to the railroad and load it on cars, a part of the price to be credited on the sum advanced. On the other hand, the two instruments construed together do not constitute a legal mortgage, for the second instrument does not contain an unconditional defeasance. The grantee was, under the contract, to have the timber in any event, and the right to take the timber was not to be cut off by a payment of the debt.

(1) We think that the instruments constituted in effect an executory contract for the sale and delivery of the timber, and an equitable mortgage on the timber for the repayment of the advanced purchase price. The deed was not intended as a completed sale and delivery of the timber, for it is evident that the delivery was to be postponed to some future date, and the failure of the grantor to complete the sale created a lien in the nature of an equitable mortgage to secure the repayment of the advanced purchase price. 3 Pomeroy's Equity Jurisprudence, § 1263.

(2) No time was specified in the contract for the delivery of the timber or the repayment of the purchase price, so the running of the statute of limitation must necessarily have begun upon a demand and refusal to perform the contract. According to the evidence in the case there never was an unqualified demand or refusal. Performance was postponed by mutual agreement

from year to year, and it was agreed that the matter should be settled by Glass procuring a purchaser of the land and timber, and repaying the purchase money out of the sum received. The last communication between the parties was the letter of February 7, 1912, written by the H. D. Williams Cooperage Company to Glass and the latter's reply some time later. It is doubtful if that incident can be treated as a demand and refusal so as to put the statute of limitation in motion, but, at any rate, it can be definitely said that the statute did not begin to run at an earlier date.

(3-4) There was an express undertaking on the part of Glass in the contract to repay the price by a delivery of the timber. Therefore, the promise to pay being in writing, five years is the statute of limitation applicable to the case. *Coleman* v. *Fisher,* 67 Ark. 27. This litigation was begun and concluded in the court below within that period, so it follows that the rights under the timber deed are not barred. The court was correct, we think, in reaching the conclusion that the instruments of writing constituted an equitable mortgage; that the same was not barred by limitation, and in decreeing a foreclosure. The timber deed was duly recorded and constituted constructive notice to subsequent purchasers not only as to existence of the conveyance but also as to extension of time for removing the timber (*Mullins* v. *Wilcox,* 124 Ark. 17), therefore appellants can not be treated as innocent purchasers and the facts related concerning the agreements between the parties for postponement of the removal of the timber permits the application of the doctrine of laches, which appellants invoke.

Decree affirmed.

BELLVILLE LAND & LUMBER COMPANY v. BRADSHAW.

Opinion delivered April 23, 1917.

1. MASTER AND SERVANT—INJURY TO SERVANT—LATENT DEFECT.—Where an employee was injured by a latent defect in a machine at which he was set to work, and the defect was known to the employer but not to the employee, the question of negligence and assumed risk are questions for the jury.
2. MASTER AND SERVANT—INJURY TO SERVANT—LINE OF DUTY.—Deceased was employed by defendant saw mill company. Defendant gave him no regular work, but being a "handy man" about the mill, he was assigned to various sorts of work. Defendant's superintendent directed him to a certain spot to "tail bolts"; deceased went on the other side of the machine and "shoved bolts" instead, and was fatally injured due to a defect in the machine at which he was working. *Held*, since his employment was general about the mill, deceased, at the time of his injury was not disobeying any rule of the company, or acting contrary to his employer's directions, and that a verdict against the defendant would be sustained.

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

J. A. Watkins and *S. M. Wassell*, for appellant.

1. The deceased assumed the risks that were incident to the operation of the machine. 95 Ark. 560; 122 Ark. 125; 77 Ark. 367; 53 *Id.* 117; 77 *Id.* 458; Labatt on Master & S., § § 388, 404; 161 Mass. 153; 16 L. R. A. (N. S.) 614. He was familiar with the machine.

2. The company used due care and provided a safe place to work in. He left his usual place and went to another. 104 Ark. 6; 90 *Id.* 149. He was working contrary to instructions and assumed the risk. There was no negligence on the part of appellant. Cases *supra.* 96 Ark. 461, 464; 84 *Id.* 377; 77 *Id.* 405; 115 *Id.* 350, 358; 12 L. R. A. (N. S.) 861; 123 Ark. 125.

G. G. McKay and *Brundidge & Neelly*, for appellee.

1. The machinery was defective and there was no assumption of risk. 124 Ark. 596; 123 *Id.* 125. Plaintiff did not know of the defects, nor were they observable from inspection. Acts 1913, § 3, No. 175, p. 734; 53 Ark. Law Rep. 223.

2. He had no regular place of work—he worked anywhere he was directed. 84 Ark. 388. The case was submitted upon proper instructions and the evidence sustains the verdict.

WOOD, J. This suit was instituted by the appellee as administratrix of the estate of Joseph C. Bradshaw against the appellant to recover damages as administratrix and in her own right for the death of her son, alleged to have been caused through the negligence of appellant.

The complaint duly alleged that the appellant was a corporation, and that Joseph C. Bradshaw was, at the time of the alleged injury, in its employ as a feeder to a certain rip-saw connected with the machinery of the company; that the company was negligent in the following particulars: That it had assigned Bradshaw to the duty of feeding the rip-saw, which required him to place timber and lumber in the rip-saw to be resawed; that the dial or mandrel that operated the said saw was entirely too short between the saw and the belt, which caused said saw to heat and kink; that this construction was negligent and the defect was known to the appellant; that the appellant failed to warn Bradshaw of the dangers incident to his employment; that the saw was entirely too small, being 15 inches in diameter when it should have been two feet or more; that sufficient boxing was not provided between the belt that operated the saw and the saw, which caused the saw to get hot and kink, and this caused the timber to fly back and inflict the injury upon Bradshaw; that the appellant failed to take the piece of timber which Bradshaw was running through the saw from the other side thereof, which contributed to cause his death; that there was no protection over the saw, and between the saw and where Bradshaw was required to stand; that the saws in use by the appellant were old, worn out and second-hand; that the boxing on the mandrel was old, second-hand and had been burned, which caused the saw to heat and kink; that the place in which Bradshaw was required to perform his duties was unsafe; that all the

above defects and the acts of negligence alleged on the part of the corporation were unknown to Bradshaw, but were known to the company, or by the exercise of ordinary care could have been discovered; that the negligent acts thus alleged caused the injury to Bradshaw, from which he suffered great mental and physical pain and anguish and from which injuries he died. The appellee asked for judgment in the sum of $1,000 for the pain and suffering, and in the sum of $20,000 for the benefit of the next of kin.

The answer denied specifically all the allegations of negligence and set up the defenses of assumed risk and contributory negligence.

The testimony showed that the machine at which Bradshaw was working consisted of a saw, extending through a table, and that the saw was driven by a belt attached to a pulley or mandrel. The boxings on the mandrel were too narrow, that is, too short, and the bolt on the pulley was too tight, which caused a friction, and that caused the mandrel to get hot, and the heating of the mandrel would heat the saw. When the saw got hot, it would not run straight and would throw the timber out, that is, it would have the effect to kick back the timber. The superintendent of the mill had knowledge of this defective condition.

Several witnesses testified that the saw did not run properly; that when it got hot it would turn first one way and then the other; that when it got hot, it would kink and would not run through the timber right. One witness testified "that he worked at this saw for two or three months. His idea was that the boxing on the shaft was not big enough for the mandrel. It was a three-inch boxing and it ought to have been six inches. The saw would run hot and kink and would not go through the timber right. It would wabble and not cut through. Witness got kicked back as a result of this several times. It knocked witness down twice. This witness saw the piece of timber that hit Bradshaw and the marks on it where the saw had

kicked it back. It was splintered there where the top of the teeth caught it."

There was testimony on behalf of the appellant tending to show that the rigging of the saw was patterned after approved construction in other mills, and that it was properly constructed, and that there was no defect about the mandrel or the saw.

There was a decided conflict in the testimony as to the condition of the machinery, and this conflict in the evidence was sufficient to warrant the court in submitting to the jury the issue as to whether or not appellant was negligent in failing to exercise ordinary care to provide reasonably safe appliances to its employee with which to do his work. This issue was submitted on instructions of which appellant does not here complain, and there was testimony to support the verdict of the jury on the issue of negligence.

The appellant contends that under the undisputed testimony Bradshaw assumed the risk of the danger to which he was exposed and therefore can not recover.

It was shown that Bradshaw was about 19 years old. His mother, the appellee, testified that he had been working about sawmills ever since he was a little tot—commenced when he was about 11 or 12 years old; that he was a bright boy, and was thoroughly familiar with sawmill work; could do most any kind of work around sawmills, and was considered a handy man at such work.

The superintendent of the mill plant testified that Bradshaw "was a handy man in every place you would put him in a sawmill;" that he had operated this saw frequently before that day; that he was a bright boy and familiar with every part of the sawmill business.

One witness testified that some days the saw would get hot and some days it would not; sometimes it would run good and sometimes not. It had been running bad off and on ever since he had been working there, some two or three months. Bradshaw had been working at the mill about a year or over. Part of the time he trucked

timber, and part of the time pulled up logs; then he went to work on the carrier, and set blocks, and did most everything around the mill. Witness was asked if he or any one else told young Bradshaw that the saw was not running well or was out of fix, and witness answered, "No, sir."

While this testimony shows that Bradshaw was a bright young man and familiar generally with the work about sawmills and had worked frequently at this saw before, it does not show, and there is no testimony in the record to show, that he had any knowledge at the time of his injury of the defective construction of the mandrel, or that he had knowledge that the saw was in a defective condition, or that it was not running properly. The work of feeding the saw was not his regular job, and for aught that appears to the contrary, during the days before when he was frequently working about the saw the same way, the saw, as one of the witnesses expressed it, may have been "running good." At any rate there is nothing in the record to show that anything occurred previous to the injury to Bradshaw that should have caused him to make any investigation as to any structural defects about the rigging of the saw or the saw itself. It can not be said that the defect of the mandrel as disclosed by the testimony of witnesses on behalf of the appellee was an obvious one. On the contrary, the defect was structural and of a latent character, rather than patent. It was such a defect that, when the attention of the superintendent of appellant was directed to it, it became appellant's duty to correct the same, and since there was evidence that the attention of the superintendent was called to the defective condition, the jury were warranted in finding that the appellant was negligent in not exercising ordinary care to remedy the defect. But it was not one of those obvious defects that an employee would be bound to take notice of in doing the work required about the saw; nor was it a danger ordinarily incident to the employment. But, on the contrary, it was a danger brought about by the negli-

gence of the employer, and, since the same was not an obvious danger, the employee did not assume it. At any rate, under the testimony it was at least a question of fact for the jury to determine from the evidence as to whether or not Bradshaw assumed the risk, and this issue the court submitted to the jury under instructions given at the instance of the appellant, and which declared the law in conformity with well established principles governing the doctrine of assumed risk that have been time and time again declared by this court.

(1) In one of our late cases we announced the familiar doctrine that "such dangers as are normally and necessarily incident to the employment are assumed by the employee, but that such risks as arise out of the failure of the employer to exercise due care to provide a safe place of work and safe appliances for his employees are not risks assumed by the employee, unless he is aware of the defect and risk, and unless such defect and danger are plainly observable, and knowledge of such defect and danger is not to be presumed." *St. Louis, I. M. & S. Ry. Co.* v. *Howard,* 124 Ark. 588, 595.

The rule above announced is applicable to the facts of this record.

(2) Appellant further contends that Bradshaw assumed the risk because he had been directed by the superintendent to take timbers from this saw, and instead, at the request of a co-worker who was employed as feeder for the saw, he had taken the latter's position, and thus at the time of the injury was working at a place not assigned him by his employer, and therefore was a volunteer in this service and assumed the risk of the danger connected therewith.

The testimony tended to prove that Bradshaw had no regular or set job about the mill, but that, to use the language of the superintendent "he was a handy man in any place you put him in a sawmill." On the day the accident occurred Bradshaw was setting blocks in the carriage that carried the logs to the main saw. The su-

perintendent was asked how he happened to change his work that afternoon, and answered, "We were loading cars. Mr. Bradshaw was familiar with any part of the sawmill business, and I sent him over to tail the bolts for Bill Hurley and put part of the crew to loading cars." Witness "sent him there to tail, and did not know why he took the other side of the table and shoved the bolts in instead of tailing them." Witness did not request him to do that work, and Hurley, who was feeding the saw, had no authority over him. The testimony shows that he had frequently operated the saw before and was a competent man to do so.

Hurley testified that he (Bradshaw) came back there and "I asked him if he did not want to push awhile, and he said he did, or would. I then asked him to push awhile, and he commenced pushing blocks through the saw, and I went around behind there to take the pieces off, and I don't suppose he had been there over a half an hour when the injury occurred."

Learned counsel for appellant, to sustain their contention, rely upon the doctrine of our court and the authorities generally, and quote from case note to *Pioneer Mining & Mfg. Co.* v. *Melvin M. Tally,* 12 L. R. A. (N. S.) 861, as follows: "The cases very generally hold that where a servant leaves his working place, and goes to another portion of the plant for his own purposes, and is injured while so away from his proper place, the master is not liable for such injuries." And they cite also several of our own cases, among them the case of *St. Louis, I. M. & S. Ry. Co.* v. *Schultz,* 115 Ark. 350, where we said: "But where the servant adopts methods for his own convenience, contrary to the methods expressly prescribed by his employer, and where the servant occupies places about the premises in the performance of his duties that the master could not reasonably anticipate that the servant would occupy, then the master owes the servant no duty to make those places or methods safe, and his failure to do so is not actionable negligence." We have examined

all the cases cited, and they are clearly differentiated from the instant case on the facts. In the cases cited from our own court, where the doctrine above relied upon is announced, there was evidence tending to prove that the servant was injured while violating the rules and doing something contrary to the directions of the master, and was not engaged in the duty which the master had assigned to him. But that doctrine has no application to the facts of this record for the reason that here the testimony tended to show that Bradshaw's employment did not contemplate that he should work in any particular place or at any special job. The testimony tends to prove, and the jury were warranted in finding, that he was in the line of his employment when he was working at any place that the appellant saw fit to assign him about the mill. He was a "handy man" in any place where appellant might put him. Bradshaw, knowing that such was the character of his employment, could not be said to be a volunteer, even though, after he had been directed to tail the bolts, he exchanged places at the request of a coworker at the saw.

Since the nature of his employment was general for any job about the mill, Bradshaw, at the time of his injury, was not disobeying any rule of the company, or acting contrary to any method prescribed by his employer for the performance of his duties.

The lumber company, on the contrary, under the proof, must be held to have contemplated that Bradshaw might occupy any place incident to the mill work in which appellant was engaged. The testimony tends to prove that Bradshaw lost his life while in the line of the duty for which he was employed, and as a result of his employer's negligence.

The verdict and judgment in favor of the appellee were therefore correct. Let the judgment be affirmed.

VAN VENEER COMPANY v. JONES.

Opinion delivered April 23, 1917.

1. MASTER AND SERVANT—DANGERS—DUTY TO WARN.—Where there is a duty to warn a servant, it would be a breach of such duty to expose him to such dangers without giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers and the necessity for the exercise of due care and precaution.
2. MASTER AND SERVANT—INJURY TO SERVANT—PROPER MACHINERY.—It is the duty of a master to use ordinary care to install in his mill machinery that is reasonably safe.
3. APPEAL AND ERROR—HARMLESS ERROR.—A cause will be reversed for error only when the same is prejudicial.
4. APPEAL AND ERROR—OBJECTION TO INSTRUCTION—DUTY TO ASK CORRECT INSTRUCTION.—In a personal injury action the court gave an instruction at plaintiff's request to which defendant objected. *Held*, when defendant objected to the form of the instruction it was his duty to do so specifically.

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

John H. Crawford and *Dwight H. Crawford*, for appellant.

1. The court erred in refusing to give the peremptory instruction for defendant. The evidence is not legally sufficient to sustain the verdict. Improper testimony was admitted. 1 Wigmore's Greenleaf on Ev. (16 ed.), 527, § 430 h and i; 84 Kans. 224; 23 L. R. A. (N. S.) 414.

2. A youthful servant who understands and appreciates the dangers of his employment, assumes the risk of injury therefrom, especially open and patent dangers as here. 39 Ark. 17; 73 *Id.* 49, 55; 93 *Id.* 153; 56 *Id.* 206, 232, 238; 104 *Id.* 489; 6 Ind. App. 677; 55 Fed. 903, 946; 39 Minn. 78; 105 N. Y. 39; 21 N. E. 717; 34 *Id.* 1059; 35 *Id.* 648; 23 N. W. 624; 100 Mich. 276; 149 *Id.* 114; 163 Mass. 391; 146 *Id.* 182; 148 *Id.* 228; 160 *Id.* 566; 97 Ark. 486; 118 *Id.* 304.

3. It was not necessary to provide the best or the safest machines obtainable, provided those furnished were reasonably safe and equipped with such safety ap-

pliances as machines of the kind are usually equipped with and especially where the dangers are open and obvious. Only ordinary care to provide reasonably safe appliances is required. The court erred in its instructions to the jury. 105 N. Y. 39, 12 N. E. 286; 21 *Id.* 284; Thompson on Negl., vol. 4 (2 ed.), § 4709; 97 Ark. 180.

Callaway & Huie, for appellee.

1. Plaintiff did not appreciate the danger. The case was properly submitted to a jury. It was the duty of defendant to warn plaintiff of the dangers. 115 Ark. 380, 384; 90 *Id.* 473; 53 *Id.* 117.

2. There is no error in instruction 1, but no specific objections were made, nor exceptions saved. 93 Ark. 589; 98 *Id.* 227; 98 *Id.* 352; 76 *Id.* 348; 93 *Id.* 521; 96 *Id.* 184. But appellant asked and the court gave No. 10 on the point.

3. There was no error in giving for appellee No. 5½. 97 Ark. 180, 187; 73 *Id.* 530; 65 *Id.* 259; 93 *Id.* 589; 117 *Id.* 524.

HART, J. Bryan Jones, a minor, by Mrs. Dora Jones, as next friend, sued the Van Veneer Company to recover damages sustained by him while in the employment of the defendant, alleged to have been caused by its negligence. There was a trial before a jury which resulted in a verdict and judgment for the plaintiff in the sum of $500. The defendant has appealed.

The principal assignment of error relied upon by counsel for the defendant to reverse the judgment is that the evidence is not legally sufficient to warrant the verdict.

Bryan Jones testified in his own behalf substantially as follows: In January, 1915, while in the employ of the Van Veneer Company at Malvern, Arkansas, I was injured, having the forefinger of my right hand cut off by a clipper or jointer, a heavy machine used in veneer mills to cut the veneering into given widths. At that time I was eighteen years and two months old. I had worked around the plant for about eight months at the time the

injury to my hand occurred. At the time I was injured, I was working at the clipper where I had been placed by the defendant's foreman, and had been working for two or three weeks. The clipper is a large machine with a heavy knife ninety inches long used for cutting veneering. It was my duty to stand at the side of the clipper and control the stroke of the knife and the width of the strips of veneering to be cut by throwing the machine in and out of gear by means of a lever. The clipper would run automatically, if so set. It was the custom for the person operating the clipper to go around in front of the machine to help take out the veneering as it was cut by the knife and pushed on the table. There was a man there to do that work, but the clipper man often helped him, and the foreman knew it. The clipper sometimes became choked or clogged by reason of splinters and small pieces of stock catching in a groove or throat in which the big knife of the clipper worked. When this happened it was my duty to free it by removing the obstruction, and I always did this without stopping the knife. It often choked up when narrow strips were being put through it. At the time I was hurt, the machinery was working on automatic feed. We were cutting narrow strips about one inch wide. I was helping the off-bearer remove the strips from the table when the machine choked up and I attempted to release it by removing the obstruction as usually done. The machinery was still running and caught my finger and cut it. My finger was bent at the time and was cut into two pieces. It had to be amputated and I suffered considerably. It was ten or twelve weeks before it was entirely well. I had never been told to stop the machine to take the obstruction out when it became choked up. I had never been instructed about how to operate the machine or to remove the obstructions, and had never been cautioned or warned by the foreman or any one else. I had never seen or worked at a machine like it before. The witness was asked if he could see the knife, and if he did not know it would cut. He replied, "Yes, of course, I

knew it would cut. I knew it would cut off my finger if it got caught in there. Anybody would know that, but I did not think about that."

On cross-examination, the witness admitted that the machine was in a well-lighted place, and that he could see the knife, and it worked up and down cutting veneering. He admitted that he knew that it would cut his hand if it should be caught, and that on the same day the top of the finger of his glove had been cut off by the knife. He stated that the foreman had seen him remove the obstructions without stopping the machine, and knew it was the custom for the obstructions to be removed in that way.

Other witnesses for the plaintiff testified that it was the custom in that mill for the operator of the clipper machine to help the off-bearer remove the veneering.

Another witness testified that he had had about thirty years' experience as a millwright and machinist, and was familiar with veneering mills and with the machinery used in such mills, called a clipper; that he knew and had examined the machine in which Bryan Jones was injured; that he had never seen but one other such machine, and that it was fitted up with a guard and wooden filler to prevent the operator from getting hurt. He said he thought the machine in question could be fitted with a wooden filler of some hardwood to fill up the groove to prevent the veneering from being caught in the groove; that this would make a smooth surface for the veneer to pass over instead of the groove in which it would sometimes catch. He also stated that the machine could be fitted with a guard which would keep any one from being cut, and that this could be done at a small expense.

On the other hand it was shown by witnesses for the defendant that the plaintiff had been warned about removing the obstructions while the machine was in motion, and that it was not practical to operate the machine with a guard and by filling up the groove with hard wood. The witnesses explained in detail and gave their reasons therefor. They were men of many years' practical ex-

perience in machinery of this kind, but we need not set out their testimony; for the legal sufficiency of the evidence to support the verdict must be tested in the light most favorable to the plaintiff.

It is strongly insisted by counsel for the defendant that the danger was known by Bryan Jones, and that he fully appreciated and understood the dangers to be apprehended in removing the obstructions while the machine was in motion. They insist that he had acquired the information by practical experience, which is the best teacher, and that he knew therefore all that the instructions or warning of the defendant would have imparted to him.

(1) Plaintiff admits that he knew the knife would cut his finger if it got caught in removing the obstructions, but said that he did not think about his finger getting caught. He stated that it was the custom of the operator of the machinery to remove the obstructions as he was doing when hurt, without stopping the machine. Knowledge of the danger was a question of fact. Bryan Jones was only eighteen years of age, and had never worked at a machine like this before. It is true he had worked around the mill for eight months, but he says that he had not worked around this machine and did not appreciate the dangers from removing the obstructions without stopping the machine. He said that it was the custom to do it that way, and that the foreman knew of this fact, and that no warning had been given him by the foreman or any one else. It is conceded that in all cases where there is a duty to warn a servant, it would be a breach of such duty to expose him to such dangers without giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to cause him to appreciate the dangers and the necessity for the exercise of due care and precaution. So under all the circumstances we do not think the court erred in not taking the case away from the jury.

Again, it is insisted that the court erred in giving instruction No. 5½. The instruction reads as follows:

"If you believe from the evidence that there were other standard veneer machines which would be reasonably safe, and if you find that the machine used was not reasonably safe, then you are instructed that it was the duty of the defendant to have installed a reasonably safe machine or to have so altered and equipped the one used as to have made it reasonably safe."

(2-3) The instruction in the precise language given was erroneous and was so held in the case of *Holmes* v. *Bluff City Lumber Co.*, 97 Ark. 180. The court should have told the jury in the instruction that it was the duty of the defendant to have used ordinary care to have installed a reasonably safe machine, etc. It does not follow, however, that because the court held such an instruction to be erroneous in *Holmes* v. *Bluff City Lumber Co.*, that the judgment in the present case must be reversed. It is the well settled rule of this court to reverse only for errors prejudicial to the rights of an appellant.

(4) In the *Holmes* case the court was dealing with a different state of the record to that in the present case. There an instruction similar to the present one was requested by the defendant and the trial court refused to give it. This court refused to reverse the judgment because the defendant did not ask the instruction in proper form. Here we have the converse of the proposition. The court gave the instruction at the request of the plaintiff. If counsel thought the instruction was open to the objection now made to it, they should have made a specific objection to the instruction, and not having done so, they are in no attitude to ask for a reversal of the judgment on this account. *St. Louis, I. M. & S. Ry. Co.* v. *Barnett*, 65 Ark. 255; *Western Union Tel. Co.* v. *Wilson*, 97 Ark. 198, and *St. Louis, I. M. & S. Ry. Co.* v. *Stovall*, 98 Ark. 425.

Moreover, the defendant itself asked for an instruction on this point which contained the same defect. He

asked and the court gave instruction No. 10, which reads as follows:

"The court instructs you that it is not the duty of the defendant company to insure the safely of its employees, but it has performed its duty to its employees when it provided them with a reasonably safe place to work, and reasonably safe appliances with which to work. You are instructed that if the defendant provided a machine of standard make, of a type suited to the work it was required to do, and provided with such safety appliances as machines of its sort are usually provided with, defendant had performed its duty to the plaintiff so far as any duty rested upon it to provide plaintiff with a reasonably safe place in which to work, and reasonably safe appliances with which to work."

A comparison of this instruction with the one under consideration shows the instruction asked by defendant to contain the same defect and counsel for the defendant having asked for an instruction containing the same defect, can not complain of the one given by the court.

It follows that the judgment must be affirmed.

ROGERS v. SCOTT.

Opinion delivered April 23, 1917.

1. SALES—TITLE ACQUIRED—TITLE OF SELLER—EXCEPTION.—The general rule is that no man can get a title to personal property from a person who himself has no title to it. An exception to the rule is in the case of a *bona fide* purchaser, who will be protected, where the owner has conferred upon the seller the apparent right of property as owner, or disposal as his agent.
2. SALES—TITLE—ACTS OF SELLER—ESTOPPEL.—Whether the owner of certain personal property was estopped from asserting ownership as against a purchaser thereof from one whom the owner had invested with indicia of ownership, is a question for the jury.

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

Morris M. and *Louis M. Cohn,* for appellant.

1. Defendants' first instruction should not have been given. 53 Ark. 196; *Ib.* 380; 51 *Id.* 61, 75; 36 *Id.* 96;

19 *Id.* 319; 16 Cyc. 941, *et seq.;* 62 Ark. 84, 88, 91; 25 L. R. A. (N. S.) 760; 209 Fed. 758; 143 Pa. 815; 120 Md. 176; 87 Atl. 814; 211 Mass. 429, 97 N. E. 1094; 162 Mass. 72, 38 N. E. 29.

2. The testimony as to the Cleora property should not have been admitted. The two transactions were entirely independent. 101 Ala. 1, 13 So. 283; 33 S. W. 604; 121 N. Y. 57.

S. H. Mann and *L. C. Going,* for appellees.

1. There was no error in admitting testimony as to the Cleora machinery.

2. Instruction No. 1 was properly given. 2 Corpus Jur. 594, § 230; 24 Law Ed. U. S. 511; 59 Am. Rep. 502. No specific objections were made. Taken in connection with other given, there was no error.

STATEMENT BY THE COURT.

George W. Rogers instituted an action in replevin against W. H. Scott and the Kemler Lumber Company to recover 29.87 tons of steel rails of the value of $657.14. The material facts are as follows:

George W. Rogers resides at Little Rock, Arkansas, and has been engaged in the banking business for the past thirty years. In the first part of the year 1914, Rogers owned a lot of mill machinery consisting of a locomotive, log cars, railroad iron, and other machinery at Cleora, Louisiana. At that time L. B. Brackin was engaged in selling second-hand machinery at Pine Bluff, Arkansas. On February 18, 1914, Rogers and Brackin entered into a written contract whereby the latter was to take charge of all the aforementioned machinery and ship the same to his place of business at Pine Bluff, Arkansas, and there dispose of it for the best price obtainable. It was agreed that a certain stipulated price should be paid to Rogers after the machinery was sold, and that all that the machinery sold for above that price should be equally divided between Rogers and Brackin. Rogers also had a lot of mill machinery and about thirty-six tons or more of steel rails at Reeder, Arkansas, where he had formerly

operated a mill. In May, 1914, according to Rogers' own testimony, he authorized Brackin to load the number two rails and the other machinery on the railroad cars and have the same hauled to Brackin's yard at Pine Bluff. He testified that it was agreed that Brackin should sell the same as Rogers' agent, but only upon terms satisfactory to him; that he told Brackin to stack the number one rails at Reeder, Arkansas, but did not authorize him to sell the same or exercise any control whatever over them; that in March, 1916, he discovered that a carload of steel rails had been shipped from Reeder, Arkansas, on December 14, 1914, consigned to W. H. Scott, at Hughes, Arkansas; that this was the first knowledge that he had that the rails had been removed; that he made demand for the return of the same of Scott, and that Scott refused to return them. Other evidence was introduced tending to corroborate the statement of Rogers.

On the other hand, L. B. Brackin testified that Rogers gave him authority to sell the rails in controversy; that he saw an advertisement in the paper that W. A. Scott wished to buy steel rails for himself and the Kemler Lumber Company; that he answered this advertisement and got in correspondence thereby with Scott and finally sold to him and the lumber company the steel rails in question. His testimony was also corroborated by other evidence.

It is also shown in evidence that Scott at the time he purchased the rails made no inquiry of Brackin as to who owned the same, but assumed that they were owned by Brackin, and the contract was made with him as the owner. It was further shown that Brackin had taken charge of all the machinery at Cleora, Louisiana, under his written contract with Rogers, and had shipped the same to his warehouse and yards at Pine Bluff, and disposed of it at various times under their written contract; that he also took charge of all the machinery and steel rails at Reeder, Arkansas, under his oral contract with

Rogers, and disposed of them in the same way, accounting to Rogers for the proceeds from time to time.

Proceedings in bankruptcy were finally instituted against Brackin, and are now pending in the bankruptcy court.

There was a verdict and judgment for the defendants, and the plaintiff has appealed.

HART, J., (after stating the facts). Counsel for the plaintiff assigns as error the action of the court in giving instruction No. 1 at the request of the defendants. The instruction is as follows:

"1. You are instructed that although you should find from the testimony that L. B. Brackin was not in fact the agent of the plaintiff to sell the property sued for, yet, if you should further find from the evidence that the plaintiff permitted the said Brackin to hold possession of this property and other property of a similar character, and permitted him to hold and sell, from time to time, property of a similar character, and to hold same out for sale, to any one who should offer to purchase, and that the defendant purchased the property without knowledge of the contract between the plaintiff and Brackin, your verdict will be for the defendants."

(1-2) The general rule is that no man can get a title to personal property from a person who himself has no title to it. There are, however, certain exceptions to the general rule. One of these exceptions is that a *bona fide* purchaser will be protected where the owner has conferred upon the seller the apparent right of property as owner or for disposal as his agent. *Jetton* v. *Tobey,* 62 Ark. 84. See, also, *Andrews* v. *Cox,* 42 Ark. 473, and case note to 25 L. R. A. (N. S.) 761 and 770. The question of whether Rogers, by his acts and conduct, so clothed Brackin with the indicia of ownership and the right to dispose of the rails that he was estopped from asserting his actual ownership against an innocent purchaser for value was submitted to the jury under proper instructions to which no objection has been urged by the plaintiff.

Counsel for the plaintiff insists, however, that instruction No. 1 went further than this, and in effect directed the jury to find for the defendants. In this contention we think counsel are correct. The instruction tells the jury that if Rogers permitted Brackin to hold possession of the steel rails and other property of a similar character, and permit him to hold and sell from time to time property of a similar character, that its verdict should be for the defendant. There was a conflict between the testimony of Rogers and of Brackin as to whether the former gave the latter the authority to take possession of and sell the steel rails in controversy. Rogers asserted that he did not give Brackin such authority, and Brackin on the other hand said that Rogers did give him such authority. It was proper that the jury should consider that during the same interval of time, Rogers did deliver to Brackin other property of a similar character to sell for him as tending to show that he gave such authority to Brackin as to the property in question; but it was wrong to instruct the jury that if Rogers permitted Brackin to hold property of similar character, and sell it for him, that its verdict should be for the defendants, for this would invade the province of the jury. The question was whether Brackin did possess such authority, and that question can not be determined alone by what authority was given him in other cases in regard to similar property. Rogers being the owner of the property, could at his own pleasure give such authority in one case, and withhold it in another.

Again, it is urged that the judgment should be reversed because the court improperly admitted evidence of the first contract between Rogers and Brackin as to the machinery and other property at Cleora, Louisiana. We do not agree with counsel in this contention. In the first place it may be said that Rogers himself first testified as to the Louisiana contract, and introduced it in evidence. In the second place it was competent for the defendants to introduce it as tending to show the course

of dealing between Rogers and Brackin, and thus to show the apparent authority of Brackin to dispose of the property in question.

For the error in giving instruction No. 1 at the request of the defendants, the judgment will be reversed and the cause remanded for a new trial.

INMAN v. QUIREY.

Opinion delivered April 23, 1917.

1. HOMESTEAD—DUTY OF WIDOW TO PAY TAXES.—Where the widow has the exclusive right to the possession of homestead property, it is her duty to pay the taxes thereon.
2. TAX SALE—PURCHASE BY PARTY BOUND TO PAY.—A purchase at a tax sale made by one whose duty it is to pay the taxes, shall operate as payment only, and he acquires no rights as against a third party by a neglect of the duty which he owed to such party. One who is in possession of land and receiving the rents and profits, can not acquire a title to it by a purchase for taxes; such purchase would operate only as a payment of the taxes.
3. TAX SALES—PURCHASE BY CO-TENANT.—A co-tenant can not add to or strengthen his title by purchasing the title to the entire property from a stranger who has purchased the premises at a tax sale.
4. TAX SALES—CONVEYANCE BY PURCHASER TO LIFE TENANT.—J., a widow, together with her son G., held possession of certain property as a homestead. The same was sold for taxes and purchased by appellant, who, before he acquired title under Kirby's Digest, § 5061, reconveyed to J. and G. *Held*, the conveyances operated as a payment of the taxes and a redemption by J. and G., and extinguished appellants' tax title, so that it could in no way operate as color of title in appellant.
5. CO-TENANTS—RIGHTS INTER SE—POSSESSION—LACHES.—The possession of one co-tenant is the possession of all and laches can not bar the right of entry to a co-tenant until the latter's disseisin has been affected by some notorious act of ouster brought home to his knowledge.
6. FRAUD—LIFE TENANT AND THIRD PARTY—COLLUSION.—Where the evidence establishes a collusive attempt on the part of a life tenant and a third person to acquire the whole title to the land, such transaction will be deemed fraudulent and void and will be set aside in equity.
7. CO-TENANCY—PURCHASER OF INTEREST—DUTIES.—One who purchases the entire title to lands from one of several co-tenants, with knowledge of the facts, becomes a tenant in common with the other parties interested, and is charged with the same duties and obligations towards his co-tenants as any other tenant in common would

be. He can not claim adversely to their interest until he had notified them of that fact.

8. DEEDS—DELIVERY TO BECOME EFFECTIVE UPON THE HAPPENING OF A CONDITION.—Parol evidence is admissible to show that deeds, delivered to the grantees, were not to become effective until the happening of a certain condition, and such a delivery held not to be in escrow.

Appeal from Lawrence Chancery Court, Eastern District; *George T. Humphries,* Chancellor; affirmed.

W. A. Cunningham, O. C. Blackford, W. P. Smith and *G. M. Gibson,* for appellant.

1. Appellant held actual possesion under a tax title for more than two years. Kirby's Digest, § 5061; 79 Ark. 364.

2. Appellees are barred by laches. 20 Ark. 381; 73 Am. Dec. 497; 38 Cyc. 4041; 123 La. 835; 49 So. 590.

3. In any event the decree should be modified so as to permit recovery by each of the plaintiffs of the interest only, which the evidence shows each of them to have had at the time the suit was filed, and not to include the interest deeded to them by Baker and Sloan before the filing of the suit. Kirby's Digest, § § 5999, 6001-2, 6004. There were no conditions in the deeds—they were delivered at once. 110 Ark. 425; 123 *Id.* 601. Baker and Sloan should have been made parties.

4. One cotenant can recover only such interest as he may prove himself entitled to. 43 Neb. 368; 47 Am. St. 765; 91 Va. 344; 50 Am. St. 838, 842, note; 156 Mo. 566; 57 S. W. 719; 79 Am. St. 540; 26 Mo. 291; 13 *Id.* 335.

Baker & Sloan, for appellees.

1. Appellant did not acquire title by limitation. The tax sale was prearranged and a fraud. It was Mrs. Jones' duty to pay the taxes, as she was in possession enjoying the rents and profits. Kirby & Castle's Dig., § § 8780, 8785; 59 Ark. 364; 95 *Id.* 333. This is true, also, of Gus Holman. 33 Ark. 267, 275; 32 *Id.* 97, 111; 46 *Id.* 504; 53 *Id.* 428; 14 S. W. 646; 22 Am. St. 231; 62 Ark. 188; 35 S. W. 788. One can not buy at his own tax sale, and

quiet his title. 99 Ark. 543; 139 S. W. 639; 31 Ark. 334, 344. The two years' statute does not apply. 71 Ark. 273.

2. A tenant in common is under the same disability. 55 Ark. 104; 40 *Id.* 42; 49 *Id.* 242; 38 Cyc. 48. The tax sale was void. 107 Ark. 374, 379. Inman acquired no title by the sale. 71 *Id.* 310.

3. The tax title was extinguished by the redemption.

4. Certain of the appellees were minors. Kirby & Castle's Dig., § 6003; 87 Ark. 428, 430.

5. The charge of laches is not sustained. 94 Ark. 122, 126; 89 *Id.* 23; 146 S. W. 135.

6. No statutory ground is alleged in the motion to modify. Kirby & Castle's Digest, § § 5160-2-3; 83 Ark. 17; 104 *Id.* 499; 120 *Id.* 255. He had no meritorious defense. But Baker and Sloan were made parties, and their rights adjudicated. The deeds were shown not effective to convey present title. 76 Ark. 140; 80 *Id.* 8, 11.

7. All defects of parties were wavied. Kirby & Castle's Digest, § 7538; 37 N. Y. 372; 85 S. W. 1134; 117 Ark. 544; 75 *Id.* 288; 91 *Id.* 252, etc.

STATEMENT BY THE COURT.

On November 9, 1914, appellees instituted this action in the chancery court against appellants to recover an undivided four-fifths interest to one hundred and sixty acres of land in Lawrence County, Arkansas, and for an accounting of the rents and profits therefrom.

J. E. Inman, one of the appellants, filed an answer in which he claimed title to the whole of said land by purchase and by adverse possession under a tax title. He also pleaded that appellees were barred of relief by laches.

The material facts are as follows: Squire Holman originally owned the land and lived on it with his wife and their minor children. He died in 1888, leaving surviving him, as his widow, Mrs. M. E. Holman and ten children as his heirs at law. Six of these children were borne him by Lizzie Holman, his first wife, who died while he lived in Kentucky. Holman married again in

Kentucky and the remaining four children were born of his last marriage. Holman came to Arkansas about three years before his death with his wife and part of his children and a part of them remained in Kentucky, where they still reside. When he came to Arkansas, he established his homestead on the one hundred and sixty acres in controversy, and lived there until the time of his death. After his death his widow continued to occupy the homestead with some of her children. She permitted the land to be sold for taxes, but it was redeemed from the tax sale, and she continued to reside on it thereafter with her son, Gus Holman. On the 11th of June, 1906, the land was again sold for taxes and the appellant, J. E. Inman, became the purchaser. On June 19, 1908, a clerk's tax deed was executed to Inman to the whole one hundred and sixty acres. It is conceded that the tax sale was void. On April 10, 1910, Inman and wife conveyed to Mrs. M. E. Jones, eighty acres of the land and the consideration recited in the deed was $200. On April 6, 1910, Inman and wife conveyed eighty acres of the land to Gus Holman and the consideration recited in the deed was $200. On April 13, 1912, Mrs. M. E. Jones conveyed to J. E. Inman the eighty acres which he had conveyed to her, and the consideration recited in the deed was $450. On the same day, Gus Holman reconveyed to Inman the eighty acres which had been conveyed to him by Inman, and the consideration recited in the deed was $800. Mrs. M. E. Jones and her son Gus Holman continued in possession of the land until after they reconveyed it to Inman on April 13, 1912.

At the time of the institution of this action, some of the children of Squire Holman had died intestate and left surviving children of their own, all of whom are made parties to the action. Inman purchased the interest of some of these so that at the time the decree in this case was entered of record he owned by purchase an undivided one-fifth interest in the property and appellees owned four-fifths interest in it.

The chancellor found that the sale by Inman to Mrs. M. E. Jones and Gus Holman amounted to a redemption of the lands from the tax sale and operated as a payment of the taxes, and that Inman's plea of adverse possession for two years under the tax title was not available to him as a defense to this action, and that he had not held the lands adversely for a sufficient period of time to acquire title by virtue of the seven years' statute of limitation. Appellees were decreed to be the owners of an undivided four-fifths interest in the lands, and appellant Inman was decreed to be the owner of an undivided one-fifth interest therein, and also to be the owner of the undersigned power of Mrs. M. E. Jones, who had married a man named Jones a few years after her former husband, Squire Holman, had died. After this decree had been entered of record, Inman found out that the heirs of Squire Holman had executed a deed to Basil Baker and Horace Sloan to a one-half interest in their undivided interest in the lands. Baker and Sloan were then asked to be made parties to the suit and the court granted the request. The court then found that the deeds executed to Baker and Sloan were not intended to take effect until the final determination of the lawsuit, and that in the absence of said deeds, appellees had a right to bring proceedings to recover their interest in the premises. There was also a final decree in which Inman was charged with the rents received by him and allowed the improvements made by him. Inman has duly prosecuted an appeal to this court.

HART, J., (after stating the facts). (1) Squire Holman owned the lands in controversy as his homestead at the time of his death. About two years after his death his widow, Mrs. M. E. Holman, married a man named Jones. She still continued to reside upon the land with some of her children. At the time the lands were sold for taxes on June 11, 1906, for the taxes of 1905, Mrs. M. E. Jones resided on the land with her son, Gus Holman. She had a life estate in the lands by virtue of her home-

stead interest. She had the exclusive right to the possession of the lands and it was her duty to pay the taxes thereon.

In *Rodman* v. *Sanders,* 44 Ark. 504, it was held that one who is in possession and receiving the rents and profits of land can not acquire a title to it by a purchase for taxes, and that such acts only operate as a payment of the taxes.

(2-3) In *Cocks* v. *Simmons,* 55 Ark. 104, it was held that a tenant in common of land can acquire no title to the interest of his cotenants by purchase at a sale of the whole for delinquent taxes and that his purchase amounts to no more than the payment of the taxes and gives him no right except to demand contribution from his cotenants. Many cases to the same effect are cited in a case note in 8 A. & E. Ann. Cas. at page 988. Various reasons have been assigned for the rule and the one most frequently given is based upon a community of interest in a common title creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the property so situated. Judge Cooley says that a purchase made by one whose duty it was to pay the taxes shall operate as payment only, and that he shall acquire no rights as against a third party by a neglect of the duty which he owed to such party. Cooley on Taxation, 3 ed., vol. 2, p. 965. This rule applies with especial force to Mrs. M. E. Jones, because she had a life estate in the lands, was entitled to the exclusive possession of them, and it was her duty to pay the taxes. If she had purchased, or procured any one to purchase for her, the lands at a sale thereof on account of the nonpayment of taxes, her purchase would be void and operate as a payment of the taxes. *Swan* v. *Rainey,* 59 Ark. 364; *Rowland* v. *Wadly,* 71 Ark. 273. The rule is founded on public policy and is designed not only to protect the interest of the parties represented,

but as a guard against temptation on the part of the representatives. For the same reason it is said that a cotenant can not add to or strengthen his title by purchasing the title to the entire property from a stranger who has purchased the premises at a tax sale, as the law will not allow that to be done indirectly which can not legally be accomplished directly. See case notes to 8 A. & E. Ann. Cas. at 989 and 116 Am. St. Rep. 367, and 75 Am. & St. Rep. at 239; *Phillips* v. *Wilmarth,* 98 Ia. 32, 66 N. W. 1053, and *Duvois* v. *Campau,* 24 Mich. 360.

Inman purchased the land at the tax sale and received the clerk's tax deed therefor in April, 1908. He conveyed a part of the land back to Mrs. Jones on April 10, 1910, and a part of it to Gus Holman on April 6, 1910. During all this time Mrs. Jones and Gus Holman had been in possession of the land. The reconveyance to them operated as a payment of the taxes. On April 13, 1912, Mrs. Jones and Gus Holman reconveyed the lands to Inman and he went into possession of them. This suit was not brought until November 9, 1914, hence it is insisted that Inman acquired a title by adverse possession under the tax deed which was executed to him on June 19, 1908, although it is conceded that the sale for taxes was void. It is contended that this tax deed notwithstanding the tax sale was void and the conveyance from Inman to Mrs. Jones and Gus Holman in 1910, operated as a payment of taxes, remained as color of title and entitled him to the benefit of section 5061 of Kirby's Digest in regard to the time in which suits may be brought against the purchaser at a tax sale. They rely upon the cases of *Brandon* v. *Parker,* 124 Ark. 379, and *Moore* v. *Morris,* 118 Ark. 516.

(4) In the case of *Moore* v. *Morris,* the title to the land was wrested from the holders of the record title by adverse possession for seven years. The court held that notwithstanding this fact, the record title continued in existence and remained as color of title so that the holder

of the record title could reacquire title to the lands by payment of taxes for seven years under section 5057 of Kirby's Digest, the lands being wild and unoccupied lands. This rule was extended in *Brandon* v. *Parker*. There a person held lands under a donation deed and another person entered in possession of them within two years and acquired title by adverse possession. It was held that the donation deed of the first owner, although the lands were forfeited to the State under a void tax sale, remained as color of title so that the holder of it could acquire title by adverse possession for two years under section 5061 of Kirby's Digest. The effect of the holding in those two cases was that although the first owner lost his title by the fact that another had acquired title by adverse possession, his deed or paper title not having been canceled by any order or judgment of the court, remained as color of title. As we have already seen, when Inman conveyed the lands to Mrs. Jones and to Gus Holman, in April, 1910, he had not acquired title to the lands under section 5061 of Kirby's Digest. Hence his reconveyance of the lands to them operated as a redemption of the lands and as the payment of the taxes by Mrs. Jones and Gus Holman. The deeds to them as fully extinguished the tax title of Inman as could have been done by any order or judgment of a court, and it could no longer remain as color of title. The deeds from Inman back to Mrs. Jones and Gus Holman having operated in law as a payment of the taxes, Inman had no further rights in the premises under the tax sale and could not thereafter be considered as a tax purchaser at all. To hold otherwise would prevent the repurchase by Mrs. Jones and Gus Holman from operating in law as a payment of the taxes.

(5) It is also contended that the appellees are barred of relief in this case by laches. There is a principle of law that where a cotenant buys in an outstanding title, his cotenant must elect within a reasonable time to

contribute his due proportion of the money expended in purchasing the outstanding title. *Brittin* v. *Handy,* 20 Ark. 381, and *Clements* v. *Cates,* 49 Ark. 242. This rule, however, has no application to a case like this; for the possession of one cotenant is the possession of all and laches can not bar the right of entry to a cotenant until the latter's disseisin has been effected by some notorious act of ouster brought home to his knowledge. *Parker* v. *Brast* (W. Va.), 32 S. E. 269. This rule applies with especial force for the reason that Mrs Jones had a life estate in the lands and was entitled to the exclusive possession of them, and it was her duty to pay the taxes. She and her son, Gus Holman, were in possession of the land up to the time they sold it to Inman in April, 1912. This action was brought on November 9, 1914, and was instituted within a reasonable time after appellees ascertained that Inman was claiming the land under his purchase of the land from Mrs. Jones and Gus Holman. Some of the parties interested lived in Kentucky and there were minors, and when all the circumstances are considered we are of the opinion that they were not barred of relief by laches.

(6) There is still another reason for upholding the decision of the chancellor. In a case note to 8 A. & E. Ann. Cas. at page 989, it is said that where a cotenant entered into negotiations with a third person by which such third person agrees to bid in the property at the tax sale and after the period of redemption expires to transfer it to the cotenant, or where, after a third person has bid in the property at a tax sale, a cotenant, by collusion with him, secretly redeemed the property and after the period of redemption has expired takes a deed from the purchaser; the transaction is fraudulent, and the purchasing tenant acquires no title as against his cotenants. Several cases are cited in support of the rule. In the cases of *Swan* v. *Rainey,* 59 Ark. 364, and *Rowland* v. *Wadly,* 71 Ark. 273, this court has distinctly recognized the rule

that where the evidence establishes a collusive attempt on the part of a life tenant and a third person to acquire the whole title to the land, such transaction will be deemed fraudulent and void and will be set aside in equity.

We think the testimony in the present case shows collusion between Mrs. Jones and her son on the one hand and Inman on the other to acquire the whole title to the land in fraud of the rights of their cotenants, at least after Mrs. Jones and Holman found out that Inman had become a purchaser at the tax sale. It is true that all of these parties deny this to be true, and state that the transaction had between them was in perfect good faith, but their testimony is contradicted by the testimony of other witnesses and also by certain contradictions and inconsistencies in their own testimony, which we will briefly attempt to point out.

It will be remembered that Mrs. Jones had had possession of the land since her husband died in 1888 and resided on it with her son, Gus Holman, at the time of the sale for nonpayment of taxes in June, 1906. Inman received his tax deed in April, 1908. Mrs. Jones and Gus Holman claimed that they began to pay him rent as soon as they found out he had received his tax deed. It does not appear that they made any effort to find out whether the tax deed was valid or not. It is now conceded that it was void. They say that they each paid Inman $200 for a deed to eighty acres of the land. Gus Holman admits that he had no money with which to pay the taxes on the land and no money with which to redeem it. It is not shown that Mrs. Jones had any money whatever. She lived on the place with her son, Gus Holman, and had no other occupation than that of housekeeper for him. Their answers as to where they got the $400 with which they bought the property from Inman are evasive, and it is fairly inferable that they did not have any such amount of money. In addition to this, a witness

testified that Gus Holman told him that they had let the land sell for taxes and were buying it in to strengthen their title. The amount of cleared land on the place was barely sufficient to afford a living for Mrs. Jones and her son, and it is not shown that they ever made anything above a living.

Inman testified that when he bought the land back he agreed to pay Mrs. Jones $450 and Gus Holman $800. He first stated that he paid them this amount in cash, but subsequently said that they owed him some accounts and that these accounts were taken as part payment of the land. They had been trading with Inman for several years, he said, and owed him on that account. This tends to show that Gus Holman and his mother did not have any money with which to purchase the land in 1910.

They testified that Inman paid them cash when they reconveyed the land to him in 1912. Inman first stated that he did not know that any one else had an interest in the land except Mrs. Jones and Gus Holman, but upon cross-examination he admitted that he talked with them before he bought the land and that they told him about the state of the title. He said they told him that Squire Holman had sold a tract of land owned by him in Kentucky, and had given the children there a part of the purchase price and had taken a part of it himself and had come to Arkansas, and bought the land in question with the understanding that his Kentucky children would claim no interest in any land he might purchase in Arkansas.

On the other hand, it is shown by appellees that the land sold by Squire Holman in Kentucky was owned by his first wife, and that his children by his first wife only took a part of the proceeds of the sale and let their father keep the other for the purpose of buying land when he came to Arkansas. Be that as it may, it is admitted by

Inman that he knew the land belonged to Squire Holman at the time of his death.

Another witness testified that he talked with Inman in 1908, and that Inman admitted to him then that he knew that other parties than Mrs. Jones and Gus Holman had an interest in the land.

(7) Still another witness testified that Inman wanted him to go in with him and buy the land from Mrs. Jones and Gus Holman, and said that Inman then knew that other parties had an interest in the land. It is true Inman denies these conversations, but when all the facts and circumstances are considered together, we think the evidence establishes a collusive attempt on the part of Inman and Mrs. Jones and Gus Holman to acquire the whole title to the land, and that this constituted a fraud which would warrant the chancellor in setting aside the sale to Inman. Besides that, as we have already seen, Inman knew that other persons were interested in the land when he purchased it from Mrs. Jones and Gus Holman, and that he could only acquire by purchase from them whatever interest they might have in the land. By his purchase he became a tenant in common with the other parties interested in the land and was charged with the same duties and obligations towards his cotenants as any other tenant in common would be. He could not claim adversely to their interest until he had notified them of that fact.

Counsel for appellant filed a motion to modify the decree on the ground that appellees by certain deeds had conveyed a one-half interest in their respective shares to Baker and Sloan, attorneys, and that they had concealed this fact until after the decree was entered of record. It appears from the testimony of Baker and Sloan that the appellees employed them to recover their interest in the land in controversy and agreed to pay them one-half of the lands so recovered. A written contract to this effect was entered into between the parties which

provided that Baker and Sloan were to have one-half of whatever percentage of the land they recovered for appellees in the action. Subsequently the parties realized that on account of the number of appellees and the fact that they lived in various places, it would be difficult to procure deeds from them in the event of a sucessful termination of the suit. Hence, they executed deeds to Baker and Sloan and delivered them to them with the express understanding that the deeds should not take effect unless there was a recovery of the lands. The court held that the deeds executed to Baker and Sloan were not intended to take effect until the final determination of the action, and that appellees had a right to bring proceedings to recover their interest in the premises without making Baker and Sloan parties. We think the decision of the chancellor was correct.

(8) It is insisted that such holding violates the well known rule of evidence that parol testimony is inadmissible to vary the terms of a written instrument and that the delivery of the deeds to Baker and Sloan was an attempt to deliver the deeds in escrow to the grantees which can not be done, for a delivery to a stranger is essential to an escrow. Conditions precedent are such as must happen before the estate depending upon them can arise. In the present case the deeds were delivered to Baker and Sloan upon the express condition that the deeds should not become effective until the successful determination of the lawsuit. Thus they were not to become operative until another part of the contract, a condition precedent, was fulfilled. This court has held that parol evidence tending to show that a written instrument was not delivered as a present contract but was left in the hands of the obligee on condition that it should not become a binding contract except in a certain contingency was competent. *Graham* v. *Remmel*, 76 Ark. 140; *Worthen* v. *Stewart*, 116 Ark. 294, and *Kimbro* v. *Wells*, 112 Ark. 126. For the same reason the delivery of the deed

subject to the condition precedent above referred to was not an attempt to deliver the deed in escrow to the grantees. Hence we think the decision of the chancellor on this branch of the case was also correct.

Moreover, Baker and Sloan were made parties to the proceedings after the original decree was entered of record and their rights were adjudicated. Therefore, no prejudice could have resulted to appellants because they were not made parties in the first instance.

We have carefully considered the record in regard to the rents and the improvements, both on appeal and the cross-appeal, and without protracting this opinion to set out the evidence and finding of the court on these points in detail, we deem it sufficient to say that we are of the opinion that the decree of the chancellor was correct on this branch of the case.

It follows that the decree in its entirety will be affirmed.

McCULLOCH, C. J., (concurring). I concur in the judgment of affirmance solely on the ground that a majority of the judges think the evidence was sufficient to warrant the finding that Inman participated in the conspiracy to permit the sale of the land for taxes in order to divest title out of the heirs of Squire Holman, and I am willing to yield my views on that disputed question of fact. But I am unwilling to declare the law to be that the purchase of the land from Inman by the widow and her son constituted a redemption from the tax sale so as to destroy the effect of the tax deed as color of title, and that in the absence of participation by Inman in the alleged wrongful conduct of the widow he should be denied the benefit of his occupancy under the deed as an investiture of title by operation of the statute of limitations.

My conclusion is that the question is controlled by the case of *Brandon* v. *Parker*, 124 Ark. 379, and that the distinction made by the majority between this case and

that one is unsound. That was a case where the effect of a tax deed as color of title was involved, and the title under the deed had been extinguished by adverse occupancy for the period of limitation, but the holder of the deed subsequently secured possession and claimed under the deed as color of title. We held that, notwithstanding the extinguishment of the title under the tax deed, it still subsisted as color of title. In the opinion in that case we said: "The owner * * * lost his title, but his deed, not having been cancelled by any order or judgment of the court, remained as color of title and entitled him to the benefit of the provisions of section 5057 of Kirby's Digest, upon complying with its terms. * * * He had lost his title by the previous adverse occupancy, yet his deed was color of title and he entered into it and remained in possession of the land for more than two years, and he thereby became entitled to claim the benefits of section 5061 of Kirby's Digest."

In the present case the tax deed had never been canceled. Its force as a conveyance of the title had been destroyed by the acts of the widow and her son, which a court of equity will treat as a redemption, but the deed itself did not cease to be "that which, in appearance, is title, but which, in reality, is no title." ***Beasley* v. *Equitable Securities Co.,*** 72 Ark. 601.

Inman occupied the land under this deed more than two years, and, if he was free from participation in the wrong-doing of others with respect to the tax sale, his title by limitation would be complete under the law declared in *Brandon* v. *Parker, supra.*

Mr. Justice SMITH concurs.

PENZEL v. TOWNSEND, TRUSTEE.
PENZEL v. STATE NATIONAL BANK.

Opinion delivered April 23, 1917.

CORPORATIONS—INSOLVENCY—PAYMENT OF DIVIDEND.—Under the evidence *held* the directors of a corporation knew of its insolvency at the time they declared and ordered paid a dividend on its capital stock, and that both the stockholders and directors of the corporation were liable to its creditors under Kirby's Digest, §§ 861 and 862.

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

Johnson & Gray and *J. A. Watkins,* for appellants.

1. Two elements are indispensable to create a liability under sections 861-2 of Kirby's Digest. (1) The insolvency of the corporation and (2) the knowledge of the directors that the corporation is insolvent. 114 Fed. 22; 91 S. W. 262; 31 L. R. A. 593. The directors, when the dividend was declared, acted honestly and were diligent and careful and the court erred in holding them liable.

Coleman & Lewis and *Wallace Townsend,* for appellees.

The directors knew the corporation was insolvent and are clearly liable. Kirby's Digest, § § 861-2; 118 Ark. 176, 190; 92 *Id.* 330, 332-4; 115 *Id.* 392; 61 Pac. 612, 618; 57 N. E. 514; 114 Fed. 22; 91 S. W. 262; 31 L. R. A. 593; 92 Ark. 327, 334; 68 *Id.* 433; 75 *Id.* 148; 93 Id. 112, 118; 175 Mich. 168; 141 N. W. 882; 68 Ark. 433; 122 *Id.* 604.

SMITH, J. Wallace Townsend, as trustee of the Little Rock Stave Company, a bankrupt, brought suit in the Pulaski chancery court against appellants, as stockholders of said company, to recover a ten per cent. dividend which was paid on the capital stock of said company on the 16th day of April, 1912, alleging that, on the 12th day of April, 1912, when said dividend was paid, said corporation was insolvent, and that "the payment of this

dividend amounted to the withdrawing and refunding to the stockholders a part of the capital stock of said corporation."

Appellants answered, admitting payment of the dividend, but denying the corporation was insolvent at the time the dividend was paid, and denying that the payment of this dividend amounted to the withdrawing and refunding to the stockholders part of the capital stock.

The State National Bank brought suit against the directors of the Little Rock Stave Company, and alleged that on April 16, 1912, they had declared a dividend of ten per cent. on the capital stock of said company, which was paid, and that said corporation was then insolvent, and that said directors knew said corporation to be insolvent, and that at that time said corporation was indebted to the State National Bank in the sum of $8,828.78. Judgment was prayed against said directors for said sum with interest.

Appellants answered, admitting payment of the dividend, also the indebtedness of appellee, but denied that said corporation was insolvent on the day alleged, and further denied, if it was insolvent, that they knew such to be the fact.

Appellants also pleaded the statute of limitations.

The two cases were submitted upon the same transcript of evidence by agreement of counsel. In the first case the court found that the defendants there named as stockholders of the stave company received payment of a dividend of ten per cent., declared April 16, 1912, on the face value of their stock and that the payment of said dividend amounted to withdrawing and refunding to the stockholders a part of the capital stock of said corporation, and rendered judgment against each stockholder for the amount so withdrawn. In the second case the court found that the directors of the stave company declared, and paid, on the face value of the capital stock of the stave company, a dividend of ten per cent., and

that, at the time said dividend was declared and paid, the company was insolvent, and that the insolvency of the company was known to its directors. There was a finding of the indebtedness due by the company and a judgment for the amount thereof against the directors of the company.

The first of these suits was brought under the authority of section 861 of Kirby's Digest, which reads as follows:

"Sec. 861. If the capital stock of any such corporation shall be withdrawn and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be liable to any creditor of such corporation, in an action founded on this statute, to the amount of the sum refunded to them respectively, as aforesaid; but if any stockholder shall be compelled, by any such action, to pay the debts of any creditor, or any part thereof, he shall have the right, by bill in equity, to call upon all the stockholders to whom any part of said stock has been refunded to contribute their proportional part of the sum paid by him as aforesaid."

The second suit was based upon section 862 of Kirby's Digest, which is as follows:

"Sec. 862. If the directors of any such corporation shall declare and pay a dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, knowing such corporation to be insolvent, or that such dividend would render it so, the directors assenting thereto shall be jointly and severally liable, in an action founded on this statute, for all debts due from such corporation at the time of such dividend."

The sections of Kirby's Digest set out above authorize the rendition of the decrees herein appealed from, provided the evidence supports the finding made by the court below, and we have only, therefore, to consider the sufficiency of the evidence for that purpose.

It was shown on behalf of appellants that, at the annual meeting of the stockholders of the stave company held on April 16, 1912, a report of the affairs of the company was submitted to the stockholders, which report was signed by Penzel, as president, by Sadler, as vice-president and manager, and by McNair, as secretary and treasurer. This report was devoted chiefly to an explanation of the failure to earn money during the year's business covered by the report. A loss of $1,500 was reported as a result of warm and rainy weather, causing a mould which had reduced the grade of staves owned by the company. It was further recited that the managers of the company had been disappointed in their expectations of shipping their staves in boats, but that on account of the low stage of the river, upon the banks of which the staves had been piled, they had been compelled to haul the staves to the railroad and ship by rail, and that this delay resulted in many staves becoming sundried and checked, to the extent that a loss of $1,200 was entailed on that account. It was also recited that it had become necessary to replace steam boxes which had been in use for a period of five years, at an expense of $600; and it was stated that these expenses and the unusual and unexpected losses would, of themselves, have represented a fair profit on the year's business. It was also stated in this report that the demand for staves was brisk, and that the price had advanced, but that the company's timber and expense in the woods had not increased, and a prosperous year's business was predicted.

The secretary of the company submitted at the stockholders' meeting a statement, under date of April 1, 1912, showing in detail the assets and liabilities of the company, and, according to this statement, there was a balance in favor of the assets of the company of $11,039.98. This statement, however, did not include the capital stock of the company, amounting to $16,500,

which was fully paid up. The directors testified that they had given attention to the affairs of the company, and held regular monthly meetings for that purpose, and that they believed the company to be solvent at the time the dividend was declared. They stated that the business of the stave company had been uniformly prosperous until that company acquired and took over the business of the Little Rock Hoop Company, which had proved unprofitable and brought upon the stave company its financial troubles, and that they had, themselves, put into the business of the company the sum of $2,500, thinking and believing that by so doing the affairs of that company would be restored to a healthful condition.

It was shown, however, that, notwithstanding the capital stock of the company, as originally subscribed, was $16,500, the stock had been bought up by the present stockholders at fifty cents on the dollar. That the debts of the stave company, with the interest thereon, amounted to $10,729.47, and that there was being carried on the books of the company accounts, aggregating nearly eight thousand dollars, which were worthless, and that these accounts were so carried for two years after they were known to be worthless. The books of the company were audited by a Mr. Orto, an expert accountant, under the direction of the court, and he testified that the books of the company showed a loss of $4,469.92 on the business for the year 1911; and yet a dividend of ten per cent. on the full amount of the capital stock was declared and paid for that year.

The report of the managing officers set out above explained losses of $3,300.00 and Orto testified that the books of the company showed an additional operating loss for that year of $2,605.75, which was increased by $1,650.00 upon the dividend for that amount being declared. It was also shown that this annual report to the stockholders carried certain assets, consisting chiefly of land and timber, at a valuation which was excessive by

more than $1,500.00. It also appears that certain machinery, which was taken into the books at $1,830.00 on April 1, 1910, was, on April 1, 1912, after two years' use, carried at $2,075.00. Certain sheds were carried on the books originally at a valuation of $1,500, but, in this statement of April 1, 1912, were carried as worth $2,001.40. It was also shown that these sheds had not been enlarged or repaired, and that they stood on the ground held by the company under a lease which required the company to surrender the premises on January 1, 1915, and that after the plant closed down the sheds were blown down because of their dilapidated condition.

The figures compiled by the accountant make it certain that the company was insolvent to the extent of several thousand dollars on April 1, 1912, and to a still larger amount if deductions for depreciation were made.

The only question in the case presenting any difficulty is, whether the directors knew the company was insolvent at the time they ordered the dividend paid. These directors held monthly meetings, and allowed themselves a salary of $25.00 per month each. They admitted that they knew these statements contained old accounts, of doubtful value, which had been carried on the books of the company after they were long past due, and upon which nothing had been realized. This $2,500 which the directors claimed to have put into the business, and which they say evidenced their faith in its solvency, was shown to have been a loan which they made to the company on September 15, 1910, for the purpose of purchasing material and paying operating expenses. This loan was made for ninety days, but the company was unable to pay it upon its maturity. At the annual meeting in April, or thereafter, these directors were all present, when a motion was adopted authorizing the charging off of a loss of $4,469.92, as shown by the company's annual report, and at this meeting a dividend of ten per cent. of the full face value of the stock was declared. In

March, 1912, the directors of the company applied to appellee State National Bank for an increased loan, which the president of the bank testified was made upon the representation that the loan was desired to extend the operations of the company; but, immediately upon receiving the money, the directors repaid themselves the loan they had made to the company.

Such was the condition of the affairs of the stave company when the annual meeting of the stockholders of that company was held in April, 1912. The report to the stockholders then made, if given the fullest faith and credit, did not pretend that the company had earned a dollar during the year. In fact, it was chiefly devoted to an explanation of an admitted loss, during the year, of $3,300.00; yet the directors declared a dividend of ten per cent. upon the full face value of the stock; and it is fairly inferable that it was paid out of the proceeds of the loan from the bank made to the company less than a month before that time.

The hopeless condition of the affairs of this company, as shown by the report of the accountant, makes it certain, as we have said, that this company was insolvent when this dividend was declared. And we think the facts recited support the chancellor's finding that the directors were aware of that fact when they ordered the dividend paid. The decree against both the stockholders and directors is affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. GAUNT.

Opinion delivered April 23, 1917.

INSURANCE—FRATERNAL INSURANCE—WAIVER OF PROOF OF INJURY.—Proof of injury, under a benefit policy requiring proof to be made upon blanks furnished by the order, *held* waived by the conduct of the officers of the insurance order.

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

N. A. McDaniel, for appellant.

1. The arm was not broken and no proof of loss or injury was made as required by the provisions of the policy. 123 Ind. 544; 24 N. E. 221; 7 L. R. A. 339.

2. There was error in the instructions given. 27 Ill. 324; 163 Ky. 146; 42 Okla. 98.

J. S. Utley and *W. T. Tucker,* for appellee.

1. The jury found that the arm was broken. This is conclusive. 70 Ark. 513; 64 *Id.* 236

2. The provision as to proof of injury was substantially complied with and formal proof was waived. 51 Vt. 520; 108 Ind. 270; 115 N. Y. 506; 145 Mass. 134; 160 N. W. 266.

3. There is no error in the instructions. *Supra.*

SMITH, J. Appellee was the holder of a beneficiary certificate in the appellant company, which contained a covenant that he should receive the sum of $200 if he should sustain a broken arm, the payment to be made upon satisfactory proof to the order that the injury had been sustained. The constitution and by-laws of the order, which, by stipulation contained in the beneficiary certificate, became a part of the certificate, provided that, in case a member was injured, the clerk and banker of the local lodge, called Household, should investigate and promptly report the date and cause of disability, and that the eminent clerk of the order should send to the clerk of the Household the proof forms prescribed by the order, upon which the beneficiary or member should make proof of the claim for which he was demanding compensation, and that no proof should be considered, and no claims allowed, upon any proof not supplied on such form.

The appellant company defended the suit against it on two grounds, first, that appellee had not sustained a broken arm, and, second, that he had not made the required proof of his alleged injury.

Appellee testified that, while cutting willows with a hand-axe, his foot slipped, and he fell across a willow

and broke his arm; that his arm became swollen and painful, and his fingers stiffened, and he went to a doctor, who placed the arm in splints for two weeks or more. That about five days after his injury, he went to a Mr. Perry, whom he described as "their head man here," and asked him about the claim, and was told by Mr. Perry that he would look after it for appellee. Mr. Perry was not, in fact, the clerk and banker of the local Household, but his wife held that office. It was shown, however, that he performed in part, at least, the duties of this office for his wife. The duty of notifying the proper officers of the company was evidently performed, for, on September 10 thereafter, the medical director of the company, whose offices were in Atlanta, Georgia, wrote appellee in regard to his alleged injury, and advised him that the constitution of the order entitled the company to require an x-ray photograph of the claimant, and, pursuant to this authority, directed appellee to report for that purpose to the office of Doctor Zell in Little Rock. The letter promised to pay appellee's railroad fare and hotel bill, but these expenses were never paid. Pursuant to these directions, appellee reported to Doctor Zell, who made the required x-ray picture, and reported to the company that appellee's arm was not broken, and Doctor Zell testified at the trial that the picture made by him did not show any fracture of the bone. The company never furnished any blanks for the purpose of making proof of injury, nor did it make any request of appellee, except to report to Doctor Zell for examination.

In support of the allegation of injury, appellee's physician testified that the arm was broken, and that this condition was revealed, not only by the touch, but that a grating sound could be heard, and the nurse corroborated him in both statements.

Appellant discusses in its brief the authority of Mr. Perry, and the failure to furnish proofs on the blanks of the company as required by the constitution and by-laws, and complains of the action of the court in refusing

to submit these questions to the jury. The court gave, at appellee's request, and over appellant's objection, an instruction which reads as follows:

"If you believe from the evidence in this case that one of the bones of the forearm, that is, the arm between the elbow and wrist, was completely fractured, that is, broken in two, then you are instructed that, within the meaning of the policy sued on in this case, plaintiff suffered a broken arm, and your verdict should be for him in the sum of $200."

It is apparent that this instruction excludes from the jury any consideration of the question of the failure to give notice, although other instructions given did submit that question, and, in testing its correctness, we must decide whether the question of notice had passed out of the case. It is conceded that the company was entitled to notice, and had the right to demand, as a condition precedent to payment of any claim, that proof of this claim be made upon the blanks provided for that purpose. But it is undisputed that appellee, the insured, had, in good faith, promptly done what he intended as a full compliance with the requirement of the order in making proof of his injury. It may be true that he should have reported his injury to Mrs. Perry, rather than to her husband, but that fact is immaterial. It does not appear whether Mr. Perry or Mrs. Perry performed the duty resting upon Mrs. Perry of communicating the claim to the investigating officers of the order; but that duty was performed, if not by Mrs. Perry, then by Mr. Perry for her, and no complaint was made by the company of the manner in which it had received the required information. Acting upon this information, the medical director took the action which the notice from Mrs. Perry would have required him to take in the discharge of his duties as medical director in the examination of this claim. He wrote appellee that the by-laws required an x-ray picture, and directed him to report to Doctor Zell for that purpose. Appellee obeyed this direction promptly, and

sustained a loss of time and incurred a substantial expense in following this direction. This examination by Doctor Zell furnished the company all the information it required. The company had the right to require formal proof on blanks to be furnished for that purpose, but it was the duty of the company to furnish the blanks, and it did not do so. This formal proof could have been furnished only on the blanks of the company, and as it did not furnish them for that purpose, it can not now complain of its own omission to demand a form of proof which it could have secured only by doing something which it failed to do. Apparently, it relied upon the report of Doctor Zell, and, while no formal denial of liability was made, the company elected to pursue its inquiry no further, although it must necessarily have known that appellee was insisting upon the payment of his claim, and was attempting to furnish such proof as the company required. Appellee was led to believe that by furnishing such proof as was asked, no other proof would be required. Under these circumstances, we must hold that, if the requirement of proof of injury was not substantially complied with, such compliance was waived, and that no prejudice resulted in the failure to submit this question to the jury. *National Masonic Accident Assn.* v. *Seed,* 95 Ill. App. Ct. Rep. 43; *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588; 14 R. C. L. (Insurance), sections 517, 519, 520, and cases there cited.

Finding no prejudicial error, the judgment of the court below is affirmed.

BUSH, RECEIVER ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* JENKINS.

Opinion delivered April 23, 1917.

RAILROADS—CROSSINGS BELOW GRADE—DUTY TO MAINTAIN.—A railway company is under a duty to construct and maintain highway crossings, both above and below grade, so as not unreasonably to interfere with the free use of the highway by the public.

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

E. B. Kinsworthy and *W. G. Riddick,* for appellant.

1. Plaintiff was not entitled to recover as no negligence was shown and plaintiff, himself, was negligent. 33 Cyc. 276; 64 Atl. 489; 46 S. W. 343; 46 *Id.* 113; 97 Ark. 437.

2. The instructions are erroneous.

N. B. Scott, for appellee.

1. There was no contributory negligence by plaintiff. The question of negligence was for the jury. 100 Ark. 53; 33 Cyc. 928. The railroad had assumed the duty of repairing and maintaining this crossing. The injury was serious and the verdict is fully sustained by the evidence.

2. There is no error in the instructions. 33 Cyc. 265-6, 270-1, 925-6-7-8, note 80; 107 S. W. 642. The opening was too small in width and depth and the bad condition was due to defective construction and the jury found appellant guilty of negligence and liable for the injury.

HUMPHREYS, J. This suit was instituted in the Chicot Circuit Court on February 19, 1916, by appellee against appellant seeking to recover a thousand dollars on account of an injury received while driving a team and wagon loaded with cotton under appellant's railway track or trestle where it crosses the public highway between the towns of Eudora and Grand Lake. Appellee based his right to recover on the alleged negligent construction and maintenance of the crossing by appellant, in that the crossing was not of sufficient height to allow safe and suitable passage for the usual, ordinary traffic on the highway.

Appellant denied all the material allegations of the complaint, and by way of further answer, charged appellee with contributory negligence.

Trial was had upon the issues joined, and a verdict returned and judgment rendered in favor of appellee for $183.75.

Proper steps were taken and the cause is here on appeal.

The assignments of error insisted upon for reversal will be better understood by a short statement, in substance, of the facts.

Will Jenkins, a negro man, was employed by W. H. Stephenson on September 5, 1916, to haul a load of cotton from Eudora to Grand Lake. Five bales of cotton were on the wagon, three on the bottom across the cotton frame, and two lying lengthwise on top of the three bales. The highway approached the trestle on a slight curve or bend and gradual rise in the roadbed. When the injury occurred, the space between the roadbed and trestle was eight and a half or nine feet. At the time the trestle was built, a space of twelve feet was left between the roadbed and the trestle. In 1912, the floods washed a hole in the roadbed to the depth of twenty-five feet. It became necessary to curve the road around this hole, and in order to do so, an additional opening was made in the dump and a new wagon road was built by the railroad company, leaving a space of twelve feet between the roadbed and trestle. The traveling public complained because the new roadbed was muddy, so the railroad company put eighteen inches of cinders on the roadbed, leaving a space of ten and a half feet between the trestle and roadbed as repaired. From that time until the injury occurred, the roadbed filled in until the space between the trestle and roadbed was eight and a half or nine feet, as stated above. This space was barely sufficient to accommodate a wagon loaded with five bales of cotton in the usual way. There was not room between the top bale on a cotton wagon so loaded and the trestle, for a driver standing on the bottom bale, to lay his arm on and hold to the burlap of the top bale. Will Jenkins was not familiar with the condition there. He had never driven a wagon loaded with

cotton under the trestle. As he approached the trestle on the curve and rise, it appeared to him that he could pass under the trestle while sitting on the top bale. When his mules had passed under the trestle, he discovered his dangerous situation and got down quickly on the front bottom bale and caught the top bale with his right hand to keep from falling, and by stooping saved his head, but his right arm was caught between the top bale and trestle and seriously injured. The accident happened about 11 o'clock A. M.

This cause was sent to the jury on the theory that it is the duty of a railroad company in Arkansas to construct and maintain a public highway crossing under its tracks or trestles in a reasonably safe condition for the ordinary use of the traveling public.

It is insisted by appellant that the theory upon which this cause was submitted to the jury contravenes the law. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 118 Ark. 72, quoting from the eighth volume of American & Eng. Enc. of Law (2 ed.), p. 363, this court said: "It is the duty of every railroad company properly to construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers so far as it can do so without interfering with the safe operation of the road;" and quoting again from the same work on page 374, said: "The duty of the railroad company to repair and restore a highway is a continuing one, and commensurate with the increasing necessity of the public. * * *"

Speaking of the same duty in *Chicago, R. I. & P. Ry. Co.* v. *Redding,* 124 Ark. 368, this court said: "The manner of discharging this duty is a proper subject of statutory regulation; but the duty is not created by the statute. It exists independently of it. Our Legislature has seen proper to exercise its authority in this respect only by prescribing the elevation of crossings by designating the ratio of horizontal to perpendicular feet; but the duty exists to adapt the width of the crossing to the necessities

of the public. We are not called upon to say, and do not decide, that the railroad company must, in all cases, make its crossings co-extensive with the roads and streets over which they are placed, but they must anticipate the reasonable demands of the public, and where the traffic requires it, the crossing must be made available for the entire width of the road or street."

It is true that the two cases above referred to were dealing with grade crossings. Appellant insists that a different rule should be announced concerning highway crossings below grade. The duty imposed upon railroads to exercise ordinary care to construct and maintain highway crossings, so as not to unreasonably interfere with the free use of the highway by the public, is a common-law duty. The general law makes no distinction between crossings at, above or below grade. We find no distinction made by Elliott on Railroads in discussing the duties of railroads to construct and maintain railway crossings on highways, in chapter 46 on highway crossings, and chapter 49 on injuries at crossings. Mr. Elliott places grade crossings, crossings above grade and crossings below grade in exactly the same category.

We think the better rule is to make no distinction in liability on account of the different character of crossings except where the statutes of the State expressly regulate the duties and liabilities pertaining to the one or the other. Appellant has cited the case of *Gray* v. *Banbury*, 54 Conn. 574, in support of its contention that no duty rests upon a railroad to keep a subway crossing in repair. In that case, the borough of Banbury worked the street and raised the grade thereof after the railroad bridge was constructed across the street, by placing gravel thereon. The undisputed evidence in the case at bar shows that appellant not only constructed the trestle above the highway, but changed the roadbed and afterward repaired it by placing eighteen inches of cinders thereon. The construction placed by the Connecticut court upon the statute requiring railroad companies to construct and maintain

all the crossings of highways in such manner as the convenience and safety of the public traveling on the highway may require, is not in accord with the rule laid down in our State.

In support of appellant's position, it also cites the case of *Metuchen* v. *Pennsylvania Railroad Company,* 71 N. J. Equity, 404. In that case the following language in a New Jersey statute was before the court for construction: "To construct and keep in repair good and sufficient bridges or passages over or under said railroad where any public or other road shall cross the same." Mr. Justice PITNEY, in declaring the obligation imposed upon a railroad by that statute, said: "I am unable to follow the very ingenious argument of the counsel for the complainant in support of his construction of that clause of the act. I think that the words *construct* and *keep in repair* apply wholly to the word *bridges.* It may be said that the railroad will, in self protection, so to speak, keep a bridge like this, which conveys the railroad over the highway, in good repair. But that consideration does not apply to the case where the bridge is erected to carry the highway over the railroad. The words *keep in repair* were intended to apply to the latter class of bridges, and do not, in my judgment, apply to the word *passages* under the railroad. This, I think, is the reasonable construction. The object of the Legislature was to prevent the railroad company from imposing upon the public any increased burden by reason of the railway crossing. Hence, where there is a crossing at grade, it is the duty of the railroad to keep in repair with proper planking, etc., so much of the highway as is immediately affected by the presence of its ties and rails." We have no such statute in this State, and the construction placed upon the New Jersey statute by that court is not applicable here. The construction of a statute is not involved in the instant case. No statute has been passed in this State imposing duties and liabilities on railroad companies with reference to the construction and main-

tenance of subway crossings, and in this State these duties and liabilities are controlled by the principles of the common law.

Aside from these two cases, the authorities are uniform in making no distinction as to the duties and liabilities of railroads in reference to overhead, grade and subway crossings. Under this view of the law, instruction No. 1, given by the court, clearly and correctly presented the law applicable in this case.

It is insisted, however, that instruction No. 1 should not have been given because there was no evidence tending to show that the roadbed itself was not in a reasonably safe condition. The objection now made to the instruction by appellant was not specifically pointed out to the circuit judge, nor do we think that the interpretation now contended for is the meaning of the instruction. The instruction was not aimed at the condition of the roadbed itself, but had reference to the entire crossing as it existed when the injury occurred.

It is contended, however, that under appellee's own testimony, he was guilty of contributory negligence, and for that reason the cause should be reversed. It is true that appellee tesified that he approached the bridge in broad daylight; that he was watching it steadily as he approached it; that there was nothing to obstruct his view. It is also true that the clearance between the sills of the bridge and the top bale of cotton was only one or two inches. It must be remembered, however, that appellee was a stranger to the condition and situation at this crossing; that on account of the change made in the roadbed by the railroad company, the approach to the passageway under the trestle was on a slight bend or curve, and that there was a gradual rise in the roadbed at that point. The conduct of appellee immediately upon the discovery of the dangerous situation indicates that he was on the alert. The jury might have inferred from all the facts and circumstances in the case that appellee made a simple mistake in estimating distances. In driv-

ing or passing under objects, the most careful and prudent man frequently overestimates the height of the object. For example, hats are knocked off and faces scratched by limbs overhanging the road on account of parties overestimating the height thereof. Many a careful, cautious farmer has had a close call and been injured when driving into a barn door. It is easier to hear noises and see objects than to measure and estimate distances.

Even if the facts are undisputed and fair-minded men could honestly draw different conclusions from the undisputed facts, it would be improper to say as a matter of law that appellee was guilty of contributory negligence. It was said in substance in *Doniphan Lumber Co.* v. *Henderson,* 100 Ark. 53, that the question of contributory negligence was a question of fact for the jury, and not a question of law for the court, if an uncertainty arose either from a conflict in testimony, or because fair-minded men might honestly draw different conclusions from the undisputed facts.

Applying the rule there announced to the undisputed facts in this case, we can not say as a matter of law that the injury was the result of appellee's own carelessness.

The judgment is affirmed.

APPENDIX

I.

CASES DISPOSED OF ON MOTION.

Lottie T. Jackson *v.* George Anderson; Washington Circuit Court; J. S. Maples, Judge; appeal dismissed March 19, 1917, for non-compliance with rule nine; *per curiam.*

J. D. Via *v.* A. J. Dorris; Mississippi Circuit Court, Osceola District; W. J. Driver, Judge; appeal dismissed March 19, 1917, for non-compliance with rule nine; *per curiam.*

J. H. Dilday *v.* Town of Osceola; Mississippi Circuit Court; J. F. Gautney, Judge; motion for rule on clerk to file transcript overruled March 26, 1917, the transcript having been tendered out of time; *per curiam.*

W. E. Templeton, W. E. Leyden and J. B. Strickland *v.* Joe Mama; Sebastian Circuit Court, Fort Smith District; Paul Little Judge,; appellee's motion to affirm superseded judgment overruled April 9, 1917, for want of jurisdiction, the time for appeal having expired; but the appeal was dismissed and ordered certified down for enforcement of the judgment and for action against the supersedeas bond if necessary; *per curiam.*

E. S. Miller and Olive Budd Miller *v.* Effie U. Corley, Alice Stockton, Lottie Lee and Lena Miller; Benton Chancery Court; T. H. Humphreys, Chancellor; compromised and appeal dismissed April 30, 1917, on appellants' motion; *per curiam.*

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OPINIONS NOT REPORTED.

Meadows *v.* State; appeal from Miller Circuit Court; George R. Haynie, Judge; affirmed March 12, 1917, *per* McCulloch, C. J.

Hudgins *v.* Hence; appeal from Montgomery Chancery Court; J. P. Henderson, Chancellor; affirmed March 19, 1917, *per* Smith, J.

Field *v.* Lucchesi; appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed March 19, 1917, *per* Humphreys, J.

Chattanooga Roofing and Foundry Company *v.* Porter; appeal from Arkansas Chancery Court, Northern District; John M. Elliott, Chancellor; affirmed March 26, 1917, *per* Wood, J.

A. L. Clark Lumber Company *v.* Pickett; appeal from Montgomery Circuit Court; Scott Wood, Judge; affirmed March 26, 1917, *per* Smith, J.

Oliver *v.* Moseley; appeal from Sebastian Circuit Court, Greenwood District; Paul Little, Judge; reversed March 26, 1917, *per* Smith, J.

Jones *v.* Little; appeal from Miller Chancery Court; James D. Shaver, Judge; reversed March 12, 1917, *per* McCulloch, C. J.

Johnson *v.* Chicot Bank & Trust Company; appeal from Chicot Chancery Court; Zachariah T. Wood, Chancellor; affirmed March 26, 1917, *per* McCulloch, C. J.

Davis *v.* Dawson; appeal from Sebastian Circuit Court, Fort Smith District; Paul Little, Judge; affirmed March 26, 1917, *per* Smith, J.

Anthony *v.* Ring & Sons; appeal from Mississippi Chancery Court, Chickasawba District; Chas. D. Frierson, Chancellor; affirmed April 2, 1917, *per* Smith, J.

Cooper *v.* Lyman; appeal from Lonoke Circuit Court; Thomas C. Trimble, Judge; affirmed April 2, 1917, *per* Wood, J.

American Life Association of Campbell, Mo. *v.* Howard; appeal from Mississippi Circuit Court, Chickasawba District; W. J. Driver, Judge; affirmed April 16, 1917, *per* Hart, J.

Pope *v.* Wilson; appeal from Conway Chancery Court; Jordan Sellers, Chancellor; affirmed April 23, 1917, *per* Hart, J.

White *v.* State; appeal from Woodruff Circuit Court, Southern District; J. M. Jackson, Judge; affirmed April 2, 1917, *per* Wood, J.

Karr *v.* Bowen; appeal from Mississippi Circuit Court, Osceola District; J. N. Thompson, Special Judge; affirmed April 16, 1917, *per* Hart, J.

Farmers Union Mercantile Company *v.* Pinkerton; appeal from Pike Circuit Court; Jefferson T. Cowling, Judge; affirmed April 23, 1917, per Wood, J.

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