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IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

EDGAR A. McCULLOCH - -	CHIEF JUSTICE
CARROLL D. WOOD - -	ASSOCIATE JUSTICE
JESSE C. HART - - -	ASSOCIATE JUSTICE
FRANK G. SMITH - - -	ASSOCIATE JUSTICE
THOMAS H. HUMPHREYS -	ASSOCIATE JUSTICE
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CORRECTION

State *ex rel.* Nelson *v.* Meek, page 349, at page 353, under paragraph numbered (1) seventeenth line from the beginning of the paragraph, first word, the word "not" should be "nor," and the sentence should read as follows:

"There is no doubt of the power of the Legislature to provide for an assessment based on the full money valuation of property, *nor* that the Legislature has so provided in the statutes which have been enacted since the adoption of the present Constitution, but it is equally clear that the Constitution itself does not compel an assessment according to full value, and it does, in fact, leave that matter entirely to the law makers."

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* FORT SMITH COMPRESS COMPANY.

Opinion delivered February 24, 1919.

1. CARRIERS—DEMURRAGE—RIGHT TO CHARGE.—Under a contract between a railroad company and a cotton compress company whereby the latter agreed to pay demurrage on cars of cotton remaining unloaded, the former will not be allowed to recover demurrage where the latter's failure to unload was due to the fault of the railroad in not furnishing cars which had been ordered by the latter for the purpose of shipping out the cotton.
2. CARRIERS—CONTRACT.—A stipulation in a contract between a railroad and a cotton compress company that the former should not be liable to the latter "for damages or penalties, whether statutory or otherwise, on account of any failure to furnish or to promptly furnish cars" was not an agreement on part of the latter not to set up as a defense, in a suit by the former for demurrage on cars, that it was prevented from carrying out its contract by the former's failure to furnish cars for shipment.
3. CARRIERS—DEMURRAGE—FAILURE TO FURNISH CARS.—Under a contract between a railroad and a cotton compress company whereby the latter agreed to pay demurrage on cars remaining unloaded, *held,* in an action by the railroad company for demurrage, in view of the evidence, that it was not contemplated that the compress company was to depend upon other railroads for empty cars, so as to relieve the contracting railroad company of the duty to furnish such cars.
4. CARRIERS—DEMURRAGE—CONGESTION OF CARS.—Under a contract between a railroad and a cotton compress company, whereby it was agreed that the compress company could, by giving written notice of a congestion of cotton, refuse to receive more cotton, the railroad company could not claim demurrage on cars which were unloaded on account of a congestion of cotton if its agents knew of the congestion, although no written notice was given, as such notice could have imparted no knowledge to the railroad company.

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

James B. McDonough, for appellant.

1. The court should have directed a verdict for the railroad company for the full amount sued for with interest. The deduction made by the jury was without authority of law and against the evidence and contrary to the contract. No defense was set up in the answer, and final judgment should be entered here for the full amount sued for. The cotton was moving in interstate commerce and the demurrage charge was duly proven. Even in the absence of a contract or statute carriers may charge for this demurrage. 201 S. W. 787; 113 Ark. 221; 69 N. E. 825; 112 Ill. App. 302; 35 S. W. 193; 72 *Id.* 122; 25 So. 579. Demurrage is part of the transportation charges. 243 U. S. 632; 243 *Id.* 444. Contracts for demurrage should be upheld. 71 Mo. App. 310; 27 Penn. Sup. Ct. Rep. 511; 27 Ohio C. C. Rep. 486; 51 Atl. 313; 61 S. W. 57. The carrier is entitled to a lien for demurrage. 37 So. Rep. 667. There is no provision in the contract which entitles the appellee to recoup any damages against the demurrage claims of the carrier. The answer contains no denial of the detention of the cars and states no defense. 30 Ark. 362; 17 *Id.* 597. The burden was on the compress company to establish its right to any reduction or recoupment. After general denials only and after admitting the failure to unload cars as required by the contract, and the wrongful detention the compress company assumed the affirmative of showing a right to recoupment or reduction. Kirby's Digest, § 3106. And having offered no evidence, plaintiff was entitled to a directed verdict for the amount sued for. 122 Ark. 445. The demurrage charges were duly proven. 37 So. Rep. 939. The measure of damages is settled by the contract. 8 A. & E. Enc. L. 636; 89 Mich. 531; 35 N. Y. S. 151; 13 Cyc., note 99; 44 Ark. 439; 12 *Id.* 699. Any reduction of damages or recoupment claimed is affirmative relief and must be set up in the answer and duly proven. 13 Ark. 11, 522; 15 *Id.* 465. See also 17 *Id.*

254; 21 *Id.* 125; 26 *Id.* 309; 31 Cyc. 46; 74 Ark. 93; 30 *Id.* 535; 34 Cyc. 623; 32 Ark. 281.

Unless a cross-action could be maintained by defendant under the contract for failure to furnish cars for outbound cotton over the rails of other carriers plaintiffs charges for demurrage can not be reduced. 32 Ark. 281; 4 Sandf. 147; 9 Mo. 47; Pomeroy on Rem., § 742; 25 A. & E. Enc. L. 548. The custom as to loading cars over other roads was properly proven and that defendant knew of the custom and signed the contract with knowledge of it.

2. The court erred in admitting the evidence of Creekmore and Lee as to a custom in 1918. Such testimony is not admissible. 108 Ark. 483.

3. Defendant can not recover because it failed to give the written notice of congestion required in the contract. Michie on Carriers, § 371; 139 S. W. 803.

It follows that plaintiff was helpless in the premises. It was bound to receive and transport the cotton. 84 Ark. 150; 50 *Id.* 397; 57 *Id.* 112.

4. The court erred in its instructions. They do not state the law correctly. Cases *supra.*

A custom is established if it is shown that it has been uniform, definite and known. 108 Ark. 437; 84 *Id.* 382; 91 *Id.* 310; 118 *Id.* 316; 46 *Id.* 210; 58 *Id.* 578; 46 *Id.* 222; 19 *Id.* 270; 113 *Id.* 325; 106 *Id.* 400. The compress company was bound by the custom, *supra.* Under that custom appellant was under no obligation to furnish cars for cotton moving out over the rails of other carriers.

There was therefore error in the court's charge to the jury and defendant's answer is not supported by the evidence.

Harry P. Daily, for appellee.

It is a good defense to an alleged breach of contract to show that plaintiff himself prevented defendant from performing the contract. That is the gist of the defense here, and it is absolutely supported by the evidence. 36 N. Y. 388; 89 *Id.* 566.

2. The proof here is undisputed as to the defense alleged, and the facts alleged in the answer were admitted by the only two witnesses for the railroad company. The railroad company during the entire season brought cotton to the compress company from points on its line which was compressed, and that appellant would issue bills of lading and order the compress company to load same at once and then refuse to furnish cars. The appellant controlled the routing.

3. The railroad company from the first absolutely and continually refused to furnish the cars and no demand was necessary. It prevented appellee from carrying out its contract.

4. Written notice was unnecessary of the congestion as it was the railroad's fault. 85 Ark. 596.

SMITH, J. The parties to this litigation, the Kansas City Southern Railway Company, hereinafter referred to as the appellant, and the Fort Smith Compress Company, hereinafter referred to as the appellee, entered into the contract out of which the litigation arises on September 1, 1916, the relevant features of which are as follows:

It is recited that appellant, which brought this suit to recover the damage by way of demurrage for an alleged violation of the contract, owns and operates certain sidetracks and switches connecting the railroad with the premises and property of the appellee compress company. "That by reason of the nature of cotton and the commercial practices and customs under which it is handled and by reason of the conditions of buying, selling, storing and transporting it, and by reason of and for the general convenience of all concerned, the railway company and the compress company agree and covenant to occupy and use jointly the property and premises of the compress company for the several purposes and to the extent hereinafter set forth.

"The intent and purpose of this agreement, among other things, is to confirm the compress company as

the limited agent of the railway company for the purpose of receiving cotton from the railway company, delivering cotton to the railway company, loading and unloading cotton from and into the cars of said railway company, making proper delivery of cotton in the custody of said compress company so far as concerns the interest of the railway company, and, as principal, to furnish the premises for the use of the railway company as a cotton depot under and subject to all the terms and conditions of this agreement and the lawfully published tariffs and regulations of the railway company with respect to the transportation and handling of cotton."

There follows an enumeration of four grades designated, respectively, as (a), (b), (c) and (d), which the contract provided should be handled by the compress company.

Class (a) was cotton delivered by the owners to the compress company and intended for shipment over the lines of the railway company and its connecting carriers. This grade of cotton is also referred to as wagon cotton, it being delivered to the compress company on wagons.

Class (b) was cotton consigned to compress points on local bills of lading and so consigned that when delivery is made by the railway company to the compress company for the consignees thereof the contract of carriage made by the railway company is completed.

Class (c) was cotton destined to compress points consigned to "order," or in any other manner, which is to be held by the compress company for account of the railway company until released by the railway company. As to this class the contract provided, "The railway company may place the cars containing such cotton alongside the compress platform and when the railway company furnishes to the compress company a written statement of such cotton showing plainly that it is covered by an 'order' bill of lading, or is for any other reason to be held for its account, the compress company agrees to receive and unload such cotton and deliver to the agent of the railway company compress warehouse receipts there-

for. The compress company further agrees to hold such cotton and be responsible to the railway company for the loss of or damage thereto occasioned in any manner howsoever other than fire until such cotton is released in writing by the railway company and the compress warehouse receipts are surrendered to said compress company."

Class (d) was cotton covered by through bills of lading delivered by the railway company to the compress company for compression, the time allowed for that purpose being only forty-eight hours unless extended by the railway company.

The contract further provided that if appellee should be unable to handle the cotton at any time by reason of congestion or accident to its plant it should have the right to cease, temporarily, to receive cotton falling in either class (b) or (c) after causing written notice of such intention to be served upon the resident station agent of the appellant company thirty-six hours before it became effective. It was further provided that in the event of failure of appellee to promptly load or unload cars placed for loading or unloading it should pay appellant one dollar per car per day for each day, or fraction thereof, after forty-eight hours (Sundays and legal holidays excepted) from the time each car was placed for loading or unloading, or when tendered and appellee was unable to accept.

The complaint alleged that during the months of October, November and December, 1916, the appellee had retained cars of the appellant over and above the free time allowed amounting to 2,698 cars for one day, and prayed judgment for the sum of $2,698. An itemized statement of this demurrage was furnished, and its accuracy appears to be conceded; but appellee seeks to avoid the liability which the contract would otherwise impose by showing that the delay in unloading cars upon which the claim for demurrage was based was wholly due to the fault of appellant in not furnishing cars to forward cotton already received from appellant and com-

pressed by appellee and which had been ordered out by appellant and for which appellant had issued bills of lading, and that during the whole of the period of time during which the claim for demurrage had accrued, appellant was constantly tendering to appellee cotton to be unloaded and compressed, while refusing and failing to furnish cars into which to load said cotton when compressed, although appellant had ordered said cotton out and had issued bills of lading therefor, and that during all said period it was constantly notifying appellant that it could not properly unload cars of inbound cotton unless cars were furnished for outbound cotton which had been compressed and for which appellant had actually issued bills of lading, and that appellant company at all times had full knowledge of these facts and through its officers and agents had waived any right to recover from appellee for failure to unload said cotton.

This litigation involves only class (c) cotton. As previously stated, this was cotton which had been shipped from points along appellant's line of railroad and which was shipped out of the compress on the orders of appellant and upon its bills of lading. As to such cotton, it was admitted by appellant that it not only received the freight from the point of origin on its line to Fort Smith, but also shared with the carrier which hauled the cotton to its final destination (usually some city of export) the freight earned on this long haul. It was shown that the custom had prevailed for the Iron Mountain Railroad and the Frisco Railroad (other railroads running out of Fort Smith) to furnish the cars for shipments of cotton routed over their lines, although the bills of lading were issued by the appellant company. Prior to 1916 there had been no difficulty in obtaining cars, but the cotton crop of that year was marketed unusually early and on account of the high price prevailing was marketed with unusual rapidity so that a sufficient number of cars was not available to supply the demand.

It is undisputed that repeated and insistent requisitions for cars were made by appellee on both the Iron

Mountain and Frisco railroads, but those railroad companies refused to furnish their own cars for the shipment of cotton covered by bills of lading issued by appellant. It is also undisputed that when appellant ordered out cotton it designated the railroad over whose line it was to be shipped. Appellee could only tender the cotton to the designated carrier and demand cars into which to load it, and appellant was advised that these cars were not being furnished and that because of this failure the congestion at the compress was daily becoming more acute.

Appellee's managing officer did not contend that all the delay in unloading cars was attributable to the loading and unloading of class (c) cotton, and estimated that twenty per cent. of the demurrage accrued on account of cotton of other classes. Liability for this twenty per cent. is admitted and reversal of the judgment for that amount against appellee is not asked. The judgment was rendered for only this twenty per cent. and appellant complains of that fact and insists that judgment should be rendered here for the remaining eighty per cent. of the accrued demurrage.

At appellant's request the trial court told the jury that if no part of the demurrage accrued by reason of the failure or refusal of appellant to furnish reasonably adequate car facilities appellant would be entitled to the demurrage claimed. But at appellee's request, and over appellant's objection, the court gave the converse of this instruction and told the jury that if a part of the demurrage claimed accrued because of the failure of appellant to furnish reasonably adequate car facilities for handling outbound cotton ordered out by the appellant, then as to such demurrage accrued by reason of that fact the appellant would not be entitled to recover.

This instruction is decisive of the case, as the verdict of the jury is conclusive as to the extent to which the demurrage accrued on some other account. We approve this instruction because it is an application of the elementary principle that a party to a contract can not

render its performance impossible by the other contracting party and then sue for damages for its breach.

It is very earnestly insisted that judgment should be rendered here for the full amount sued for because appellee admits that there was demurrage to the extent alleged, and it is pointed out that the contract provides that "the railroad company shall not be liable to the compress company for any damages or penalties, whether statutory or otherwise, on account of any failure to furnish or to promptly furnish cars," and it is argued that to allow any credit on the admitted demurrage by reason of the failure to furnish cars is to adopt a measure of damages on that account which contravenes the express recital of the contract that no such damages shall be allowed. But it is pointed out in appellee's brief that the agreement that the railway company should not be liable for damages for failure to furnish cars might operate to defeat an independent suit for damages on that account, without having the effect of precluding the compress company from setting up this failure to furnish cars to defeat a suit against it for demurrage for failure to unload cars, when this failure to unload the cars was caused by the railroad's antecedent failure to furnish cars to load out cotton which had already been compressed, thereby affording the necessary space for unloading the cars in question. In other words, the agreement of the compress company not to hold the railway company for penalties or damages for failure to furnish cars can not be construed as an agreement on the part of the compress company, in a suit by the railway company against it, not to set up and prove, as a defense, that it was prevented from carrying out the contract by the refusal of the railway company to perform its duty in furnishing cars.

It is insisted on behalf of appellant that inasmuch as the custom had been, prior to 1916, for both the Iron Mountain and the Frisco railroads to furnish cars upon demand, the parties must be held to have contracted with reference to this custom. But on behalf of appellee it is

shown that no issue about the duty to furnish cars had ever arisen prior to 1916, and appellee's manager testified that the compress company had never acknowledged the existence of any custom absolving the appellant from the duty to furnish cars for the shipment of cotton covered by appellant's bills of lading. Appellee was not a carrier and had no cars of its own and it could only call upon the railroads to furnish the cars for the shipment of cotton covered by appellant's bills of lading, and in doing so it was acting as the agent of appellant, and appellees as appellant's agentmade repeated demandsfor these cars and as frequently advised appellant that these demands were not being supplied, and appellant itself made no offer of its own cars. Under these circumstances the court was warranted in giving, at appellee's request, the instruction set out above.

It is finally insisted that appellee failed to give appellant the written notice which the contract provided should be given in case of congestion. Such a notice would have accomplished no result, as it is not even claimed by appellant that its policy would have been altered had written notice been given. It is undisputed that appellant's agents, not only were warned of the congestion, but these agents admit having knowledge of this congestion at all times and that the situation was being constantly accentuated by the continued delivery of cotton at the compress, and a written notice could have imparted no additional knowledge to appellant.

Finding no error the judgment is affirmed.

WOOD and HART, JJ., dissent.

Kansas City Southern Railway Company v. Akin.

Opinion delivered March 3, 1919.

1. Limitation of actions — answer — denial of allegations of complaint.—An answer alleging that plaintiff's cause of action is barred by the statute of limitations of three years and denying that plaintiff had a right to maintain the suit, did not con-

stitute a denial of the allegations of the complaint as to a nonsuit in the Federal Court and of the bringing of the present suit within a year thereafter.

2. Same—commencement of action.—Under Kirby's Dig., § 6033, as to what is a commencement of an action, a suit was commenced when the complaint was filed in the office of the circuit clerk and summons was issued thereon.

3. Same—injury to passenger.—A cause of action against a railroad company for personal injuries to a passenger is barred by Kirby's Dig., § 5064, in three years.

4. Evidence — hypothetical questions. — Hypothetical questions were proper where there was testimony tending to prove the facts on which they were based.

5. Negligence—proximate cause—jury question.—Conflicting testimony as to whether an injury to plaintiff was the proximate cause of tuberculosis *held* a question for the jury.

6. Appeal and error—harmless error—instructions.—Where errors complained of in instructions were of the language merely which could have been corrected if specific attention had been called to them, judgment will not be reversed.

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

James B. McDonough, for appellant.

1. The cause of action was barred by the statute of limitations.

The complaint was filed April 4, 1918. It shows on its face that the injury was done on August 28, 1914. The file mark on the complaint is a part of the record and conclusive. 41 Ark. 53. The answer and hence the record shows that the suit was brought more than three years after the cause of action accrued and that the bar of the statute was claimed. The complaint showed that the action was barred and defendant could raise that question by demurrer because no cause of action was stated. 108 Ark. 219; 112 *Id.* 572. The filing of an answer does not waive the demurrer. Kirby's Digest, § § 6096, 6119; 65 Ark. 495; 67 *Id.* 184; 64 *Id.* 510; 44 *Id.* 205; 8 *Id.* 74; 49 *Id.* 277. The beginning of the introduction of the evidence is a "stage of the proceedings" and hence defendant had the right to object to the introduc-

tion of any evidence on the ground that the action was completely barred. The court erred in admitting any evidence. 41 Pac. 400; 116 *Id.* 782, 944.

Unless there exists some reason to stop or toll the operation of the statute of limitations plaintiff is barred as a matter of law. Kirby's Digest, § 5064. The statute applicable to torts and the bar is three years. 83 Ark. 6; 71 *Id.* 71. Unless plaintiff shows that the statute of limitations was suspended as to him, the judgment below must be reversed. He can not claim any exception to the running of the statute unless that claim is founded on some act of the Legislature. The Legislature has made no such exception and the courts can make none. 6 Ark. 14; 13 *Id.* 291; 16 *Id.* 671; 24 *Id.* 487. Statutes of limitation are favorably regarded by the courts. 6 *Id.* 513. Plaintiff attempts to allege facts relieving him of the bar, *i. e.,* that he brought suit in the circuit court of the Fort Smith District which was removed to the United States District Court, that a nonsuit was taken without prejudice. But the allegation is not sufficient to toll the statute. It is not alleged that the United States court had jurisdiction and it had none unless the controversy exceeds $3,000 exclusive of interest. 4 Fed. Stat. Ann., p. 842. Besides there is no allegation of diversity of citizenship and the fact does not appear of record. The jurisdictional facts must be alleged and shown. A State court can not take judicial knowledge of the contents of pleadings in other or the same cases in its own record. 15 Ark. 84. The State court could not take knowledge of the contents of the pleadings in the Federal court and the objection to the introduction of any evidence was well taken because the cause of action was shown to be barred as matter of law. The burden was on the plaintiff to rebut the defense of the bar of the statute. 69 Ark. 311. But if mistaken on this point, plaintiff must fail for lack of proof.

2. Plaintiff introduced no proof to sustain his allegation of nonsuit in the United States court. There is no evidence that this same suit was pending in the United

States court and was dismissed without prejudice. The exhibit of a record entry does not prove itself or the fact. If the Arkansas statute giving plaintiff the right to bring a new suit within one year applies to a nonsuit taken in the Federal court, before plaintiff can avail himself of it he must prove the allegations of his complaint, as the allegations do not prove themselves. He must prove that it was the *same cause of action.* 69 Ark. 311. The burden was on him to prove this by a duly authenticated copy of the record. The complaint is the *only evidence.* 156 Pac. 955; 54 N. E. 200. The identity of the suits must be shown by the record and not *aliunde.* 79 Ill. App. 22.

Paragraph 5 of the answer did set up the fact that suit has been brought in the Federal court, but that part was stricken out on motion of plaintiff, and he is precluded from claiming any benefit of it. 64 Ark. 213. In addition he did not offer this answer in testimony. Pleadings are not evidence unless offered in testimony. 102 Ark. 640. The answer was amended by the court on motion of plaintiff and the original can not be evidence. 33 Ark. 251; 58 *Id.* 490. State laws have no power over procedure in the Federal courts. They do not control Federal court procedure. Kirby's Digest, § 5083, only applies to Arkansas courts. The law of the forum governs. 99 Ark. 105; see also 3 *Id.* 409. A nonsuit in a Federal court is not governed by the Arkansas statutes. 62 N. Y. App. Div. 56; 4 Fed. C. No. 1960; 63 S. E. 135; 120 Ga. 104; 110 *Id.* 223; see also 246 Fed. 236; 247 *Id.* 478; 232 *Id.* 288; 236 *Id.* 419; 90 S. E. 1040; 67 *Id.* 668; 97 Ga. 722; 122 *Id.* 608.

4. Plaintiff can not avail himself of the nonsuit because there was some time left of the three years after the nonsuit was taken. There is no legal proof as to when the nonsuit was taken. It is alleged it was on April 7, 1917. The tort was committed August 2, 1914, and hence the three years statute of limitations did not expire until August 27, 1918. Therefore according to the allegations at the time the nonsuit was taken the three years statute

had not barred the cause of action. The clear purpose of meaning of these limitation statutes saving the right to sue after a nonsuit is to preserve the right of suing in cases where the statute of limitations has expired before the nonsuit and while the case was pending. The legislative purpose was to give parties the right to bring suit over again when they had brought it within the period and the period had expired and a nonsuit was suffered thereafter. If plaintiff still has time to sue after the nonsuit there is no reason for applying the statute.

If the action is not barred and still in existence and plaintiff still has time to bring suit after his nonsuit the reason for the law does not exist. When the reason for a law ceases, the rule of law ceases to exist. 10 Ark. 184; 77 *Id.* 535; 23 *Id.* 684; 11 *Id.* 28; 93 *Id.* 215; 102 *Id.* 65; 91 Ill. App. 20. The cases in 93 Ark. 215; 102 *Id.* 65, and 107 *Id.* 353 do not apply here, and the point here has not been decided by this court. See 171 Pac. 928; 47 Ark. 170.

5. Plaintiff did not bring this second suit within the year named in the saving clause. The summons and return are parts of the record. The burden was on plaintiff to show by the record that this second action was brought within the year. 47 Ark. 479; 27 *Id.* 343; 103 *Id.* 601. If the record fails to show that the summons was placed in the sheriff's hands on or before April 7, then plaintiff fails and no evidence could be introduced and a directed verdict for defendant was required. The new complaint was filed April 4, 1918, and summons issued on that day which was served on the local agent of appellant on *the second day after the year had expired.* There is no showing *when* the summons was placed in the sheriff's hands unless the date of the service is the day it came to him. The law requires the sheriff to endorse thereon the time when a writ comes to his hands (Kirby's Digest, § § 6883, 7815-16). This essential fact can not be shown except by the record. The statute must be observed and an oral return is not sufficient. 60 Ark. 182. The object of the return is to show the manner and time

of the service. Kirby's Dig., § 6043. Therefore on the face of the return the service was after the year had expired and the burden was on plaintiff to show affirmatively by the record that the writ was placed in the sheriff's hands before the year expired, so as to show that the suit was brought within the year. 47 Ark. 479. It was plaintiff's duty to see that the sheriff did his duty. Kirby's Digest, § 6040.

The presumption that public officers have done their duty does not supply proof of a substantive fact. 92 U. S. 281; 2 Ark. 26; 3 *Id.* 505; 95 *Id.* 188; 145 Fed. 273; 99 Mass. 605; 100 U. S. 693; 200 *Id.* 480; 45 N. E. 463; 68 Pac. 58.

The mere signing and sealing a summons by the clerk is not sufficient. It must be delivered to the sheriff or some one for him. 62 Ark. 401. From the above it is clear that plaintiff did not commence his second action until two days after the year expired and he is barred.

6. The evidence is insufficient to show that the injury was the proximate cause of the "flaring up" or development of tubercular germs in plaintiff's body. 108 Ark. 14, relied on by plaintiff below, will not support the judgment here. This case is more like 119 Ark. 349. The case here rests much on conjecture. 116 Ark. 36. No damages can be recovered for injuries due to tuberculosis. The court below refused to take that question from the jury and erred in so doing. Outside the damage from tuberculosis plaintiff's damages were very small. It was error to refuse to instruct that plaintiff could not recover for damages caused by tuberculosis and it was error to refuse defendant's requests withdrawing this question from the jury. The evidence on that question was insufficient to take that issue to the jury. 122 Ark. 445; 99 *Id.* 69; 119 *Id.* 349.

There was error in allowing the hypothetical questions asked and the testimony given in response thereto over the objections of defendant. 108 Ark. 14. The law does not allow mere conjectures or inferences to go to a jury as evidence. 116 Ark. 82. This court takes judi-

cial knowledge of the circulation of the blood. 16 Cyc. 856; 79 Ark. 608. Blood does not follow gravity down the circulating medium, hence it can not be that tubercular bacilli come down the circulating medium to the sheath and into the testicle. The positive evidence of Doctor Foster, who is plaintiff's own witness, is that tuberculosis will not follow unless the encasing walls are broken.

A disreputable presumption can not prevail over positive evidence. 203 S. W. 246; 155 *Id.* 426; 148 *Id.* 925.

Theory can not supply the place of evidence. The whole of the expert testimony is a mass of theory and inference. 72 Atl. 979; 113 Ark. 353. The evidence of the doctors was surmise pure and simple. All formed an opinion as to past facts. All were mere surmise on conjecture. 116 Ark. 56. The recovery here is clearly against the law.

7. There is no evidence that the bruise in the groin in any way injured the spermatic cord.

8. The injuries in the wreck were not the proximate cause of tuberculosis, and there was nothing to take the case to a jury, and there was no liability shown. 119 Ark. 349; 238 Fed. 14; 117 Pa. 390; 70 App. Div. N. Y. 60; 71 So. Rep. 685; 106 N. E. 837; 24 L. R. A. (N. S.) 978; 132 Am. St. 204; 119 N. W. 200; 113 *Id.* 1016; 39 *Id.* 884; 116 Ark. 56. Where the evidence tends equally to sustain either of two inconsistent propositions a verdict in favor of one bound to sustain one of them against the other is necessarily wrong. 116 Ark. 82; 119 Ark. 349; 197 S. W. 492; 62 N. E. 349; 12 N. Y. App. Div. 512; 71 S. E. 525; 96 S. W. 1045. If tuberculosis was a new infection plaintiff can not recover. 72 Atl. 979; 133 N. W. 142. See also 137 S. W. 1053.

9. The evidence of Doctors Cooper and Wood was clearly admissible, so was Doctor Eberle's. All were erroneously excluded. 111 Ark. 554; 117 *Id.* 396; 98 *Id.* 352.

10. It was plain error to exclude the testimony of Dr. Wood. 148 N. Y. 88.

11. Having called Drs. Wood, Wolferman and Eberle, plaintiff waived his privilege and could not object to the evidence of Dr. Cooper. 98 Ark. 352; 148 N. Y. 88; 156 S. W. 699; 158 *Id.* 733. See also 155 N. Y. S. 887; 193 N. Y. 11; 10 N. Y. S. 159; Wigmore on Ev., § 2390; 104 N. Y. 352.

12. Plaintiff also waived his privilege because he made no objections and hence consented to the introduction of Dr. Cooper's evidence as to his treatment and the causes of the operation. 193 N. Y. 11; 85 N. E. 827; 20 L. R. A. (N. S.) 1003; 98 Ark. 352.

13. The evidence of plaintiff and Dr. Foster as to the condition of plaintiff's arm in 1903 to 1906 was too remote and inadmissible. 1 Elliott on Ev., § 42.

14. There is reversible error in the hypothetical questions propounded to plaintiff's expert witnesses. 100 Ark. 518; 103 *Id.* 196; 87 *Id.* 243; 100 *Id.* 518; 2 Elliott on Ev., § § 420, 1228.

15. The photographs were inadmissible. 2 Elliott on Ev., 1228.

16. The evidence of the experts that tuberculosis was more likely to result from light trauma than from a severe one was inadmissible. Plaintiff cannot set up two inconsistent theories. He cannot offer proof contradicting his pleadings. 2 Ark. 512. Evidence which does not tend to prove any issue is not admissible. 7 Ark. 470; 57 *Id.* 512.

17. There is error in the instructions, both in giving and refusing. The accident occurred in Oklahoma and the rights and obligations are governed by the laws of that State. Rev. Laws of Okla., 1910, § 800; 172 Pac. 929; 18 Okla. 75; *Ib.* 97; 98 Ark. 240; 67 *Id.* 295.

Oglesby, Cravens & Oglesby, for appellee.

1. The suit was not barred. It was brought within a year after the nonsuit, without prejudice. The United States Court had jurisdiction and it was the same suit. 49 Ark. 248.

2. The proof shows that the nonsuit was taken within the year and it is so alleged. The allegations were not denied. 72 Ark. 62. The cases cited by appellant have no bearing here. 100 Fed. 146; 128 *Id.* 183; 36 S. E. 775. The judgment was no bar. 53 L. R. A. 931; 34 *Id.* (N. S.) 1195; 217 U. S. 209; 9 R. C. L. 212-13; 107 Ark. 353; 115 Fed. 69; 71 N. E. 371; 123 N. W. 371; 38 S. E. 253; 12 Ohio St. 620; 42 S. E. 333; 66 *Id.* 586.

3. The record shows that the suit was brought within the year after the nonsuit. The complaint is marked, "Filed April 4, 1918," and summons issued April 4, 1918, and returned duly served on April 9, 1918.

4. The evidence shows that the wreck caused the injury. If the condition of the waiting room was the proximate cause of the disease the railroad company is liable. 114 Ark. 112. The court properly refused to take the case from the jury. It was a jury case. 118 Ark. 569; 129 Ark. 521.

The cases 203 S. W. 246; 1148 *Id.* 925, and 155 *Id.* 426; are not applicable, and the cases on expert testimony, 72 Atl. 979 and 113 Ark. 353, are not in point. King and Drs. Eberle, Foster and Stewart were experts and testified that the injuries received in the wreck brought about plaintiff's condition and in addition all of the defendant's witnesses testified that any injury to a person predisposed to tuberculosis which causes loss of weight or strength or vitality, or causes him to run down, would cause inactive bacilli to become active. It is not controverted that he did not receive injuries to his back, groin and skin; that his urination, which before was normal, became so frequent that he had to go to the toilet from three to six times at night; that he became physically weak after the wreck and commenced going down until he reached 140 pounds in weight; that he suffered pain for a long period of time and was not able to do a full day's work. This brings the case squarely in line with the Steel case in 108 Ark. 14, a case exactly in point. See also 127 Ark. 259; 118 *Id.* 569.

A case was made for a jury and their verdict is conclusive. 118 Ark. 569; 114 *Id.* 112; 107 *Id.* 545; 116 *Id.* 82. See also 91 *Id.* 343; 63 Fed. 942; 238 Fed. 14.

There was no error in admitting or excluding testimony, nor any error in the court's charge.

There were no specific objections to the expert testimony. 120 Ark. 530. Nor were there any specific objections to the instructions. The instructions are approved by the Oklahoma cases. 124 Pac. 2. The instructions were really too favorable to defendant. The case was fairly submitted to a jury and no prejudicial error was committed on the trial and the judgment should be affirmed. Cases *supra.*

WOOD, J. This appeal is from a judgment in favor of appellee against appellant in the sum of $3,000.

On the 4th day of April, 1918, the appellee filed in the circuit court of Sebastian County his complaint against the appellant in which he alleged, in substance, that on August 28, 1914, he was a passenger on appellant's train from Joplin, Missouri, to Fort Smith, Arkansas; that through the negligence of appellant the coach in which he was riding, with other cars, was derailed and overturned, by reason of which he was thrown with great force and violence to the opposite side of the car and was mashed, cut and bruised on his head, face, back and legs, thereby causing him great physical and nervous shock, by which he was rendered unconscious and sustained great and permanent injuries and caused great pain and suffering. That there had been tubercular bacilli in his system for some time prior thereto, but at the time he received the injuries he was in good health and the tubercular germs were encapsulated, innocuous and inactive. That as a result of the bruises produced by his injuries his strength and vitality were greatly affected and by reason of his injuries the tubercular germs became active and tuberculosis developed in his spermatic cords and testicles. That on account of said tubercular condition a surgical operation had to be performed, resulting in

the removal of his testicles. That by reason of the injuries and the results thereof above described he had suffered great physical pain and mental anguish and humiliation, and had been damaged in the sum of $3,000, for which he prayed judgment. That prior to August 28, 1916, he brought suit in this court against appellant for the cause of action and injuries herein sued for, which suit was dismissed by nonsuit without prejudice on April 7, 1917, in the United States District Court, to which it was removed, and this suit is now brought within less than one year from date of said nonsuit and dismissal for the same cause of action. The clerk's certificate shows that summons was issued on the 4th day of April, 1918, and returned duly served on the appellant on the 9th day of April, 1918.

On the 27th day of April, 1918, appellant answered, denying the material allegations of the complaint as to negligence and as to the injuries alleged and the damages sustained. Paragraph 5 of the answer was as follows:

"The defendant alleges that the plaintiff in this case brought suit herein for the same alleged cause of action set forth in the complaint herein, and said cause was tried in the United States District Court, Western District of Arkansas, Fort Smith Division, and all of the evidence in said cause was heard on both sides. At the conclusion of all of the evidence, and after all the evidence had been introduced, a motion was made by the defendant to direct a verdict in favor of the defendant, in so far as the plaintiff claimed any damages resulting from the development of tuberculosis in his body. After that motion had been argued by both sides, and after the court had taken the same under advisement, the court held that the motion must be sustained. Thereupon and thereafter, and not until then, the plaintiff asked leave to take a nonsuit. This defendant denies that said nonsuit was taken without prejudice, and alleges that the trial of said cause in said United States Court was a final determination and final settlement of all matters between the

plaintiff and the defendant, growing out of the same alleged cause of action, and the same facts, and that therefore, the cause of action which the plaintiff now sets forth in his complaint is *res adjudicata.*

"Defendant further alleges that by reason of the suit in said United States Court, in costs and necessary expenses, in defending said suit, the defendant expended therein the sum of $1,200. The defendant alleges that it is entitled to recover from plaintiff said sum of $1,200 as costs and expenses, incident to the trial of said cause in said United States Court."

Paragraph 6 was, in part, as follows:

"The defendant alleges that the alleged cause of action of the plaintiff has long since been barred by the statute of limitations of three years of the State of Arkansas. In that connection, the defendant alleges that the plaintiff, in the year 1917, brought a suit on this same cause of action in the State of Oklahoma in the District Court within and for LeFlore County, State of Oklahoma, and thereafter dismissed that suit. The defendant denies that the plaintiff has a right to bring and maintain this suit, and alleges that the statute of limitations of the State of Arkansas has barred the same; and denies that the dismissal of the suit in the United States District Court gave the plaintiff the right to bring and maintain another suit in the State court within one year thereafter; but alleges that said alleged cause of action set forth in the complaint is fully and completely barred by the statute of limitations of the State of Arkansas.

"Premises considered, the defendant prays judgment against the plaintiff in the sum of $1,200, costs and expenses, expended in the United States District Court for the Western District of Arkansas, and also for all costs in this action laid out out and expended."

On the 21st day of June, 1918, the appellee filed a demurrer to appellant's plea of *res adjudicata set* up in the 5th and 6th paragraphs of its answer.

And, also, on the same day, the appellee filed the following motion:

"Comes the plaintiff, F. M. Akin, and moves the court to strike the following from paragraph 5 of defendant's answer:

" 'Defendant further alleges that by reason of the suit in said United States Court, in costs and necessary expenses in defending said suit, the defendant expended therein the sum of $1,200. The defendant alleges that it is entitled to recover from the plaintiff said sum of $1,200, as costs and expenses, incident to the trial of said case in said United States Court.'

"And further to strike from its answer its prayer for judgment of any amount exceeding the costs taxed in the case in which judgment was rendered against plaintiff in said suit in said United States Court for costs, defendant not being entitled to recover any other sum."

On June 26, 1918, the following order was entered of record:

"Comes defendant by its attorney, J. B. McDonough, and files answer herein; plaintiff's demurrer to the 5th and 6th paragraphs of defendant's answer heretofore filed on June 21, 1918, this day noted of record. Plaintiff's motion to strike certain language from paragraph 5 of defendant's answer heretofore filed on June 21, 1918, this day noted of record. And the court being well and sufficiently advised in the premises, doth sustain said motion as to paragraph 5, and defendant excepts, and doth overrule said motion as to paragraph 6, and plaintiff excepts.

"Plaintiff moves to strike language between brackets in paragraph 6, which said motion is by the court sustained, and defendant excepts."

On the same day, June 26, 1918, an amended answer was filed, which omitted that part of paragraph 5 of the answer to which the above and foregoing motion to strike was directed.

Paragraphs 6 and 7 of the amended answer contained all that was embraced in paragraph 6 of the original answer except the prayer for judgment against the plaintiff in the sum of $1,200, costs and expenses in the

United States District Court for the Western District of Arkansas.

The bill of exceptions, after setting out the amended answer was filed the appellee renewed his demurrer and motion to strike paragraphs 5 and 6 from the answer. The court overruled the demurrer and motion to strike except as to certain language set forth in the bill of exceptions. The bill of exceptions further shows that "there was no ruling, one way or the other, on the motion to strike out a part of paragraph 5, as the same was omitted in the amended answer which was filed June 26, 1918."

The bill of exceptions, after setting out the amended answer, contains the following recital:

"Thereupon the plaintiff renewed and filed anew the demurrer above mentioned and motion to strike paragraphs 5 and 6 from said complaint above set forth. The court treating said demurrer both as a demurrer and a motion to strike, sustained the same as to paragraph 5 and struck out said paragraph 5 from said complaint."

First. Appellant contends that the cause of action was barred by the statute of limitations as shown on the face of the complaint. True the complaint alleges that the injury was done on August 28, 1914, and the filing of the complaint and the issuing of the summons shows that this suit was instituted April 4, 1918, more than three years after the cause of action had accrued; but the complaint alleges that "prior to August 28, 1916, plaintiff brought suit in this court against defendant for the said cause of action and injuries herein sued for, which suit was dismissed by nonsuit without prejudice on April 7, 1917, in the United States District Court, to which it was removed, and this suit is now brought within less than one year from the date of said nonsuit and dismissal for the same cause of action."

The appellant, in paragraph 5 of its amended answer, admitted that the appellee had brought this suit "for the same alleged cause of action set forth in the complaint herein" and that a nonsuit and dismissal was

taken in the United States District Court; but denied, in paragraph 6, "that the dismissal of the suit in the United States District Court gave the plaintiff the right to maintain another suit in the State court within one year thereafter," and alleged that the said cause of action "was completely barred by the statute of limitations." But counsel for appellant contends that paragraph 5 of the amended answer, *supra,* was stricken out and that, therefore the burden was upon the appellee to support the allegations of his complaint as to the nonsuit in the Federal Court. The recitals of the record proper show that certain language was stricken from paragraph 5 of the original answer as set out in the motion to strike; but the language containing the admission as to the nonsuit for the same cause of action was not stricken from paragraph 5 of the original answer, and the language containing this admission was brought, as the bill of exceptions shows, into paragraph 5 of the amended answer. While the recital of the bill of exceptions shows that the court sustained the motion "as to paragraph 5 and struck out said paragraph 5 from said complaint," yet, when this recital is taken with the further recital in the bill of exceptions that "there was no ruling, one way or the other, on the motion to strike out a part of paragraph 5, as the same was omitted in the amended answer which was filed June 26, 1918," it is obvious that the whole of paragraph 5 of the amended answer was not stricken out, and the prior recital to that effect had reference to the language of paragraph 5 of the original answer which was stricken out on motion of the appellee, as shown by the order of the court to that effect entered on the judgment roll or record proper, which is controlling.

The language in paragraph 6, to-wit: "That the alleged cause of action of the plaintiff has long since been barred by the statute of limitations of three years of the State of Arkansas," and the further language, to-wit: "This defendant denies that the plaintiff has a right to bring and maintain this suit," does not constitute a denial of the allegations of appellee's complaint

as to nonsuit in the Federal Court of a suit on the same cause of action for which this suit was brought and the bringing of this suit within "less than one year from date of said nonsuit."

We conclude, therefore, that the pleadings show that the present suit was instituted within one year after the nonsuit in the Federal Court of a suit based on the same cause of action.

The present suit was commenced when the complaint was filed in the office of the circuit clerk and the summons was issued thereon. The endorsement and notation of the clerk shows that the complaint was filed, and the summons was issued on the 4th day of April, 1918. Section 6033, Kirby's Digest; *Burleson* v. *McDermott,* 57 Ark. 229; *Railway* v. *Shelton,* 57 Ark. 459; *Barker* v. *Cunningham,* 104 Ark. 627.

Section 5083 of Kirby's Digest gives a plaintiff who has suffered a nonsuit the right to commence a new action "within one year after such nonsuit suffered."

But for this statute appellee's cause of action would have been barred within three years from August 28, 1914. See section 5064, Kirby's Digest; *Emrich* v. *Little Rock Traction & Electric Co.,* 71 Ark. 71; *St. L., I. M. & S. Ry. Co.* v. *Mynott,* 83 Ark. 6.

The pendency of the suit in the Federal Court for the same cause of action had the effect to toll the general statute of limitations of three years, and when nonsuit was taken in the Federal Court and the present suit was begun for the same cause of action within one year after such nonsuit, appellee had the right to maintain the same under the express provisions of section 5083 of Kirby's Digest, *supra.*

The language of the statute is exceedingly comprehensive. There are no restrictions to causes of action begun in the State courts. There is nothing to indicate a purpose to so confine it. The language is broad enough, and was doubtless so intended, to cover any action in any court having jurisdiction within the State.

The doctrine applicable here, which is supported by practically all the modern authorities upon the subject, is forcefully stated in the case of *Gassman* v. *Jarvis,* 100 Fed. 146-7, as follows:

"The State court possesses original jurisdiction of all such causes of action. The removal of the case, and its subsequent dismissal, untried and undetermined, cannot, under any known rule of law, be held to be a merger of the cause of action; nor can the removal or dismissal of the cause be pleaded in abatement of the new suit brought in the State court. When a cause of action removed into a court of the United States is dismissed therefrom without any trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby, and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought."

Stevenson's Admr. v. *Illinois Central R. R. Co.,* 117 Ky. 855, 4 Ann. Cas. 890, and case note; *McIver* v. *Florida Central Ry. Co.,* 110 Ga. 223; *Hooper* v. *Atlanta, K. & N. Ry. Co.,* 106 Tenn. 28, 53 L. R. A. 931; *Baltimore & Ohio R. R. Co.* v. *Larrill,* 83 Ohio State 108, 93 N. E. 619, 34 L. R. A. (N. S.) 1195; *Southern Ry. Co.* v. *Miller,* 217 U. S. 209; 9 R. C. L. 212-13; *Carr* v. *Howell,* 97 Pac. 885. See, also, *Dressler* v. *Carpenter,* 107 Ark. 353.

The appellant contends that this nonsuit statute (section 5083, Kirby's Digest) cannot toll the general statute of limitations because the three years had not yet expired at the time the nonsuit was taken and there was some time remaining before such expiration in which appellee might have brought this suit. The nonsuit statute very plainly says that "the plaintiff may commence a new action within one year after such nonsuit suffered." The limitation of one year, therefore, cannot be construed to apply to causes only where the time of limitation under the general statute shall have expired at the date of the dismissal. As said in *Love* v. *Cahn,* 93 Ark. 215, this statute "instead of shortening the period of limitation,

really extends the period provided by the general statute of limitations applicable to the cause of action." See, also, *Dressler* v. *Carpenter, supra; Knox* v. *Henry et al.,* 55 Pac. 668; *Meek* v. *Norfolk & S. R. R. Co.,* 42 S. E. 333; *Bates* v. *S. D. & C. R. R. Co.,* 12 Ohio State 620.

Second. The appellant contends that there was no evidence tending to prove that the injuries received in the wreck were the proximate cause of the tuberculosis which thereafter developed and became active in appellee's body for which he alleged, and was allowed to recover, damages. The appellant, in several of its prayers for instructions, requested the court to withdraw from the jury the issue of damages alleged to have accrued to appellee from tuberculosis caused from the injuries received by reason of the derailment. The court refused these prayers, and appellant now insists that this ruling was erroneous.

Over the objection of appellant the following hypothetical question was propounded to four physicians who qualified as experts:

"Q. In June, 1904, the plaintiff had his right elbow scraped for tuberculosis. He was not relieved, and in August, 1906, the arm was amputated above the elbow on account of the tuberculosis in that joint. He made a good recovery from the operation and was in good health up till August 28, 1914, at which time he weighed 165 pounds, his normal and usual weight, and had no active tuberculosis. In August, 1914, while riding on a train the coach in which he was riding was derailed, while he was asleep and while it was being overturned he was thrown from his seat to the opposite side of the car in or on the parcels rack, by which he was injured on his head and other parts of the body to the waist line. And he received at the time a bruise on the right groin beginning about here, indicating, and extending about four inches up the groin about the width of my two fingers. Both of his legs between his ankles and his knees were bruised and skinned so that his underclothing stuck to the flesh for about sixteen hours. He didn't know of the injury

to his shins above described till after he had been taken back into one of the cars as heretofore stated. When he attempted to extricate himself from the position in which he had been thrown, he was in a dazed condition, and somewhat nauseated. He extricated himself from this position and walked with difficulty to the end of the overturned coach, during which time he was suffering severe pain, and about the time he attempted to get out of the door of the car he became unconscious or fainted, and when he recovered from this condition he was lying on the railroad embankment from which place he was removed to a coach near the coach which was derailed. While in this car he suffered intense pain, became nauseated and it was then that he discovered the injuries below his knees. He was carried to Fort Smith, arriving there about four or five o'clock p. m. of that day. He received a bruise on his back and on his groin, and afterwards suffered severe pain from the injury to the groin. He received a severe shock, nervous shock, as well as the injuries above described. He was in bed about four or five days, during all of which time he suffered severe pains, and at times was forced to get up on account of pains and then go back to bed. While sitting up he suffered as much pain as while sitting or lying down. His urination which was normal before the accident became frequent, causing him to go to the toilet five or six times each night. That he began to lose weight soon after the accident and injuries described which he never regained, and was 25 pounds lighter at the time of the operation for the removal of the first testicle. At said operation the testicle was found by examination and incision after removal to contain tuberculosis nodules and was in an acacious or cheesy condition. He doen't know whether there was any injury to his testicles at the time of the accident. He discovered no bruises on the scrotum, and felt no pain in the testicles at the time of the accident. In December afterwards he felt an occasional pain in his groin where it was injured, or where it had been bruised. He noticed no pain in his testicles till about June, 1915,

when there was pain, a sort of pulling down pain. In July following the testicle became enlarged to the extent that it was in the way and the pain was more continuous. In August following, which was just one year after the accident, he had his testicle, which was on the same side that the groin was bruised, removed, and when removed it was found full of tubercular nodules and in an acacious or cheesy condition. In April, 1916, another operation was performed, removing a part of the spermatic cord; when removed it was found to be full of tubercular nodules and in an acacious, cheesy condition. In July, 1916, the other testicle became affected and was removed and when removed was found in an acacious, cheesy condition. He received no injury from the time of the accident in the railroad wreck up to the time of the operation and suffered no illness or symptoms except those produced by the accident before described. But never recovered his normal condition after the accident and before the operation. Now, doctor, assuming those facts to be true as stated, give your opinion as to whether the injury received in the railroad accident caused or produced the tubercular condition of his testicles or spermatic cord or either of them?"

The witness answered that the injuries caused the condition of tuberculosis found in the appellee's testicles and spermatic cord at the time of the operation, when same were removed. Some of these witnesses further testified, in answer to questions, "that tuberculosis was not like any other disease. It does not run on schedule time. Tubercular bacilli lie in the latent condition for different lengths of time; sometimes they manifest themselves within a few weeks, and sometimes a year. No one can say that they manifest themselves in a certain time. They are not like typhoid bacilli or the smallpox germ." They further testified that any injury to a person which impaired his physical condition, causing him to lose in weight, vitality and strength, would tend to cause the inactive bacilli to become active. The witnesses answered further that any excitement or nervous

shock which would cause the condition of a person to become "devitalized, to lose his strength and vigor and his vitality," would set inactive tubercular bacilli into activity; that where a person had the bacilli of tuberculosis in his system that had become arrested, if such person received an injury that affected his general physical condition and impaired his vitality, such injury would hasten or aggravate an attack of tuberculosis.

Giving the evidence its strongest probative force in favor of the appellee, which the court must do, there was testimony tending to prove the facts upon which the hypothetical questions were grounded. These questions conformed to the rule announced in *Taylor* v. *McClintock,* 87 Ark. 243-294; *Arkansas Midland Ry. Co.* v. *Pearson,* 98 Ark. 399; *Ford* v. *Ford,* 100 Ark. 518; *Williams* v. *Fulks,* 103 Ark. 196; *Williams* v. *Cantwell,* 114 Ark. 542; *Scullin* v. *Vining,* 127 Ark. 124.

The appellant propounded substantially the same question to some expert introduced in its behalf, and also other hypothetical questions based upon the testimony in its most favorable light from the viewpoint of appellant, and the answer to these questions was in effect that the injuries caused by the wreck did not cause the tuberculosis afterwards developed in appellee's testicles.

Counsel for appellant contends that the issue as to the approximate cause of the tuberculosis in the testicles of appellee was put at large in the realm of speculation and conjecture by the testimony of the experts.

Now as to whether or not the appellee was afflicted with active tuberculosis in his arm, which was arrested by amputation in 1906; and whether or not the germs of tuberculosis may be arrested, become encapsulated, inactive and innocuous, and remain in this condition in the system for several years, and then, by reason of some injury to the person, be revived and become active and hurtful, are questions which would require scientific knowledge for their correct solution. These are matters beyond the grasp of the ordinary layman, but peculiarly appropriate for expert knowledge and opinion. Because

the experts differ in their opinions upon the same state of facts, assuming them to be true, is no reason for relegating to the realm of conjecture and speculation the issue as to whether or not the injury was the proximate cause of the tuberculosis thereafter developed in appellee. The theory upon which all expert testimony rests is that, where facts are established with reference to the subject-matter of inquiry which the common observation and experience of the jury would not enable them to correctly understand and interpret, then they may have the benefit of the opinions of those who, by reason of their special study and learning, have peculiar knowledge of the subject. Roger's Expert Testimony, page 19, sec. 6. Because experts differ in their opinions as to the conclusion to be drawn from the facts proved does not render the ultimate result to be determined by the jury one of speculation or conjecture. In such cases the question is one not of conjecture and speculation on the part of the jury but rather a question of the weight and credit to be given to the conflicting opinions of experts. As is said in Ruling Case Law, vol. 11, p. 578, sec. 10, "Each party has the right to lay before the jury the scientific inferences properly deducible from the facts which he claims to have proved, subject to the contingency that the jury shall find such facts to be as claimed. * * * The solution of this problem which has been worked out by the courts is to permit counsel to put to the expert, after his competency has been established, a question in which the things that counsel claims to have proved are stated as an hypothesis, and the witness is asked to state and explain the conclusion which in his opinion results." If the experts differ in their opinion as to results, then it is the province of the jury to determine which has reached the correct conclusion. A contrary doctrine would result in the elimination of the opinions of all experts, unless they happened to be of one mind, and abrogate the rule of evidence permitting the introduction of such testimony.

Applying these principles to the facts of this record it was, therefore, an issue for the jury as to whether or

not the injuries produced by the alleged wreck were the proximate cause of the tuberculosis for which the appellee claimed damages, and the court did not err in refusing prayers for instructions which sought to withdraw that issue. "Where fair-minded men might honestly differ as to the conclusion drawn from the facts, whether controverted or uncontroverted, the question of issue should go to the jury." *St. L., I. M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112-119.

The doctrine announced by this court in the case of *M. D. & G. R. R. Co.* v. *Steel,* 108 Ark. 14, is applicable here. See, also, *St. L., I. M. & S. Ry. Co.* v. *Steel,* 129 Ark. 521-527; *Rieff* v. *Interstate Business Men's Acc. Assn.,* 127 Ark. 254-259; *Biddle* v. *Jacobs,* 116 Ark. 82; *Sterling A. Cor. Co.* v. *Strope,* 130 Ark. 435; *Hurley* v. *New York & Brooklyn Brewing Co. et al.,* 43 N. Y. Supp. 259.

Counsel for appellant presents many assignments of error in the rulings of the court in granting and refusing prayers for instructions.

The injury occurred in the State of Oklahoma. The issue of negligence was sent to the jury under instructions which declared the law in substantial compliance with the statute of Oklahoma and in conformity with the doctrine announced by the Supreme Court of that State. See *St. L. & S. F. R. R. Co.* v. *Posten,* 124 Pac. 2; *Lusk et al.* v. *Wilks,* 172 Pac. 929; sec. 800, Revised Laws Okla. 1910.

Only a general objection was reserved at the trial, to the rulings of the court, and we find no inherent defect in any of the instructions. The errors, if any, were merely those of verbiage which could have readily been corrected if the attention of the court had been specifically called to same. The charge of the court taken as a whole on this issue and on the issue as to the proximate cause of the tuberculosis in the testicles of appellee correctly declared the law, and fully and fairly submitted these issues to the jury, and there was testimony to sustain the verdict.

We find no error in the rulings of the court in the admission or rejection of testimony. The judgment is, therefore, affirmed.

CHERRY v. KIRKLAND.

Opinion delivered March 3, 1919.

1. ACCOUNT—JURISDICTION.—Where an account involved in a suit consisted of two debit items and about a page of credit items, covering only a short period of time and growing out of and relating to one transaction, and neither intricate nor complicated. the law court properly refused to transfer the cause to chancery.
2. LANDLORD AND TENANT—UNLAWFUL DETAINER—RIGHT OF ACTION. —Under Kirby's Digest, section 3630, a grantee or assignee of a landlord may bring an action of forcible entry and detainer.
3. GOOD WILL—SALE—FALSE REPRESENTATIONS—DAMAGES.—The good will is an asset subject to sale and purchase, and where the sale is induced by fraud the buyer is entitled to damages.

Appeal from Marion Circuit Court; *John I. Worthington,* Judge; reversed.

Allyn Smith and *Seawel & Williams,* for appellant.

1. The cause should have been transferred to chancery court as the answer shows there is a long and intricate account between the parties which ought to have been stated by a master. 27 Ia. 234, and cases cited; 48 Ark. 426; 51 *Id.* 98; 31 *Id.* 345; 71 *Id.* 32; 49 *Id.* 568; 6 *Id.* 191.

2. It was error to reject evidence as to the value of the "good will' where the sale was induced by false and fraudulent representations of plaintiff and the "good will" was included in the sale. It was also error to reject evidence as to the damages to Cherry. The evidence was competent and should have been admitted. 131 Pac. 15; 83 Kan. 353; 150 Pac. 1; 1 Ark. 31.

3. The testimony shows that at the time of the sale Mrs. Kirkland owned the buildings, and afterwards sold them to Mr. Kirkland and Cherry became his tenant; that after the retransfer to appellee never attorned to

her nor became her tenant; that she never demanded such attornment and until she properly brought home to him the fact that she was his landlord she could not terminate his tenancy for non-payment of rent nor oust him nor recover rent. Unlawful detainer would not lie unless the relation of landlord and tenant existed. 41 Cas. 432; 31 Ark. 369; 44 *Id.* 444; 29 Cal. 168.

4. The form of the verdict of the jury did not authorize the entry of judgment for possession. It was only for a lump sum of $269. The court also erred in its instructions given and refused and in its modifications of those asked by appellant. Cases *supra.*

J. A. Comer, for appellee.

1. Appellee was entitled to recover rents from January 1, 1917, to the date of suit. Appellant admits he owes $325 as rent.

2. Appellant is not entitled to recover back the $2,000 paid appellee as a *bonus* on the merchandise and *good will* of the business. The record is silent as to the value of the "good will." There was no competent proof that the good will was not worth all that was paid for it.

3. Appellant suffered no damages on account of appellee's failure to pay the debts of the mercantile company contracted prior to the sale. His own statements show any damages.

4. Appellant had no right to open up the account after a statement made and a due bill given for the balance due appellee and all the records and books turned over to him and he retained them for more than 18 months without objection.

5. No reason is shown why the case should have been transferred to equity. There were no accounts to state. The matter was properly referred to a jury.

6. There is no proof in the record showing that the relation of landlord and tenant did not exist. Appellee told appellant that she was the owner and expected him to pay rent to her.

7. The finding and form of the verdict of the jury is legal and carried with it the right to possession and there is no error in the court's charge.

HUMPHREYS, J. Appellee instituted suit against appellant on the 2nd day of August, 1917, in the Marion Circuit Court, for forcible entry and unlawful detainer of lot 7, block 4, and lots 8, 9 and 10, block 7, in the town of Rush, all in section 11, township 17 north, range 15 west, in said county, upon which she had constructed a store building, bungalow, hotel, warehouse and pool room, and for rents and damages. Appellee alleged ownership, right of possession, failure of appellant to pay rent after demand, and refusal to quit after notice.

Appellant answered, denying appellee's ownership, right of possession, right to rents or that he unlawfully detained the property; and by way of further defense, filed a cross-bill specifically alleging that his possession of the store building was under written lease, incorporated in a contract for the purchase of goods and the good will of the business conducted in said building; that the sale of stock and good will was induced by representations that the stock was free from incumbrance and that the daily cash sales of the business ran from two hundred to five hundred dollars per day; whereas, the business was indebted between three and four thousand dollars, which destroyed appellant's credit and sales, in a measure, and the good will, was of little value and practically worthless because the daily sales did not exceed $25 or $50; that, on account of these misrepresentations, he was damaged $2,000 which he paid for the good will, and $3,000 for loss of time, clerk hire and depreciation in the value of the goods. Appellant also alleged that appellee was indebted to him in the sum of $1,079.05, balance due on account attached to the cross-bill as an exhibit. Every material allegation in the cross-bill was denied by appellee.

The appellant filed a motion, before trial, to transfer the cause to the chancery court, and renewed it at the

conclusion of the evidence, assigning as a reason for the transfer, that the adjustment of a complicated account was involved as an issue in the case. The motion was denied over the objection and exception of appellant.

The cause was submitted to a jury on the pleadings, oral and documentary evidence and instructions of the court. The jury returned a verdict in favor of appellee for $269, and judgment was rendered for said amount and for possession of the property, from which an appeal has been prosecuted to this court under proper proceedings.

Appellant first insists that the court erred in refusing to transfer the cause to the chancery court. The account attached consisted of two debit items and about a page of credit items covering only a short period of time and growing out of and relating to one transaction. It is neither a running account involving mutual items of debit and credit nor is it intricate and complicated. For this reason, we think a jury could determine the matter as accurately as a master. The court did not err in retaining the cause.

Again, it is contended by appellant that appellee is not in a position to bring suit for forcible entry and detainer under the statutes of this State. The evidence disclosed that appellee was the owner of the lots and building at the time the stock of goods and good will of the business were sold to appellant. In September thereafter, appellee sold and conveyed the property to her husband, O. D. Kirkland. After that time appellant recognized O. D. Kirkland as his landlord and attorned in him as such landlord until the first day of January, 1917. On the 23rd day of December, 1916, O. D. Kirkland, in a divorce settlement with his wife, reconveyed the property by quitclaim deed to her. Appellee testified that in January, 1917, appellant called at her home in Little Rock, at which time she stated to him that the property belonged to her and that he would have to account to her for the rent from that time on. Appellant admitted that, when he called on appellee in Little Rock, she talked to

him about the rents coming to her and about a settlement which she and Mr. Kirkland were about to make, but said that he told her at the time that he did not expect to pay any more rents until she complied with her contract (referring to the contract for the sale of the goods). On February 2, 1917, appellee wrote appellant a letter which he received, of which the following is a part: "Mr. Kirkland and I have made a settlement and the rents are mine; also, the balance on the warehouse money. I wish you would send me a check for rents and as much on the warehouse goods as you can, so I can get all bills paid as soon as possible. Send either to Mr. Clayton or Mr. Comer, my attorneys, or to me."

Appellant did not then question, and, as we understand it, does not now question, that appellee was the owner of the property. Appellant's contention is that the rights of a conventional landlord to institute suit for forcible entry and detainer do not pass to his grantee by deed unless the tenant recognizes the grantee as landlord by attornment or otherwise. Appellant cites *Reay* v. *Cotter*, 29 Cal. 168, in support of his contention. By the statutes of California, the remedy of forcible entry and detainer is conferred upon the landlord only. Under the peculiar wording of the California statute, the court held that the remedy did not pass to the successors in estate to the landlord. The statute of this State is broader and confers the action of forcible entry and detainer upon any person having the right to the possession of the property. Of course, the relationship of landlord and tenant must exist as a basis for the institution of this action, but the statute is broad enough to include the conventional or original landlord, his grantee or assigns in estate. Section 3630, Kirby's Digest. Under the facts in this case, appellee had a right to institute this character of action.

It is also insisted that the court erred in excluding from the jury the issue tendered, and evidence offered in support thereof, of whether the sale of the good will of the business was induced by misrepresentations as to

the amount of daily sales. It was alleged that appellee was induced to pay $2,000 for the good will of the business by representing that the daily cash sales ran from two hundred to five hundred dollars; whereas, the daily cash sales only amounted to $25 or $30. Appellant offered proof tending to establish this allegation, which was excluded by the court. Appellant also requested an instruction presenting that issue to the jury, which was refused by the court. The court took the position that the good will of a business was not a thing the sale of which could be induced by fraud. We think the good will of a business is a tangible thing; that it is a valuable asset. We see no difference between the good will of a business and any other valuable asset possessed by it. The good will of a business has been recognized in the law as an asset subject to sale and purchase. 1 Page on Contracts, section 374; *Bloom* v. *Home Insurance Agency,* 91 Ark. 367. The good will of a business, being a thing of value and subject to sale and purchase, may be induced by false and fraudulent representations just as the sale and purchase of any other property may be so induced.

For the error in excluding this issue from the jury, the judgment is reversed and remanded for a new trial.

FUNK v. YOUNG.

Opinion delivered March 3, 1919.

1. BANKS AND BANKING—INSOLVENCY OF BANK—SET-OFF BY DEPOSITOR.—Where a bank becomes insolvent, depositors may set off deposits against notes held by the bank, to the end that only the true balance may be required to be paid to the representative of the bank.
2. BANKS AND BANKING—INSOLVENCY.—A receiver of an insolvent bank is not an innocent purchaser of its notes and takes them subject to any equities that would be good against the bank itself.
3. SAME—INSOLVENCY—RIGHTS OF ASSIGNEE.—One to whom notes of an insolvent bank had been assigned by its receiver or by the bank commissioner acquires only the rights of the bank, and the

maker of a note may set off against it debts owing to him by the bank.

4. PLEADING—AMBIGUITY.—Incomplete, ambiguous or defective averments of an answer may be reached by motion to make them more definite and certain.

5. PLEADING—INTENDMENT.—In determining the sufficiency of any pleading, every fair and reasonable intendment must be indulged in its support.

6. BANKS AND BANKING—ACTION ON NOTE—SET-OFF.—One having a deposit in an insolvent bank as trustee for another could set off his claim therefor in a suit on a personal note due by him to the bank.

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

STATEMENT OF FACTS.

Towne Young, trustee, brought suit against Funk & Son, E. M. Funk and Erwin C. Funk to recover the sum of $149.40 and the accrued interest alleged to be due him on a promissory note. The note is dated April 27, 1914, at Rogers, Arkansas, and is signed by Funk & Son, E. M. Funk and Erwin C. Funk. The face of the note was for $200 and was due and payable to the order of the Bank of Rogers sixty days after date with interest at the rate of ten per cent. per annum from maturity until paid. The note had the following endorsements on the back of it:

"Bank of Rogers by W. E. Talley, Pres."

"Paid Dec. 18-16 $100, J. R. D."

"For value received I hereby assign and transfer the within note to Towne Young, Trustee. John M. Davis, Bank Commissioner."

The defendant filed an answer to the complaint as follows: "They deny that they are indebted to the plaintiff in the sum of $149.40, or in any other sum.

"*Second.* Defendants further answering, admit that on April 27, 1914, they executed their promissory note to the Bank of Rogers for the sum of $200, bearing ten per cent. interest from date, and admit that there was endorsed as paid thereon $100, December 18, 1916.

"*Third.* That on the ..... day of July, 1914, the said Bank of Rogers being insolvent closed its doors and was with all its assets taken over by John M. Davis, State Bank Commissioner, and the affairs of said bank are now in process of settlement in the Benton Chancery Court. That at the time the said bank failed, defendant Erwin C. Funk, had on deposit in said bank subject to check the sum of $25.06; that the firm of Funk & Son had on deposit in said bank subject to check, the sum of $8.37. That there is due and owing the defendants, E. M. Funk and Erwin C. Funk, members of the firm of Funk & Son, $33.43, and interest which they are entitled to have set off against the said note in suit.

"*Fourth.* Defendant, E. M. Funk, further answering for himself, says: That on the ..... day of the ..... 19....., he, as trustee for S. C. Walters, deposited in said bank, for which he was personally responsible to S. C. Walters, on time deposit, the sum of $300; that at the time the aforesaid bank failed there was due and owing him as such trustee from said bank the sum of $300. That about July, 1914, a short time before the said bank closed its doors he received from said bank, a bank draft for $4.20, being for the interest due on the aforesaid time deposit; that the bank failed before the draft could be presented for payment, and defendant avers that he is entitled to have the same applied towards the payment of said note.

"*Fifth.* That the said several sums above mentioned as owing from the Bank of Rogers to defendants, Funk & Son, E. M. Funk and Erwin Funk, have been filed with the bank commissioner and have been allowed as subsisting claims against the bankrupt estate of the said Bank of Rogers; that 27 per cent. of said claims have been paid, leaving due and owing these defendants, jointly 73 per cent. thereof.

"Defendants pray that the amount of the several sums unpaid and found due and owing these defendants as above set forth and mentioned, or so much

thereof as may be necessary be allowed as set-off against the amount that may be found due and owing plaintiff on the note in suit; that the plaintiff take nothing from defendants, for their costs and for all proper relief."

Subsequently they filed an amendment to the answer which is as follows: "Wherein they say that on the 22nd day of January, 1916, subsequent to the maturity of the note sued on plaintiff purchased from John M. Davis, State Bank Commissioner, all of the assets of the said Bank of Rogers, including the note in controversy, and defendants aver that plaintiff purchased the said note subject to the equities of the defendants."

The answer was duly verified by E. M. Funk. The defendants also filed a motion to transfer the case to equity. The plaintiff filed a demurrer which was sustained by the court. The judgment recites that the defendants refused to plead further, but elected to stand upon their answer and cross-complaint and that the court found that the defendants were indebted to the plaintiff in the sum of $174.50 as principal and interest on the note.

Judgment was rendered against the defendants in favor of the plaintiff for that amount and the defendants have appealed.

The appellants *pro se.*

The court erred in sustaining the demurrer. Defendants admit the execution of the note and their joint and several liability and the only question is, did the court err in sustaining the demurrer to the answer as amended? At the time the note was executed —the note to the Bank of Rogers—it was a going corporation and defendants were regular patrons of the bank carrying deposit accounts, joint and several, and at the time it closed its doors and was taken over by the bank commissioner, Funk & Son and Erwin Funk had small deposits. A demurrer to an answer admits the allegations thereof to be true. 102 Ark. 470; 104 *Id.* 466. Thus the bank was indebted to defendants on these several deposits when it failed and the note sued on be-

ing a joint and several obligation, defendants are entitled to have credited the amounts of their deposits or enough to extinguish their joint and several liability on the note. By a general deposit the bank becomes debtor of the depositor and bound to pay same upon demand or order, and the depositor is entitled to offset the amount of his deposit against the bank's demand. 98 Ark. 299; 69 *Id.* 47; 146 U. S. 499; 13 Sup. C. Rep. 627. Since the passage of Act 267, Acts 1917, a cause of action of either on contract or tort may be the subject-matter of counter-claim in action for recovery of money. *Coats* v. *Miller,* Ark. Law Rep., July 13, 1918, p. 318. Hence defendants may offset against their joint and several liabilities on the note any debt due them from the Bank of Rogers or its assigns. 54 Wis. 103; 2 Ann. Cases 600 and note; 1 Ala. 95; 14 Ark. 668; 5 B. Mon. (Ky.) 376. Plaintiff did not purchase the note in due course, but took an assignment after maturity from the bank commissioner, and he took subject to all the defenses which the makers had against the assignor. Receivers of insolvents are not purchasers for value without notice but personal representatives of the insolvents and take their assets subject to all set-offs, liens and encumbrances as they exist at the time of their appointment. 94 Ark. 294; 34 Cyc. 195-6. The pleadings show that the note was past due and that appellee did not purchase in due course of business. An endorsee of a note after maturity takes no greater rights than his endorser had. 76 Ark. 245; 10 Pac. 331; 69 Cal. 124; 4 Words and Phrases 3566. See also 2 Words and Phrases (2 series) 163; 41 L. R. A. (N. S.) 391; 38 Ark. 127; 39 *Id.* 306. The demurrer is a general one and if either one or more of the items set out in the answer states a cause of defense the demurrer should have been overruled. 72 Ark. 29; 37 *Id.* 32.

If a cause of action can be reasonably inferred from the allegations of a complaint it is not subject to a general demurrer. 93 Ark. 371; 102 *Id.* 287. In determining the sufficiency of any pleading, either action or de-

fense, every intendment must be indulged in support of such pleadings. 96 Ark. 163; 110 *Id.* 130; 125 *Id.* 464.

Where a complaint at law states a good cause of action in equity and defendant demurs, the demurrer should be treated as a motion to transfer to equity. 107 Ark. 70.

W. N. Ivie, for appellee.

The demurrer, which was general, was sustained properly, as the answer set up no valid offset or defense to the complaint. The many cases cited by appellants are not in point. No case of set-off was alleged in the answer. 51 Ark. 368; 36 *Id.* 228; 3 Cyc. 750; 72 Ark. 44; 23 *Id.* 33; 7 *Id.* 520. As to the $300 deposited by Erwin Funk as trustee that could not have been a good offset even against the Bank of Rogers. 13 Ark. 563.

Where a bank fails there is no legal obligation that its notes shall be received as a set-off against debts due it. 13 Ark. 563.

Under the act of March 3, 1913, our banking law, it was appellants' duty upon the failure of the bank to file their claims with the Bank Commissioner, and if not allowed suit must be brought within six months. The admitted facts show that this note was not sold to appellee until long after the six months allowed by law had expired. No cause of action was stated in the answer against appellee.

The appellants *pro se* in reply cite 72 Ark. 83.

HART, J., (after stating the facts). The court erred in sustaining the plaintiff's demurrer to the defendants' answer and cross-complaint and in rendering judgment in favor of the plaintiff against the defendants for the amount sued for.

In *Steelman* v. *Atchley,* 98 Ark. 294, the court held that the relation between a bank and a general depositor being that of debtor and creditor, if a bank becomes insolvent, a depositor who is also indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee of the bank to recover on the in-

debtedness due the bank. The trend of all modern decisions is toward liberality in the allowance of set-offs in the case of insolvency of the party against whom the set-off is claimed to the end that only the true balance may be required to be paid to the representative of the estate of the insolvent. In such cases a receiver is not an assignee for a valuable consideration in the ordinary sense of that term and by operation of law the rights and property of the bank pass to him precisely in the same condition and subject to the same equities as the corporation held them. So it is the well established rule that a receiver takes the claims in favor of the bank subject to all the equities between the bank and its depositors. See case note to Ann. Cas. 1917 C at p. 1188 and note to Ann. Cas. 1916 D at p. 599. Under our statutes the Bank Commissioner takes the place of a receiver of an insolvent bank. Section 51 of Act 113 of the Acts of Arkansas, 1913, p. 462.

It is also deducible from the authorities cited above that the assignee of the receiver is entitled to no greater rights than were possessed by the receiver. The reason is that he only purchases the rights of the bank and a note or demand held by an insolvent bank against a third person is an asset of the bank only so far as there may be a balance due upon the same after deducting whatever the bank may be owing the person against whom the demand is held. Our statute, Kirby's Digest, section 6098, provides that the defendant may set forth in his answer as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he shall have. Sections 6099 and 6101 of Kirby's Digest defining, respectively, counter-claims and set-offs have been amended by Act No. 267 of the Acts 1917, p. 1441. As amended the counter-claim may be a cause of action in favor of the defendants or some of them against the plaintiffs or some of them. A set-off may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort. So the court has held that in a suit on a promissory note

the parties may settle all matters in dispute between them whether the respective causes of action grew out of the same or different contracts or whether they arise upon contract or arise out of some tort. *Coats* v. *Milner,* 134 Ark. 311.

In the application of this statute to the facts of the present case, it is readily apparent that Erwin C. Funk had the right to set off against the claim of the plaintiff the sum of $25.06, which he had on deposit in the bank at the time of its failure and that the firm of Funk & Son had a right to set off the sum of $7.87, which the firm had on deposit in the bank at the time it became insolvent.

It therefore follows from the principles of law above announced that the court erred in sustaining the demurrer to the answer and cross-complaint of the defendants and in not allowing the set-offs above referred to as claimed by the defendants. For this reason alone the judgment must be reversed and the cause remanded for a new trial.

In the fourth paragraph of the answer the defendant, E. M. Funk, further answering for himself avers that at the time the bank became insolvent there was due and owing him as trustee from the bank the sum of $300; that he had deposited this sum in the bank as trustee for S. C. Walters and that he was personally responsible to Walters for said sum.

In *Dickerson* v. *Hamby,* 96 Ark. 163, the court held that where the averments of an answer are incomplete, ambiguous or defective, the remedy is a motion to make them more definite and certain. The court further held that in determining the sufficiency of any pleading, every fair and reasonable intendment must be indulged in to support such pleading, and an answer is not demurrable if the facts stated, with every reasonable inference to be drawn therefrom constitute a good defense. See also *Jonesboro, L. C. & E. Rd. Co.* v. *Board of Directors of St. Francis Levee Dist.,* 80 Ark. 316.

Tested by this rule we think that the demands of the plaintiff and of the defendants were mutual demands and that the assignee of the insolvent bank having sued the defendant for the collection of the debt due to the insolvent estate, the defendants may set-off the debt due to them or either of them from the insolvent estate and account for the balance only. In other words, we think it fairly inferable that the language of the paragraph of the answer just referred to was merely descriptive of the person of the defendant, Funk, and did not alter the right of the depositor to have mutual claims that are due the bank and himself set off against each other. This view is strengthened by the averment that the defendant is personally liable for the amount so deposited by him. Michie on Banks and Banking, vol. 2, p. 1060, sec. 135 (1b) and cases cited; *Laubach* v. *Leibert,* 87 Pa. 55, and *Miller* v. *Franklin Bank* (N. Y.), 1 Paige 444.

In the last mentioned case it was held that the public administrator of the city of New York is entitled to offset against a debt due from him to the bank a demand for deposits in the bank, whether made in his own name or as public administrator. The court said that as between him and the bank he stood in the same situation that an attorney would, who had deposited in the bank for safe keeping the moneys collected for different clients, in one general account in his name as attorney, to be drawn out on his own check when called for. The court further said that in neither case could the bank object to paying the money to the depositor, or to allow it to be offset against a demand in favor of the bank, unless they had notice from the persons having an equitable claim thereon not to pay it. We think this principle was recognized in the *Bank of Hartford* v. *McDonald,* 107 Ark. 232, where the court held that a trustee with full control over the trust funds in a bank may draw them out at his will, and the bank incurs no liability in permitting this to be done so long as it does not participate in any breach of trust resulting in any misapplication of the funds.

It follows that the judgment must be reversed and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

ATKINSON v. THOMAS.

Opinion delivered March 3, 1919.

1. SPECIFIC PERFORMANCE—REAL PARTY IN INTEREST—EVIDENCE.—In a suit for specific performance of a contract by which defendant gave plaintiff an option to purchase land, evidence *held* to show that the contract was in fact made with plaintiff's husband, who was the real party in interest.
2. VENDOR AND PURCHASER—AUTHORITY TO RESCIND.—Where one enters into an option contract to purchase land, using his wife's name, it is not necessary for him to secure permission from her to rescind the contract, since she is not a party in interest to the contract.
3. HUSBAND AND WIFE—RESCISSION OF CONTRACT—EVIDENCE.—In a suit for specific performance of an option contract to purchase land for $4,000, evidence *held* to show that $200 was paid to plaintiff's husband, the real party in interest, for the purpose of rescinding the contract.
4. FRAUDS, STATUTE OF—RESCISSION OF CONTRACT.—A verbal rescission of an option contract to purchase land is available in equity to repel a claim upon that contract.

Appeal from Lincoln Chancery Court; *John M. Elliott,* Chancellor; reversed.

STATEMENT OF FACTS.

On the 8th day of February, 1917, Mrs. Virgie Thomas brought this suit in equity against R. G. Atkinson for the specific performance of a certain real estate contract. The contract which is the basis of the suit is as follows:

"Yorktown, Ark., April 1, 1916.

"This agreement made and entered into this day and date by and between R. G. Atkinson, party of the first part, and Mrs. Virgie Thomas, party of the second part,

"Witnesseth, That whereas the first party has purchased from H. L. Hunter certain lands located at or very

near Yorktown, Lincoln County, Arkansas. Said lands fully described in deed from H. L. Hunter to R. G. Atkinson, dated March 31, 1916, and recorded in book 13, page 181, first party paying therefor the sum of four thousand, two hundred dollars cash, the said land having been leased by.....before this sale, they paying the annual rental of $500 per year. Now the said sum of $500 for rent is to be paid to first party for the years 1916 and 1917, the said parties continuing to hold under said lease until it expires.

"On or before December 1, 1917, the second party hereto is to have the option or privilege of purchasing said land for cash, and is to pay to the first party the sum of four thousand dollars cash. Upon the payment of said sum over and above the annual rent as stated above to first party or his assigns, then the first party is to make warranty deed to the second party, or her assigns, to the said lands, then this agreement is to become null and void.

"All improvements, if any are made during the life of this contract upon said lands, are to be free from any cost or charge to the first party hereto.

"Witness our hands and seals, day and date above written.

"R. G. Atkinson,
"Mrs. Virgie Thomas."

The plaintiff alleged in her complaint that on or about the second day of January, 1917, she tendered the defendant, Atkinson, $4,000 and demanded of him a deed conveying to her the lands described in her complaint and that the defendant refused to carry out the terms of his contract.

The material facts are as follows: R. L. Thomas, H. W. Thomas, T. A. Thomas and J. L. Thomas who are brothers, carried on a plantation supply business at Tarry and Yorktown, towns about five miles apart. The business became in an insolvent condition and a corporation composed of their principal creditors, called Lincoln Supply Company, was organized for the purpose of taking

over and carrying on the business at each place. The Thomas Brothers continued to manage the business. At the end of the year 1915, the business was not satisfactory to the creditors and R. G. Atkinson purchased all of the stock of the Lincoln Supply Company except two shares. He allowed the Thomas Brothers to continue to manage the business. T. A. Thomas and J. L. Thomas conducted the business at Yorktown and R. L. Thomas and H. W. Thomas conducted it at Tarry. In the fall of 1916 there arose dissension among the Thomas Brothers about the conduct of the business. R. G. Atkinson had known them all their lives and tried to adjust their differences. The agreement, when the Lincoln Supply Company was formed was that the Thomas Brothers should succeed to the assets as soon as the debts were paid. J. L. Thomas had some judgments against him and on that account conducted the business in the name of his wife, Virgie Thomas, and his deposits in the bank were carried in her name. J. L. Thomas had no interest in the business at Tarry. Atkinson first suggested to him that he buy out the Yorktown business. During this time J. L. Thomas and T. A. Thomas were conducting the business at Yorktown. About the beginning of the year 1917, J. L. Thomas sold his interest in the business to his brothers for the sum of $8,000. In closing up the trade a check was given him for $8,200, the $200 being given J. L. Thomas for an interest in a tract of land.

It is the contention of the defendant that this was given him for his interest in the land in controversy and that he and not his wife is the real party to the contract now sought to be specifically enforced.

On the other hand it is the contention of the plaintiff that this $200 was in payment of another tract of land and that she is the real party in interest to the contract involved in this suit.

T. A. Thomas first thought of buying the land involved in this suit. It was situated just back of their store at Yorktown and would be very useful to them in conducting their business there. It was the intention of

T. A. Thomas and J. L. Thomas at that time to purchase the interest of their brothers in the Yorktown business at the end of the year 1916. Atkinson agreed to furnish $4,000 of the amount necessary to purchase the land from Hunter and T. A. and J. L. Thomas were to furnish the additional $200, which was to be paid immediately. Thus far the facts are practically undisputed.

According to the testimony of J. L. Thomas, when it came time to close the trade with Hunter for the land in controversy, his brother, T. A. Thomas, told him that he could not furnish any part of the $200 and would relinquish his rights to be a party to the contract. His wife, Virgie Thomas, then concluded to become a party to the contract and she furnished the $200 out of her own money. J. L. Thomas sold his interest in the business to his brothers for $8,000, the money being furnished by R. G. Atkinson. Subsequently an additional $200 was included for his interest in a tract of land but which was not the tract of land in controversy. J. L. Thomas admitted that during all this time he had conducted his business in the name of his wife, but denied that her signature to the contract in question was placed there as a cloak for him and that he was the real party in interest in the contract for the sale of the lands involved in this suit.

Mrs. Virgie Thomas, also, testified that she was the real party in interest in the contract and signed her name as such. She denied that her husband had any interest whatever in the contract. She said that she made the $200 from her cows and chickens and keeping a few boarders. She denied that she gave her husband the right to sell her interest in the contract at the time he sold out his interest in the business.

On the other hand according to the testimony of R. G. Atkinson, Mrs. Virgie Thomas was not a party to the contract but her husband signed her name thereto in pursuance of his usual custom; that he conducted his business in his wife's name and that she knew nothing about the business and had no interest whatever therein. When J. L. Thomas sold out his interest in the business he was

paid $200 additional to cancel his interest in the contract involved in this suit. R. L. and T. A. Thomas both corroborated the testimony of Atkinson in every respect. In addition T. A. Thomas said that he first thought of buying the land from Hunter because it was near their store and would be useful to them in conducting the business of selling plantation supplies; that their business furnished the $200 which was paid by J. L. Thomas at the time the contract was entered into; that he thought J. L. Thomas had taken the contract for them until some time after its execution when he asked his brother to see it; that J. L. Thomas first put him off and finally showed him the contract and being reminded that the contract was not according to their agreement, J. L. Thomas said that he would change it. Both R. L. and T. A. Thomas testified in positive terms that the $200 paid J. L. Thomas was for his interest in the land in controversy and that Mrs. Virgie Thomas was never considered a party to the contract, but that her name was only signed thereto in pursuance of the custom of J. L. Thomas in transacting all his business in his wife's name; that Mrs. Virgie Thomas had no means of her own at any time.

Frank Knox, an employee in the business, testified that he had known Mrs. Virgie Thomas for ten or fifteen years and that she had no means or estate of her own; that J. L. Thomas conducted all his business in her name and deposited his money in the bank in her name.

The cashier of the bank upon which the check was drawn testified that he first drew the check for $8,000 and that then it was suggested that a certain real estate deal had been left out which would increase the check $200; that the first check was destroyed and a second one was written by him which included the $200; that the $200 was paid in settlement of some real estate deal with which the parties interested seemed familiar.

It was also shown by the manager of an oil mill with whom the parties conducted business, and had numerous transactions, that Mrs. Virgie Thomas never had any interest in the business; that he had numerous transactions

with her husband about the business and that he always claimed it to be his own; that he never heard of Mrs. Virgie Thomas being interested in any manner whatever in the business. Other facts will be referred to in the opinion.

The chancellor found the issues in favor of the plaintiff and caused a decree for specific performance to be entered of record. The defendant has appealed.

Taylor, Jones & Taylor, for appellant.

The question presented here is entirely one of fact. On the whole case it is clear that the chancellor erred in granting appellee specific performance of the option contract, as she was not entitled to the relief prayed. Her plea of the statute of frauds is unavailing. She had no means of her own and no money or business and paid nothing. Her husband merely used her name as a cloak as there was a judgment against him. The $200 was paid for the husband's interest in the Hunter land and not for another tract. No case was made for specific performance and her plea of the statute of frauds is not available. She was only a nominal trustee or in equity a naked trustee without any powers or rights in the land other than to hold the right to purchase for her two brothers, Alf and Lee, when Alf and his other brothers, Bob and Wallace, obtained through Atkinson's endorsement $8,200 and paid it to Lee and Lee waived and extinguished all his rights in the optional contract and Atkinson, under his arrangement with the other brothers, became no longer bound to Lee to convey the land to those of the boys who remained in business at Yorktown, namely, Bob, Alf and Wallace. 52 Ark. 207; 69 *Id.* 513. The plaintiff is estopped to plead the statute. 37 *Id.* 47; 96 U. S. 544; Bishop on Contracts, § 1237. The plea is a personal one and could only be plead by Lee Thomas. A rescission or agreement to abandon a right under a contract of option is not such a contract as is required to be in writing. Kirby's Digest, § 3654; 104 Ark. 465; 10 L. R. A. (N. S.) 867; 159 Pa. St. 142; 78 Ark. 314; 21 L. R.

A. 128; 39 W. Va. 214; 33 Fed. 530; 82 Ark. 581; 171 S. W. 1195. In any view of the case the plea of the statute of frauds is not availing. Appellee is not entitled to relief and her complaint should be dismissed. *Supra.*

Crawford & Hooker, for appellee.

Joel Lee Thomas being duly authorized in consideration of $200 and other valuable considerations paid, canceled and annulled the option contract set up in the complaint. The chancellor was correct in his findings. If the contention of defendant is admitted it still constituted no defense on Atkinson's part. He states that he has no interest in the outcome of this suit and he has not. Under the evidence he cannot avoid the effect of his contract to convey the land. If Mrs. Virgie Thomas had sold this option to Bob and Alf Thomas, that would be no defense to Atkinson. Mrs. Thomas has never surrendered, assigned nor sold her contract or option. The burden was on appellant to show that the interest of Mrs. Thomas belonged to her husband in the Lincoln Supply Company. J. L. Thomas could not bind his wife in any sale of the Hunter land. *Fleming* v. *Chamber of Commerce,* — Ark. *supra.*

The attempted rescission by parol is clearly within the statute of frauds. It was to cover just such cases as this. Our plea is sustained by Kirby's Digest, § 3654, par. 4; 2 Reed on Statute of Frauds 732, par. 455-6. Lee Thomas, as the chancellor held, could not be compelled to convey the Hunter land to the brothers. The great preponderance of the evidence and all the law sustains the findings of the chancellor and it should not be disturbed, as the decree is just and righteous. Cases *supra.*

HART, J., (after stating the facts). The record shows that the lands in controversy were purchased from H. L. Hunter for the sum of $4,200, of which R. G. Atkinson paid $4,000, and the remaining $200 was paid either by J. L. Thomas for himself and brother or by Mrs. Virgie Thomas. Atkinson took possession of the lands and has held them ever since. It is the contention

of the plaintiff that she signed the contract on her own account; that her husband, J. L. Thomas, had no interest in the lands; that she never authorized him to dispose of her interest therein when he sold to his brothers all his interest in the business conducted by them; and that he did not do so.

On the other hand, it is the contention of the defendant, Atkinson, that he made the contract with J. L. Thomas for the benefit of himself and brothers and that J. L. Thomas signed his wife's name thereto because he was transacting all his business in her name. In determining whether the contract in question was the independent contract of Mrs. Virgie Thomas, or whether her name was signed thereto for the benefit of her husband and in consequence, it was his contract, we must not only consider the testimony directly bearing on this phase of the case; but, also, all the testimony relating to the conduct of the parties antecedent to and following the signing of the contract which would tend to show the real character of the transaction and who was the real party in interest.

On the one hand, J. L. Thomas testified that his wife, Mrs. Virgie Thomas, executed the contract for herself and that he had no interest in it. His wife corroborated his testimony and testified that she furnished the two hundred dollars that went to pay for the land over and above the four thousand furnished by the defendant, Atkinson. She testified that she earned the $200 by the sale of butter, milk and chickens, and kept a few boarders. She made this general statement but did not enter into any particulars about how much she made, or to what extent she was conducting a separate business. She does not show that she had any bank account of her own and the testimony of her husband shows that he kept his own bank account in her name and that it was subject to his check.

On the other hand it is admitted that the defendant, Atkinson, paid $4,000 of the purchase price of the lands to Hunter and that he did this as an accommodation to

J. L. and T. A. Thomas. The intention at the time was that they should have an option to purchase the land under the terms mentioned in the contract which is the basis of this suit and Atkinson only furnished the money as an accommodation to them. Atkinson testified in positive terms that he made the contract with J. L. Thomas and that his wife's name was signed thereto because J. L. Thomas carried on all his business in her name; that Thomas so explained the transaction to him at the time. T. A. Thomas was the one who first thought of purchasing the lands and said that they were to be purchased for the benefit of their business, which was that of furnishing supplies to plantations. He said that it was thoroughly understood that the lands were to be purchased for his brother J. L. Thomas and himself and that J. L. Thomas so admitted to him after the contract had been made and explained that it was made in his wife's name because he transacted all his business in her name. He further testified that the $200 was taken out of their business and applied toward the purchase price of the lands.

The undisputed evidence shows that J. L. Thomas transacted all his business in his wife's name. J. L. Thomas himself admitted this to be true. It is not claimed that Mrs. Virgie Thomas ever entered into any other business transaction of her own. All the witnesses say they have known her for quite a number of years and that she had no independent estate or business of her own. She herself does not claim any except what she might have made off of her cows and chickens and does not even pretend to state how much this was. So it may be said that the undisputed evidence shows that J. L. Thomas had conducted all his business in his wife's name for a period of several years before the execution of the contract in question and that during all this time his wife never engaged in any business transaction whatever, nor did she ever interest herself in her husband's business affairs. These circumstances shed light upon the transaction in question and tend to show its true character.

In addition, the record shows that Atkinson furnished the money for the purchase of the land in question as an accommodation to J. L. and T. A. Thomas. He did not expect at the time that there would be any considerable rise in the value of land and expected them to pay him his money back and take a conveyance of the land to themselves. He knew that they had means with which to purchase the land and that Mrs. Thomas did not have any means whatever. These facts in addition to those already related tend strongly to show that the contract was made with J. L. Thomas and that the use of the name of Mrs. Virgie Thomas in signing the contract was merely a cloak, or at least, was the use by J. L. Thomas of the trade name by which for years he had carried on his business, and it is immaterial whether he or she actually affixed her signature to the contract.

When all the facts and circumstances preceding and following the execution of the contract are read in the light of the evidence relating to the execution of the contract, we are of the opinion that the clear preponderance of the evidence shows that the contract was made by J. L. Thomas and not by Mrs. Virgie Thomas.

It is next contended that a clear preponderance of the evidence shows that the option contract was annulled or rescinded by the act of the parties and that the $200 was restored to J. L. Thomas. We agree with counsel in this contention. It is true Mrs. Virgie Thomas testified that she did not give J. L. Thomas any authority to rescind the contract; but if we are correct in holding that she was not a party in interest to the contract, it would not be necessary for him to have permission from her. J. L. Thomas admits getting $200 over and above the $8,000 which was to be paid for his share in the business and that the $200 was paid him on account of a real estate transaction; but he says that it was on account of another real estate transaction which he describes. The record shows, however, that this tract of land had been sold prior to the time he sold out his interest in the business and that the proceeds had gone into the business. The

cashier of the bank who drew the check in favor of J. L. Thomas for the $8,000 states that the $200 was paid him for his interest in a land contract. T. A. Thomas and Atkinson both testified that the contract was the one involved in controversy in this case. This land was situated near to the store and would be considered a considerable asset in the business. Atkinson was furnishing the money with which to buy out the interest of J. L. Thomas. He knew that Mrs. Thomas did not have any independent means of her own and that the object of buying the lands in controversy was to use them in connection with the business. The parties did not at that time anticipate any considerable rise in the price of real estate. It is conceded that Mrs. Thomas would have had to borrow the money with which to pay for it when she exercised an option to purchase it.

When all these facts and circumstances are read and considered in the light of each other, we are of the opinion that a clear preponderance of the evidence shows that the $200 was paid J. L. Thomas for the purpose of annulling and rescinding the contract which is the basis of this suit.

Again it is sought to uphold the decree upon the plea of the statute of frauds. It is claimed that the admission of oral evidence to show a rescission of the contract would be in contravention of the statute of frauds. J. L. Thomas did not go into possession of the lands. He was paid back the $200 which he had paid out under the contract and as we have already seen, a preponderance of the evidence shows that this was for the purpose of rescinding the contract. It is firmly established that a parol discharge of a written contract within the statute of frauds is available in equity to repel a claim upon that contract. Brown on Statute of Frauds, (5 ed.), sec. 433; Wood on Statute of Frauds, sec. 403; *Phelps* v. *Seely,* 22 Grat. (Va.) 573; *Marsh* v. *Bellew,* 45 Wis. 36; *Jones* v. *Booth,* 38 Ohio St. 405; *Miller* v. *Pierce,* 104 N. C. 389, and *Arrington* v. *Porter,* 47 Ala. 714. It follows that the decree must be reversed and the cause

will be remanded with directions to the chancellor to dismiss the complaint for want of equity.

EASLEY v. ROWE.

Opinion delivered March 10, 1919.

1. EXECUTORS AND ADMINISTRATORS—ACTIONS ON CLAIMS—JURISDICTION.—The circuit court has jurisdiction of claims against estates of deceased persons provided the affidavit of the justice and nonpayment of the claim, made before commencement of the action, is produced.
2. SAME—AUTHENTICATION OF CLAIM.—In an action against an administratrix to recover money collected by her and her deceased husband on plaintiff's notes, an affidavit setting out the amount of the claim, that nothing had been paid in satisfaction, and that the amount of $200 was justly due, was a substantial compliance with Kirby's Digest, section 114, and was all that was required.
3. SAME—STATUTE OF NONCLAIM.—Under the statute of nonclaim, suit against an administratrix, with claim produced and properly authenticated, must be brought within one year after grant of letters.
4. SAME—EXHIBITION OF CLAIM.—Under Kirby's Digest, section 112, bringing an action against an administrator as such within one year after his appointment is a legal presentation of the claim; but bringing an action against an administrator personally cannot be treated as such legal exhibition.

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

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

1. The suit should have been brought in the probate court, as the circuit court had no jurisdiction. Kirby's Digest, § 124; 90 Ark. 198.

2. There was no duly authenticated claim against the estate presented prior to the institution of suit in the circuit court. Kirby's Digest, § § 110, 119; 30 Ark. 756; 7 *Id.* 78; 14 *Id.* 234; 110 *Id.* 225; 105 *Id.* 97.

3. The suit was barred by the statute of nonclaim of one year. Kirby's Digest, § 110; Acts 1907, p. 1171; 202 S. W. 239.

4. The original suit brought by Ada Rowe and Ella Small before a justice of the peace was against Ella Easley *individually* and not as administratrix and a nonsuit without prejudice would not arrest the statute of limitations.

5. The notes of C. W. Moore, if delivered as a gift to appellees, their remedy was against C. W. Moore, who owed the debt, and not against Easley's estate. The instructions are against the law and the judgment should be reversed and the case dismissed.

Jabez M. Smith, for appellees.

1. Suits may be brought against an estate either by ordinary action or in the probate court. Either the circuit court or probate court has jurisdiction. The claim was duly authenticated. 7 Ark. 78; 14 *Id.* 234; 105 *Id.* 97; 110 *Id.* 225. The proper affidavit was made. 90 Ark. 340-1; 97 *Id.* 296; 105 *Id.* 95.

2. The suit was not barred, as the facts show. Suit was brought before a justice of the peace. Nonsuit was taken and suit brought within one year. Kirby's Digest, § 5083. Nonclaim cannot be availed of because the record shows the letters of administration were dated November 23, 1916, and appellees had the right to rely upon the record and the year had not expired, as appellees were misled by the record. Mistakes for which parties are not liable will not affect their rights. Citations are not necessary, as this is the settled law.

HUMPHREYS, J. On October 15, 1917, appellees instituted suit against appellant, as administratrix of the estate of C. H. Easley, deceased, in the Hot Spring Circuit Court, to recover $200 with interest at the rate of eight per cent. per annum from the 7th day of November, 1911, for money which had been collected on notes, belonging to appellees, partly by C. H. Easley, in his lifetime, and partly by appellant, as administratrix of the estate of C. H. Easley, deceased. It was alleged that appellant was appointed administratrix of the estate of C. H. Easley, deceased, on the 23rd day of November, 1916.

With the complaint, an affidavit of the justice and non-payment of the claim was produced, of date September 24, 1917.

Appellant denied that the notes upon which the money had been collected by her husband, C. H. Easley, in his lifetime, and by her, as administratrix of his estate, were the property of appellee; also denied that she was appointed administratrix of the estate of C. H. Easley, deceased, on the 23rd day of November, 1916; and, as an additional defense, pleaded the statute of nonclaim, alleging that letters of administration of the estate of C. H. Easley, deceased, were issued to her on September 26, 1916, and that the suit was not instituted by appellees until October 15, 1917. Appellees filed a reply to the answer of the administratrix, setting up that, after appellant was appointed administratrix, appellees instituted suit against appellant in the court of J. M. Ketchum, a justice of the peace of Henderson township, which was appealed to the circuit court on the 30th day of July, 1917, and nonsuit was taken in said suit without prejudice. Appellant filed an answer to appellees' reply, denying that there had been a suit instituted after her appointment as administratrix before J. M. Ketchum, a justice of the peace, against her as administratrix of the estate of C. H. Easley, deceased.

The cause was submitted to a jury on the pleadings, evidence and instructions of the court. The jury returned a verdict in favor of plaintiffs for $75 each, and a judgment was rendered in accordance therewith. Proper steps were had and done and an appeal has been prosecuted to this court from said judgment.

Appellant first contends that this cause of action was exclusively cognizable in the probate court of Hot Spring County and that it was error for the circuit court to entertain jurisdiction of the action. Before the adoption of the Constitution of 1874, courts of law had jurisdiction to entertain suits for claims against the estate of deceased persons if an affidavit of the justice and non-payment of the claim, made before the commencement of the

suit, was produced. *Ryan et al. use etc.* v. *Lemon, Admr.,* 7 Ark. 78; *Beirne & Burnside* v. *Imboden et al. Admr.,* 14 Ark. 237; *Alter* v. *Kinsworthy, Admr.,* 30 Ark. 756; *Eddy* v. *Loyd,* 90 Ark. 340. The jurisdiction to entertain such suits by courts of law was not disturbed by the adoption of the Constitution of 1874. *Turner* v. *Rogers,* 49 Ark. 51; *Meredith* v. *Scallion,* 51 Ark. 361.

It is next insisted by appellant that the claim was not properly authenticated. The affidavit of the authentication set out the amount of the claim, that nothing had been paid toward the satisfaction thereof, and that the amount of $200 was justly due. This was a substantial compliance with the form of affidavit required in section 114 of Kirby's Digest. A substantial compliance in the matter of form of the affidavit is all that is required. *Wilkerson* v. *Eads,* 97 Ark. 296; *Hayden* v. *Hayden,* 105 Ark. 95; *Davenport* v. *Davenport,* 110 Ark. 222.

Lastly it is insisted that the claim, or demand, is barred by the statute of nonclaim. The undisputed evidence in the case disclosed that the application, bond and letters of administration were all dated September 26, 1916; that she made out her inventory and appraisement of the estate on October 16, 1916, and filed them on October 21, 1916; that the letters were recorded, through mistake of the deputy clerk, on November 23, 1916; that this suit was instituted on October 15, 1917, more than one year after the date of the letters of administration. Appellees insist that the statute of nonclaim did not begin to run until the letters of administration were recorded on November 23, 1916, and that the statutory bar did not attach because the suit was instituted within one year from that time. Appellees are in error in this contention. This court has held (quoting syllabus 1) that "all claims against the estates of deceased persons must be exhibited, duly authenticated, to the administrator or executor, within two years after the grant of letters, as decided in *Walker Ad.* v. *Byers,* 14 Ark. 246." *Bennett et al.* v. *Dawson et al.,* 15 Ark. 412. The time has been changed in the statute of nonclaim from two years to one

year since the decree in *Walker, Ad.* v. *Byers, supra,* so under the statute as it now stands, a suit with claim produced and properly authenticated must be brought within one year after the grant of letters. However, it is insisted by appellees that they brought suit against appellant before J. M. Ketchum, a justice of the peace, within one year from the date of the letters, which case was appealed to the circuit court where a nonsuit was taken without prejudice on the 30th day of July, 1917, less than a year before the institution of the present suit. It is insisted that they had one year within which to institute the suit after the nonsuit was taken. Section 112 of Kirby's Digest is as follows: "All actions commenced against any executor or administrator after the death of the testator or intestate shall be considered demands legally exhibited against such estate, from the time of serving the original process on the executor or administrator, and shall be classed accordingly." Thus it will be seen that the bringing of an action against an administrator within one year after the appointment is a legal exhibition of the claim or demand against the estate. Had such a suit been brought and nonsuited without prejudice, appellees could have brought another suit at any time thereafter against appellant in her representative capacity. But, on inspection of the record, we have ascertained that the suit instituted before J. M. Ketchum was a suit against Mrs. Ella Easley in her personal capacity, and, for that reason, the suit cannot be treated as a legal exhibition or presentation of the claim against the estate. It follows that it was necessary to have brought this suit within one year from the appointment of the administratrix.

For the error indicated, the cause is reversed and dismissed.

BUSBY v. REID.

Opinion delivered March 24, 1919.

1. ANIMALS—STOCK LAWS—CONSTRUCTION OF STATUTE.—Acts 1915, p. 707, amending Acts 1907, p. 474, authorizing the county court of Pike County, on petition, to form a district not less than 5 miles square wherein certain animals should be prohibited from running at large, operates to extinguish a district formed under a former statute which permitted the organization of districts comprising five square miles.
2. CONSTITUTIONAL LAW—DISSOLUTION OF STOCK DISTRICT.—The Legislature may, without impairing vested rights, dissolve any district formed under a statute authorizing the creation of a district not organized for any length of time wherein animals are prohibited from running at large.
3. ANIMALS—RIGHT TO IMPOUND.—The right to impound stock running at large depends entirely upon the statute conferring that right, which must be strictly construed.

Appeal from Pike Circuit Court; *J. S. Lake,* Judge; reversed.

W. S. Coblentz, for appellant.

1. The act of 1907, Acts 1907, p. 474, was repealed by act of 1915, Acts 1915, p. 707, and the old district was thereby dissolved. All rights under a repealed statute are lost by its repeal unless saved by express words or there be vested rights, and in this case there were none. 31 Ind. 11; 130 Ark. 67; 36 Cyc. 1083, 1224; 68 Ark. 433; 89 *Id.* 598.

2. The court erred in declaring the law. The right to impound animals running at large is purely statutory; the requirements of the statute must be strictly complied with. 1 Enc. of Proc. 981. Penal statutes are construed strictly. 1 R. C. L. 1149. The hog law district of the act of 1907 was annulled by the amendment of 1915.

O. A. Featherston, for appellee.

1. The old district was not annulled by the amendment to Act 1907. It was merely a change in the scope of the application of section 1 of Act 201, Acts 1907. There are no words showing an intention to nullify the old law

or district. 15 Ark. 555; 94 *Id.* 422; 58 *Id.* 113; 34 *Id.* 263, 269; 130 *Id.* 67; 6 *Id.* 484; 85 *Id.* 390.

2. There was no error in the instructions and the case was properly submitted to the jury. The verdict is sustained by the law and the evidence and the judgment should be affirmed. 85 Ark. 930.

McCULLOCH, C. J. This is an action in replevin to recover possession of certain hogs, the property of plaintiff, which were impounded by defendant while trespassing on the enclosed lands of the latter.

A fencing district in Pike County was formed pursuant to the terms of a special statute (Acts of 1907, p. 474) which provided for the formation of such districts by order of the county court on petition of the owners of property in the territory to be affected, which was, according to the terms of the statute, not to consist of less than "five square miles." The statute also contained provision for impounding stock trespassing on enclosed lands inside of a prohibited area.

The Legislature of 1915 amended the first section of the statute (Acts of 1915, p. 707) by providing that a district so formed shall consist of not less than "five miles square," and another section of the new statute prescribes a penalty for allowing stock to run at large in the district.

The case of *Green* v. *State,* 130 Ark. 67, was a criminal prosecution under the statute for permitting stock to run at large in a district which had been formed under the original statute prior to its amendment, and we held that the penalty prescribed by the statute did not apply in a district organized under the old statute. We expressly pretermitted a decision of the question now presented, whether or not the amendment of the statute prescribing a larger area for such districts operated as a dissolution of districts formed under the old statute which do not come up to the requirements of the new statute.

Plaintiff's hogs were trespassing on enclosed lands inside the boundaries of the old district, and the question

is squarely presented now whether or not the old district is legally in existence.

We think that the amendment to the statute prescribing different requirements, and also prescribing a penalty for violations necessarily operated as a dissolution of districts formed under the old statute which do not meet the requirements of the new statute. The Legislature undoubtedly had power to dissolve any district formed under the statute. Such districts are not organized for any specified length of time, and are subject completely to the will of the lawmakers. No vested rights are involved. It is merely the exercise of a phase of the State's police power. The old statute stands amended according to the terms of the new statute, and since the old district does not conform to the law as it now stands it has no legal existence.

The right to impound stock running at large depends entirely upon statute conferring that right, which, according to settled rules, must be strictly construed.

The trial court erred in submitting the case to the jury under the law as established by the statute referred to.

Reversed and remanded for a new trial.

E. O. BARNETT BROS. v. PORTER.

Opinion delivered March 24, 1919.

EQUITY—RELIEF AGAINST JUDGMENT AT LAW RES JUDICATA.—Equity will not grant relief against a judgment at law upon the ground of surprise where the facts relied upon as ground for relief in equity were set up in the motion for new trial on the trial in the action at law.

Appeal from Hot Spring Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

Oscar Barnett, for appellants.

1. It was error to sustain the demurrer. The allegations of the amended answer show that appellee only asked $25 for the alleged wrongful taking of the mare

but the jury awarded $50, or $25 more than he asked. A claimant cannot state one cause of action and recover on another. 31 S. W. 262; 8 *Id.* 562; 170 *Id.* 324. The affidavit of Goodman by which this court was guided and the manner in which it was gotten into the record before this court in the case in 203 S. W. 842 was a fraud practiced on this court. A court of chancery has inherent power without the consent of the appellate court to review, on the grounds of newly discovered evidence, its decrees, though it has been passed upon on appeal. 155 S. W. 99; 159 *Id.* 20. See also the parallel case of 121 S. W. 282. The case made entitles appellant to the relief prayed. Cases *supra.* 33 Ark. 173; 121 S. W. 282.

2. The demurrer admits the truth of the allegations of fraud. 169 S. W. 808. The petition states a case for relief in equity. 85 S. W. 87; 33 Ark. 173; 60 *Id.* 453; 141 S. W. 729; 188 *Id.* 1164; 113 Ark. 134. The allegations are admitted to be true by demurrer. 153 S. W. 94; 106 Ark. 157; 170 S. W. 324. The fraud admitted the judgment should be reversed and cause remanded. 170 S. W. 324.

E. H. Vance, Jr., for appellee.

The judgment in *Barnett Bros.* v. *Porter* was affirmed in 203 S. W. 842. Appellants in this case use the same affidavits used in the former case in circuit court in their motion for new trial. The decree of the chancellor should be sustained. 15 Ark. 403; 35 *Id.* 909; 37 *Id.* 519. On the merits of the case see 126 Ark. 562; 132 *Id.* 432; 94 *Id.* 375. Fraud was practiced in the trial of the original case, which was admitted, but it was known to appellant before the motion for new trial was filed and the decision of this court is final and the demurrer was properly sustained.

SMITH, J. The parties to this litigation were the parties to a suit brought originally as an action in replevin, and after a trial which resulted in a judgment in favor of Porter in the circuit court, Barnett Bros. prosecuted an appeal to this court. The judgment of the

circuit court was affirmed by us in an opinion found reported in 134 Ark. 268, 203 S. W. 842. Thereafter Barnett Bros. brought this suit in the chancery court of Hot Spring County—the county in which the trial at law had occurred—to set aside the judgment which had been pronounced thereon and affirmed by this court.

The relief prayed for was asked upon the ground that fraud had been practiced in the trial of the original cause, in that witnesses for Porter had testified, for the purpose of increasing the damages, that the colt of the mare, which constituted the subject-matter of the replevin suit, had died for the want of nourishment after the mare had been seized under the order of delivery, when, in truth and in fact, the colt had not died. It was also alleged that the falsity of this testimony was not known until after the trial. Attached to the complaint as exhibits thereto were copies of the affidavits which had been used in support of the motion for a new trial. A demurrer to the complaint was sustained, and this appeal has been prosecuted to reverse the decree of the court below dismissing the complaint as being without equity.

We have before us here the identical record upon which the judgment of this court has already been pronounced with allegations to the effect that the false testimony in regard to the colt constituted such a fraud in the procurement of the judgment as authorizes the chancery court to set it aside.

It appears, however, from the recitals of our former opinion and the complaint now before us that all the facts now alleged as constituting the fraud complained of were known to appellant when he filed his motion for a new trial and were recited in said motion, and one of the points sought to be raised on the former appeal was the alleged error of the trial court in refusing to grant a new trial in view of the showing made of false testimony in regard to the colt. We there held that the trial court had refused to allow the exception in regard to the surprise occasioned by the alleged false swearing in regard to the colt and that the exception had not been

brought up on the record by a bystanders' bill of exceptions as provided by statute. The decision to that effect is conclusive of the facts raised on this appeal, and the decree of the court below sustaining the demurrer is, therefore, affirmed.

CHAPIN v. QUISENBERRY.

Opinion delivered March 17, 1919.

JUDICIAL SALE—REFUSAL OF CONFIRMATION.—The court properly refused to confirm a judicial sale where the property brought a grossly inadequate price, and the sale was attended with circumstances working out a harsh result against the owner's interests, though the purchaser himself was guilty of no fraud or misconduct.

Appeal from Benton Chancery Court; *Ben F. McMahan,* Chancellor; affirmed.

The appellant *pro se.*

The sale was fairly made under the order of court and in conformity to law and there was no fraud and no evidence that the property would bring more on a resale. It was error to refuse to confirm for mere inadequacy of price. 77 Ark. 216; 86 *Id.* 255; 108 *Id.* 366; 56 *Id.* 240; 20 *Id.* 381; 44 *Id.* 502; 108 *Id.* 366; 29 Fed. Cases No. 17422; 14 Col. 30; 23 Pac. 170; 20 Fla. 141; 119 Ga. 10; 45 S. E. 790; 91 Ill. 228; 36 Kan. 437; 13 Pac. 787; 23 Kan. 432; 138 S. W. 312; 11 N. J. Eq. 167; 13 S. W. 91; 27 S. E. 507; 94 Va. 703.

Duty & Duty, for appellees.

The court properly refused to confirm the sale. The price was grossly inadequate and appellee was misled and deterred from attending the sale and there was unfairness and misunderstanding to the prejudice of the rights of appellees. 199 S. W. 112; 206 *Id.* 445; 43 Ark. Law Rep. 294; 81 Ark. 102; 123 *Id.* 532; 90 Ark. 166; 20 *Id.* 381; 108 *Id.* 366; 44 *Id.* 502; 47 *Id.* 86; 65 *Id.* 152; 66 *Id.* 490; 62 *Id.* 215; Rorer on Jud. Sales, § § 126-8; 12 A. & E. Enc. Law 219; 73 Ark. 37; 111 *Id.* 158; 113 *Id.* 322.

McCULLOCH, C. J. This appeal is from a decree refusing confirmation of the sale of real estate made by the court's commissioner. The grounds of the decision in refusing confirmation were that the price for which the property sold was grossly inadequate, and that appellee was misled and deterred from attending the sale by a statement of the attorney for the plaintiffs in the decree under which the sale was made to the effect that he would bid the amount of the decree. Appellant was the purchaser at the sale, and $805 was the amount of his bid. He was not a party to the original action in which the decree was rendered and that decree was in favor of John M. Davis as State Bank Commissioner in control of the assets of the defunct Bank of Rogers, for recovery of the sum of $1,307.33, and in favor of John Schaap & Sons Drug Company for for $281.70. The decree was for foreclosure of liens in favor of those parties against the property in controversy, which was a house and lot in Rogers, Arkansas.

The testimony shows that the fair market value of the property was about $1,500. Several witnesses testified on that subject, and their estimates of value range from $1,200 to $2,000. The court could have reached the conclusion from this testimony that the property was worth at least $1,500, or perhaps $1,600. The testimony also shows that the attorney for the plaintiffs in the original litigation stated to the attorney for appellee, Quisenberry, who was defendant in the original suit, against whom the liens were asserted, that he would attend the sale and bid the amount of the original decrees which aggregated about $1,600, and that said appellee and her attorney, supposing that the property would thus be made to bring at least $1,600, were induced to remain away from the sale. There was also testimony to the effect that the statement of the attorney for the original plaintiffs was communicated to another person who contemplated attending the sale and bidding, but refrained from doing so in reliance on the statement that plaintiffs would bid as much as $1,600.

We have a case, therefore, where the property brought a grossly inadequate price, and also where there were circumstances attending the sale which worked out a harsh result against the interests of the owner of the property. Appellant himself was guilty of no fraud or misconduct, but he purchased the property at an inadequate price and that, together with the circumstances which produced the hardship on the owner of the property, was sufficient to justify the court in refusing confirmation.

The facts of the case bring it within the rule announced by this court in the following cases: *Stevenson* v. *Gault,* 131 Ark. 397; *Hawkins* v. *Jones,* 131 Ark. 478; *Moore* v. *McJudkins,* 136 Ark. 292, 206 S. W. 445. Under these circumstances we cannot say the chancellor erred in refusing confirmation of the sale. Affirmed.

HUMPHREYS, J., not participating.

PARKS v. THOMAS.

Opinion delivered March 10, 1919.

1. ADVERSE POSSESSION—TACKING SUCCESSIVE POSSESSIONS—EVIDENCE—In a suit for trespass on land, where, to establish title by adverse possession, it was necessary for defendant to tack his possession to that of a predecessor, it was competent to explain the character and extent of such predecessor's title.
2. EVIDENCE—ADMISSION BY GUARDIAN.—A guardian can make no admission in derogation of his ward's title.
3. TRESPASS—GOOD FAITH—EVIDENCE.—In an action of trespass by the guardian of a minor owner, testimony that the guardian had stated, before defendant cut a fence in committing the trespass complained of, that certain gravel was on defendant's land was admissible as evidence of defendant's good faith.
4. TRESPASS—PUNITIVE DAMAGES.—Evidence in trespass *held* insufficient to justify award of punitive damages.
5. TROVER AND CONVERSION—MEASURE OF DAMAGES.—Where property is wrongfully taken, the measure of damages is its market value where there is no testimony warranting punitive damages.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; modified and affirmed.

STATEMENT OF FACTS.

The parties to this litigation are coterminous proprietors of tracts of land which are made irregular in shape by Booneville creek, a tortuous stream running through the land, or, rather, forming the boundary of both tracts. Both parties deraign their title from one James Ross, who at one time owned the land on both sides of the creek at the point in controversy. Ross sold the land east of the creek to one J. P. Henderson and this is the land owned by appellee Thomas at the time of the institution of this suit; his father (from whom he had title by descent) having acquired the title by *mesne* conveyances from Henderson. Ross died, but his son and heir disposed of all the land west of the creek except a twenty-two-acre tract, which he sold and conveyed to one Sweeney, who conveyed to Bruer, who conveyed to appellant Parks. These deeds described the land by reference to Booneville creek.

Appellee brought this suit to recover damages, both compensatory and punitive, to compensate the alleged unlawful and malicious trespasses committed by appellant on the land of appellee. The complaint contained two counts. In the first count it was alleged that appellant, by force of arms, had broken and entered appellee's close, and had wilfully, wantonly and unlawfully cut down and destroyed appellee's post and wire fence there situated and had injured and damaged appellee's grass, herbage and soil. In the second count it was alleged that appellant had wilfully, wantonly and unlawfully broken and entered appellee's close and had taken and carried away appellee's soil, sand, earth, rock and gravel and had converted the same to his own use. There was a prayer in each count for damages both compensatory and punitive.

The answer specifically denied the allegations of both counts of the complaint, and further alleged that "in 1871 J. P. Henderson sold to —— Ross, the land now owned by the defendant, and that the said J. P. Henderson, who

owned the land now owned by the plaintiff and —— Ross, had an agreement about the line between their land, and that the said J. P. Henderson built his fence enclosing his land on the west side on the bank of the creek where the fence is now standing, and that the —— Ross joined his fence enclosing the land now owned by the defendant to the J. P. Henderson fence as it is at this time. That said fencing has been standing as it is at this time for the past forty years; that defendant and his assignees have had peaceable, open, adverse possession against the plaintiff and his assignees for the past forty years, paid the taxes thereon and have continuously exercised ownership over same for the said time of about forty years.

"Defendant further states that the gravel bed is west of the creek, near the ford, on defendant's land, and that defendant and his assignees have continuously exercised ownership over said gravel bed for the past forty years or thereabout."

There was a verdict for appellee on the first count for $300 and on the second count for $200, and this appeal has been prosecuted to reverse the judgment rendered for the sum total of the two verdicts. The court instructed the jury that appellee was entitled to recover compensatory damages on the first count, and under instructions, which are not questioned, submitted the right to recover compensatory damages under the second count, and gave instructions declaring the conditions under which punitive damages might also be assessed on either or both counts.

As grounds for reversal of the judgment, it is chiefly insisted that the court erred in directing a verdict on the first count, and in submitting the question of punitive damages on either count. Other errors are assigned which will be discussed in the opinion; while other assignments of error need not be discussed, as they relate to the punitive damages, which question we have disposed of upon the grounds stated in the opinion.

A. S. McKennon and *Kincannon & Kincannon,* for appellant.

1. It was error to direct a verdict on the first count and in submitting the question of punitive damages to the jury under either count. The testimony shows conclusively that the gravel bed was on the west side of the creek when Dr. Thomas purchased the land for plaintiff. The testimony fails to justify a verdict for any punitive or exemplary damages under either count. 104 Ark. 89. The verdict is excessive. The rental value of the land was shown to be $8 and the value of the gravel $37, a total of $45, while the verdict was for $300 as compensatory damages, which is excessive. The measure of damages where property is unlawfully taken is the value of the property taken. 126 Ark. 554; 101 *Id.* 34; 85 *Id.* 111. The verdict fixes a specific sum as damages and is grossly excessive as compensatory damages, without any intimation whatever that the jury found any ground for punitive damages, defendant was entitled to know whether he was required only to pay plaintiff reasonable compensation in money, the actual damage to the gravel bed and to his property by his act of tearing down the fence and depriving plaintiff of the use of his pasture. It was the duty of the jury to observe and follow the instructions of the court. It is evident that punitive damages were allowed, for which the judgment should be reversed. Cases *supra.*

2. There were errors in admitting the testimony and in counsel's statement in opening the case that "one Mrs. Gray, a poor widow, had her cow in the pasture and that defendant turned it out," etc. Mrs. Gray was not a party to the suit and testimony to sustain this statement would be wholly irrelevant; it could prove no issue and was calculated to prejudice the minds of the jury and clearly erroneous. 87 Ark. 461; 12 A. & E. Enc. Pl. & Pr. 727; Thompson on Trials, § 963.

Bryan Thomas was permitted to testify that on sale of the land the purchaser reserved $500 of the purchase money. This was too remote and could not bind or affect defendant, nor establish any issue. Also C. M. Roberts was permitted to testify that he purchased plaintiff's

land and reserved $500 of the purchase price because of this suit. This was not an element of damage and could not be considered for any purpose. Plaintiff's counsel was permitted to ask Mrs. Gray about pasturing her cow with defendant and what she had paid him. H. Sweeney was allowed to testify that he did not buy or claim the gravel bed nor buy nor claim any ground across the creek from the west; that he did not buy or claim or take into possession any ground adjacent to his land on this side of the creek or claim anything on this, the west side, of the creek. As defendant deraigns title through Sweeney this was prejudicial error. Defendant also offered to prove that he had sold gravel from the bed; that Hiram Tatum, then in control of plaintiff's property and acting for plaintiff's guardian, objected to money being paid to defendant for gravel. That afterwards in conversation with defendant he withdrew said objections, stating that he believed that said gravel bed belonged to defendant and would make no further objections to defendant's use of it. This was objected to by plaintiff and the court erred in sustaining the objection. Counsel for plaintiff was permitted to ask plaintiff on the stand as a witness, "You claim to be a law-abiding man. If you are, why did you with strong hand tear down this property and not resort to the courts?" Defendant excepted to the ruling of the court. It was vexatious and disrespectful, and its purpose to bring defendant into disrespect before the jury.

It was error by peremptory instruction to direct a verdict on the first count. 98 Ark. 334; *Ib.* 370; 105 *Id.* 136; 61 *Id.* 429; 131 *Id.* 153; *Ib.* 197; Warville on Abstracts of Title, 53-4, 314; 131 Ark. 197.

John P. Roberts and *Evans & Evans,* for appellee.

1. There is no error in the instructions; they correctly state the law as laid down by this court.

2. The evidence sustains the verdict on both counts. A verdict for punitive damages is sustained by the evidence and there is no error and the judgment should be

affirmed with 10 per cent. penalty, as the appeal was taken merely for delay.

SMITH, J., (after stating the facts). Appellant complains of the admission of the testimony of Sweeney to the effect that he did not buy or claim the gravel bed in controversy; that he did not buy or claim any portion of ground across Booneville creek from the west where appellant cut appellee's fence, and that he did not buy or claim or take into his possession any portion of the ground on the east side of the creek where the fence was cut; the ground of the objection being that the conveyances are the best evidence of what any vendee took by his deed. It will be observed, however, that appellant did not allege ownership of the land where the alleged trespasses were committed by reason of any deed to him. The claim of title alleged was based upon adverse possession for a period of forty years. Appellant obtained his deed in October, 1913, and could not, therefore, of course, have had such possession as would have ripened into title. Sweeney was one of his immediate predecessors in title, and it would have been necessary for appellant to tack his possession to that of Sweeney's to give title by adverse possession. The deeds in the chain of title from Ross were not introduced by appellant, but were introduced by appellee over appellant's objection; and on the issue of adverse possession it was competent for Sweeney to explain the character and extent of his possession. *Welch* v. *Welch,* 132 Ark. 227, 228, 238; *King* v. *Slater,* 96 Ark. 589, 590, 593; *Waldrop* v. *Ruddell,* 96 Ark. 171, 175; *Hughes Bros.* v. *Redus,* 90 Ark. 149, 151; *Jeffery* v. *Jeffery,* 87 Ark. 496, 497, 498; *Foster* v. *Beidler,* 79 Ark. 418, 426; *Seawell* v. *Young,* 77 Ark. 309, 315, 316; *Eaton* v. *Sims,* 59 Ark. 611, 613; *Richardson* v. *Taylor,* 45 Ark. 472, 478.

There was no testimony in regard to any agreement fixing the boundary, and there was no testimony legally sufficient to support a finding that appellant had title to any land not described in his deed, and the court did not err, therefore, in so directing the jury.

Appellant calculates the compensatory damages recoverable on the first count at $8 and on the second count admits a liability of $37, if liable at all; and appellee makes no showing that the compensatory damages exceeds the sum of $45, so that appellee is entitled to have the judgment affirmed to the extent of $45 on account of compensatory damages; and it remains only to determine whether the judgment should be affirmed for the balance of the verdicts of the jury, which necessarily represent the amount assessed by way of punitive damages.

Appellant admits that he twice cut the fence, but no circumstance of force or intimidation accompanied his act on either occasion. There was no threat of violence in doing so, and there was no wilful or wanton destruction of property, and no damage was done to the freehold except to the extent of the value of the gravel taken. Appellee's land was in possession of one Suttles, who was using it as a pasture, and he testified on behalf of appellee as follows: "I was pasturing this when this high water came; my cow was in the pasture at that time and I went down and cut the fence next to the meadow and brought the cow out that way. Mr. Parks (appellant) had fenced up his pasture and joined the fence across at the upper end, and in putting this fence back where we had it I joined onto his fence at the north end, joined the fence where I joined it before in the bend of the creek, on the creek on the west side. I went probably six or eight feet nearer the water, the fence stayed there, I don't know, three or four days, and Mr. Parks spoke to me about the fence, said you got a little too far over. I said, 'Yes, sir;' he said it was his, and I told him he would have to see Bryan Thomas or Mr. Roberts about it, and a day or so afterwards it was cut and thrown back." He further testified that "the fence was cut in two places where I joined onto him and it was cut where I went to the creek and posts pulled up and thrown back where the fence used to set." It appears, therefore, that appellant was only attempting to restore the fence to the line where

it ran before Suttles moved the fence out towards appellant's land. Suttles restored the fence a few days after it had been cut down to its advanced line, and appellant again pulled it down; but no circumstances of force, threat or violence accompanied that action. Suttles testified that appellant said to him that he would have the line located by a survey, "as Bryan Thomas was coming twenty-one years old." This suit was brought originally by appellee's guardian, but appellee attained his majority before it came to trial, and it proceeded to trial in his own name after an order to that effect had been made.

As bearing upon the question of good faith appellant offered to show that appellee's brother-in-law, who was also appellee's guardian, had stated prior to the time the fence was cut that the particular gravel here involved was on appellant's land; but this testimony was excluded. This testimony was incompetent on the question of title, as the guardian could make no admission in derogation of his ward's title. But the testimony should have been admitted as bearing on the question of good faith. It affirmatively appears that there was a genuine controversy which was submitted to the jury upon the conflicting testimony of a number of witnesses in regard to the channel of the creek as affecting the boundary of the respective tracts of land. It is true that some angry words were exchanged between appellant and one Roberts, who lived on appellee's land, after the tearing down of the fence; but this occurred after the fence had been cut down and related to a past transaction.

We, therefore, conclude that there was no testimony legally sufficient to justify the infliction of punitive damages, and the court should have eliminated this branch of the case from the jury. *Brown* v. *Allen,* 67 Ark. 386; *Kelley* v. *McDonald,* 39 Ark. 333. Where property is wrongfully taken from the owner, the measure of damages is the market value of the property taken, in the absence of testimony showing the circumstances of the taking to be such as to warrant the infliction of punitive damages; and there appears to be no conflict as to the sum

which will compensate the actual damage done. This is the only error we find in the record, and the judgment will therefore be reduced to $45, and, as thus modified, affirmed.

BUDD v. BURNETT.

Opinion delivered March 17, 1919.

1. JUSTICES OF THE PEACE—DEFAULT JUDGMENT.—Default judgment of a justice of the peace entered on February 22 was void where the summons, directing defendant to appear March 3, was served on February 26.
2. SAME—CERTIORARI—MERITORIOUS DEFENSE.—A petition for certiorari to quash a judgment of a justice of the peace, alleging that petitioner, when sued, was not indebted to the judgment creditor, stated a meritorious defense to the action before the justice of the peace.

Appeal from Polk Circuit Court; *J. S. Lake,* Judge; reversed.

Prickett & Pipkin, for appellant.

The judgment was void and the circuit erred in not quashing it on certiorari issued by the judge in vacation. The defendant had not been served with summons when the judgment was rendered and defendant had a meritorious defense to the suit. Kirby's Digest, § 4424; 2 Ark. 85, 124. Jurisdiction of courts inferior cannot be inferred, but must be shown. 51 Ark. 317. The record shows a void judgment quashable on certiorari. 2 Ark. 85; *Ib.* 124; 11 *Id.* 301; 51 *Id.* 317; 105 *Id.* 5; 82 *Id.* 330; Kirby's Digest, § 4424.

R. T. Powell, for appellees.

The account is justly due and within the jurisdiction of the justice of the peace. Budd was duly served with process. The remedy by appeal was complete, and certiorari does not lie to correct mere irregularities or errors. 101 Ark. 531; 89 *Id.* 609; 39 *Id.* 399; 43 *Id.* 33; 25 *Id.* 476; *Ib.* 518; 37 *Id.* 318; 23 *Id.* 110.

HART, J. This is a proceeding by J. D. Budd in the circuit court to quash the judgment of a justice of the peace against him in favor of C. B. Lyons. The proceeding was heard in the circuit court upon the petition for the writ of certiorari, the transcript of the record of the justice of the peace and the motion of C. B. Lyons to dismiss the writ of certiorari. The circuit court sustained the motion and dismissed the petition. Budd has appealed.

The transcript of the justice of the peace shows that on the 16th day of February, 1915, C. B. Lyons filed before the justice an account for labor against J. D. Budd for $36.03. A summons was issued by the justice returnable on the 3rd day of March, 1915. The return of the constable shows that it came to his hands on the 17th day of Februray, 1915, and was served by him on the 26th day of February, 1915, by delivering a true copy to J. D. Budd. The justice's transcript further shows that judgment by default against Budd in favor of Lyons was rendered on the 22nd day of February, 1915, for $36.03 and costs; that on the 22nd day of July, 1915, a writ of garnishment was issued on said judgment against the First National Bank of Mena, Arkansas, and that on August 7, 1915, an execution was issued on said judgment and delivered to the constable of the township.

The above facts are, also, set up in the petition for the writ of certiorari. The petition, also, sets up that the plaintiff did not know that there was a judgment against him in said justice court until July 22, 1918, when the writ of garnishment was served on the First National Bank; that he had a complete defense to said action instituted against him by Lyons in the justice court, and that he was not at that time nor at any other time indebted to C. B. Lyons in any sum whatever.

The circuit court erred in not granting the writ of certiorari. It appears from the transcript of the justice of the peace and as well from the allegations of the complaint, which are not denied, that the default judgment against Budd was entered on the 22nd day of February,

1915. The summons in the case was not served until the 26th day of February, 1915, and directed him to appear on March 3, 1915. Therefore the judgment is illegal and void, for it was entered up on a day not authorized by the summons, and inconsistent with its mandate, and consequently on a day when the defendant was not bound to appear in court. *Woolford & McKnight* v. *Harrington,* 2 Ark. 85, and *Levy* v. *Ferguson Lumber Co.,* 51 Ark. 317.

The doctrine laid down in many cases that a judgment by default entered by a justice of the peace on a summons served an insufficient number of days before the return day is merely erroneous and not void has no application under the facts presented by the record. The reason for the holding in such cases is that from the moment of the service of the process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void, and therefore can not be attacked collaterally. See *Kerr* v. *Murphy et al.* (S. D.), 8 Ann. Cas. 1138 and case note.

Here the record shows that the judgment was rendered before the summons was served. The complaint alleged that Budd was not at the time he was sued, nor at any other time, indebted to Lyons. This constituted a meritorious defense to the action. Therefore, the transcript of the record of the justice of the peace shows that the judgment was absolutely void and the remedy against it by certiorari was complete. *Knight* v. *Creswell,* 82 Ark. 330.

The principles of law above announced were recognized and applied in *Nelson* v. *Freeman,* 136 Ark. 396. There the relief by certiorari was denied because the party seeking the relief had appeared before the justice of the peace within thirty days after the rendition of the judgment against him for the purpose of quashing the judgment. He failed to appeal from the judgment of the justice, refusing to do so; and the court held that his failure to appeal from the adverse judgment barred him from seeking relief which he might otherwise have obtained.

Here the facts are essentially different. Budd alleges that he did not know of the judgment against him in the justice court until July 22, 1915, when the time for appeal had expired; and this allegation is not denied. It follows that the judgment must be reversed and the cause remanded for a new trial.

JONES v. BLYTHE.

Opinion delivered March 17, 1919.

1. REPLEVIN—SET-OFF.—Neither Kirby's Digest, section 6869, nor Acts 1917, p. 1441, authorizes a counterclaim in replevin to recover possession of personal property for purpose of foreclosing mortgages or deeds of trust, only authorizing a set-off against mortgage indebtedness.
2. SET-OFF AND COUNTERCLAIM—JURISDICTIONAL AMOUNT.—The total amount of a set-off pleaded in a justice's court determines the jurisdiction of that court to hear it, and if the amount is in excess of that court's jurisdiction it cannot be pleaded unless the excess above jurisdiction is relinquished.

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

Sid White, for appellant.

1. The instruction to the jury is a mistaken statement of the law. It authorizes the jury to arbitrarily take into their own hands the entire business transaction and "settle the entire matter" independent of any representation or warranty, by determining what the horse was worth and awarding to appellant or appellee the difference between this value and the amount already paid by appellee simply as a moral right. This is not the law. The most that appellee can claim would be an offset to the amount of the difference in value of the stallion as represented or warranted and as he was in fact and this only after the jury had found that there was a false warranty or fraudulent representation. In replevin but one verdict may be rendered and that is for the property or its value. Kirby's Digest, § § 6868-9; 104 Ark. 132.

Section 6869, Kirby's Digest, gives appellee the right of proving his set-off if any he has and provides that the judgment "shall be rendered for the property or balance due thereon." The failure of appellant's warranty or the falsity of his representations, if any, would probably have availed appellee as a defense by way of counterclaim but only so far as was necessary to defeat appellant's demand. 34 Cyc. pp. 1417-18; 60 Ark. 389; 56 *Id.* 426.

2. The verdict was not responsive to the issues and should not have been accepted. 104 Ark. 132; Kirby's Digest, § § 6868-9. The award of damages was in excess of the jurisdiction of the justice or the circuit court on appeal.

Kincannon & Kincannon, for appellee.

The differences between appellant and appellee were matters of fact which were settled by the jury after hearing the testimony under the instructions of the court which were based upon Kirby's Digest, § § 6868-9, which permits all controversies as to mortgages to be settled in one suit. 74 Ark. 320; 22 *Id.* 445; 110 *Id.* 215; 1 Cush. 271; 29 Me. 341; 35 Iowa 283; 27 L. R. A. (N. S.) (note) 991-2. The jury after hearing the testimony and instructions settled the matter and the verdict should be sustained.

McCULLOCH, C. J. Jones sued Blythe in replevin before a justice of the peace to recover possession of a stallion which he had sold to Blythe, and there was a balance of $200 unpaid on the purchase price, as evidenced by notes aggregating that amount, secured by a mortgage on the horse. The suit was instituted to recover possession of the horse for the purpose of foreclosing the mortgage. The trial before the justice of the peace resulted in a verdict in favor of the plaintiff, and an appeal was prosecuted to the circuit court.

Blythe pleaded, in defense, an alleged breach of warranty in the sale of the horse as to his qualities for breeding purposes. Unliquidated damages were set up as re-

sulting from the alleged breach of warranty. On the trial of the cause before a jury there was no dispute as to the unpaid balance of the purchase price of the horse, but there was substantial evidence tending to establish a warranty by the plaintiff as to the qualities of the horse, and a breach of the warranty and the amount of damages resulting therefrom. The court in its instructions to the jury, after outlining the issues, declared the law as follows:

"If you find for the plaintiff, Jones, you will find a judgment for the amount of the notes not paid and for the possession of the horse. But if you find for the defendant, that is that there was a warranty and that within a reasonable time after Blythe found that there was a breach of the warranty he offered to return the horse, then you should find for the defendant the amount of the damages suffered by reason of the breach of said warranty."

This instruction was given over the objection of the plaintiff, who properly saved his exceptions. The jury returned the following verdict: "We, the jury, find for Blythe $225, and horse to be returned to plaintiff."

The verdict of the jury was inconsistent with the instruction of the court, as well as the testimony adduced in the cause, and should not have been accepted by the court. The statute governing trials of cases of this kind, that is to say replevin suits to recover possession of personal property for the purpose of foreclosing mortgages or deeds of trust, provides that "the defendant or defendants in said action shall have the right to prove or show any payment or payments or set-off under such mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days and satisfy the judgment and retain the property." Kirby's Digest, section 6869.

Under this statute the defendant had the right to show that the plaintiff was indebted to him in an amount

sufficient to set off the mortgage debt, and in that case the verdict should have been wholly in favor of the defendant. But this verdict finds for the defendant in an amount of damages in excess of the mortgage debt, and yet finds for the plaintiff for the return of the horse. The two features of the verdict are absolutely inconsistent with each other when tested by the statute. Whether the jury meant to assess the damages of the defendant at $225 in excess of the mortgage debt, or whether it was meant to assess the damages at that sum and to return the horse to the plaintiff to hold under his mortgage, we need not inquire, for in either event the verdict would not be correct, for, as before stated, if the mortgage debt was discharged by payment or set-off then there should be no judgment in plaintiff's favor for the return of the horse.

This calls for a reversal of the judgment and a remand of the cause for a new trial, but we deem further discussion of other matters essential to the proper guidance of the court in the proceedings on the remand.

The pleadings do not appear in the record, and we cannot determine definitely what amount of damages was claimed by the defendant, or whether the same were claimed by way of counterclaim or set-off. We assume, however, from the language of the court's instruction that the claim was presented in the form of a counterclaim and not a set-off, and from the form of the verdict we might assume that the defendant's claim was in excess of the jurisdiction of the justice of the peace, which is fixed in the Constitution at the sum of $300 in actions on contract. The statute already quoted above does not authorize a counterclaim in this kind of an action. It only authorizes proof of payment or set-off for the purpose of determining whether or not the debt has been discharged in full, or, in case of partial discharge, the amount of balance due. *Neal* v. *Brandon,* 74 Ark. 320. Nor does the act of 1917 (p. 1441) authorize a counterclaim in this kind of an action. We held in the case of *Smith* v. *Glover,* 135 Ark. 531, 205 S. W. 891, that un-

der the recent statute counterclaims can be presented only in actions for the recovery of money, and not in actions for the recovery of specific property. An action for the recovery of specific personal property for the purpose of foreclosing a mortgage on the property is not one for the recovery of money, even though the statute hereinbefore quoted provides for proof of payment or set-off, and for an ascertainment in the judgment of the amount of balance, if any, due on the mortgage debt. The statute only changed the law with respect to the judgment in regard to the alternative recovery in case the property be not delivered. Under the old form of action the alternative judgment was for the value of the property, while under the statute quoted the alternative judgment should be for the balance due on the debt. The action is still, however, one for the recovery of specific property, and although the plea of set-off is authorized, the counterclaim is not except by way of extinguishment or reduction of the mortgage debt. There cannot be a recovery over of any excess.

Even as to the plea of set-off, which is expressly authorized by the statute in this kind of an action, the total amount of the set-off determines the jurisdiction of the court to hear it, and if the amount is in excess of the jurisdictional amount of the court, then it cannot be pleaded as a set-off unless the excess above the jurisdictional amount is expressly relinquished. *Kilgore Lumber Co.* v. *Thomas,* 95 Ark. 43. The correct rule is stated in one of the encyclopedias as follows: "The rule is that a claim, to be available as a set-off, counterclaim, or reconvention, must be such that the court entertaining the action in which the cross demand is interposed would, if defendant had brought an original action upon his cross demand, have had jurisdiction thereof as to subjecmatter, amount, or territorial limitations, and a set-off exceeding the jurisdictional amount of the court cannot be brought within the jurisdictional amount by a credit for plaintiff's demand; but defendant may waive a por-

tion of his demand so as to bring it within the jurisdiction of the courts." 34 Cyc. p. 646.

Our decision in the case of *Kilgore Lumber Co.* v. *Thomas, supra,* sustains that rule, and there are other decisions of this court on that subject which also sustain it. We held in *Neal* v. *Brandon, supra,* that the judgment of the court in a replevin case determining the amount of balance due on a mortgage debt constituted an adjudication of that question which was binding on the parties in subsequent litigation. Now, if the adjudication was final as to the amount due under the mortgage, then it necessarily results that the amount of the claim to be adjudicated must be within the constitutional jurisdiction of the court, and the whole of the claim must be considered in determining the jurisdiction, unless there be a remission of the amount in excess of the jurisdiction of the court.

Reversed and remanded for a new trial.

PARK v. DEPRIEST.

Opinion delivered March 24, 1919.

1. LANDLORD AND TENANT—ENTICING RENTER.—Under Kirby's Dig., § 5030, amended by Acts 1905, p. 726, making one who interferes with, entices away, knowingly employs, or induces, a laborer or renter to leave the employer or the leased premises before expiration of his contract liable for damages or advances, defendant was not liable for hiring plaintiff's renter where the renter had breached his contract before he was employed by defendant.
2. SAME—ENTICING RENTER—INSTRUCTIONS.—In an action to recover for employment by defendant of plaintiff's renter, in violation of Kirby's Dig., § 5030, as amended by Acts 1905, p. 726, an instruction *held* not to mislead the jury as intimating that defendant was not liable if there had been a mere falling out between plaintiff and the renter, or unless defendant had in some way participated in bringing about the breach or induced the renter to leave plaintiff before expiration of his contract.

Appeal from Lonoke Circuit Court; *Thos. C. Trimble,* Judge; affirmed.

W. P. Beard, for appellant.

The court erred in its instructions to the jury and in its remarks in the course of the trial. The appellant on the law and the evidence was entitled to recover. Act 298, Acts 1905, p. 726. Hill admits the account was correct and appellee was liable under the act for the account. 84 Ark. 412. Judgment should be entered here for the amount sued for. Acts 1905, p. 726; 84 Ark. 412. Appellee knew of the contract and that it had not expired; also knew of Hill's debt to appellant and is clearly liable. *Supra.*

Trimble & Williams, for appellee.

Appellee was not liable under the act. 86 Ark. 436; 84 *Id.* 412. Under the law and the evidence the judgment should be affirmed, as the instructions properly declare the law, and the evidence sustains the judgment.

HUMPHREYS, J. Appellant instituted suit against appellee in the Lonoke Circuit Court to recover $339.38 for employing his renter, A. B. Hill, in violation of Act 298, Acts 1905, of the General Assembly, amending section 5030 of Kirby's Digest. It was alleged in the complaint that A. B. Hill contracted with appellant to cultivate 40 acres of land on shares, in the year 1918; that, in compliance with the contract, appellant advanced Hill said amount in money and supplies; that, before the expiration of the contract, appellee did knowingly interfere with, entice away, knowingly employ and induce Hill to leave appellant, with knowledge of the existing debt for advances.

Appellee filed answer denying all the material allegations in the complaint.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which resulted in a judgment dismissing appellant's complaint. Proper steps were taken and an appeal has been duly prosecuted to this court from the verdict and judgment.

Appellant established by his wife, Mrs. J. I. Park, who kept his books, the correctness of his account for

medicines, doctor bills, moneys and supplies furnished his tenant, A. B. Hill. She testified that, after allowing all credits to Hill for work, he owed her husband a balance of $349.63 for advances when he left. In support of his claim, appellant himself testified, in substance, as follows: That A. B. Hill entered into a contract with him to cultivate 40 acres of land on shares in 1918; that, when not working in the crop, Hill was to work for him at the rate of $2 per day and allow his girls to work for him at the rate of $1 per day, with the understanding that they might have the use of two cows; that the crop was planted and cultivated until June 13, at which time, they had a misunderstanding concerning the girls' work; that Hill became angry, cursed, threatened to whip him and to quit; that, when Hill left, he tried to call him back and talk to him, but Hill refused to come back or permit him to talk to him; that, a short time thereafter, appellee called him up over the phone and said, "Mr. Hill is up here wanting to hire to me and move on my place." I said, "Bob, he owes me between three and four hundred dollars that I furnished him to make his crop, and if I was you, I would let that alone;" that he also told him he wanted Hill to finish his crop; that Hill moved the next day; that he then had Hill arrested and fined for cursing him.

In defense, appellee offered the testimony of himself and others, which was, in substance, to the effect that appellant and his tenant, A. B. Hill, quarreled over the price to be paid the girls for work; that, during the quarrel, Hill cursed, abused and threatened to whip appellant; that appellant requested Hill to leave as soon as possible; that Hill left for the purpose of procuring another house and returned and moved away the next day; that appellee refused to furnish a team or in any wise assist Hill in moving, and refused at that time to employ him, but did permit him to move into a little house on his place for the reason that he had no other place to go; that, when Hill was arrested the next day, through the procurement of appellant, appellee went on his bond, and,

when fined for using abusive language, gave Hill work in order that he might earn the money with which to pay his fine; that, at the time appellee employed Hill, he knew he owed appellant for advances and that he had not completed the share crop contract.

The statute furnishing the basis of this suit is as follows: "If any person shall interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises, before the expiration of his contract without the consent of the employer or landlord, he shall, upon conviction before any justice of the peace or circuit court, be fined not less than twenty-five nor more than one hundred dollars, and in addition shall be liable to such employer or landlord for all advances made by him to said renter or laborer by virtue of his contract, whether verbal or written, with said renter or laborer, and for all damages which he may have sustained by reason thereof."

Instructions were requested by appellant, presenting the theory that appellee would be responsible under said act for advances made by appellant to his tenant, Hill, if appellee employed him knowing that the rental contract had not been completed. The instructions given by the court, over the objection of appellant, were based upon the theory that appellee would not be responsible under said statute for advances if either appellee or appellant, or both, breached the rental contract without interference by appellee, and if Hill had moved from the premises of appellant without enticement or inducement by appellee before he employed him. Appellant insists that the court sent the case to the jury on the wrong theory. The contention of appellant is inconsistent with the interpretation heretofore placed upon the statute by the court. It was said by this court in the case of *Tucker* v. *State,* 86 Ark. 436, that, "The words 'knowingly employ' are used in the statute in connection with other words which imply that the employment must be done as an interference with the laborer's performance of his

prior contract with another or as an enticement of the laborer away from his employer or an inducement of the laborer to leave the services of his employer." The correct interpretation of the statute was carried in the instructions given by the court and the instructions requested by appellant carrying a contrary interpretation were properly refused. It is said, however, that oral instruction No. 2, given by the court on his own motion, exempted appellee from liability if the jury found that there had been a mere falling out between appellant and his tenant, Hill, or unless appellee in some way participated in bringing about the breach or enticed or induced Hill to leave appellant before the expiration of the rental contract. The instruction is not accurately worded, but, when read as a whole, we do not think it conveys the meaning suggested by appellant. No specific objection was made to the instruction for the reasons now urged by appellant. No reversible error was committed by the court in giving oral instruction No. 2.*

Again, it is said by appellant that it was contrary to the statute for appellee to employ appellant's tenant, Hill, until the contract of rental was terminated by mutual consent. Appellant requested, and the court refused, an instruction to that effect. The instruction was as follows: "You are instructed that one party to a contract can not of his own accord terminate that contract without the consent of the other contracting party."

It is insisted that the court erred in refusing the instruction. We think there is nothing in the statute preventing a tenant from breaching a rental contract with his landlord, and *vice versa*, and then seeking employment elsewhere, provided, of course, the subsequent employer

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*Following is instruction No. 2 referred to in the opinion:

"You are instructed that if the defendant knew at the time that the said Hill had a contract with said Park, and owed said Park for supplies and advances and knowingly employed said Hill, then your verdict will be for the plaintiff; provided at the time he was in the employ of the plaintiff and was carrying out his contract and was persuaded and induced to abandon it." (Rep.).

or landlord did not interfere with the original employment or entice or induce the tenant to leave his first employer or landlord before the expiration of the rental contract. Such right was recognized by this court in the case of *Tucker* v. *State, supra.* In the course of the opinion in that case, the court said: "It (referring to the statute) is not intended as a punishment for merely giving employment to a laborer during the unexpired term of his *broken* contract with another person."

The court did not err in refusing the instruction.

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* WINSLOW.

Opinion delivered March 24, 1919.

1. ACCORD AND SATISFACTION—EXECUTORY AGREEMENT.—An unexecutory agreement to settle for personal injuries for a specified amount provided the injured person's physician approved thereof does not defeat a cause for action for the injuries if the physician did not approve of the settlement.
2. DAMAGES—EXCESSIVENESS OF VERDICT.—Where the plaintiff, a 70-year-old woman, while in good health, was violently thrown from a train, injuring her back and hips and causing partial paralysis of a leg, was confined for four weeks, was suffering pain and had frequent violent headaches as a result of the injury, with probability of the injuries being permanent, a $1,500 verdict was not excessive.

Appeal from Craighead Circuit Court, Jonesboro District; *R. H. Dudley,* Judge; affirmed.

W. F. Evans, W. J. Orr, Basil Baker and *E. L. Westbrooke,* for appellant.

The court should have admitted the evidence of settlement offered by appellant pleaded in the amended answer; (a) there was a contract of settlement between the claim agent of appellant and Charlie Winslow, son and agent of appellee. Generally an accord without satisfaction cannot be pleaded in bar, but where there are mutual promises and undertakings not performed by him who has the cause of action, or where he who has the

cause of action, prevents satisfaction, accord may be pleaded in bar. 2 Ark. 225; 7 Col. 172; (2 Pac. 916); 7 Col. 209. Here the agent Winslow agreed to accept and the company agreed to pay one hundred dollars conditioned on Dr. Copeland giving a statement of the injuries sustained, which condition was not complied with through the instrumentality of the doctor who advised Winslow against accepting the money after advising him that his mother had recovered sufficiently. Appellant always was and is ready to perform its part of the contract, and having offered so to prove, it was denied the right by the court and this was a matter which should have been submitted to the jury, it being a question of the parties. 14 S. W. 556. The cases in 115 Ark. 139 and 127 *Id.* 106 are not applicable. The train did not drag Mrs. Winslow. Her feet were on the platform and the brakeman had the box there until the train started and his left hand was on Mrs. Winslow's to keep her from falling. Her feet were on the platform when he took hold of her. She never fell over. She got down on the platform and never turned loose the rod until he got hold of her. Thus are the injuries detailed by appellee's witnesses. The train backed slowly and easily; no complaint was made that she was jarred. The claim agent, Smith, called on her and talked with her about the injury and her only claim was that the train started to back up; she almost fell and the brakeman caught her thumb and wrenched it. We invoke the rule announced in 100 Ark. 123: "In fixing the amount appellee will be permitted to recover, the court will not be careful to see that it shall be sufficient to compensate for the the injury sustained, but rather that the amount required to be remitted shall be large enough to strip the verdict of the jury of any prejudicial elements." See also 74 Ark. 326; 23 So. 456; 57 So. 172; 3 *Id.* 462; 176 Ill. App. 436; 168 Ill. 538; 154 S. W. 278; 178 *Id.* 287; 87 Ark. 109; 84 S. W. 849; 153 *Id.* 21; 98 Ark. 211; 103 *Id.* 374; 77 Ill. App. 474; 40 N. Y. Supp. 1117; 93 Ark. 119. These case show that the verdict is excessive by at least $1,400 and it should be reduced or a new trial granted.

J. F. Gautney and *F. C. Mullinix,* for appellee.

1. The evidence as to the alleged accord was properly excluded. Dr. Copeland declined to make the statement and advised Charlie Winslow not to accept the money. No money was paid or offered in consummation of this alleged contract. If there was an accord there was no satisfaction. The alleged accord was no defense. 88 Ark. 473; 127 *Id.* 106; 75 *Id.* 354; 115 *Id.* 347; 1 C. J. 363, § 20.

2. The verdict is not excessive. The evidence shows she was confined to her bed four weeks and suffered considerable pain and still suffers from the injury. 87 Ark. 109. The amount in view of the evidence is very small.

SMITH, J. Appellee recovered judgment to compensate an injury sustained by her while traveling as a passenger on one of appellant's trains; and only two errors are assigned for the reversal of the judgment.

The first is that the court erroneously refused to permit appellant's claim agent to testify "that at the instance of the appellee's agent, designated by her in his and the agent's presence, the agent went to see Charlie Winslow, her son and agent, and they agreed upon a settlement by the appellant paying to him, as appellee's agent, $100, upon condition that Dr. Copeland, who was appellee's physician, should give a statement to justify the claim agent's action in paying the railroad company's money. That Dr. Copeland not only declined to make the statement, but advised Charlie Winslow not to accept the money, and further advised him to refrain from making a statement in connection with the alleged injury. No money was paid and no agreement was made by Mrs. Winslow except through her son, Charlie Winslow, who was her agent, and no agreement was put in writing."

It sufficiently answers this contention to say that Dr. Copeland refused to give a certificate; and if there was an accord, there was no satisfaction thereof. Appellee could never have maintained a suit on the executory agreement sought to be proved; nor can appellant rely upon it to defeat the cause of action which it was pro-

posed to settle. *St. Louis & San Francisco Ry. Co.* v. *Mitchell,* 115 Ark. 339; *Lewis* v. *Arnn,* 127 Ark. 106.

The second assignment of error is that the verdict—which was for $1,500—is excessive. This assignment cannot be sustained in view of the testimony offered on appellee's behalf, to which we are required to give full faith and credit in testing its legal sufficiency to support the verdict. This testimony was to the effect that appellee, who is seventy years of age, was suddenly and violently thrown from a slowly moving train; that she fell and injured her back and hips either in the fall or while she was being dragged after the train was set in motion, and was confined to her bed about four weeks as a result of the injury, during all of which time she suffered considerable pain. That she continues to suffer pain and has frequent headaches as a result of the injury, and that these headaches are so violent as to cause the head to be drawn backwards. That there is a partial paralysis of her right leg as a result of these injuries, and that she frequently falls while attempting to walk. Dr. Copeland, the witness who refused to give the certificate upon which a settlement for $100 would have been made, testified that it was not likely that appellee would ever recover from the result of her injuries, and that they were probably permanent. The evidence in appellee's behalf was that she was in good health and active for a woman of her age prior to her injury.

No prejudicial error appearing, the judgment of the court below is affirmed.

CAMPBELL v. SANDERS.

Opinion delivered March 31, 1919.

TAXATION—SALE OF SEPARATE LOTS IN MASS.—A tax deed showing on its face a sale of separate town lots in mass for a lump sum is invalid, under Kirby's Dig., § 7087.

Appeal from Jackson Circuit Court; *D. H. Coleman,* Judge; affirmed.

STATEMENT OF FACTS.

This is a suit in ejectment by W. W. Campbell against H. C. Sanders and S. Brundidge to recover possession of lots 5 and 6 in block 13, in Morris' Addition to the city of Newport, Arkansas.

The complaint alleges that the defendants are in the possession of the lots. The plaintiff bases his claim and right of possession solely upon a tax deed executed to him by the clerk of Jackson County, Arkansas, on the 13th day of June, 1918. Lots 5, 6, 7 and 8 of block 13, in Morris' Addition to the city of Newport, Arkansas, are vacant lots contiguous to each other and under one enclosure. They were assessed as a whole for the year 1915, and the taxes being unpaid, they were returned delinquent and offered for sale by the collector. W. W. Campbell bid and offered to pay the taxes, penalty and costs against all of said lots for lots 5 and 6. Lots 5 and 6 were then sold to said Campbell and in due course he received the clerk's tax deed therefor.

The circuit court was of the opinion that the sale for taxes for the year 1915 was void and dismissed the plaintiff's complaint.

From the judgment rendered, the plaintiff has duly appealed to this court.

L. L. Campbell, for appellant.

1. There was no error as to the assessment. Kirby's Digest, § § 6976, 6980, 7018, 7083-5. These sections do not require or contemplate that where there are two or more lots in a city or town owned by the same person and are contiguous and in one tract that they should be severally listed or assessed. The owners for a number of years, of lots 5, 6, 7 and 8, block 13, had been assessed as they were and appellees are estopped by long acquiescence. 37 Cyc. 1001, and cases cited.

2. The tax sale is valid. 83 Ark. 174 is not in point. The lots had a common ownership and they were separately described and a valuation of $400 put upon the whole tract. As assessed these lots were extended as provided by section 7018, Kirby's Digest, as a single tract

and so sold. The assessment, extension of taxes and sale was in accordance with our statutes. *Supra.* The judgment should be reversed.

Joe M. Stayton and *Harry Neelly,* for appellees.

1. The appellees were in possession of the lots and it was not necessary to exhibit their title with their answer. In ejectment a party seeking possession must recover on the strength of his own title and not upon the weakness of his adversary's. Being in possession under a *bona fide* claim of title it devolved upon appellant to prove his title. 87 Ark. 189; 80 *Id.* 34.

2. The tax deed is void on its face, as it shows that lots 5, 6, 7 and 8 were offered for sale altogether *en masse.* 83 Ark. Ark. 174; 31 *Id.* 491; 30 *Id.* 579; 55 *Id.* 104; 88 *Id.* 395; 94 *Id.* 222. Our statutes expressly provide for the manner of assessment, extension of taxes and sale of lots or lands. Kirby & Castle's Digest, § § 8613, 8634-5, 8655, 8665, 8675, 8712, 8739-40-5. By these it will be seen that the collector must sell each lot or tract separately. Here the sale was not en mass and was void. *Supra.*

HART, J., (after stating the facts). We are of the opinion that the holding of the circuit court was correct and that the case is ruled by *LaCotts* v. *Quertermous,* 83 Ark. 174, where the court held that a tax deed is void which shows on its face that two separate lots within a town were sold en mass for a lump sum.

Counsel for appellant insists that inasmuch as the record in the case just cited does not show that one valuation was placed by the assessor upon both lots as one tract, that the holding in that case does not control here. The record does show, however, in that case that there was a frame building on both lots and that both lots were sold as one tract by the collector at the tax sale. The statute in regard to the sale of delinquent lands provides that the collector shall offer for sale each tract of land, city or town lot for the tax, penalty and costs thereon. Kirby's Digest, section 7087. The collector in making the sale takes the description

from the tax books. The tax books are made out by the county clerk and delivered to the collector, but they are made out from the descriptions of the assessor and placed by him on his books. So the presumption is that the collector sold the land in that case from the description as prepared in his list of delinquent lands and these in turn would be just as made out by the county clerk as taken from the assessor's books. This finding is in accord with our statutes on the subject.

Subdivision 2 of section 6976 of Kirby's Digest provides that the return of the assessor shall contain the name of the owner and the description of each lot in each town or city and the value thereof as determined by the assessor. Section 7018 of Kirby's Digest relative to the making of the tax books by the county clerk provides that each separate lot or a tract of real property in each city or town shall be set down in a line opposite the name of the owner. When all of the sections of our revenue act are construed together, we think the intention of the framers of the act was that each lot should be separately assessed and valued so as to bear its own portion of the taxes. The rule is well expressed in *Terrill* v. *Groves,* 18 Cal. 149, as follows:

"We think the true meaning of the provision is to require a separate assessment and valuation of each lot in cases like this of city property. If a man owned a hundred lots or if, after the assessment, he sold some of them, and it became necessary or desirable to pay the taxes on a part of the property, it would be impossible to do so without paying the full amount assessed. It was evidently the intention of the statute that each lot should be made to bear its own portion of the public burdens, and a great deal of confusion and injustice would grow out of a gross assessment of several lots, and a sale in gross for the payment of the general tax."

This construction is in accord with *Hutton* v. *Jones,* and *Hutton* v. *King,* 134 Ark. 463, 205 S. W. 296. There we had under consideration the penalties accruing for failure of the owner to meet the board of assessment.

The court said that under our system of taxation the charge is made against the land and not the owner; and that it was intended to provide a separate assessment of each lot and a separate penalty chargeable thereon in case of omission from the list furnished by a non-resident owner.

Therefore, the judgment will be affirmed.

GREER v. JOYCE.

Opinion delivered March 17, 1919.

JUSTICES OF THE PEACE—TIME FOR PLEADING SET-OFF.—Set-offs not presented in the justice's court cannot be allowed on appeal in the circuit court.

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

Brundidge & Neelly, for appellant.

1. It was error to overrule plaintiff's motion to strike defendant's set-off. No set-off or counter-claim was plead before the justice and it could not be plead in the circuit court on appeal for the first time. Kirby's Digest, section 4682; 44 Ark. 375; 85 *Id.* 444.

2. The court erred in its oral charge to the jury. *Cases supra.* Judgment should be entered here, as the claim is undisputed.

J. N. Rachels and *W. A. Barnett,* for appellee.

The judgment appealed from was a default judgment before a justice of the peace. Appellee was not summoned and had no chance to make his defense before the justice and had the right to plead the set-off in the circuit court. 91 Ark. 93; 44 *Id.* 375; 15 *Id.* 24. Act No. 267, Acts, 1917; 98 Ark. 125. At most a remittitur should be allowed but the judgment should not be reversed. *Supra.*

WOOD, J. The appellant filed an account in the justice court against the appellee for the sum of $26. Service was had upon the appellee and judgment was rendered against him by default.

Appellee appealed to the circuit court. There he filed a set-off in the sum of $50. Appellant moved to strike the set-off, which was overruled. Appellant duly saved exceptions to the ruling.

The appellee admitted that he owed the amount sued for but contended that the amount was set off by his claim and that appellant was due him a balance of $24. The cause was sent to the jury, and a verdict and judgment were rendered in favor of the appellee in the sum of $24. This appeal is duly prosecuted.

The court erred in overruling appellant's motion to strike the set-off. "Set-offs not presented in the justice court cannot be allowed on appeal in the circuit court. Kirby's Digest, section 4682; *Texas & St. L. R. Co.* v. *Hall,* 44 Ark. 375; *St. L., I. M. & S. R. Co.* v. *Richter,* 48 Ark. 349; 3rd Crawford's Digest, 3101. See also *Woolverton* v. *Freeman,* 77 Ark. 234; *Chicago, R. I. & Pac. Ry. Co.* v. *Young,* 85 Ark. 444; *Hinds* v. *Stevens,* 90 Ark. 518.

For the error indicated, the judgment is, therefore, reversed. As the appellee admits that he is due appellant the amount claimed, it follows that judgment must be entered here for that sum and it is so ordered.

ECCLES & COMPANY v. MUNN.

Opinion delivered March 24, 1919.

1. WAREHOUSEMEN — LOST RECEIPT — RIGHTS OF HOLDER.—An unindorsed warehouse receipt which shows on its face that it belongs to the depositor or to a specified person is not a negotiable receipt, under Acts 1915, p. 986, § § 4, 5.
2. WAREHOUSEMEN — RECEIPTS — NEGOTIABILITY.—Acts 1915, p. 987, § 7, requiring that warehouse receipts be marked "non-negotiable," and making the warehouseman liable for failure to comply therewith, has no application to a case where a receipt non-negotiable in form was lost and was transferred by the finder to an innocent purchaser, the warehouseman not being a party.
3. CUSTOMS AND USAGES—WAREHOUSE RECEIPTS—TITLE.—A custom of cotton buyers, farmers and merchants to treat warehouse receipts, made non-negotiable by statute, as negotiable and as passing title,

cannot be proved, as a custom cannot be set up in violation of a statute.

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

STATEMENT OF FACTS.

This is an action in replevin brought in a justice court by W. M. Munn against Alexander Eccles & Company to recover a bale of cotton alleged to be worth $140. There was a judgment in the justice court in favor of the plaintiff, and the defendants appealed to the circuit court. There the case was tried upon a state of facts substantially as follows:

During the year 1917, W. E. Mitchell raised a crop on the shares on the farm of the plaintiff, W. M. Munn. After Mitchell had gathered the first two bales of cotton, he brought them to Hope, Arkansas, and placed them in a warehouse. Receipts were issued to him for the cotton. Mitchell and Munn then divided the cotton, each taking a bale. Mitchell turned over to Munn the warehouse receipt for his bale which together with the endorsements on it are as follows:

"Planters Warehouse, No. 4709.

"In consideration of the price paid it is understood and agreed by the seller that 10 cents for weighing and 15 cents for handling be deducted from the amount of each bale of cotton sold. Storage after 30 days. Positively not liable for fire.

"Hope, Ark., 10/11, 1917.

"Bought of W. E. Mitchell, one bale of cotton.

"Mark	Weight	Tare	Price	Remarks
	520		10	
			—	$140.92
			27	.25
				$140.67

"Ruff Boyett, Manager."

Stamped across the face of said ticket in blue ink appears: "Void after Oct. 10, 1917. Betts & Brundidge, Hope, Ark."

Stamped across the face of said ticket in purple ink appears: "Planters WA Co. Cancelled Oct. 16, '17. Ruff Boyett, Mgr."

Mitchell did not endorse the warehouse receipt when he turned it over to Munn. The latter either lost the receipt or it was stolen from him. When Munn first lost the warehouse receipt he came to the warehouse at Hope and tried to locate the bale of cotton. At that time the party in possession of the receipt had sold the bale of cotton to Alexander Eccles & Company, the defendants, and had delivered to them the warehouse receipt. Alexander Eccles & Company bought the cotton believing the holder of the receipt to be the owner thereof. They did not know that it had been lost or stolen from Munn. The value of the cotton was alleged and proved to be $140.

The circuit court directed the jury to return a verdict in favor of the plaintiff for the possession of the bale of cotton or its value, $140.

From the judgment rendered, the defendants have prosecuted an appeal.

Jas. H. McCollum, for appellants.

Appellants purchased the cotton in open market in due course of business and according to usage and custom of long standing, universally known, paid valuable consideration without notice of any claim of appellee or defect of title in the holder and were innocent purchasers. The warehouse receipt was transferable by delivery without endorsement and its delivery carried with it the right and title to the cotton. 44 Ark. 301; Kirby & Castle's Digest, § 9995. Kirby's Digest, § 527, was repealed by implication. Ch. 174, K. & C. Dig.; 70 Ark. 27; 100 *Id.* 504; 120 *Id.* 530; 103 Am. St. 983 and note.

The receipt was negotiable by long established custom and usage. 46 Ark. 210; 58 *Id.* 565; 81 *Id.* 549; 84 *Id.* 389.

Both parties here are innocent in the eyes of the law. One of them must lose. Appellee is the one to bear the loss, as the loss of the receipt was by his inadvertence.

or negligence. 57 U. S. (Law Ed.) 1245; 42 Ark. 478; 49 *Id.* 40; 55 *Id.* 45; 41 Am. St. 172; 50 *Id.* 540.

It was error to direct a verdict. The issues should have been submitted to a jury. 55 Ark. 45.

Steve Carrigan, for appellee.

44 Ark. 301 is not applicable, as the statute upon which it was based has been repealed by the act of 1887. Kirby's Digest, § 529. The receipt was not indorsed and was not negotiable by delivery. *Ib.* The finder of a lost receipt indorsed in blank cannot by delivery or transfer divest the title of the owner. 101 U. S. 557; 29 Wis. 482; 9 Am. Rep. 603. A non-negotiable receipt cannot be negotiated. *Ib.* The act of 1915 controls this case. The custom cannot prevail over our statute. 7 Allen (Mass.) 29; 83 Am. Dec. 656; 19 Pa. St. 243; 29 Am. & Eng. Enc. Law (2 ed.) 376-8. Losing the receipt was not negligence. 25 U. S. (Law ed.) 894. Appellant should suffer the loss. 57 *Id.* 1245. This case is controlled by Acts 1915, p. 983. Appellee was not negligent; the receipt was lost or stolen without his fault. The law of this case is settled by the court properly in its instructions and the verdict should be sustained, as the evidence supports it.

HART, J., (after stating the facts). The circuit court was right in directing a verdict for the plaintiff. The undisputed facts show that the plaintiff was the owner of the warehouse receipt for the bale of cotton in controversy and that he either lost it or that it was stolen from him. The party finding the receipt or stealing it could bestow no greater rights upon the transferee than he himself possessed. The defendants, Alexander Eccles & Company, therefore, acquired no greater rights than were transferred to them by the delivery to them of the warehouse receipt. In other words the finder of an indorsed warehouse receipt which on its face shows the name of the true owner, cannot by selling it transfer the title of the true owner. *Citizens Bank* v. *Arkansas Compress & Warehouse Co.,* 80 Ark. 601. The correctness of this holding depends upon the construction to be given to

our uniform warehouse receipt law passed by the Legislature of 1915. See Acts of 1915, p. 983. Sections 4 and 5 of the act read as follows:

"Section 4. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

"Section 5. A receipt in which it is stated that the goods received will be delivered to the bearer , or to the order of any person named in such receipt is a negotiable receipt."

Our statement of facts shows that the receipt contained all the essential requirements prescribed by the statute and is therefore a valid one. The receipt states that the cotton belongs to the depositor, or at least to a specified person. It is, therefore, under the statute a non-negotiable receipt. It is true it is not marked on its face "non-negotiable" as required by section 7 of the act. That section provides that in case of the warehouseman's failure so to mark a receipt, a holder of it who purchased it for value supposing it to be negotiable, may, at his option, treat such as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. The warehouseman, however, is not a party to this action, and this section, therefore, has no application to the present case.

Section 39 of the act reads as follows: "Section 39. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

"A non-negotiable receipt can not be negotiated, and the endorsement of such a receipt gives the transferee no additional right."

As we have already seen, the warehouse receipt is non-negotiable, and it is apparent from the latter part of the section just quoted, that even if the receipt had been endorsed to the defendants they would not have acquired any greater rights than the transferer. As stated in *Citizens Bank* v. *Arkansas Compress & Warehouse Co., supra,* a thief who finds a compress receipt can give no

more title to a purchaser from him than he could to property which he had found or stolen.

It is also contended by counsel for the defendants that a long and well established usage of trade at Hope made the receipt negotiable and transferable by delivery and that the delivery thereof to the defendants, who were innocent purchasers for value, carried the title and right to the possession of the bale of cotton. It was proved by the defendants that it had been the custom for many years at Hope for cotton buyers, farmers, and merchants to treat and consider that a cotton ticket or warehouse receipt would pass title to the cotton and the right to the possession of it by the delivery of the receipt from one person to another. Such a custom, however, could have no effect to set aside the statute, where the latter is designed to prohibit such a mode of transfer. As we have just seen, the receipt was a non-negotiable one, and under the terms of the statute, the transferee acquired no greater rights than the transferer. The defendants can not set up a custom which would be in violation of the express terms of the statute and in that way abrogate the statute. *Citizens Bank* v. *Ark. Compress & Warehouse Co., supra.*

In a case note to 17 Ann. Cas. at 672, it is said that it is generally held that a statute making warehouse receipts negotiable by endorsement does not prohibit their transfer by delivery, and that title to the property represented thereby will pass if the delivery is made with that intent. It is further stated that a transfer without endorsement will merely transfer the title of the transferer and will not afford the transferee the greater rights which are granted under the statute; and several cases are cited in support of the statement.

It follows that the trial court was right in directing a verdict for the plaintiff, and the judgment will be affirmed.

THE J. R. WATKINS MEDICAL COMPANY v. HOGUE.

Opinion delivered March 24, 1919.

1. SALES—DISTINGUISHED FROM AGENCY.—Where a contract in plain terms created the relation of vendor and vendee, the court should have so declared as matter of law.
2. PLEADING—JUDGMENT ON FACE OF PLEADINGS.—Where plaintiff sued on a contract which on its face created the relation of vendor and vendee, an answer which admitted the execution of the contract but claimed that the goods were furnished to the defendant as agent to sell for plaintiff states no defense, and judgment should have been entered for plaintiff.

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

STATEMENT OF FACTS.

This action was brought by the appellant against the appellees. The appellant is a Minnesota corporation, duly authorized to do business in the State of Arkansas. It alleged that it entered into a contract with Jinks S. Hogue by which it agreed to sell and deliver to the latter, f. o. b. cars, at any of its regular places of shipment, certain goods, extracts, and other articles manufactured and sold by it, at customary wholesale prices between January 29, 1915, and March 1, 1916; that Hogue agreed to pay for the goods so purchased, as specified in the terms of the written contract, and at the expiration of the period named therein to pay the entire sum remaining unpaid; that A. B. Cox and J. L. Smith, in consideration of $1 paid by the company and the execution of the contract, as sureties jointly and severally promised and guaranteed the full and complete payment for the said goods according to the terms of the contract; that there was due and unpaid by Hogue the sum of $731.26, for which it prayed judgment. The complaint was duly verified.

The appellant attached the copy of the contract, as an exhibit to its complaint, which is as follows:

"This agreement, made at Winona, Minnesota, U. S. A., this 29th day of January, A. D. 1915, between the J. R. Watkins Medical Company, a Minnesota corporation,

hereinafter called the company, party of the first part, and Jinks S. Hogue of Bauxite, Arkansas, party of the second part, witnesseth, that for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the party of the second part, the company promises and agrees to sell and deliver to the party of the second part, free on board cars at Winona, Minnesota, or at its option, at any of its regular places of shipment any and all medicines, extracts and other articles manufactured or sold, or which may hereafter be manufactured or sold by it, unless prevented by fire, insurrection, invasion, strikes, or other cause, at the usual and customary wholesale prices, as the party of the second part may reasonably require for sale by him from time to time, from the date hereof, until the first day of March, 1916, as hereinafter provided, in the following described territory, excepting the incorporated municipalities therein located, to-wit:

"In the State of Arkansas: The part of Saline County lying southeast of the military road, including the townships of Fairplay and Liberty.

"In consideration of the sale and delivery to him f. o. b. cars at Winona, Minnesota, or other regular shipping point as above mentioned, by said company, of the medicines, extracts and other articles manufactured or sold by it, in such reasonable quantities as he may require for sale in said territory as herein provided, upon the terms herein expressed, the party of the second part promises and agrees as soon as practicable after said medicines, extracts and other articles are received, to make a thorough and personal canvass of said territory at least three times a year, at his own cost and expense, and to provide a good team and proper wagon and outfit therefor, and to sell said medicines, extracts and other articles, or so much thereof as possible, and at all times during said term, said party of the second part agrees to keep a complete record of all goods disposed of by him and on hand and to make to said company complete, regular, weekly written reports of all sales and collections

and also report the goods on hand and outstanding accounts when requested by said company so to do.

"And the party of the second part promises and agrees to pay to said company, at Winona, Minnesota, the wholesale prices aforesaid, for the medicines, extracts, and other articles sold to him from time to time, as herein provided, and the prepaid freight and express thereon, if any during said term, at the time and in the manner and in accordance with the provisions of the weekly report blanks of said company, to be furnished to the party of the second part, and at the termination of this agreement, to pay the whole amount therefor then remaining unpaid; or in cash, within ten days from date of invoice, with the understanding that said company will allow a discount of three per cent. from said wholesale prices on cash payments, provided full payment for all goods previously furnished shall then have been made; but such payments or any of them, may be extended by the said company without notice to the sureties herein and without prejudice to the rights or interests of said company, and if the party of the second part shall not pay cash for said medicines, extracts and other articles so sold and delivered to him, and if the payments at the time and in the manner and in accordance with said weekly report blanks, as aforesaid, are insufficient to pay therefor, said company may, in its discretion, thereafter either limit the sales herein agreed to be made, or discontinue the same until such indebtedness is paid or reduced as said company may require; and, at the termination of this agreement the party of the second part agrees to return by prepaid freight to said company, at Winona, Minnesota, or other point at which the same were delivered, in as good condition as when delivered to him f. o. b. cars, all of the said medicines, extracts and other goods, undisposed of by him, and the company agrees to receive such medicines and other goods, if the same are in such condition when received at Winona, Minnesota, or other point at which they were delivered to the party of the second part f. o. b. cars, and pay, or credit, the party of

the second part therefor at the same prices at which the same were sold and delivered to him, and if not in such condition when so received, the company shall make a reasonable charge for putting them in such condition, if that can reasonably be done, and deduct the same from the amount of the goods so returned, and pay or credit the party of the second part with the balance thereof, but no medicines, extracts or other goods left by said second party, with his customers, on time or trial, not paid for by them, or by them partially used and then returned to him, shall be returned to said company, or be paid for by it or credited to the account of said party of the second part.

"And it is mutually agreed between the parties hereto that the party of the second part shall pay all transportation charges of goods he so purchases and all expenses and obligations incurred in connection with the canvass of said territory and the sale of the goods therein, and shall have no power or authority to incur any debt, obligation or liability of any kind whatsover, in the name of, or for, or on account of said company, and that said company shall in no way contribute to the expense of, nor share in the profits or losses on the sales of said goods by said second party; nor have any interest in the accounts due for goods sold by the said second party; and no printed, advertising or other matter of said company sent to or distributed by said second party, shall be construed to change or modify the terms of this agreement; and that this is the complete, entire and only agreement between the said parties, and that it shall not be varied, changed or modified in any respect except in writing executed by the parties hereto. And it is further mutually agreed that either of the parties hereto may terminate this agreement at any time by giving the other party notice thereof in writing by mail and any sum then owing from said second party to said company shall thereupon be and become immediately due and payable."

The appellees answered and admitted the execution of the contract, and admitted that the amount claimed

was a true and correct statement of the account; but denied that the goods were sold to Hogue. They set up that the goods under the contract were furnished to Hogue as agent of the plaintiff company, and that same were to be sold and accounted for by Hogue, as agent. That immediately after the contract was executed, the plaintiff company abandoned the idea, if it ever entertained such, that the contract created the relation of vendor and vendee between it and Hogue, and by its conduct in carrying out the contract, as well as by the contract itself, the plaintiff company became the principal and Hogue its agent. The answer then specified the terms of the contract, upon which the defendants rely as creating the relation of principal and agent; and also set up that the plaintiff company had terminated the contract after Hogue, acting under the directions of the company, had sold large amounts of goods on credit for which he was not responsible; that the contract was entered into with the fraudulent intent to induce Hogue to place on credit and on trial as great an amount of goods as possible and then terminate the contract and compel the sureties to pay for the goods; that the contract was terminated by the plaintiff company at that season of the year when collections could have been made, and that Hogue had no opportunity to continue the business and make the collections. The answer was not verified.

At the trial, before any evidence was taken, the plaintiff company filed a motion for judgment on the pleadings; which motion was overruled, and the plaintiff company saved its proper exceptions.

Testimony was then introduced by the plaintiff and the defendants. At the conclusion of the testimony the plaintiff requested the court to instruct the jury to return a verdict in its favor, which the court refused.

The verdict and the judgment were in favor of the defendants, and this appeal followed.

J. S. Utley, Benton, Ark., and *Tawney, Smith & Tawney,* of Winona, Minn., for appellant.

1. The court should have construed the contract and declared as matter of law that there was a sale of the goods and the relation of vendor and vendee established and as the account was not disputed should have granted appellant's prayer for a directed verdict for the sum sued for. 112 Ark. 169; 115 *Id.* 171; 126 *Id.* 600; 131 *Id.* 15.

2. The evidence shows a sale to Hogue and judgment should have been rendered on the pleadings for the sum claimed. It was error not to direct a verdict for plaintiff. 131 Ark. 20; 179 S. W. 275; 112 *Id.* 169. Judgment should be entered here for appellant.

J. C. Ross and *Mehaffy, Reid, Donham & Mehaffy,* for appellees.

Appellant has failed to abstract the record and the judgment should be affirmed under Rule 9. 101 Ark. 20; 80 *Id.* 259; 81 *Id.* 237; 110 *Id.* 7; 57 *Id.* 441; 88 *Id.* 447; 104 *Id.* 641; 57 *Id.* 304, 441; 58 *Id.* 448; *Hubbert* v. *Ry. Co.,* Ark. Law Rep., Oct. 28, 1917.

WOOD, J., (after stating the facts). The contract sued on herein is very similar in much of its language to the contract sued on and set forth in *Clark* v. *J. R. Watkins Medical Co.,* 115 Ark. 166 (170-174). But it also differs in some very material respects from the language of that contract, and there is eliminated from the contract in the instant case the language which rendered the contract ambiguous in the case of *Clark* v. *J. R. Watkins Medical Co., supra.* Moreover, other language contained in the contract, here in suit, which was not in the contract in the above case, served to differentiate that case from the one at bar, and renders the contract in the present case free from ambiguity.

The court, therefore, erred in not construing the contract as one which created the relation of vendor and vendee. There is no language in the contract which would warrant the court in submitting this as an issue of fact to the jury. The contract being one which in

plain terms created the relation of vendor and vendee, the court should have so declared as a matter of law. The case is ruled on this point by the cases of *W. T. Rawleigh Medical Co.* v. *Holcomb,* 126 Ark. 597, and *Lange Medical Co.* v. *Johnson,* 131 Ark. 15.

Nor do we find that the allegations of the answer are sufficient to justify the conclusion that the parties to the contract, by their conduct, had abandoned the same, and entered upon a new and different contract which would relieve the appellee and his sureties from liability on the contract sued on.

It follows that the court erred upon the pleadings in not granting appellant's prayer for a directed verdict in its favor.

The judgment is, therefore, reversed and judgment will be entered here for the appellant in the sum of $731.26, as prayed for in its complaint.

WILSON *v.* DAVIS.

Opinion delivered March 31, 1919.

1. CONSPIRACY—SUFFICIENCY OF EVIDENCE.—A conspiracy may be inferred, although no actual meeting of the parties is proved, if it be shown that two or more persons pursued by their acts the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected.
2. SAME—AGREEMENT TO DEFRAUD—LIABILITY OF CONSPIRATORS.—Where an unlawful agreement is entered into, the parties become liable as joint tort-feasors to the extent of the damage done as a result of the conspiracy, and the liability of a particular conspirator does not depend upon the extent to which he profited or his activity in promoting the conspiracy.
3. BANKS AND BANKING—ULTRA VIRES ACT—ESTOPPEL.—Where a bank accepts the benefit of an unauthorized act of its president, it can not complain that the act was *ultra vires.*
4. CONSPIRACY—FRAUD—EVIDENCE.—Finding that a mortgagee entered into a conspiracy with the mortgagor and with the president of a bank which had assumed the mortgage by negotiating the note which had been paid by the bank and by the mortgagee

accepting as bonus bank assets without the knowledge of the directors, *held* not against the preponderance of the evidence.

5. CONSPIRACY—INDORSEMENT OF PAID NOTE.—Where a bank assumed a mortgage and paid one of the mortgage notes, and thereafter the president and original mortgagor, with intent to divert to their own use funds of the bank, erased the "paid" mark from the note and secured the mortgagee's indorsement on the note for the purpose of circulation, the mortgagee became a tort-feasor and became liable to the bank to the extent of its damage.

Appeal from Benton Chancery Court; *B. F. McMaham,* Chancellor; modified and affirmed.

Holloway & Holloway, for appellant.

1. The payment of the bonus was not *ultra vires,* and the court erred in so holding. There was no testimony that the bank through its officers exceeded its charter powers in paying the $3,100 bonus. The bank had the power to expend this sum to preserve its assets and protect its securities and a debt due to the bank. And it had the power to acquire by purchase the Texas ranch and cattle. Act No. 113, Acts 1913, § 29; 5 Cyc. 492. As it acquired title to the ranch and cattle subject to the incumbrance held by appellant, it became liable for the payment of the principal and interest of the notes held by appellant, and it was the bank's privilege and lawful right to bring about a change in the person of the mortgagee, in order to bring the incumbrance into friendly hands and reduce its interest liability to 6 per cent. Therefore the payment of the bonus was a benefit to the bank and it can not recover, regardless of the charter powers of the bank. It could not accept the benefits of an *ultra vires* act and at the same time avoid the burdens. 91 Ark. 367; 96 *Id.* 594.

2. The bank was not defrauded in the transaction with the Mississippi Valley Trust Company, but if Talley and Felker perpetrated a fraud, which is not conceded, appellant did not participate in the fraud so as to become liable therefor. The testimony shows conclusively that appellant had no connection with the arrangement with the trust company to take up and carry the

notes, and had no knowledge of such arrangement, but if he had endorsed the notes to the trust company that was no fraud on the Bank of Rogers. There is no evidence of fraud or conspiracy. The burden was on appellee to show fraud. 3 Cyc. of Ev. 415; 92 Ark. 586. The decree should be reversed and the cross-bill dismissed.

Moore, Smith, Moore & Trieber and *Duty & Duty,* for appellee.

1. The bank was defrauded out of $3,100, the bonus paid Wilson, and appellant clearly promoted the fraud and was a co-conspirator in the fraud. The conspiracy was proven by circumstances if not by direct evidence. 98 Ark. 575; 98 *Id.* 609; 77 *Id.* 444; 95 S. W. 477. See also 98 Ark. 975; 20 *Id.* 216; 59 *Id.* 422; Am. Ann. Cases 1918, p. 459; 5 R. C. L. 1061, 1091; Words & Phrases (2 Series), 1910; 20 Ark. 216.

2. A recovery may be had against two or more conspirators, if the charge is sustained against one, since damage and not the conspiracy is the gist of the action. Am. Ann. Cases 1917 E, 1022; 169 Fed. 259; 79 Conn. 414; 48 S. W. 429.

3. After the conspiracy is established, whatever is done in pursuance thereof by one is the act of all. 5 R. C. L. 1093; 176 Ill. 608; 68 Am. St. 203; Note 6, L. R. A. 630. This is true irrespective of the fact that they do not actually participate therein or to the extent to which they benefit thereby. 209 Ill. 159; 103 Wis. 125.

4. Every person entering into the conspiracy is in law deemed a party to all acts done by any of them in furtherance of the common design. 5 R. C. L. 1093; 77 Vt. 294; 60 Atl. 74; 107 Am. St. 765.

5. The bank was defrauded by the payment of the bonus of $3,100 and in addition thereto of interest. Where an officer of a bank takes a portion of its assets or funds and misappropriates them the bank can sue for and recover from the party who receives them with knowledge. 105 Mo. App. 463; 79 S. W. 1177. Where an agent of a bank certifies a check which he issues

whereby the funds of the bank may be withdrawn for his benefit, the person receiving the check in order to give it validity is bound to make inquiry of other officers as to its validity. 47 Ore. 562; 85 Pac. 81; 6 L. R. A. (N. S.), 365.

6. Where a contract is manifestly *ultra vires* as here, there can be no enforcement thereof, yet the party benefited can be compelled to return the property or money received. 103 U. S. 99; 98 *Id.* 640; 77 Fed. 85; 25 *Id.* 812.

7. Under all the circumstances in the record the chancellor was correct in holding that the payment of $3,100 to Wilson was an *ultra vires* and fraudulent transfer of the money of the bank to him and that the negotiation of the notes to the trust company for $10,000 was a fraud upon the bank and participated in by appellant to such an extent as to render him liable in an action for civil conspiracy. The decree should be affirmed, even if based on an erroneous conclusion of fact. 55 Ark. 112; 170 *Id.* 304; 85 *Id.* 1; 86 *Id.* 140.

SMITH, J. The Bank of Rogers was incorporated in 1912, with a capital stock of $150,000, and in the latter part of that year was sold to W. E. Talley and his associates by W. R. Felker, who owned the bank and operated it as a private banking institution before its incorporation and who owned most of its stock after its incorporation. At the time of this sale Felker was personally indebted to the bank to the extent of about $85,000 and was also obligated to the bank as endorser on a large amount of paper held by the bank.

Prior to the month of July, 1913, Felker was the owner of a large cattle ranch situated in Texas, and J. B. Wilson, the appellant herein, held a mortgage on this ranch and the cattle thereon to secure a loan of $40,000 made by Wilson to Felker, the loan being evidenced by four notes, each for the sum of $10,000, and bearing interest at the rate of 8½ per cent. per annum, payable, respectively, in the years 1913, 1914, 1915 and 1916.

After Talley and his associates had purchased the bank from Felker, the bank began to press Felker for the

payment of his indebtedness to it, whereupon Felker sold the ranch and the cattle thereon to the bank for the consideration of about $129,000. The sale was, of course, subject to Wilson's mortgage, the payment of which was assumed by the bank as a part of the purchase price. The balance of the purchase price was evidenced by two certificates of deposit in the sum of $5,000 each which were issued to Felker, who immediately negotiated them to appellant Wilson. Shortly after this transaction was closed the bank sold a large number of calves off the ranch for something over $18,000, and out of the proceeds of this sale paid to the appellant Wilson one of the $10,000 notes. This note was marked "paid" by Wilson and surrendered by him to the bank.

The bank closed its doors on July 6, 1914, and appellant Wilson filed with the Bank Commissioner for allowance the two certificates of deposit of $5,000 each, which Wilson had acquired from Felker. The liability of the bank on these certificates is not questioned; but Wilson and Talley were made defendants in a cross-bill filed by the Bank Commissioner in which judgment was prayed against them for an alleged wrongful conversion of certain funds of the bank. The facts on which this cross-action was based will fully appear from the further statement of the points at issue.

A statement of other facts essential to an understanding of the points at issue appear in the findings of fact made by the court below (and which we think the testimony supports), from which we copy as follows:

"The court finds that immediately after said purchase the said Bank of Rogers paid to the said Wilson ten thousand dollars of said indebtedness, leaving thirty thousand dollars due the said J. B. Wilson, and that thereafter the said W. E. Talley made an arrangement with the Mississippi Valley Trust Company of St. Louis, Missouri, whereby it took up said indebtedness to said J. B. Wilson and that at the said time the said indebtedness to said Wilson as aforesaid was not due, but in order to perfect the arrangement with the Mississippi Valley

Trust Company, whereby the said company was to carry the loan of thirty thousand dollars belonging to the said J. B. Wilson, and in order to induce the said J. B. Wilson to agree to said contract made by the said W. E. Talley with the Mississippi Valley Trust Company and to permit the Mississippi Valley Trust Company to take up and carry said indebtedness, the said J. B. Wilson required and exacted from the said Bank of Rogers a bonus of thirty-one hundred dollars and that the said W. E. Talley without any authority, authorization or without the knowledge or consent of the board of directors of the Bank of Rogers, took said thirty-one hundred dollars out of the assets of the Bank of Rogers and turned the same over to the said J. B. Wilson as a settlement of said bonus and that the said transaction was well known to the said J. B. Wilson, which act of the said W. E. Talley the court finds to be *ultra vires* and void and that said Bank of Rogers received no consideration for said thirty-one hundred dollars as aforesaid, which was well known to said Wilson and that said J. B. Wilson was a party to said transaction which amounted to a fraud against the creditors and stockholders of said Bank of Rogers.

"The court further finds that on or about the 3d day of November, 1913, that the cross-defendant J. B. Wilson was the holder of forty thousand dollars in promissory notes executed to him by W. R. Felker, the same being and including the thirty thousand dollars notes as above set forth and that all of said promissory notes were secured by a mortgage on lands, leaseholds and cattle situated in Mitchell, Howard and Sterling Counties, Texas. That said mortgage was dated December 18, 1911, and of record in said counties and that on or about the said date W. R. Felker was the owner of said lands, leaseholds and cattle and that on or about said date he sold said properties to the Bank of Rogers, the said Bank of Rogers assuming and agreeing to pay the said forty thousand dollars due to the said J. B. Wilson and that at the time the said W. E. Talley was president

of the Bank of Rogers and that W. R. Felker was vice president of the Bank of Rogers and that said J. E. Felker was cashier of said institution.

"The court further finds that on or about said date or soon thereafter, that said W. E. Talley and J. E. Felker, and by and with the consent of the said J. B. Wilson, the holders of said mortgage, sold and disposed of ten thousand dollars worth of the cattle on said real estate in said counties, in the State of Texas, and that said ten thousand dollars received from the proceeds from said sale were turned over to said J. B. Wilson in payment of one promissory note, the same being one of a series of four notes of ten thousand dollars each, amounting to the said forty thousand dollars indebtedness, which said J. B. Wilson held against said properties as above found.

"The court further finds that upon the payment of the said ten thousand dollars note that same was canceled and marked 'paid' by the said J. B. Wilson and sent to the Bank of Rogers, but that shortly thereafter a fraudulent scheme was entered into by and between the said J. B. Wilson, W. E. Talley and J. E. Felker, whereby the Bank of Rogers could be defrauded out of the sum of ten thousand dollars and that the said W. E. Talley returned said note to J. B. Wilson and that W. E. Talley then entered into a contract with the Mississippi Valley Trust Company, a banking corporation located in the city of St. Louis and State of Missouri, and arranged with the said Mississippi Valley Trust Company, whereby said trust company should take over the entire forty thousand dollars notes which were formerly secured by mortgages on said Texas property, which at that time belonged to the Bank of Rogers and that the said J. B. Wilson, J. E. Felker and W. E. Talley conspired together to falsely Texas property had been paid and that the indebtedness to the said Mississippi Valley Trust Company that none of said forty thousand dollars indebtedness against said and fraudulently represent and did falsely misrepresent amounted to forty thousand dollars, of which thirty thou-

sand dollars was held by the said J. B. Wilson and that the ten thousand dollar note which had been paid to said Wilson by the Bank of Rogers as aforesaid was not in fact paid, but was owned and held by J. E. Felker and W. E. Talley, said representations being made by the said Wilson, Talley and Felker with full intent of defrauding the Bank of Rogers out of its ten thousand dollars, which it had paid to the said J. B. Wilson.

"The court further finds that acting upon said representations the said Mississippi Valley Trust Company entered into a contract with said Wilson, Talley and Felker whereby it took said forty thousand dollars worth of notes and paid to the said Wilson the sum of thirty thousand and the said J. E. Felker and W. E. Talley the sum of ten thousand dollars, which they had represented as aforesaid, to be due the said W. E. Talley and J. E. Felker on the said ten thousand dollar note, which had in fact been paid by the Bank of Rogers and which at said time was not due and payable to any one. And did unlawfully and fraudulently erase said 'paid' mark from said note and said Wilson did unlawfully and fraudulently endorse and assign same to the Mississippi Valley Trust Company.

"The court finds that the said ten thousand dollars received on said note was fraudulently appropriated to the personal use and benefit of the said W. E. Talley and J. E. Felker and that the said J. B. Wilson assigned, aided and abetted in the misappropriation of said funds belonging to said bank as aforesaid with the intent then and there to cheat and defraud the said bank out of said sum of ten thousand dollars.

"The court finds further that thereafter the Mississippi Valley Trust Company foreclosed its mortgage on said Texas property owned by the said Bank of Rogers and on which said forty thousand dollar mortgage existed and that thereby the said Bank of Rogers was forced to and did pay the said ten thousand dollars in notes a second time and that said Bank of Rogers received no benefit whatever from the transaction with the said J. B. Wilson

and the said Mississippi Valley Trust Company, wherein it lost said ten thousand dollars, but that the said ten thousand dollars went for the personal use and benefit of said Talley and Felker."

Upon these findings of fact it was by the court directed that the Bank Commissioner have judgment for the use and benefit of the Bank of Rogers for the sum of $13,100 against the cross-defendants, J. B. Wilson and W. E. Talley, and that said judgment be offset to the extent of $10,412.32, the amount of the certificates of deposit which Wilson had purchased from Felker and had filed for allowance by the Bank Commissioner with the interest thereon, and judgment over was rendered against Wilson and Talley for the net sum of $2,687.68, together with interest thereon at the rate of six per cent. from November 4, 1913.

We have copied the somewhat lengthy findings of fact because, as is stated in appellant's brief, the questions involved are principally questions of fact; and it is not only insisted that the testimony does not support the findings made, but it is also insisted that the findings do not support the decree rendered.

Appellant's brief is devoted to a discussion of three questions, which may be consolidated into a single question and stated as follows: Did Felker and Talley conspire together to defraud the bank, and, if so, did Wilson participate in this conspiracy to such an extent as to deny him the right to recover as against the bank any portion of the money lost by the bank as a result of the conspiracy? Before discussing the questions of fact stated we announce the propositions of law applicable to the issues and which are applied by us in arriving at our conclusions.

In the case of *Parker* v. *State,* 93 Ark. 575, this court said: "In the case of *Chapline* v. *State,* 77 Ark. 444, it is held that a conspiracy may be inferred, although no actual meeting among the parties is proved, if it be shown by the testimony that two or more persons pursued by their acts the same unlawful object, each do-

ing a part, so that their acts, though apparently independent, were in fact connected; and in the same case it is held that any act done or declaration made by one of the conspirators in furtherance or perpetration of the alleged conspiracy may be shown as evidence against his fellow-conspirators."

If such an unlawful agreement exists the parties thereto become liable as joint tort feasors and to the extent of the damage done as a result of the conspiracy, and the liability of a particular conspirator does not depend upon the extent to which he profited by the conspiracy or his activity in its promotion. *National Fire Proofing Co.* v. *Masons Bldg. Assn.,* 169 Fed. 259; *Kimball* v. *Harman,* 34 Md. 407; *Wyeman* v. *Deady,* 79 Conn. 414.

The agreement under which the Bank of Rogers became indebted to the Mississippi Valley Trust Company was evidenced by a writing dated November 3, 1913, and it clearly appears that the contract was not entered into for the benefit of the bank. We do not set out this contract because of its length, but it begins with a recital that, "The Ozark Land & Lumber Company (a concern owned by Felker), W. R. Felker, J. E. Felker and the Bank of Rogers, Rogers, Arkansas, are indebted to you (the trust company) in the sum of $45,000 and accrued interest as evidenced by their notes for said amount due on demand and secured by the pledge of a certain fund in your bank as trustee under a second mortgage of the Ozark Land & Lumber Company dated January 2, 1912." This statement was not correct, as the bank was not indebted to the trust company and only became indebted to it by the execution of the contract containing the recital just set out. Talley testified that no advantage to the bank was contemplated, and when asked why the contract was executed in the name of the bank stated that it was "a daylight hold-up." Paragraph 3 of this writing recites that "the undersigned, W. E. Talley and J. E. Felker (a son of W. R. Felker) are the owners of the remaining $10,000 note described in paragraph 2 above. (This is the note involved in this litigation)." It is not

denied that this statement was known to be false when it was written, as neither Talley nor Felker owned this note or any interest in it. Neither is it denied that this note had been paid to Wilson and had been marked paid and that, after it had been paid, Wilson mailed it to the Bank of Rogers which had paid it. Nor is it denied that after this note had been paid it was resurrected and the word "paid" erased and the note endorsed by Wilson without recourse. This was done for the admitted purpose of putting a paid and canceled note again in circulation and was done only after Talley and Felker and a representative of the trust company had called on Wilson at his home for the purpose of conferring with him in regard to the transaction. Wilson admits that he consented to do this only after he had been paid the bonus of $3,100 in the form of a draft drawn on the Bank of Rogers, which was paid out of the funds of that institution. Wilson denied, however, that he had knowledge of or was a party to any agreement that was calculated or intended to defraud the bank out of any sum of money, and he denied that he had profited to any extent by the agreement made with the trust company. But, when asked if he had made any inquiry about the effect of the agreement made with the trust company, he answered that he did not care so long as he received the money due him and the bonus.

Appellant earnestly insists that no fraud was practiced or intended on the bank itself but that the contract with the trust company was made for and inured to the benefit of the bank. The correctness of this contention appears to be the controlling question in the case, for however credulous and passive Wilson may have been, resulting from his confidence in Talley and Felker, we think the court below was warranted in finding that Wilson was in possession of facts which charged him with notice of what Talley and Felker were doing. As has been stated, the trust company sent its representative to confer with Wilson before the execution of the agreement which resulted in the reissuance of the $10,000 note. And it is undisputed that the deal would never

have been put through but for Wilson's endorsement of the previously paid note for the purpose of again putting it in circulation. This mortgage indebtedness was not paid, and when the bank closed its doors on July 6, 1914, the mortgage was foreclosed and the bank lost its valuable equity in the ranch in addition to the $10,000 note which it had previously paid.

It is insisted, however, that if the bank had not assumed the debt due the trust company Felker would have been thrown into bankruptcy and the sale of the ranch to the bank would thereupon have been set aside. There is no testimony, however, that this would have been done, or could have been done, as there is no showing that Felker was insolvent.

It is also argued that if the bank had not raised and used the money borrowed from the trust company it would have been compelled to use other assets belonging to it. But $15,000 of the $45,000 indebtedness which the bank assumed was not its debt. The bank itself owed no part of the debt to the trust company prior to its assumption of it, although its ranch was subject to the mortgage for $30,000 which was included in the $45,000 debt to the trust company which the bank assumed. The written contract with the trust company recites that the indebtedness there secured was the indebtedness of the Ozark Land & Lumber Company, Felker and the bank, but no contention is made that the bank was liable to the trust company in any sum prior to the execution of the contract which was evidenced by the writing which recited the existence of the obligation. The beneficiaries of the whole transaction were Felker and the Ozark Land & Lumber Company, which desired assistance to complete five miles of a railroad which it had under construction at the time, and the net result of the whole transaction is that Talley was using both the credit of the bank and its assets, represented by a note for $10,000 which had been previously paid, for the benefit of another corporation.

To the argument that Wilson derived no profit or advantage from the bonus paid him, and that the bank

sustained no loss, in that, paper bearing 8½ per cent. was exchanged for paper bearing 6 per cent., we quote the following answer from appellee's brief:

"A contract with the Mississippi Valley Trust Company provided for an interest rate of six per cent. Now let us see if the bank lost or gained, as the appellant seems to think. If they had let the notes remain in the hands of the appellant, the first ten thousand dollar note at maturity, December, 1914, would have produced interest at eight and a half per cent. for one year, or eight hundred and fifty dollars. The second ten thousand dollar note for two years, or until December, 1915, at eight and a half per cent. would have produced seventeen hundred dollars. The third ten thousand dollar note at eight and a half per cent. for three years, or until the date of maturity, December, 1916, would have produced twenty-five hundred and fifty dollars interest, or the total interest would have amounted to fifty-one hundred dollars at the maturity of the notes.

"Now under the arrangements with the appellant and the Mississippi Valley Trust Company, what was the Bank of Rogers actually out in interest, together with the thirty-one hundred dollar bonus for the same length of time? The figures show as follows:

Interest on $10,000 note, 6 per cent., for one year	$ 600
Interest on $10,000 note, 6 per cent., for two years	1,200
Interest on $10,000 note, 6 per cent., for three years	1,800
Total interest at 6 per cent	$3,600
Bonus paid appellant	3,100
Making a total cost to the Bank of Rogers of	$6,700
Total the bank was actually out in interest and bonus	6,700
Total the bank would have been out if the contract with Wilson and Mississippi Valley Trust Company had not been made	5,100
Lost to Bank of Rogers by transfer	$1,600

"It seems to us that this is sufficient answer to the appellant's assertion that the Bank of Rogers gained by the payment of the bonus of thirty-one hundred dollars."

It is finally insisted by appellant that the bank had the right to expend its assets to preserve its securities and that whether Talley was authorized or not to make the deal, out of which this litigation arose, the trade was made for and has accrued to the benefit of the bank and that having accepted the benefit of an act *ultra vires,* the bank can not now complain. Counsel for appellee find no fault with the law as thus stated; nor do we; but we agree with them that the facts as found by the chancellor, as well as by a majority of this court, do not warrant an application of the principle announced. The thirty-one hundred dollars was not only used without the knowledge or consent of the directors of the bank, but it was not used to preserve the assets of the bank or to protect its securities. The indebtedness was not even placed in more friendly hands, as urged by counsel for appellant, than it was with Mr. Wilson, for it appears that before the paper all matured the trust company immediately proceeded to foreclose its mortgage and to sell all the interest that the bank had in the Texas property.

Upon a consideration of the testimony as a whole we are of the opinion that the findings of the court set out above are not clearly against the preponderance of the evidence, except that instead of sustaining a loss of $3,100 on account of the bonus the net loss on that account was only $1,600 as shown by appellee's own figures set out above, and Wilson should not be charged on this account with a greater loss than the bank sustained. The decree of the court will, therefore, be modified by reducing the judgment $1,500, and as thus modified, will be affirmed.

SMITH, J., (on rehearing). In the lengthy petition for rehearing which is filed in this case attention is called to several inaccuracies in the finding of fact made by the court below, which was adopted by us. There was certain confusion of facts in the briefs which we sought to

avoid in the opinion, and for this purpose we copied into the opinion the somewhat lengthy finding made by the court below. Some of these inaccuracies to which attention is now called are unimporant, while attention to others was not called in the original briefs. But the motion for rehearing does challenge our approval of the chancellor's finding that Wilson so far participated in the conspiracy as to become liable for its consequences upon the ground that if there was in fact a conspiracy to divert the assets of the bank to uses other than those of the bank, Wilson was neither aware of nor party to that purpose and that no competent testimony sustains the finding of the chancellor which we have approved. This insistence is made with such earnestness and apparent assurance that we are constrained to notice some of the statements contained in the petition for rehearing.

Appellant's argument assumes as true the very point at issue, and that is that Wilson was no party to the scheme to divert the bank's assets to uses other than its own by putting again in circulation notes for ten thousand dollars which the bank had already paid and which it has since paid the second time. The chancellor made no finding, nor do we, that Wilson was a party to the various machinations of Talley and Felker which wrecked the bank except as to the ten thousand dollar item. Nor was it necessary to find that Wilson appreciated the extent to which Talley and Felker were misusing the funds of the bank. The question here involved is, Did Wilson know that they were about to misuse this ten thousand dollar note, and did he participate in that misuse? It seems clear to a majority of the court that every one connected with this transaction realized that it was out of the ordinary and that it was one which could by no possibility result in profit to the bank. Felker testified that during the negotiations leading up to the transaction he spent several days at Wilson's home, during which time the transaction was frequently discussed; and Lackey, representing the trust company, also made a trip to Wilson's home for the purpose of discussing the transaction

with him. We think the inference fairly follows that Wilson knew what was about to be done.

It is said in the petition for rehearing that Wilson did not send the note to the bank but that he sent it to Felker, the maker, and that he had not marked it paid before doing so. But on page 83 of appellant's original brief in the statement of facts there contained the following admission appears: "Later on the bank, acting through some of its representatives, sold approximately eleven hundred calves off the Texas cattle ranch for eighteen thousand or twenty thousand dollars, and of the proceeds of that sale the sum of ten thousand dollars and accrued interest on two five thousand dollar notes was paid to the appellant, Mr. Wilson, and two notes so paid were marked 'Paid' on their face and surrendered by Mr. Wilson to the Bank of Rogers." The testimony sustains this admission.

It is also now insisted that Wilson did not endorse the note "without recourse" after having marked it paid. But it is not denied that this endorsement was made and by virtue thereof it was again put in circulation as the property of Talley and Felker when it had been previously paid by the bank, and by the transaction which again put it in circulation the bank assumed and became responsible for its payment again, and because of this transaction did later pay it the second time. As the payee in the note, Wilson alone had the right to endorse it, and no charge of forgery is contained anywhere in the briefs. Indeed, it is argued that it was a perfectly innocent thing for Wilson to have endorsed the note, if he did, as the bank would have been compelled to use other assets if it had not used the particular note. But there is the crux of the case. It is no excuse for Wilson to say that Talley and Felker were going to wreck the bank anyway. The question is, if Wilson did endorse this note for the purpose of putting it in circulation after it had been paid by the bank and after he had marked it paid, did he do so with knowledge of the fact that by this device Talley and Felker were about to

divert to their own use the funds of the bank? If Wilson did this he became a joint tort-feasor, and, as such, liable to the extent of the damage done as a result of the wrongful act in which he participated.

A number of questions of fact are discussed in the petition for rehearing, a review of which would greatly protract the opinion and practically require it to be rewritten; but we dispose of them all by saying that in our opinion the finding of the chancellor that Talley and Felker had conspired to divert the assets of the bank and that the conspiracy was made effective by Wilson's participation therein, is not clearly against the preponderance of the evidence, and, if this be true, it is unimportant to discuss the evidence in further detail.

McCULLOCH, C. J., (dissenting). The only relationship between appellant and the Bank of Rogers was, according to the undisputed evidence, that appellant held notes of W. R. Felker aggregating $30,000, secured by mortgage on a cattle ranch and the cattle thereon situated in Texas, which Felker sold to the Bank of Rogers subject to said mortgage. The notes were to become due in about one, two and three years, respectively, from the date of the transaction now under investigation bearing interest at 8½ per centum per annum from date. It was a part of the plan for Talley and the Felkers, representing themselves and the Bank of Rogers, to get the notes into the hands of the Mississippi Valley Trust Company of St. Louis, to be carried at a lower rate of interest, and they, together with Mr. Lackey, representing the trust company, went to Dallas, where appellant resided, for the sole purpose of inducing appellant to part with the notes. The security was abundant, and appellant declined to assign the notes or to allow them to be paid off unless a satisfactory sum was paid in consideration of a commutation of the unearned interest. Finally the parties agreed on the sum of $3,100 as the consideration to be paid, and this arrangement was consummated. Appellant assigned the notes to the Mississippi Valley

Trust Company and the latter paid to appellant the face of the notes with accrued interest. The $3,100 was paid to appellant by cashier's check on the Bank of Rogers—the payment proceeding through regular channels without anything to indicate secrecy. Now, there was nothing illegitimate about this transaction. The unearned interest on the notes would have amounted to about $5,100, and the security being good, appellant refused to surrender the notes and mortgage unless something was paid him for the loss of the unearned interest. The transaction was not an unusual one, and no charge of fraud can be predicated on it. Talley was in absolute control of the affairs of the bank, and even if there was any question about his authority to carry out this transaction, it was not repudiated by the bank, which continued business for nearly a year after this occurrence.

Passing to the other question in the case of appellant's liability for the $10,000 on the notes which had been paid but which were embraced in the deal between the Mississippi Valley Trust Company on the one side and the Bank of Rogers, the Ozark Land & Lumber Company and the Felkers on the other side: Appellant was not a party to that transaction, either directly or indirectly, and had no interest in it, and was to derive no benefit under it. He merely sold the notes secured by the mortgage on the cattle ranch and cattle in Texas and received compensation for giving up the unearned interest. The contract between the parties named above recited that the Ozark Land & Lumber Company, the Bank of Rogers and the Felkers owed the Mississippi Valley Trust Company $45,000 evidenced by certain notes due on demand, and secured by a mortgage executed by the Ozark Land & Lumber Company, and the agreement was, in substance, that the Trust Company should take up the $30,000 in notes held by appellant, and the other two notes aggregating $10,000 (which the contract recited to be then held by Talley and J. E. Felker), and that Talley and Felker were to pay to the trust company $10,000 to be applied on the aforesaid $45,000 debt, and that the bal-

ance of $35,000 on that debt should be paid by sale of cattle on the Texas ranch (to which sale the trust company was to consent and release the cattle from the mortgage). It was further agreed that the trust company should subsequently make advances out of a certain trust fund to the Ozark Land & Lumber Company to enable it to begin construction of a short line railroad. The net result to be obtained under the contract was that the trust company was to be paid its debt of $45,000 against the Ozark Land & Lumber Company, the Bank of Rogers and the Felkers, and should carry, at six per centum interest, $40,000 in notes against the Texas ranch. The $10,000 paid by the trust company for the notes which had previously been paid to appellant and which the contract recited were held by Talley and J. E. Felker, was to go in part payment of the $45,000 debt, and the balance of $35,000 was to be paid from proceeds of sale of cattle on the Texas ranch. In other words, the trust company was to obtain payment of the Ozark Land & Lumber Company debt of $45,000, but was to carry a debt of $40,000 secured by mortgage on the Texas ranch.

I fail to discover the slightest circumstance connecting appellant with any design to defraud the Bank of Rogers. He concedes that the two notes had been paid and that he had mailed them to J. E. Felker, which occurred on October 23, 1913, about ten days before he assigned the remaining notes to the trust company. The evidence does not show that appellant made any indorsement on the notes after he mailed them to Felker. Not a single witness testified that such was the case and appellant himself testified that he had no recollection when he indorsed the words "without recourse" on the back of the notes. It is undisputed, however, that appellant received no part of the funds paid to the trust company on those notes. All that he received was the amount of the $30,000 in notes then held by him, and the so-called bonus of $3,100. The endorsements are on the notes in appellant's handwriting, but the question is when were they made? They may have been made by appellant when he mailed

the notes to Felker or even before then—no witness pretends to remember about that. But, even if it be conceded that appellant did in fact make the indorsements on those two notes at the time they were delivered to the trust company, he did so at the request of the Felkers and with the approval of Talley, who was acting for the Bank of Rogers. The Bank of Rogers was interested in carrying through the deal with the trust company. It was responsible with the Ozark Land & Lumber Company and the Felkers for the debt of $45,000 to the trust company; and the evidence shows also that it was interested in preventing threatened bankruptcy proceedings by the trust company against W. R. Felker which would nullify the sale of the Texas ranch by Felker to the bank. The bankruptcy proceedings were never instituted, it is true, but, according to the evidence, there was such a threat and it was not carried into execution for the reason that the debt was satisfactorily arranged through the contract now under consideration. Mr. Lackey, the representative of the trust company, insisted on the deal being closed before November 5, 1913, the expiration of the time within which the sale of the ranch could be set aside in bankruptcy as an unlawful preference.

The agreement with the trust company in which the Bank of Rogers, acting through its representative, was a participant, provided that the trust company should have a lien on the Texas ranch for $40,000, and if the two previously paid notes had not been used to make up the required amount, then it would have been necessary for the bank to make it up in some other form—a new note secured by mortgage on the ranch and cattle. The bank was already liable for the debt of the Ozark Land & Lumber Company, which was to be discharged under this arrangement, and it was, therefore, directly interested in the deal. It was represented in the deal by Talley, the president, and if it be conceded that appellant participated to the extent of making a new indorsement on the previously paid notes so as to put them into the hands of the trust company, the transaction was a perfectly le-

gitimate one, for the reason that it was done at the instance of the bank itself. If any wrong was done to the bank at all it was in making it liable for the obligations of the Ozark Land & Lumber Company, or in unloading on it the Texas ranch, but there is no claim that appellant had any part in either of those transactions.

The decision of the majority is based solely on an unfounded inference that appellant was in league with Talley and the Felkers to use the proceeds of the Bank of Rogers for their own private enterprise, *i. e.*, the promotion of the Ozark Land & Timber Company, but in my opinion there is not even grounds for suspicion, under the proof, that appellant was a party to, or the beneficiary of, those transactions. He merely looked after his own interest in a perfectly legitimate way in disposing of the immature notes of which he was the owner, and he was not responsible for the misconduct and bad motives of Talley and the Felkers.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* MAPLE SLOUGH DRAINAGE DISTRICT.

Opinion delivered March 31, 1919.

1. DRAINS—APPEAL FROM ASSESSMENT OF BENEFITS.—As Acts 1909, p. 829, relating to the organization of drainage districts, does not provide the method of taking an appeal from an order confirming assessments, the general statute regulating appeals from the county court (Kirby's Dig., § 1487) must control as to the manner of perfecting an appeal.
2. SAME — ASSESSMENT OF BENEFITS — TIME OF APPEALING.—Under Acts 1909, p. 829, § 7, in reference to appeals from judgments confirming benefit assessments in drainage districts, the appeal must be prayed either from the county court or from the circuit clerk within 20 days from the rendition of the judgment.
3. MANDAMUS—GRANTING APPEAL.—Where an application for appeal from a judgment on benefit assessments in a drainage district, made in apt time, is denied either by the county court or by the circuit court, mandamus will lie to compel the order to be made as of the date it should have been made.

4. CONSTITUTIONAL LAW — DRAINS — RIGHT OF APPEAL.—Acts 1909, limiting certain appeals to 20 days, *held* not a denial of the constitutional right of appeal.

Appeal from Jackson Circuit Court; *D. H. Coleman,* Judge; affirmed.

Troy Pace and *Samp Jennings,* for appellant.

1. The order granting the appeal was made in time and it was error to dismiss the appeal. Acts 1909, p. 837, § 7. The appeal was prayed and granted within the twenty days.

2. The general statute, Kirby's Digest, § 1487, applies here except insofar as modified as to the time by the act of 1909, *supra.* The right of appeal is constitutional and cannot be destroyed by the Legislature. Article 7, section 14, Constitution 1874. See also section 33, *Ib.* The substantial part of the opinion in 117 Ark. 292 is *obiter.* See 76 Ark. 184, 192; 95 *Id.* 385; 73 *Id.* 66, 69; 90 *Id.* 219-221-2; 25 *Id.* 487-9; 27 *Id.* 440-2. As to the remedy by mandamus 25 Ark. 298; 43 *Id.* 33-40; 35 *Id.* 298; 39 *Id.* 82, 88; 125 *Id.* 488. Under the act the appeal must be prayed within the twenty days, but a reasonable time should be allowed the court to make the order. The court should not follow the construction placed on the statute in 117 Ark. 292, as the opinion is *obiter* and not binding and no property rights would be affected.

Edwin L. Boyce, for appellee.

1. While the prayer for appeal was made and filed within the twenty days, yet the order for appeal was not made within the time and the time was not too short. Section 7 of the act fixed the time within within which appeals *must be taken.* It is the *order* which constitutes an appeal, and here the order was not made within the time. 9 Ark. 128; 65 *Id.* 419-21; 92 *Id.* 148-151. This court correctly stated the law in 117 Ark. 292.

2. Appellant had a clear remedy by mandamus. 35 Ark. 298; 43 *Id.* 33; 110 *Id.* 296.

3. The time allowed by the act is not unreasonably short; twenty days is ample time within which to perfect the appeal and the judgment should be affirmed.

HUMPHREYS, J. Maple Slough Drainage District was organized in Jackson County under Act 279 of the Session Acts of 1909, providing for the creation of drainage districts in this State. Exceptions were filed by appellants to the assessment of benefits, which exceptions were overruled by the county court of said county, on the 20th day of November, 1916. Ten days thereafter appellants filed an affidavit and prayer for appeal, which was not presented and acted upon by the court until the 8th day of January, 1917, the second day of the next term of court, at which time an appeal was granted by the county court of Jackson County. Appellee filed a motion in the circuit court to dismiss the appeal, upon the ground that the appeal was not granted by the county court or the clerk of the circuit court within the time prescribed by law. On September 20, 1918, in term time, the appeal was dismissed, from which judgment of dismissal an appeal has been prosecuted to this court.

The sole question presented by the appeal is whether the order of the county court granting the appeal was made within the time allowed by law. It is provided in section 7, Act 279, Acts 1909, in reference to the findings of the county court in confirming, increasing or diminishing benefit assessments against property in the district that "its findings shall have the force and effect of a judgment from which an appeal may be taken within twenty days, either by the property owners or by the commissioners of the district." The method and manner of taking an appeal from an order confirming assessments is not provided for in said act, so the general statute providing for appeals from the county court must control as to the manner and method of perfecting an appeal under said act. The general statute is as follows:

"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 the rendition of the same, either by the court rendering the order of judgment or by the clerk of the circuit court, with or without supersedeas, as in other cases at law, by the

party aggrieved filing an affidavit and prayer for appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court rendering the judgment or order appealed from, or the clerk of the circuit court, shall forthwith order an appeal to the circuit court, at any time within six months after the rendition of the judgment or order appealed from, and not thereafter. The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him.'' Section 1487, Kirby's Digest.

The provision in section 7, Act 279, Acts 1909, in reference to appeals from judgments confirming benefit assessments in drainage districts formed under said act, shortened the time of appeal provided in section 1487, Kirby's Digest from six months to twenty days. *Chicago Mill & Lumber Co.* v. *Drainage Dist.,* 117 Ark. 292. It is specifically provided in section 1487 of Kirby's Digest, that, upon the filing of an affidavit and prayer for an appeal, the county court or the clerk of the circuit court shall forthwith order an appeal to the circuit court. Under section 1348, Kirby's Digest, similar to the statute under consideration, this court ruled that the order granting an appeal within the time prescribed in the statute was a prerequisite to the exercise of jurisdiction by the circuit court. *Matthews* v. *Lane,* 65 Ark. 419; *Walker* v. *Noll,* 92 Ark. 148; *Speed* v. *Fry,* 95 Ark. 148. Applying the same rule of construction to section 1487, Kirby's Digest, modified as to the time by section 7, Act 279, Acts 1909, in respect to appeals from judgments confirming benefit assessments in drainage districts, it is necessary to obtain from the county court or circuit clerk an order granting an appeal within twenty days after the rendition of the judgment in order to give the circuit court jurisdiction. In construing that part of section 3, Act 279, Acts 1909, in reference to appeals from the findings of the county court creating or dissolving the district, in connection with section 1487 of Kirby's Digest, limiting appeals to twenty

days after the rendition of judgment just as they are limited in section 7, Act 279, Acts 1909, this court ruled in the case of *Chicago Mill & Lbr. Co.* v. *Drainage District,* 117 Ark. 292, that, although an affidavit and prayer for an appeal were filed within twenty days, the court could not be compelled to enter an order of appeal after the expiration of the twenty days from the date of the rendition of the judgment. This was tantamount to saying that, in order to perfect an appeal, it was necessary to present the motion for appeal either to the county court rendering the decree or to the circuit clerk for allowance within twenty days from the rendition of the judgment and not thereafter. Unless the motion was presented and order made within the time, the court or circuit clerk was without right to enter the order. Had an application for appeal been made to either, or both, within the time prescribed by the act, and had the court rendering the decree, or the clerk of the circuit court, failed or refused to enter an order granting an appeal, then, in that event, either could have been compelled by mandamus to grant and enter the order as of date it should have been made. *McCreary* v. *Rogers,* 35 Ark. 298; *Pettigrew* v. *Washington County,* 43 Ark. 33. Appellant insists that this case is not ruled by the case of *Chicago Mill & Lbr. Co.* v. *Drainage District, supra,* for the reason that no order for appeal was made in that case, whereas, an order for appeal was made in the instant case. It is true an order for appeal was made in the instant case, but it was applied for and made more than twenty days after the rendition of the judgment. An order made either by the county court rendering the decree or the circuit clerk, after the time has elapsed for taking an appeal under the law, could have no more effect than had no order been made. So we think the exact question presented on the record in the instant case was before the court for determination in the case of *Chicago Mill & Lbr. Co.* v. *Drainage District, supra,* and that the instant case is ruled by that case. But it is strenuously insisted by learned counsel for appellant that the parts of Act 279, Acts 1909, lim-

iting appeals to twenty days is a practical denial of the right of appeal guaranteed by the Constitution and is, therefore, void. There has been a tendency in the legislative department to shorten the time for appeals in matters pertaining to public improvement districts. It is apparent that the intention of the lawmaking power was to provide for the organization of improvement districts and the completion of the improvement as quickly as possible, consistent with the rights of the property owners in the district. One of the rights guaranteed by the Constitution of the State to property owners is the right of appeal. If such a short time were fixed as to destroy this right, then the statute would be unconstitutional. It seems to us that twenty days gives ample opportunity to appeal a case of this character from the county court. The only requirements are that an affidavit and prayer for appeal shall be filed, and the prayer presented to either the court rendering the judgment or the circuit clerk within twenty days, for allowance and order. And especially is this true where, under the procedure of the State, in case of refusal to grant the order or failure or neglect to enter the same, either the court or clerk may be required by mandamus to grant and enter the order of appeal. Certainly the record in the instant case would not warrant a conclusion that injury resulted to appellant by reason of the limited time for perfecting an appeal. For aught that appears in the record, the court may have been open at the time the affidavit and prayer were filed. If so, appellant had ample opportunity to present the prayer for allowance and order. Nor is it shown that the court adjourned until court in course immediately after the rendition of the judgment. If the court remained open, after the rendition of the judgment, from day to day, there is no good reason why appellant could not have presented the prayer for appeal to the court for allowance, nor is any good reason assigned why appellant did not apply to the circuit clerk for allowance and order of appeal, which alternative remedy was provided in section 1487 of Kirby's Digest. We do not

think the limit of twenty days in which to perfect an appeal in this character of case is such an abridgment as to deny or destroy the constitutional right of appeal. The effect of the opinion in the case of *Chicago Mill & Lbr. Co.* v. *Drainage District, supra,* was to uphold the act as constitutional.

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

Justices HART and SMITH concur on the ground of *stare decisis.*

GREEN *v.* BLANCHARD.

Opinion delivered March 24, 1919.

1. DENTISTS—REVOCATION OF LICENSE.—While it is competent for the Legislature to declare for what acts or conduct a license to practice dentistry may be revoked, and to vest in a board the authority to try charges made under such a statute, the statute should specifically designate the offenses which shall constitute causes for revocation.
2. SAME—REVOCATION OF LICENSE—STATUTE.—Acts 1915, p. 178, creating the State Board of Dental Examiners, and empowering the board to license and revoke licenses of dentists, in section 7, subdivision 2 and 3, provides that the board may refuse or revoke license for publication or circulation of any fraudulent or misleading statement as to skill or method of operator or for advertising with a view of deceiving or defrauding the public. *Held* too uncertain and indefinite for enforcement, though the remainder of the section is valid.
3. DENTISTS—REVOCATION OF LICENSE—ADVERTISEMENT.—A dentist who advertised that he had absolutely minimized pain from dental work was not liable to have his license revoked as for having advertised to practice dentistry without causing pain, in violation of Acts 1915, p. 184, section 7, subdivision 3.
4. SAME—REVOKING LICENSE—"ADVERTISE."—The giving of receipts to customers with the words "Painless Dentists" on them by a dentist after work had been done for such customers did not constitute an advertisement, in violation of the above statute.

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

STATEMENT OF FACTS.

This is a proceeding by certiorari in the circuit court to set aside an order of the Board of Dental Examiners of this State revoking the certificate of Dr. F. A. Blanchard authorizing him to practice dentistry.

The proceeding brings into question an act of the Legislature passed in 1915 regulating the practice of dentistry and dental surgery in this State. Acts of 1915, p. 178. The power to grant licenses to applicants to practice dentistry in this State and various other powers are conferred upon the State board by the act. Among others, the power to revoke the certificate is conferred by section 7 of the act.

On the 27th day of February, 1918, the Arkansas State Board of Dental Examiners issued a citation to Dr. F. A. Blanchard to appear before it on the 9th day of April, 1918, at the Senate chamber in the State Capitol in the city of Little Rock and there to show cause, if any there be, why the license heretofore issued to him by said board should not be revoked under the provisions of sections 7 and 8 of the act.

After hearing the testimony introduced, the board found Dr. Blanchard guilty of violation of the provisions of the act above referred to and entered an order revoking his license. At the request of Dr. Blanchard the findings of the board were stated by its president as follows: "The painless dentist; sixteen years' written guarantees were not given—the experts—wholesale cost did not enter into the transaction."

The facts are as follows: In February, 1918, and for several months prior thereto, Dr. F. A. Blanchard was practicing dentistry in the city of Little Rock and employed several assistants in his office. He advertised his business in the daily papers and an advertisement in his name dated March 10, 1918, contained the following: "Blanchard's Dentists are Specialists. Each Thoroughly Efficient in His Own Line. Dental work is divided into parts at Blanchard's. If a tooth is to be pulled, you are attended by an expert extractor who understands this thor-

oughly. If a crown is to be made, an expert laboratory man does this, and so on. You are thus assured of the work as good as the best."

Another advertisement contained the following:

"Dental specialists, who attend you here. Each a specialist in his line, thus giving you the greatest dental skill.

"Dr. F. A. Blanchard, sixteen years' continuous practical experience.

"Dr. C. N. Cantrell, thoroughly efficient in all dental work.

"Dr. M. E. Ludwick, expert crown and bridge workman.

"Dr. W. D. Flack, expert extractor and bridge workman.

"Dr. F. L. Merck, chief of laboratory."

"Sixteen years' written guarantee given to every patient."

"These dentists are past masters in their respective lines, busily at work practicing the latest science of dentistry in office without a superior in all America, as far as modern equipment is concerned. Offices fitted with all modern mechanical and other devices, perfected to add to the pleasure and comfort of all patients."

Still another is as follows:

"Highest efficiency. The gentlemen operators and mechanical dentists in my office are time-tried and proven men of highest efficiency, otherwise they would have no place in my office. The work they do for you will be done thoroughly and conscientiously and will be backed by my guarantee, which I do not fail to make good. It is my honest opinion that we give more and better work for the money than any dental parlor or parlors in the United States. Our supplies of all kinds are purchased in great quantities at lowest wholesale cost, a fact that redounds to the advantage of our patients and makes possible our present scale of low prices."

There was also evidence on the part of the board tending to show that neither Dr. Blanchard nor his assistants were experts or specialists in dentistry.

A young man seventeen years old testified for the board that he worked for Dr. Blanchard from the 4th to the 9th day of March, 1918. He worked in the laboratory on plates for false teeth and stated that he was the only laboratory man Dr. Blanchard had that week. On cross-examination he admitted that he did not make any crowns or attempt to make any. His only work was working on plates for false teeth, polishing them, etc. He also admitted that there were two operators who did the most difficult part of the laboratory work. He testified that there were three assistants in the office who did the crown work while he was there.

Several of the advertisements of Dr. Blanchard contained the following: "I have absolutely minimized pain from dental work."

It was also shown that Dr. Blanchard issued receipts to his patients upon which were the printed words, "painless dentists." These receipts also had printed on them the words, "United Dental Company." The printed words were marked out with a stamp.

According to the testimony of Dr. Blanchard, these were some old receipts which he had when he was practicing in New Orleans, Louisiana. He was delayed in getting receipts which he had ordered for his office here and only used these receipts until he could get others. He plainly marked out with a stamp the words, "painless dentist" and "United Dental Company." The receipts were not used to advertise his business at all. On the back of the receipts used by Dr. Blanchard here are the following words: "We do good work cheap and for cash. If any work is defective, kindly call our attention to it, and we will gladly make it good without extra charge. All complaints must be made to Dr. Blanchard, and if fault is found in the work, will gladly repair same for you without argument. "Dr. F. A. Blanchard,

"By Flack."

It is also shown that the assistants employed by Dr. Blanchard were experts and specialists as advertised by him. One witness testified that Dr. Blanchard repaired a plate for her and that she had three teeth extracted at his office absolutely without pain; that she did not know what anesthetic was applied; that she had had work done by other dentists and that they hurt her much more; that the work that was done for her in Dr. Blanchard's office was very satisfactory.

Upon the hearing of the writ of certiorari in the circuit court, judgment was rendered setting aside the order of the board revoking the license of Dr. Blanchard.

From the judgment rendered the board has duly appealed to this court.

House, Rector & House, for appellants.

1. There was ample evidence of a substantial character to justify the findings of the board and it was error to set aside the order revoking appellee's license. 126 Ark. 125. The decision of a board upon a question of fact is final if made in good faith. 1 L. R. A. (N. S.) 811; 17 *Id.* 439; 43 *Id.* 911. The courts will not disturb the findings of a board if there is substantial evidence to sustain its findings. Cases *supra.* All presumptions are in favor of its findings.

2. The law had been violated by appellee by the publication and circulation of fraudulent and misleading statements in his advertisements as to skill and methods. Act 56, Acts 1915, § § 7-13. He advertised *painless dentistry.*

3. He falsely advertised also as to giving written 16-year guarantee to each patient and that he had trained experts, specialists, and as to wholesale cost of supplies. 65 Atl. 263; 28 R. I. 3; 161 S. W. 1169; 51 L. R. A. (N. S.) 958; 162 *Id.* 796; 157 Ky. 123; 116 N. W. 528; 119 *Id.* 17; 135 S. W. 631; 129 Pac. 1128; 180 S. W. 538; 154 Pac. 56; 158 *Id.* 982; 43 L. R. A. (N. S.) 911; 142 Pac. 505.

The action of the board was done in good faith and upon sufficient evidence under the act. The writ should

have been dismissed and the judgment should be reversed and the findings of the board sustained.

Mehaffy, Reid, Donham & Mehaffy and *J. A. Tellier,* for appellee.

1. The board exceeded its jurisdiction. The action of the board in refusing to make the charges more specific, definite and certain was arbitrary and unwarranted and deprived appellee of a fair and just trial. He was convicted on charges that were not made. 128 Ark. 239; 157 Ky. Rep. 129.

2. The evidence before the board furnished no substantial basis for revoking his license. No charges against Dr. Blanchard's character were made. It is only claimed that he violated that portion of the act relating to advertising. Act 56, Acts 1915. But the findings of the board are not sustained by any substantial evidence.

3. Certiorari is the proper remedy. Kirby's Digest, sections 1315-16; 126 Ark. 125, 135-6. The evidence was not legally sufficient. 1 Jones on Ev. 906; 97 Ark. 442; 57 *Id.* 461-468; 7 Words and Phrases 6762; 22 S. E. 142-3; 94 Ga. 804.

4. Appellee did not advertise to practice dentistry without pain but only to absolutely "minimize pain" and there was no violation of the act. The receipts were not advertisements to induce public patronage. His advertisements as to experts and specialists did not violate the act. As to definition of experts, see 3 Words and Phrases, p. 2594-5-6; 71 N. Y. 453, 460; 82 N. Y. Supp. 1064-7; 84 App. Div. 628; 65 Pac. 595-6; 39 Ore. 26; 62 L. R. A. 543; 21 S. W. 737-8; 114 Mo. 335; 90 N. W. 10, 11; 24 Pac. 506; 5 R. I. 243. "Specialist," see 7 Words and Phrases 6596; 64 N. E. 38; 29 Ind. App. 456.

See also 116 N. W. 528; 119 *Id.* 17; 135 S. W. 631; 129 Pac. 1128; 43 L. R. A. (N. S.) 911; 151 Pac. 56; 158 *Id.* 983-4.

5. The statute is unreasonable and too uncertain and indefinite. It is penal also in its nature. 7 A. & E. Ann. Cases 750; 63 S. W. 785; 253 Mo. 284-5.

6. No one was deceived or defrauded. Cases *supra;* 28 R. I. 3-4-5, etc.

HART, J., (after stating the facts). The constitutionality of statutes creating State Medical and Dental Boards and empowering them to license and revoke licenses of physicians and dentists have generally been upheld. This court upheld such a statute in the case of *State Medical Board of the Arkansas Medical Society* v. *McCrary,* 95 Ark. 511. The appeal, however, does involve the construction of that part of the act regulating the practice of dentistry relating to the revoking of licenses by the board. See Acts of 1915, p. 178. The sections referred to are sections 7 and 13. They read as follows: "Section 7. The State Board of Dental Examiners may refuse license or suspend or revoke the same for any of the following reasons: * * *

"*Second.* The publication or the circulation of any fraudulent or misleading statement as to the skill or method of any person or operator.

"*Third.* The commission of a criminal operation or conviction of felony, or chronic or persistent inebriety, drunkenness or confirmed drug habit, or in any way advertising to practice dentistry or dental surgery without causing pain or advertising in any other manner with the view of deceiving or defrauding the public or in any way that would tend to deceive the public, or using or advertising as using any drug, nostrum, patent or proprietary medicine of any unknown formula, or any dangerous or unknown anesthetic which is not generally used by the dental profession, or using or advertising as using any drugs, material, medicine, formula, system or anesthetic which is either falsely advertised, misnamed, or not in reality used."

* * * * * * * * * * *

"Section 13. It shall be unlawful for any person or persons to practice or offer to practice dentistry or dental surgery under any name except his or her own name, or to use the name of company, association, corporation, or

business name, or to operate, manage, or be employed in any room or rooms or office where dental work is done or contracted for under the name of any company, association, trade name or corporation. Any person or persons practicing or offering to practice dentistry or dental surgery shall practice under and use his or her name only."

Section 17 provides that any person who shall practice or attempt to practice dentistry or dental surgery during the period of revocation of his license shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars nor more than two hundred dollars or shall be imprisoned in the county jail not less than one month nor more than one year; or shall be punished by both such fine and imprisonment.

The board relied upon the power given it by that part of section 7 contained in section 2 and the following in section 3, "or advertising in any other manner with the view of deceiving or defrauding the public, or any way that would tend to deceive the public" in making the order revoking the license of appellee.

On the part of appellant board it is contended that subdivision 2 and the words "deceiving or defrauding the public" include the acts proved by the board to have been done by appellee as set out in our statement of facts. Counsel say that it was impossible for the Legislature to enumerate all the acts which these words embraced and that they include all the acts proved by the board in this case and that their meaning would be so considered by the common judgment of mankind. Cases are cited by them to sustain their contention.

On the other hand the judgment of the circuit court annulling the order of the board revoking appellee's license is sought to be upheld on the ground that subdivision 2 and that part of subdivision 3 of section 7 just referred to are so vague and indefinite as to make the statute inoperative and invalid for that reason. Cases are cited by them to sustain their contention. This court has never been called upon to contrue these words or words of similar import in a statute of this sort. In the

case of *State Medical Board of Arkansas Medical Society* v. *McCrary,* 95 Ark. 511, the court was called on to construe our statute empowering State Medical Boards to revoke the license of one who publicly advertises "special ability to treat or cure chronic and incurable diseases." The contention was there made that the statute was too vague and indefinite to be enforced. The court said that the question gave it the gravest concern but upheld the statute on the ground that "chronic and incurable diseases" are specifically named and discussed in standard medical works and are so known to all physicians who are qualified to practice their profession. Cases on both sides of the question are cited in the opinion. Additional cases are cited in *State ex rel. Spriggs* v. *Robinson et al., State Board of Health,* 161 S. W. 1169, a case decided by the Supreme Court of Missouri. Here the language of the statute is essentially different from that construed in the McCrary case. It does not advise the dentist in advance of what act or acts may be in violation of its provisions. Subdivision 2 and the words, "deceiving or defrauding the public" have no common law definition. They are not defined in the statute and have no generally well-defined meaning in the decision of courts. Under the statute, a dentist might do an act neither violating moral law nor involving moral turpitude and which he regarded as strictly proper and, still his acts might, in the opinion of the board, be such as were calculated to deceive or defraud the public. Different standards might be established by different boards. It is well known that the different schools of medicine and even of dentistry have widely divergent views as to the treatment of certain diseases. It must be remembered that the statute does not prohibit advertising, however unprofessional and unethical we might consider that to be. It only prohibits advertising with the view of "deceiving or defrauding the public or in any way that would tend to deceive the public." So the members of one school of medicine or dentistry might advocate a certain treatment and in good faith advertise it

to the public which might be condemned by members of another school as calculated to deceive and defraud the public. The members of the profession are usually men of intelligence and good citizens. We do not believe that they would be guilty of such a multiplicity of wrongful acts that their conduct could not be safely regulated by a specific legislative enactment.

It is competent for the Legislature to declare for what acts or conduct a license may be revoked and to vest in State boards the authority to investigate and try the charges which may be made under such a statute, but the statute should specifically name or designate the offenses or wrongful acts which shall constitute a cause for revoking his license so that the dentist may know in advance whether he has violated the terms of the statute. We think this construction is in accord with the principles of law heretofore laid down by this court.

In *Ex Parte Jackson,* 45 Ark. 158, the court annulled a statute which made it a misdemeanor to "commit any act injurious to the public health, or public morals, or the perversion or obstruction of public justice, or to the due administration of the laws." In construing the statute the court said: "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The Constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

So, too, in discussing the principle in *United States* v. *Reese et al.,* 92 U. S. 214, the court held the statute too vague and indefinite for enforcement and in discussing the question said: "Penal statutes ought not to be

expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime." Continuing, the court said: "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

But it is insisted that because this is not a case of prosecution for crime that the doctrine of those cases has no application. This very question came before the court in *Czarra* v. *Board of Medical Supervisors of the District of Columbia,* 25 Appeal Cases (D. C.) 443, in which the court held that the doctrine was applicable and cited with approval the cases just referred to.

Shepard, C. J., speaking for the court, said: "The police power of every State warrants the requirement of the possession of all reasonable qualifications by those who seek to engage in the public practice of medicine, and, incidentally, the extension of a wide discretion to those agencies charged with the duty of inquiry and determination: But we do not agree that the exercise of the same wide discretion can be extended to a case where, when one has been regularly admitted, the deprivation or forfeiture of his license is sought under another or an independent provision of the same statute. The right to practice the profession, once regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property, and is safeguarded by the principles that apply in the protection of property lawfully acquired. And these are of the same general nature, though not in all particulars, as those which safeguard him when prosecuted for the commission of a minor offense."

As said in that case while the proceeding to revoke the license is not itself a criminal proceeding, it is a preliminary step thereto. The statute provides a severe penalty for practicing dentistry after the revocation of the license and in the prosecution therefor the order of revocation must necessarily be held to be conclusive evidence of the fact of the revocation of the license. It is a fact worthy of note that the case of *Ex Parte Jackson, supra,* has been cited in all cases of this character where the statute was held too indefinite and uncertain for enforcement.

It is also a fact worthy of note that in most of the cases which have upheld statutes as general as the one under consideration, the question now under discussion was not raised, discussed or decided. The question discussed in each case was the constitutionality of such statutes and that is noticeably so in the cases cited by this court in *State Medical Board of Arkansas Medical Society* v. *McCrary,* 95 Ark. 511. The principle under discussion is well stated in the case of *Czarra* v. *Board of Medical Supervisors, supra.* There the question was whether "unprofessional or dishonorable conduct" as declared in the act were sufficiently specific and certain as to warrant the exercise of the power of revocation of the license by the Board of Medical Supervisors. The court held "that unprofessional or dishonorable conduct" was not defined by the common law and that the words have no common or generally accepted signification, and that what conduct may be of either kind is a matter of opinion only. Chief Justice Shepard, speaking for the court in discussing this phase of the case says: "Doubtless all intelligent and fair-minded persons would agree in the opinion of the Board of Medical Supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statutes. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefi-

nite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts."

The principle was also recognized by the Supreme Court of the United States in *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94.

It follows that subdivision 2 of section 7 and that part of subdivision 3 as follows: "or advertising in any other manner with the view of deceiving or defrauding the public or in any way that would tend to deceive the public" are too uncertain and indefinite for enforcement.

The remaining part of the section, however, is valid and capable of enforcement. This brings us to a consideration of whether or not appellee violated that part of subdivision 3 of section 7 as follows: "or any way advertising to practice dentistry or dental surgery without causing pain." Appellee advertised in the daily papers as follows: "I have absolutely minimized pain from dental work." Does this bring the case within the rule laid down in *Hall* v. *Bledsoe,* 126 Ark. 125. We do not think this language in its common acceptation means that appellee would practice dentistry or dental surgery without causing pain. The word "minimize" as defined by the Century Dictionary means "to reduce to a minimum or the lowest terms or proportions; to make as little or slight as possible." So the word does not indicate that appellee would practice dentistry without causing pain; but that he had reduced it so as to make the pain as little or slight as it was possible to do in the practice of dentistry. The word "absolutely" means positively, and was only a word of emphasis. There is nothing in the record to show that the words were used in any other signification.

It is contended on the part of the board that the use of the receipts with the words, "painless dentists," on

them indicated that appellee was intending to evade the statute. These receipts were given to customers who had paid him for work after it had been done. They were not in any sense used to advertise the business. To advertise means to give public notice.

It follows that the judgment of the circuit court must be affirmed.

McCULLOCH, C. J., (dissenting). It is conceded that the law applicable to this case, as far as concerns the scope and extent of appellee's remedy on *certiorari,* is settled by the decision of this court in the case of *Hall* v. *Bledsoe,* 126 Ark. 125, which involved a review of the proceedings of the Board of Control in the removal of the superintendent of one of the State charitable institutions. In that case we said:

"We are not called on to decide primarily whether or not the decision of the board was correct. The lawmakers have placed that authority in the Board of Control, and it would be clearly an encroachment by the courts upon the authority of another department of government to undertake to substitute the judgment of the judges for that of the members of the tribunal vested with authority to manage the institutions of the State and to appoint and remove those who are placed there in charge. When all the testimony in the case is considered and viewed in the strongest light to which it is susceptible in support of the board's findings, it can not be said that there is an entire absence of evidence of a substantial nature tending to establish the charge of inattention and neglect of duty on the part of the superintendent. This being true, it becomes the duty of the courts, upon well-settled principles of law, to leave undisturbed the action of the tribunal especially created by the lawmakers to pass upon those questions. Any other view would make the Board of Control a mere conduit through which a decision on the removal of an unfaithful or inefficient superintendent would be passed up to the courts instead of leaving the matter where the lawmakers have placed it, in the hands of the board."

I think the position of the majority in condemning certain parts of the statute is untenable and against the great weight of judicial authority. The doctrine of the McCrary case (95 Ark. 511) ought to control the present case. The provision of the statute considered in that case was different from the one in the instant case, but not to the extent that they escape control by the same principles. In the McCrary case the statute which we upheld made "advertising special ability to treat or cure chronic and incurable diseases" grounds for revoking the license of a physician, and we said that the terms of the statute were not too vague for the reason that it is easily ascertainable from standard medical books what diseases are considered by the profession as "chronic and incurable." Medicine is not an exact science—it is progressive—and a disease considered incurable today may be definitely known tomorrow as being curable. The standard books of today may repudiate accepted theories of yesterday. Yet we declared, rightly, I think, that the statute thus dealt with was not so vague as to render it invalid. Now, under the same principles we ought to declare the same result concerning the statute under present consideration which authorizes the revocation of the license of a dentist who advertises himself by the publiaction of "any fraudulent or misleading statement as to the skill or method of any person or operator." Fraud is many-sided and manifests itself in various forms, yet when brought to light, it is recognizable under whatever form it may assume. Fraud is a fact—not a principle of law—and it does not constitute a delegation of legislative power, to authorize the State Board of Dental Examiners to determine whether or not, in a given instance, a fraudulent or misleading statement has been published. In other words, this delegation of power to the board is not to act in a legislative capacity in declaring what the law on the subject is, but the Legislature itself has declared the law in the statute, and the delegation to the board is merely one to determine the question of fact whether or not the publication in a given instance con-

stituted a fraudulent or misleading one within the meaning of the language of the statute.

No case has come to our attention which deals with a statute containing the precise provision found in the statute now under consideration, but in the McCrary case we expressly recognized the fact that the weight of authority preponderated in favor of the validity of statutes which authorize the revocation of physicians' licenses for "unprofessional or dishonorable conduct." Among the few cases holding to the contrary, the case of *Czarra* v. *Board of Medical Supervisors,* 25 D. C. App. Cas. 443, was referred to as being with the minority, and, strangely enough, that case seems to have controlling influence on this court in the decision of the present case.

The cases constituting the majority are very numerous, and the following are especially in point: *Forman* v. *State Board of Health,* 157 Ky. 123; *Richardson* v. *Simpson,* 88 Kan. 684, 43 L. R. A. (N. S.), 911; *Berry* v. *State,* 135 S. W. (Tex. Civ. App.), 631; *Lassen* v. *Board of Dental Examiners,* 142 Pac. (Wash.), 505; *People* v. *Apfelbaum,* 251 Ill. 18; *State ex rel.* v. *Goodier,* 195 Mo. 551; *State ex rel. State Medical Examining Board,* 32 Minn. 324.

The case of *Matthews* v. *Murphy,* 23 Ky. L. R. 750, 63 S. W. 785, is one of the three cases constituting the minority, but in the later case cited above the court ranged itself with the majority by holding to be valid a statute authorizing the revocation of a physician's license for unprofessional and dishonorable conduct which is fraudulent or involves moral turpitude. The court said that such a provision is not vague, as it "erects a definite standard by which the board is to be governed, to which every member of the learned and honorable profession should conform; and he may know in advance that he should conform to this standard." The Texas case cited above dealt with a statute which authorized revocation for "grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public," and the court decided that the grounds stated were

not so indefinite as to render the statute void. This decision was by one of the Courts of Civil Appeals of that State, but a writ of error to the Supreme Court was denied.

A statute of the State of Washington contains the following as grounds for revoking the license of a physician: "All advertising of medical business which is intended or has the tendency to deceive the public, or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety." The Supreme Court of that State, in the case cited above, upheld the statute, and in the opinion it was said that it was as definite as it could reasonably be made because such an advertisement "as to the limitless variations of language, symbols and verbal or pictorial allurements, no human ingenuity could possibly anticipate and forestall them."

The language of our statute is obviously much more definite than that of many others which declare that the license of a physician may be revoked for "unprofessional or dishonorable conduct;" yet, by the great weight of authority the latter is sufficiently definite to sustain the validity of such a regulation.

I am of the opinion, therefore, that the statute is valid, and that the Board of Dental Examiners had before it substantial evidence that appellee violated the statute with respect to the character of advertisement made grounds for revocation. The evidence tended to show that the advertisement was false on each point set forth in it, and that appellee made the false claims for the purpose of deceiving the public. It is unnecessary for us to determine where the preponderance of the testimony adduced before the board was, for, if there was any evidence at all to sustain the finding of the board, we have no authority under the law to disturb it. *Hall* v. *Bledsoe, supra.*

I am clearly of the opinion, too, that the decision of the board holding that appellee, in advertising that he had "absolutely minimized pain from dental work," violated the terms of the statute. The language of the ad-

vertisement is not precisely that used in the statute, but the effect upon the public mind is the same, and was evidently so intended. The statement was very artfully framed so as to escape the exact language of the statute, and yet convey the same meaning at least to unthinking or credulous persons. The most emphatic words were used in the advertisement. In the first place, though it did not say that pain was eliminated, it said that it was "absolutely minimized * * * from dental work." Even a close analysis of these words leads to the interpretation that it was meant to convey the idea that pain was eliminated, for to "absolutely minimize pain from dental work" is to reduce it to a practical exclusion. But that is certainly true in a popular sense. The words are calculated to carry the same meaning as those used in the statute, and since the board has so decided, we ought not to disturb the findings of that tribunal, which was expressly clothed with power to pass on such questions.

I dissent.

SMITH, J., concurs in the dissent.

ALLEN v. DAVIS.

Opinion delivered March 31, 1919.

1. COSTS—DEPENDENT ON STATUTE.—Fees can be taxed as costs only when authorized by statute.
2. COSTS—CONSTRUCTION OF STATUTES.—Statutes allowing costs are strictly construed.
3. COSTS—FEES OF PROSECUTING ATTORNEY.—A deputy prosecuting attorney, under Kirby's Dig., § § 3488, 6390 and 6389, as amended by Acts 1905, p. 560, § 3, is not entitled to fees except when present and prosecuting, and therefore is not entitled to a fee where defendant appeared before a justice of the peace and pleaded guilty before the day set for trial.

Appeal from Craighead Circuit Court, Lake City District; *R. H. Dudley,* Judge; reversed and dismissed.

J. F. Johnston and *J. F. Gautney,* for appellant.

The prosecuting attorney *was not present* and prosecuting when the plea of guilty was entered and he was not entitled to the fee. Kirby's Digest, § 6389, as amended by Acts 1905, p. 559. The amendment does not in any way amend or repeal section 6390, which provides that no prosecuting attorney or his deputy shall receive any fee unless he personally appears and prosecutes, etc., It was error to award the mandamus. 103 Ark. 601.

E. L. Westbrooke, for appellee.

1. The prosecuting attorney did attend court on the day the cases were set for trial but found that Cato ten days before gone before the justice and plead guilty for the express purpose, as stated by him, of defeating the prosecuting attorney in the collection of his fees. He was clearly entitled to the fees. 85 Ark. 382. The deputy met all the requirements of our statutes. The case in 103 Ark. 601, is not a parallel case. 85 *Id.* 382.

HUMPHREYS, J. This controversy involved the question of whether a deputy prosecuting attorney is entitled to a fee in a gaming case based upon his information filed before a justice of the peace, in which he did not personally appear and prosecute. The facts are that D. C. Joslin, deputy prosecuting attorney in the Lake City District of Craighead County, filed two affidavits against Luther Cato for gaming, before a justice of the peace of Lake City township. The cases were transferred on change of venue to E. Treadway, a justice of the peace in Luster township, and, on a second change of venue, to George Allen, a justice of the peace in said township, and, in that court, set down for trial on September 29, 1917. The deputy prosecuting attorney was present when each change of venue was taken, but did not appear on September 29, 1917. The cases were then set for trial on October 16, 1917. Defendant Cato appeared before the justice of the peace, where the cases were pending on October 6, and pleaded guilty in each of the cases for the purpose of avoiding the payment of a prosecuting attorney's fee. A fine of $10 was imposed

in one case and held up during good behavior. The deputy prosecuting attorney was not present at the time Cato entered the pleas of guilty, but did appear on October 16, the date the cases were set for trial. On that date, the defendant did not appear. The deputy prosecuting attorney directed the justice of the peace to enter a judgment, finding the defendant in one case and to issue a commitment against the defendant in each case. The defendant thereafter paid the fines and cost but did not pay the prosecuting attorney's fee. The record does not show, and there is nothing in the record from which it might be reasonably inferred, that the pleas of guilty were entered for the purpose of avoiding a greater penalty than was imposed. In other words, the record does not contain a suggestion that a larger fine would have been imposed had the prosecuting attorney been present. The only suggestion is that the judgment was collusive in the sense of avoiding the payment of an attorney's fee.

This court is committed to the doctrine that fees can only be taxed as cost when authorized by statute and that statutes allowing such fees "are to be strictly construed and pursued." *Badgett, Ex Parte,* 6 Ark. 280; *Hanna* v. *Pitman,* 25 Ark. 275; *Cole* v. *White County,* 32 Ark. 45; *Fanning* v. *State,* 47 Ark. 442; *Logan County* v. *Trimm,* 57 Ark. 487; *Peay* v. *Pulaski County,* 103 Ark. 601. The only authority for the allowance of fees to the deputy prosecuting attorney is to be found in sections 3488 and 6390 of Kirby's Digest, and in section 3, Act 220, Acts 1905, amending section 6389 of Kirby's Digest, which latter amended section is applicable to certain counties, including Craighead, where these gaming cases were filed. The change made in section 6389, Kirby's Digest, by amendment, did not affect the construction placed upon that section by this court in the case of *Peay* v. *Pulaski County, supra.* It was decided in that case, under sections 3488, 6389 and 6390 of Kirby's Digest, that deputy prosecuting attorneys were entitled to fees only when they were present and prosecuting, and that a justice of the peace had no authority or jurisdiction

under said sections to render judgment in favor of deputy prosecuting attorneys unless they were present and prosecuting. In the course of the opinion the court took occasion to say: "The presence of the prosecuting attorney, or his deputy in person, under the above statutes (referring to the statutes above cited) is essential to his right to recover the fee in the first place, and also to the jurisdiction of the justice to render a judgment in his favor for such fee." The undisputed facts in the instant case show that the deputy prosecuting attorney was not present on the 6th day of October, 1917, when the defendant, Luther Cato, in the gaming cases, appeared and entered a plea of guilty in each of the cases; that the court was not opened and the cases prosecuted or pleas of guilty accepted on the 16th of October, to which time the cases had been continued, and at which time the deputy prosecuting attorney was present. We think, under the facts, the instant case is ruled by the case of *Peay* v. *Pulaski County, supra.*

The judgment of the court, in effect holding that the deputy prosecuting attorney, appellee, was entitled to fees, is reversed and the complaint is dismissed.

Justices WOOD and HART dissent.

McLAIN v. BREWINGTON.

Opinion delivered March 31, 1919.

1. COURTS—JURISDICTION—APPEALS FROM PROBATE COURT.—Const., art. 7, § 34, confers exclusive jurisdiction upon the probate court in matters of guardianship of minor children, with a right to appeal to the circuit court, but no right of appeal to the chancery court.
2. COURTS—JURISDICTION—TRANSFER OF CAUSES.—Kirby's Digest, § § 5991, 5994, 5995, authorizing transfers of causes from the circuit to the chancery court, or *vice versa*, apply only to actions which originate in one or the other of those courts, and not to causes appealed to the circuit court from one of the inferior courts.

3. COURTS—JURISDICTION—CONSENT.—Consent can not confer jurisdiction of the subject-matter of a cause where such jurisdiction could not under any circumstances otherwise exist.

4. JUDGMENT—CONSOLIDATED ACTIONS—PARTIAL INVALIDITY OF DECREE.—Where two proceedings were transferred to the chancery court and consolidated, and the decree is void as to one of them for lack of jurisdiction, it is not necessarily void as to the other, of which it had jurisdiction.

5. GUARDIAN AND WARD—CUSTODY OF CHILD.—It was not error for the chancery court to refuse to disturb the custody of an infant by transferring it during the pendency of a contest over its guardianship.

Appeal from Fulton Chancery Court; *Geo. T. Humphries,* Chancellor; reversed in part and affirmed in part.

Ellis & Jones, for appellant.

1. McLain had the right to appeal from the action of the probate court. Kirby's Digest, § 1347; art. 7, § 35, Const. 1874; 18 Ark. 600; 22 *Id.* 368. The appeals are in proper form. *Ib.* Appellees can not question the transfer to chancery, because they asked for the transfer themselves.

2. The court erred in overruling the demurrer of appellant McLain. By electing to stand upon the one reason of tuberculosis they waived all other reasons why McLain should not be appointed, as he was competent and a suitable person for guardian. Kirby's Digest, § § 3758, 3768, 3772. The probate court is vested with the sound legal discretion to appoint a guardian and that discretion will not be overruled except for manifest error or abuse of discretion. 18 Ark. 600; 22 *Id.* 368.

3. Where the parents are dead the grandparent or grandmother, where next of kin, is a minor's natural guardian. 92 Iowa, 202. See also Woerner on Guardianship, § 32; 10 Sm. & M. (Miss.), 624. Relatives are preferred to a stranger. Hopkins, Chy. 226; 44 Ga. 485; 63 Mich. 319; 14 Id. 249; 45 Atl. 980; 2 N. J. Eq. 78; 146 Pa. St. 585; 2 Atk. 315; 25 Miss. 290; 9 Am. & Eng. Enc. Law 92. These authorities show also that the only burden upon McLain was to show that he was not incompe-

tent and unfit as guardian by reason of tuberculosis. He and his wife are the relatives, next of kin. Mrs. Brewington is also a grandmother of the minors, but did not ask to be appointed guardian, and thus recognized her own unfitness. She is estopped by her own acts.

Physicians are experts. The witnesses below testified in answer to hypothetical questions and appellees can not question their testimony. 5 Enc. of Ev., p. 539; Hughes on Ev. 159. No question about this testimony was raised below and appellees can not now complain. 77 Ark. 426; 98 *Id.* 359-60. *Ib.* 409. Their testimony was worthy of credit. There was manifest error and abuse of discretion in holding that McLain was not a suitable guardian and in appointing Short. Kirby's Digest, § 3777, etc.

4. The duly appointed guardian of a child is entitled to its custody as against one to whom the parent had given the child. 128 Col. 214; 67 Iowa, 640; 123 *Id.* 165; 14 N. J. Eq. 540. The judgment of the probate court is conclusive as to the rights of a guardian as to the child's custody. 21 Tex. 511; 9 Am. & E. Enc. Law 99. The child's best interest should always prevail. 86 Ark. 473; 89 *Id.* 501; 78 *Id.* 193; 106 *Id.* 197.

5. An appeal in chancery brings up every paper in the cause, the whole record. No motion for new trial or bill of exceptions were necessary. 38 Ark. 477; 35 *Id.* 225. The cause should be reversed for the errors above named, and the cause remanded with directions to appoint McLain guardian and award him the custody of the minors. Cases *supra.*

H. A. Northcutt, for appellees.

No motion for a new trial was made and there is no bill of exceptions. Kirby & Castle's Digest, § § 7657-60. The action of the probate court is conclusive unless there is manifest error or abuse of discretion, and here none is shown. 18 Ark. 600; 22 *Id.* 368. The findings of the chancellor are sustained by the evidence and the law and the decree should be affirmed. *Supra.*

McCULLOCH, C. J. This is a controversy over the custody of two infant orphans under the age of fourteen years, residing in Fulton County, and also over the appointment of a guardian for said infants. Appellant is the grandfather of the two children on the paternal side, and Rilda Brewington, one of the appellees, is the grandmother of the children on the maternal side. In June, 1918, appellant filed his application with the clerk of the probate court of Fulton County for letters of guardianship of the persons and estates of said infants, and upon the execution of a bond the clerk issued the letters. The children were then living with Mrs. Brewington, and on July 3, 1918, appellant instituted an action in the chancery court against Mrs. Brewington for the recovery of the custody of the children. During the pendency of the action in the chancery court Mrs. Brewington appeared in the probate court of Fulton County at the first term thereof after the issuance of letters of guardianship to appellant and filed therein a remonstrance against the confirmation of the action of the clerk in granting said letters. She alleged that appellant was not a proper person to whom letters of guardianship over the persons and estate of said infants should be granted, and the court sustained the remonstrance and refused to confirm the action of the clerk. The letters of guardianship issued to appellant were revoked and appellee J. M. Short was appointed by the probate court as guardian of said infants.

Appellant prosecuted an appeal to the circuit court from the judgment of the probate court. Appellees appeared in the circuit court and moved to transfer the proceedings therein on appeal to the chancery court, and the order of transfer was made without objection. When the chancery court convened, the two proceedings, that is to say, the appeal from the judgment of the probate court and the action instituted in the chancery court by appellant against Mrs. Brewington, were consolidated by consent, and progressed to a final decree in favor of the appellees.

The first question presented is whether or not the chancery court had jurisdiction to hear and determine the appeal from the probate court. We are clearly of the opinion that the chancery court had no such jurisdiction. The Constitution (art. VII, § 34) confers exclusive jurisdiction upon probate courts "in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates;" and there is also conferred a right of appeal to the circuit courts from judgments and orders of probate courts. There is no right of appeal to the chancery court.

The statute authorizing transfers of causes from the circuit to the chancery court, or *vice versa,* applies only to those actions which originate in one or the other of those courts (Kirby's Digest, § § 5991, 5994, 5995), and does not confer authority for the transfer of a cause appealed to the circuit court from one of the inferior courts. *Jackson* v. *Gorman,* 70 Ark. 88; *McCracken* v. *McBee,* 96 Ark. 251; *Brownfield* v. *Dudley E. Jones Co.,* 98 Ark. 495.

There was no objection to the transfer of the cause, but consent can not confer jurisdiction of the subject-matter of the proceedings where such jurisdiction could not, under any circumstances, otherwise exist. *Price* v. *Madison County Bank,* 90 Ark. 195.

It does not follow, however, that the whole of the decree is void, or even erroneous, for the chancery court had jurisdiction of the action for the custody of the children. The cause was heard on oral testimony brought upon the record by bill of exceptions. The letters of guardianship issued to appellant by the clerk of the probate court were revoked by that court and another person was substituted as guardian who left the children in the custody of their grandmother, Mrs. Brewington. The court did not err in refusing to disturb that custody by transferring it to appellant during the pendency of the contest over the guardianship.

The decree of the chancery court to that extent will be affirmed.

The decree so far as it relates to the disposition of the appeal from the probate court is reversed and the cause is remanded with directions to remand it to the circuit court for further proceedings.

ARKANSAS-LOUISIANA HIGHWAY IMPROVEMENT DISTRICT *v.* DOUGLAS-GOULD AND STAR CITY ROAD IMPROVEMENT DISTRICT.

Opinion delivered March 10, 1919.

1. VENUE—TRANSITORY ACTION.—An action by one road district against another road district to enjoin the commissioners of the latter district from extending the whole of the assessments against lands in the county embraced in plaintiff district is in its general nature not local but transitory, not falling within the definitions of local actions in Kirby's Dig., § 6060, subdiv. 1-4.
2. HIGHWAYS—INJUNCTION SUIT BETWEEN TWO HIGHWAY DISTRICTS—VENUE.—Under Acts 1917, p. 1366, creating the Arkansas-Louisiana Highway Improvement District, suit against the district to restrain the commissioners from extending assessments on lands embraced in another district should have been brought in Desha County, domicile of defendant district.
3. DISMISSAL AND NONSUIT—VENUE.—A suit brought in the wrong county should be dismissed.

Appeal from Lincoln Chancery Court; *John M. Elliott,* Chancellor; reversed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The motion to dismiss and to quash the summons for want of jurisdiction should have been sustained. The suit should have been brought in Desha County and not in Lincoln County. Acts of 1917, pp. 1714, 1366. The suit was improperly brought in Lincoln County when it should have been brought in Desha County, where the *venue* was properly under the act and our statutes. The defendant resided in Desha County and its domicile was there. The act requires all suits shall be by service on one of the commissioners in Desha County. The suit is

not *in rem* but is essentially *in personam.* Kirby's Digest, § § 6060-6072. This suit falls within the latter section. 42 Ark. 422-4.

2. The decree that appellant divide its assessment was erroneous. [The construction given section 34 of the appellee act (§ 34) seems to require impossibilities or great inconvenience and such must be avoided.] Endlich on Int. of Stat. 441, 251, 258; 91 Ark. 5; 104 *Id.* 583. The construction given by the court below reaches a conclusion that would make section 34 direct an assessment or rather a division of assessments obviously arbitrary and unequal, and the last sentence of the section is therefore void. The section may be considered as merely directory to the commissioners of appellee district that in making their assessments they should take into consideration the benefits afforded the Arkansas-Louisiana road and to this extent it is legitimate and proper. 97 Ark. 334. But anything requiring the property owners in one district to contribute to the benefits conferred by another district must be disregarded or stricken from the section as unlawful.

A. J. Johnson, for appellee.

1. The Lincoln Chancery Court had jurisdiction. Kirby's Digest, § 6072; Act No. 265, Acts 1917, § 19; 118 Ark. 128; 65 *Id.* 498; Act No. 345, Acts 1917, § 34. There was service on one of the commissioners in Desha County the domicile of appellant district. Acts 1917, No. 265, § § 4, 13, 25.

2. There is no error in the decree as to assessments of benefits. The relief sought is prohibitive. Any interference or extension of taxes against its half of benefits by defendant district would be unlawful and unauthorized. § 34, Act 1917; 72 Ark. 119; Kirby's Digest, § 3966. A careful reading of section 34 reveals the intention of the lawmakers and it should be carried out. § 9720, Kirby & Castle's Digest; 65 Ark. 529. The assessments are equal and uniform and the lands in both districts are equally benefited by the two roads. The Legislature has so declared, and it was its province to so

declare and make the rate the same in both districts. 97 Ark. 328; 84 *Id.* 390.

McCULLOCH, C. J. Appellant is an improvement district created by special act of the Legislature (Acts 1917, p. 1366), embracing lands in Ashley, Chicot, Desha, Drew and Lincoln Counties, for the purpose of constructing certain roads described in the statute. An attack was made on the validity of the statute, but it was declared valid in the decision of this court in *Bennett* v. *Johnson,* 130 Ark. 507.

Appellee district was created by a special statute enacted at the session of 1917 (Acts 1917, p. 1714), embracing certain territory in Lincoln County, for the purpose of improving a road in that county.

The two statutes are quite similar in form, and each provides for the appointment of commissioners with power to levy assessments and to borrow money, and to construct the improvements described in the statutes. The act creating appellee district went into effect seven days later than the act creating the other district, and contains the following provision:

"Section 34. Any land the district may acquire may be sold by the commissioners for the price and on the terms they deem best. A portion of the lands in the district created under this act are embraced in the Arkansas-Louisiana Road Improvement District, and it is hereby declared that the lands which are embraced in both districts will be benefited equally by the two roads, and that the assessment of benefits made upon said lands shall be at the same rate as the other lands similarly situated in said Arkansas-Louisiana Road Improvement District and in the district created under this act so that the tax derived from said lands shall be equally divided between the two districts."

The two organizations were perfected under the respective statutes and are proceeding with the construction of the improvements. The commissioners in appellant district proceeded to levy assessments on all the lands in the district, including the lands in Lincoln

County which are embraced in appellee district, and the present action is one instituted in the chancery court of Lincoln County by the commissioners of appellee district against appellant to enjoin the commissioners of the latter district from extending the whole of the assessments against the lands in Lincoln County. The prayer of the complaint is that appellant district "and its board of commissioners be restrained from extending for assessment and collection more than one-half of the benefits they had assessed against the lands."

Counsel for appellant appeared in the action and filed a motion to quash the service of process and dismiss the action on the ground that the action was improperly instituted in Lincoln County, whereas the venue was properly in Desha County. The court overruled the motion, and appellant filed an answer in the action, but preserved its objection to the institution of the action in the wrong county. Final decree was rendered in favor of appellee in accordance with the prayer of its complaint, and an appeal has been duly prosecuted to this court.

We are of the opinion that under the statutes of this State the venue in this action was in Desha County, and that the court erred in refusing to sustain appellant's motion to quash the service and dismiss the action.

The special statute creating appellant district contains the following provision:

"The said commissioners and their successors in office shall compose a body corporate for the purpose of this act under the name and style of "Arkansas-Louisiana Highway Improvement District," and by this name may contract, and sue and be sued. The domicile of the corporation shall be in McGehee, in Desha County, and all suits against it shall be by service on one of the commissioners in that county."

The present action is, in its general nature, not local but transitory. It does not fall within the definitions of local actions found in either of the four subdivisions of section 6060 of Kirby's Digest. The action does not relate to the recovery of real estate, or an interest therein,

nor for the sale of real estate under a mortgage or other lien, or for an injury to real estate. It is merely a controversy between the two districts with respect to funds to be raised by assessments on certain real property, and does not constitute the kind of action mentioned in the section of the statute referred to above. The special statute creating the district, however, fixes the venue in the county of the domicile of the defendant.

The suit having been brought in the wrong county, it follows that the same should have been dismissed. The decree is, therefore, reversed and the cause remanded with directions to the chancery court to dismiss the action.

EARL v. ELLISON.

Opinion delivered March 10, 1919.

1. ACTION—MISJOINDER OF CAUSES.—Where several parties joined as plaintiffs, but in separate counts, alleging that defendant at the same time, for the same price and under identical contracts, sold oats warranted to be Burt oats and to germinate, when they were not Burt oats and would not germinate, it was not error to overrule a demurrer for misjoinder and a motion to require plaintiffs to elect to dismiss as to all of the plaintiffs except one, since the court, under Acts 1905, p. 798, might have consolidated the actions if they had been brought separately.
2. PLEADING—NECESSITY OF PROOF—DAMAGES.—In view of Kirby's Dig., § 6137, providing that "allegations of value or of amount of damage shall not be considered as true by the failure to controvert them," it was error to render judgment for plaintiffs in a suit for damages arising from the sales of worthless seed, on their verified allegations as to the amount of damages without proof thereof.

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

STATEMENT OF FACTS.

Seventeen parties, the appellees, as plaintiffs, instituted this action in the justice court against R. D. Earl, doing business under the firm name of Earl Brothers & Company, the defendant.

Each of the plaintiffs, in a separate count, set up that on or about the first day of February, 1917, he purchased from the defendant a certain quantity of Burt oats for seed. That he told the defendant that he wished the oats for seed; that the defendant "falsely and fraudulently stated to the plaintiff that he would guarantee said oats to be the genuine Burt oats and that they would germinate. That plaintiff, relying upon said guaranty, purchased said oats and planted same, but they would not germinate and were entirely worthless and were not the genuine Burt oats; that said representations were false and untrue." Each of the plaintiffs, in each of the separate counts, designated the number of bushels of oats purchased by him and the amount of damages he had sustained, by reason of the alleged false representation, on account of the worthless oats, and also the amount of damages he had sustained in loss of rent, time and expense in preparing the soil and sowing the oats; and prayed judgment for damages. All of the plaintiffs joined in a prayer for judgment for damages for the aggregate amount of the sums paid by each of them for the oats and also for the aggregate amount of the damages sustained by them for the loss of time, and expense in preparing the soil and planting the oats, and in the loss of rent.

The case was appealed to the circuit court. The defendant filed a special demurrer in which he set up that there was a misjoinder of parties plaintiff and a misjoinder of causes of action, and that the court was, therefore, without jurisdiction. The demurrer was overruled. The defendant then filed a motion to require the plaintiffs to elect as to each cause of action and as to which plaintiff should prosecute the suit, and that the cause of action as to all other plaintiffs be dismissed. The motion was overruled. The defendant elected to stand upon his demurrer and motion, and refused to plead further.

"Thereupon," as the record recites, "this cause coming on to be heard, same was submitted to the court upon the complaint of the plaintiffs, which was sworn to and

verified by the plaintiffs, and the court being well and sufficiently advised, doth find that the plaintiff, Ruff Ellison, is entitled to judgment against the defendant in the sum of $36.80."

Then follows consecutively a recital naming each of the other plaintiffs, and the amount of the judgment to which he was entitled, and a judgment in his favor for that sum. The recital concludes, "it is further ordered and adjudged that each of the above named plaintiffs have and recover of and from the defendants all their costs in this suit, laid out or expended, for which let execution issue."

The appellant duly excepted to the ruling of the court in overruling his demurrer to the complaint and his motion requiring the plaintiffs to elect and in rendering judgment against him, and from the judgment rendered prosecutes this appeal.

Calvin Sellers and *W. P. Strait,* for appellant.

1. The court erred in overruling the demurrer and the motion to require plaintiffs to elect. Plaintiffs were separate and distinct customers and each bought oats for planting purposes, and each was in no way interested in the other's purchase. There was clearly a misjoinder of separate parties and causes of action. Kirby's Digest, § § 6079-80-81-83, under our statute there could be no consolidation of these separate suits between different parties and for separate causes of action. 65 Ark. 215; 80 *Id.* 231; 74 *Id.* 54; 90 *Id.* 482; 5 *Id.* 651.

2. It was error to render judgment without hearing proof on the intervention of a jury. Art. 2, § 7, Const.; 32 Ark. 553; 56 *Id.* 391; 48 *Id.* 426; 57 *Id.* 583; 109 *Id.* 534.

2. Allegations of value or the amount of damages must be proven before a jury. 90 Ark. 158; 1 Ark. 144; 4 *Id.* 534, 574; 12 *Id.* 599; 5 *Id.* 640; 10 *Id.* 258; 29 *Id.* 373; 39 *Id.* 491; Kirby's Digest, § § 6137, 6240. It was at least the duty of the court to hear proof, *supra.*

Edward Gordon, for appellees.

1. There is no error. The questions argued by appellant were not raised in the court below and no objections were made below. The rulings of the court were not objected to, nor saved in the motion for new trial nor shown by a bill of exceptions, and all objections are thereby waived. 60 Ark. 250. See also 73 *Id.* 407; 85 *Id.* 326; *Ib.* 488; 91 *Id.* 43, 47; 108 *Id.* 224-6; 60 *Id.* 257; 15 How. 160.

2. There was no misjoinder of parties. Kirby & Castle's Digest, § 7254; Acts 1905, 798; 90 Ark. 483; 83 *Id.* 288; *Ib.* 255; 88 *Id.* 128. See also 84 *Id.* 556; 91 *Id.* 51; 86 *Id.* 130; 83 *Id.* 372; 117 *Id.* 71; 119 *Id.* 558.

WOOD, J., (after stating the facts). *First.* The court did not err in overruling the demurrer nor in overruling the motion to require the appellees to elect to dismiss the complaint as to all except one of the plaintiffs. Act 339 of the Acts of 1905, page 798, provides: "When causes of action of a like nature or relative to the same question are pending before any of the circuit or chancery courts of this State, the court may make such orders and rulings concerning the proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The several causes of action in the single complaint in separate counts, in which each plaintiff is named, grew out of precisely the same character of contract entered into on the same day for the purchase of the same kind of oats and at the same price. The only difference in the several contracts being in the amount of oats purchased. While the difference in the quantity of oats purchased by each of the several plaintiffs and the difference in the loss of rent, time, and expense in preparing the soil and sowing the oats, necessarily caused a difference in the measure of damages for each of the several plaintiffs, nevertheless, there was such a similarity in the nature of

the causes of action as to bring the several causes strictly within the provisions of the above statute.

The purpose of the statute, as expressed therein, is "for avoiding unnecessary costs or delay in the administration of justice." It can readily be seen that the time of the court would be greatly conserved and the expense of litigants and taxpayers would be considerably reduced by combining these several causes of action into one for the purpose of trial. The language, "may consolidate said causes when it appears reasonable to do so," shows that a broad discretion was intended to be conferred upon trial courts in applying the statute in order to effectuate its advantageous purposes.

Our statute for the consolidation of causes, *supra,* is almost a literal copy of section 921, R. S. (U. S. Comp. St. 1901, p. 685).

In *Mutual Life Ins. Co.* v. *Hillman,* 145 U. S. 285-293, there was a single plaintiff who brought a cause of action against several defendants, in which the defense to the cause of action was the same. The trial court consolidated the actions for trial "because they appeared to the court to be of like nature and relative to the same question, because it would avoid unnecessary costs and delay, and because it was reasonable to do so and was within the discretionary power of the court, under section 921 of the Revised Statutes."

The Supreme Court of the United States, in approving the order of consolidation for trial, said: "The learning and research of counsel have produced no instance in this country, in which such an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exception or writ of error."

The same ruling would be applicable, of course, where there were several plaintiffs against one defendant. See *Rose Mfg. Co.* v. *Whitehouse Mfg. Co. et al.,* 193 Fed. 69.

In evoking the sound discretion of the court, each case must depend largely upon its own peculiar circum-

stances to determine whether the discretion of the court has been reasonably exercised.

If separate suits had been brought by each of the appellees against the appellant, it is manifest that the court under the above statute would not have abused its discretion in ordering the suits consolidated for trial. Such being the case, it was not prejudicial error to refuse to require the appellees to elect to proceed separately in the trial of the cases. There was not enough difference in the testimony upon which each of the appellees relied to produce inextricable confusion, and, therefore, the court was justified in its ruling. See *Waters Pierce Oil Co.* v. *Van Elderen,* 84 Ark. 556; *Mahoney* v. *Roberts.* 86 Ark. 130; *Ashford* v. *Richardson,* 88 Ark. 128; *St. L., I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 484; *American Ins. Co.* v. *Haynie,* 91 Ark. 51; *Fidelity Phoenix Fire Ins. Co.* v. *Freidman,* 117 Ark. 77; *The Beatrice Creamery Co.* v. *Garner,* 119 Ark. 564.

Second. After the demurrer and the motion to elect were overruled, the appellant stood upon his pleadings and refused to plead further, and the court proceeded, thereupon, to render judgment for the several plaintiffs, appellees, in the amounts severally claimed by them in their complaint.

One of the grounds of the motion for new trial is, "that the court erred in rendering judgment against the defendant in this cause."

"Allegations of value or of amount of damage shall not be considered as true by the failure to controvert them." Sec. 6137, Kirby's Digest.

The court erred in rendering judgment in favor of the appellees on the allegations of their complaint as to the amount of damages, without proof as to the amount of such damages. *Derrick* v. *Cole,* 60 Ark. 394-399; *Greer* v. *Newbill,* 89 Ark. 513; *Greer* v. *Strozier,* 90 Ark. 161.

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

SMITH, J., concurring.

GIBSON v. ALLEN-WEST COMMISSION COMPANY.

Opinion delivered March 31, 1919.

1. TRIAL—DIRECTED VERDICT ASKED BY BOTH SIDES.—Where trial is before a jury, and at the conclusion of the testimony both sides ask for a directed verdict, and neither side asks any other instruction, the court is warranted in finding the facts and directing a verdict in accordance therewith.
2. LANDLORD AND TENANT—ESTOPPEL BY ATTORNMENT.—Where a tenant has attorned to the landlord's immediate predecessor in possession and title, he can not thereafter dispute the landlord's right of possession without having first surrendered possession.

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

J. M. Carter, for appellants.

1. The testimony shows that Sevilla Gibson was in lawful possession of the land for many years under claim of title that she and her husband occupied the land for twenty years or more, that her husband died in possession, and after his death she occupied the land in person or by her tenant. Weston Gibson claimed the land under purchase and died in possession. Rosenberg, the former owner, during his life told her the place was hers for a lifetime home, and for her to pay the taxes, and she did. This permission was sufficient interest or ownership for her to hold the land against appellee but against all others, as she was in possession, which was notice to the world of her claim. 55 Ark. 294. Even if the judgment against Weston is supported by the evidence, yet as to Sevilla Gibson there is a total want of evidence to sustain it. A verdict should have been directed for both defendants as asked.

Moore, Smith, Moore & Trieber, for appellee.

1. This is unlawful detainer, and Weston claims no interest in the land; he was a tenant, but his lease had expired, and he refused to vacate or pay rent. Mrs. Gibson was also a tenant, but seeks to set up a defect in appellee's title. A tenant can not dispute the landlord's title. He must first surrender possession and then bring

suit. 84 Ark. 220. Both parties asked a peremptory instruction only, and thus the court's direction in favor of appellee has the effect of a verdict of a jury and is conclusive. 105 Ark. 25; 118 *Id.* 134; 63 Ark. Law Rep. 331. Both appellants were tenants by permission only, and were holding over unlawfully. 2 Tiffany, Landlord & Tenant, par. 2730; 16 R. C. L. 1182; 120 Am. St. Rep. 55; 66 Ark. 145. The judgment should be affirmed as to both appellants, as no valid ground is shown for disturbing a judgment on the equivalent of a verdict by a jury.

SMITH, J. Appellee recovered judgment against appellants in unlawful detainer brought to recover possession of a certain eighty-acre tract of land, of which about sixteen acres were in cultivation. As ground for the reversal of the judgment it is insisted that the testimony establishes the following facts: That the land was occupied by Manuel Gibson and his wife, Sevella Gibson, for twenty years or more; that Gibson died in possession of the land and claiming title thereto, and that since his death Sevella has occupied the land either in person or by her tenant and co-appellant, Henry Weston, who is also her son-in-law. It is also insisted that while the proof does show that Weston during the year prior to the institution of this suit occupied the land as the tenant of appellee, no showing of tenancy is made as against Sevella Gibson, and that the judgment should have been rendered against Weston alone and not against her. The trial was before a jury, but at the conclusion of the testimony both sides asked a directed verdict and neither side asked any other instruction; and the court was, therefore, warranted in finding the facts and in directing a verdict in accordance with that finding. *Webber* v. *Rodgers,* 128 Ark. 25. So that the question for us to determine is whether the testimony, viewed in the light most favorable to appellee, is legally sufficient to support the finding made in its favor. When thus viewed, the testimony may be stated as follows: Appellee had succeeded, in some manner not shown in the record, to the title and right of possession of one Rosenberg, from

whom Sevella Gibson had rented the land for several years. Indeed, upon her cross-examination she admitted having paid rent on the land to Rosenberg for five or six years; and according to one witness who testified in appellee's behalf Sevella first rented the land in 1912 or 1913 and rented the land for three or four years, while appellee had acquired the Rosenberg title in 1915 or 1916. If this witness was correct—and Sevella Gibson denies that he was—then Sevella herself became appellee's tenant.

Appellee's representative and agent testified that after Sevella Gibson left the land it was rented to Weston for the year 1917, and the rent for that year was paid, and that Weston continued to occupy the land for the year 1918, but refused to pay the rent for that year, whereupon this suit was brought. Sevella Gibson admitted that she had spent most of the years 1917 and 1918 away from the land, but denied that she had abandoned her claim of dower and homestead and the privilege to occupy under those rights, and testified that her temporary absence was occasioned by the attention she was required to give to two afflicted sons, who did not live on the land, and that during her absence her possession was continued by Weston, her tenant and son-in-law.

But, as has been said, the court was warranted in finding that Weston had attorned to appellee, and even if Sevella herself had not done so, she had attorned to appellee's immediate predecessor in possession and title, and having done so, they could not thereafter dispute appellee's right of possession without having first surrendered this possession. *James* v. *McDuffy,* 202 S. W. 821; *Burton* v. *Gorman,* 125 Ark. 141-144, 145; *Adams* v. *Primmer,* 102 Ark. 380-382-383; *Dunlap* v. *Moose,* 98 Ark. 235; *Washington* v. *Moore,* 84 Ark. 220.

Judgment affirmed.

MEMPHIS, DALLAS & GULF RAILROAD COMPANY v. THOMPSON.

Opinion delivered March 17, 1919.

1. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE.—Proof, in an action for death of plaintiff's intestate at a crossing, that defendant's train came around a curve and on to the crossing at a high rate of speed and without signaling is sufficient evidence of negligence.
2. SAME—DEATH BY RUNNING OF TRAIN—PRESUMPTION.—From proof that plaintiff's intestate was killed in a collision by a train, a presumption arises that the railway company was negligent.
3. SAME—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—Where deceased, riding in a wagon driven by another, was killed at a crossing when a train collided with the wagon, the question of his contributory negligence was for the jury.
4. DEATH—DAMAGES—WHEN NOT EXCESSIVE.—Where decedent, a farmer twenty-two years old, industrious and competent, and managing a farm for the benefit of his dependent next of kin, producing $500 or $600 annually, was killed by defendant's negligence, a recovery of $1,200 for their benefit was not excessive.
5. SAME—DAMAGES FOR PAIN AND SUFFERING.—Where the evidence tended to prove an instantaneous death, there being no conscious pain and suffering, a recovery for the benefit of decedent's estate will not be sustained.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed as to judgment for benefit of estate of decedent; affirmed as to judgment for benefit of next of kin.

J. W. Bishop, for appellant.

1. Appellee was not entitled to recover anything because of contributory negligence of the deceased. Neither he nor his driver stopped, looked nor listened for the train at the crossing, nor exercised care or diligence to discover a train where the track was plainly in view and open and unobstructed. Such negligence precludes a recovery. 10 N. E. 128; 5 N. Y. S. 574; 54 Ark. 431; 56 *Id.* 459; 59 *Id.* 129; 61 *Id.* 559; 62 *Id.* 158, 250; 65 *Id.* 239; 76 *Id.* 14, 225; 78 *Id.* 359; 81 *Id.* 326; 82 *Id.* 444; 92 *Id.* 443; 94 *Id.* 529; 99 *Id.* 170; 100 *Id.* 533.

Where a person injured has been guilty of contributory negligence the liability of defendant arises only from a failure to use ordinary care after the discovery of the perilous position. 86 Ark. 306; 87 *Id.* 628; 89 *Id.* 496; 92 *Id.* 437; 96 *Id.* 438; 101 *Id.* 322; 69 *Id.* 135; 92 *Id.* 443; 97 *Id.* 442; 117 *Id.* 457; 99 *Id.* 171; 103 *Id.* 378; 115 *Id.* 529; *Ib.* 101; 105 *Id.* 294; 125 *Id.* 440; 121 *Id.* 351. See also 111 Ark. 137; 115 *Id.* 48; Kirby & Castle's Digest, § 8131.

2. The testimony for plaintiff was not sufficient to warrant the verdicts returned, even if defendant had been present making a defense and it was not and had no opportunity to rebut the presumption of the *prima facie* case made. However, in the motion to vacate, it is shown that the engineer blew the whistle and stock alarm, applied brakes, rang the bell, etc.; that the wheels skidded, as the rails were wet and slippery. It is shown that all due precautions were taken to prevent an accident or injury.

3. The verdicts after the remittitur are still excessive and not warranted by the evidence. There was no evidence as to pain and suffering, as deceased was unconscious from the time he was struck until death. A verdict should have been directed for defendant. Cases *supra.* The judgment should be reversed and the cause dismissed.

4. The $1,500 judgment after the remittitur is still excessive, as under the proof there should have been no recovery at all. *Supra.*

Calvin T. Cotham and *Houston Emory,* for appellee.

1. The transcript is imperfect and incomplete and this case should be affirmed as a delay case.

2. No contributory negligence was shown on part of deceased. It is shown that Mahan, the driver, used and exercised due care. The cases cited by appellant are not in point. 10 N. E. 128; 5 N. Y. S. 574, is a strong case for appellee.

3. The questions of negligence and contributory negligence are always for the jury unless the facts are undisputed and here the questions have been settled by

the verdicts. 97 Ark. 347. The evidence abundantly sustains the verdicts. The verdicts are not excessive. On the whole case the judgment should be affirmed. 61 Ark. 549; 97 *Id.* 347; 101 *Id.* 424.

HUMPHREYS, J. On January 15, 1918, appellee, as administrator, for the benefit of both the estate and next of kin of Braden Thompson, deceased, instituted suit against appellant in the Garland Circuit Court, to recover damages on account of the killing of Braden Thompson on January 1, 1918, at a point where appellant's railroad crossed a public road in Garland County, near the Gardner ferry or bridge. It was alleged in the complaint that appellant's employees wrongfully, carelessly and negligently ran its passenger train across said public road crossing at an unusual speed and failed to ring the bell or sound the whistle or to give any other warning of its approach, and failed to keep a constant lookout for persons about to cross the track at the public crossing; that appellee's intestate was bruised, mangled and mutilated as a result of the injuries received from the train when it struck him, and died within a few minutes in great pain and mental anguish; that, at the time his intestate was killed by the train, he was 22 years of age, and was appellee's main dependence for labor on his farm; that, on account of the wrongful killing of his intestate, he was damaged, as father and next of kin, in the sum of $5,000, and that the estate of his intestate was damaged in the sum of $15,000.

Appellant filed answer denying all material allegations in the complaint and alleged, as a further defense, that at the time of the injury, appellee was seated in a wagon drawn by a pair of mules and driven by Alexander Mahan; that they suddenly drove upon the track, immediately in front of the approaching train, without looking and listening, and without using the means at their command to ascertain the approach of the train.

On the 12th day of June, 1918, the cause was submitted to a jury upon the pleadings, appellee's evidence and instructions of the court. The jury returned a ver-

dict in favor of W. G. Thompson, administrator, for the benefit of next of kin, in the sum of $5,000, and a verdict in favor of W. G. Thompson, as administrator, for the benefit of the estate, in the sum of $5,000. Upon the same day, judgment was rendered in accordance with the verdicts. Appellant was not present at the trial, but appeared on June 14th and requested and was granted until June 22nd to file a motion to set aside the judgment and for a new trial. On that date, appellant filed its motion setting up, first, that it was not present at the trial and not represented by counsel, for the reason that it was led to belive that the cause would not be tried until after the primary election; that it had a meritorious defense to the cause of action, setting it out; and that the evidence was insufficient to support the verdict and judgment. Thereafter, appellee filed a response to the motion denying all material allegations therein. On the 13th day of July, 1918, the motion was submitted to the court upon affidavits and testimony. The court declined to vacate the judgment and grant defendant a new trial upon remittitur by appellee of his judgment as administrator, for the benefit of the estate, to the sum of $300, and his judgment as administrator, for the benefit of the next of kin, to the sum of $1,200, and modified the original judgment to conform to the amounts as thus reduced. From the final judgment, under proper proceedings, an appeal has been prosecuted to this court.

We deem it unnecessary to set out even a summary of the evidence introduced by appellant in support of the motion to vacate, and by appellee in support of his response thereto, for the reason that appellant does not now contend in his argument and brief that the court erred in refusing to vacate the judgment. It is contended, however, by appellant that the undisputed evidence disclosed, first, that the death of appellee's intestate was not caused by the negligence of the appellant's employees; second, that the death of appellee's intestate was caused by his own negligence; and, third, that the judgment was excessive, even after the remittitur.

(1) The evidence tended to show that appellant's train was behind time; that it approached the crossing, where the fatal accident happened, at a high rate of speed; that the employees failed to sound the whistle or ring the bell; that the train came around the curve onto the crossing from behind a hill; that it struck the wagon broadside, in which Braden Thompson was riding, and carried his body about 100 feet west and deposited it a few inches to the north of the track where it was found badly bruised and broken. The train came to a stop 550 yards west of the crossing. Under these facts, appellant must be held on appeal to have injured and killed Braden Thompson through the negligent acts of its employees, because there is some legal evidence tending to establish negligence on their part. *Malone* v. *Collins,* 112 Ark. 269. Again, the killing was proved beyond question, so the law will indulge the presumption that it was negligenltly done. *St. L., I. M. & S. R. Co.* v. *Evans,* 80 Ark. 19; *Huddleston* v. *St. L., I. M. & S. R. Co.,* 90 Ark. 378; *St. L., I. M. & S. R. Co.* v. *Drew,* 103 Ark. 374.

(2) On the morning of January 1, 1918, Braden Thompson, who was walking to Hot Springs to make out his questionnaire, was overtaken by Alexander Mahan who invited him to ride. He took his seat beside Mahan in the wagon and they proceeded along the public road toward town. When within thirty feet of the point where the railroad crossed the public road, Mahan looked in the direction from which the train came and continued to look while going on, but did not see the train until his mules crossed the track and the front wheels of his wagon had crossed the first rail. He then hallooed to his mules and slashed them in an effort to push them across the track, having gone too far to get them back. He saved himself by jumping. As the front wheels crossed the track, Braden Thompson said, "There comes the train," and Mahan thought that he jumped about the same time he himself did. The train came onto the public road crossing around a curve and from behind a hill, which prevented Mahan or Braden from seeing the train until they

were upon the track. This proof, taken in connection with the fact that there was proof tending to show that the whistle was not blown or the bell rung as the train approached the public road crossing, and the fact that the train was behind time and running at a great rate of speed, was sufficient to carry the question of contributory negligence to the jury. *St. L., I. M. & S. R. Co.* v. *Martin,* 61 Ark. 549; *Missouri & North Ark. Rd. Co.* v. *Clayton,* 97 Ark. 347; *St. L., I. M. & S. R. Co.* v. *Hutchinson,* 101 Ark. 424.

(3) The evidence is sufficient to sustain the judgment of $1,200 in favor of appellee, as administrator, for the benefit of the next of kin of Braden Thompson, deceased. On account of sickness and old age, appellee was unable to work and manage his farm. He had made arrangements with his son to look after the place and farm it, with the understanding that the family should receive support out of the proceeds therefrom. The family consisted of himself, wife and two younger children. The young man had been residing at home, was unmarried, industrious and competent to manage and work the farm. There were thirty-five acres of the farm in cultivation and it would produce between five and six hundred dollars annually in crops. It cannot be said that the judgment of $1,200 in favor of appellee, as administrator for the benefit of the next of kin of deceased, was excessive. The judgment, however, of $300 in favor of appellee, administrator for the benefit of the estate of Braden Thompson, deceased, was not warranted by evidence. In order for appellee, in his representative capacity as administrator for the benefit of the estate of Braden Thompson, deceased, to sustain a recovery for more than nominal damages, it was necessary to have shown that his intestate underwent conscious pain and suffering prior to his death. *St. L., I. M. & S. R. Co.* v. *Dawson,* 68 Ark. 1. Appellee did not meet this burden. Alexander Mahan was the only witness to the killing. His testimony on this point was that, when the train struck the wagon, Braden Thompson was in the act of jumping, that he found him

in a few seconds, 100 feet west of the crossing, near the track, lying on his stomach, his legs broken and twisted, and arms doubled around; that, as he approached him, he heard him struggle two little struggles; that he never spoke a word; was pale, and dead, so far as he could judge. For aught the evidence showed, appellee's intestate was killed instantly or rendered unconscious when struck by the train. To say otherwise would be mere conjecture. For failure to show, by direct or circumstantial evidence, conscious pain or suffering prior to the death of appellee's intestate, the $300 judgment can not stand.

The judgment for $1,200 is therefore affirmed, and the judgment for $300 is reversed and the action of appellee, as administrator for the benefit of said estate, is dismissed.

WESTERN CLAY DRAINAGE DISTRICT v. DAY.

Opinion delivered March 17, 1919.

1. APPEAL AND ERROR—QUESTIONS DETERMINED.—Only questions on which a decision is invoked are determined by the Supreme Court.
2. DRAINS—LOANS BY DIRECTORS—LIABILITY.—Directors of a drainage district who elected to loan its funds on terms fixed by themselves, instead of upon the terms fixed by Acts 1907, p. 890, under which the district was organized, are personally liable for the loans.
3. TRIAL—REOPENING CASE—DISCRETION.—No abuse of discretion was shown in the refusal of the court to reopen the case after submission for the purpose of considering testimony taken by deposition without authority.
4. APPEAL AND ERROR—REVIEW—TESTIMONY NOT BEFORE TRIAL COURT. —The Supreme Court will not consider testimony not properly before the lower court.
5. DRAINS — EMPLOYMENT OF ATTORNEY BY DISTRICT.—Though the board of directors of a drainage district was not properly in session when a contract of employment of an attorney was made, if the district continued to accept his services after the contract was made, as if a valid contract had been made, the district became liable for the value of his services.

6. DRAINS—ACTION AGAINST OFFICERS OF DISTRICT—PARTIES.—In suits by landowners against directors of a drainage district on account of money illegally loaned to themselves and others, including the attorney for the district, the latter was a proper party.

7. ATTORNEY AND CLIENT—FEE—SUFFICIENCY OF EVIDENCE.—Allowance by the chancery court to an attorney for a drainage district who conducted litigation to a successful issue, *held* not against the preponderance of the evidence.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellees, D. P. Day and other land owners in the Western Clay Drainage District, brought this suit against D. Hopson, Joseph McCracken and J. H. Magee, individually, and as directors of the drainage district, for the purpose of charging the directors with personal liability for various sums of money derived from the sale of the bonds of the district which had been loaned by said directors to themselves and to other persons in violation of the law. There was a prayer for an accounting of the sum so loaned and for judgment against the directors. An amendment to this complaint was filed in which the names of the persons who had borrowed this money was alleged, and these persons were made parties defendant pursuant to the prayer of the amendment to the complaint, although no judgment was prayed against any of the persons named in the amendment. Among the persons so named in the amendment was G. B. Oliver, who filed an answer and cross-complaint against the drainage district. In this answer Oliver admitted having borrowed the sums alleged to be due in the complaint, but by way of cross-complaint against the drainage district alleged that the drainage district was indebted to him in the sum of $2,500 for professional services. His cross-complaint was so amended as to allege the sum due for services to be $3,500. The appellant drainage district filed a motion to strike out the name of Oliver as a party defendant, and also a motion to strike out the cross-complaint of Oliver and a demurrer to his answer and cross-complaint,

all of which were overruled and exceptions were saved by the drainage district. The drainage district then filed its answer to the cross-complaint of Oliver in which liability in any sum for services rendered was denied.

The drainage district was organized pursuant to an act of the General Assembly of 1907 (Act 368, Acts 1907, page 890), and the amendments thereto, and D. Hopson, A. B. McKinney and H. H. Williams were appointed directors of said district. McKinney and Williams, upon the expiration of their terms, were succeeded by appellants McCracken and Magee. The act authorized the directors to divide the district into sub-districts, and pursuant to this authority five of these sub-districts were organized. The act provided that the directors might issue bonds for the purpose of raising the necessary funds to construct the proposed improvement in any sub-district, and that only the lands in a particular sub-district should be liable for the bonded indebtedness incurred in constructing the improvement in that sub-district. The act further provided that none of these bonds should be sold for a price less than ninety-five cents on the dollar. Sub-district No. 1 was organized, and $100,000 in bonds were issued for its account, and the records of the district show that these bonds were sold for ninety-three cents, which was $2,000 less than the minimum price for which they could legally have been sold. It was explained, however, by the directors of the district that the bonds had in fact been sold for ninety-five cents and that $2,000 was allowed the purchaser for having the bonds printed and for certain other expenses incident to their issuance. Later four other sub-districts were organized and bonds were issued for the account of each of them so that for the entire district bonds in excess of $400,000 were issued.

The act creating the district authorized the directors to loan the money of the various sub-districts until needed to pay the cost of the proposed improvements, and to take as security therefor first mortgage bonds on real estate. After selling the bonds the directors proceeded to make loans of money to themselves and to numerous other par-

ties. These loans appear to have been made without regard to the requirements of the act authorizing them, and the directors seek rather to defend their good faith than the legality of their actions.

Upon the filing of the suit by the land owners the directors and certain of the borrowers began to comply with the law either by repaying the loans or by giving the mortgages required by law, so that at the time of the final hearing most of the money had been legally accounted for. It appears, however, that certain loans were made of funds belonging to two of the sub-districts which had not been repaid or secured as required by law, and as to these sub-districts no relief as prayed was granted the land owners for the reason stated by the court below that none of them owned land in these sub-districts and were not, therefore, interested in those funds. The court, however, found the balances due to the sub-districts in which the lands of the plaintiffs were situated and rendered judgment against those borrowers and the directors personally. There was no controversy as to the sum loaned Oliver, who offered to pay the balance due by him after deducting a fee for legal services which he claimed. The court fixed Oliver's fee at $2,000 and both Oliver and the district have appealed from this allowance. The court also held that the cause of action against the directors for the $2,000 representing the price at which the bonds of sub-district No. 1 had been sold below the minimum price fixed by law was barred by the statute of limitations. The directors have appealed from the decree fixing personal liability against them for the sums of money loaned in violation of the law, and from the allowance of the fee to Oliver; and the director, McCracken, makes the separate defense that he was not a member of the board at the time the loans were made. Other facts will be stated in the opinion in connection with the discussion of the points stated above.

F. G. Taylor, for appellants Western Clay Drainage District and Joe M. McCracken.

1. It was error to hold that McCracken was liable as director of the district for the loan mentioned in the decree and to render judgment against him for the amount for which the court held appellees could maintain this suit. No loans were made while he was a director, but that two of the loans were renewed to Polk and Hopson. Acts 1909, p. 827, § 12. A director is not liable for the wrongful acts of his predecessor unless he sanctions or approves. Innocent directors are not liable for the misprision of their codirectors. The presence of a director at a meeting at which the previous minutes of a meeting are read and approved does not make him personally liable for an *ultra vires* investment ordered at a previous meeting. 7 Thompson on Corp., § 8513. The remedy against the borrowers must be first exhausted before suing the directors. 95 Ark. 124.

2. The presence of Oliver was not necessary. He was not a necessary party to the suit. The suit was simply against the directors for misappropriating the funds of the district, and his presence was not necessary in order that the court might determine the question simply because said directors had illegally loaned him a part of said funds. Kirby's Digest, § 6011; 70 Ark. 444.

The cause of action in Oliver's cross-complaint is an action at law pure and simple, and he can not enforce it in a court of equity against said district over its objections. 7 Ark. 520; 13 *Id.* 630; 26 *Id.* 649; 27 *Id.* 97; 48 *Id.* 331; *Ib.* 167.

The demurrer to the cross-complaint should have been sustained. Cases *supra.* [Parties having independent rights are not proper parties to any kind of an action.] 105 Ark. 581; 27 *Id.* 581. Oliver was never employed by the district other than as stated by him and Mrs. Skinner. His conversations with members of the board at times could not bind the district, as it was a corporation and could not make a contract except at a meeting of its directors at which all were present or had notice. 55 Ark. 473; 62 *Id.* 33; 118 *Id.* 157; 197 S. W. 1163. The only way Oliver could have been allowed an additional fee

was to have rescinded the original contract rescinded by mutual consent at a meeting of the board of directors and then made a new contract. Any other contract would be void. 6 C. J. 337, § 311, and notes 50-1-2; 114 Ark. 289; 57 *Id.* 93.

Oliver's fee is excessive. The Caton case settled the law of the Curtis case, and all that was necessary to do was to call the attention of the court to the fact by the plea of *res adjudicata.* Two thousand dollars was an unreasonable fee, the lawyers who testified stand eight to seven for a much smaller fee. Oliver was a party to the illegal acts of the directors and can not recover. He must come into court with clean hands.

G. B. Oliver, for appellee D. Hopson.

Hopson appeals from that part of the decree allowing plaintiff's attorney a fee for the prosecution of the suit and the failure of the court to tax the costs of the special master appointed to state an account against plaintiffs below. On these points appellee adopts the brief filed by G. B. Oliver, and in addition submits that the court erred in fixing a fee and declaring a lien on the judgment. Act No. 293, Acts 1909, p. 892, § § 1, 2. There was no contract between the attorney and the district. He was employed by the plaintiffs below and not by the district nor was it his *client.* 6 C. J. 567, § 5; Century Dictionary, "*Client;*" Rapalje & Lawrence, Law Dic., "*Client,*" p. 220.

2. Appellees D. P. Day *et al.* complain that the court erred (1) in holding that plaintiffs could not recover because none of them owned land in Subdistrict No. 5, and (2) in holding that the sum of $2,000 alleged to have been embezzled by D. Hopson was barred by limitation. Appellees are the only parties to this litigation appealing on these points. The district only appeals from that part which allows G. B. Oliver a fee of $2,000 in the case of *Curtis* v. *Western Clay Drainage District.* McCracken only appeals from that part of the decree in which a judgment is rendered against him for the amounts found due Subdistrict No. 3. Appellees are

therefore appellants and not appellees on the two alleged errors. They have not prayed an appeal or a cross-appeal. 122 Ark. 530-537. The pretended appeal of plaintiffs should be dismissed. Plaintiffs below have no lands in Subdistrict No. 5 and no interest in the finances thereof and could not maintain a suit in regard thereto. 25 Ark. 301; 93 Atl. 140; 162 N. W. 1073; 116 N. E. 434.

4. Drainage districts are *quasi*-public corporations and perform some of the functions of government. 14 Cyc. 1026 (c); 10 A. & E. Enc. Law, 233; 87 Ark. 8. Their officres are therefore *quasi*-public officers, and the statute of limitations is applicable. 24 Cyc. 1050 (j), *Ib.* 1053 (2). Ignorance of the cause of action does not prevent the statute from running. 85 Ark. 584; 61 *Id.* 527. The records of the district were public records and open to examination. One is chargeable with notice of what he could have ascertained by consulting public records. 17 R. C. L., § 105; 85 Pac. 90; 5 L. R. A. (N. S.), § 986.

If there was any liability of Hopson, it was from neglect or misconduct, and the statute runs from the breach of duty and not from date of discovery. 17 R. C. L., § § 132, 218-20; 32 Ark. 281; 80 N. E. 787; 12 L. R. A. (N. S.), 105; 139 Pac. 602; 51 L. R. A. (N. S.), 279; 25 Cyc. 1116 (20) and cases cited. If Hopson was a trustee the general rule would not apply. 25 Cyc. 1152 (b).

J. L. Taylor, for appellee G. B. Oliver.

1. Before could be rendered against a borrower he must be made a party to the suit. Here additional and unexpected services were rendered which could not have been in contemplation of the parties. Here we have the "peculiar facts" which render a contract for additional compensation binding and which if the services were received, even without a contract, would bind the district for their value. The proof shows that two of the active directors were informed of the services and that appellee would demand a reasonable fee and assented thereto and that appellee had discussed with the directors the advisability of employing assistant counsel outside the district

and the board consented for appellee to attempt the defense for himself. 6 C. J. 737, § 311. The fee was reasonable as the preponderance of the testimony shows and should have been allowed by the court below. The cross-complaint was proper and not demurrable, but stated a good cause of action in equity, and if he had not set it up in this suit he would have been barred. He was a proper and necessary party.

2. On the appeal vs. D. P. Day *et al.* The court did not err in fixing a fee for their attorney and declaring it a lien on the judgment. The fee was grossly excessive. The audit was had on plaintiffs' motion and judgment for the costs and expenses of it should have been rendered against them. The audit was unnecessary. 125 Ark. 66-76. The matter of costs was within the sound discretion of the chancellor. The books were absolutely correct and the audit an unnecessary expense which plaintiffs should pay and judgment should have been rendered against them. 125 Ark. 66-76, *supra.*

J. F. Gautney, for the land owners of Western Clay Drainage District, appellees.

1. The court erred in holding that plaintiffs could not recover because none of them owned lands in Subdistrict No. 5. The district was created by Acts 1907 and later amended by act in 1909. These acts conferred upon the district all rights, powers and privileges usually conferred upon corporations and gave it the right to create subdistricts, but gave the subdistricts no powers as subdistricts for any purpose. See Acts 1907 and 1909, Acts 1907, Subd. B, p. 896, § 8; Kirby's Digest, § 5008. The subdistricts have no rights or powers as corporate entities. Their business is managed by the board of the district. It was therefore unnecessary to bring suit in the name of the subdistricts, as they do not levy or collect taxes nor erect or construct any improvements or have control of any funds from the sale of bonds, etc. Bonds are issued by the district, and when sold the funds belong to the district and are paid to the treasurer and by him disbursed on warrants ordered by the directors of said

district. When the directors refuse to bring suit to recover funds unlawfully loaned, no other mode of procedure was open save the one pursued in this case. 124 Ark. 6; 101 *Id.* 172; 9 S. W. 801; 63 *Id.* 446-(7); 80 N. W. 726.

We are not interested in the cross-complaint of G. B. Oliver.

SMITH, J., (after stating the facts). A very forceful argument is made in the brief of counsel for the landowners to the effect that the court below erroneously held the cause of action for the recovery of the $2,000 item to be barred by the statute of limitations; and that the court was also in error in holding that the land owners bringing this suit had no right to call the directors to account for the loans of money belonging to the sub-districts in which they owned no land. These land owners, however, prayed no cross-appeal, and as no one else raises these questions we dispose of them by saying that they are not properly presented for our decision.

In this connection, it might be said that the drainage district, which has appealed and which could, therefore, raise these questions, has not done so. It is not the practice of this court to search out and decide all the questions which might be said to be presented by a particular record. In private litigation the court is content to pronounce judgment upon those questions only upon which a decision is invoked.

Both Hopson and McCracken have appealed from so much of the decree of the court below as holds them personally liable for the loans of money made in contravention of the statute. But we think the decree in this respect should be affirmed. The act prescribed the terms upon which the funds of the district might be loaned, and if the directors wished to escape any personal liability on that account they should have complied with the law in making these loans. Inasmuch as they elected to loan the money upon terms fixed by themselves rather than upon the terms prescribed by law, the loans must be treated as if they were unauthorized by law and the direc-

tors held responsible for any loss thus incurred. Director McCracken seeks to escape this liability by saying that he was not a director when the loans were originally made. But it affirmatively appears that he was present at a director's meeting at which the land owners requested the directors to bring suit or to authorize suits to be brought to recover the unlawful loans, and McCracken refused to consent to this action upon the ground that such suits would result in a receivership for the entire district; and further that he thereafter consented to the renewal of various loans as they matured, without taking the security required by the law.

It is very earnestly insisted on behalf of the drainage district that the court below should have stricken the answer and cross-complaint of Oliver from the files, and that the fee finally allowed him was excessive. And upon his cross-appeal Oliver insists that the fee allowed was inadequate. In support of his contention that the fee allowed him was inadequate Oliver insists that we should consider the testimony taken in his behalf and found in certain depositions which have been brought up by certiorari. The cause appears, however, to have been submitted to the court for decision on the 25th of June, 1918, and the depositions were taken between that date and July 18, the date on which the court below pronounced a final decree. The court had previously fixed the time within which the testimony should be taken and had apportioned a given number of days to each of the parties. This time had expired some days before the cause was submitted, and during the allotted time much testimony was taken, and it does not appear that the court was requested to extend the time for further proof before taking the case under submission, and no abuse of discretion is shown in the failure of the court below to reopen the case for the purpose of considering testimony which was taken without authority. As the testimony was not properly before the court below we can not consider it now.

The point is made that the board of directors of the district was not properly in session when the contract for Oliver's employment was entered into. This point is answered, however, by saying that thereafter the district continued to accept Oliver's services as if a valid contract therefor had been made, and we proceed to consider the value of these services as shown by the testimony taken on that issue. Before doing so, however, we take occasion to say that no error was committed in refusing to strike Oliver's answer and cross-complaint from the files. The complaining land owners had alleged in their amended complaint the sum of money loaned Oliver, and there was no controversy about the correctness of the sum alleged to have been loaned him. And while the land owners did not ask judgment against Oliver for this sum they did ask judgment against the directors for having loaned Oliver the money stated, and it, therefore, appears that in the proceeding to which Oliver was made a party, judgment was prayed against the directors for the money loaned Oliver. So that even if Oliver were not a necessary party he was a proper party to have before the court in adjudicating the liability of the directors for money loaned him; and while the directors against whom the judgment was asked on account of their loan made to Oliver were the parties who asked that the cause of action as against Oliver be dismissed, we think no abuse of discretion is shown by the failure of the court to dismiss the cause as to Oliver.

Oliver took the depositions of seven lawyers on the question of the fee he was entitled to charge, and all these witnesses placed the fee at a larger sum than the charge made. On behalf of the district the testimony of eight lawyers was taken, all of whom placed the fee at a smaller sum than Oliver sought to charge. The testimony of the attorneys in Oliver's behalf was taken in response to a hypothetical question prepared by him, and that in behalf of the district upon a hypothetical question prepared by the attorney for the district. These questions were lengthy and will not be restated here; but upon a com-

parison of the two hypothetical questions we are of the opinion that the question propounded by Oliver presents more fully than the other the facts in the case upon which the opinion of the attorneys should have been based.

Briefly restated, these facts are as follows: This court, in the case of *Caton* v. *Western Clay Drainage District,* 87 Ark. 8, upheld the validity of the organization of this drainage district and the assessment of the benefits thereunder. Later, in the case of *Martin* v. *Reynolds,* 125 Ark. 163, we decided that a special statute creating a certain drainage district was void on its face for the reason that it made an unauthorized discrimination in the property to be assessed for taxation to pay for the improvement authorized. The section of the statute condemned in the last cited case was an exact copy of a section of the act creating the Western Clay Drainage District. Thereafter the land owners who brought this suit, together with other land owners of the district, employed counsel to resist the collection of further assessments of benefits against the lands in this drainage district. It was shown that these land owners had agreed to pay these attorneys a given per cent. of the assessments then remaining unpaid in the event that the proposed litigation was conducted to a successful issue. The fee thus contracted for would have approximated ten thousand dollars. At that time the district had been in operation for nine years and had issued and sold bonds to the amount of $419,000, and practically all of its work in four subdistricts had been completed by the expenditure of more than $300,000, and about 145 miles of ditches and 25 miles of levees had been constructed. It was shown by the testimony of the engineer of the district that the annual cost of maintenance of the completed work was from three to five thousand dollars and that the assessed and actual benefits of the improvement to the property in the district largely exceeded their cost and that their value depended on their maintenance and upkeep. Oliver conducted this litigation to a successful issue as appears from the decision of this court in the

case of *Curtis* v. *Hopson,* 127 Ark. 344, and we can not say that the action of the chancellor in allowing a fee of $2,000 for the services performed was contrary to the preponderance of the evidence in the case, or that a larger fee should have been allowed, and the allowance of that fee will, therefore, be affirmed.

No reversible error appearing, upon a consideration of the whole record, the decree of the court below will be affirmed.

FERNWOOD MINING COMPANY *v.* PLUNA.

Opinion delivered March 10, 1919.

1. NEW TRIAL—BILL IN EQUITY.—In order that a bill in equity may lie to obtain a new trial of an action at law, it must appear, not only that inevitable accident has prevented the losing party from prosecuting an appeal based on assignments of error, but also that it would be contrary to equity and good conscience to allow the judgment to be enforced.
2. NEW TRIAL—RELIEF IN EQUITY.—Where the losing party in an action at law had a remedy at law by appeal or motion for new trial, and lost it without fault on his part, by causes beyond his control, preventing him from prosecuting his appeal in due time, equity will grant relief.
3. NEW TRIAL—UNAVOIDABLE CASUALTY—EQUITABLE RELIEF.—Where defendants in an action at law were prevented from presenting their bill of exceptions to the presiding judge, because he had left the State, a bill in equity will not lie on the ground of unavoidable casualty; it appearing that plaintiffs in bill might have obtained an adjournment of court from a special judge for the purpose of having the bill signed, or might have procured from opposing counsel an agreement that the bill of exceptions was correct.

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

Paul McKennon and *James B. McDonough,* for appellant.

1. This court has often upheld the power and right of a chancery court to enjoin a judgment at law unless the successful party would submit to a new trial. 61 Ark.

354; 38 *Id.* 283; 40 *Id.* 338; 35 *Id.* 123; 73 *Id.* 555; 75 *Id.* 507; 96 *Id.* 520; 114 *Id.* 261; 120 *Id.* 151.

Keeping in mind the principles laid down in the above cases, the appellant is (1) without fault and (2) the judgment is unjust and inequitable and appellant was entitled to relief. Judge Priddy had left the State and remained away during the entire term of the court and thereby appellant had lost the right of review. A judge who is absent from the State is legally dead and no one should be prejudiced by an act of the court. 128 Ark. 269. The judge could not sign the bill of exceptions in time. 143 Pac. 329; 22 Cyc. 365; 129 Pac. 693; 35 Okla. 362; 26 Kan. 780; 12 Ga. 612; 131 Ind. 437; 31 N. E. 88; 45 Kan. 541; 128 Pac. 111; 83 Atl. 337; 85 Ark. 385; 59 *Id.* 162.

2. The allegations of the complaint show a complete absence of any negligence on the part of appellant or attorneys. They had the right to presume that Judge Priddy would be present and hold court. He had not notified them that he would not and awaited his coming. The unexpected absence of the judge was an unavoidable casualty. 26 Okla. 605; 26 *Id.* 613; 25 *Id.* 319. See also 86 S. E. 623; 147 N. W. 880; 169 S. W. 828; 140 Pac. 690; 126 *Id.* 5. The judgment should have been set aside. 128 Ark. 169; 61 Pac. 1119; 48 *Id.* 324. Unavoidable accident or casualty is good ground for relief. 39 Okla. 466; 26 *Id.* 613; 110 Pac. 1071; 128 N. W. 349; 119 Pac. 681; 118 S. W. 747; 100 N. Y. S. 747; 80 N. W. 1079; 57 Atl. 104; 35 Ark. 123. See also 172 Pac. 84; 166 *Id.* 78; 78 Atl. 928; 71 N. W. 989; *Ib.* 990; 6 N. W. 762; 49 *Id.* 353; 99 N. W. 843; 58 Atl. 793; 10 L. R. A. 796; 95 Me. 244; 44 S. W. 194.

Appellants were forced to trial before a jury that had formed an opinion on the merits. The Pluna trial followed immediately after the trial of the Kukar case against the same defendants and that case had its prejudicial effect upon the jury. Some at least had heard the evidence and argument in that case. 61 Ark. 354; 60 *Id.* 221; 21 *Id.* 336; 24 Cyc. 279.

3. It was harmful error to admit in testimony the evidence of Pluna as to his having no property and as to having a wife and children dependent upon him. 3 Elliott on Ev., § 1990, and note 119; 74 Ark. 326; 102 U. S. 451; 73 Wis. 158; 81 Fed. 807; 45 Fla. 403; 101 Ill. App. 155; 64 Kan. 421; 86 Mo. App. 193; 55 Ohio 392; 17 Tex. Civ. App. 70; 41 S. E. 216.

4. The articles of incorporation were inadmissible. Cook on Corp., § § 663-4. One corporation cannot be the dummy of another. 69 Ark. 85; 94 *Id.* 471; 107 *Id.* 126; 169 Fed. 255; 61 S. W. 165; 69 Ark. 85, 88. See also 68 Fed. 105; 71 Ark. 290; 70 *Id.* 10; 109 Ga. 827; 126 Fed. 278; 116 *Id.* 157; 45 *Id.* 812; 109 La. 1050; 34 So. 74; 45 S. W. 207.

5. As matter of law the Fernwood Mining Company was an independent contractor under the lease.

6. The relation of master and servant does not exist between Pluna and the Arkansas Anthracite Coal & Land Company. Cases under par. 5.

7. The evidence was insufficient to support the verdict. Appellee's own evidence shows this.

8. There is error in the instructions given and refused. 128 Ark. 479.

Evans & Evans, for appellee.

1. This is an attempt to enjoin a judgment of the circuit court after that judgment had been merged in the judgment of the Supreme Court on appeal and the rules applicable to a case where it is sought to enjoin a judgment of the circuit court do not apply but the rules applicable to suit to enjoin a judgment of the Supreme Court prevail. 33 Ark. 161. Such a judgment cannot be reviewed, altered or modified by an inferior court for matters upon the record but only for matters arising after judgment of the appellate court rendering it inequitable to carry it into execution. 60 Ark. 50; 63 *Id.* 141; 61 *Id.* 354; 73 *Id.* 556; 75 *Id.* 509; 96 *Id.* 522; 120 *Id.* 151; 48 *Id.* 355. It must clearly appear that it would be contrary to equity to allow the judgment to be enforced and

that the party complaining must be free from fault and the judgment unjust and inequitable and he has lost his right of appeal or review by unavoidable accident. Mere errors in the trial are not sufficient to warrant the interposition of a court of equity. Here the parties were not free from fault, nor did they lose their right of appeal or review by unavoidable accident. 118 Ark. 355. An agreed bill of exceptions could have been gotten up and signed by counsel of record under Acts 1911, p. 192. Under this act it was not necessary for Judge Priddy to sign the bill of exceptions. The complaining party must be free from fault and have lost his right of appeal by unavoidable casualty or accident. Cases *supra.* As to the admission of testimony that Pluna had a wife and children dependent upon him and the amount of damages, see 99 Ark. 265; 100 *Id.* 107, 535; 104 *Id.* 415; 74 *Id.* 326.

2. The articles of incorporation were properly admitted in evidence. Cook on Corp., § § 663-4-7; 142 U. S. 417; 142 Fed. 247. Under the law as we have presented it and the evidence, the Fernwood Company was not an independent contractor and the relation of master and servant did exist between Pluna and the Arkansas Anthracite Coal & Land Company. The testimony shows this. The evidence also sustains the verdict and it is not excessive nor was there any error in the instructions. The judgment was right and the court properly refused to enjoin it for the many reasons stated above.

STATEMENT OF FACTS.

This was a bill in equity for a new trial upon the ground that the defendants had been prevented by unavoidable casualty from obtaining the signature of the presiding judge to their bill of exceptions within the time prescribed by law and that they thereby lost the right to have their assignments of error reviewed in the Supreme Court in the case of *Fernwood Mining Co. et al.* v. *Pluna,* 136 Ark. 107, 205 S. W. 822.

The court sustained a demurrer to the complaint of the plaintiffs and the plaintiffs electing to stand upon their complaint, the court dismissed the same for want

of equity and dissolved the temporary injunction which had been granted in the case. The complaint is as follows:

"Come the plaintiffs, Fernwood Mining Company and Arkansas Anthracite Coal & Land Company, and for their cause of action say that at the December, 1917, term of the Johnson Circuit Court the suit of *Alex Pluna* v. *Fernwood Mining Company* and *Arkansas Anthracite Coal & Land Company* was tried, and a judgment for damages in favor of the plaintiff was rendered in the sum of twenty-five thousand dollars ($25,000), and a motion for new trial was prepared, presented to the court by the defendants, and by the court overruled, from which ruling of the court the defendants prayed an appeal to the Supreme Court of Arkansas.

"Plaintiffs state that in the trial of said cause in the Johnson Circuit Court, various errors in the instructions given by the court and in the testimony of plaintiff were made, and were set forth at length in the exceptions of the defendants that were duly prepared in the motion for new trial and the bill of exceptions, which said bill of exceptions is hereto attached and made a part hereof. Plaintiffs state that the verdict was rendered in this case on the 27th day of February, 1918, at 10 o'clock at night; that the court had indicated a purpose to adjourn at once, which necessitated the filing of the motion on the part of defendants for time in which to prepare a motion for new trial. This motion was filed on the morning of the 28th of February, was granted and time given until March 18, in which to file said motion for new trial. The court then adjourned over to that day. On March 18 the motion for new trial was filed and presented to the court and overruled. Ninety days were given in which to prepare and file a bill of exceptions. According to this order, the defendants had until June 17 in which to file bill of exceptions.

"Counsel for the defendants urged the court stenographer while in the court room to rush the completion of the record in this case. He was also urged by letters

from counsel to complete the work at once. This evidence arrived at Clarksville on the night of April 20, by express, with collect charges amounting to $88.77, which was paid by defendants, and the package was delivered on April 21, 1918. One of the defendants' counsel resides at Fort Smith, and the other at Clarksville, and they had prepared all that part of the bill of exceptions which could have been prepared without the stenographer's notes, and on April 24 they met at Fort Smith and completed the bill of exceptions, which was completed by the stenographer in counsel's office, and brought back to Clarksville.

"Attorneys for these plaintiffs approached attorneys within four days after April 24, Reynolds, Ragon and Patterson, who represented the suitor, Pluna, in the trial of this suit, to secure their approval of the bill of exceptions, all of whom stated that the approval must be made by Judge J. H. Evans of Booneville, Arkansas, who was leading counsel for the plaintiff. In these conversations with said Ragon, Patterson and Reynolds, plaintiffs' attorneys had no knowledge that Judge Priddy would soon leave the State, and neither Patterson, Ragon nor Reynolds mentioned in said conversations the fact that Judge Priddy, who tried this case, would leave the State before the May term of the Johnson Circuit Court opened, and the plaintiffs now alleged that the said Judge Priddy did leave the State on May 2, 1918, and before said Johnson Circuit Court opened. These plaintiffs now charge upon information and belief that the said Ragon, one of the attorneys for Pluna, by reason of his being prosecuting attorney of the court, at the time of the above conversation, had knowledge that Judge Priddy would leave the State soon and would not hold said May term of court, but said Ragon did not communicate that knowledge to either of these plaintiffs' attorneys. The May term of the Johnson Circuit Court began on the first Monday in May, which was May 6. Attorney Charles Evans, son and law partner of J. H. Evans, was in the town of Clarksville some days before the opening of said May

term of court, and attorneys for these plaintiffs approached him, and spoke to him about the approval of the bill of exceptions, stating to him that it was completed, with the exceptions of binding together, and inquired about the whereabouts of J. H. Evans, and if he would be present in Clarksville during the May term of court, which convened the following Monday. Charles Evans stated that his father was expected to be in several different places, naming McAlester, Oklahoma City, and possibly other points, but that he would call at his home, and ascertain over the telephone and would inform attorneys of his father's movings. On Sunday, May 5, at noon, attorneys for these plaintiffs were informed for the first time that Judge A. B. Priddy, who had tried the case, had left the State to attend a Methodist General Conference at Atlanta, Georgia, and would not be present during the term of court. Attorneys for these plaintiffs made frequent calls on the telephone to Judge Priddy's office and home in Danville, in an effort to ascertain some definite information as to when he expected to return, but could not learn anything in regard to it. On the morning of May 9, Judge Evans appeared in the court room in Clarksville, and attorneys for these plaintiffs spoke to him regarding the bill of exceptions in this case. Paul McKennon, one of the attorneys in this case, stated to Judge Evans that he, McKennon, had the bill of exceptions in the Pluna case in his office. Judge Evans stated that he did not have time to inspect it then, and mentioned the absence on this date of Judge Priddy. Judge Evans stated that he had come in on an early morning train, with his wife, because of the sickness of his son, who was at a local hotel, and that he was leaving at noon for home with him. He stated that if the bill of exceptions was sent to him at Booneville he would inspect the same and return at once. At the time attorneys for the plaintiffs had no knowledge that Judge Basham would adjourn court during that week and did not know at that time and before he did adjourn it that he would adjourn the May term of the court before Judge Priddy's return

to the State of Arkansas. On the evening of said May 9 the said Paul McKennon made application to said Judge Basham and was excused from further attendance upon the court for that week and these plaintiffs and their attorneys had no knowledge or reason to suppose prior to the adjournment of said court by Judge Basham that said court would be adjourned before the return of Judge Priddy to the State. Attorneys for these plaintiffs in this case made frequent calls at Booneville during the entire week. On the morning of May 13 defendant's attorneys conferred at Fort Smith about the absence of Judge Priddy from the State, and during this conference made some additions to the bill of exceptions which were dictated to the stenographer and sent to Clarksville by express on the night of the 14th, and delivered to counsel on the 15th.

"In the meantime, counsel for these plaintiffs had wired Judge Priddy at Atlanta, inquiring about his return to the State of Arkansas, and informing him that there were important papers to sign. The bill of exceptions was sent to Judge Evans at Booneville on the 15th of May, and was returned to counsel with his refusal to approve it, dated May 18, and was received by counsel on May 22. Counsel for these plaintiffs in the meantime had reached Judge Priddy at his home on May 18, which was the first time communication had been established with him. Judge Priddy stated that he had been back from Atlanta a day or so, but had been at Magazine with his sick mother. He returned to Arkansas on the 16th of May. The bill of exceptions had been received from Judge Evans on May 22, and was taken to Fort Smith, where attorneys for these plaintiffs, after a conference, sent the bill of exceptions to Judge Priddy from Fort Smith by express, at noon on May 24. It should have reached him that night. Not hearing from him, attorneys for these plaintiffs called him over the telephone on May 27 and made inquiries. Judge Priddy stated that he had just found the package in the law office of his former law partner, and had signed and shipped it to

Clarksville that day. It should have reached Clarksville the following day, and not arriving, the express agent at Clarksville wired a tracer for it, and it arrived on May 31, and was filed on that day. Judge Priddy's signature to the bill of exceptions was made after the May term of court at Clarksville had adjourned, but the said bill of exceptions was prepared and ready for his signature before said term of court opened, it being the intention of counsel to submit the same to him, and to discuss any changes that might be suggested by opposing counsel during that term of court, and if Judge Priddy had been present to hold the term of court, or if he had been within bounds of the State during said term of court, the bill of exceptions would have been presented to him for his signature, and signed and filed before the adjournment of that term of court. Between April 25, the day on which the Pluna bill of exceptions was completed, and May 2, the day on which Judge Priddy left the State of Arkansas, plaintiffs' counsel believing that counsel for defendant Pluna and Judge Priddy both would be present and relying upon a practice frequently followed, to settle, sign and file bills of exceptions at the beginning of a term of court, when both parties would be present, and counsel for these plaintiffs not knowing that Judge Priddy would leave the State before the opening of said May term of court, and Judge Evans not being in Clarksville between April 25 and the opening of said court, did not present said bill of exceptions to the said Evans and Judge Priddy between said dates, relying upon the belief that said Evans and Judge Priddy would be present at said term of court, at which time said bill of exceptions would be signed and filed. As Judge Priddy did not return to the State before the May term of the court was adjourned, and as he was without power or authority to sign a bill of exceptions outside of the State, it was therefore impossible under the facts above stated to have this bill of exceptions signed and filed before the adjournment of the May term of the court, Judge Priddy not being in the State, and not having held a May term of court at

all. Plaintiff's counsel was not in the court room when Judge Basham entered an adjourning order of the May term of the court and did not know that Judge Basham would make an order adjourning that term of the court at that time.

"Plaintiffs state further that, due to the short period of time between the overruling of the motion for new trial and the opening day of the May term of court, attorneys for these plaintiffs had made unusual and extraordinary efforts to complete the bill of exceptions without delay; that the record in the case is very voluminous, containing 260 typewritten pages, and they were absolutely without knowledge of the intention of Judge Priddy to leave the State, and that this knowledge was first conveyed to them at noon on Sunday, May 5, before the opening of the court, the following morning, by Attorney H. H. Ragon, who represented Pluna in his suit, and that Attorneys Patterson, Ragon and Reynolds had each declined to inspect the bill of exceptions and to approve it. Plaintiffs state that by reason of the fact that the bill of exceptions was not filed until after the closing of the May term of court, they have been deprived of their right of appeal, and of having the case reviewed upon the exceptions made by them in the trial of the case, which said failure works a great injustice upon the plaintiffs in this court, and was due to no fault or negligence on their part.

"Plaintiffs further allege that by reason of the facts above set forth, and by reason of the absence of Judge Priddy from the State of Arkansas, during the May term of said Johnson Circuit Court, and by reason of the fact that the Supreme Court on motion of defendant in this case, struck from the transcript of the record in the Supreme Court the bill of exceptions in this case, the plaintiffs in this case are without fault or negligence on their part, being deprived of the right to a fair trial in this case.

"Plaintiffs herein allege that in the trial of said case in the circuit court, numerous harmful errors occurred,

depriving the defendants of their rights, and their property, without due process of law, and these errors are specifically set forth in the motion for a new trial filed in said cause in the circuit court, which motion for a new trial, setting up all said errors, is in words and figures as follows:" (Here followed the motion for a new trial in the law case.)

"The plaintiffs further allege that by reason of the absence of Judge Priddy from the State of Arkansas, and their inability to have the bill of exceptions signed before the adjournment of the May term of the Johnson Circuit Court, they have lost their right of review of said errors in a court of law. The said errors set forth in the above and foregoing motion for a new trial are manifest, and when said motion for new trial is considered in connection with the bill of exceptions, said errors are clearly shown. As before stated, the said bill of exceptions is hereto attached and made a part hereof, to the end that this court may see that harmful errors were committed against the rights of these plaintiffs in this action.

"By reason of the facts set forth, plaintiffs herein have lost their right to have said judgment reviewed in the court of last resort of the State, and plaintiffs therefore have no remedy at law, and are without remedy except in a court of equity.

"Plaintiffs further allege that they are advised that the defendant in this cause, being the plaintiff in the suit in the circuit court, will, unless restrained, proceed to a collection by execution and otherwise, of said judgment rendered in the circuit court. The Supreme Court of the State, on motion of the defendant in this case, as above set forth, struck out the bill of exceptions and affirmed the judgment in this cause of the circuit court. The defendant in this cause will, therefore, unless restrained, proceed to the immediate collection of that judgment to the great injury and harm of the plaintiffs in this action. The plaintiffs herein allege that the defendant in this action being plaintiff in the other action, is insolvent and

therefore the plaintiffs in this action will suffer irreparable injury and loss, unless a temporary restraining order is issued against said defendant in this action, restraining him, his agents and attorneys, from the immediate collection of said judgment at law.

"The Arkansas Anthracite Coal & Land Company further and specifically allege that the plaintiff in the lower court, Alex Pluna, being the defendant in this court, was not in the employ of the Arkansas Anthracite Coal & Land Company. The relation of master and servant did not exist between the defendant Alex Pluna and the Arkansas Anthracite Coal & Land Company. The Fernwood Mining Company was operating the mine and Alex Pluna was in the employ of the Fernwood Mining Company, but there was no contractual or other relation between the Arkansas Anthracite Coal & Land Company and Alex Pluna. The Arkansas Anthracite Coal & Land Company, therefore, specifically alleges that this judgment against said Arkansas Anthracite Coal & Land Company is a judgment based upon the existence of the relation of master and servant, between Alex Pluna and the Arkansas Anthracite Coal & Land Company, whereas in truth and in fact no such relation existed, and said Pluna was not at the time of his accident in the employ of the Arkansas Anthracite Coal & Land Company as the latter company was not operating said coal mine and had nothing whatever to do with the employment of Alex Pluna, and said Alex Pluna was not working for the Arkansas Anthracite Coal & Land Company, and was not employed by it at the time of his injury. The said Arkansas Anthracite Coal & Land Company, therefore, alleges that to permit the defendant Alex Pluna to recover in a judgment against the Arkansas Anthracite Coal & Land Company in the sum of $25,000 based upon the existence of the relation of master and servant, whereas in truth the relation of master and servant did not exist, would be to deprive the Arkansas Anthracite Coal & Land Company of its property without due process of law, contrary to and to deprive it of the equal protection of the

law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

"Premises considered, the plaintiffs herein pray that this court issue a temporary restraining order, restraining the defendant in this action, his agents and attorneys, from the issuance of any execution or other process on said judgment at law, until the further order of this court, and that at the final hearing hereof said temporary restraining order be made permanent.

"The plaintiffs further pray that at the final hearing of this cause the said judgment erroneously rendered in the circuit court be set aside and held for naught, and that a new trial by reason of the errors set forth in the motion for new trial be granted, and that these plaintiffs have all other and further relief to which they may be entitled in equity."

The case is here on appeal.

HART, J., (after stating the facts). The complaint in this case proceeds upon the theory that the plaintiffs herein had a meritorious defense to the suit in the law court against them and they asked for a new trial upon the ground of unavoidable accident. After a careful examination of the petition, which is set forth in full in the statement of facts, we are of the opinion that it fails to state facts sufficient to entitle the plaintiffs to a new trial in the law case. It is not enough that an inevitable accident has prevented the losing party from prosecuting an appeal based upon assignments of error occurring at the trial in the law case, but it must also clearly appear to the court that it would be contrary to equity and good conscience to allow the judgment to be enforced; else a court of equity declines to impose terms upon the prevailing party. *Johnson* v. *Branch,* 48 Ark. 538, and *Whitehill* v. *Butler,* 51 Ark. 341.

The complaint sets out the motion for a new trial and the bill of exceptions in the law case in order to show that the defendants therein had a meritorious defense to the action. We have not set these out for the

reason that if it be assumed that this is so we do not think that the defendants in the law case were prevented from obtaining a new trial or prosecuting their appeal by reason of inevitable accident or unavoidable casualty. In *Vallentine* v. *Holland et al.*, 40 Ark. 338, the court said:

"Courts of chancery will direct a new trial after a judgment at law, when the complainant can show, first, that his adversary had obtained an advantage that can not be conscientiously retained, as that a successful plaintiff had no cause of action, or an unsuccesful defendant had a meritorious defense; second, that his own conduct has been free from fault and unmixed with negligence; third, that, owing to some fraud, accident or mistake, not imputable to him or his attorney, he was not present at the trial, nor able to make his defense there; or if there, that he was prevented from moving for a new trial because the judges dispersed or the term lapsed before it could be made or disposed of; or that, on account of the existence of some other peculiar circumstance, he is without remedy at law. The subject is learnedly discussed in a note to 19 American Decisions, 609." See also *Jackson* v. *Woodruff*, 57 Ark. 599, and *Noe* v. *Layton*, 76 Ark. 582. Many other decisions of this court might be cited to the same effect, but the rule is so firmly established as to render a further citation of authorities unnecessary. The only difficulty is in the application of the principles to a given state of facts. The effect of our decisions is that where the losing party had a remedy at law by appeal or motion for a new trial and has lost it, without fault on his part, by causes which he could not control preventing him from prosecuting his appeal in due time, equity will grant him relief. It has been said that "unavoidable casualty" signifies events or accidents which human prudence, foresight and sagacity can not prevent."

It will be observed that "casualty or misfortune" that authorizes the granting of a new trial must be "unavoidable." The mere ordinary "casualty or misfor-

tune" is not sufficient. There must be some supervening and uncontrollable accident or casualty. Tested by this rule, the question is, were the plaintiffs by "unavoidable casualty or misfortune" prevented from prosecuting their appeal from the damage suit brought against them by Alex Pluna? The trial of the damage suit of *Alex Pluna* v. *Fernwood Mining Company* and *Arkansas Anthracite Coal & Land Company* for damages on account of a serious injury resulting from the alleged negligence of the defendants was concluded and a verdict reached on the 27th day of February, 1918, at 10 o'clock at night. The court indicated that it would adjourn at once, and on that account the defendants asked leave and were given until March 18, 1918, in which to file their motion for a new trial. The court adjourned to that day. On March 18, the motion for a new trial was filed and presented to the court and overruled. Ninety days were given the defendants in which to prepare and file a bill of exceptions. Pursuant to this order, the defendants would have had until June 17, 1918, in which to file a bill of exceptions had not a term of circuit court in which the case was tried commenced and ended before that time. The attorneys for the plaintiffs secured the stenographer's transcript of the evidence on April 21, 1918. One of the defendant's attorneys lived at Fort Smith and the other at Clarksville, Arkansas, where the trial was had. These attorneys met in Fort Smith on April 24th inst., and within four days thereafter they presented the bill of exceptions to local counsel of the plaintiffs at Clarksville. They stated to the attorneys for the defendants that Judge J. H. Evans of Booneville, Arkansas, was the leading counsel for the plaintiffs and that the bill of exceptions would have to be submitted to him for approval. Judge A. B. Priddy, the presiding judge at the trial in the law case and the regular judge, lived at Danville, Arkansas. The regular May term of the Johnson Circuit Court began on the first Monday in May, which was May 6, 1918. The attorneys for the defendants thought Judge Priddy would preside at this term of the court

and intended to secure his signature to the bill of exceptions during the term. Judge Priddy, however, left the State on May 2, 1918, to attend the General Conference of the Methodist Church, South, at Atlanta, Georgia. The May term of the circuit court of Johnson County was held by a special judge elected for that purpose. Court adjourned for the term without any request having been made to him to adjourn to a day certain in order that the bill of exceptions might be submitted to Judge Priddy for his signature and approval. The May term of court was adjourned on May 11, 1918, and the bill of exceptions was presented to Judge Priddy after his return to the State and within the ninety days given by him within which to prepare and file it. Upon appeal, this court held that a bill of exceptions filed after the adjournment of the suceeding term of court in which the case was tried was filed too late to become a part of the record. *Fernwood Mining Co. et al.* v. *Pluna,* 136 Ark. 107, 205 S. W. 822.

The complaint also alleges that counsel for the defendants presented the bill of exceptions to Judge Evans as soon as he appeared at the May term of the court. Judge Evans told them that he had only come there for the purpose of visiting and taking home, if possible, his son, who was sick, and that if they would send the bill of exceptions to him at Booneville he would promptly examine it.

It will be observed that no request was made to the presiding judge to adjourn court to a given day so that the bill of exceptions in the meantime might be presented to Judge Priddy for his approval and signature on his return. Neither did the attorneys for the defendant ask the attorneys for the plaintiffs to agree in writing upon the correctness of the bill of exceptions by endorsements thereon signed by counsel for the respective parties, to the end that agreed bill of exceptions might become a part of the record in the case as effectively as though approved and signed by the judge trying the case. See Act of April 28, 1911, page 192.

Counsel for the defendants earnestly insist that they had a right to rely upon Judge Priddy attending and presiding at the May term of the Johnson Circuit Court. This may be true, but it only shows that they were not guilty of culpable negligence but falls short of showing unavoidable casualty within the legal definition of these words. Defendants do not allege in their complaint that Judge Priddy promised them that he would sign their bill of exceptions at the May term of the circuit court. If he had done so and had left the State and remained away for such a length of time that they could not have procured his signature to the bill of exceptions this might have been unavoidable casualty or misfortune within the meaning of the legal definition of the words. Then, too, when the attorneys for the defendants in the law case found out that Judge Priddy would not be present at the May term of the court they might have asked the special judge to adjourn over to the end that they might get Judge Priddy to sign the bill of exceptions upon his return to the State, or failing to do this, they might have asked the attorneys for the plaintiff to sign an agreed bill of exceptions under the statute above referred to. The testimony had been taken at the trial and transcribed by the regular court stenographer and there is nothing in the record to indicate that attorneys for the plaintiff would not have signed the bill of exceptions if asked to do so. Nothing was done to mislead the defendants in the law case, and when all the allegations of the complaint are read and considered in the light of each other we are of the opinion that it can not be said that the defendants in the law case were prevented from obtaining the presiding judge's signature to their bill of exceptions by unavoidable casualty or misfortune within the legal definition of those terms.

It follows that the decree must be affirmed.

BROWN v. YUKON NATIONAL BANK.

Opinion delivered March 3, 1919.

1. BANKS AND BANKING—DRAFT—TITLE OF INDORSEE BANK.—Where a draft is indorsed to and deposited with a bank, and the amount credited to the holder's account, the bank becomes the absolute owner of the draft, and entitled to the proceeds in the hands of a garnishee.
2. GARNISHMENT — JUDGMENT FOR INTERVENER — INTEREST.—Where the court found for the intervener in garnishment, it was error to render judgment against plaintiff for interest upon the total amount in the garnishee's hands; the amount sued for and costs being the basis for computing interest.
3. COSTS—ALLOWANCE ON APPEAL.—On reversing a judgment at law, the court, under Kirby's Digest, § 970, must allow appellant his costs.

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

STATEMENT OF FACTS.

Walter Brown and W. T. Oglesby, a partnership under the firm name of Brown & Oglesby Cash Feed Company, filed a suit, by attachment in the circuit court against Yukon Mill & Grain Company, a non-resident corporation, for a balance alleged to be due on a contract of $210. The basis of the suit is that the plaintiffs bought from the defendant 860 barrels of flour at an agreed price to be shipped as directed. Subsequently a local representative of the defendant sold to a firm of merchants at Hot Springs, one car of flour containing 210 barrels and it was agreed between the plaintiffs and defendant that this flour should be taken out of the lot sold to the plaintiffs and that the defendant would pay them the sum of $1 per barrel advance price. A writ of garnishment was issued against the Peoples Savings Bank of Little Rock. The garnishee answered stating that it had in its possession $2,303.50 which came into its hands from a draft drawn by the defendant upon the plaintiffs. The Yukon National Bank filed an intervention in which it claimed it was the owner of said draft of $2,303.50.

The facts are that the Yukon Mill & Grain Company shipped a car of flour to plaintiffs under the contract above referred to and drew a sight draft on plaintiffs with bill of lading attached for the purchase price of a car of flour which was $2,303.50. The draft was drawn on the 26th day of September, 1917, and on the same day the draft was transferred by the Yukon Mill & Grain Company to the Yukon National Bank at Yukon, Oklahoma, and the amount of the draft was placed to the credit of the Yukon Mill & Grain Company. At the time the bank purchased the draft it did not know anything of any claim of the plaintiffs against the defendant. At that time and up to the date of the trial the Yukon Mill & Grain Company had over $100,000 on deposit with Yukon National Bank.

The court rendered judgment for the intervener, Yukon National Bank, against the Peoples Savings Bank, as garnishee, for $2,303.50, the amount of the draft and also rendered judgment against the plaintiffs in the sum of $135.88 interest on the amount of the draft from October 2, 1917, the date of the filing of this suit, to September 25, 1918, the date of the judgment.

W. D. Swaim and *Emerson, Donham & Shepherd,* for appellants.

1. Appellee paid nothing of value for the draft and was therefore not a *bona fide* purchaser for value. This case is identical with 60 Pac. 273; 106 N. W. 942; 48 So. 340; 67 N. W. 1105; 113 *Id.* 858; 150 U. S. 231; 54 S. E. 862; 77 *Id.* 452; 112 N. W. 999. The cases relied on by appellee, 122 Ark. 104; 101 *Id.* 266, and 107 *Id.* 601, do not apply to this case. The doctrine laid down in those cases is not questioned but do not settle this case, as here the burden shifted to appellants, after appellee had shown that it was the holder of the draft in question, to show that no consideration was paid for it by appellee. This was done by showing that at no time from the date the draft was deposited until its proceeds were attached was the balance of the Yukon Mill & Grain Company less than the

amount of the draft. Appellant here followed the course outlined in the Morrison case (60 Pac. 273), by taking the burden of proof to show that appellee paid no consideration for the draft, and therefore could not be a *bona fide* holder for value. This question is settled, by practically all the courts in this country, that where a bank takes a check or draft and merely deposits the proceeds to the depositor's credit without parting with any other consideration, that alone will not constitute it a *bona fide* holder for value. 8 C. J., p. 482, and cases *supra.* The court clearly erred in finding that appellee was a *bona fide* holder of the draft.

2. The court erred in rendering judgment against appellants for $135.88, interest on $2,303.50 from October 2, 1917, the date the $230, which was part of the proceeds of the draft, September 25, 1918, the date of the judgment of the lower court. If the court was correct in its decision that appellee was the *bona fide* holder of the draft and its owner, then, as the amount attached was only $230, appellants would not be liable in any sum exceeding 6 per cent. interest on $230 from date of attachment to the date of the judgment, with costs. 93 Ark. 609; 73 *Id.* 120. Clearly it was not appellant's duty to to see that the remaining proceeds of the draft were forwarded back to the owner, as this was the duty of the bank as agent of the owner. If any one should suffer on account of the negligence of the garnishee in forwarding the proceeds of the draft less the amount attached, it should be the garnishee or the appellee, as appellee could easily have taken steps to have the garnishee surrender this amount to it if it had been inclined to do so. If this court should find that the lower court was correct in holding that appellee was the owner of the draft, the case should be reversed and judgment entered against them for interest on the $230 at 6 per cent. from date of the attachment to date of judgment and that appellants recover of appellee the costs of this appeal.

Rose, Hemingway, Cantrell & Loughborough, for appellee bank.

Whether the Yukon National Bank was a holder for value or not is not the point. The draft was paid when presented to the drawee and the only question is to whom belonged the money that was attached. It is not disputed that the Yukon Mill & Grain Company took the draft and bill of lading to the Yukon National Bank and assigned both to the bank for the full value of the draft paid in the form of a credit on their checking account. This transaction was in the usual course of business and in good faith. The mill company and the bank intended that the bank should own the draft and its proceeds. The relation of creditor and debtor subsisted between them. 196 U. S. 283. The mill company was solvent and could have assigned the draft and its proceeds to any one it pleased, even without consideration, and the assignee could have held them against the world. The fact that the bank could have recovered of the maker if the draft was not paid is of no importance. 127 Ark. 149; 107 *Id.* 601; 15 Ga. App. 319. See also 182 Ill. App. 522; 7 Corp. Jur. 635. The obligation of the garnishee to collect the draft and remit the proceeds to the Yukon National Bank was entire. It could not collect a part only or remit only a part and discharge its obligation. The fund was entire; if part of it did not belong to the Yukon bank then no part of it did.

Plaintiffs caused their attachment to be wrongfully levied on property of the Yukon bank. The bank holding the attached fund appeared in the cause with plaintiff and recited the funds in its hands and how it was acquired and held it subject to the order of court in the proceeding plaintiff was conducting. It was the duty of plaintiff to secure such court orders and so mould his proceedings that his wrongful attachment would not trespass on the rights of others to their damage. Damage to the bank is undenied and the amount undisputed. It was caused by the wrongful proceeding of plaintiffs and they should be made to respond. 66 Ark. 175-178; 62 *Id.* 138; 61 *Id.* 454. If we are wrong in this view we consent

to a remittitur in such amount as to the court seems correct, but the costs of the lower court and on appeal should be taxed against appellants.

HART, J., (after stating the facts). The court was right in holding that the money garnished in the hands of the Peoples Savings Bank belonged to the intervener, the Yukon National Bank, and in this respect the case is ruled by *Cox Wholesale Grocery Co.* v. *The National Bank of Pittsburg, Kansas,* 107 Ark. 601. In that case it was held that where a bank receives upon deposit a draft indorsed without restriction and gives credit for it to the depositor as cash in a checking account, the bank becomes the absolute owner of the draft so deposited. The effect of crediting the proceeds is simply to establish the relation of debtor and creditor between the bank and the depositor. The cases of *Sanders* v. *W. B. Worthen Co.,* 122 Ark. 104, and *Southern Sand & Material Co.* v. *Peoples Savings Bank & Trust Co.,* 101 Ark. 266, and other cases relied upon by counsel for the plaintiffs, have no application to the facts of the present case. The question of whether the bank was a *bona fide* holder of the draft for value so as to be protected against infirmities therein, is not involved in the present case. The maker of the draft is not asserting that it was procured by fraud or that there is any infirmity in it. The fact that the maker of the draft might interpose a defense against the bank when sued on the paper does not impair the negotiability of the draft. The Yukon Mill & Grain Company transferred the draft to the Yukon National Bank. The draft was a negotiable paper and the title to it passed to the bank before the writ of attachment and garnishment in this case was issued. Hence so far as the plaintiffs and garnishee are concerned, the Yukon National Bank had a right to the proceeds of the draft.

The court erred, however, in rendering judgment against the plaintiffs for interest on $2,303.50, the full amount of the draft from October 2, 1917, the date of filing the suit, to September 25, 1918, the date of the judgment.

The amount sued for by the plaintiffs was $210 and the costs amounted to only $20. Therefore, interest at the rate of 6 per cent. should have been allowed only on the sum of $230 from October 2, 1917, to September 25, 1918, which would amount to $21.40. Therefore the court should have only rendered judgment for this amount.

For the error in not doing so, the judgment must be reversed. But, inasmuch as the case has been fully developed, judgment will be rendered here against the plaintiffs in favor of the intervener for that amount. This will carry the cost of the appeal. Section 970 of Kirby's Digest provides that if the judgment be reversed, the appellant shall recover his costs. This is an action at law and this court has no discretion in the matter of adjudging costs when it reverses the judgment. *American Soda Fountain Company* v. *Battle,* 85 Ark. 213.

It is so ordered.

BRODERICK *v.* McRAE BOX COMPANY.

Opinion delivered March 31, 1919.

1. FRAUDS, STATUTE OF—SALE OF GROWING TREES.—A sale of growing trees is within the statute of frauds, and must be evidenced by a writing.
2. EVIDENCE—RESERVATION OF TIMBER.—In the absence of fraud or mistake, parol evidence is inadmissible to show that standing timber was accepted when a warranty deed was executed.
3. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—Clear, unequivocal and decisive evidence is necessary to reform a written instrument on the ground of fraud.
4. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.—Where, before the execution of a warranty deed, the vendor informed the vendee that the timber on the land had been previously sold, this put the vendee on inquiry as to the rights of the parties who had purchased the timber.
5. VENDOR AND PURCHASER — NOTICE — SUFFICIENCY OF EVIDENCE.—Only a preponderance of evidence is required to establish actual notice to a vendee of the rights of a third person.

Appeal from White Chancery Court; *J. E. Martineau,* Chancellor; reversed in part; affirmed in part.

STATEMENT OF FACTS.

Thos. E. Broderick brought this suit in equity against the McRae Box Company, Jim K. Hale, E. T. Hall and S. M. Hall, to restrain them from cutting and removing timber from the 80 acres of land described in the complaint and, also, to account to him for the value of the timber already cut.

E. T. and S. M. Hall filed a separate answer to the complaint. They stated that they had sold the land described in the plaintiff's complaint to the plaintiff and that the gum timber on the land was excepted by them from the sale; that the plaintiff was informed by them at the time he purchased the land that they had already sold the gum timber.

The McRae Box Company filed an answer which contained a general denial of the allegations of the complaint. The question of the jurisdiction of the chancery court to try the cause was raised and all the parties to the suit filed a written stipulation in which they agreed that the cause might be heard and determined in the chancery court.

Thos. E. Broderick testified for himself. According to his testimony, Dr. Hall told him that he had sold the hickory timber on the land, but did not tell him that he had sold the gum timber on it. There was nothing said by Dr. Hall, or anyone for him, about excepting the gum timber from the sale. A warranty deed was executed by Dr. E. T. Hall and by his wife, S. M. Hall, to Thos. E. Broderick for the land described in the complaint. The deed contained a general covenant of warranty and did not contain any exceptions or reservations of the timber on the land. Broderick went into possession of the land under his deed and afterwards a quantity of gum timber was cut and removed from the land by Mr. Hale for the McRae Box Company. The plaintiff also introduced in evidence the warranty deed from Hall and wife to him for the land in question.

Tom Hall, a son of the defendants, E. T. and S. M. Hall, testified for the defendants. According to his tes-

timony he showed the plaintiff the land and told him that the timber on it had been sold and that the purchaser had until some time in December, 1918, to cut and remove it from the land.

According to the testimony of E. T. Hall, one of the defendants, he told the plaintiff that the timber on the land had been sold to R. B. Hale. Hall first sold the hickory timber on the land to Hale by a written contract and in it, it was provided that Hale should have until December 1, 1918, to cut and remove the timber. Subsequently he sold to Hale all the other timber on the land by a contract in writing, and provided in it that Hale should have until the 30th day of December, 1918, to cut and remove the timber. Both of these timber contracts were executed in 1917. The deed from Hall to Broderick was executed in March, 1918. Mrs. S. M. Hall was present when Dr. Hall and Mr. Broderick made the contract for the sale of the land. She stated that her husband told Mr. Broderick that the timber on the land had already been sold and that the purchaser had a certain time in the future within which to cut and remove the timber.

In rebuttal G. W. Treece testified that he bought from Dr. Hall the land south of the land in question and that nothing was said to him about any timber on the land having been sold to Hale or anyone else. The land purchased by Treece from Dr. Hall was a part of the land described in the timber contract from Hall to Hale.

Broderick again testified in rebuttal and denied that Dr. Hall had said anything to him whatever about the timber on the land having been sold by him previously to the sale of the land.

The chancellor found the issues in favor of the defendants and dismissed the complaint for want of equity. The plaintiff has appealed.

John D. DeBois, for appellees.

1. The positive testimony of E. T. Hall shows that Broderick was advised of the two timber sales made by him to R. B. Hale at the time he purchased and that he

purchased subject to the two timber deeds or contracts held by R. B. Hale. Being advised as to the sale of the timber and having stated that he understood it, he is estopped to afterwards claim that his deed fails to recite such reservation. 37 Ark. 47-53; 71 *Id.* 31-35.

2. The two timber deeds show a sale of the hickory timber to R. B. Hale and that he had until December 1, 1918, to take the timber from the land. The other or second contract at Beebe, dated September 27, 1917, was a timber sale of all the other timber to R. B. Hale and that the purchaser had until December 30, 1918, to cut and remove it. The written contracts were deeds and the courts of equity will enforce them. Broderick knew of the deeds or contracts at the time he bought and cannot complain.

3. The statute of frauds must be pleaded to avail. 71 Ark. 302; 96 *Id.* 505. The facts warranted the chancellor in dismissing the cause of action.

John E. Miller and *C. E. Yingling,* for appellant.

1. The defendants plead a parol reservation of standing and growing timber. Even if the contracts made with Hale are *bona fide* and were outstanding at the time, still they did not vest the title to the timber in him, and he or his vendee would be liable for any timber cut and removed after the execution and delivery of the deed. 109 Ark. 230. No parol condition, reservation or defeasance can be proved where the deed is absolute on its face. 109 Ark. 230; 29 *Id.* 489; 41 *Id.* 293; 8 R. C. L. 1093; 3 Jones on Ev. 367; 10 Ark. 13; 123 *Id.* 18; 110 *Id.* 63; note Ann. Cases 1915 D, 865; 74 Mich. 183; 16 Am. St. 621.

2. No mistake in the execution of the deed was placed, nor does the evidence show any mistake in the deed. The effect of the decree below is to engraft upon the deed a parol reservation of the gum timber. This was error. 2 Pom. Eq. Jur. (4 ed.), 1756-7; 75 Ark. 72; 102 *Id.* 334; 132 *Id.* 227.

HART, J., (after stating the facts). We think that the court erred in dismissing the complaint of the plain-

tiff so far as the defendants, E. T. and S. M. Hall, are concerned. It is settled in this State that growing trees or standing timber are part of the realty, and that consequently a contract for the sale thereof is within the statute of frauds and must be evidenced by a deed or other instrument in writing. *Graysonia-Nashville Lumber Co.* v. *Saline Development Co.,* 118 Ark. 192; *King-Ryder Lumber Co.* v. *Scott,* 73 Ark. 329, and *Kendall* v. *J. I. Porter,* 69 Ark. 442.

It has been frequently said that the general rule that parol evidence cannot be received to modify or vary a written contract arises from the presumption that the parties place their agreement in writing to avoid the consequences flowing from defects of man's memory and the prejudice which might result from the testimony of interested witnesses.

It may be said in this connection that contracts are frequently made which are independent of the written contract, as was the case in *Kimbro* v. *Wells,* 112 Ark. 126. They may be established by parol evidence because being collateral to or independent of the written contract, it was not the intention of the parties to include them in the writing. The value of a written contract largely depends upon the credit to be given it, so that it cannot be modified or varied by proof of facts leading up to the contract itself or occurring at the time of its execution.

In the application of these principles to the facts of the present record, it may be said that all the articles of agreement between Dr. Hall and Broderick for the sale of the land were merged in and extinguished by the subsequent deed thereto between the parties. The deed in the absence of fraud or mistake is the final contract between the parties and cannot be varied or modified by parol evidence. In the application of this rule, this court has held that an oral argreement between the vendor and purchaser of land made at the time of the execution of the deed to the effect that crops growing on the land shall be excepted from the conveyance and remain the property of the vendor is of no effect and may not be proved

by the vendor. *Gibbons v. Dillingham et al.,* 10 Ark. 9, and *Gailey* v. *Ricketts,* 123 Ark. 18. So, too, it was held in *Hardage* v. *Durrett,* 110 Ark. 63, that parol evidence is not admissible to show that a covenant against encumbrances was not intended by the parties to apply to a particular encumbrance, in the absence of a question of fraud or mistake, and when no exception to that effect is contained in the deed itself. Therefore, it was incompetent as far as the defendants, E. T. and S. M. Hall, are concerned to prove by parol evidence that the standing timber had been excepted from the sale at the time it was executed.

Again it is insisted that this exception was left out of the deed by the fraud of the plaintiff. It is true that Hall and his wife both testified that this was left out of the deed at the suggestion of Broderick, but Broderick denies it in positive terms and he is corroborated by another witness who purchased some of the land embraced in the timber contract and who stated that the timber was not excepted when he purchased the land. Without entering into a detailed discussion of the evidence on this point, we are of the opinion that the fraud was not established by that clear, unequivocal and decisive evidence held necessary to reform a written instrument upon the ground of fraud. *Welch* v. *Welch,* 132 Ark. 227.

The court, however, was right in dismissing the complaint so far as the McRae Box Company and Hale were concerned. Prior to the execution of the deed to the land from Hall to Broderick, Hall, by a written contract, sold and conveyed the timber to a third person. According to the testimony introduced for the defendants, McRae Box Company and Hale, Broderick was informed by his vendor before the execution of the deed by the latter to the former that the timber had been sold. This was actual notice to Broderick and put him on inquiry as to the rights of the parties who had purchased the timber. *Kendal* v. *J. I. Porter Lumber Co.,* 69 Ark. 442; *Collins* v. *Bluff City Lumber Co.,* 86 Ark. 202, and *Weaver-Dowdy Co.* v. *Martin,* 94 Ark. 503.

It is true that Broderick denied that Hall told him that he had sold the timber at the time he made the contract with him for the sale of the land; but the testimony as to notice need only be established by a preponderance of the evidence. We are of the opinion that a preponderance of the evidence establishes the fact that Broderick had actual notice that the timber had been sold at the time he made the contract with Hall for the purchase of the land and the deed therefor was executed to him.

It follows that the chancellor was right in dismissing the complaint in so far as the defendants, McRae Box Company and Hale were concerned and the decree as to them will be affirmed.

For the reasons given above, the court erred in dismissing the complaint as to the defendants, E. T. and S. M. Hall and for that error the decree will be reversed and the cause remanded for further proceedings in accordance with the principles of law laid down in this opinion.

LIGHT v. SELF.

Opinion delivered March 24, 1919.

1. COURTS—TERMS—ADJOURNMENT.—Where the county court entered an order that "court adjourn until called by the judge," it cannot thereafter validate an order entered during adjournment by amending the order of adjournment so as to make it read: "The court will suspend until tomorrow and remain open until the business of the term is completed," since the court was not in session at such time.
2. HIGHWAYS—ROAD DISTRICT—PROCEEDINGS.—An order of the county court, under Acts 1915, p. 1400, creating a road improvement district, is void.
3. CERTIORARI—DELAY.—Where an order creating a road improvement district was entered on February 7, 1918, the circuit court did not abuse its discretion in quashing the proceedings establishing the district upon petition for certiorari filled September 30, 1918, by owners who were contesting the assessments where the amount of their assessments had not been finally settled; the owners not being chargeable with unnecessary delay.

Appeal from Greene Circuit Court, First Division; *R. H. Dudley,* Judge; affirmed.

D. J. Beauchamp, W. E. Hemingway, G. B. Rose, D. H. Cantrell and *J. F. Loughborough,* for appellants.

1. The *nunc pro tunc* order was valid at least to the extent of setting aside the entry made by the clerk as of January 9. All courts have the inherent power to correct their records so as to make them speak the truth and where the judge knows that the record contains a false or erroneous recital it is within his power and his duty to correct the record and make it speak the truth. It was a matter within his own knowledge. The petition to set aside the order was in apt time and properly overruled. 134 U. S. 136, 141; 84 Pac. 530; 85 *Id.* 594; 95 N. C. 471; 45 S. E. 396; 7 Cush. 282-5; 37 Me. 230; 53 Md. 179; 30 *Id.* 78; 40 Ark. 224; 75 *Id.* 12. The court was justified in substituting for the order, properly set aside, another order. 75 Ark. 12. *Without an adjourning order the term continued from day to day* as long as the business required. Kirby's Digest, § 1356. No order is necessary to keep the court in session but one is necessary to end the term. 78 N. W. 602; 21 N. E. 1039; 37 Pac. 1066; 7 Kan. 386; 110 Pac. 493; 47 Tex. 90; 1 Wis. 156; 8 Atl. 822; 53 Barb. 442; 89 Pac. 267; 113 *Id.* 401; 97 Mass. 214; 15 C. J. 231 F. 234 B.; 1 Freeman on Judg., § 90; 21 N. E. 1039. If the original entry stands, the term was kept open and the court was in session. Under the law, *supra,* the court stood adjourned from day to day and our statute fixes the hours within which it could properly convene. During the whole period there was a court in session; the term was open and the action taken was not *coram non judice.* 21 N. E. 1039; 78 N. W. 602; 97 Mass. 214; 113 Pac. 401; 110 *Id.* 493-6; 65 Fed. 433.

2. Upon a correct state of the record it appears that the county court was in session, but no evidence was taken with respect to the assessments and they were held to be void as the result of holding the organization of the district void, and the judgment should be set aside and

cause remanded for further proceedings; the judgment quashing the formation of the district should be set aside, as also the judgment setting aside the correction of the record, and that the formation of the district should be approved and the correction of the record permitted to stand. Cases *supra.*

Huddleston, Fuhr & Futrell, for appellees.

1. The circuit judge found that the county court did not make the *nunc pro tunc* order and properly denied the petition to make it. While a court has inherent power to correct its record by *nunc pro tunc* order to make it *speak the truth,* it cannot so amend it as to make it speak what it did not speak, but ought to have spoken. 93 Ark. 234; 118 *Id.* 593; 45 *Id.* 240; 1 Black on Judg. (2 ed.), § 156; 23 Cyc. 873. Appellants are bound by the judgment of the lower court on the facts. 75 Ark. 12. The court having found against them on the application for *nunc pro tunc* order the original order of January 9 remains in full force. 82 Ark. 188. An adjournment, unless it is to some day certain, constitutes an adjournment for the term. 203 S. W. 707. The old common law rule that a court's term was considered as of one day and continuously in session until final adjournment has been changed by our statutes. 118 Ark. 416; 203 S. W. 704, etc.; Kirby's Digest, § 1531. The cases cited by appellants are from States following the old common law rule changed in Arkansas.

2. The assessments made here are void. Act No. 338, Acts 1915, § 9. The record shows that certain material, substantive acts were done April 17, when the court had no jurisdiction. The assessors also failed to assess all the land in the district and have duplicated assessments on some of the lands and no proper notice was published. Only county roads were to be improved, not city and town streets. Acts 1915, No. 338, § 7. There was also a material change in the route of the road after the district was created.

McCULLOCH, C. J. Appellants are commissioners of a road improvement district, the legal existence of which depends upon the validity of an order entered on the records of the county court of Greene County February 7, 1918, purporting to create the district pursuant to the terms of Act No. 338 of the General Assembly of 1915. Appellees are owners of real property within the territorial boundaries of the district and they assail the validity of the proceedings on the ground that the county court was not in session on the day which the record shows the order was made.

According to the record before us, the county court convened on the first Monday in January, 1918, the day prescribed by law, and remained in session until the 9th day of January, when an order was entered in the following words: "It is ordered by the court that the court adjourn until called by the judge." This record was signed by the presiding judge of the court. There were no further proceedings in the court, and, according to the record, no other session of the court was held until February 7, 1918, when the order was entered creating this road improvement district.

Appellees thereafter appeared in the county court and contested the assessments of benefits, and appealed from the order of the county court approving the assessments, and also presented to the circuit court a petition for *certiorari* for the purpose of bringing up the records of the county court and quashing the same on the ground that those records disclosed the fact that the county court was not legally in session on the day the proceedings were had creating the improvement district. During the pendency of these proceedings in the circuit court, the county court at a session held on October 26, 1918, entered an order correcting the former entry made on January 9, 1918, concerning the adjournment of the court so as to make that order read as follows: "The court will suspend until tomorrow and remain open until the business of the term is completed."

Appellants filed an answer to the petition and the matter was heard by the court on the pleadings and oral testimony of the county judge and the clerk of the county court, which in substance showed that when business of the county court was suspended on January 9, 1918, there was no specific order made by the judge, but the judge testified that his intention was that the court should remain in session from day to day until the business of the court was completed. The circuit court, on the final hearing, quashed the proceedings on the ground that the county court was not legally in session on the day the order was made creating the district. In other words, the court held that it was a vacation order, which is not authorized by statute.

The contention of learned counsel is that the rule still prevails here, according to what is said to be the common-law rule on the subject, that where a court meets at the proper time and place specified by law the term continues until the beginning of another regular term, which breaks the continuity, or until there has been an affirmative order of the court adjourning without day or to a specified day. Such, indeed, was the common-law rule, which was a part of the fiction that a term of court, however long extended, was but a day, and that all judgments and orders of the court were of that same day. We have expressly repudiated the common-law rule as being inconsistent with our statutes so far as concerns the theory that the term is but one day. *Ex parte Baldwin,* 118 Ark. 416; *State ex rel.* v. *Canal Construction Co.,* 134 Ark. 447, 203 S. W. 704.

In *Ex parte Baldwin, supra,* we said: "The ancient rule was that a term of court was considered as of one day and the court deemed to be continuously in session from beginning of the term until the final adjournment. * * * Our statute manifestly contemplates different days of the term of court, but it does not take account of parts of days, and even if the court announces an adjournment it has the power to reconvene on the same day for the purpose of transacting business."

In *State ex rel.* v. *The Canal Construction Co., supra,* we said: "Under our statutes certain times and places are fixed by law to hold court. * * * When the court adjourned to a day certain all persons interested had the right to remain away until the day fixed by the court to convene again, and the judge could not before that day arrived convene the court and proceed with the dispatch of the cases and other matters pending therein. The fact that by a statute in this State courts must be held at fixed times and places raises the implication that courts cannot assume a vagrant character and hold their sessions at other times or places than those provided by law."

The county court is a court of record and our statute regulating the procedure in such courts provides for what are termed adjourned sessions of court, and also for special terms of court. The statute authorizing adjourned sessions reads as follows:

"Special adjourned sessions of any court may be held in continuation of the regular term, upon its being so ordered by the court or judge in term time, and entered by the clerk on the record of the court." Kirby's Digest, section 1531.

This statute is manifestly in conflict with the common-law rule concerning the continuity of a term of court, and necessarily changes the common-law rule, for, if that rule still prevails making terms of court continue from day to day without an order of court, then it is surplusage for the lawmakers to require an adjourned session in continuation of the term to be expressly ordered by the court and entered on the record.

The statute is not declaratory of the common-law rule but operates as a restriction of that rule by requiring adjourned sessions of court to be specifically ordered and the order entered on the record.

The case before us does not involve an instance where the county court suspended business without a specific order of adjournment and resumed its function the next day, but the facts of the case are that the court met on a distant date—after the intervention of twenty-nine

days without convening the court in the meantime—and attempted to continue the business of the term. It is immaterial whether we consider the order originally entered by the clerk or the one subsequently entered *nunc pro tunc* by the court. One of them recites that the court was adjourned "until called by the judge," and the other recites that the court suspended business until the next day to "remain open until the business of the term be completed." It does not appear that the court met the next day, or any other day, until February 7, 1918, the day on which the order creating this district was entered.

To uphold the action of the judge as being that of the court in session would be to approve and legalize the practice which we expressly condemn in *State ex rel.* v. *Canal Construction Co., supra,* and adhere to a rule which would permit the court to "assume a vagrant character and hold its sessions at other times or places than those provided by law," for, if that practice is to be followed, there would be no notice to litigants when court is to be held so as to afford them an opportunity to attend. To allow such a rule is also to ignore the statute which provides that an adjourned session of the court must be definitely specified by an order entered on the record in term time; or, in other words, while the court is legally in session.

It is unnecessary to inquire what the rule is in other States, for we think that our statutes on the subject settle the question against the contention of counsel for appellants.

The court not being in session, it follows that the order creating the district is void, and the only remaining question is the one earnestly argued by counsel that the case falls within the rule that *certiorari* is a matter of discretion and not one of right, and that the relief should be denied unless the proceeding is invoked without delay after the entry of the judgment or order sought to be quashed.

That rule has been applied by this court, as contended for by counsel, in several cases, notably in *Black*

v. *Brinkley,* 54 Ark. 372, and *Johnson* v. *West,* 89 Ark. 604. Whether the rule is applicable to a case of this sort, involving the validity of an improvement district which necessarily results in the levying of special taxes on real property, we need not stop to inquire, for we are of the opinion that the trial judge did not abuse his discretion, under the circumstances, in granting the relief sought. The record shows that the petition for *certiorari* was filed in the circuit court on September 30, and it was heard at the October term, 1918. In the meantime appellees were contesting their assessments, and as a part of their contest brought up for review the county court's record establishing the district. The amount of assessments of benefits had not been finally settled when the present attack on the validity of the organization was begun. We are of the opinion that appellees are not chargeable with unnecessary delay, or, at least, we will not disturb the finding of the circuit court to that effect.

Affirmed.

WOOD, J., (dissenting). The county court of Greene County convened on Monday, January 7, 1918, the day fixed by law, for the commencement of one of the regular terms of that court. Section 1356, Kirby's Digest.

Petitions for the creation of Road Improvement District No. 1 of Greene County, Arkansas, were pending before the court. The court, as shown by an order, entered on its record, consolidated and treated these petitions as one, and fixed January 18, 1918, as the day for the hearing of the petition. On January 9, 1918, when the business of that day was closed, the judge of the court "walked off the bench and made no order at all," adjourning court. "It was the intention that the court should remain open until the work was completed." There was a record

Note.—The court in this case did not consider whether section 40 of Act 338 of 1915 was applicable. The section was not called to the court's attention.—(Rep.)

entry as of January 9, 1918, as follows: "It is ordered by the court that court adjourn until called by the judge." The county court afterwards entered a *nunc pro tunc* order so as to make the adjourning order of January 9 read as follows: "This court will suspend until tomorrow and remain open until the business of this term be completed."

It does not appear that there were any formal orders opening and adjourning the court from day to day from January 9 until January 18, the day set for hearing the petition for the creation of Road Improvement District No. 1 of Greene County, but there is in the bill of exceptions an order of the county court entered of record as of January 18, 1918, which recites as follows: "Court met pursuant to adjournment. * * * On this day is presented to the court the petition of Jason L. Light *et al.;* also, the petition of J. W. Seay *et al.;* also, the petition of the Security Bank & Trust Company *et al.;* and the petition of J. A. Newberry *et al.,* all praying for the establishment of a road improvement district," *et cetera.* "Honorable Jeff Bratton asks that the hearing of the petitions be continued until the 1st day of February, 1918, which was by the court granted, and the cause is continued until the 1st day of February, 1918."

There is also an order showing that the court met on the first day of February, 1918, "pursuant to adjournment," and the hearing of the cause was continued on that day until the 7th day of February, 1918, on which day the county court entered an order establishing Road Improvement District No. 1 of Greene County.

The undisputed testimony of the clerk and his deputy, one of whom entered the purported adjourning order of January 9, *supra,* shows that they did not know whether the court actually made the order or not. The testimony of the judge, himself, shows that no such order was made; and, indeed, the undisputed testimony of the judge shows that no adjourning order of any kind was made by the court on the 9th day of January, 1918.

The rule, as established by our own and the authorities generally, is that courts of record have power by an order *nunc pro tunc* to make their records reflect the facts as they actually took place; in other words, to make their records speak the truth. But they cannot, by *nunc pro tunc* orders, cause their records to show what was not actually done. "A *nunc pro tunc* order does not create, but only speaks, what has been done." *Cox* v. *Gress,* 51 Ark. 231; *Gregory* v. *Bartlett,* 55 Ark. 30; *Lourance* v. *Lankford,* 106 Ark. 470; *Citizens Bank of Mammoth Springs* v. *Commercial Bank,* 118 Ark. 271.

The county court, under the undisputed evidence, properly set aside the order entered by the clerk, to-wit: "That court adjourned until called by the judge." But the court had no power to substitute for this order one which the court intended to, but did not, in fact, make.

Therefore, the facts of this case as shown by oral testimony and the record entries of the county court as set forth in the bill of exceptions are: That the county court of Greene County, by an order entered on its record, set for hearing January 18, 1918, certain petitions that were pending before the court praying for the establishment of Road Improvement District No. 1 of Greene County, Arkansas; that after making the above order on the 9th day of January, 1918, the same being a day of the regular January term, the judge left the bench without making a formal order adjourning court; that on Friday, January 18, 1918, the court "met pursuant to adjournment," and the cause presented by the petitions for the creation of Road Improvement District No. 1 of Greene County, was called and on motion of the attorney for the remonstrants, was continued until February 1, 1918; that on the 1st day of February, 1918, the hearing of the cause was continued until the 7th day of February, 1918; that on February 7, 1918, the county court of Greene County convened pursuant to adjournment and entered a judgment establishing the district above named.

On the 30th day of September, 1918, the appellees herein filed in the circuit court of Greene County, a peti-

tion for writ of *certiorari,* alleging in substance that the county court was not legally in session, and therefore had no jurisdiction to make the order establishing Road Improvement District No. 1 of Greene County.

The appellants responded denying the allegations of the petition. At the hearing the facts as above set forth were developed and the court entered the judgment quashing and setting aside the judgment of the county court establishing Road Improvement District No. 1 of Greene County.

First. I have been thus careful to state the facts in detail for the reason that in the opinion of the majority of the court, no notice is taken of the fact that prior to January 9, 1918, the county court had set January 18, 1918, as the day for the hearing of the cause pending on the petitions for the creation of Road Improvement District No. 1 of Greene County. An accurate statement of the facts is a prerequisite to a proper application of the law. Consideration of the above important fact, in my opinion, is essential to a correct decision of this cause, for it shows conclusively that the business of the January term of the Greene County Court was not completed at the close of the 9th of January, when the judge left the bench without formally adjourning the court. The fact that the hearing of the cause for the creation of Road Improvement District No. 1 was set for January 18, shows that the business before the court required that the court meet on that day. This fact also demonstrates unmistakably, and the county judge himself testified, that it was the intention of the court when the judge left the bench on the 9th day of January, 1918, not by that act to finally end the term, but it was the intention that the court should again be in session during that term at least on the 18th day of January succeeding.

If the judge of the county court through inadvertence, or because he may have considered it unnecessary, failed to enter a formal order adjourning the court on that day to the next day, and from day to day until January 18, 1918, the day previously designated for the hear-

ing of the cause pending before the court, or did not adjourn from the 9th until the 18th, did such failure cause the term of the court to lapse? That is the precise question first presented by the undisputed facts of this record. The county judge in this connection testified:

"Q. On the 9th day of January, 1918, you had in your court for hearing this Road Improvement District No. 1 to take place on the 18th day of January, didn't you?

"A. I don't know whether it was on the 9th or not, but it was the 18th that it was to come up again, I know.

"Q. And I believe you stated that you were pretty positive that when the work on the day of the 9th, if that was the proper day, was completed you simply got up and went out without making any order for adjournment?

"A. That is the best of my memory."

The record entry, as before stated, shows that the court had entered an order setting the 18th day of January, 1918, for hearing the petitions for the creation of Road Improvement District No. 1 of Greene County. This action of the court in setting the cause, and nonaction in merely failing to announce an adjournment or recess in the regular session from the 9th to the 18th day of January, as disclosed by the testimony, taken together, was but tantamount to an adjournment or recess of such regular session of the court from the 9th to the 18th of January, and on the latter date there was an order entered of record continuing the cause until the 1st of February, 1918, which in effect was an adjournment of the court for the regular term to a special adjourned term to be held on the 1st of February, 1918.

In *Ex parte Baldwin* the circuit court of Sevier County was in regular session of the January term, 1915, and on the 5th day of February, 1915, there was a record entry as follows: "Ordered that court adjourn until .....," and immediately following was the entry: "Ordered that court adjourn until Thursday morning, March 4, 1915." Intervening these dates there was a regular term of the circuit court in another county.

The question was whether or not the January term of court lapsed. We held that the record showed an adjournment on the 5th day of February to the 4th day of March, 1915, and that inasmuch as a definite day was fixed in the adjourning order the intervening regular term in another county did not cause the regular January term of the Sevier Circuit Court to lapse. Although the first adjourning order left the date blank, the second adjourning order made on the same day supplied the date, and we treated the record as showing an order of adjournment made on the 5th day of February until March 4, 1915. In that case we said: "Our statute manifestly contemplates different days of the term of court, but it does not take account of parts of days and even if the court announces an adjournment, it has power to reconvene on the same day for the purpose of transacting business." *Ex parte Baldwin,* 118 Ark. 416.

In *State ex rel. Hall* v. *Canal Construction Co.,* 134 Ark. 447, the county court of Poinsett County on the 5th day of October, 1914, entered an order adjourning the court until the 28th day of October, 1914. The regular term of the probate court of Poinsett County intervened these dates. Instead of meeting on the 28th day of October, the presiding judge attempted to convene court on the 26th day of October, and on the latter date made the order which was called in question. We held under these facts that the county court may adjourn to a fixed day and that when the court has done so it can not prior to that day reconvene the court. In this case we said: "When a court adjourns to a distant day and does not reconvene the same day the functions of the court cease after the expiration of the day on which the order of adjournment is made until the day fixed for reconvening."

The undisputed facts of the present record, as I have set them out in detail above, unquestionably in effect show an adjournment, or rather, recess, in the regular session of the county court of Greene County from the 9th to the 18th of January, 1918, on which latter date the court reconvened and by appropriate order continued the

cause, which in effect adjourned the court for the regular term to February 1, a special day, and on that day again to February 7 and on the latter day, February 7, 1918, convened "*pursuant to adjournment,*" and entered judgment establishing the district. Applying the doctrine of the above cases to the facts of this record, it appears to me that the county court of Greene County was in due and regular session, pursuant to previous orders of adjournment, on the 7th day of February, 1918, and had jurisdiction to render the judgment establishing Road Improvement District No. 1 of Greene County. The circuit erred in holding otherwise.

Second. But I further maintain that even if the 18th of January had not been set for the hearing of the petitions for the creation of Road Improvement District No. 1 of Greene County, nevertheless, the county court of Greene County, having duly convened in regular session on Monday, the 7th day of January, 1918, continued as long as the business pending before the court required; that in the absence of an affirmative order entered of record adjourning the court to a special adjourned session, or adjourning court *sine die,* the term of court remained open for the transaction of business until the next term of the same court or probate court, presided over by the same judge; and that no formal affirmative order each day opening and adjourning court for that day and then to the next, or to a distant day of the regular term, was necessary in order to preserve its sessions and keep the term from lapsing; that consequently when court convened on the 18*th day of January,* 1918, *it was in due and regular session.*

Section 1356 of Kirby's Digest provides: "The regular terms of the county courts in the several counties of this State shall commence on the first Monday in January, April, July and October of each year *and continue as long as the business shall require.*" By force of this statute, the Greene County Court, having met on Monday, January 7, 1918, the day provided by law, continued *as long as the business required,* and until the next regu-

lar term of the county court or of the probate court, unless it was sooner terminated by an affirmative order adjourning the court *sine die,* or to a distant day for a special adjourned session, or unless a special term of the court had been called. The presiding judge of the county court, whose function and duty it is to dispose of the business of that court, must necessarily determine whether the business requires that the court sessions continue for the full term. In performing this purely administrative function of dispatching the business, it is also necessarily within the province of the court to determine whether it is expedient to hold consecutive sessions from day to day, or at intervals of one or more days, or weeks.

The statute providing that the regular terms of the county courts shall "continue as long as the business shall require," designates specifically Monday as the day when the regular terms shall commence, but neither this nor any other statute prescribes specifically (other than the day of commencement), any particular day, or number of days that the court shall be in session during the term, or when the term shall end. The unrestricted language, "continue as long as the business shall require," shows clearly that it was the purpose of the Legislature to have the judge presiding over the county court as the administrator of the affairs of the county, determine whether the exigencies of the business of the county required the full term with the court in continuous session from day to day, or whether it could be disposed of in a shorter time and with sessions at intervals. The broad language used certainly implies that when a regular term of the county court is begun, it shall continue until ended by statute fixing the beginning of another term of the same court, or other court presided over by the same judge, or by the affirmative act of the court adjourning the court to a special adjourned term, or adjourning *sine die,* or till court in course, and thus declaring the term ended.

The statute is but declaratory of the common law and in conformity with the rule that obtains, as shown by

decisions of the highest courts, in every State of the American Union, so far as I know, having similar statutes, as well as in those States having no statute on the subject, or none expressly providing to the contrary. The learned authors of *Corpus Juris* say: "In general, a term continues until it is adjourned, or until it expires according to the time established by law." Again, "Where the time of beginning, but not of ending a term is fixed, the term when it has been duly begun, will continue, and may for all general purposes, be considered as in session, until it has been determined by some affirmative judicial act, such as an adjournment *sine die*, or until the next term." 15 Corpus Juris "Courts," section 23, 1 F.

Mr. Freeman says: "Every term continues until the call of the next succeeding term, unless previously adjourned *sine die*." 1 Freeman Judg., section 90. Counsel for appellants cite and quote the above and they also refer to the following authorities as supporting the doctrine announced. *Deleon* v. *Barrett*, 22 S. C. 412-419; *Garrard County Court* v. *McKey*, 11 Bush. 232; *Brown* v. *Stewart*, 26 N. E. (Ind.) 168; *People* v. *Central Bank*, 53 Barber 412; *People* v. *Sullivan*, 21 N. E. (N. Y.) 1039; *Eastman* v. *City of Concord*, 8 Atl. (N. H.) 822; *Commonwealth* v. *Barmon*, 97 Mass. (Allen's Rep.) 214-220; *Barrett* v. *State*, 1 Wis. 156-161; *State* v. *McBane*, 78 N. W. (Wis.) 602; *Jones* v. *McClaughrey*, 152 N. W. (Ia.) 210-212; *Green* v. *Morse*, 77 N. W. (Neb.) 925; *Union Pac. Ry. Co.* v. *Hand*, 7 Kan. 380-388; *State* v. *Hargis*, 113 Pac. (Kan.) 401; *Labadie* v. *Dean*, 47 Texas 90-100; *In re Dossett*, 37 Pac. (Okla.) 1066-1071; *Bidwill* v. *Love*, 98 Pac. (Okla.) 425; *St. Louis, etc.* v. *James*, 128 Pac. (Okla.) 279; *Tucker* v. *State*, 139 Pac. (Okla.) 998; *Territory* v. *Armigo*, 89 Pac. (New Mexico) 267; *Ex parte Harrell*, 110 Pac. (Ore.) 493; *State* v. *Marlock*, 115 Pac. (Ore.) 425; *Dees* v. *State*, 28 So. (Miss.) 849; *The Canary No.* 2, 22 Fed. 536; *Townsend* v. *Chew*, 31 Md. 247; *Sterlong* v. *Wayne*, 31 Pac. (Wyo.) 1032; *Scoffield* v. *Horse Springs Cattle Co.*, 66 Fed. 435. All of the above cases

are in point. I shall not undertake to review them all *seriatim;* but anyone who may be sufficiently interested to examine them will find that they sustain the rule for which appellants contend. Some of them note, by way of narrative, the historical fact of the existence of the rule of the common law which has come down to us through the ages out of a remote past. The cases, as I now recall do not support the rule because it is so "full of years," but, regardless of its origin, they approve it because it is "ripe in wisdom," and is indispensable to the administration of justice.

The above authorities cannot be summarily disposed of by a statement in the majority opinion to the effect that it is unnecessary to inquire what the rule is in other States; that our statutes on the subject and decisions in *Ex parte Baldwin, supra,* and *State ex rel.* v. *Canal Construction Company, supra,* settle the question contrary to the rule announced in the many cases cited in brief of counsel for appellants.

Let us see if they do. We have a statute prescribing that "every regular or special term of the county court, shall be held with open doors, and between the hours of nine o'clock a. m. and six o'clock p. m." Section 1369 Kirby's Digest; and another statute providing that "the county judge of any county may hold a special term of the county court when the public good of the county demands same." Section 1367, Kirby's Digest; and another which provides, "special adjourned sessions of any court may be held in continuation of the regular term, upon its being so ordered by the court in term time, and entered by the clerk on the record of the court." Section 1531, Kirby's Digest.

These statutes do not in any manner impair, or abrogate the rule above announced as to the continuity of a term of court. The statute authorizing the holding of a special term, section 1367, *supra,* provides a separate, independent, and distinct term from the regular term, and in no manner conflicts with the period set apart for the regular terms. Its purpose is to meet emergencies

in the business of the county arising in the interval between the day of adjournment of the regular session until court in course, or until the day appointed for the special adjourned term, as the case may be. See 7 Words and Phrases, "Special Term," and cases cited; also American Digest, 1907 to 1916 (2 Dec. ed.), "Courts," sec. 64 (1) *et seq.* to sec. 65, and cases; 7 R. C. L., "Special Terms and Sessions," 990, sec. 17.

The statute (section 1531, *supra*) providing for special adjourned sessions, is but declaratory of the common law upon that subject. "All courts unless restrained by some statutory provision, have a right of adjourning their sittings to a distant day, and the proceedings had at the adjourned session will be considered as the proceedings of the term so adjourned." *Dunn* v. *State,* 2 Ark. 229 (citing *Mechanics Bank* v. *Withers,* 6 Wheat. 106, 5 U. S. L. Ed., 217). See, also, 7 R. C. L. 990, sec. 18 "Courts"; *In re Dossett, supra; Harris* v. *Gest,* 4 Ohio St. 470; *In re McDonald,* 33 Pac. (Wyo.) 18; *Scoffield* v. *Horse Springs Cattle Co., supra; Tucker* v. *State, supra.*

Section 34, Code Civil Proc. of New York, provides that a "general, special or trial term of a court of record may be adjourned from day to day, or to a specified future day, by an entry in the minutes." The Court of Appeals of New York in an opinion by Mr. Justice Peckham held that "the power of courts in regard to adjournments is not limited to that derived from the above section," that the common law powers of courts were not restricted or abrogated by the statute quoted. *People* v. *Sullivan, supra.*

Under the common law rule the orders of a court of record were of course required to be entered of record. Therefore, the statute requiring that the order for adjourned sessions of court be specifically entered of record does not restrict the common law rule in that respect, but is only declaratory of it.

But it is said in the majority opinion, "We have expressly repudiated the common law rule as being inconsistent with our statutes, so far as concerns the theory

that the term is but one day," citing *Ex parte Baldwin* and *State ex rel.* v. *Canal Construction Company, supra.* I took part in the decisions of those cases and concurred in the opinions rendered therein. In both, as already stated, there was a special adjourned term by order entered of record. In the Baldwin case, the circuit court of Sevier County being in regular session at its January term, adjourned from February 6, 1915, until March 4, 1915. We held that there was a special adjourned term of the regular January term from February 6 until the definite date, March 4, and that the January term did not lapse even though a regular term in another county intervened those dates. In the Canal Construction Company case, there was an adjournment of the regular October term of the county court of Poinsett County from the 5th day of October, 1914, until the 28th day of October, 1914. The regular term of the probate court of Poinsett County intervened these dates. Section 1337, Kirby's Digest. We held that the county court having adjourned the regular October term on the 5th until the 28th of October, could not reconvene on the 26th, two days before the day appointed for the special adjourned term. In the latter case, the regular October term of the Poinsett County Court, having begun on Monday, October 5, 1914, would have terminated by law before the 26th day of October, 1914, because of the intervening regular term of the probate court, October 19, 1914. Sections 1337 and 1356, Kirby's Digest. Since the 26th of October was not a day in the period of time set apart for the regular October term of the county court, this court was manifestly correct in holding that the county court had no jurisdiction to convene on that day, but only had power to convene on the 28th, the day appointed by the order for the special adjourned session. Had the 26th of October been a day of the regular term, a different question entirely would have arisen.

It is further stated in the opinion of the majority, "that this cause was heard by the court on the pleadings and oral testimony of the county judge and the clerk of

the county court, which in substance showed that when business of the county court was suspended on January 9, 1918, there was no specific order made by the judge, but the judge testified that his intention was that the court should remain in session from day to day until the business of the court was completed." I have already shown by the record itself and the undisputed evidence of the judge, that an order was entered of record before January 9, 1918, setting January 18, 1918, as the day for hearing the cause involved in the petitions for the creation of Road Improvement District No. 1 of Greene County, and that the court on the 18th "met pursuant to adjournment." But if it be conceded that the facts are as stated in the majority opinion, then the present case is wholly unlike the cases of *Ex parte Baldwin* and *State* v. *Canal Construction Company, supra,* and therefore, those cases, under the facts stated in the majority opinion, have no application whatever to this case. The conclusion reached, respectively, in *Ex parte Baldwin* and *State* v. *Canal Construction Company* is certainly sound when applied to the facts there stated. But, I respectfully protest against the construction now given those cases by the majority of this court, for such construction places them in the unenviable category of being out of harmony with the great weight of authority in this country. Not only so, but, what to me is far worse, they are now cited in support of a rule of practice which is extremely technical, and which has no foundation in reason; a rule, which, when carried to its logical ultimate conclusion, as it sooner or later must be, will lead to absurdities and greatly trammel the practical administration of justice.

When our courts of record are duly convened on the first day of the regular term, does the integrity of the term, and of the proceedings had on a subsequent day or days of the regular term, depend upon whether there is an affirmative order of the court entered on the record showing that the court took a recess or adjourned from day to day, or till the distant day of the regular term when the proceedings were had? Does the jurisdiction

of the court to proceed depend upon an affirmative order on the record showing that the court met on the precise day to which the recess or adjournment was had, and that the business was transacted on that very day and no other? If these orders are essential to give the court jurisdiction of the subject-matter and to preserve the continuity of the regular term of court, then indeed is the jurisdiction of our courts of record to proceed to transact the business before them during the regular term dependent upon circumstances extremely adventitious. It is suspended, so to speak, in thin air and upon a very brittle thread. Memory is fickle. The judges may forget to make orders for the necessary recesses, intermissions or adjournments of court sessions. Fortuitous events may, and will happen, after the regular term has begun, to prevent judges from atttending on the days specially designated. Fortunately, our statutes which, after all, are but declaratory of the inherent common law powers of these courts of record, provide for the continuation of their regular sessions when once begun, until the business before them is disposed of. See section 1928 as to Courts of Chancery; sections 1320 and 1326 as to Circuit Courts; section 1337 as to courts of probate, and the section under review (1356) as to county courts, Kirby's Digest. When these courts are once convened in regular session on the day fixed by law, that session may be suspended with or without formal orders by recesses or adjournments at the close of a day's session till the next or a more distant day in the regular term. See *Deleon* v. *Barrett, supra; Garrard County Court* v. *McKey*, 11 Bush. 236. But a term of these courts, once regularly begun, can not end, under the above statutes, until it expires by operation of law, by the beginning of another term or by the affirmative order of the court adjourning the session *sine die,* or until court in course. I am referring now only to sessions of the regular term and not to special adjourned sessions. A session of court during the period covered by law for the regular term is not the special adjourned session contemplated

by section 1537, Kirby's Digest. *Kingsley* v. *Bagby,* 41 Pac. 991. See also *State* v. *Butler,* 118 Mo. App. 587, 95 S. W. 310; *Montgomery* v. *Dormer,* 181 Mo. 579; 1 Words & Phrases, 192, "Adjourned Term," Supplement, vol. 1, p. 114, "Adjourned Term;" 15 C. J. "Courts," sec. 233.

As to the policy and effect of the rule the court in the majority opinion says: "To adhere to this rule would permit the court to assume a vagrant character and hold its sessions at other times and places than those provided by law, for, if that practice is to be followed, there would be no notice to litigants when court is to be held, so as to afford them an opportunity to attend." Learned counsel for appellees cite *Irwin* v. *Irwin,* 37 Pac. 548 (Okla.), where language to the same purport is used. But in the latter case the adjourning order recited: "*There being no further business* before the court, it is considered, ordered and adjudged that this court be and the same is hereby adjourned." This clearly showed that the *business for the term* had been *concluded,* and the order was an adjournment for the term; it was tantamount to an adjournment *sine die,* or till court in course. After such an order, of course, the court could not reconvene on a subsequent day of the same term, and the Supreme Court correctly decided that any proceedings on such day were void because the term had lapsed. The Supreme Court of Oklahoma did not intend, in *Irwin* v. *Irwin, supra,* to approve the rule now announced by the majority of this court, as is shown conclusively by the fact that on the same day when the opinion in that case was handed down, it also rendered the opinion *In re Dossett, supra,* which is decidedly one of the strongest and ablest opinions of the many cited in support of the rule for which appellants contend. Another case relied on by appellees is *Baker* v. *Newton,* 112 Pac. 1034. In that case the statute fixed a day for the beginning of the regular term of the probate courts, but there was no provision like ours that they "shall continue as long as the business shall require." The county court convened on the

first day of the regular term and on the same day "*adjourned subject to call.*" The Supreme Court of Oklahoma said: "Upon adjourning the regular term, without fixing in the order of adjournment any time at which the court shall convene, the term lapsed." The court cited *Irwin* v. *Irwin, supra,* but made no reference to *In re Dossett,* showing that the court did not intend to impair the doctrine of that case. Therefore, the court in *Baker* v. *Newton, supra,* simply held that where there is an *adjournment of the term without day* the court can not reconvene until the time fixed by law. In *Meyers* v. *East Bench I. R. R. Co.,* 89 Pac. (Utah), 1005, the "court adjourned subject to call on order of the court." The court held that an adjournment without fixing any special time, ends the term, and that the court could not reconvene until the next regular term. The above are the only cases from foreign jurisdictions relied on by counsel for appellees to sustain their contention. The facts of the cases clearly differentiate them from the present case. These cases have no application here, for the reason that in each of them there was an affirmative order entered upon the record showing an adjournment of the court, in one case, "there being no further business;" in another (as the court held) an order "adjourning the regular term," and in the third, an order adjourning "subject to call, or on order of the court;" and, in the third case there was an attempt under such order to hold a session of court beyond an intervening regular term. The Supreme Court held that the adjourning order entered of record in each of the above cases was tantamount to an order of adjournment *sine die,* or for the term, *i. e.,* till court in course. How different are the facts of the present record. Here, as the undisputed evidence shows, the county judge, at the close of the session of the court on the 9th day of January, left the bench without making any order of adjournment at all, and fully intended not to adjourn for the term, but on the contrary, to keep the court open for the transaction of the business which had not yet been disposed of.

The briefs of counsel for both parties show a most exhaustive research for authorities to sustain their respective contentions, and no case has been cited, and none exists, so far as I know, that sustains the contention of appellees. Therefore, I feel safe in saying that in the opinion handed down in the case at bar, this court is almost, if not entirely, alone in repudiating the rule announced in Corpus Juris, by Mr. Freeman, and the many cases, *supra.* I confess that while such isolation would not be pleasing to me, nevertheless I would concur in the opinion of the court, if, as stated therein, an adherence to the rule contended for by appellants, would permit our courts to assume a vagrant character and enable them to dispose of causes without notice to litigants. Such, however, is not the case. The law fixes the terms of courts and designates the place where their sessions shall be held (1009 and 1124, Kirby's Digest), and the day when their sessions shall begin. Of these all parties must take notice. No honest judge would arbitrarily undertake to hold a session of court and to render judgments and make orders in the absence of litigants. If a court should render any judgments or make any orders under such circumstances, it would be a fraud practiced by the court itself upon the parties over whom the court had acquired jurisdiction, and an unavoidable casualty or misfortune preventing them from appearing. While these matters could not in any wise deprive the court of jurisdiction, yet against any such judgment or orders, the law affords ample protection. See *Ex Parte Baldwin,* p. 418; sec. 4431, subdiv. 4 and 7, and sec. 6220, Kirby's Digest. No case of remediless injustice ever has arisen, or ever will arise under the rule for which appellants contend.

On the other hand, the rule for which appellees contend, and which is now for the first time approved by the majority of this court, will occasion great inconvenience, delay and cost, and result in numerous miscarriages of justice. Because of the infirmities of memory, judges will fail, just as in this case, to order at the close of the

day's session an adjournment or recess of the court session until the following day, or to a distant day. On account of some casualty the judges will fail to attend court on the distant day of the regular term, to which same has been adjourned, but may be able a day or so thereafter to resume court functions and continue the business already begun. Such occurrences are attested by the experience and observation of nearly every trial judge. Yet the highly technical rule now announced by this court would cause, under the above circumstances, the term of court to lapse, and all the annoyance and expense incident to proceedings begun, but not concluded, would have to be repeated.

I greatly fear we shall often be confronted with records which will compel us, under the rule now sanctioned by the court, because of some such sheer technicality as above set forth, to reverse causes of the greatest magnitude. Then indeed will this court find itself in a dilemma, which, with slight paraphrase, is aptly described in the language of the immortal Pike:

> "The ghosts of the sound rule haunt us,
> The ills of the bad rule taunt us,
> And disappointments daunt us,
> Every year."

Some of the cases cited in appellant's brief portray most forcefully the absurdities and the disastrous consequences to court proceedings that would ofttimes inevitably follow under the rule now adopted by the court. I refer especially to the cases of *U. P. Ry. Co.* v. *Hand, People* v. *Sullivan* and *In re Dossett, supra.*

Again it is stated in the majority opinion that, "the case before us does not involve an instance where the county court suspended business without a specific order of adjournment and resumed its function the next day, but the facts of the case are that the court met on a distant day after the intervention of twenty-nine days without convening the court in the meantime," etc. The above statement shows that the court has made an egregious mistake as to the facts, and emphasizes the truth

of what I said in the beginning, towit: "An accurate statement of the facts is a prerequisite to a proper application of the law. The record must speak for itself. I have set it forth together with the undisputed testimony of the judge who made it.

The facts are that the court was in regular session on January 9 and again on the 18th of January. So that instead of being an "intervention of twenty-nine days," there was an intervention of only nine days. This fact is of controlling significance. For I concede that if no order was entered of record by the court, or judge, calling a special adjourned session for the 7th of February, and that without such order the court undertook to convene on the latter date, then the January term would have lapsed. If such were the facts, the proceedings had on the 7th of February, 1918, would be *coram non judice* and void, for the reason that the regular term of the probate court began on the third Monday in January, and the regular January term of the county court expired by operation of law on the convening of the probate court. The facts, however, being as I have stated them, the proceedings of the county court on February 7, 1918, were, as I have shown, in all things regular, and its judgment creating the district was valid.

May I ask, in this connection, are we to infer from the statement in the opinion last above quoted, that if the court had resumed its functions "the next day after the 9th of January, or on some succeeding day, but not so far distant as the 7th of February, thereby reducing the interval to less than twenty-nine days, that the January term would not have lapsed? If so, then this portion of the opinion is a mere begging of the question and inconsistent with other portions. The issue between appellants and appellees is sharply drawn. The court in the majority opinion correctly states appellant's contention, towit: "That where a court meets at the proper time and place specified by law, the term continues until the beginning of another regular term, which breaks the continuity, or until there has been an affirmative order of the

court adjourning without day or to a specified day." After stating that such was the common law rule, the court then expressly repudiates it, saying that it was based upon the fiction at common law that a term of court, however long, was but one day; that if "that rule still prevails making terms of court continue from day to day without an order of court, then it is surplusage for the lawmakers to require an adjourned session," etc. The opinion of the court plainly holds that, to continue a regular session of court, once begun, from day to day, requires an affirmative order. Such is the appellees' contention. The court sustains the contention of the appellees and thereby overrules the contention of appellants. There is no middle ground between these contentions. Now, if an affirmative order continuing the session of court from day to day or to a more distant day is necessary to prevent the term from lapsing and to preserve the court's jurisdiction, then, at the close of a day's session of court, if the court for any reason whatever fails to make an order adjourning the session till the next day and so on, or to a specified future day, the moment the court fails to make such order, *eo instanti,* the term lapses and the court loses jurisdiction. What difference could it make in such case whether the delay of the court to return and to attempt to resume its session was for one day or forty? Jurisdiction, is the power to hear and determine causes. *Rose* v. *Christinet,* 77 Ark. 582, and other cases cited in 2 Crawford's Digest, § § 1 and 2; 4 Words & Phrases, "Jurisdiction," and cases cited; 1 Black on Judgments, § 215. When jurisdiction during a term is once lost, it is lost forever, so far as that term is concerned. It is not a matter of degrees. Once lost, it is beyond the power of the judge to restore it.

Again it is stated in the majority opinion that the common law rule, for which appellants contend, "was a part of the fiction that a term of court however long extended was but a day, and that all judgments and orders of the court were of that same day." We can only determine whether the common law rule contended for by

appellants, was a part of the common law fiction, by tracing the history of such fiction.

"Throughout all christendom, in very early times, the whole year was one continual term for hearing and deciding causes." Later, "the Church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations," and "law terms were appointed with an eye to those canonical prohibitions." There were four of these terms, designated as: Hillary, Easter, Trinity and Michaelmas. "In each of these terms were stated days called days in bank (dies in banco), to which all original writs were made returnable," and they "were called the returns of that term." "Every term had more or less." The first return day in every term was the essoign or excuse day. Three days of grace were allowed. "Therefore, at the beginning of each term the court did not usually sit for the dispatch of business, till the fourth or appearance day." The courts sat "till the *quarto die post* or appearance day of the last return, which is therefore the end of each of them." 3 Blackstone's Com., chap. 18, pp. 274 to 279, and notes; 3 Chitty, Gen. Prac., chap. 3, p. 89, *et seq.*

At the common law writs were made returnable at least fifteen days from the date (teste) when they were issued to give the defendant time to appear "upon some day in one of the four terms in which the court sets for the dispatch of business." 3 Blackstone, Com., chap. 18, pp. 275 to 279, and notes; 3 Chitty's Gen. Prac., chap. 3, p. 89, *et seq.*

Contemporaneous with the establishment of terms of court, at least in very remote times, all judgments of the law courts, no matter on what day of the sitting or session, during the term, same were rendered, related back to the first or return day of the term in cases where they might have been rendered on that day. *Greenway et al.* v. *Fisher,* 7 B. & C. 198; *Wright et al.* v. *Mills,* Hurlstone and Norman's (Exchequer), 487-91; *Johnson* v. *Smith,* 2 Burr 967; *Wynne* v. *Wynne,* 1 Wils. (K. B.) 39; 3 Chitty, Gen. Prac. 101; 1 Black on Judgments, § 441; 1 Freeman

on Judgments, § 39. In the very nature of the case it was physically impossible for the judges and other court functionaries to hold a continuous session of court from the beginning to the close of the term. Hence it was but a fiction to say the courts were in session but one day covering the period of the entire term.

The above rule of the common law as to judgments and the fiction on which it was based, obtained in England until the act of Parliament in 1676 changed it. 29 Car. II, chap. 3.

We had a territorial statute in harmony with the common law rule passed July 3, 1807. Steel & McCampbell's Dig. Laws of Ark., p. 339, § 70; *Keatts* v. *Fowler's Devisees,* 22 Ark. 483-86. This rule and fiction of the common law were therefore a part of the common law adopted by us in the revised statutes of December, 1837. Rev. Stat., chap. 28; secs. 623-24 Kirby's Digest. The rule, however, as to judgment liens was repealed by the act of March 5, 1838. Rev. Stat., chap. 84. See also sec. 4438, Kirby's Digest.

From the above brief history we discover that "sessions" (not terms) of court, however many during the term, were all considered, by fiction of law, as of one day, the first or return day of the term, in order that judgments, no matter on what day they were in fact rendered, might relate back and take effect as of the first, or return day when they might have been rendered. We discover that this fiction of the common law as to sessions of court and the rule as to judgments were adopted by and remained with us for a short time, until expressly abolished by statute.

Let it be observed that there was never any fiction at the common law concerning the "term" or "terms" of court. The fiction was concerning the "session" or "sessions" of court. There is a clear distinction between the words "term" or "terms" of court and the words "session" or "sessions" of court. The word "term" when used with reference to a court signifies the period during which the court may, or may not, be in

actual session, while the word "session" signifies the time during the term when the court actually sits for the transaction of business. The session commences when the court convenes for the term and continues (by fiction) until final adjournment either before, or at the expiration of the term. "The term of the court is the time prescribed by law during which it may be in session. The session of the court is the time of its actual sitting." Bouvier's, Anderson's, Black's Law Dic., *verba,* "term" "Session;" Webster's New Int.; Funk & Wagnall's Dic. *verba* "term" "Session." See also *Horton and Heil* v. *Miller,* 38 Pa. St. Rep. 270.

There may be, and usually are, many sittings or sessions of court during a term, with intervals, long or short, as the convenience of suitors and the exigencies of the business require, to be determined by the presiding judge. The jurisdiction of the court to continue to hold a session during the term is not affected by the number of sessions, the length of time between them, or the failure of the court to hold a session as per the day appointed. The jurisdiction to hold a session during the term continues to the end thereof, unless the court sooner adjourns its sessions finally or for the term. However, to say that such sessions, broken by intervals of days, weeks or months, is a continuous session as of one day, is to express a fiction. But since a "term" of court by the common law, as shown above, is a period during the whole of which sessions of court might be held, it is not a fiction, but a reality, to speak of it as if it were but one day. In other words, a "term" of court, spoken of as a period during the whole of which sessions of court may be had, is an integer, like as a day is an integer in the calendar for measuring time.

I am aware that lawmakers, lexicographers, authors of text-books on the law and judges of courts frequently use the words "term" and "session," when applied to courts, interchangeably and often synonymously. But if traced to their origin and critically examined it will be found that the distinction between them is quite clear.

As is said by the Supreme Court of Texas in *Lipari* v. *State,* 19 Texas Cr. App. 431-33: "It is true that lexicographers give very nearly the same meaning to the two words, and make them almost synonymous; yet it will be found upon close examination that the distinction in their signification, which we have stated, is the correct one."

A failure to observe the distinction between the words "term" and "session," and the use of the words synonymously, and interchangeably, I opine would be of little or no practical importance except in cases where such use affected the jurisdiction. Such is the case here.

The fiction therefore at the common law was that all sessions of court, held on different days, however many, of the term, were considered as a continuous session of one day. And the purpose of this was that all judgments might take effect from that day. I fail to see that such fiction has any connection whatever with the common law rule that a term of court was a fixed period which, as to continuity, not length, was regarded as a matter of fact, not fiction, as one day in which sessions of court might be held.

In *Ex Parte Baldwin, supra,* the Chief Justice, speaking for the court, said: "The ancient rule was that a term of court was considered as of one day and the court deemed to be in session until final adjournment." Thus we recognized, by way of historical narrative, the continuity of a term and also of a "session" of court at the common law, but we were not called upon by the facts to make any distinction in their meaning and we did not do so. Further along in the opinion, however, we used this language: "Our statute manifestly contemplates different days of the term of court." And in *State ex rel. Hall* v. *Canal Construction Company,* we repeated this language, and added: "Section 1531 of Kirby's Digest provides for the adjournment of court to a distant day. This shows that we have departed from the common law rule that a term of court shall be considered as one day." It is now urged by counsel for appellees that this court by the use of the language, "our stat-

ute manifestly contemplates different days of the term of court," decided that the common law rule for which appellants contend has been abrogated. To correctly interpret the language of an opinion it must be construed in the light of the facts upon which it is based. In *Ex Parte Baldwin* and *State ex rel.* v. *Canal Construction Company, supra,* the court dealt with affirmative orders adjourning the regular term of court to a special adjourned session, *i. e.,* a session beyond the period fixed for the regular term. True, Judge HART in the latter case states that the "court adjourned to a fixed day later in the term." But this was a mistake of fact and doubtless an inadvertence. I mention it here for the sake of accuracy and because whatever may be the language in the opinion, the decision was correct by reason of the fact that the court session was adjourned for the period of the regular term, and to a special adjourned session beyond it. So that the court did not have before it in the above cases the issue as to whether or not there was a continuity of the regular term. The court, therefore, by the language used, in these opinions could not have properly decided, that the common law rule as to the continuity of a term of court as contended for by appellants, had been abrogated by our statute. Any language in the opinions of those cases susceptible of such construction would be the purest *obiter.*

Since the issue is now so sharply drawn between us as to what was really decided in those cases, I am free to confess that the language, "our statute manifestly contemplates different days of a term of court," and other language there used, was not as clear as it might or should have been to prevent any possible confusion and misapprehension of the law. The language, "our statute manifestly contemplates different days of the term of court," should be construed to mean that the statute contemplates different days during the fixed and continuous period set apart by law for a term of court, in which sessions of court may be held. The history, *supra,* of terms of court discloses that at the common law there

were different days of a term of court during which a session of court might be held. Therefore, the common law rule contemplates different days and in this respect is in perfect harmony with our statute.

Section 1531 of Kirby's Digest, which the court now holds abrogates the common law rule, was a part of the revised statutes (1838), yet we find this court through Judge WALKER in 1850, declaring that: "The whole term is but one day in contemplation of law." *State Bank* v. *Arnold et al.*, 11 Ark. 347. And again in 1853 this court, through the same judge, says: "A whole term in contemplation of law is considered as one day, and, by a legal fiction, it may be said that time between the submission and detemination of a cause is but one day. So that the practice may be settled by long usage in this court upon the authority of numerous decisions of other courts directly in point, and upon reason and analogy." *Cunningham* v. *Ashley et al.*, 13 Ark. 653-73. Here it may be noted, in passing, that the learned judge in speaking of the continuity of a term of court as of one day, did not say it was because of any fiction. But when he referred to the session as being but one day (although of much longer duration) he says this was "by a legal fiction." Thus in applying the fiction to the "session" and not to the "term" of court, he observed the proper distinction between them.

Our attention was called to *Cunningham* v. *Ashley et al., supra,* in *Ex Parte Balwin, supra,* and if the court had intended in the latter case to overrule the doctrine that "a whole term in contemplation of law is considered as one day," the court would have so stated in express terms and would have commented upon and overruled *Cunningham* v. *Ashley et al., supra.* In *State ex rel. Hall* v. *Canal Construction Company,* the court only followed *Ex Parte Baldwin.* So I conclude that we have heretofore decided that a term of court is a continuous period as of one day, and that *Ex Parte Baldwin* and *State etc.* v. *Canal Construction Company* do not decide to the contrary.

But let me concede for the sake of the argument, that at the common law there was a fiction concerning the continuity of a term of court, and that a "term" of court and a "session" of court have precisely the same meaning. Then it is certainly true, as we have seen, that the fiction of the common law which considered a "term" or "session" of court (using the words synonymously) as of one day, had its origin in the purpose to have all judgments entered as of the first or return day of the term. This fiction, therefore, was abolished not by section 1531, as contended by the majority, but by the statute, *supra,* making all liens of judgments take effect from the day of their rendition.

Now because the fiction pertaining to the date of the rendition of judgments, so as to make their liens take effect from the same day, has been abolished, is no reason for holding that all other useful rules of procedure growing out of the fiction have also been set aside. On the contrary these other rules should be preserved and the fiction retained if necessary for that purpose. There is nothing sacrosanct about legal fictions further than they may be made to serve the ends of right and justice. The ancient maxim is that: "All fiction of law is founded in equity." "Equity is the life of legal fiction." Brooms Legal Maxims, 106. In *Morris* v. *Pugh,* 3 Burr. 1243, Lord Mansfield remarked: "Fictions of law hold only in respect of the ends and purposes for which they were invented," and to this may I add, that with respect to such ends and purposes they should, and do hold, until expressly repealed by statute.

If the rule for which appellants contend had its origin in a fiction of the common law, and if that fiction has been abrogated by statute, and if such annulment carries with it the rules of practice growing out of the fiction (as the majority now hold) then, not only the rule under review but other rules founded on the fiction, long established, often approved by this court, and, until now, deemed prerequisite to the administration of justice, have also been annulled. For example growing out of the fic-

tion that a session is deemed as of one day is the rule mentioned in *Cunningham* v. *Ashley, supra,* that where either party dies after the cause is submitted and before final judgment, the judgment may be rendered in the names of the original parties as of a day previous to such death. *Pool* v. *Loomis,* 5 Ark. 110. See also *Trapnall et al.* v. *Burton et al.,* 24 Ark. 372-73 (last syllabus). Another rule based on the fiction is that a court has the power during the whole of the term at which a judgment or order is rendered to set aside, vacate and annul its judgments and orders. Such has been the unvarying rule in this State from the first, and it has been the rule in all other jurisdictions, State and Federal, in this country. *Keatts* v. *Rector,* 1 Ark. 391; *Smith* v. *Dudley,* 2 Ark. 66; *Walker et al.* v. *Jefferson,* 5 Ark. 23-25; *Ashley* v. *Hyde,* 6 Ark. 100, and other cases cited in 3 Crawford's Digest, p. 3017, "Judgments," and on down to *Wells Fargo & Co.* v. *Baker Lbr. Co.,* 107 Ark. 415; 23 Cyc. 901, and cases in note.

If a question were presented to this court involving the existence of the rules last above mentioned, we could not logically escape the conclusion, under the doctrine of the majority opinion, that since the fiction that a term or session of court was but one day had been abrogated by statute, all the rules founded upon the fiction had died with it. All general courts of record in the meanwhile would be justified in so construing the opinion.

Third. The circuit court erred in quashing the judgment of the county court creating the district for the reason that appellees delayed for a period of nearly eight months after the judgment was rendered before filing their petition for writ of *certiorari.* The court disposes of appellants' contention on this branch of the case as follows:

"We are of the opinion that the trial judge did not abuse his discretion under the circumstances in granting the relief sought. The record shows that the petition for *certiorari* was filed in the circuit court on September 30 and it was heard at the October term, 1918. In the

meantime appellees were contesting their assessments and as a part of their contest brought up for review the county court's record establishing the district. The amount of assessments of benefits had not been finally settled when the present attack on the validity of the organization was begun. We are of the opinion that appellees are not chargeable with unnecessary delay."

There is no allegation in the petition for *certiorari* giving any cause or excuse for the delay in presenting the petition. No proof was adduced at the hearing showing any cause or excuse for the delay. Indeed appellees do not pretend in their brief that there was any excuse for the delay.

The record shows that the assessments were challenged on the ground that the court was not legally in session and because of alleged jurisdictional defects growing out of a failure to comply with certain statutory requirements in making the assessments. Appellees now contend that appellants' charge against them of unreasonable delay is fully answered by the fact that they, in apt time, attacked the assessments on the ground that the county court had no jurisdiction to establish the district. They also contend that the question of jurisdiction to establish the district could be raised by appellees at any time in the absence of any act on their part creating an estoppel. The court sustains appellees' contention that there was no unreasonable delay on their part because they, "as a part of their contest, brought up for review the county court's record establishing the district."

Section 3 of Act 338 of Acts of 1915, provides: "The order of the county court establishing a road improvement district shall have the force and effect of a judgment and shall be deemed conclusive, final and binding upon all territory embraced in said district, and shall not be subject to collateral attack, but only to direct attack on appeal. Any property owner may appeal from said judgment within thirty days by filing an affidavit for appeal, stating in said affidavit the special matter on which

the appeal is taken." In sections 13 and 14 provisions are made for the property owners to contest the assessments. The proceedings are expressly limited to the "purpose of having any errors adjusted, or any wrongful grievous assessment corrected" and "any owner of real property in the district may appeal from the judgment fixing the assessment of benefits or damages."

This court in the very recent cases of *Chicago, R. I. & P. Ry. Co.* v. *Road Improvement District No.* 1 *of Prairie County,* 137 Ark. 587, 209 S. W. 725, and *Mo. Pac. Rd. Co.* v. *Conway County Bridge Dist.,* 134 Ark. 292, held under special statutes, containing similar provisions to those above quoted, that on appeal from final order or judgment adjusting and assessing the benefits, "the inquiry should be confined to an ascertainment of the benefits;" that the validity of the special statute creating the district was not involved on an appeal from the order of assessment of benefits, but that the validity of the statute could only "be tested in another appropriate action instituted for that purpose." In the first of the above cases we said: "The prosecution of the appeal to the county court, and then to the circuit court, could only raise the question of correctness of the assessment of benefits, and we confine ourselves to a consideration of that issue without looking to the statute to determine whether any other objections can be made to the proceedings."

"Ignorance of the law excuses no one." In contemplation of law as settled by the above cases the appellees by an appeal from the order assessing the benefits, "could not bring up for review the county court's record establishing the district." In precise words, the majority decides in the present case that this can be done as an excuse for the delay of appellees in applying for the writ of *certiorari.* How this decision can be reconciled with the above cases baffles my comprehension. The above cases are not referred to in the majority opinion. Therefore it was not the intention of the court, I take it, to overrule them.*

*See opinion in case of *Kansas City S. Ry. Co.* v. *Road Imp. Dist. of Little River County* (Reporter).

Appellees are represented in this lawsuit by able attorneys. We may safely assume they knew, or should have known, that the statute under which this district was created provides that an appeal may be taken from the judgment of the county court establishing the district within thirty days, and that "any party not appealing within the time prescribed shall be deemed to have waived any objections he may have to said order, and to have relinquished all rights he may have to question same." Section 3, Act 338, *supra*. We may also assume that appellees' counsel were familiar with the above decisions. However this may be, appellees must be held to have had knowledge of the above statutes and decisions. But whether they had actual knowledge thereof or not they are bound by the law as if they had. Appellees should not be allowed to avail themselves of the affirmative relief they seek by setting up as an excuse for their delay a mistake of law pure and simple made alone by themselves or their attorneys. "Where the general law of the land—the common jus—is involved, a pure and simple mistake in any kind of transaction cannot be relieved." 2 Pom. Eq. Jur., sec. 849. It therefore appears that appellees allowed the time to expire for taking an appeal from the judgment establishing the district, and permitted the labor and expense incident to such proceedings as if they were valid; that they attempted to raise the issue of the validity of the order establishing the district for the first time on appeal from an order adjusting the assessment of benefits, when they knew or, at least, by reasonable diligence, should have known such issue could not be so raised; that they waited for a period of eight and one-half months before asking the writ of *certiorari* to quash the judgment creating the district. Instead of holding under the above facts that appellees "are not chargeable with unnecessary delay," the holding, it occurs to me, undoubtedly should be that their delay was unreasonable and without even a shadow of excuse.

The Alexander law is a general law "for the creation and establishment of road improvement districts.

for the purpose of building, constructing and maintaining the highways of the State of Arkansas." (Title of the act.) The work affects the public and is of a public nature. "In cases of highway proceedings, the interest of the public being at stake, the petitioner must make speedy application to entitle him to a review of the proceedings." 4 Enc. P. & P. 143. See *State* v. *Ten Eyck,* 18 N. J. Law, 373, and other cases cited in note. "Where a reversal of the proceedings sought to be reviewed would result in detriment or inconvenience to the public, or is calculated to derange the interests of society, a party is required to act speedily in making his application, and any unreasonable delay in so doing will warrant the dismissal of the writ." 4 Enc. P. & P. 133; *Keys* v. *Marion County,* 42 Cal. 252-56 (a public road case), and other cases cited in note; 11 C. J. 134, and cases. See also *Black* v. *Brinkley,* 54 Ark. 372; *Johnson* v. *West,* 89 Ark. 604, 117 S. W. 770; *Sumerow* v. *Johnson,* 56 Ark. 80.

But regardless of the public interest involved, in the absence of statutory regulations, the writ of *certiorari* must be applied for within a reasonable time after the assailed order or judgment has become final. What constitutes a reasonable time is a question within the sound judicial discretion of the court. This discretion is not absolute. It must not be arbitrarily or capriciously exercised, but must be exercised according to the settled principles of law applicable to the case in hand, and have some basis of reason and justice to rest upon. The writ is an extraordinary remedy. It will lie to vacate a final order or judgment of the tribunal to which it is issued, where that tribunal exceeded its jurisdiction. The burden is upon the one who invokes this remedy to allege facts that will entitle him to it. If the facts alleged are denied he must exonerate himself from laches, even before he is entitled to an issuance of the writ. If the writ has issued and return made thereon then he must be prepared to prove that he proceeded with reasonable dispatch to ask for such relief. Where there has been unreasonable delay in applying for the writ the petitioner

must show some legal excuse therefor. Where the petitioner fails to prove that he moved with reasonable diligence, after the order or judgment became final to have same set aside, then if the writ was issued under such circumstances it was done improvidently and the trial court abuses its discretion if it fails to quash the writ. Especially is this so where the public interest is affected. Such failure is an error for which this court on review will reverse the judgment of the trial court. These are familiar rules of law concerning *certiorari* as settled by our own court. *Randle* v. *Williams,* 18 Ark. 380; *Flournoy et al.* v. *Payne,* 28 Ark. 87; *Moore* v. *Turner,* 43 Ark. 243; *Pearce ex parte,* 44 Ark. 509; *Burgett* v. *Apperson,* 52 Ark. 214-22; *Black* v. *Brinkley, supra; Sumerow* v. *Johnson, supra; Johnson* v. *West, supra.* See also to same effect cases cited in 1 Words and Phrases, 618, "*Certiorari*" "As Discretionary Writ," 5 R. C. L. 253-4, secs. 5-6; 11 C. J., secs. 125-133-141-172-293-295-309-374-397-410.

In *Black* v. *Brinkley, supra,* we held that, "where the application was made eight months after the final judgment, to set same aside, where no excuse for the delay was offered, the writ will be refused." In *Johnson et al.* v. *West, supra,* we said, quoting from the last case: "The rule is to refuse it when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, and especially where great public inconvenience will result from its use." The latter case was an effort by *certiorari* to quash the judgment of the county court establishing a public road, and there was a delay of eleven months, which we held was unreasonable.

If the doctrine of these and other cases cited above had been applied to the facts of this record, the judgment of the circuit court would have been reversed, and the cause remanded with directions to quash the writ of *certiorari* and to affirm the judgment of the county court establishing the district. The case properly should have ended here with that result.

Fourth. In conclusion let me say, that from my point of view a misconception of the facts has led to an erroneous decision against appellants.

However much I may differ with my associates on the facts, if that were all, I would not have dissented. But the court, as I see it, has also misapprehended the law concerning *certiorari,* and concerning the continuity of a "term" of court. In so doing it has overruled, by clear implication, several decisions of this court.

In failing to observe the distinction in meaning between "terms" of court, and "sessions" of court, the opinion of the majority practically makes every day's session of court a term, and if the lower courts fail by affirmative order entered upon their records to adjourn each day's session to another day, the term lapses, and they lose jurisdiction over that term. The rules now adopted in the majority opinion, unless changed by this court, or legislative fiat, will be binding on this and all other general courts of record in this State.

In cases where property rights are involved they will become rules of property. The rules now approved, if adhered to, will necessarily set aside other rules which have become so firmly imbedded in the jurisprudence of our State, that to uproot them now, will lead to inextricable confusion and do irreparable mischief.

On account of the general and far-reaching consequences of the majority opinion, under the rules sanctioned by it, I do not recall that any more important questions have been presented for decision than are presented in this case since I have been a member of this court.

If I am correct in the views I have expressed, then the opinion of the majority is fraught with infinite possibilities of harm in the administration of the law, and is unsound through and through and all the way round. So believing, I have entered upon this dissent, and have endeavored without regard to the length of my own opinion, as best I could to analyze the opinion of the majority and to review the case from every possible angle, in or-

der to uphold what I conceive to be the correct rules of practice. I realize that dissenting opinions are seldom read in the jurisdictions where they are rendered, therefore, their preparation, for the most part, is a work of supererogation. But if the researches I have made and the thoughts I have here registered shall be found, in the least, helpful to practicing lawyers, or trial judges in our own or other jurisdictions, I shall be fully compensated for the time and labor given this opinion and shall feel that my efforts have not been altogether in vain.

HUMPHREYS, J., concurs in this dissent.

TOMPKINS v. VAUGHT.

Opinion delivered April 7, 1919.

1. USURY—ESTOPPEL.—In a suit to foreclose a mortgage securing loans alleged to be usurious, the borrower, by accepting a check given by the lender in correction of a mistake in calculation, did not estop himself from pleading usury where there was an additional chargemade intentionally in excess of the maximum legal rate of interest.
2. USURY—PAYMENT OF BROKER'S COMMISSION.—Where $900 was loaned at 6 per cent. for seven years and, in addition to notes therefor, the borrower executed two notes for $63 each to the lender's broker, secured by a second mortgage, the latter notes and mortgage were usurious as providing for interest above the legal rate of 10 per cent.
3. USURY—INTEREST NOTES.—Where notes for an excessive amount of interest were executed, such notes are void, whether the law of Oklahoma or of Arkansas governs the contract.

Appeal from Polk Chancery Court; *Jas. D. Shaver*, Chancellor; affirmed.

Prickett & Pipkin, and *Pearson & Baird* (of Oklahoma City), for appellant.

1. Appellees are estopped. No man can take advantage of his own wrong. 5 L. R. A. 344; 52 Ark. 211. The Vaughts claimed to have received $774 and begun their contest on the ground that the contract is usurious

and then receive and cash the check for $36 more and then still insist on equitable relief. They are estopped. 32 Ark. 346; 53 *Id.* 514; 30 *Id.* 453; 97 *Id.* 163.

2. The contract was not usurious. Cox was the agent of the borrower and the interest and commission paid him do not make the loan usurious. 63 Ark. 385; *Ib.* 249; 66 *Id.* 387; *Ib.* 159; 51 *Id.* 535, 546; 126 *Id.* 155; 91 *Id.* 461; 206 S. W. 40. Usury will not be presumed. 68 Ark. 162; 74 *Id.* 252; 67 *Id.* 159. There was no intention to charge usurious interest. If any calculation shows usury, it was a mistake. The contract was made in Oklahoma, and the laws of Oklahoma, the place of the contract, give the remedy. 66 Ark. 77; 12 Mod. Am. Law. 55-56.

Reservation of excessive interest by mistake is not usury. 75 Ark. 387; 62 *Id.* 370; 63 *Id.* 225; 67 *Id.* 159.

On the law and facts there was no usury. *Supra.*

J. I. Alley, for appellees.

1. The facts show a wilful case of usury. There can be no estoppel. 65 Ark. 316; 32 *Id.* 346; 55 *Id.* 143; 35 *Id.* 217.

2. The court below found that it was an Arkansas contract and governed by its laws and its finding will not be disturbed unless clearly against the preponderance of the evidence. 89 *Id.* 132; 77 *Id.* 305.

3. There was no mistake in charging usury. The case of *Habach* v. *Johnson,* 132 Ark. 374, settles all the contentions of appellant's against them.

4. Cox was not the agent of the borrower, but really of the lender, and took the written contract as a subterfuge for the purpose of collecting the commission and avoiding the disastrous result of usury.

McCULLOCH, C. J. This is an action instituted by appellant against appellees in the chancery court of Polk County to foreclose a mortgage executed by appellees on land in that county. Appellees pleaded usury as a defense, and the chancellor sustained the plea upon the testimony adduced and rendered a decree dismissing appellant's complaint for want of equity.

Appellees borrowed money from F. B. Collins, doing business at Oklahoma City under the trade name of The F. B. Collins Investment Company, and executed to Collins their note for the sum of $900, payable in seven years from date with interest at the rate of six per centum per annum, payable semi-annually, and also executed to Collins a mortgage on the lands involved in this controversy. The loan was to be for the sum of $900, and was negotiated by one Cox, who procured appellees to sign an application for the loan creating him (Cox) as agent of the borrower and agreeing to pay a broker's commission in the sum of $252. Cox transferred his contract to appellant, and the loan was closed by the preparation of the necessary papers at the office of Collins and appellant in Oklahoma City and sent to Polk County, where appellees resided, for execution.

At the time of the execution of the mortgage to Collins, appellees also executed two joint promissory notes, each for the sum of $63, payable in one and two years, respectively, and also executed to appellant a mortgage on the same lands subject to the Collins mortgage. These papers were forwarded to Collins and the loan was consummated by Collins paying to appellees the sum of $774, but thereafter appellant paid over to appellees the additional sum of $36, making $810, total amount received by appellees under the loan.

Collins is not a party to this action, and, so far as we know from this record, has not instituted any action to foreclose his mortgage. This suit involves only the mortgage to Tompkins for the two notes given as a commission, as contended by appellant, and a bonus according to the contention of appellees.

There is a controversy, in the first place, as to whether the payment to appellees of the additional sum of $36 was made in correction of an honest mistake in the calculation of the amount due under the loan so as to bring the case within the rule that the acceptance or reservation of excessive interest through mistake of fact on the part of the lender does not render the contract usu-

rious (*Garvin* v. *Linton,* 62 Ark. 370); or whether the payment was a mere afterthought and was made with intention to avoid the charge of usury.

The notes and mortgage were executed on January 7, 1916, and the additional payment was made by a check mailed to appellees from appellant's office April 18, 1916, which was nearly a year before the commencement of the present action. Appellees held the check a considerable length of time before collecting it, but finally presented the check for payment and received the money on it. Appellant testified that there was a mistake in the calculation, and that this check was sent to appellees in correction of the mistake, and we do not find any contradiction of his testimony on that subject.

It is further contended that the acceptance by appellees of the check operates as an estoppel which prevents them from pleading usury, but we see no reason for applying the doctrine of estoppel, except to treat the acceptance of the check as a correction *pro tanto* of the mistake. If, however, there was an additional charge made intentionally in excess of the maximum legal rate of interest, the correction of the mistake does not rescue the contract from the taint of usury.

It is seen from the foregoing statement that appellees received the sum of $810 and executed to Collins their note for $900, with six per cent. interest from date, and also executed two notes aggregating $126 to appellant, and a simple computation of the interest shows that according to the contract as written appellees were obligated to pay sums which in the aggregate exceeded the principal sum received by them and ten per centum per annum. Both sides agree in the argument that, adding interest at the rate of ten per centum per annum for seven years on $810, makes the aggregate sum of $1,377, whereas, adding to the $900 note the interest at six per centum for seven years, and also adding the sum of $126, evidenced by the notes to appellant, makes a total of $1,404, or $27 over the principal actually received and interest at ten per centum.

There is no contention that this resulted from any mistake of fact, but the plea of usury is sought to be avoided on other grounds. It is contended that Cox was the agent of the borrower, and that for that reason the amount which appellees agreed to pay him as commission should not be computed as a part of the interest for the forbearance, but we think the evidence justifies the finding that this contract was a mere subterfuge, and that appellant's relations with Collins, the lender, were such that he should be treated as a party to the loan, and that neither Cox nor appellant were in fact the agent of the borrower. In other words, the evidence justifies the conclusion that the notes in controversy were executed purely as a bonus to the lender, or his agent, for making the loan, and that the contract is on that account usurious.

Collins, not being a party to the present action, the decree in this case will not affect his rights in a suit instituted by him to foreclose his mortgage, for the testimony may be different on material points. We merely hold now that, according to the evidence before us, the contract is shown to be one for the payment of interest in excess of ten per centum per annum.

The notes were dated and made payable in the State of Oklahoma, but the proof shows that they were in fact executed in the State of Arkansas. We need not stop to consider whether the rights of the parties should be tested by the laws of Arkansas or by the laws of Oklahoma, for in either event there can be no recovery.

Under our laws the contract for the payment of interest in excess of ten per centum per annum is usurious and void *in toto*. Under the Oklahoma Constitution and statutes ten per centum per annum is the maximum rate of interest allowed, and it is provided that charging a rate of interest in excess of ten per centum per annum "shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." Constitution of Oklahoma, article 14, sections 2 and 3; Revised Laws of Oklahoma (1910), volume 1, section 1005.

If the laws of Oklahoma are to control, the contract is valid as to the principal debt, and there may be a recovery here for that amount, but there can be no recovery on the agreement to pay interest, which is forfeited under the Oklahoma law. *Crebbin* v. *Deloney,* 70 Ark. 493. The notes executed to appellant constituted part of the interest, which is forfeited, and there can be no recovery on those notes.

Of course, if the law of Arkansas were to be treated as controlling the right of recovery, the whole contract would be held to be void as to both principal and interest.

It follows that the decree of the chancery court was correct, and should be affirmed. It is so ordered.

HENRY WRAPE COMPANY v. BARRENTINE.

Opinion delivered April 7, 1919.

1. APPEAL AND ERROR—SUBSEQUENT APPEAL—LAW OF THE CASE.—A rule of law announced on a prior appeal is the law of the case on a subsequent appeal where the facts on the second trial were substantially the same as on the first trial.
2. MASTER AND SERVANT—ASSUMPTION OF RISK.—One who continues to work after complaining of a custom of his fellow employees throwing stones on the master's premises during rest hours, and with appreciation of the danger, assumes the risk of injury.
3. SAME—MISCONDUCT OF FELLOW SERVANT—DUTY OF EMPLOYER.—The master is liable for negligence in failing to discover, and to suppress, the dangerous practice of employees throwing stones about the premises.
4. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—In an action for injuries from stones thrown by a fellow servant during rest hours while on the master's premises, evidence *held* to warrant submission to jury of assumed risk from continuing to work with knowledge of the danger.
5. MASTER AND SERVANT—PERSONAL INJURIES—INSTRUCTION.—In an action by a servant for injuries from stones thrown by a fellow servant during rest hours while on the master's premises, an instruction embracing the abstract proposition of the assumption by a servant of all the ordinary and usual hazards of the service was properly refused as misleading.

6. TRIAL—REQUESTED INSTRUCTION.—It was not error to refuse a requested instruction which was not accurate and free from criticism.

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

Brundidge & Neelly, for appellant.

The judgment should be reversed and the cause dismissed, because:

1. The court erred in refusing to give the jury the peremptory instruction requested, as the evidence shows that appellee assumed the risk of injury at the time he entered the employment. He was of age and fully realized and appreciated the danger arising from the practice of throwing stones and missiles about the mill plant. 3 Labatt Master & S. (2 ed.), p. 3170, § 1182; 62 Ark. L. R. 695; 96 Ark. 387; 95 *Id.* 560; 105 *Id.* 533; 90 *Id.* 411; 77 *Id.* 367-458; 82 *Id.* 11; 161 Mass. 153; 68 Ark. 319; 56 *Id.* 237. See also 77 Ark. 375; 99 *Id.* 377; 104 *Id.* 489; 18 R. C. L. 683, § 172; 126 Fed. 501; 81 N. E. 529; 206 S. W. 655.

2. The court erred in giving instruction No. 1 requested by plaintiff (1) because it assumed that plaintiff was injured upon the premises of defendant and while in its control and while said fellow servant was in the discharge of his duties, and (2) because it failed to tell the jury that if plaintiff assumed the risk and same was obvious to him and he continued to work, he could not recover. Cases *supra.*

3. The court erred in its refusal to give instructions Nos. 8, 9, 10 and 11, requested by appellant. 105 Ark. 487.

4. The court erred in its refusal to give No. 14, requested by defendant. The question of assumption of risk was not submitted to the jury in any other instruction for defendant. Cases *supra.*

5. It was error to admit parol testimony to establish the incorporation of defendant. Kirby's Dig., § 845; 107 Ark. 58.

J. N. Rachels, for appellee.

1. There is but one question raised here, that of "assumed risk." The law of this case was settled on the former appeals, except assumed risk. 105 Ark. 485; 120 *Id.* 206, and 129 *Id.* 111.

2. The question of assumed risk was not raised in any of these appeals or trials and the question has no place here. 116 Ark. 196. Act 69, Acts 1907, abolishes the doctrine of assumed risk as a defense. 90 Ark. 543; 92 *Id.* 92. See 206 S. W. 677; 32 L. R. A. (N. S.) 1028.

3. There should be a limitation on the right to amend answers. 60 Ark. 531; 85 *Id.* 43; 120 *Id.* 601. See also as to the "assumption of risk," 9 C. C. A. 130; 23 U. S. App. 62; 69 Fed. 553; 29 C. C. A. 374; 85 Fed. 608; 3 N. E. 627; 26 *Id.* 210; 2 *Id.* 24; 25 *Id.* 373; 156 Ill. App. 602; Labatt on M. & S. (2 ed.), § 894; 14 L. R. A. 737; 126 Ark. 452; 116 N. E. 324. "Assumed risk" has no place in this case, and every other question has been settled by the former appeals.

McCULLOCH, C. J. Appellee instituted this action against appellant to recover damages on account of personal injuries. He alleged, in substance, that while in the service of appellant company upon its premises and in the discharge of his duty he was struck in the eye by a rock thrown by one of the company's employees while such employee was upon the premises of the company, and under its control, and that the company was guilty of negligence in failing to exercise care to protect him from danger.

The answer denied the material allegations of the complaint, and set up affirmatively as a defense assumption of risk.

This is the fifth appeal in this case. See 105 Ark. 485, 113 Ark. 196, 120 Ark. 206, 129 Ark. 111.

The defense of assumed risk was raised for the first time at the trial which resulted in the judgment for appellee, from which is the present appeal.

Appellee testified that when he went to ask employment of appellant he saw and knew that the dangerous practice of throwing stones was going on. After he accepted employment he saw it every day during the twenty months he worked for the appellant company; it was going on practically all the time. He had frequently complained to the management about it and they had declined to correct the evil and never promised appellee that they would correct it. Nevertheless, he remained in the employment of the appellant for twenty months with full knowledge that he was liable to get hurt. He gave as his reason for remaining in the service, with such knowledge, that he was out of a job and was looking for work.

After appellee had so testified, appellant asked permission to amend its answer setting up the defense of assumed risk, and over the objection of appellee the request was granted.

At the conclusion of the testimony, appellant presented certain prayers for instructions on the issue of negligence, defining the duties and obligations of the master to the servant under the facts which the testimony tended to prove. Some of these the court granted and some it refused. We deem it unnecessary to set forth these prayers for instructions.

Appellant also requested instruction on the subject of assumed risk, which reads as follows:

"The jury are instructed that, under the law, when the plaintiff entered the service of the defendant company and continued in said employment, he assumed all the ordinary and usual hazards incident to such employment, and he also assumed the risk from the manner in which he knowingly sees and observes that the business is being operated and carried on; and if you find, from the testimony, that prior to the injury plaintiff had been in the employ of the defendant company for a period of twenty months, or thereabouts, during which time he saw and knew of the dangerous habits of some of the employees in throwing missiles and stones, and that he appreciated this danger and continued in the service, then

under the law he assumed the risk of injury therefrom, if any, and you will find for the defendant."

Appellant also asked that the jury be instructed to return a verdict in its favor, which the court refused.

The appellant duly excepted to these rulings.

On the first appeal in this case, we said: "The master owes to his servants, while on his premises to perform services, and also to strangers who rightfully come upon the premises, the duty of exercising ordinary care to free the premises from known dangers, all dangers of which the master is informed. This, of course, included dangers arising from negligent or wilful acts of the servants. Though it is not essential to the master's liability that the negligent servant should be acting at the time within the scope of his authority, yet it is essential that the master should have control of him, or the opportunity to control his actions, before the liability attaches on account of his conduct. If the servant in committing the negligent act is not proceeding within the line of his duty, and is not at the time within the control of the master, then the latter is not liable." 105 Ark. 485. This was also reiterated in the opinions of this court on the subsequent appeals.

The rule as thus announced, on the issue as to the alleged negligence of the appellant, is the law of the case on the present appeal, for the facts on that issue were substantially the same on the last trial as they were on the former trials. The charge of the court on the issue of negligence conforms to the law as thus announced on former appeals, and we find no error in the rulings of the court in giving and refusing prayers for instructions on that issue.

Appellant contends that the court erred in its rulings in refusing its prayer for peremptory instruction, for the reason that the undisputed evidence shows that appellee assumed the risk, but if mistaken in this, appellant contends that assumed risk under the evidence was at least an issue which should have gone to the jury under the above prayer for instruction, and, therefore, its

prayer on that subject, set out above, should have been granted.

The facts upon which appellant predicates its defense of assumed risk are substantially as follows:

Appellee had been working for appellant eighteen or twenty months when one of the employees of appellant threw a rock, which struck appellee in the eye, causing him to lose the same. It had been the practice of the employees to throw rocks and other missiles on the mill yard ever since appellee had been there. Appellee had not engaged in this practice. He asked the managers of the company to stop the throwing, telling them "that somebody was liable to get hurt." Appellee says, "He told me to go ahead and attend to my damn business and he would attend to his." They did not stop it. It was the general practice from the time appellee began work until he was hurt. It was going on when appellee went there. He saw it the day he went down and asked for employment, and saw it before he ever hired there; knew it was going on for twenty months before he was injured. There was never a day during the twenty months that some of the people, the boys especially, were not out throwing rocks, staves and chunks. "The boys would go out there and get to throwing, leaping and running." It was going on practically all the time. Appellee was asked why he wanted to work at a dangerous place like that, and answered that he was out of a job and looking for work. Appellee told Mr. Wrape just a day or two before he got hurt "that he ought to put a stop to the boys throwing, that somebody was liable to get hurt," and received the reply above set forth.

Counsel for appellee contend that there can be no question of assumption of risk in an instance of this kind, and he bases his argument on the doctrine stated in *St. Louis, Iron Mountain & Southern Railway Company* v. *Ledford,* 90 Ark. 543. But in that case the liability of the master depended upon the act of negligence of a fellow servant of the injured person, according to the terms of a statute enacted March 8, 1907, whereas the liability

of the master in this case rests on his own negligence in failing to exercise ordinary care to free the premises from a known danger. Other employees were guilty of improper and wilful conduct in throwing stones on the premises during the rest hours, but in so doing they were not acting within the scope of their authority so as to make the employer responsible for their conduct, but the negligence of the employer, if any, consisted in failing to exercise ordinary care to protect its employees by surpressing the practice of throwing missiles on the premises. In other words, the master is guilty, "not of the wrongful act itself, but only of neglect to restrain his servants from doing it." *Barrentine* v. *Henry Wrape Co.,* 105 Ark. 485; Shearman & Redfield on Negligence, § 141.

Though we held in the Ledford case, *supra,* that the risk of danger arising from the negligence of a fellow-servant was not, in a suit against the master under the act of March 8, 1907, assumed by the injured servant merely on account of knowledge of the habitual negligence of such fellow-servant, yet we distinctly recognized the rule that where the liability of the master depended on the question of his own negligence in the selection of his servants, the risk of the danger can be assumed. In the opinion in that case, we said: "Risks of danger arising from negligence of the master in employing incompetent or reckless servants could be assumed by a servant who took service or continued in service, with knowledge and appreciation of the danger. * * * In this respect the statute has wrought no change." In support of that statement of the law we cited cases which fully sustain it. *Kansas P. Railway Co.* v. *Peavey,* 34 Kan. 472; *Hatt* v. *Nay,* 144 Mass. 186; *Davis* v. *Detroit & M. Rd. Co.,* 20 Mich. 105; *Latremouille* v. *Bennington, etc., Ry. Co.,* 63 Vt. 336; *Frazier* v. *Pennsylvania Railway Co.,* 38 Pa. St. 104.

The same rule should apply in a case like this, where the negligence of the master consists in failing to restrain his servants from committing improper acts to the in-

jury of their fellow-servants under circumstances under which he can control them. Where the liability of the master depends, as it does in this case, solely on the question of negligence in failing to stop the dangerous practice of throwing stones about the premises, it necessarily follows that the doctrine of assumed risk applies, and that there is no liability where the injured servant himself has knowledge of the repeated wrongful acts of his fellow-servants and appreciates the danger of continuing in the service. The master has the higher duty of exercising care to ascertain what the conduct and habits of his servants are while on the premises and is liable for negligence in failing to discover such dangerous practices, as well as in failing to suppress such practices which actually come to his knowledge; whereas a servant is only bound to take notice of those things which come to his knowledge and he assumes the risk only when he has that knowledge and appreciates the danger.

We are of the opinion, therefore, that the doctrine of assumed risk applies in this case and that there was sufficient evidence to warrant a submission of that issue to the jury, but we do not think that the undisputed evidence shows that the risk was assumed, and the court was, therefore, correct in refusing to give a peremptory instruction in appellant's favor.

It is true that appellee admitted that he knew of the improper practices when he took service and that the same continued during his period of service, but it was a question for the jury to determine whether or not the wrongful acts of the servants in throwing missiles about the premises were so frequent as to bring home to appellee a full appreciation of the danger of working on the premises. The jury might have found from the evidence that the conduct of the other employees was such as to charge appellant, resting under the duty as master of protecting his premises from dangers, with negligence in failing to suppress the dangerous practice, while on the other hand the jury might have found that appellee, resting under no such duty, did not fully appreciate the dan-

ger so as to constitute an assumption of the risk. The question should, therefore, have gone to the jury on appropriate instructions and should not, at the request of either party, have been taken from the consideration of the jury.

Error is assigned in the refusal of the court to give the aforementioned instruction on this subject, but that instruction was erroneous because it embraced the abstract proposition of the assumption by a servant of all of the ordinary and usual hazards incident to his service. That particular phase of the doctrine of assumed risk was not involved in this case, for the charge of negligence is the master's failure to exercise care to free the premises from the dangers arising from wrongful practices of employees on the premises, and this was not one of the ordinary hazards incident to the employment. It was an extraordinary hazard arising from the negligence of the master, and this verdict would have been calculated to mislead the jury. The doctrine of assumed risk is one not easily understood by the average layman, even when lucidly expressed, and a trial judge should not be criticised or reversed because he refuses to give an instruction which erroneously embraces an abstract proposition with respect to this doctrine. In fact, it has been the settled rule of this court since it was first announced in the case of *Allison* v. *State,* 74 Ark. 444, that a party can not complain of a court's refusal to give an instruction on a given subject unless one is asked which is technically accurate and free from criticism.

No other instruction on this subject was requested by appellant, and the court was not bound to give an instruction unless one in correct form was requested.

There are other assignments of error not of sufficient importance to discuss.

Affirmed.

HUMPHREYS, J., concurs.

SMITH, J., dissents.

BATESVILLE v. SMYTHE.

Opinion delivered April 7, 1919.

1. DISORDERLY HOUSE—QUESTION FOR JURY.—Evidence *held* sufficient to warrant submission of the issue as to whether defendant was a prostitute occupying a room for purpose of prostitution, in violation of a city ordinance.
2. DISORDERLY HOUSE—CITY ORDINANCE—PROOF.—Under a city ordinance prohibiting a prostitute or loose woman from occupying any room or tenement for the purpose of prostitution or assignation, proof of a single act of sexual intercourse in a house is insufficient to warrant a conviction, without further proof that the woman using the room was a prostitute and that she was using the room for the purpose of prostitution or place of assignation.
3. DISORDERLY HOUSE—EVIDENCE—REPUTATION.—In a prosecution of an alleged prostitute for maintaining a room or tenement for purposes of prostitution or assignation, in violation of a city ordinance, proof of the ill repute of the house and of the general reputation of inmates and frequenters thereof is competent to show the character of the place.
4. DISORDERLY HOUSE—EVIDENCE—REPUTATION.—In such prosecution, the accused's reputation is admissible to show the character of the house, she being an inmate thereof.
5. CRIMINAL LAW—FORMER JEOPARDY.—Under a city ordinance which prescribes a fine but no imprisonment, defendant may be tried again on reversal of the cause after acquittal.

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

Samuel M. Casey, for appellant.

The court erred in holding that a single act of prostitution was not sufficient to make out an offense under the ordinance and that it was necessary to show that the illicit intercourse must be shown to have been for gain, that is, that money should pass. The plain terms of the ordinance do not require any such showing, and further do not require more than one act of intercourse to make the offense. The ordinance is well within the authority and powers of the city. 127 Ark. 268; Kirby's Dig., § 5438.

204 S. W. 626 defines a prostitute as one who for hire or without hire offers her body, etc. The city proved that defendant used her room for prostitution and offered to prove her reputation for morality was bad and that it was that of a prostitute. It was shown that her house was a place where loud noises, vulgar language and general disorderly conduct was had. The judgment should be reversed as the ordinance only provided for a fine. 205 S. W. 981; Kirby's Digest, § 2626.

McCULLOCH, C. J. Appellee was arrested and tried before the mayor of the city of Batesville, for violation of an ordinance of the city, which reads as follows:

"Sec. 211. That every bawd, prostitute or loose woman who shall use or occupy any room or tenement for the purpose of prostitution or place of assignation within the city of Batesville, and every person who shall rent or permit any room or tenement in his or her possession or control to be so used or occupied, and every male person visiting any room or tenement so used and occupied for the purpose of illicit intercourse shall be guilty of a violation of this ordinance."

The ordinance provides for punishment by a fine of $25 for each offense. On appeal to the circuit court from a judgment of conviction before the mayor, the case was tried before a jury, and the court, after the introduction of the evidence was completed, gave a peremptory instruction to the jury for acquittal of the accused.

Appellee was operating a restaurant in Batesville, occupying a room in a two-story building, and the evidence tends to show that she was detected having sexual intercourse with an unidentified man one night about 10 o'clock in the room. Appellee and this man were, according to the testimony, seen by several witnesses lying on the floor having sexual intercourse. The testimony also shows that the room occupied by appellee was a disorderly place, and that cursing and loud noises were permitted there frequently until late at night so as to disturb the family who occupied the second story of the building.

Counsel for appellant also offered to introduce testimony of certain witnesses to prove bad reputation of appellee in the community for morality.

No testimony was introduced on behalf of appellee.

We are of the opinion that there was sufficient testimony introduced to warrant a submission of the issue as to the violation of the city ordinance. If the proof had been confined to a single act of sexual intercourse in the house it would have been insufficient, for, in order to constitute an offense under this ordinance, the accused must be shown to have been a "bawd, prostitute or loose woman," and that she used or occupied the room "for the purpose of prostitution or place of assignation." It is thus seen that there are two elements constituting the offense; one the character of the woman as a prostitute or loose woman, and the use or occupancy of the room for the purpose of prostitution. It was, therefore, not sufficient to show merely that the room was used in a single instance for illicit sexual intercourse, without further proof that the woman using the room was a prostitute, and that she was using the room "for the purpose of prostitution or place of assignation."

The words employed in the ordinance are defined, so far as concerns the case now before us, in the opinion in the recent case of *Sisemore* v. *State,* 135 Ark. 179, 204 S. W. 626, where we held that (quoting from the syllabus), "the word prostitute means a woman given to indiscriminate lewdness, and the word 'prostitution' means a state of existence for that purpose, and does not include merely the act of a woman occupying the relation of concubinage with one man."

We find other proof in the record, however, which in connection with the proof of the single instance of sexual intercourse, is sufficient to make a case for submission to the jury. That proof consists in the statements of witnesses as to the disorderly manner in which the house was conducted.

It is also insisted that the court erred in refusing to admit testimony of appellee's reputation for immorality.

The rule of evidence in this class of cases is well settled that proof of the ill repute of the house or apartment alleged to have been used for purposes of prostitution is competent, and that proof of the general reputation of inmates and frequenters of such place is competent for the purpose of showing the character of the place. We recognized the soundness of the rule in the case of *Lismore* v. *State,* 94 Ark. 207, but held that such proof was, of itself, insufficient to sustain a conviction. In the opinion, Judge BATTLE, speaking for the court, said: "The evidence that the house occupied by appellant had the reputation of being a bawdy house was not sufficient to convict. It is a circumstance which may be shown in connection with evidence that it was a resort of men and women who are reputed to be of lewd and lascivious character. Independently, it is of no force or effect."

There is a conflict in the authorities as to the admissibility of proof of the reputation of the accused person, the same as other inmates of a house of prostitution, but we think the weight of authority sustains the view that such proof is competent. The universally conceded rule is that guilt of a person accused of crime can not be established by proof of general reputation, but an exception to that rule, or rather an instance of nonapplication of the rule, is that the character of a house may be established by the reputation of its inmates and frequenters, and this applies to the proof of reputation of the accused person as an inmate of the house. *State* v. *Hendricks,* 15 Mont. 194, 48 Am. St. Rep. 666; *Howard* v. *People,* 27 Col. 396; *Dailey* v. *State,* 55 S. W. (Tex. Ct. App.) 823; *Sparks* v. *State,* 59 Ala. 82; *State* v. *Mack,* 41 La. Ann. 1079.

We content ourselves with quoting the views expressed by the Montana Supreme Court in the case of *State* v. *Hendricks, supra,* as follows:

"The principle of law that the character of a defendant may not be attacked by the State unless she puts her character in issue by her defense can not be said to be violated because the evidence of her reputation is not

admitted to prove that, inasmuch as the defendant is a prostitute, she is therefore a bad woman, and thus would be more likely to commit the crime charged against her, but as bearing upon a material issue in the information; that is, the character of the inmates of the house, of which she may happen to be one, and the character of the house, and the intent of the keeper. * * * A woman may live as the sole inmate and keeper of a bawdy house; yet, if several of the cases cited by appellant correctly state the law, although the reputation of the inmates of a bawdy house is a proper subject of investigation, still there could be no testimony offered to prove the fact that she was by reputation a prostitute, simply because she was the person charged with the offense. We think such a distinction is not well founded, and prefer to lay down the rules fixed in those cases which put the defendant keeper, if an inmate, on a plane with the others, whose characters become matters of common repute."

It necessarily results from these views that evidence of the bad reputation of the occupant of the house was competent for the purpose of establishing the character of house, and the use she was making of it. It is not a question of establishing guilt by proof of bad reputation, but, in order to establish guilt, it is competent to show the bad reputation of the house by proving the character of the people who lived in it, or who resorted to it.

We think the court erred in not admitting the offered testimony.

There is no imprisonment prescribed in the ordinance as punishment for violation, and when the cause is remanded the accused may be tried again without exposing her to jeopardy for the second time.

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

MEHAFFY v. WILSON.

Opinion delivered April 7, 1919.

1. PARTNERSHIP—LIABILITY—TORTS.—A partner is liable for a co-partner's torts if committed in the course of the partnership business.
2. PARTNERSHIP—LIABILITY.—To establish a liability against a partner for the acts of others, it must appear that the partnership was formed by express agreement or that the party sought charged has been guilty of some act by which he is estopped from proving that he is not in fact a partner.
3. PARTNERSHIP—WHEN CREATED.—A contract, when considered as a whole, may create a partnership, though the parties expressly provide that such is not their intention.
4. PARTNERSHIP—PRESUMPTION.—Where there is a joint enterprise and a division of profits as such between the parties, it is a cogent circumstance tending to prove the existence of a partnership, and, as to third parties, the presumption is conclusive unless proof is adduced to overcome it.
5. PARTNERSHIP—CONSTRUCTION OF CONTRACT.—An agreement that a timber and mill owner should receive specified prices for his timber and compensation for his services and the use of the mill, residences, etc., out of a certain proportion of the profits, if there were profits, did not make him, as to third persons, a partner of the operator of the mill.

Appeal from Hempstead Circuit Court; *G. R. Haynie,* Judge; affirmed.

STATEMENT OF FACTS.

This action was instituted by the appellant, as natural guardian and next friend of Pearl Mehaffy, against Matthew Wilson and Ralph Russell.

The appellant alleged that the defendants were partners in a sawmill at Kilgore, Hempstead County, Arkansas; that Pearl Mehaffy was a minor thirteen years of age and employed by the defendants to work on the yard at said mill; that Pearl Mehaffy was inexperienced with machinery and mill work, and that the foreman of the mill knew this fact; that the foreman negligently instructed Pearl Mehaffy to remove sawdust from under the saw of said mill which necessitated his working in close proximity to a line shaft while same was revolving

at a high rate of speed; that the defendants negligently failed to warn him of the danger incident to said work; that they negligently failed to box or guard the line shaft, and negligently allowed a strap of belting to be tied about said line shaft where said Pearl Mehaffy was instructed to work, and negligently permitted the same to remain on the shaft with one end of the strap loose and flying around the shaft as the same revolved; that the defendants negligently failed to use due care to inspect said shaft; that defendants failed to exercise ordinary care by reason of the negligence set forth, to provide Pearl Mehaffy a safe place to work; and that by reason of said negligence the end of the strap caught Pearl Mehaffy by the hand causing him to come in contact with the line shaft and his body to be whirled around said shaft tearing his left arm from his body, causing him great pain, suffering, and mental anguish to his damage in the sum of $20,000, for which judgment was asked.

The defendants were nonresidents of the State and were duly served with notice by publication. The defendant Matthew Wilson filed an answer denying all the material allegations of the complaint and setting up the affirmative defense of contributory negligence.

The plaintiff introduced testimony which tended to sustain the allegations of his complaint as to negligence and as to the injury inflicted, and also introduced a contract between one Matthew Wilson, party of the first part, Ralph Russell, party of the second part, and J. D. Stuart, or such other person as Wilson from time to time might name, as party of the third part.

The recitals of the contract show substantially the following: That Wilson was the owner of about 10,000 acres of land in Hempstead, Pike and Nevada Counties, in this State, upon which there was estimated to be 64,889,500 feet of standing timber of various kinds, which it was agreed had varying values, according to kind, from $3 to $10 per thousand feet board measure.

The contract was paragraphed and the paragraphs were substantially as follows:

1. That the contract did not create a partnership or the relation of principal and agent.

2. That the title to all the lands, timber, mills, and other property furnished by Wilson should remain in him.

3. That Russell was to repair the buildings and equip the mill and maintain the same so as to manufacture timber upon the lands for sale, and for the proceeds of which he was to account to Wilson.

4. That the sales and collections were to be made by one Stewart, who was to have supervision of the books and also render general services in the operation. As compensation for his services Stewart was to be given a certain amount per week by Russell and an additional amount by Wilson of 10 per cent. of 50 per cent. of the net profits which should be received by Wilson. That Russell should receive so much per week and the remaining 50 per cent. of any net profits realized in cash out of the operations. Wilson was to receive for the timber and logs removed from the land certain prices, designated for certain kinds of timber and for such as were not designated the prices were to be agreed upon by arbitration.

5. That Russell was to pay Wilson for all saw logs upon the land which were not used for repairing the mill and which were injured by delay in manufacture, the same price as for standing trees.

6. That Wilson and Russell were to contribute equally to the cost of constructing any tramways or additional mill which they might decide to erect in the future. Their contributions to be paid back with 6 per cent. interest out of the profits of the operation before the division of the net profits equally between them.

7. That the order of the charges or claims upon the moneys realized out of the product were to be as follows:

First. Taxes, insurance, expenses of the lands, buildings, etc.

Second. The price of stumpage to Wilson.

Third. Payment to Russell for wages of men (other than himself and Stewart) and of teams.

Fourth. Wages per week for Russell and Stewart.

Fifth. Repayment to Russell for repairs, and other costs of operation, including the sales.

Sixth. The cost of new mills and any railway or tramway.

That there shall be no charge or lien of any kind created either directly or indirectly by Russell or Stewart on the land of Wilson

8. Russell was to carry on all the operations.

9. That the money received from the operations should be deposited in the bank, designated by Wilson. There was to be kept in the Bank of Prescott money necessary for wages and petty cash required in the operation. The other moneys were to be deposited in Canada in the name of Stewart or such other person as might be agreed upon in trust to carry out the agreement. That Stewart should sign all checks and keep all vouchers for money paid out, Russell having the right, in order to keep track of these checks and vouchers, to countersign them.

10. All leases to be made by Wilson through Stewart approved by Russell. Wilson to pay all the arrears of taxes and receive all arrears of rent. The failure of title should not invalidate the agreement or make either party liable to the other.

11. That Russell upon completion of the operations was to have all the property which he had put in and paid for, which he had not received any repayment for.

12, 13, 14, 15, are not important as showing the relation between Russell and Wilson.

16. That Wilson was to have access at all reasonable times to the books, accounts, etc.

17. That Wilson might discharge Stewart and engage another man for Russell who should have the same duties and powers as Stewart.

18. That either Wilson or Russell could terminate the agreement by three months' notice in writing to the other of his intention to do so.

19. That Wilson was not to be personally liable for anything or on any account under the agreement except for contributing money under clause 6.

20. That Russell upon failure to carry out the operations as provided in the contract, or any other breach of the agreement by Russell continued for a period of four weeks, should forfeit all his rights thereunder and give Wilson the right to take possession and carry on the operations.

21. That Russell was to deposit the sum of $2,000 in the Standard Bank of Canada as the guaranty for the faithful performance of his contract.

22. Wilson was to have the right to take possession of any section or one-quarter section of the land, where Russell had stopped operations thereon.

23. That any person who advanced money to Russell upon default by Russell might notify Wilson by writing and assume Russell's contract upon giving Wilson the same security as Russell had done.

24. That the provisions in regard to Stewart should apply to any other nominee of Wilson.

25. That the provisions relating to the rights and duties of Wilson and Russell should extend to their heirs, executors, administrators and assigns, but Russell could not assign any right without first obtaining the written consent of Wilson.

Upon motion of the defendant the contract was excluded from the jury, to which ruling the plaintiff duly excepted.

The defendant, thereupon, moved the court to instruct a verdict in his favor, which motion the court granted, to which the plaintiff duly excepted.

From the judgment in favor of the defendant is this appeal.

U. A. Gentry, Lemley & Lemley and *O. A. Graves,* for appellants.

The court erred in directing a verdict for defendant, Wilson, in excluding the partnership contract from

the jury and in holding that as a matter of law Wilson was not liable, either as principal or partner. Wilson under the contract was a partner and liable for torts. 32 Ark. 315; 36 *Id.* 268. The contract and other circumstances show him to have been a partner. Such was the intention of the parties, the *legal* intention, and that is the true test. 30 Cyc. 360; 34 Vt. 121, 80 Am. Dec. 670; 20 Ore. 132, 11 L. R. A. 149; 30 Am. Dec. 596; 30 N. E. 442; 87 Ark. 416. Participation in the profits is not the sole criterion as to creditors. 44 *Id.* 423; 63 *Id.* 518; 74 *Id.* 437; 80 *Id.* 23.

See also as to the partnership 169 Pa. 480; 30 Cyc. 390; 110 S. W. 314; 14 Barb. 471; 1 Bosw. 490; 18 Wend. 175; 31 Am. Dec. 376; 169 Pa. 480; 32 Atl. 578; 23 Wis. 254; 17 *Id.* 141, 84 Am. Dec. 734; 20 L. R. A. 776. Wilson was really the principal and liable as such. *Supra.*

McRae & Tompkins, for appellee.

The court was right under the contract and all the facts in excluding the contract and in directing a verdict for Wilson, as he was neither a principal nor a partner nor liable as such. 26 Ark. 154; see also 5 *Id.* 61; 44 *Id.* 427; 93 *Id.* 57; 74 *Id.* 437; 87 *Id.* 412; 80 *Id.* 23; 63 *Id.* 518; 91 *Id.* 26; 93 *Id.* 521; 97 *Id.* 390; 207 S. W. 221; 30 Cyc. 380.

The doctrine of "holding out" as a partner has no application in *torts.* 1 Lindley on Partnership, pp. 42-47; 52 L. R. A. 675. The contract states, "It is not a partnership such as was clearly the intention of the parties and this should prevail, especially as to third parties." 133 Fed. 462; 58 Conn. 413; 51 N. J. L. 103; 22 Vt. 181; 18 L. R. A. (N. S.) 975, and notes. 80 Ark. 23 in note to 10 Ann. Cas. 135. Mere participation in profits and losses is not sufficient. 207 S. W. 221. The usual elements of copartnership are lacking here. 54 Ark. 384; 2 H. Blackstone, 235; 8 H. L. C. 260; 1 Ont. App. 115; 19 Ont. 83; 44 Ark. 425-428; 63 *Id.* 518; 96 Mich. 160; 144 *Id.* 274; 45 Mich. 188.

WOOD, J., (after stating the facts). The testimony was sufficient to prove a cause of action in favor of the appellant against Russell and the only question for our consideration is whether or not a partnership relation was created by the contract between Russell and the appellee. For if Russell and Wilson were partners then Wilson would be liable for the torts of Russell committed by the latter as a partner in the course of the partnership business, whether Wilson had knowledge of such torts or not. *McIlroy* v. *Adams,* 32 Ark. 315; *McClure* v. *Hill,* 36 Ark. 268.

But if the contract under review did not create the relation of partnership between Russell and Wilson then the latter would not be held liable for the torts of the former, because there is no testimony in the record to warrant the conclusion that the appellee by his conduct had caused Pearl Mehaffy, the employee, to believe that Russell was the partner of appellee in the sawmill, in the operation of which Mehaffy was injured.

In *Haycock* v. *Williams,* 54 Ark. 384, we held, quoting syllabus: "To establish a liability against a party as a partner for the acts of others, it must appear that a partnership was formed by express agreement, or that the party sought to be charged has been guilty of some act by which he is estopped from proving that he is not in fact a partner." See also *Beecher* v. *Bush,* 45 Mich. 188; *Miller* v. *Simpson,* 101 Va. 476, 59 S. E. 578, 18 L. R. Ann. (N. S.), 962, case note subdiv. 6, p. 988.

Recurring then to the question as to whether the contract created a partnership relation a careful analysis of it shows that it is lacking in many of the essential elements of such relation.

In the recent case of *Wilson* v. *Todhunter,* 137 Ark. 80, we quoted from the Supreme Court of Missouri in the case of *Distilling Co.* v. *Milson,* 172 Mo. App. 612, as follows: "Mere participation in the profits and losses of a business, alone, would not necessarily make a participant a partner. Whether in fact a partnership exists depends upon the intention of the parties, to be discovered from

the contract into which they enter, construed in the light of all the facts and circumstances that obtain." See also *Buford* v. *Lewis,* 87 Ark. 416, where we said, "Whether a given agreement amounts to a partnership between the persons themselves is always a question of intention."

The contract is lengthy and it could serve no useful purpose to discuss its provisions in detail. After the preamble the first paragraph of the contract expressly provides that nothing contained therein is intended to create a partnership. While this language is not conclusive upon that issue yet if there is nothing in the subsequent language of the contract in conflict with such expressed intention, due force and effect should be given to it.

It is undoubtedly true, and many of the authorities so hold, that if the language of the contract when considered as a whole creates the partnership relation then it should be so construed, even though the parties expressly provide that such is not their intention. *Fougner* v. *First National Bank,* 141 Ill. 124; *Loomis* v. *Marshall,* 30 Am. Dec. 596, 30 N. E. 442; *Flower* v. *Barnekoff,* 20 Ore. 132, 11 L. R. A. 149, 30 Cyc. 360. See also *Miller* v. *Simpson, supra,* and *Beecher* v. *Bush, supra,* and many other cases cited in case note of *Miller* v. *Simpson, supra.*

But here there is nothing in the subsequent language of the contract out of harmony with the expressed intention not to create a partnership. On the contrary, we are convinced that when all of the provisions of the contract are considered it can not be construed as creating a partnership relation between Russell and Wilson.

Where there is a joint enterprise and a division of the profits as such between the parties it is a cogent circumstance tending to prove the existence of a partnership, and, as to third parties, the presumption is conclusive unless proof is adduced to overcome it. See *Buford* v. *Lewis, supra; Rector* v. *Robins,* 74 Ark. 437; *Johnson* v. *Rothschild,* 63 Ark. 518.

Now, there is nothing before us except the construction of the written contract. No presumptions are to be

indulged, and the question as to the intention of the parties must be gathered solely from the language of the instrument taken as a whole.

Wilson was the sole owner of the mill, and the machinery that caused the injury. There was no community of interest in the property existing at the time of the injury, no division of profits or losses as such. Wilson was not responsible for any losses and did not share in the profits as profits, but only was to receive a certain price for his timber and then compensation for his services and use of the mill, residences, etc., out of a certain proportion of the profits, if there were profits. These conditions would not make him a partner of Russell. *Haycock* v. *Williams, supra.* See also *Lacotts* v. *Pike,* 91 Ark. 20-28; *Denny* v. *Cabot,* 47 Mass. 82-90; 1 Rowley on Part., § 78.

Our conclusion is that when the essential tests for determining partnership are applied to the contract under review, the trial court was correct in holding that it was not a partnership agreement.

The judgment is, therefore, affirmed.

HOOPER v. WIST.

Opinion delivered April 7, 1919.

1. JUDGMENT—TITLE TO LAND—RES JUDICATA.—A default decree confirming a party's title to land, though erroneous, is conclusive in a subsequent action between the same parties relating to the title to the same land.
2. JUDGMENT—COLLATERAL ATTACK—PRESUMPTION.—In a collateral attack upon a judgment of a court of general jurisdiction every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment.
3. JUDGMENT—COLLATERAL ATTACK.—A suit to have the title quieted to certain lands and asking that a decree in a former suit brought by a land owner adjacent to plaintiff to confirm such adjacent owner's title be reformed, where land affected by such decree constitutes a part only of the land to which plaintiff seeks to have title quieted, is a collateral attack, and not a direct attack, on such decree.

Appeal from Madison Chancery Court; *Ben F. McMahan,* Chancellor; affirmed.

STATEMENT OF FACTS.

Frederick T. Hooper brought this suit in equity to confirm his title to certain lands described in the complaint.

The complaint alleges that he is the owner in fee and in possession of certain lands which are specifically described. His complaint first describes 120 acres of land and then describes the following:

"Part of the northeast quarter of the northwest quarter, section 1, township 13 north, range 26 west, beginning at a stone at the northeast corner of the above described one-fourth, thence west 7 chains and 15 links to a stone set in the standard line for the beginning point, thence south 42 degrees west with the middle of the old lane to the west line of said forty, thence north with said line to the northwest corner of said forty, thence east with the standard line 13 chains and 39 links to the beginning point containing 14 acres more or less." (A part of the land just described is the land in controversy in this suit.)

In the second paragraph of his complaint the plaintiff sets forth his muniments of title. In the third paragraph, plaintiff alleges that he and those under whom he claims title, have had adverse possession of all of said lands for more than seven years last past and have continuously paid the taxes thereon for said term of years; that there is no one else in possession of any part of said lands and that there is no one laboring under the disability of infancy, idiocy, or coverture; that there is no one known to the plaintiff claiming any part of said lands unless it be the part of the lands specifically described above; that at the February term of the Madison Chancery Court in 1912 Mary A. Wist filed her petition asking the court to confirm her title to a part of the northeast quarter of the northwest quarter of section 1 north, range 26 west; that both the plaintiff herein and Mary A. Wist

owned land in said forty-acre tract and that a mistake was made in said decree in describing the boundary line in said forty-acre tract between the plaintiff and Mary A. Wist.

The prayer of the complaint is that the title to all said lands be quieted and confirmed in the petitioner, Frederick T. Hooper, and that the chancery decree in the case wherein Mary A. Wist had her title confirmed to the lands in controversy be reformed to speak the truth. Frederick T. Hooper was made a party defendant to the chancery suit of Mary A. Wist to quiet her title to the lands in controversy and Mary A. Wist was made a party defendant to the present suit.

Mary A. Wist filed an answer denying the general allegations of the complaint, and also specifically denying that any mistake was made in the chancery decree rendered at the February term, 1912, of the Madison Chancery Court in the suit of Mary A. Wist to confirm her title to certain lands, including the land in controversy and in which Frederick T. Hooper was made a party defendant. The defendant further alleges that she is the owner of the land in controversy and prays that the plaintiff's complaint be dismissed in so far as it affects the land in controversy.

The plaintiff, Frederick T. Hooper, was a witness for himself. According to his testimony he owned a part of the forty-acre tract of land in which the land in controversy is situated and Mary A. Wist owned the remaining part of said forty-acre tract. There was, at one time, a lane between the two tracts of land and he cultivated up to one side of the lane and Mary A. Wist cultivated up to the other side of it. He always claimed the land down to the old lane. There is a fence there now and the old lane has grown up in bushes. He denied ever signing an agreement that the line between him and Mary A. Wist should be on a line south 45 degrees west. He always considered the old lane the line between them. He was served with summons in the chancery suit of Mary A. Wist to quiet her title to certain lands including the land

in controversy. He was informed that she was not trying to take any of his land and filed no answer in that case. His testimony was corroborated in the main by that of his son.

J. W. Wist testified that he was the husband of Mary A. Wist and acted as her agent in transacting her business concerning this land; that his wife had her title to the land confirmed in the chancery court in 1912, and that the line in dispute began 7 chains and 15 links from the northeast corner of the forty and ran south 45 degrees west to the west line of the forty; that this line was agreed upon several years ago by Hooper and himself; that the deed of Hiram Richie to his wife was changed to correspond with the agreement made between him and Mr. Hooper.

G. W. Anderson, who was circuit clerk at the time testified that at the request of the county surveyor he made a notation on the deed from Hiram Richie to Mary A. Wist changing the description from 50 degrees to 45 degrees as it now shows.

Three other witnesses for the plaintiff testified that the middle of the lane was the dividing line between Frederick T. Hooper and Mary A. Wist; that the lane was sixteen feet wide and that each party had cultivated up to his side of the lane.

It was decreed that the boundary line between Frederick T. Tooper and Mary A. Wist be on a line south 45 degrees west in the northeast quarter of the northwest quarter of section 1, township 13 north, range 26 west, and that the plaintiff's complaint be dismissed for want of equity in so far as it affects the defendant's title to the land in this forty-acre tract.

It is further decreed that the plaintiff's title to all the other lands described in his complaint be confirmed in him as prayed for in his complaint. The plaintiff has appealed.

W. N. Ivie, for appellant.

The question at issue is purely a question of fact, and is settled by the evidence. The law is controlled by 100 Ark. 555, 140 S. W. 743.

Appellant has claimed the land and cultivated it for more than seven years and has always recognized the old lane or fence row as the boundary line, a line *visible* and *known,* and 100 Ark. 555 is conclusive of the settlement of a disputed boundary line acquiesced in by both parties to this action and his title should be confirmed.

Combs & Combs, for appellee; *J. B. Harris,* of counsel.

Appellant, if he ever had title to the strip of land, is concluded by the decree, after being duly summoned in *West* v. *Pool et al.,* as the court below held. The finding of the chancellor is conclusive as it is clearly not against the preponderance of the evidence. 67 Ark. 287; 68 *Id.* 314; 78 *Id.* 275; 91 *Id.* 549. The decree in *West* v. *Pool* concludes appellant's rights. 41 Ark. 75. The court had jurisdiction and did not exceed it as to subject-matter or the parties. Appellant is bound by the findings and decree of the court and is estopped in a subsequent suit to deny a material fact charged in the pleadings and found by the court. 43 Ark. 439; 119 *Id.* 413. See also 57 Ark. 97. The matter is now *res adjudicata* and the judgment should be affirmed. *Supra.*

HART, J., (after stating the facts). The decree of the chancellor was right; for the parties are concluded in the present case by the decree of the Madison Chancery Court rendered at its February, 1912, term in the case wherein Mary A. Wist was plaintiff and Frederick T. Hooper was defendant. In that case, the record shows that Mary A. Wist and Frederick T. Hooper each owned land in the northeast quarter of the northwest quarter, section 1, township 13 north, range 26 west, and the decree specifically fixed the boundary line between them. The chancery court in that case had jurisdiction of the subject-matter of the action and of the parties. The ob-

ject of the suit was to confirm the title of the plaintiff, Mary A. Wist, in the lands claimed by her. A settlement of the boundary lines between her and the defendant in the action was within the issues. It does not matter that the judgment in that case may have been wrong. It was conclusive between the parties until reversed on appeal or set aside in a direct proceeding brought in the same action for that purpose. It is true a default decree was taken in that case, but a judgment or decree by default is as conclusive as any other judgment or decree.

It is well settled in this State that in a collateral attack upon a judgment of a court of general jurisdiction every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment or decree. *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390; *Clay* v. *Barnes,* 121 Ark. 474, and *Jones* v. *Ainell,* 123 Ark. 532.

This brings us to a consideration of whether the present case is a direct or collateral attack on the former chancery decree. A direct attack on a judgment is usually defined as an attempt to reform or vacate it in a suit brought in the same action and in the same court for that purpose. On the other hand a collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio.* 15 R. C. L. 838, par. 311. This is the effect of our decisions in the cases above cited as well as numerous other decisions of the court.

In the present case the plaintiff brought suit to have his title quieted to certain lands specifically described in his complaint. It is true that when he comes to the lands in controversy, he does ask that the decree in the former chancery suit brought by Mary A. Wist to confirm her title to the same land in which he was made a party defendant, be reformed, but this does not prevent this being a collateral attack on the decree in that action.

In *Cassady* v. *Norris,* 118 Ark. 449, the court held that if an action or proceeding has an independent purpose and contemplates some other relief, although the overturning of a judgment may be important or even necessary to its success, then the attack upon the judgment is collateral.

In Vanfleet's Collateral Attack on Judicial Proceedings, paragraph 3, the author says:

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat or evade it, or to deny its force and effect in some manner not provided by law. As there are only two ways to attack a judicial proceeding, direct and collateral, it is obvious that this definition complements the one in the last section, and they are both self-evident. Any proceeding provided by law for the purpose of avoiding or correcting a judgment, is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power."

In Black on Judgments (2 ed.), vol. 1, par. 252, the rule is stated as follows:

"We are next to inquire what constitutes a collateral attempt to impeach a judgment within the meaning of the rule prohibiting such endeavors. And here we shall find that the word "collateral" is always used as the antithesis of "direct" and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose. If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon

the judgment is collateral and falls within the rule. Thus, whether a judgment is irregular or erroneous is not a legitimate inquiry in a suit brought for its enforcement."

In the application of these principles to the facts of the present case, it is apparent that this is not an action to set aside the decree in which Mary A. Wist was the plaintiff and Frederick T. Hooper was the defendant, entered of record at the February, 1912, term of the Madison Chancery Court. The main object of the present suit is to quiet the title of Frederick T. Hooper to certain lands, and the reformation of the decree in the former suit is also asked.

Under the authorities cited above this action is a collateral attack upon the decree in the former case and the decree in that case must of necessity be conclusive of the rights of the parties. See *Kalb* v. *German Savings & Loan Society* (Wash.), 87 Am. St. Rep. 757; *Kizer* v. *Caufield* (Wash.), 49 Pac. 1064, and *Morrill* v. *Morrill* (Ore.), 23 Am. St. Rep. 95.

The principle is stated in the last mentioned case as follows: "If she neglected or failed, without some reasonable excuse, to produce all of the evidence in her possession in that suit, it is now too late for her to be heard to complain. There must be an end to litigation, and where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences, when the judgment or decree is sought to be enforced against him in a collateral proceeding."

The matter set up in the present action by the plaintiff was not made a ground of defense to the former suit between Mary A. Wist and himself and having failed to set it up in that action the plaintiff can not be heard to urge it in a collateral attack on the decree in that suit.

It follows that the decree must be affirmed.

MORTON v. LINTON & PLANT.

Opinion delivered April 7, 1919.

1. APPEAL AND ERROR—ABSTRACT—SUFFICIENCY.—Upon appeal from a judgment on the pleadings, an abstract setting out the pleadings in full need not give the pages in the transcript where each pleading might be found.
2. SAME—ABSTRACT—SUFFICIENCY.—An appeal from a judgment on the pleadings will not be dismissed because the abstract sets out the pleadings in full and also two chattel mortgages which purport to be the foundation of the lawsuit, but which are not part of the pleadings and have not been brought into the record by bill of exceptions or otherwise.
3. JUDGMENT—RES JUDICATA.—The right of a chattel mortgagor to contest the amount due in replevin proceedings by a mortgagee to foreclose the mortgage, is not precluded because a replevin suit subsequently brought by the mortgagor against the mortgagee was dismissed, upon the ground that the mortgagee might rightfully have possession though his taking under the writ of replevin was unlawful.

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

STATEMENT OF FACTS.

This action was begun before a justice of the peace on the 30th day of December, 1915, by Linton & Plant against Frank Morton to replevy certain personal property under a chattel mortgage for the purpose of foreclosing it. The complaint is as follows:

"The plaintiffs, Linton & Plant, are a partnership doing mercantile business at Rose Bud, Ark., in White County, Arkansas, under oath say they are entitled to one light bay horse of the value of $40; one dark bay horse of the value of $75; one red heifer, two years old, value $20; one three-inch Owensboro wagon, value $30; one set of harness, value $12.50, also the entire crop of cotton, cotton seed, corn, hay and fodder by virtue of one chattel mortgage given January 26, 1915. The plaintiffs claim they are entitled to immediate possession of said property, same being wrongfully detained by said defendant and for said wrongful detention the plaintiffs say

they ought to recover of defendant the sum of $222.85, two hundred and twenty-two and 85/100, balance due on note and the sum of fifty dollars damages and other proper relief, and that their cause of action has accrued in the last three years, and that property was not taken for tax or fine against plaintiffs or under an order of judgment of a court against them or under an execution or attachment against their property. And plaintiffs further state that they believe that the property or a part thereof has been concealed with the intent to defeat this action."

On the 12th day of January, 1916, the defendant filed an answer as follows: "Comes the defendant and for his answer in this cause herein says that he denies that the light bay horse or one red heifer or one three-inch Owensboro wagon or set of harness or one dark bay horse or any part of defendant's crop, either corn, cotton, cotton seed, hay, fodder, or any other thing belongs to the plaintiffs. The defendant denies that he is due the plaintiffs the sum of $232 or any other sum. But for his cross-complaint herein says that in the month of December plaintiffs and defendant had a settlement and that he made, executed and delivered to the plaintiffs a noninterest-bearing note due November 1, 1919, for $135, and to secure the due payment of said note defendant made, executed and delivered a chattel mortgage and that said note was accepted by the plaintiff in full satisfaction of plaintiff. Defendant further answering, says that he has been damaged in the sum of $100 for being deprived of the use and benefit of his property. Whereas defendant prays judgment for the release of his property and for the sum of $100 as his damages for other and proper reliefs."

Judgment in the justice court was in favor of the plaintiffs for the itemized list of the property described in the complaint or for the sum of $222.85, balance due them on the mortgage indebtedness and the further sum of $59.30 costs.

The defendant, Morton, appealed to the circuit court. In the circuit court the plaintiffs, Linton & Plant, filed a plea of *res adjudicata* and moved to dismiss the appeal. To sustain their plea, they attached as part of their motion a complaint which was filed in the circuit court on December 2, 1916, by Frank Morton against D. T. Linton and W. E. Plant. The complaint is very lengthy, and we shall only attempt to set out its substance.

The complaint alleges that on the 26th day of January, 1915, Frank Morton was indebted to a partnership composed of D. T. Linton and W. E. Plant in the sum of $332.50, for which he executed to them his promissory note secured by a chattel mortgage on certain personal property. Here follows a description of personal property of the same description as that set out in the complaint in this case.

The complaint further alleges that on the 13th day of December, 1915, Morton paid to Linton & Plant his entire merchandise account for the year 1915 and paid on the note aforesaid $138.40, which left him owing the defendants on the note aforesaid a balance of $120.

The complaint further alleges that Morton had a full settlement with Linton & Plant and acknowledged himself indebted to them in a sum of $135, for which he gave them his note secured by a mortgage on the horses, wagon and heifer described in the complaint.

The complaint further alleges that Linton & Plant caused the constable to unlawfully take possession of all of the property embraced in both of said mortgages for them and converted the same to their own use to the damage of Morton in the sum of $494.39. An itemized list of the property, together with the value of each item, is set out in the complaint and amounts to the sum just stated.

The complaint further alleges that Linton & Plant did not deliver to Morton a verified account of the amount due under the mortgage to them until several days after they had taken possession of the property described in the mortgage to them.

To sustain their plea of *res adjudicata,* the plaintiffs herein introduced the judgment in the case last referred to wherein Frank Morton was plaintiff and D. T. Linton and W. E. Plant were defendants. The judgment recites that the court gave a peremptory instruction for the defendants and judgment was rendered accordingly. Morton appealed to the Supreme Court and the judgment was affirmed. See *Morton* v. *Linton & Plant,* 136 Ark. 512, 197 S. W. 584.

In the present case the circuit court sustained the plaintiffs' plea of *res adjudicata* and the defendant has duly prosecuted an appeal to this court.

J. N. Rachels, for appellant.

1. The abstract for appellant is a sufficient compliance with Rule 9 of this court. It presents the substance of the pleadings and evidence. 89 Ark. 222. It informs the court that the property was seized upon an order of delivery issued out of a court that had no jurisdiction of the subject-matter as the complaint or affidavit failed to affirmatively show that the property was of value not to exceed $300. In matters of contract the maximum amount of the jurisdiction of justice of the peace is $300. Constitution 1874, art. 7, § 40; 36 Ark. 268; 43 *Id.* 407; 61 *Id.* 33.

2. The abstract also discloses that appellee failed to deliver a verified statement of his account before instituting the replevin suit. The delivery of such an account, showing each item of debit and credit and the balance due is a necessary prerequisite. Kirby's Dig., § 5415; 92 Ark. 313. It is ascertainable from the abstract that the seizure of the property under the writ was without authority of law. This suit is for the unlawful conversion of mortgaged property. It can not be said that because the manner of obtaining the property was wrong that the possession was unlawful. 65 Ark. 316, syllabus 3.

The right of possession was the only thing or question litigated or decided on the former appeal.

A recovery in replevin is no bar to a subsequent action of trover by the defendant in replevin. 29 Ark. 576. Where two suits are for different objects (one for value, the other for possession) both may progress at the same time. 52 Ark. 416; 55 *Id.* 293. See also 66 *Id.* 336-343; 96 *Id.* 87. The judgment in the first suit was no bar. 113 *Id.* 196; 116 *Id.* 501; 124 *Id.* 432. The court erred in sustaining the plea of *res adjudicata.* Cases *supra.*

Miller & Yingling and *Brundidge & Neelly,* for appellees.

1. Appellant's abstract does not show the transcript pages except to two mortgages and otherwise fails to comply with rule 9.

2. The plea of *res adjudicata* should have been sustained as the question raised was concluded by the judgment in the other cause and the judgment below is right.

HART, J., (after stating the facts). It is sought to uphold the judgment of the court below on the ground that appellant failed to file an abstract in accordance with the rules of this court. In the first place, it is claimed that the abstract does not show the pages of the transcript. It would be too technical to dismiss the appeal for this reason in this case. The judgment was upon the pleadings, and the pleadings are set out in full in appellant's abstract. Hence it is not necessary to give the pages in the transcript where each pleading might be found.

Again it is suggested that appellant failed to comply with the rules because his abstract sets out the transcript in full. As we have just seen, the judgment was upon the pleadings and it may be that appellant thought it necessary to set out the pleadings in full so that this court might more readily determine the issues raised by the pleadings. In such a case it is not a violation of the rule calling for the affirmance of the judgment to set out in full the pleadings which were the basis of the judgment of the court below. It is true appellant sets out two chattel mortgages in his abstract which purport to be

the foundation of this lawsuit. These mortgages, however, are not part of the pleadings and have not been brought into the record by a bill of exceptions or otherwise. Hence they do not properly belong in the transcript and appellant should not have set them out in his abstract. This court will treat them as not a part of the transcript and will not dismiss the appeal because they are contained in the abstract.

We now come to a discussion of the case on its merits. We are of the opinion that the court erred in sustaining the plaintiffs' plea of *res adjudicata.* It will be observed that the complaint in this case is filed under the provisions of section 6869 of Kirby's Digest. The purpose of the plaintiffs in filing it was to recover certain personal property described in the complaint under a chattel mortgage executed to them by the defendant for the purpose of foreclosing the mortgage.

Subsequently to the commencement of this suit the defendant herein filed a suit in the circuit court against the plaintiffs herein in which he sought to obtain judgment against them for the unlawful conversion of the mortgaged property. Two grounds are set up in his complaint. He alleged that the mortgaged property described in the complaint in the present case amounted to $494.39, an amount exceeding the jurisdiction of the justice of the peace and that therefore the seizure of the property by the plaintiffs under their writ of replevin was without authority of law.

The complaint also sets up that the plaintiffs had not filed a verified account of the amount due them under the mortgage at the time they instituted the present action. It is apparent from the complaint in the case brought in the circuit court by Morton against Linton & Plant, that the issue raised by the pleadings in the present case was not determined in that case. This is shown by the opinion in the former case reported in 136 Ark. 512 under the style of *Morton* v. *Linton et al.* The court held upon the appeal in that case that, although the method of seizure of the mortgaged property by the mort-

gagees was unlawful because the value of the property exceeded the jurisdiction of the justice of the peace, or because a verified account was not filed by the mortgagees as required by the statute, still the possession of the mortgaged property by the mortgagees was not necessarily unlawful, because under the terms of the mortgage they might be entitled to the possession thereof. In other words, the court held that the mortgagor could not maintain a suit against the mortgagees for the unlawful conversion of the mortgaged property because the mortgagees had unlawfully obtained possession of it in a replevin suit without first complying with the statutory requirement of furnishing an itemized account of his indebtedness to the mortgagor; or by bringing his suit before a justice of the peace for property the value of which exceeded the jurisdiction of the justice.

We think the complaint and judgment in that case bring the present case within the rule announced in *Livingston* v. *Pugsley,* 124 Ark. 432. There as here the mortgagee brought suit in replevin against the mortgagor to recover the possession of certain personal property for the purpose of foreclosing a chattel mortgage. On the motion of the mortgagor the case was transferred to the chancery court and was there finally determined. The mortgagee subsequently in some way obtained possession of the mortgaged chattels and the mortgagor instituted an action at law against him to recover the possession of them. The trial resulted in a verdict and judgment in favor of the mortgagor. The mortgagor then interposed a plea of *res adjudicata* to the original suit brought by the mortgagee to foreclose the mortgage. The lower court refused to sustain the plea and this court held that the decision of the chancellor was correct, for the reason that no issue was made in the law case as to the validity of the mortgage, but the decision turned entirely upon the question of the right of the mortgagee to foreclose the mortgage without having furnished an itemized account as required by the statute. Here we have the converse of the proposition but the principle is the

same. Here the mortgagees brought suit in replevin under the statute to recover possession of the mortgaged property for the purpose of foreclosing the mortgage. Subsequently the mortgagor brought suit against the mortgagees for the unlawful conversion of the mortgaged property. It is true that both actions related to the mortgaged property, but there is no such identity of causes of action as to make the judgment in the suit for unlawful conversion a bar to the suit to foreclose. In both actions, the mortgagor admits that he was indebted to the mortgagees and that the mortgage indebtedness was secured by a mortgage on the chattels in controversy. The dispute between them was as to the amount of the mortgage indebtedness. The complaint and judgment only in the suit by the mortgagor against the mortgagees for unlawful conversion appear in the record to support the plaintiffs' plea of *res adjudicata*. It is apparent from them that the mortgagor based his right to recover on the ground that the mortgagees were in the unlawful possession of the mortgaged property and that on this account he had a right to maintain a suit for its unlawful conversion.

The circuit court in that case properly directed a verdict for the mortgagees for the reason that while the record showed that the mortgagees had not legally come into possession of the mortgaged property, there was nothing in the record to show that they were not entitled to the possession of it for the purpose of foreclosing their mortgage. For that reason the mortgagees were not guilty of the conversion of the mortgaged property and the mortgagor was not entitled to recover judgment. The right of possession of the mortgagees to the mortgaged property was the only issue made by the pleadings and determined by the court. It follows from the conclusion reached that the judgment in the former case is not a bar to the present action; for the same issues were not litigated in the two cases.

It follows that the judgment must be reversed and the cause remanded for a new trial.

McCULLOCH, C. J., (dissenting). This action was instituted before a justice of the peace to recover possession of certain chattels for the purpose of foreclosing a mortgage executed by appellant to appellees, and the statute governing such actions provides that the defendant "shall have the right to prove or show any payment or payments or set-off under said mortgage, * * * and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days and satisfy the judgment and retain the property." Kirby's Digest, § 6869.

Appellant presented two separate defenses in his answer: First, that appellees had failed to furnish an itemized account as required by statute (Kirby's Digest, § 5415); and second, that the debt had been settled and the mortgage discharged by a new note for the sum of one hundred and thirty-five dollars, executed by appellant to appellees, secured by another chattel mortgage. The judgment of the justice of the peace was in favor of appellees for recovery of the chattels, or, in the alternative, for the recovery of $222.85, the amount found to be due on the mortgage indebtedness. Appellant prosecuted an appeal to the circuit court, but whilst the cause was pending in the circuit court he instituted an independent action against appellees in which he set forth as grounds for recovery precisely the same things pleaded as a defense in his answer in this action, and in addition alleged that the justice of the peace was without jurisdiction and that the seizure of the property under process issued from that court was unlawful because the value of the property exceeded the sum of three hundred dollars. In the trial of that case the court rendered judgment on a directed verdict in favor of appellees and appellant prosecuted an appeal to this court, and we affirmed the judgment. That judgment is now pleaded in bar of appellant's right to prosecute his appeal from the judgment of the justice of the peace in the original action, and the trial court sustained the plea.

If the judgment in the second action, which we affirmed, constituted an adjudication of the same issues involved in the original action, then the last decision undoubtedly constituted a bar to the prosecution of the appeal. *Church* v. *Gallic,* 76 Ark. 423; *Jenkins* v. *Jenkins,* 78 Ark. 388; *Dunbar* v. *Bourland,* 88 Ark. 153; *Quellmalz Lumber Manufacturing Co.* v. *Day,* 132 Ark. 469; 2 Black on Judgments, § 791.

The issues were plainly stated in the opinion delivered by this court on the former appeal (136 Ark. 512) and we decided that the justice of the peace was without jurisdiction of the present action and that appellees had failed to comply with the statute with respect to furnishing an itemized statement of account, but that, notwithstanding those things, appellees were rightfully in possession of the mortgaged chattels, that in the imperfect state of the abstract we had to assume that the evidence established the fact that the mortgage debt was due, and that appellees could not be sued for conversion of the property on account of the unlawful seizure under void process. In the opinion we said: "The abstract sufficiently informs us that the property was seized upon an order of delivery issued out of a court that had no jurisdiction over the subject-matter of the action for the reason that the complaint or affidavit for the order failed to affirmatively show that the property was of value not exceeding $300." * * * "To sum up, it is ascertainable from the abstract that the seizure of the property under the writ of replevin was without authority of law. As we understand it, this finding is not conclusive of the issue involved. This suit is for the unlawful conversion of the mortgaged property. It can not be said that, because the manner of obtaining the mortgaged property was wrong, the possession thereof is unlawful."

Now, what other issue is there for the court to try in the present action; or how can it try any issue at all since, according to the decision in the other case, the court is without jurisdiction of the subject-matter? Surely there can not be another trial of the issue whether or not

appellees are rightfully in possession of the property under a mortgage, for that question has been finally adjudicated in the other case; and it is equally plain that there can not be another trial of the issue whether or not appellees have a valid and subsisting, mature indebtedness secured by mortgage on the property involved in the controversy, for that question, too, was finally adjudicated in the former case.

The only other issue between the parties not adjudicated in the other case relates to the amount of the mortgage debt, and that issue can not be decided in this action for the simple reason that the court is without jurisdiction—the jurisdiction being fixed according to the value of the property sued for and it has already been finally adjudicated that the court has no jurisdiction in the same.

When this case goes back to the trial court on remand the anomolous situation will be presented that the case is there again under the mandate of this court, but without jurisdiction of the subject-matter, and with all of the issues already adjudicated in another action between the same parties.

I fail to see the analogy between this case and the case of *Livingston* v. *Pugsley,* 124 Ark. 432, cited by the majority as sustaining their views.

If appellant has any remedy it is by paying off the mortgage and then suing to regain possession of the mortgaged property on refusal by appellees to surrender possession.

Mr. Justice SMITH joins in this dissent.

Jonesboro, Lake City & Eastern Railway Company v. Kilgore.

Opinion delivered April 7, 1919.

1. Railroads — injury by running of train — presumption.— Where a horse was killed when it ran into a trestle, was struck by a train, but it was neither alleged nor proved that it was struck by a train, Kirby's Dig., § § 6776, 6781, as to liability for killing animals by trains and presumptions from killing, have no application.
2. Same—injury to animal—proximate cause.—Where an animal became frightened by a train and ran into a trestle, it must be shown that the negligence of the railroad employees in charge of the train was the proximate cause of the injury, to sustain a recovery from the railroad company.
3. Same—injury to animal—jury question.—Evidence *held* to make it a jury question whether a railroad engineer exercised due care after discovering the peril of an animal frightened into a trestle by the approaching train.

Appeal from Craighead Circuit Court, Lake City District; *R. H. Dudley*, Judge; affirmed.

STATEMENT OF FACTS.

This action was brought by the appellee against the appellant for the alleged killing of appellee's mare by one of appellant's trains.

It is alleged that the appellant ran one of its trains upon appellee's mare and wrongfully and wilfully frightened her, causing her to run into a trestle on appellant's road, which resulted in her death. The value of the animal was alleged to be $175.

The appellant answered, denying the allegations of the complaint and admitting the allegations as to value.

One witness testified in substance that on June 19, 1917, four or five animals, among which was the mare of appellee, were observed running on appellant's track and right-of-way ahead of one of appellant's trains going east. Witness said that he saw the animals run about six or eight rods before one of them "kinda stumbled and went on." The train, when it stopped, was two or three rods behind it. By the time the train stopped "the animal

had gotten out of the trestle." "I don't think," says the witness, "it got plumb down." Witness' attention was attracted to the animals by the sounding of the whistle.

Another witness said that he "saw the horses coming down the track in front of the train, it was pretty close. It stopped when the animal went into the trestle. The track was about as level as any track they have and the track going down from there was straight. It looked like the mare tried to stop and could not stop and slid into the trestle. She was in the trestle when the train stopped. She stayed in the trestle a minute or two and then went on, rolled off the dump. The train passed her there. The slide was about ten feet. The rim of the mare's belly was burst and her guts were coming out in the skin. The animal got out of the trestle herself and went away. The slide was in the middle of the track. She left hair and blood on the rails in the trestle. The track at that point is elevated on a dump about two feet high and slopes off into the flat on the other part of the right-of-way." According to witness' best judgment, the mare ran "something like fifty or sixty yards before she fell into the trestle."

It was shown that the animal in controversy belonged to the appellee.

A witness on behalf of the appellant testified as follows: "I was the engineer on the train in June, 1919, that scared some horses and ran them down the track. There is a spur about a quarter of a mile from the trestle and I started blowing the whistle at that spur for some horses that were on the right-of-way near the track. They ran up the track a piece and then got into the middle of the track. As soon as they got into the middle of the track I shut off the steam and was blowing the whistle all the time, and was slowing down my train. The first horse jumped over the trestle, the second fell in and I don't remember how the other passed it. I was going then about five miles an hour and could have stopped my train within ten feet, but the horse got out of the trestle and ran on down the track as fast as he had ever run. I

didn't think that the horse was hurt at all by the way it ran. I was going to slow up to stop to get the horse out but before we got there he was out and had run off. We blow the stock whistle to frighten them away. It is the order of the company and a Government law. The track at that place is on a slight elevation and there is nothing to prevent the horses from running off the dump any place. The trestle or culvert is about ten feet long and from top to bottom of the culvert is not over two or two and a half feet. From the time the horses got on the track I shut off the steam and commenced to slow down."

From a judgment in favor of the appellee in the sum of $175 is this appeal.

Eugene Sloan, for appellant.

1. It was not alleged nor proven that the mare was injured by contact or collision with the train nor by the "running" of the train and Kirby's Digest, sections 6776-6781, have no application. This case does not fall within the provisions of our statute and plaintiff failed to make out a case. 84 Ark. 407; 107 *Id.* 441; 57 *Id.* 16; 84 *Id.* 421; 36 *Id.* 174; 116 *Id.* 49; 66 *Id.* 248.

2. The engineer had the right to presume that the mare would leave the track and not try to cross the trestle or culvert and there was no negligence in this presumption. 36 Ark. 607; 37 *Id.* 593. He had the right and it was his duty to sound the stock-alarm whistle and use other means to frighten stock away from the track and right-of-way and defendant was in no way liable for the injury so long as the engineer was not guilty of any heedless, unnecessary or wanton act which would increase the fright or danger. No such heedlessness or wantonness was shown. 77 Ark. 174; 99 *Id.* 226. The court erred in not directing a verdict for defendant and in refusing instruction No. 1 for defendant. Due care and caution were exercised by the engineer, and he did all in his power to prevent the injury and he started to stop the train but the mare, after she stumbled, was up and gone before he stopped the train. There was no statutory pre-

sumption of negligence, but if so, the evidence rebuts the presumption. 66 Ark. 439; 53 *Id.* 96; 37 *Id.* 593; 67 *Id.* 514; 78 *Id.* 234; 66 *Id.* 248-439. There was no question for a jury to pass upon. The facts disclose an unavoidable accident for which there was no liability. Cases *supra.*

S. R. Simpson, for appellee.

The instructions given properly put the question of appellants' negligence before the jury. It was a question for the jury as to whether there was negligence or not in not stopping the train. If the witnesses and the engineer were not testifying as to the same incident, the statutory negligence shown by the killing by a running train is in no way met. 104 Ark. 501; 111 *Id.* 309; 119 *Id.* 179; 66 *Id.* 248; 113 *Id.* 418. The verdict of the jury settles the question of negligence in not stopping the train. 102 Ark. 417; 99 *Id.* 422; 124 *Id.* 523; 36 *Id.* 607; 69 *Id.* 619.

It is not necessary to prove that the train hit the animal. 37 Ark. 598; 84 *Id.* 507. When stock is killed by the running of trains there is a presumption of negligence. Kirby's Dig., § 6773; 80 Ark. 382.

WOOD, J., (after stating the facts). The appellee does not allege that his mare was killed or wounded by contact or collision with appellant's train running in this State, nor does the testimony of the appellee tend to prove that the animal in controversy was struck by the running of a train. Therefore, sections 6776 and 6781 of Kirby's Digest have no application to the facts of this record.

The only issue is whether or not the proximate cause of the injury and death of appellee's mare was the negligence of the employees of the appellant. *Earl* v. *St. L., I. M. & S. Ry. Co.*, 84 Ark. 507-10.

The above case rules this. See, also, *Central Ry. Co.* v. *Lindley,* 105 Ark. 294-98.

Under the evidence it was a question for the jury to determine whether or not the engineer of the appellant,

after discovering the peril that the animal was in, exercised ordinary care, that is all the care that a reasonably prudent person should have exercised under the circumstances to avoid the injury.

This issue was submitted under correct instructions, and there was testimony to sustain the verdict.

The judgment is, therefore, affirmed.

FREEMAN v. ROGERS WHITE LIME COMPANY.

Opinion delivered April 7, 1919.

1. CORPORATIONS—DIVISION OF SURPLUS—EVIDENCE.—Evidence that a corporation's stockholders all consented to a division of its surplus among its stockholders, that all existing creditors were paid, and that the corporation thereafter continued business for five years, does not sustain a finding that the withdrawal of such surplus defrauded its creditors and future stockholders.
2. CORPORATIONS—DIVISION OF SURPLUS—STOCKHOLDERS.—Corporation *held* estopped after five years from questioning the division of its surplus among stockholders where all the then existing stockholders had acquiesced.
3. CORPORATIONS—DIVISION OF SURPLUS.—A private corporation's surplus may be divided among its stockholders without a formal declaration of a dividend where no creditors are injured.

Appeal from Benton Chancery Court; *Ben F. McMahan,* Chancellor; reversed.

Duty & Duty, for appellants.

1. Exception No. 7 to the master's report filed by plaintiffs in cross-complaint should have been overruled and the master's report referred to in said exception No. 7 should have been sustained. Where the findings of a master are sustained by the evidence, it is error to set the same aside, and where he does so improperly this court will reverse because chancery cases come here on appeal *de novo,* and this court renders such decree as the court should have rendered. 98 Ark. 364; Acts 1915, p. 1088, § 16.

2. Where the master was present and saw the demeanor of the witnesses on conflicting evidence the court

should be loath to reverse the findings of the master if there is a fair amount of evidence to support them. 144 U. S. 104; 10 R. C. L. 521, § 307; 19 Ann. Cas. 910, and note 911.

3. The doctrine that a corporation is an entity separate from its stockholders is a mere legal fiction introduced for convenience and to subserve justice; but when invoked in support of an end subversive of its policy, should be disregarded in equity. 7 R. C. L., § § 4 and 168; 65 Md. 428; 19 S. W. 67.

4. It is well settled that a purchaser of shares of stock in a corporation can not complain of the prior acts and management of the corporation. 12 Am. St. Rep. 337; 108 *Id.* 716.

5. As disclosed by the evidence the division of profits was made in 1912, the records are lost or mislaid and the corporation is estopped or barred by long affirmance, acquiescence, nonprotest, limitation or laches, and no creditor is seeking relief. 7 R. C. L., § § 474-484; 66 Am. Dec. 173.

6. Stockholders may agree among themselves informally to distribute a sum as dividends without going through the form of corporate action. No formal declaration of a dividend is necessary. 139 Am. St. Rep. 587; 80 N. Y. Supp. 438; 2 Cook on Corp. (6 ed.), § 534. The master's findings should be sustained.

HUMPHREYS, J. On June 22, 1917, F. F. Freeman and Byron Leach, minority stockholders in the Rogers White Lime Company, instituted suit against that corporation, W. E. Talley, its president, and J. D. Cowan, its secretary, in the Benton Chancery Court, in substance charging that said Talley and Cowan had usurped the powers of the board of directors of said corporation, refused to call meetings of the stockholders or account to them, and had wrongfully diverted and appropriated its earnings and property to their own use and the use of a lime plant in Oklahoma, in which they were interested.

The prayer of the bill was for an accounting and the appointment of a receiver.

Appellees, Talley and Cowan, answered, denying the allegations of usurpation, wrongful diversion and appropriation of the earnings and property of the corporation and the Rogers White Lime Company filed a cross-bill against appellants, F. F. Freeman and J. E. Felker, charging, among other things, that on or about November 1, 1912, while appellants were president and secretary of the Rogers White Lime Company, they borrowed $15,000 in cash from W. A. Mundell, on the company's notes, which sum they unlawfully and corruptly appropriated to their own use.

Appellants denied this, as well as all other allegations in the cross-bill.

By consent, E. P. Watson was appointed special master to take evidence, state an account between the parties and give his conclusions of the law in all matters at issue, or which might be put in issue.

The master proceeded to take evidence, on which he predicated and filed a report responsive to the issues joined. Upon the issue joined in the cross-bill and answer thereto, charging a misappropriation by appellants of $15,000, which they borrowed from W. A. Mundell while president and secretary of the corporation, the master made the following finding:

"I find that said F. F. Freeman and J. E. Felker were on and after January 2, 1912, up to and including August 28, 1915, the legal owners of all the capital stock of the Rogers White Lime Company, except the forty shares given to Ed Allen by said F. F. Freeman.

"I find that as such owners of said shares of stock, they were entitled to all the surplus earnings of said company, either by way of dividends or by way of distribution of the surplus earnings of said company, except what was due said Allen.

"I find that some time in the year 1912, between October 1 and November 30, 1912, while they were the owners of all of the capital stock of said corporation, except

the shares of said Ed Allen, that said Freeman drew out of the treasury of said corporation, $9,500 and that Felker drew out the sum of $1,700, that said Allen knew of such fact and acquiesced to such withdrawals.

"I find that at said time the fact they drew out said sums of money the same did not affect the rights of security of any creditor of said corporation, nor affect the right of any stockholder, nor did it deplete the assets of the corporation in such manner as to affect its solvency at that time or in the immediate future, so far as shown by the testimony.

"I declare as a matter of law, that the withdrawal by them of said surplus, was the same in equity as if they had declared a dividend to themselves out of said surplus; that the same belonged to them as such stockholders, if no creditor of said company, then in existence, was not affected by the withdrawal of such surplus; that the said corporation, by its stockholders, directors and officers, had full knowledge of the action of said Freeman as president and treasurer, and Felker as director and secretary of said company, and for over three years acquiesced in such action on their part, and said corporation who is the only party complaining of such transactions and by ratification of the acts of its officers, stockholders and directors, from bringing this suit in this particular.

"I find that said cross-complaint should be dismissed for want of equity, in the same."

In apt time, appellees filed exceptions to this and other findings of the master. Likewise, appellants filed exceptions to the findings of the master adverse to them. The cause was submitted to the court upon the pleadings, testimony of several witnesses, record and documentary evidence and the several exceptions of appellants and appellees to the report of the master. The court sustained appellees' exceptions to the master's finding exempting appellants from liability on account of the amounts withdrawn by them from the treasury of the corporation, between October 1 and November 30, 1912, and, in lieu of the master's finding on this particular issue, made the following findings and decree:

"As a matter of law, the withdrawal of the plaintiff, F. F. Freeman, of the sum of $9,500 and the plaintiff, J. E. Felker, of the sum of $1,700 from the assets of the defendant, Rogers White Lime Company, was wrongful and without authority of law, and in fraud of the rights of the creditors of said corporation and in fraud of the rights of any future stockholders, and that the withdrawal of said sums by plaintiff did deplete the assets of said corporation in such a manner as to affect its solvency, and that said plaintiffs, Freeman and Felker, are liable to said corporation for such sums so withdrawn, and that said Rogers White Lime Company should have judgment against said plaintiffs for said sums; that the defendant, Rogers White Lime Company, have judgment on its cross-complaint against the cross-defendant, F. F. Freeman, for the sum of $9,500, and against the defendant, J. E. Felker, for the sum of $1,700."

From the findings and decree of the court, set out above, an appeal has been prosecuted to this court. The findings of the master on other issues, the exceptions thereto and the findings and decree of the court thereon, have been omitted from the statement of the case because no appeal has been prosecuted therefrom.

Appellant insists that the master's finding on the particular issue involved on this appeal was sustained by the weight of the evidence, and that the court erred in sustaining appellees' exception thereto. This brings us to a consideration of the evidence. Only two witnesses, J. D. Cowan, on behalf of appellees, and F. F. Freeman, on behalf of appellants, testified relative to the withdrawal of funds from the treasury of the corporation by F. F. Freeman and J. E. Felker. Upon examination of the abstract of the evidence of each we find no material conflict between them. It appeared from their testimony that the Rogers White Lime Company was organized in 1902, with its principal place of business at Rogers, Arkansas; that it carried on a prosperous business between the years 1902 and 1915, and, from a small beginning, grew in property value to $67,255.25 on the first day of

January, 1912, with no liabilities except a stock liability of $50,000, a surplus liability of $16,260.90 and a debt liability of $944.32 to F. F. Freeman. The financial condition of the company on January 1, 1912, as stated above, was established by a balance sheet struck on that date and signed by F. F. Freeman, as president of the company, which was produced by the witness, J. D. Cowan. The policy of the company under the Freeman administration had been to transfer the profits each year into the surplus account instead of declaring dividends. F. F. Freeman testified that in the early part of 1912 the surplus or profit account amounted to between twenty-six and twenty-seven thousand dollars; that, during the year, he and Felker had acquired all the stock in the company, after which F. F. Freeman gave Ed Allen, foreman of the plant, $1,000 of his stock; that he then credited his personal account with $18,000 and Felker's personal account with $6,000 on account of accrued or undivided profits or surplus, on the basis of the stock owned by each, but, at the time, did not draw out any money in payment of the amounts thus credited to their respective accounts; that the corporation carried an account in the Bank of Rogers, where it deposited its daily receipts from the sale of lime; that, on October 31, 1912, the company borrowed $15,000 from W. A. Mundell upon note, and deposited it in the bank with its other funds; that, on said date F. F. Freeman received the company's check drawn on said bank account for $9,950.31, and J. E. Felker a check for $1,700 in part payment of the surplus or profits credited to their respective accounts prior to that time; that Ed Allen, the only other stockholder, knew of, and consented to, the apportionment of profits or surplus aforesaid and to the withdrawal of said amounts by Freeman and Felker in part payment of said apportionment; that the company subsequently paid the Mundell loan.

It further appears from the evidence abstracted that the company thereafter continued business at a profit under the management and control of Freeman, Felker

and Allen, who were the sole stockholders, directors and officers of the corporation for a period of about three years until the control and management of the corporation passed to Talley and Cowan, who became, by purchase, the majority stockholders in the corporation, and subsequently its directors and officers. It also appears that the company continued business under the new management for several years thereafter and until the appointment of a receiver, upon the final adjudication of this suit in the Benton Chancery Court.

On this state of case made, the master found that Freeman and Felker were not accountable to the appellee, Rogers White Lime Company, for the surplus or profits drawn out by them while sole stockholders of said corporation. In sustaining appellees' exception to the master's finding, the court found that the withdrawal of $9,950.31 by F. F. Freeman and $1,700 by J. E. Felker depleted the assets of the corporation so as to affect its solvency and to defraud its creditors and future stockholders. The abstract of the evidence fails to support the finding of the court. All existing creditors were thereafter paid, and, by fair inference, subsequent creditors were paid, for the company continued business for five years or more before any question was raised as to the withdrawal of said funds. There is a want of evidence to show that the subsequent stockholders were deceived or misled at the time they became the majority holders of stock by purchase in said corporation. It seems to us that the finding of the master is supported by the weight of the evidence and is in accord with the law. In the case of *Railway Co.* v. *Martin*, 57 Ark. 355, where the minutes of the corporation failed to show the adoption of a resolution declaring a dividend but that the officers of the company, acting upon the assumption that such a resolution had been adopted, paid a dividend to all the stockholders except one, a suit would lie at the instance of the one omitted for his portion of the dividend, upon the theory that the company would be estopped to deny that such a resolution had been adopted.

It seems to us that the doctrine of estoppel is also applicable to the facts in this case for the company, under both managements, acquiesced in the apportionment of dividends and surplus by the sole stockholders of the company at the time of said apportionment, for a period of more than five years thereafter. We know of no law in the State of Arkansas in derogation of such right on the part of the stockholders in a private corporation. In support of this doctrine, see also 7 R. C. L., p. 492, § § 477 and 484; *Lexington, etc., Insurance Co.* v. *Page,* 66 Am. Dec. 165. Where creditors are not affected or injured through such a disposition of dividends or surplus by the sole stockholders in a private corporation, we do not see the necessity of a formal declaration of dividends. Vol. 2, Cook on Corporations (7 Ed.), § 534; *Breslin* v. *Fries-Breslin Co.,* 70 N. J. L. 274; *Groh's Sons* v. *Groh,* 80 N. Y. Supp. 438; *Barnes* v. *Spencer & Barnes Co.* (Mich.), 139 Am. St. Rep. 587.

For the error indicated, the finding and decree of the chancellor is reversed and the cause is remanded with instructions to overrule the exception to the master's report and to render decree in accordance with the master's finding.

STALCUP v. HUNT.

Opinion delivered April 7, 1919.

1. DEEDS — NONCOMPLIANCE WITH CONDITIONS — CANCELLATION.— Where a grantee agreed to live with the grantors during the term of their natural lives, attend to household duties, and make life for the grantors as pleasant and comfortable and agreeable as possible, and that failure to comply with such conditions should render the conveyance void, the surviving grantor would be entitled to a cancellation upon the failure of the grantee to perform those conditions.
2. SAME — NONCOMPLIANCE WITH CONDITIONS — EVIDENCE. — In a grantor's action to cancel a deed upon the ground that the grantee failed to comply with conditions subsequent therein contained, evidence *held* insufficient to establish the allegations of the complaint.

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

Charles T. Coleman and *Wallace Townsend,* for appellant.

Appellee admits that she voluntarily breached the contract and refused to further perform the services she agreed to render, and for which she had been twice paid. Her answer places the burden on her. Her obligation was not only to care for Mrs. Stalcup but also for Mr. Stalcup for life. Her own testimony shows, as does all the other testimony, that Mr. Stalcup committed no act of violence and made no threats against her nor refused to permit her to discharge her duties nor that he ejected her from his home. She has enjoyed the fruits of her contract and will not be allowed to refuse to perform her obligations. The sole consideration having failed by her own fault and acts, the court erred in refusing to cancel the conveyance. 12 N. E. 698; 203 S. W. 286; 165 Pac. 85; 114 N. E. 561; 148 Pac. 502; 144 Pac. 133; 4 R. C. L. 509, par. 22. She voluntarily breached her contract, and even if it were true, as it is not, that Mr. Stalcup made conditions unpleasant, that did not excuse performance on her part. 12 N. E. 698; 47 N. W. 768; 148 Pac. 502. It was her duty to stay in the home and perform her contract but she did not, and the conveyance should have been set aside. Cases *supra.*

W. E. Hemingway, G. B. Rose, D. H. Cantrell and *J. F. Loughborough,* for appellee.

Under the pleadings the burden was upon appellant to show a breach of the contract by appellee. The testimony shows that appellee was willing to perform her contract and did so in a conscientious and faithful way for eight years and only ceased because of rude treatment and offers of violence personally, which rendered her condition intolerable and forced her to leave. There is no breach of a contract where performance is prevented by the wrongful conduct of the other party complaining. 93 Ark. 204; 85 *Id.* 599; 48 Minn. 113. The decree is

supported by a great preponderance of the testimony and should not be disturbed. *Supra.*

McCULLOCH, C. J. Appellant owned a certain piece of real estate in the city of Little Rock, and on December 17, 1907, he and his wife joined in a deed conveying the same to appellee. The deed contained a provision reserving the rent of the property to appellant as long as he lived, and the deed also contained the following clause:

"And the said party of the second part, for and on her behalf, agrees that she will live with the said parties of the first part for and during the term of their natural lives, and that she will take charge of the home duties, and in so far as may be in her power, attend to all the household duties connected with their home, and the welfare of the parties of the first part, and make the same as pleasant and comfortable and agreeable as may be in her power so to do. Failure on part of the said party of the second part to keep and perform the above covenants and agreements, shall render the above agreement of conveyance void and of none effect."

This is an action instituted by appellant in the chancery court to cancel the deed on the ground that appellee has failed to perform the conditions set forth in the deed, and has forfeited her right to claim under the deed. Appellee answered, denying the allegations of the complaint with respect to her failure to perform the contract, and alleged that on the contrary appellant has, by his own conduct, prevented her from performing the contract. On the final hearing of the cause the chancellor found in favor of appellee and rendered a decree dismissing the complaint for want of equity.

Appellee was a sister of appellant's wife, who is now dead. She came to live with appellant and his wife in the city of Little Rock during the year 1883, while she was yet a young girl, and they gave her a home without charge and sent her to school. When she had finished her education, they secured a position for her, first as school teacher and later as a saleswoman in one of the

stores in this city. She did not continue to live with them at all times, and in the year 1905, when she was living away from them, appellant induced her to return to their home, and it was then agreed that she should remain there in appellant's home and give her time and attention to keeping the home and administering to the wants of appellant and his wife. Mrs. Stalcup was then a cripple and her mind was to some extent impaired. In consideration of her agreement to remain with appellant and his wife in their home and assist in taking care of them, appellant assigned to her a certain contract for the sale of real estate for the purchase price of $1,380, payable $15 per month. The payments under that contract were made to appellee by the purchaser until the contract was discharged. Appellee insisted upon additional compensation for her services and the conveyance now under consideration was made to her in response to that request or demand. She remained with appellant and his wife continuously until December 2, 1915, when she left their home and since then has not rendered any services to them. Mrs. Stalcup died about a year later.

The testimony is voluminous. Appellant testified at length in support of his charge that appellee had broken the contract by leaving his home and service without reasonable cause, and, on the other hand, appellee testified at length, giving in detail instances which tended to support her contention that appellant's conduct was such as rendered her further remaining in his household impossible. The testimony of each party is to some extent corroborated, but the strongest corroborative testimony is in support of appellee. She introduced a great many of her neighbors and friends whose testimony tended to establish her contention that appellant's conduct became such as to render her condition as a member of the household intolerable, and that she could no longer live there and was compelled to leave the home. The testimony of those witnesses also tends to show that appellant purposely made appellee's situation in the home so disagreeable as to compel her to leave. It would serve no

useful purpose to analyze the evidence in detail, or to set forth the particulars in which the parties were at fault according to the testimony adduced upon each side. The law on the subject is well settled, and we can not disregard the numerical strength of the witnesses who testified in corroboration of appellee's statements, or their opportunities for knowing the facts which they undertook to relate.

This case, unlike most other decisions on this subject, involves a deed which not only states the consideration to be performed by the grantee, but also contains a statement of the conditions upon which the conveyance is executed, and an express provision that the conveyance shall be void upon the failure to perform those conditions. If the proof was sufficient, appellant would be entitled to a cancellation of the deed. *Salyers* v. *Smith*, 67 Ark. 526; *Priest* v. *Murphy*, 103 Ark. 464. Appellant's difficulty is that he has failed to establish his case by a preponderance of the evidence. At least, we can not say that the evidence preponderates against the finding of the chancellor.

Decree affirmed.

THOMPSON v. UNDERWOOD.

Opinion delivered April 7, 1919.

1. MINES AND MINERALS—RECOVERY OF POSSESSION.—In an action for possession of mining claims, where plaintiff testified, without objection, that the land was unappropriated Government land at the time he located his mining claim, that he knew it was such from his inspection of forest maps, from printed advertisements in newspapers and from forest agents who were offering timber for sale in parts of the section where he located his claim, a finding that plaintiff's locations were on Government lands was sustained by evidence.
2. MINES AND MINERALS—EJECTMENT—MINING CLAIM.—One who located a mining claim could maintain ejectment for possession of the land against a trespasser or one holding it unlawfully, although he had leased the mining claims to another.

3. SAME—LOCATION OF MINING CLAIM—NOTICE.—The object and purpose of the location notice required by Rev. Stat. U. S., § 2324, is to give notice to subsequent locators, and if there is a defect in the notice, and the subsequent locator has actual notice of the prior location, he will be bound thereby, at least as far as the defects are concerned.

Appeal from Polk Circuit Court; *J. S. Lake*, Judge; affirmed.

Prickett & Pipkin, for appellant.

1. The court erred in refusing defendant's request for a directed verdict because (1) plaintiff failed to prove that the property claimed was unappropriated Government lands at the time of his attempted location. U. S. Rev. St., § 2319; (2) plaintiff had leased the claims to J. D. Budd and his associates for twenty-five years before this suit for possession and had no right to sue for possession. (3) The notices posted and recorded do not contain a sufficiently definite description of the claims as to render them capable of identification and were not recorded in time so as to give notice. The county is not stated nor is the township stated north or south, or the range, whether east or west. An "oak tree" or a "pine tree" is not definite enough, as there are many of each, and such a description is not sufficiently descriptive of natural objects. On the evidence there was no case for a jury, and a verdict should have been directed.

Norwood & Alley, for appellee.

1. It was proven that the land was unappropriated United States land.

2. The claims were merely leased to Budd *et al.* on a royalty. Appellee did not sell and he was still the owner and entitled to the possession.

3. The location notices were recorded in Polk County, and this was sufficient to put any one on notice that the land was in that county. The law does not require location notices of mining claims to give section, township or range. It only requires that the name of the locator and date of location be given, and such a de-

scription by reference to some natural object or permanent monument as will identify the claim. U. S. Rev. St., § 2324.

4. The notices identified the claims by reference to trees and piles of stones, a blazed tree at the point where notices are posted and three corner stakes at stated distances is sufficient to enable a surveyor to ascertain the claims. 115 Fed. 531; 114 Idaho, 516; 95 Pac. 14. The blazed trees and stone piles were sufficient. 130 U. S. 291; 37 Pac. 480; 33 *Id.* 675; 80 *Id.* 736; 63 *Id.* 856; 13 Ann. Cas. 518; 55 C. C. A. 626; 13 Pac. 543.

4. Appellant can not take any advantage of any defect in the notice, because he claims that he never saw it and was not misled, for Ashcraft told him about the locations and he had notice of them. 93 C. C. A. 84. The sufficiency of the notice was a question for the jury and the verdict is conclusive, as there was no error in the instructions. 111 U. S. 356.

HUMPHREYS, J. On September 18, 1918, appellee instituted suit against appellant in the Polk Circuit Court to recover possession of lands in Polk County, under alleged valid mining location claims. In substance, it was alleged in the complaint that the lands claimed were unappropriated Government lands in May, 1918, at which time appellee and I. H. Howard located two manganese mining claims on said lands in accordance with law, and designated them as claim No. 2 on the Ada lode, and claim No. 7 on the Orvil lode; that the mining claim location notices posted on the Ada manganese lode and filed with the district recorder were as follows:

"Notice is hereby given that the undersigned, having complied with the United States mining laws and the location regulations, has located mining claim No. 2, on the Ada manganese lode or vein beginning at oak tree and running 1,500 feet north of east and 300 feet on each side of the center of the lode or vein, including all dips, spurs, angles and parallel veins within said boundary. Corners northeast pile of stone, northwest pile of stone, southwest pile of stone, southeast pile of stone, bounded on

north, east, west and south by United States Forest Reserve. Situated in section 24, township 3, range 31, ... Mining District, County of ....., State of Arkansas.

"Located 5/21, 1918. W. P. Underwood Locator."

That the mining location claim notice posted on the Orvil manganese lode and filed with the district recorder was the same in form and substance as the aforesaid notice, except the beginning point was at a pine tree, instead of an oak tree; that, after appellee had done all the things necessary to establish valid mining claims, appellant took unlawful possession of the lands in question, under the pretense of being a locator thereof, with full knowledge at the time he went upon the lands that the claims thereon had been previously located by appellee.

Appellant filed answer, denying that appellee was entitled to possession of the lands under valid mining locations, or that the descriptions contained in the mining location notices were sufficiently definite for identification, or that he was in the unlawful possession of said lands, or that he entered into the possession of them with knowledge, or notice, that appellee had laid valid mining claims upon them.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, upon which a verdict was returned in favor of appellee and judgment rendered in accordance therewith adverse to appellant. From the verdict and judgment an appeal has been prosecuted to this court.

The record reflected that appellee discovered manganese in section 24, township 3 south, range 31 west, in Polk county, and on May 21, 1918, made two mining locations thereon by posting a notice on each claim in the form designated above, by marking the boundaries thereof with blazes on trees, by piling stone at the four corners of each claim and by filing said notices with the recorder of the county; that O. B. Ashcraft was present when appellee posted the notices of the claims in May,

1918; that several months after the posting of the notices aforesaid, appellant came into the county prospecting for manganese and spent the night with O. B. Ashcraft, who lived on mining property near the claims located by appellee. In order to secure a promise from appellant to buy some mining machinery from him, Ashcraft pointed out the manganese to him and told him of the former locations. Appellant then placed location notices upon the claims previously located and took possession of the property. In the course of his testimony, appellee testified that, at the time he laid the claims upon the lands, they were unoccupied, unappropriated United States Government lands; that he knew it from his inspection of forest maps and printed advertisements in the newspapers and from forest agents who were offering the timber for sale in parts of the section where he located his claim; that, after posting his location notices on the lands, marking the boundaries thereof by blazes and by stones piled at the corners thereof, and recording the notices in the record's office of Polk County, he gave a lease to Mr. Budd and some of his associates, granting them the right to enter upon the lands and mine the same on a royalty basis.

It is first insisted by appellant that appellee failed to prove that the property was on unappropriated Government lands when he made his locations on May 21, 1918. Appellee testified that it was unoccupied, unappropriated Government land at that time, and, on cross-examination, gave his reasons for knowing that it was Government land. No objection was made by appellant to the character of the evidence. Upon this evidence the question was submitted to the jury and the jury found it was Government land. There was sufficient evidence to sustain the finding of the jury in this regard.

It is next insisted by appellant that appellee had no right to maintain the suit for possession, because he had leased the mining claims to Budd and his associates before instituting the suit. There is nothing in the evidence to indicate that he sold his mining claims to Budd

and his associates. He only granted them the right to enter and mine the land on a royalty basis. The execution of the lease in no way affected his right to maintain ejectment for the possession of the land against a trespasser or one holding it unlawfully.

Lastly, it is contended by appellant that the notices posted upon the land and filed in the recorder's office do not contain a sufficiently definite description of any lands to render same capable of identification. It is conceded by both parties that, in the mining district where these claims were laid, it was the rule or custom to record the notices in the recorder's office of the county. When necessary by statute, rule or custom to so do, section 2324 of the Revised Statutes of the United States provides that the notice shall contain the name of the locator, the date of the location, and such description by reference to some natural object or permanent monument as will identify the claim. It is said by appellant that the description is indefinite and uncertain for the reason that it does not show whether the land claimed was in township 3 south or north of the base line, or whether in range 31 east or west of the fifth principal meridian, or whether in Polk County; and because the oak tree mentioned as the beginning point on the Ada claim, and the pine tree mentioned as the beginning point on the Orvil claim, are not tied to any particular tree on the ground when the evidence showed that there were other trees of the same kind about the same place. Conceding, without deciding, that the description in the notices was not sufficiently definite to give constructive notice of the location of appellee's claims to subsequent locators, yet, when taken in connection with the information appellant obtained from Mr. Ashcraft and the actual markings and monuments on the ground, it was sufficient to inform appellant of appellee's prior locations. Under the facts and circumstances in this case, appellant was precluded from raising questions of defect in appellee's location notices. It was said in the case of *Bismarck Mountain Gold Mining Co.* v. *North Sunbeam Gold Co.*, 95 Pac. 14, that: "The object

and purpose of the location notice is to give notice to subsequent locators, and if there is a defect in the notice, and the subsequent locator has actual notice of the prior location he will be bound thereby, at least as far as defects are concerned."

No error appearing, the judgment is affirmed.

DAUGHERTY v. SOUTHERN COTTON OIL COMPANY.

Opinion delivered April 14, 1919.

1. NUISANCE—FACTORY WHISTLE.—The use of a steam whistle in a manufacturing establishment or gin is not a nuisance *per se*, but such whistle may be used so as to become such.
2. MUNICIPAL CORPORATIONS—USE OF STREETS—RIGHTS OF PUBLIC.—The traveling public is entitled to make free use of the streets of a city, and an adjoining property owner has no right to so use his property as unreasonably to interfere with the public enjoyment of this right.
3. NEGLIGENCE—STREETS—USE OF ADJACENT PROPERTY.—It is not negligence *per se* to own and operate near a public highway a gin or other industrial plant, in the necessary and reasonable operation of which loud noises are produced.
4. SAME—STEAM WHISTLE FRIGHTENING HORSE.—The ordinary blowing of a steam whistle at a gin situated near a city street, causing a horse to run away and inflict personal injuries, does not constitute negligence.

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

STATEMENT OF FACTS.

Appellants sued appellee to recover damages for injuries sustained by being thrown from a buggy by the horse drawing it becoming frightened at the negligent blowing of a steam whistle at the gin of appellee.

L. D. Daugherty lived about one mile east of Newport and worked in a garage in that city. On the 24th day of September, 1917, Mrs. Daugherty drove from their residence into town, in a one-horse buggy drawn by a gentle black horse, for the purpose of bringing her husband home. She was accompanied by her sixteen-months-

old infant child. On her way there and back she had to pass the gin of appellee, which was situated on Bridge Avenue in the city of Newport. The engine house of the gin was situated thirty or forty feet from the middle of the street. On her way home Mrs. Daugherty drove with her right hand and had her child in her lap. Just as the horse and buggy got opposite the engine house of appellee, the engineer gave one short blast of the whistle and the horse became frightened. Mrs. Daugherty spoke to the horse and tried to quiet him. The horse jumped to the right and ran, striking the hind wheel of the buggy against a telephone or electric light pole near the edge of the sidewalk. Mrs. Daugherty and her child were thrown headlong about ten or fifteen feet upon the concrete sidewalk. The horse stripped itself loose from the buggy and ran away. Mrs. Daugherty was painfully injured by her fall and her child was so severely injured that according to the testimony adduced by appellants it died on the 27th of November, 1917, as the result of its injuries. Other evidence tended to show that the child died of Bright's disease. The horse had been frequently driven by the gin on other occasions and had never become frightened at the noises made by the operation of the gin, or the blowing of the whistle. On the occasion in question the whistle was blown one short blast and in the ordinary way. It was an ordinary whistle and was blown in the ordinary way as if to give a signal. The accident happened about 6 o'clock in the evening, which was the usual time for quitting work at the gin. The gin had been shut down during the summer months and was being repaired preparatory for operation during the ginning season.

The court directed a verdict in favor of appellee and the case is here on appeal.

Gustave Jones, for appellants.

1. The question should have been submitted to a jury as to whether or not there was negligence on the part of defendant under the circumstances of this case,

and it was error to direct a verdict. 57 Ark. 429; 56 *Id.* 387; 98 *Id.* 413; 61 *Id.* 141-150; 49 Am. Rep. 611; 76 Me. 282; 202 Pa. 427; 170 Ind. 585; 90 Me. 313; 89 Mo. App. 192; 41 Penn. Super. Ct. 509; 110 Ark. 495, 503.

John W. & Jos. M. Stayton, for appellee.

The ground of negligence is that appellee "carelessly, negligently and unnecessarily sounded the whistle, when it knew, or by the exercise of ordinary care could have known, that the whistle so sounded was calculated to frighten horses on the street."

It was necessary therefore before appellee could be called upon to offer its defense for appellant to show:

1. That appellee blew the whistle negligently and unnecessarily.

2. That the sound was calculated to frighten horses on the street.

3. That appellee knew or should have known in the exercise of ordinary care that the sound of the whistle was calculated to frighten horses when blown as it was on this occasion. 58 Ark. 401; 112 *Id.* 593.

I.

It does not appear with *prima facie* force that the whistle was blown negligently or unnecessarily.

A steam whistle is not a nuisance *per se.* 1 Thompson on Neg. 1122; 38 Conn. 438; 40 *Id.* 399.

II.

The next essential element of the burden of proof upon appellant was to show that the sound of the whistle was calculated to frighten horses. 52 N. H. 401; 76 Me. 282. The mere showing of the accident was not a *prima facie* showing of negligence, as blowing the whistle was in the usual course of business and necessary to business. 54 Ark. 213; 56 *Id.* 387; 64 *Id.* 535.

III.

The burden was on appellant to show that the sound of the whistle was calculated to frighten horses and was known to appellee or could have been known in the exercise of ordinary care. Appellant having failed to make sufficient proof of any of the essential elements of his

cause of action, there was no other course for the court to take than to instruct a verdict for defendant. Cases *supra.*

HART, J., (after stating the facts). The issue raised by the appeal is whether or not the court erred in directing a verdict for appellee.

The use of a steam whistle in a manufacturing establishment or gin is not a nuisance *per se,* but it may be used so as to become such. Thompson on Negligence, vol. 1, par. 1261. In the application of this principle it has been frequently held that although it is lawful for a manufacturing establishment to maintain a steam whistle, that whistle must be used with ordinary care and due regard for the rights of others, and if by the negligent use thereof horses are frightened and caused to run away and inflict injury, the owner of the establishment is liable for the resultant damages. On the other hand, it may be said that while the traveling public is entitled to make free use of the streets of the city and that an adjoining property owner has no right to so use his property as unreasonably to interfere with the public enjoyment of this right, still the doctrine is settled that it is not negligence *per se* to own and operate, near a public highway or street, a gin or other industrial plant in the necessary and reasonable operation of which loud noises are produced. Under modern conditions the operation of gins near a public highway or street, not only subserve the convenience of the public, but are matters of necessity. The use of the steam whistle in giving signals and for other necessary purposes in connection with operation of the plant becomes wrongful only when its use is attended with negligence. It is true that the horse became frightened at the sound of the steam whistle and ran away throwing the occupants of the buggy with great violence on a concrete sidewalk and that he was a gentle and well broken horse; but it will not do to say that under these circumstances appellee was guilty of negligence. If we should hold that because it was impossible that a

gentle and well-broken horse should become frightened at the noise of a steam whistle of the kind ordinarily in use when used in an ordinary manner, the effect of such holding would tend to prevent gins and other plants using steam, from establishing and operating their plants in such places, and thereby greatly retard the progress and development of the country.

In the present case so far as the record discloses the whistle was blown in the ordinary way for a useful purpose in the conduct of appellee's business. Under the facts disclosed in the record the blowing of the whistle was one of the usual noises which attend the operation of a gin and to which persons traveling public highways and streets must submit. The principle is well stated in *Goodin* v. *Fuson et al.* (Ky.), 60 S. W. 293, as follows:

"Again, if the operation of the mill frightened the horse, and placed the appellant in a perilous position, and if, by stopping the mill, they could have, after discovering his peril, avoided the injury, then it was their duty to do so. It seems to us that the court properly instructed the jury. It certainly can not be said to be *per se* negligence to erect and operate a sawmill within sixty feet of a county road. If this be true, then it would be hazardous to erect any manufacturing establishment on a highway or public street, because, if a horse should become frightened, and injure some one, then the owners or proprietors would be liable in damages therefor. Some horses might become frightened at a bicycle, automobile, or a threshing machine on a public highway, and it would not do to say, because it was possible that it might become frightened thereby, it was *per se* negligence to operate them along a public highway or street. To hold that the erection of a sawmill or a manufacturing establishment near a public highway or street is *per se* negligence would be to circumscribe the business affairs of life, and retard the progress of the age. The usual noises which attend the operation of machinery in mills and manufacturing establishments situated on public highways and streets are such to which the traveling public must submit."

It follows that the judgment must be affirmed.

ROBINSON v. WELKER.

Opinion delivered April 14, 1919.

1. PARTNERSHIP—DISSOLUTION—DIVISION OF CAPITAL.—Where a partnership agreement provided that plaintiff furnish the partnership capital and defendant his services in the operation of the business, and that profits and losses were to be equally shared, but contained no provision as to sharing capital upon distribution of assets, defendant, upon dissolution, was not entitled to a share of the capital.
2. PARTNERSHIP—DISSOLUTION—ALLOWANCE TO ATTORNEY NOT A PARTY.—In an action by a partner for dissolution and distribution of assets, the court properly refused to allow the claim of an attorney at law for services rendered the firm where the attorney was not a party to the action, and where a separate suit was pending against the partnership for recovery of such fee.
3. APPEAL AND ERROR—BURDEN OF PROVING ERROR.—In a partner's action to dissolve partnership and have assets distributed, in which the plaintiff cross-appealed, alleging error in the court's action in charging an item of profit against him which he claimed to have earned as member of another firm, he has the burden of showing that the court's decree was erroneous in this respect.
4. PARTNERSHIP—ACCOUNTING—ATTORNEY'S FEES.—In a partner's action for dissolution of a trading partnership and for distribution of assets, where plaintiff was also member of a law firm which had performed services for the partnership, it was proper to deduct from the assets 50 per cent. of the amount recovered by such firm for the partnership where that was the customary fee in such cases.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed.

C. T. Bloodworth, for appellant.

1. The chancellor erred in crediting Welker with the entire capital he put into the business, $3,700. He agreed to furnish the cash capital and Robinson to furnish his services and time. If Welker so agreed and he did, then Robinson should be credited with his services, each to share equally. Whatever is contributed as capital becomes firm property and ceases to be owned by the contributor as an individual. 30 Cyc. 440. In view of the partnership agreement, if Welker is to be credited

and then paid back his entire capital contributed then Robinson should be credited with his eighteen months' services. 30 Cyc. 391. Yet according to the findings, Robinson must lose his entire capital or eighteen months' services and also bear the *pro rata* share of the loss of $3,700. As to this item, Welker should bear the entire loss, if any, and Robinson should lose his entire time. But if Welker receives credit for his $3,700 then Robinson should receive credit for a like sum for his services as the partnership agreement was made with the view that Robinson's ability and experience was of equal value to Welker's capital.

2. Welker should be charged with the full amount Irby judgments collected by him, and it was error not to do so. By all means he should be charged with the amount he says he received, $791.94, if not the full amount. He says he sold the judgments and credited the amount together with the $3,700 to the credit of the firm, but the testimony on this subject is false. Robinson refused to discount the two judgments more than 10 per cent., and they were collectible out of Irby's property. But Welker discounted them and settled more than $1,550 for $791.94. This was gross negligence, and he should be charged with the full amount. 13 Ark. 609; 44 *Id.* 34; 30 Cyc. 453. He sold over the protest of his partner, Robinson, and acted in bad faith, cases *supra,* and should be charged with the full amount.

3. The chancellor erred in his refusal to credit Robinson with the full amount he paid General Holland for labor in taking care of partnership stock nine and a half months at $55 a month, whereas the chancellor only allowed $385. 30 Cyc. 450.

4. It was error to charge him with the item of $871.46 overdraft, as there is no testimony to justify the charge. It was a *firm* overdraft.

5. It was error to refuse to order paid from the partnership funds the $250 attorneys' fees for the firm. The fee was reasonable and the attorneys had a lien on the fund for the fee.

G. B. Oliver, for appellee.

Appellant was at fault in selling the partnership property to Irby and taking notes in payment. He had full charge of the business and it was his duty to attend to the collections in good faith, and without negligence. 30 Cyc. 452; 44 Ark. 34; 23 *Id.* 566; 2 Bates, Law of Part., § 763. As to the other items and findings the evidence fails to show any error in the findings except as to the $275 for money collected on the railroad judgments at Poplar Bluff. As to this, the decree should be reversed on the cross-appeal. It was error also to charge appellee with this item as also with the $650, his part of the profits derived from an entirely separate and distinct partnership. As to these two items, the decree should be reversed on the cross-appeal and the account restated.

McCULLOCH, C. J. This is an action instituted in the chancery court to dissolve a partnership existing between the plaintiff Welker and the defendant Robinson, and to distribute the remaining assets. Plaintiff resides at Neelyville, Missouri, and is president of a banking institution, and is also an attorney at law, being a member of a certain firm of lawyers. The defendant resides in Clay County, Arkansas.

The partnership between these two parties was formed for the purpose of buying and selling live-stock and wheat, and, according to the terms of the agreement, plaintiff was to furnish the necessary capital upon which the business was to be operated, and defendant was to contribute his personal services in operating the business, and the profits and losses were to be equally shared between the parties.

The chancery court in the final decree stated an account between the parties in which it is shown that the copartnership owes the plaintiff the sum of $2,609.65, balance on contributions to the capital, and owes defendant the sum of $468.45 so contributed, and the total assets consisted of money deposited in the bank, to be distributed between the parties *pro rata* on the basis of the re-

spective claims against the copartnership as above set forth. The defendant appealed from the decree, and the plaintiff has cross-appealed.

The decision of the chancellor involves chiefly mere questions of fact, and the inquiry here is whether or not the findings of the chancellor are against the preponderance of the testimony.

There is, however, one contention on the part of appellant which involves a question of law as to the rights of the parties under the contract. It is this: According to the findings of the chancellor, the amounts due by the copartnership to the respective copartners for contributions to the capital stock exceed than the remaining assets, and it is contended that the court erred in not crediting the defendant with the value of his services contributed in the operation of the business of the firm as against the money contributed by the plaintiff. The answer to that contention is that, according to the contract, the defendant was only to share in the profits, and hence it appearing that the obligations of the copartnership to the members of the firm on contributions to the capital exceed the assets, there are no profits to distribute. According to the terms of the contract as set forth in the pleadings and proof, defendant was only to share in the profits, and that does not give him the right to a share of the capital contributed by his copartner.

The correctness of several items in the account, as stated by the chancellor, is challenged by counsel for defendant, and it is also contended that other items are established by the proof which ought to have been charged to the plaintiff. The principal item involved in this contention is the sum of $800, for which the plaintiff sold a copartnership judgment against one Irby. It is contended that the judgment should not have been sold at less than face value, for the reason that the full amount might have been realized on execution, and also that the plaintiff failed to account for the proceeds of the sale. According to the testimony as abstracted, we can not say that the findings of the chancellor on the issues as

to this item are against the preponderance of the testimony.

Again, it is contended that the court erred in refusing to deduct from the assets the claim of an attorney at law for services rendered in the suit against Irby, and in the effort to collect the judgment, but the court refused to allow this on the ground that the attorney was not party to the proceedings, and that all action at law was then pending against the partnership for recovery of the attorney's fee. It does not appear that the attorney asked to be made a party to this proceeding, or has filed any claim in this suit. The court did not err, therefore, in refusing to adjudicate the question of liability for attorney's fees in this particular action.

As to other items concerning which there is a controversy, we can not say that the testimony preponderates against the findings of the chancellor.

It follows that so far as concerns the original appeal, the decree must be affirmed.

Appellee cross-appeals on two items; one, an item of $650 charged against him in the account for profits on the purchase and sale of a certain lot of wheat. It is stated in the brief that this is error for the reason that the profit was earned by appellee as a member of another copartnership in which he and appellant were both members, and that this item had nothing to do with the partnership accounts between him and appellant. The difficulty about this contention is that it is not supported by sufficient abstract of the record showing an absence of testimony on which the finding of the chancellor was based. It is a mere assertion in the argument of the case, and we find nothing in the abstract that would justify us in overturning the finding of the chancellor on this item. It devolves on appellee, as cross-appellant, to show that the decree was erroneous in this respect, and he has failed to do that.

There is another item involved in the cross-appeal of $275 charged to appellee for sums collected in certain litigation against a railroad company for damages sus-

tained by the partnership. The testimony as to that item comes entirely from appellee, and he shows that he received $275, but that the collections were made by a firm of lawyers, of which he was a member, and that the customery fee in cases of that sort in that locality was fifty per cent. of the amount recovered, and that the firm made their charge in accordance with that custom and deducted one-half of the amount recovered. The testimony of appellee is not contradicted on this point, and we think it was improper in the face of that testimony to charge appellee with the full amount of the collection.

The decree will, therefore, be modified so as to allow appellees the additional sum of $137.50, making a total of $2,747.15 to be allowed to appellee as a basis for distributing the remaining assets. In all other respects the decree will be affirmed.

The cause is remanded with directions to the chancellor to distribute the funds in accordance with this opinion.

BOARD OF IMPROVEMENT OF GRAVETTE WATERWORKS IMPROVEMENT DISTRICT *v.* CARMAN.

Opinion delivered April 7, 1919.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—SUFFICIENCY OF DESCRIPTION.—Where petitions for the organization of an electric light and a waterworks improvement district prayed that the whole of a named city be formed into such districts, and the ordinances forming the districts recited that the whole city was included, and also gave the boundaries of the town by metes and bounds, the districts were not void merely because the description by metes and bounds was insufficient.
2. SAME—IMPROVEMENT DISTRICTS—TITLE OF ORDINANCES.—Kirby's Digest, section 5684, prescribing the form of an ordinance assessing betterments of an improvement district and fixing the liens on lands benefited, does not require the title of the creating ordinance to be in any particular form.
3. SAME—IMPROVEMENT DISTRICTS—TITLES OF ORDINANCES.—The title of a city ordinance organizing an improvement district *held* sufficient to comply with section 5481, Kirby's Digest, if it be conceded that this section applies to the ordinance.

4. SAME—IMPROVEMENT DISTRICTS—BURDEN OF PROOF.—In an action to recover assessments against property included within improvement districts, if the property owners contend that the districts were not established by petitions of a majority of the property owners, as formed by the city council, the burden is on them to prove such fact.

5. SAME—IMPROVEMENT DISTRICTS—INVALID ORGANIZATION—DE FACTO OFFICERS.—Where a legislative act attempting to raise an incorporated town to the rank of a second-class city is invalid, the acts of officers of the town attempting to act as a city were valid if within the powers of officers of an incorporated town.

Appeal from Benton Chancery Court; *Ben F. McMahan,* Chancellor; reversed.

C. M. Rice and *McGill & McGill,* for appellants.

1. The allegations of the original complaint made a *prima facie* case as to the validity of the ordinances establishing the districts and levying the assesments. There is no specific denial of the allegations of the cross-complaint that no petition was filed within three months after the publication of the ordinances. 68 Ark. 376; 84 *Id.* 257. All objections to the validity of the proceedings establishing the districts, or levying and collecting assessments, must be specifically stated. Mere denials are not sufficient, or general allegations of fraud, illegality or irregulartiy, present no issue, and do not impose upon the board the burden to show that all proceedings were regular. The burden of showing defects and irregularities is upon him who sets them up and relies upon them. 28 Cyc. 1188-9. This includes the constitutional objection that a majority of landowners did not sign the petition. 84 Ark. 257; 90 *Id.* 29. The only defects set up in the amended answer and cross-bill are that the proceedings are void because the organization of the city or town as a city of the second class was not signed by a majority in value and was not presented in time. The court sustained the first objection but made no finding as to the second, but it went further and found that the ordinance was void for fatal variance between the description of the district in the ordinance and the petition of the real

estate owners asking for the district and because the description in the ordinance is indefinite and uncertain and because the ordinance does not state the subject of the ordinance or its title. As no issue was made in the pleadings or developed in the evidence bearing on the description or the title, the court must have made its findings by an inspection of the ordinance, and all the findings were erroneous.

2. The description was sufficient and there was no variance. The whole town was included. 70 Ark. 451; 90 *Id.* 219; 113 *Id.* 193; 115 *Id.* 594. No metes and bounds were necessary, as the whole town was included. As to the title of the ordinances the record shows a complete title. Kirby's Dig., § 3684.

3. The initial petition and majority petition both had the requisite number of signers. No issue was made in the pleadings as to the validity of the initial petitions. The waterworks petition was signed by twelve persons and the electric light petition by ten persons, all residents and real estate owners. It was not necessary that they should be residents. Both petitions were duly signed and presented in time. The proceedings were all regular and the districts duly established and the levies made were valid, as if done by the town council of Gravette.

4. The act of March 23, 1915, cured all defects in the proceedings had and done under the special act of February 7, 1911, raising the town to a city of the second class. Acts 1915, 831. It declares them *de facto* governments. Const., art. 12, sec. 3. *Ib.* § 2. The classification was purely arbitrary. Kirby's Dig., § § 5421, 5422-4. After the decision in 117 Ark. 190, the Legislature passed the curative act of March 23, 1915, *supra,* which cured all defects in proceedings. 125 Ark. 126.

5. The acts and proceedings in relation to the districts were valid without the curative act, as they were performed by *de facto* officers. 123 Ark. 231; 38 Conn. 449; 9 Am. Rep. 409; 49 Ark. 439; 38 *Id.* 159; 118 U. S. 425; 122 Am. St. 331; 134 *Id.* 543; notes to Am. Rep., Trinity Series, pp. 683-694; 134 Mich. 537; 188 N. Y. 185;

117 Am. St. 841; 32 Conn. 432; 4 Am. Rep. 89; 24 Wend. 520; 81 Ark. 391.

6. It appears in evidence that since these suits all of the defendants have paid up their assesments in full. The signing of the referendum petition was not a legal step towards resisting the proceedings, as the referendum does not apply to such a case. 110 Ark. 528; 117 *Id.* 266. On the question of estoppel by signing petitions, acquiescence and failure to take legal steps, see 55 Ark. 148; 29 *Id.* 344; 69 *Id.* 68; 70 *Id.* 45; 71 *Id.* 556; 95 *Id.* 575; 90 *Id.* 29; 115 *Id.* 88; Ann. Cases 1915, B. 746 and note. In determining benefits the board may adopt a percentage valuation. 86 Ark. 1.

7. It was error to dismiss the complaints and enjoin the ordinances for any purposes and to cancel them. *Supra.*

W. N. Ivie, for appellees.

1. The appeals should be dismissed or the decrees affirmed because (1) there is no bill of exceptions in the record identifying and bringing upon the records, divers records read in evidence upon which the chancellor based his decrees. (2) The transcripts are not complete and do not contain all the evidence and documents introduced as required by law and the rules of this court. (3) The transcripts are defective and contain depositions and documentary evidence which are no part of the record and not used in the court below, and (4) said records and transcripts are not properly abstracted as required by the rules of this court. The stipulation of counsel as to records and documents was not complied with and numerous records and documents were placed in the records without identification by the court or being submitted to counsel for appellee, and could only be brought into the record by bill of exceptions. 86 Ark. 368; 112 S. W. 373; 92 Ark. 622; 124 S. W. 254. The case should be affirmed on the presumption that the chancellor's decree was warranted by the evidence. *Supra.*

2. The decree is right on the merits. The petitions were defective in the description of the real estate embraced in the districts and the extent and character of the improvements. 116 Ark. 167; 172 S. W. 864; 103 Ark. 269; 146 S. W. 505-6. The boundaries must be designated and the council must conform strictly to the authority conferred upon it by the petition, the foundation of the improvements. 71 Ark. 566; 104 *Id.* 298. The metes and bounds are uncertain and indefinite and there are alterations and additions to the records and many irregularities which avoid the districts. In addition, the city was without authority to pass the ordinances at the time. The city of Gravette was raised to a city of the second class by a special act and said act was void. 117 Ark. 190. It could not be validated or cured by any subsequent act. Acts 1915, p. 831 (No. 212). The case in 125 Ark. 126 does not aid counsel for appellant. The council were elected under a *void* act and its members were not even *de facto* officers, nor the city a *de facto* government. 2 McQuillin Mun. Corp., § § 611, 706-7; Const. 1874, art. 19, § 27; 84 Ark. 380; 116 *Id.* 167; 123 Ark. 327.

SMITH, J. Suits were brought by the electric light and waterworks improvement districts of the incorporated town of Gravette against appellees to collect unpaid and delinquent assessments due on the lands described in the complaints. The complaints were drawn in conformity with sections 5691 and 5692 of Kirby's Digest, and contained only the allegations there required. An answer and cross-complaint was filed in each case, in which the validity of the assessments sought to be enforced was challenged upon two grounds. First, that no authority existed for the passage of the ordinance which raised the grade of the town to that of a city of the second class, the ordinances creating the improvement districts having been passed by the council while acting under its supposed authority as a city of the second class. Second, that a majority of the property owners had not petitioned the formation of the districts. By way of cross-com-

plaint it was prayed that the collection of the assessment sued for, as well as any others, be perpetually enjoined.

The court sustained the first objection, but made no finding on the second. The court, however, went farther and found and declared the ordinances establishing the improvement districts were void by reason of a fatal variance between the description of the districts in the ordinances establishing them and the description in the petition praying their establishment, because the description set out in the ordinances is indefinite and uncertain, and, because the ordinances are not entitled, and do not state the subject of the ordinances in the title. The finding is identical in each case, as the suits were tried together by consent on identical records and are briefed here as a single case, although separate appeals have been perfected. We dispose of the questions stated in the order in which they are discussed by counsel.

We think the districts were not invalid because of an insufficient description of the territory to be embraced. The prayer of the petition was "to lay off and establish the whole of the city of Gravettte into an electric light improvement district to be known as the Gravette Electric Light Improvement District." And a similar petition was filed for the waterworks district. The record of the city council recites that the council proceeded, pursuant to the petition of the property owners, "to take the necessary legal steps to lay off the whole of the city of Gravette, Benton County, Arkansas, into an improvement district, as the same is now established, towit," and then follows by metes and bounds the boundary of the town. Attention is called in appellees' brief to two patent errors in this description; but it is insisted by appellant that if any issue as to the sufficiency of the description of the districts had been raised by the pleadings the errors pointed out could have been explained. Indeed, the argument is made that if the description is considered in its entirety no error exists. Whether this be true or not, we think the court's finding that the district is void because of its imperfect description, can not

be sustained, for the reason that it is manifest from the recitals of the petition, and of the ordinance which sets it out, that the entire city was being established into an improvement district. The ordinance so expressly states, and, while an error may have been made in copying the boundary lines of the town, it is not contended that any uncertainty exists as to that boundary, and no contention is made that the entire town could not have been put into a single district. Section 5665, Kirby's Digest.

Upon the question of the title of the ordinance it may be said that section 5684 of Kirby's Digest prescribes the form of an ordinance assessing the betterments of the improvement against the lands embraced in the district and fixing the lien thereon, but makes no requirement in regard to the title of the ordinance. Indeed, it makes no reference to a title. The form there given contains a preamble, which sets forth recitals that would ordinarily be contained in the title. However, if section 5481 of Kirby's Digest does apply to the ordinance assessing the betterments the record of the council recites the introduction of an ordinance entitled, "An ordinance establishing an improvement district in the city of Gravette, Benton County, Arkansas, to be known as the Gravette Waterworks Improvement District, for the purpose of acquiring, erecting, building, maintaining and operating a general system of waterworks in said improvement district," and if a title is required—which we do not decide—the one set out above suffices. The record of the electric light district is identical.

It is very earnestly insisted that neither the initial nor the majority petition contained the requisite number of signers, and in support of this contention it is asserted that "it does not affirmatively appear that all the testimony offered at the trial is included in the transcript and that we must, therefore, indulge the presumption that omitted testimony would support a finding that the petitions did not contain the requisite number of signers." The court, however, made no such finding, the decree against the districts being based upon other grounds

as stated above. The clerk has certified that the transcript, to which his seal is attached, "contains a true and correct transcript of all the pleadings, records and evidence, both oral and documentary, introduced in the above entitled cause, * * *" and there is nothing in the decree itself in conflict with this certificate. The decree recites that the cause "is submitted to the court upon the pleadings of the parties, and the exhibits thereto, the depositions of witnesses, the original record and minute book of the corporation of Gravette, Arkansas, and other documentary and record evidence adduced by consent of parties relative to the raising of said town to a city of the second class, and the creation and establishing of said improvement district and the enforcement thereof." Counsel for appellees say, however, "that there is nothing in the evidence or in this record to show that there was a majority in value of the real estate owners in either of the districts who had signed the petitions, and nothing to show what a majority in value was in either district." The court below made no finding on the question of majorities, and it may be true, as counsel contends, that such a finding can not be made from the record before us. But the districts are not to be defeated on that account. No burden rested upon the districts to show affirmatively that they had been established upon majority petitions. Under the statute the assessments of benefits could not have been levied as liens upon the lands within the districts until the precedent finding had been made by the town or city council that the improvements had been petitioned for by a majority of the property owners in the districts; and while this finding was not conclusive, it was *prima facie* correct, and imposed the burden of showing that the districts had not been petitioned for by a majority of the property owners upon him who attacked the districts on that ground. *Boles* v. *Kelley,* 90 Ark. 29; *Board* v. *Offenhauser,* 84 Ark. 257; *K. C. P. & G. Ry. Co.* v. *Waterworks Imp. Dist.,* 68 Ark. 376.

The serious and real question in the case is whether the districts are void as having been established by a council which had no legal existence. The facts are that a special act of the Legislature approved February 20, 1911 (Special and Private Acts 1911, page 52), undertook to raise the incorporated town of Gravette to the grade of a city of the second class and to confer the powers inhering in a city of that grade. Pursuant to this act, the town council on March 7, 1911, passed Ordinance No. 62 for the purpose of making effective the act of the Legislature. This ordinance divided the town into wards and provided for an election at which aldermen should be elected from the respective wards. This election was held and the aldermen then elected proceeded to discharge the duties of aldermen, and in this capacity enacted the ordinances out of which this litigation arises. On February 22, 1915, in the case of *Cotton* v. *City of Benton,* 117 Ark. 190, we held unconstitutional a special act of the Legislature declaring the town of Benton a city of the second class, as violative of article 12, section 2, Constitution 1874, which provides that "the General Assembly shall provide by general laws for the organization of cities (which may be classified) and incorporated towns, and restrict their power of taxation, assessment, borrowing money, and contracting debts so as to prevent the abuse of such power." The Legislature was in session at the time this decision was handed down, and immediately passed an act entitled "An act to legalize the governments of municipalities which have been erroneously declared by the Legislature to be cities of the second class." This act undertook to legalize the acts of the *de facto* governments of such municipalities and to constitute the *de facto* governments the *de jure* governments until such time as an election could be held for the election of the officers provided for by law for incorporated towns.

It is now earnestly insisted by counsel for appellant that the act of 1915 cured any defects in the organization of the improvement districts and that the case of

Cotten v. *Hughes,* 125 Ark. 126, so holds. But we there expressly pretermitted any discussion of the validating effect of that statute on acts which had been performed prior to its passage. That case is distinguishable from the instant case in this, that the improvement district, the organization of which was there upheld, was created by the council of the town of Benton after the passage of the act of 1915 and while the council was acting under the authority there conferred by that act as the council of the town of Benton pending the election of their successors, which had not then been held; while here the improvement districts were established by aldermen who were assuming to act as aldermen of a city of the second class and prior to the passage of the act.

Interesting briefs are filed on the effect of this curative act; but we have chosen not to decide that question, as we uphold the organization of the districts upon another ground. And that ground is that the districts were organized by *de facto* officers, and are valid as such.

The town of Gravette did not cease to be an entity, and its right to exercise its governmental functions did not cease to exist. Because of an unconstitutional act the functions of government were for a time exercised by officers who assumed to act as for a city of the second class which was in fact only an incorporated town. The aldermen who had been in office prior to the passage of the act of 1911 raising the grade of the town to a city of the second class had ceased to act as aldermen of the town, and no officers were undertaking to discharge the function of aldermen except those who had been elected pursuant to ordinance No. 62, referred to above. But while these aldermen were acting as for a city of the second class they did not undertake, so far as this litigation is concerned, to exercise functions which inhered in a city of the second class but not in incorporated towns. We would have a very different question if there had been no legislative authority to create improvement districts in incorporated towns. But that authority existed and improvement districts could legally have been organized

by the council of an incorporated town, and the procedure for organizing the districts would not have been different had these aldermen been acting for a town rather than for a city of the second class. The districts in question are therefore valid if the officers who enacted the ordinances are to be regarded as *de facto* officers of the town. It is intolerable that there could be a period during which a governmental entity should be without a government. Yet at the time of the passage of the ordinances in question the *de jure* town of Gravette would have been without even *de facto* officers unless the aldermen who enacted the ordinances are held to have been the *de facto* officers of the town. No other officers were undertaking to act at that time, and there would have been no legal governmental authority if these aldermen were not *de facto* officers. Both the light plant and the waterworks were installed pursuant to ordinances which no one had questioned, at a cost of many thousands of dollars, which were raised by the sale of bonds, which were issued and sold on the faith of the credit of the districts, and for a period of about four years the government of the town was administered upon the theory that these aldermen were *de jure* officers. A proper regard for the orderly administration of government constrains us to hold that the acting aldermen were *de facto* officers, and the ordinances are, therefore, valid. *Inland Construction Co.* v. *Rector,* 133 Ark. 277; *Faucette* v. *Gerlach,* 132 Ark. 58; *McClendon* v. *State ex rel.,* 129 Ark. 286; *Eureka Fire Hose Co.* v. *Furry,* 126 Ark. 231; *State* v. *Carroll,* 38 Conn. 449.

The decree of the court below will, therefore, be reversed and the causes will be remanded with directions to foreclose the lien against such property as remains delinquent.

N. P. SLOAN COMPANY v. BARHAM.

Opinion delivered April 14, 1919.

1. TRIAL—SALE—INSTRUCTIONS IGNORING ISSUES.—In an action for price of cotton destroyed in a warehouse before shipment to buyer, instructions requested by the buyer that it did not become liable for the cotton prior to its delivery or the acceptance of a draft to which the bill of lading was attached, *held* properly refused as leaving out of account the seller's contention that a completed sale had been made.
2. CONTRACTS—LAW GOVERNING.—The law of the place of performance controls in an action for breach of contract.
3. SALE—ACTION FOR PRICE—JURY QUESTION.—In an action against a purchaser of cotton which was destroyed by fire in the warehouse before being shipped, it was a jury question whether the parties intended that title should pass before the cotton was loaded and shipped and received by the purchaser at its office.
4. SALES—PASSING OF TITLE—INTENT.—If buyer and seller of cotton intended that title should pass upon the conclusion of a telephone conversation, or when the warehouse receipts for the cotton in question were separated from other receipts for other cotton owned by the seller, a delivery was accomplished, and the title passed upon the happening of that event; but if the delivery was to be accomplished and the title passed only on the acceptance of the draft with bill of lading attached, there was no completed sale.
5. SALE—PASSING OF TITLE.—If the title to cotton had already passed, with the understanding that the cotton would be shipped after all negotiations between the parties had ended, such requirement did not defeat the sale, though the cotton was subsequently destroyed by fire.
6. TRIAL—MISLEADING INSTRUCTION.—In an action for the price of cotton destroyed in warehouse before shipment to the buyer, an instruction that if the jury found that the buyer instructed the seller to purchase cotton, and the seller did so under such instruction, and the cotton burned, the seller was entitled to recover the amount agreed on if the fire was without his fault, was abstract and misleading; there being no question of agency.
7. SALES—ACTION FOR PRICE—EVIDENCE.—In an action for the price of cotton sold but destroyed by fire in the warehouse before actual delivery, testimony of the cashier of a bank with which the buyer did business, and of a cotton buyer, in regard to insurance on all cotton purchased by the buyer *held* incompetent as forming no part of the transaction.

8. SALES—ACTION FOR PRICE—EVIDENCE.—In an action for the price of cotton destroyed in warehouse before actual delivery testimony of seller as to policies of insurance held by the buyer on all cotton purchased by it *held* competent.

Appeal from Union Circuit Court; *Chas. W. Smith,* Judge; reversed.

Powell & Smead, and *Will C. Thompson,* of Dallas, Texas, for appellant.

1. The court should have instructed a verdict for defendant. The title to the cotton did not pass until all the acts usual to a sale of cotton were complied with and there was no sale. 19 Ark. 573; 24 *Id.* 549. The cotton must be loaded on cars at the expense of plaintiff and bill of lading secured and appellant notified and draft drawn. There was no liability upon appellant, as Barham failed in a number of particulars and is not entitled to recover. 92 Ark. 287; 50 *Id.* 20; Benjamin on Sales, § 399; 2 Schouler, Pers. Prop., § 27, *et seq.;* 5 Ann. Cas. 263; 2 L. R. A. (N. S) 79; 77 Ark. 482; 113 Am. St. 160; 44 L. R. A. (N. S.) 463; 88 Ark. 270; 114 S. W. 216; 89 Ark. 342; 116 S. W. 1171; 92 Ark. 287.

2. Under the undisputed evidence defendant below was entitled to judgment. 70 So. 686; 118 N. E. 239; 93 S. E. 1030; 192 Ill. App. 545; 84 S. E. 880; 22 N. W. 886.

3. Sloan & Co. were not liable, as no title to the cotton passed, Barham failing to segregate the cotton or load it or take bill of lading, or draw a draft or furnish an invoice. 79 Ark. 353; 78 *Id.* 511; Story on Sales, § 296; 29 Tex. 209; 90 S. E. 816; 112 Fed. 258; 80 *Id.* 878; 38 Atl. 212; 80 Pac. 963; 89 S. W. 1130; 75 N. W. 1; 74 *Id.* 670; 66 N. E. 1104. There was no delivery to a carrier so as to vest title. 80 Ark. 269.

3. The contract was an Arkansas one. The laws of Louisiana did not apply and were not plead. 72 S. W. 893. The offer to buy was accepted in Arkansas by Lake in Arkansas. Rul. Case Law, "Conflict of Laws," § § 26-27; 15 R. I. 380; 2 Am. St. 902; 5 Atl. 632; 2 Elliott on Cont., § 1116. The cotton was to be delivered at El Dorado in Arkansas. 80 Ark. 399; 66 *Id.* 464; 33 *Id.* 645;

2 Elliott on Cont. 1112; 9 Cyc. 691; 91 U. S. 406; 23 S. W. 245.

4. Lake, defendant's agent, was without authority to bind it by the contract. 105 Ark. 111; 126 *Id.* 405. Plaintiff was charged with notice of Lake's want of authority. 105 Ark. 111.

5. There was error in the admission of testimony, or in the giving and refusal of instructions.

J. W. Elder and *Mahony & Mahony,* for appellee.

1. The record shows that the transaction and course of dealing between the parties constitute a contract as to render appellant liable for the purchase price of the cotton. The verdict of the jury has settled all conflicts in the evidence and their finding is conclusive as to the liability of appellant.

2. The sale was a Louisiana contract, and under Louisiana laws appellant became liable without delivery. La. Code, § § 2552-2530.

3. The law of the case, see 42 Col. 442; 74 Conn. 675; 21 Ill. 526; 66 Kan. 463; 25 N. Y. 520; 33 Mich. 386; *Kelton* v. *Lee,* 35 Ore. 573; 123 Wis. 598; 135 Wis. 605; 31 Ark. 131; 100 U. S. 124.

4. There is no error in the instructions and the evidence supports the verdict. The instructions fairly state the law and there are no reversible errors.

SMITH, J. The appellant, hereinafter referred to as the company, is a large cotton company with principal offices in Philadelphia, and is extensively engaged in buying and exporting cotton. The company maintained an office at El Dorado, Arkansas, of which G. W. Lake was in charge, and at this point bought large quantities of cotton in the adjacent territory. Appellee, C. C. Barham, who was the plaintiff below, was a merchant and cotton buyer at Dubach, Louisiana, a town in the territory covered by Lake for his company. On December 26, 1917, Lake, at El Dorado, called Barham at Dubach over the phone, and in the conversation which then occurred contracted to buy forty bales of cotton at 29 cents

per pound. Later in the day Barham called Lake over the phone and advised him that he knew of 110 more bales which he could buy at the same price, and Lake agreed to take that also. Thereupon Barham bought 115 bales of cotton at 28¾ cents per pound and sold Lake 110 of them at 29 cents. Barham testified that in consummating the negotiations he asked Lake about the insurance on the cotton and Lake answered that they would take care of the insurance, as they already had insurance on all the cotton they bought. Lake, however, denied that this conversation occurred.

Barham further testified substantially as follows:

Immediately after selling this cotton he proceeded to have it brought in from the country for shipment to El Dorado. The cotton was delivered to Barham at the warehouse in Dubach, where it was destroyed by fire on the night of December 29. On December 27 Barham made a list of the cotton then in the warehouse and completed this list on the 28th when the balance of the cotton was delivered to him at the warehouse, and in the afternoon of that day his bookkeeper mailed this list to the company at El Dorado. It was the custom of the warehouse people to issue a receipt for each bale of cotton, which gave the gin number of the bale and its marks and weight, the cotton being weighed as it was received at the warehouse. Barham took the tickets for the 150 bales he had sold the company and placed them in a wrapper on the back of which he wrote "S. C. Sloan Company"—having mistaken the initial letters of the company—and he deposited this package with his local bank. The warehouse people proceeded to load out this cotton as rapidly as they could secure cars, and two cars—one containing twenty-six bales of cotton and the other twenty-eight—were shipped and delivered to the company at El Dorado. A third car, containing twenty-six bales, was burned in the fire which destroyed the warehouse after a bill of lading from the railroad had been obtained therefor. On the morning after the fire Lake called Barham over the phone and asked if any of the company's

cotton had been destroyed, and Barham answered that all of it had burned except fourteen bales, whereupon Lake directed that the fourteen bales be shipped, and this was done at once. Barham at the time asked Lake if he should draw against the company at El Dorado for the cotton that had been burned, but Lake told him not to do so until he had taken the matter up with the company. Later the company paid for the cotton burned in the car and for that shipped after the fire, but declined to pay for the fifty-six bales burned in the warehouse. Whereupon this suit was brought, and at the trial below judgment was recovered against the company for the value of the fifty-six bales burned in the warehouse, and this appeal has been duly prosecuted.

On behalf of the company there was testimony that the list which Barham said he made on the 27th and 28th was received through the mail in an envelope which bore a postmark the day after the fire. Lake admitted asking Barham about the fire and directing the shipment of the fourteen bales, but he stated that the conversation in regard to the draft covering burned cotton related only to the cotton destroyed in the car. Lake also denied having made any statement in regard to having insurance which covered the cotton in the warehouse.

As affirmative testimony and over the company's objection Barham had the cashier of the Citizens National Bank at El Dorado—the bank with which the company did its banking business at El Dorado—testify in regard to the insurance carried by the company. By this witness it was shown that the company had insurance "to cover all cotton in bales in the United States of America purchased by the assured or for their account, attaching from the moment the cotton becomes the property of the assured or legally at their risk, provided, however, that no cotton shall be covered hereunder prior to actual delivery to the assured or their agent, unless specifically identified by marks and numbers or other designation in possession of the assured or mailed to the assured prior to loss. * * *"

This testimony was given from a statement which had been furnished the bank as a basis in part to cover any risk from fire assumed by the bank in handling the drafts drawn against the company for cotton bought by Lake. Barham was also permitted over the company's objection to prove by a cotton buyer at Junction City that he (the cotton buyer) had sold and delivered fifty bales of cotton to the company at Junction City and that in a conversation over the insurance of this cotton, then being in a warehouse at Junction City, Lake told him that the cotton was covered with insurance as soon as it was sold to the company and that immediately after he bought cotton he reported the purchase and the company's insurance then covered it.

Over the company's objection Barham was also permitted to introduce and read in evidence sections 2552-2530, Louisiana Code, on the subject of sales of personal property, which reads as follows: "If after the contract and before the seller has been required to deliver the thing it ceases to be susceptible of delivery, without his fault, the buyer is still bound to pay the purchase price."

On behalf of the company liability was denied upon the ground that there had been no delivery, and Lake testified that there had been no delivery. This answer was stricken out on Barham's motion for the reason that the answer was the mere opinion of the witness. Thereupon the witness stated the custom under which he bought this cotton as follows: It was the seller's business to deliver the cotton f. o. b. cars and to obtain a bill of lading therefor subject to shipper's order, notify N. P. Sloan Company. The seller would deposit with his local bank a draft on the company at El Dorado for the purchase price of the cotton, with the bill of lading attached, and the local bank would transmit this draft to its correspondent bank at El Dorado, which bank would notify Lake of its possession of the draft. Whereupon Lake for the company would accept in writing the draft on the company and receive the bill of lading from the bank. The possession of the bill of lading was essential to se-

cure a delivery of the cotton from the carrier which had transported the cotton to El Dorado. That the two car loads of cotton of the 150-bale purchase were delivered and paid for in this way, and the remainder would have been handled in the same manner but for the fire.

The company specifically pleaded as a defense the statute of frauds; but that defense is not insisted upon here for the reason no doubt that a delivery of a portion of the cotton had in fact been made. *Arkansas Short Leaf Lbr. Co.* v. *McInturff*, 134 Ark. 284.

It was also shown that both buyer and seller accepted as correct the weights of cotton made by the warehouse people upon receiving the cotton into the warehouse, and the weight of each of the fifty-six bales had thus been determined, although the bales were in different parts of the warehouse at the time of the fire.

Over the objection of the company the court gave an instruction numbered 1, reading as follows: "No. 1. The court instructs the jury that if you find from the preponderance of the evidence in this case that there was a meeting of the minds and an agreement by both of the parties to the sale and purchase; that is to say, upon the one part there was an intention and offer to sell and on the other part an acceptance of such offer and an intention to buy, and that the purchaser did intend to buy and also accept the offer and the seller did intend to sell and did accept the offer, then you are told that is a contract of sale, and if you further find from a preponderance of the evidence in this case that the quantity and price of the chattel were determined and agreed upon, and a part of the property was delivered by the seller and accepted by the purchaser, and a part of the property was destroyed by fire without negligence or fault on the part of the seller, then you are told that your verdict must be for the plaintiff."

Other instructions were also given which either ignored the question of delivery or treated it as an accomplished fact.

The court also gave over the company's objection an instruction numbered 3, which reads as follows:

"No. 3. If you find from a preponderance of the evidence in this case that the purchaser instructed the plaintiff to purchase an additional 110 B-C of the lot of 150 B-C and the plaintiff did so under the instruction of the purchaser and said cotton afterwards burned, then you are told that the plaintiff is entitled to recover the amount agreed on according to the price and weights as shown by the warehouse receipts, provided said fire was without fault or carelessness on the part of the plaintiff."

On behalf of the company instructions were asked which declared the law to be that the company did not become liable for the cotton prior to its delivery at El Dorado or the acceptance of a draft to which the bill of lading was attached. But these instructions were properly refused as leaving out of account the contention of Barham that a completed sale had been made which passed the title to the cotton as it lay in the warehouse.

On the other hand, Barham insists that the contract is a Louisiana contract and that under the statute of that State set out above no delivery at El Dorado was necessary to bind the company, as the delivery was prevented by the fire for which Barham was not responsible. But we can not say as a matter of law that this was a Louisiana contract, for the law of the place of performance controls in an action for breach of a contract, and the very point at issue is, where was the contract to be performed? If the parties intended to accept the telephone conversation as constituting a delivery of the cotton, then a delivery was made and Barham would be entitled to recover under the Louisiana statute offered in evidence, and he would be entitled to recover under the statute if a performance of the contract by a delivery of the cotton in this State was not contemplated. But if there was a delivery he could recover without the aid of this statute for a breach of a contract of sale. The record presents the question, Had the cotton been delivered? According to the testimony of Lake the title to this cot-

ton would not have passed until a draft, with the bill of lading attached, had been presented and accepted and the bill of lading delivered to him, and if the parties contemplated that this acceptance of the draft should be a condition precedent to the passing of the title, then the contract was not only executory but was an Arkansas contract, as the contract would have been performed in this State by the presentation and acceptance of the draft, and the delivery of the cotton in this State.

In the case of *Isbell-Brown Co.* v. *Stevens Gro. Co.,* 118 Ark. 20, we said: "Here, the facts are essentially different. The goods were consigned to 'shipper's order,' at Newport, Arkansas, and the order contained this clause: 'Terms: Draft with B. L. payable upon arrival and examination of goods.' As between seller and purchaser, it is a general rule that the title to goods shipped under a bill of lading in favor of the seller or his agent with a draft attached does not pass to the buyer until he has complied with the conditions. See case notes to 5 Am. & Eng. Ann. Cases, 263, and 2 L. R. A. (N. S.) 79.

"The rule has been recognized by this court. See *Arkansas Southern Ry. Co.* v. *German National Bank,* 77 Ark. 482; *Josey* v. *State,* 88 Ark. 270; *Midland Valley Rd. Co.* v. *J. A. Fay & Eagan Co.,* 89 Ark. 342; *American Jobbing Assn.* v. *Wesson,* 92 Ark. 287."

Without dispute this cotton would have been consigned on a "shipper's order" bill of lading, as were the portions of the lot which had been loaded, except for the fire, and the question should, therefore, have been submitted to the jury whether the parties intended by their contract to pass the title before the cotton was loaded and shipped and received at El Dorado.

In the case of *Georgia Marble Finishing Works* v. *Minor,* 128 Ark. 124, we said: "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 con-

tract 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."

The statement of the law quoted must be read, however, in the light of the facts of that case. We had there recognized and restated the well established proposition that the delivery of goods to a common carrier, pursuant to the directions of the purchaser constitutes a delivery to the purchaser and consummates the sale; but by the language quoted we qualified the statement of the law that the delivery to a carrier is such a delivery to the consignee or the purchaser as consummates the sale, where a contrary intent is evidenced by consigning the goods on a shipper's order bill of lading for the purpose of retaining control of the property until the same has been paid for or other precedent condition performed. In other words, the sale becomes complete upon delivery of the property sold, and the parties may, by their contract, when dealing with articles as bulky as bales of cotton, provide that that essential occurs and the title thereby passes upon the happening of any event which it is agreed shall evidence the delivery. So here, if it was intended by the parties that the possession of the cotton should pass upon the conclusion of the telephone conversation, or when the warehouse receipts for the cotton in question were separated from other receipts for other cotton owned by Barham, then a delivery was accomplished and the title passed upon the happening of that event. But if the delivery of the cotton was to be accomplished and the title thereby passed only upon the acceptance of the

draft with bill of lading attached, then there was no such completed sale as would support this action.

It is, of course, undisputed that both parties understood that the cotton would be shipped to the company after all the negotiations had ended; but this requirement would not defeat the sale if the title had already passed. The finality of the sale as such is not affected by any duty which the seller may assume in regard to the property sold once the title has passed.

In the case of *Lynch* v. *Daggett,* 62 Ark. 592, this court decided (to quote the syllabus) that, "A sale of specific personal property may be final and complete, where such is the intent of the parties, although something remains to be done subsequently by the seller as part of the consideration of the contract, as to deliver the property at a place named." Other cases to the same effect are *Anderson-Tully* v. *Rozelle,* 68 Ark. 310; *St. L., I. M. & S. R. Co.* v. *Wynne H. & C. Co.,* 81 Ark. 389; *Priest* v. *Hodges,* 90 Ark. 131; *Elgin* v. *Barker,* 106 Ark. 482; *McDermott* v. *Kimball Lbr. Co.,* 102 Ark. 344; *Guion Merc. Co.* v. *Campbell,* 91 Ark. 240; *Shaul* v. *Harrington,* 54 Ark. 305.

A recent case dealing with the question now under consideration is that of *Dickson-Rodgers Trading Co.* v. *O. O. Scroggins Co.,* 136 Ark. 33, 206 S. W. 49. There sixty bales of cotton were sold while in the seller's warehouse. The sale was made under the rules of the Little Rock Cotton Exchange, according to which the transaction is complete upon the delivery of the cotton itself to the railroad and the issuance of a bill of lading f. o. b. cars with draft attached. At this point the insurance of the purchaser becomes effective, and not till then. An invoice and bill of lading of all the cotton was prepared by the seller, who then proceeded to haul the cotton to the railroad. But the platform was so crowded that only thirty of the bales could be loaded on it and the railroad issued bills of lading for only that number of bales. The remaining thirty bales were destroyed that night by fire in the warehouse. Under these facts we there feel that

the real question was, what was the understanding of the parties to the transaction? and that we could not say as a matter of law that the sale was not complete because the cotton had not been delivered to the carrier, and that the cause was properly submitted to the jury to determine whether or not there was a completed sale. The present record presents a similar question which should have been submitted to the jury. Other cases holding that delivery is a question of intent of the parties are: *Georgia Marble Finishing Works* v. *Minor,* 128 Ark. 128; *Gibson* v. *Inman Packet Co.,* 111 Ark. 521; *Lynch* v. *Daggett,* 62 Ark. 592; *Guion Merc. Co.* v. *Campbell,* 91 Ark. 240; *Shaul* v. *Harrington,* 54 Ark. 305; *Elgin* v. *Barker,* 106 Ark. 482; *Deutsch* v. *Dunham,* 72 Ark. 141; *Summit Lbr. Co.* v. *Sheppard,* 102 Ark. 88, 91; *White* v. *McCracken,* 60 Ark. 613; *Brown* v. *Simsboro Cash Store,* 102 Ark. 531.

We are all agreed that instruction numbered 3 set out above should not have been given, as the question there presented is wholly abstract. There is no question of agency in the case and the instruction is, therefore, misleading.

The majority of the court are also of the opinion that the court erred in permitting the cashier of the bank and the cotton buyer at Junction City to testify in regard to the policies of insurance; but we are all agreed that Barham's testimony in that respect was competent. The majority are of the opinion that the testimony of the cotton buyer and the bank cashier was incompetent because it formed no part of the transaction and had no relation to the transaction under review. That the recitals in the policies of insurance written some months before the occurrence of the transaction out of which this litigation arises could have no relevancy in determining what contract was made between Lake and Barham, and that no recital in these policies could control subsequent contracts or be of value in construing a contract made with one who was not a party to these insurance contracts and who in fact knew nothing of their existence or recitals.

Mr. Justice WOOD and the writer, however, are of the opinion that the testimony of both the cotton buyer and the bank cashier was competent, not as a part of the *res gestae,* for such it could not have been, but as explaining the intention of the parties at the time of the sale. The subject-matter of the sale was very valuable—worth many thousands of dollars—and neither party was willing to assume the risk of carrying the property without insurance, but only that person could insure who owned the cotton. Neither could have had any insurable interest except that of ownership, and the ownership depended on the question whether the sale had been completed, and the intention of the parties determined that. Lake's statement (if he made it) that his policies covered the cotton was, therefore, tantamount to an assertion of possession, especially as he had wired his company the information of the purchase of this cotton after his last telephone conversation with Barham. Lake testified that this cotton was bought just as all other cotton was bought; that no exception was made in this case, and it was, therefore, important and competent to show that Lake regarded himself as being in posesssion of the cotton and his policies therefore in effect as soon as he had completely agreed with the seller on the terms of the sale, and the evidence held incompetent by the majority tended to show the company's custom of dealing in such matters. For the errors indicated the judgment will be reversed and the cause remanded for a new trial.

RYAN v. RYAN.

Opinion delivered April 14, 1919.

1. WILLS—RULE IN SHELLEY'S CASE.—The rule in Shelley's case is one of law and not merely of construction, so that when words of limitation in a will bring a case within the rule, the intention of the testator is presumed to be in accordance with that which the law implies from the use of words having a fixed and definite meaning.

2. WILLS—CONSTRUCTION OF WORD "HEIRS."—Where the devisee under a will takes an estate of freehold, and in the same clause of the will an estate is limited, either mediately or immediately to his heirs, the word "heirs" is a word of limitation of the estate, and not a word of purchase.

3. WILLS—CONSTRUCTION—RULE IN SHELLEY'S CASE.—Where J. devised property to his wife during her life and then "to go to A., heir of J., and at his death to go to his heirs," and there are no qualifying or explanatory words repugnant to the acceptance of the word "heir" in its strict legal sense, which would embrace the whole line of heirs, A took a fee simple, according to the rule in Shelley's case.

Appeal from Greene Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellants brought this suit in the chancery court against appellees to enjoin them from tearing down and removing the houses on lots 6 and 7 in block 12, of West End Addition to the city of Paragould, Arkansas. The facts are as follows:

Appellee, A. A. Ryan, is a son and heir at law of John H. Ryan and appellee, M. A. Ryan, is his wife. Appellants are the minor children of A. A. Ryan. John H. Ryan made a will in which he devised all of his property to his children and heirs at law which are A. A. Ryan, N. C. Tedder, C. D. Bowlin, L. V. Dacus, V. L. Brust and Lucy Adams. So much of the will as is necessary to the decision of the issues involved in this appeal is as follows:

"Know all men by these presents, that I, John Ryan, being in sound mind and body and recognizing the certainty of death, and the uncertainty of life, being desirous of making my last will and testament. Now it is my will for Sarah Ryan, the wife, John Ryan, to have place that we are living on at present being this the ..... 1916. Described as follows, towit: Block 12, lots 6 and 7, in the city of Paragould, Arkansas, and six hundred dollars in money now at her death should any money be left after paying sixty-five dollars for a tombstone to be put to her

grave, then the balance to be divided between our children.

"Now after all of the above have been fulfilled then the above place, which is described as follows, towit:

"Block 12, lots 6 and 7, goes to A. A. Ryan, heir of John Ryan. I value this place that we are living on at present to be worth five hundred dollars more than any other places that I have got. J. H. Ryan.

"Now if Sarah Ryan is living on the place that we are living on at present, then the other heirs is to pay A. A. Ryan one dollar each, that is, N. C. Tedder, C. D. Bowlin, L. V. Dacus, V. L. Brust and Lucy Adams, per month for rent as long as she lives on the place, that is Sarah Ryan, the wife of John H. Ryan, then at Sarah Ryan's death, then this place that is described as follows, towit: Block 12, lots 6 and 7, in the city of Paragould, go to A. A. Ryan, heir of J. H. Ryan, and at his death goes to his heirs. Now it is my will for all that I have written to go just as I have said."

The land described in the will is the land involved in this controversy. John H. Ryan died, and his will was duly probated. The widow and devisees and heirs at law of John H. Ryan, deceased, conveyed by deed the property in controversy to A. A. Ryan and the latter entered into the possession of it. A. A. Ryan claims that under the terms of the will he has a fee simple title to the property in controversy. His children claim that he has only a life estate in it. Hence this lawsuit.

The decision of the chancellor was in favor of appellees and the case is here on appeal.

Huddleston, Fuhr & Futrell, for appellants.

1. A will is to be construed so as to carry out the intention of the testator unless that intention conflicts with some rule of law or is contrary to public policy.

2. Where an estate is limited to one person and immediately or mediately thereafter is given to the heirs of such person, the first person takes an estate in fee simple.

3. The word "heirs" shall not be construed as one of limitation in wills when it is clear from the intention of the testator that the term "heirs" was intended to be a word of purchase. The first proposition needs no citation of authorities. The second and third are sustained by Tiedeman on Real Prop., § 30; 13 Ark. 88.

It is apparent that the testator intended to give and that A. A. Ryan took a life estate and not the fee simple title to the lots. *Supra.*

HART, J., (after stating the facts). The only question presented by the appeal is as to the proper construction of the will set out in our statement of facts. It is shown in the proof that the property in controversy is that mentioned in the will. The particular clause of the will, the construction of which is involved, provides that the property in question should be given to Sarah Ryan, the wife of John H. Ryan, the testator, during her life and then to "go to A. A. Ryan, heir of J. H. Ryan, and at his death go to his heirs."

The decision of the chancellor was based upon the theory that the language of the will calls for the application of the rule in Shelley's Case and therefore vests in A. A. Ryan an estate in fee simple.

In *Hardage* v. *Stroope,* 58 Ark. 303, the court held that under the section of our Digest adopting the common law of England, so far as applicable, the rule in Shelley's Case is in force in this State, except in so far as it has been repealed by the section abolishing fees tail. Judge BATTLE, who delivered the opinion of the court, quoted with approval Kent's abridgement of Mr. Preston's definition of the rule in Shelley's Case. It is as follows:

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to genera-

tion, the limitation to the heirs entitles the ancestor to the whole estate."

In that case the court also held that in the application of the rule the presumption is, that the testator uses the word "heir" in its primary legal sense; that is as a word of limitation. Under this and subsequent decisions of our court it is settled that the rule in Shelley's Case is one of law and not merely one of construction. So when the words of the limitation bring a case within the rule, the intention of the testator is presumed to be in accordance with that which the law implies from the use of words having a fixed and definite meaning. The language used in the present case is within the very words of the rule, for where the devisee under the will takes an estate of freehold and in the same clause of the will an estate is limited, either mediately or immediately to his heirs the words, "the heirs" are words of limitation of the estate and not words of purchase. In the present case there are added no qualfying or explanatory words which are repugnant to the acceptance of the word "heir" in its strict legal sense. There are other clauses of the will in which the testator devises his property to his other children by name in which he calls them his heirs. In some of these provisions the devise is to the child by name with the added words "heir of John Ryan." In others the devise is to the child by name with the added words "heir of John Ryan and at her death it goes to her heirs." There is nothing in these added words or in the whole language of the will to show that the testator intended to use the word "heir" in its common or restricted sense to denote children and thereby form a root of a new succession instead of using the word in its primary legal sense which would embrace the whole line of heirs.

We think it is clear that the language used in the will brings the case within the operation of the rule in Shelley's case and that when so construed the will of J. H. Ryan gave the lots in controversy to A. A. Ryan in fee simple. See *Galloway* v. *Darby,* 105 Ark. 558.

The decision of the chancellor was therefore correct and will be affirmed.

SULLIVENT v. CLEAR CREEK OIL & GAS COMPANY.

Opinion delivered April 14, 1919.

MINES AND MINERALS — CONSTRUCTION OF OIL LEASE.—An oil lease which provides that all rights under it shall cease if drilling is not commenced within a year unless the lessee elects to continue the lease in force by paying an annual rental of $35 until a well shall be drilled, does not entitle the lessor to a rental of $35 for the first year.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

STATEMENT OF FACTS.

This action was begun in the justice court.

The appellant alleged that the appellee was due him the sum of $35 on account for rent, for the second year, under a lease contract entered into November 24, 1915, between the appellant and the appellee whereby the appellant leased to the appellee a certain tract of land in Crawford County for a period of ten years and as long thereafter as oil and gas were produced in paying quantities. The appellant alleged that under the terms of the lease the appellee was to pay him a rental of $35 a year in the event of his failure to prospect for gas and oil. That the appellee had the right to forfeit the lease at any time upon the payment of all accrued rentals. That the appellee attempted to surrender said lease without paying the sum of $35, which was then due.

The case was appealed to the circuit court, where by the consent of the parties it was tried by a jury of eleven.

The appellant introduced the contract upon which he relied, and testified that the sum of $35 was due and unpaid. That some time after the lease was executed he demanded of the appellee the sum of $35 rent for the first year, and was told that appellee would pay at the end of the year. He waited and when the year was out it sent him $35, and he was satisfied until the end of the next year, and when he made demand for the next year's rent he was told that they were not to pay anything for the first year. The company did not notify the witness that

it was going to forfeit the lease, just mailed the lease to witness, and in a letter wrote that the lease was not on productive land, that it intended to cancel the same and would pay no more rent.

The lease contained among others the following provisions: "That in case no well drilling operations for oil, gas and other minerals is begun on premises or other premises within two and a half miles from same within one year from the date thereof, all rights and obligations secured under this lease shall cease upon notice in writing being served on the said second party by the party of the first part, unless the second party shall elect to continue this lease in force as to any and all parts of the premises by paying to the party of the first part an annual rental of $35 for all of said premises or such portion thereof as the said second party may designate until a well is drilled, provided that when such well is drilled or mine opened up the above provided for rental shall cease."

"That the said second party, its successors and assigns, shall have the right at any time to surrender and terminate this lease by serving written notice upon the party of the first part of such intention, after which all payments and liabilities to accrue shall cease and terminate."

After the evidence was adduced the court over the objection of the appellant withdrew the cause from the jury, and entered a judgment in favor of the appellee, from which is this appeal.

J. E. London, for appellant.

When this lease was entered into it was clearly the intention of the parties that appellee should pay an annual rental of $35 per year. Appellee only paid for the first year and it was error to take the case from the jury and in rendering judgment for defendant. Appellee did not cancel the lease. The mailing of the lease to appellant without notice was not a release. He was to pay the rent until a well was drilled. Appellee was clearly liable for the rental. 64 Ark. 627; 72 *Id.* 354; 70 *Id.* 541; 13 N.

W. 758. Appellant accepted appellee's promise to pay the second year's rent at the end of the year and permitted him to hold the land. This was a sufficient consideration and the court erred in not submitting the case to a jury. Thornton on Oil and Gas, § 145, and notes; 28 Atl. 22; 42 N. E. 234; 10 Atl. 474; 27 *Id.* 961; 28 *Id.* 219; 30 *Id.* 719; 109 Pac. 851; 68 N. E. 319; 84 *Id.* 53.

Starbird & Starbird, for appellee.

Only nominal rent accrued the first year, $35 was paid in advance for "a continuance of the lease" for the second year and the notice and surrender of the lease effectually terminated the lease at the end of the second year. Thornton on Oil and Gas, pp. 223, 302, § § 68, 148, 145, note 105; *Ib.,* § 229, also p. 310 b., and § 154, p. 230-1. The surrender of the lease was a full and complete compliance with its terms. There is no error. *Supra.*

WOOD, J., (after stating the facts). The judgment is correct. Under the provisions of the contract of lease the appellee had the exclusive right and privilege, upon consideration of $1 of entering upon and holding the lands described in the contract, for the period of one year, for the purpose of drilling, mining, etc., for oil, natural gas, coal, etc. If drilling operations were not begun within one year then the appellee had the option upon the payment of $35 to continue the lease in force by paying an annual rental of $35 until a well was drilled, when the rents should cease. *Monfort* v. *Lanyon,* 67 Kan. 310; the Law Relating to Oil and Gas, Thornton (2 ed.), p. 219, sec. 145.

The unambiguous terms of the contract clearly contemplated the right upon the part of the appellee at the end of the first year to continue the lease, to the end of the ten-year period, upon the payment in advance of an annual rental of $35 until a well is drilled.

The uncontradicted testimony shows that the appellee at the end of the first year paid the sum of $35. This had the effect of continuing appellee's rights under the contract for another year, or until November 24, 1917.

On that day the appellee wrote the appellant that the lease was not on productive land and that it intended to cancel the same and pay no more rent. This letter, which appellant testified he received, notified him of the intention of the appellee to terminate the lease and under the plain terms of the contract the appellee was not liable to the appellant thereafter for rents.

Indeed, appellant did not sue and does not claim rent after November 24, 1917. His claim is based on rents alleged to be due for the second year. As already shown appellant received the payment for that year.

Hence, the judgment of the court is correct, and it is affirmed.

McFALL v. FIRST NATIONAL BANK OF FORREST CITY.

Opinion delivered April 14, 1919.

1. BANKS AND BANKING — REFUSAL TO HONOR CHECK — DAMAGES.— Where a bank wrongfully refuses to pay checks of a depositor having funds subject to check, the depositor is entitled to recover substantial damages.
2. BANKS AND BANKING — REFUSAL TO HONOR CHECK — DAMAGES.— In an action by merchant depositors against a bank for the latter's wrongful refusal to honor their check, the only burden imposed upon the plaintiffs, in order to recover substantial damages, was to show that they had sufficient funds in defendant bank to cover checks drawn, and that the bank refused to pay them.
3. BANKS AND BANKING — REFUSAL TO HONOR CHECKS — DAMAGES.— In such action the jury in assessing the damages to plaintiffs should consider the importance of the checks to the merchants' business, the size of the account, the merchants' standing as business men in their community, and the probable effect the dishonoring of the checks had on their credit.

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

C. W. Norton, for appellants.

The court erred in its instructions to the jury. They should have been instructed that plaintiffs were entitled

to "substantial" damages and that a mistake of the bank in dishonoring the checks would not excuse it from liability. 5 Cyc. 535; Ann. Cases, 1913, A. 999; 7 Am. Cases 818; 10 *Id.* 897; 121 Pac. 939; 67 N. E. 655; 5 R. C. L. 550. If the depositor is a merchant or trader, "substantial" damages will be presumed without proof. 5 R. C. L. 550 and cases cited; Ann. Cases, 1913, A. 1002. See also 121 Pac. 939; 5 R. C. L. 549, 546; 7 Ann. Cas. 818.

Mann, Bussey & Mann and *R. J. Williams,* for appellee.

1. The court's instructions in this case were responsive to the pleadings and evidence. No special damages were alleged nor proven. The case was submitted on the theory that plaintiffs were entitled to substantial damages. The jury found that $50 was sufficient. There was no proof to warrant the submission of any other issue.

2. Substantial damages means that more than nominal damages should be assessed and is defined to be such damages as is fair and reasonable under the facts of the particular case. 15 L. R. A. 134.

3. Many cases hold that only nominal damages are recoverable where no measurable or tangible damages are shown, but here the trial judge adopted the general rule that the mere fact of refusal to pay the depositors' checks without a good and sufficient excuse is sufficient to warrant a recovery of substantial damages and so instructed the jury. 7 C. J. 696 and cases cited. The jury thought $50 sufficient and the judgment should be affirmed, as there is no error.

HUMPHREYS, J. Appellants instituted suit against appellee in the St. Francis Circuit Court to recover damages for wrongfully and wilfully dishonoring or refusing to pay certain checks drawn by them upon appellee in favor of the Southwestern Telephone & Telegraph Company engaged in business in Forrest City, Arkansas, and various wholesale merchants engaged in business in Memphis, Tennessee. In substance, the complaint alleged that appellants were partners engaged in a general grocery

and butcher business in Madison, Arkansas; that appellee was a national bank engaged in the banking business at Forrest City, Arkansas; that, in May, 1917, appellants were depositors in appellee's bank and issued checks on their deposit, payable to the Southwestern Telephone & Telegraph Company and certain wholesale merchants in Memphis, Tennessee, which checks, in the course of negotiation, were passed through banks in Memphis, St. Louis and Forrest City; that, in due course of business, said checks were presented to appellee for payment, and wrongfully and wilfully refused or "turned down" by it on the 18th, 19th and subsequent dates in May, 1917, to the damage of appellants in the sum of $6,000.

Appellee filed answer, denying that it wilfully or wrongfully refused to pay or "turned down" checks of appellants; or that appellants were damaged in any sum by reason of its refusal to pay the checks when presented, but admitting all other allegations in the complaint.

The cause was submitted to a jury on the pleadings, evidence and instructions of the court, upon which a verdict was returned and judgment rendered against appellee in the sum of $50. Under proper proceedings, an appeal has been duly prosecuted to this court from the verdict and judgment.

The evidence disclosed that on May 14, 1917, appellants, who were engaged in the mercantile and butcher business at Madison, Arkansas, deposited $293 with appellee, who was engaged in the banking business at Forrest City; that they drew checks against the deposit on and after May 14, 1917, in payment of a telephone bill and goods purchased in Memphis; that the deposit was sufficient to pay all checks drawn; that the check to the telephone company was presented to appellee and refused; that the checks issued to wholesale merchants in Memphis passed through Memphis, St. Louis and Forrest City banks in the regular course of business; that four of them were presented to appellee prior to May 24, 1917, and refused; that one of the checks was refused on the 18th and 21st days of May; that on the 19th day of May the atten-

tion of the bank had been called by Mr. McFall to the fact that appellants had money in the bank to pay the checks, and, on the 21st day of May, their attention was again called to that fact by Mr. Scales, who showed the cashier the deposit slip issued to them for $293 on the 14th day of May, for which they had not received credit; that thereafter checks were refused until appellants made a deposit on May 22nd of a sufficient amount to pay them; that, on May 25th, the error was discovered and appellee gave appellants credit as of that date for the sum of $293 deposited by them on May 14th.

This appeal involves a determination of the rule by which to measure damages against a bank for refusal to pay a merchant depositor's check, who has sufficient funds on deposit to pay it. There is no statute in our State fixing the measure of damages in this character of case; so, under section 623 of Kirby's Digest, the common law rule will control. The common law rule, as stated in *Siminoff* v. *Jas. H. Goodman & Company Bank* (Cal.), 121 Pac. 939, is as follows: "Substantial damages are recoverable against a banker for dishonoring the check of a depositor where there is sufficient money in his hands at the time to meet it." See also *Rolin* v. *Steward,* 14 C. B. 595, and other English cases referred to in the note to the annotated case of *Lorick* v. *Palmetto Bank & Trust Company* (S. C.), Am. & Eng. Ann. Cas., vol. 7, p. 818. The note appears on page 819. The great weight of American authority is clearly in accord with the common law rule. The general rule announced under the heading, "Liability of Bank to Drawer" in 5 Cyc., p. 535, is as follows: "If the bank neglect or refuse to pay on order of a depositor, where the latter has sufficient funds on deposit and no other good excuse exists, the depositor can maintain an action against the bank for the money, and is *entitled* to recover *substantial* damages for such refusal." The text is supported by a number of cases from many States in the Union. Touching upon the measure of damages in this character of case, it is said in Ruling Case Law at page 548 that "even where the de-

positor is unable to show any special loss or injury, the authorities seem to be almost universal to the effect that he is not limited to mere nominal damages" and that the depositor "is entitled to recover general compensatory damages." The doctrine thus announced in the text is sustained by leading American cases under citations 15 and 17. It is indicated in the note to *Blanche O. Lorick* v. *Palmetto Bank & Trust Co.*, vol. 7, Am. & Eng. Ann. Cas., 818, that the American cases adhering to the common law rule have followed the English case of *Rolin* v. *Steward,* 14 C. B. 595; 78 E. C. L. 595, and that the American cases announcing a contrary rule have followed the English case of *Marsetti* v. *Williams,* 1 B. & Ad. 415, 20 E. C. L. 412. In that note, the case of *Rolin* v. *Steward, supra,* is characterized as a leading case on that subject, and the fact is emphasized that Judge Campbell "instructed the jury that they ought not to limit their verdict to nominal damages, but should give the plaintiff such temperate damages as they should judge to be reasonable compensation for the injury which they must have sustained from the dishonor of their checks;" and that the case of *Marzetti* v. *Williams* "can hardly be considered as an authority in point," because the point at issue was not involved in that case. Concerning the latter case, it is said in the note that "the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought in contract and not in tort. Beyond that point the statements are merely *obiter.*" The chief reasons assigned in support of the doctrine sustained by the great weight of authority, to the effect that a merchant or trader has a right to recover substantial damages for the wrongful refusal of a bank to honor his check when he has sufficient funds in the bank to pay it, is that "the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty or bad faith to the drawer of the check, and has the effect of slandering the trader in his business." 5 R. C. L. 549. These reasons are sound and all sufficient.

Many other reasons have been assigned but we deem it unnecessary to reiterate them here, as we do not understand that learned counsel for appellee seriously controvert the common law rule adopted by the weight of American authority. In fact, they virtualyy concede the rule in their opening and closing statements to the effect that the court, in substance, instructed the jury that appellants were entitled to substantial damages and that the case was tried and the verdict returned on that theory. We have examined the several instructions given by the court on the measure of damages and find that they precluded the idea that appellants, being merchants, were entitled to recover substantial damages, without first making proof that they had sustained actual damage. For example: The court gave the following written instructions:

"The jury is instructed that if you find from the evidence that the checks were not paid, notwithstanding plaintiffs had money in the bank, the defendant would be liable for nominal damages only, unless it is shown by the evidence that they in fact suffered actual damage."

"The jury is instructed that the burden is on the plaintiff to show by competent evidence the amount of damage sustained by them, if any, in excess of nominal damages."

It will be observed in the first instruction just above quoted that the court clearly told the jury that only nominal damages could be returned unless it was first established by the proof that appellants had suffered actual damages. It will also be observed in the last instruction just above quoted that the burden was placed upon appellants to show by competent evidence that they were actually damaged before they would be entitled to any sum in excess of nominal damages. This instruction was erroneous for the reason that, under the law, the only burden imposed upon appellants was to show that they were merchants, that they had money on deposit in appellee's bank in sufficient amount to cover checks drawn by them, and that the bank refused payment of the

checks. The instruction as written, imposed the additional burden of requiring appellants to prove by competent evidence the amount of damages sustained by them, if any, in excess of nominal damages. The instruction practically eliminated the presumption of substantial damages arising from the law in favor of appellants on account of their being merchants at the time appellee turned down their checks.

As a further evidence that the court had in mind and intended to convey the idea to the jury, in his written instructions, that it was necessary for appellants to prove some actual damage before they could recover substantial or moderate damage, the following oral instruction was given at the conclusion of the written instruction:

"Then, gentlemen, I will give you this additional instruction: The jury is instructed that if you find from the evidence that the checks were not paid, notwithstanding the plaintiffs had money in the bank, the defendant would be liable for nominal damages, unless it is shown by the evidence in the case that they in fact suffered actual damages."

At this juncture, appellants excepted to the oral instruction, whereupon the court instructed the jury as follows:

"Gentlemen, I give you this additional instruction; it was given to you a few minutes ago, but since that time, I have modified it, and give it to you in this form: If you find that the plaintiff should recover, you are instructed that in arriving at what is a fair and just sum for the damages sustained, you will take into consideration the importance of these checks to the plaintiff's business; also the size of their account; also the plaintiffs' standing as business men in their community, and you will fix the damages at such sum as you think will be a fair and just compensation for the injury sustained, if you find there has been an injury sustained by the plaintiffs."

The latter instruction properly set out matters that the jury should consider in arriving at their verdict. For example: It told them that they should take into consid-

eration the importance of the checks to the plaintiffs' business, the size of their account, the plaintiffs' standing as business men in their community, etc., which direction was proper matter to be taken into consideration in arriving at a verdict for substantial damages, but the instruction thus given carried the same error as was contained in the first two written instructions copied in this opinion. It will be noted that the latter clause, of the last oral instruction given, states that the jury should fix just compensation for the injury sustained if the jury found that appellants had sustained injury. This direction necessarily implied that unless the evidence showed appellants had sustained actual injury they could not recover more than nominal damages. The instruction carried the same error as the other instructions above quoted and did not clear up the clean-cut statement in the first oral instruction given, which was to the effect that unless the evidence in the case showed actual damage, only nominal damages could be recovered. If by any manner of construction it could be said that the last oral instruction conveyed the idea to the jury that appellants were entitled to a verdict for substantial damages it would be in direct conflict with the two written instructions quoted above, which were in no wise modified or attempted to be modified by it.

It cannot be said, under the facts in this case, that the jury would not have returned a larger verdict had they been properly instructed to the effect that the law presumes that a merchant or trader suffers substantial damage by having his check dishonored by a bank in which he has sufficient funds to meet such checks, and that it was unnecessary for a merchant or trader to prove damages in any specific or certain amount in order to entitle him to damages for a substantial amount.

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

McCULLOCH, C. J., (dissenting). The first and readiest answer to the contention that prejudicial error

was committed by the court's refusal to charge the jury as to the right of appellants to recover substantial damages is that the jury's verdict awarded substantial damages, and no prejudice resulted even though the ruling of the court was incorrect. An award of fifty dollars is not an award of nominal damages. That sum is a substantial one, and is, in this instance, apparently adequate according to the evidence adduced. At any rate, the evidence in the record is such that we cannot say that the jury erred in the assessment of damages. The court instructed the jury that "in arriving at what is a fair and just sum for the damages sustained" they should "take into consideration the importance of those checks to the plaintiff's business, also the size of their account, also the plaintiff's standing as business men in their community" and "fix the damages at such sum as you think will be a fair and just compensation for the injury sustained." In view of the award of a substantial sum as damages, it ought to be presumed that the jury followed that instruction and that no prejudice resulted from the court's refusal to charge the jury concerning appellant's right to recover substantial damages, or from the instruction that there would only be liability for nominal damages "unless it is shown by the evidence that they (appellants) in fact suffered actual damages," even if the court committed error in those respects. This court should not annul the judgment on account of immaterial error.

But it seems clear to me that the court did not err in its charge. An instruction telling the jury that appellants were entitled to substantial damages would have been a charge on the weight of the evidence, which is prohibited by the Constitution, article 7, section 23. Principles of law appropriately declared in opinions of courts with respect to the weight and sufficiency of evidence are out of place in an instruction to a trial jury where, as in this State, judges are forbidden to charge on the weight of evidence. This has been illustrated in cases here. For instance, it was once said by this court, in discussing the weight of evidence, that unexplained possession of re-

cently stolen property was sufficient to sustain a conviction of larceny (*Shepherd* v. *State,* 44 Ark. 39), but we have since repeatedly held that it is improper, as an instruction on the weight of evidence, for the trial court to tell the jury so. *Blankenship* v. *State,* 55 Ark. 244; *Duckworth* v. *State,* 83 Ark. 192; *Thomas* v. *State,* 85 Ark. 138; *Reeder* v. *State,* 86 Ark. 341. And in an opinion this court declared the law to be that in a suit for malicious prosecution the jury may infer malice from proof of want of probable cause (*Lavender* v. *Hudgens,* 32 Ark. 763; *Bozeman* v. *Shaw,* 37 Ark. 160), but it has been decided that an instruction to that effect would be erroneous. *L. B. Price Mercantile Co.* v. *Cuilla,* 100 Ark. 316; *Dare* v. *Harper,* 101 Ark. 37; *Kable* v. *Carey,* 135 Ark. 137. Other similar instances may be found in the decisions of this court.

The instructions requested by appellants were indeed open to the objection that they related to the weight of the evidence and were erroneous unless it be held that as a matter of law the wrongful or negligent failure of a bank to pay the check of a depositor who is a merchant entitles such person to recover substantial damages under all circumstances. No court ever held that, and it is contrary to reason, for everyone familiar with the ordinary run of business affairs knows that some merchants are in such affluent circumstances and their credit is so firmly established that not a cent of actual injury is sustained by the failure or refusal of a bank to pay a check. The most that has been decided on the subject is that a trial jury may, without direct proof as to the extent of the injury, infer injury resulting to the credit of a merchant from the failure of a bank to honor his check, and in jurisdictions where instructions on the weight of evidence are not forbidden the courts may charge juries to that effect.

This doctrine, which the majority of the judges of this court now invoke as calling for a reversal of the judgment of the circuit court, had a very small beginning to have grown to such dimensions, in the English case of

Rolin v. *Steward,* 14 C. B. 595. The trial court had in that case told the jury that they "ought not to limit their verdict to nominal damages, but should give the plaintiff such temperate damages as they should judge to be a reasonable compensation for the injuries sustained." The jury returned a verdict assessing damages in favor of the plaintiff in the sum of 500 pounds, and the appellate court affirmed the judgment on appeal, saying: "A breach of contract of this sort must of necessity be injurious to a person in trade, and if so, the jury might properly take that into consideration and give damages accordingly." The practice in the English trial courts is for the judges to sum up the evidence in their charge to juries and they are not forbidden to charge on the weight of evidence; so in the light of that power, the decision of the appellate court was undoubtedly correct. Many American courts have followed that lead, and the majority of them hold that direct proof of injury is not essential to the recovery of substantial damages, for the reason that an inference of substantial injury may legitimately be drawn from the fact that a trader's check has been dishonored, which is, of itself, calculated under ordinary circumstances to injuriously affect the credit of a merchant. I have no quarrel with that holding, but I think it is wrong and out of harmony with our own decisions to say that a trial court may instruct a jury what inference they may draw from the circumstances. This inference is one of fact and is not a presumption of law, and the courts have no right under the Constitution of this State to charge juries on the weight of such inferences. The correct rule was stated by Judge Hook in delivering the opinion of the United States Circuit Court of Appeals for this circuit in the case of *Bank* v. *Ober,* 178 Fed. 678, where he said: "This rule proceeds upon the fact, commonly recognized, that the credit of a person engaged in such a calling is essential to the prosperity of his business, and the dishonoring of his checks is plainly calculated to impair it, and to inflict a most serious injury. In common opinion substantial damages is the nat-

ural and probable consequence of the act, and, therefore, a substantial recovery may be had without pleading or proof of special injury." The court in that case went on to decide that no such inference could be drawn as to a person not in business, which shows that the rule creates only an inference of fact under certain circumstances, and that it is not a presumption or rule of law which a trial court can declare to a jury. The trial court can only instruct the jury, as was done in the present case, that in order to ascertain the amount of the damages consideration should be given to the condition of the plaintiffs and the probable effect the dishonoring of the checks had on their credit.

Nor was there any error in the instruction telling the jury that the burden of proof was on appellants to "show by competent evidence the amount of damages sustained, if any, in excess of nominal damages." This instruction was, of course, to be considered in connection with the others which followed telling the jury what circumstances they might consider in ascertaining the extent of the injury. Our statute puts the burden of proof on the plaintiff as the party having the affirmative of the issue, and this instruction was in line with that statute.

It would have been proper for the court, if asked, to instruct the jury that it was not essential for the damages to be proved by direct evidence, and might be proved by circumstances, but no such instruction was asked for. That was, however, the effect of the last oral instruction given by the court.

Mr. Justice SMITH concurs in these views.

OLIVER v. SOUTHERN TRUST COMPANY.

Opinion delivered April 21, 1919.

1. STATUTES—APPROPRIATION BILL—NUMBER OF NOTES.—Under Constitution, article 5, section 26, relating to appropriations, the Legislature cannot appropriate money to pay a claim against the State under a contract not authorized by pre-existing law ex-

cept by a bill passed by two-thirds of the members elected to each branch of the General Assembly.

2. SAME—EFFECT OF PARTIAL UNCONSTITUTIONALITY.—Where a statute is unconstitutional in part, the valid portion will be sustained if complete in itself and capable of being executed in accordance with the apparent legislative intent; but if the valid and invalid portions are so mutually connected and dependent on each other as to warrant the belief that the Legislature would not pass the valid portion independently, the entire act must fail.

3. SAME—CONSTRUCTION—TITLE—PREAMBLE.—While not controlling, the title and preamble of an act may always be considered in determining its meaning.

4. SAME—PARTIAL INVALIDITY—DEPENDENT PROVISIONS.—Acts 1915, p. 326, entitled an act to appropriate money for an exhibit of the State's resources, at an exposition, the main object being to make an appropriation, was void as a whole, not having received the necessary two-thirds vote of the members elected to each branch of the General Assembly.

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

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

The act did not receive the necessary affirmative vote required by article 5, section 27, Constitution, and is a nullity. 1 Sutherland on Stat. Const. 579; 6 R. C. L. 121; 117 Ark. 352. The claims sought to be paid are not provided for by any pre-existing law and the whole act is void. 10 Wash. 388. The whole act must be constitutional or it is void.

Moore, Smith, Moore & Trieber, for appellees.

There was pre-existing legislation and the unconstitutionality of section 6 does not render the whole act void. The act was properly passed and received the necessary vote. The act was divisible and the constitutional parts should be sustained. 32 Ark. 131; 37 *Id.* 356; 48 *Id.* 370; 89 *Id.* 466; 111 *Id.* 108; 119 *Id.* 324; 93 *Id.* 612-620. Section 6 can be entirely eliminated and the balance of the act will stand. The act is complete without section 6. As to the title see 124 Ark. 475. Eliminate section 6 and

the balance of the act is constitutional and valid. The act was constitutionally passed. Art. 5, § 27, Const.

SMITH, J. Appellees filed their petition for mandamus, which contained the following recitals: The Governor of the State on or about the —— day of —— 1914, appointed a commission to select a site at the Panama-Pacific International Exposition upon which to erect a building within which the exhibits of this State might be housed, and to take such steps as might be necessary for the collection and maintenance of such exhibits as would be shown at the exposition. Because of the early approach of the opening day of the exposition, to-wit, February 20, 1915, it was deemed inadvisable by the commission to await until the next ensuing session of the General Assembly to pass legislation formally authorizing the commission to proceed with the work and to make an appropriation towards the expense thereof. Accordingly on June 26, 1914, the commission selected a site and proceeded with erection of a building thereon, and with the collection of the respective exhibits and with the transportation of them to the exposition. In order to pay for the foregoing work approximately twenty-five thousand dollars in money was donated to said commission by citizens of the State, and other citizens of the State donated several thousand dollars worth of building materials of various kinds. In addition to the foregoing fund the commission during the progress of said work received and had available the further sum of approximately eighteen thousand dollars which was loaned and advanced it by other citizens.

At the ensuing session of the General Assembly, Act No. 82 was passed, which was approved February 25, 1915, entitled, "An act to appropriate money for an exhibit of the resources of the State of Arkansas at the Panama-Pacific International Exposition of 1915, and for other purposes."

That in the passage of said act the General Assembly had in view the fact that the commission had received

and was in the act of collecting and maintaining said exhibit with the aforesaid donations and advances of money and material; but in order to make a more creditable display appropriated the additional sum of forty thousand dollars, or so much thereof as might be necessary, in order that the exhibit might be made more successful. Upon the passage of the act two-thirds of the members present and voting in the Senate voted that the act become a law, and a majority less than two-thirds of those present and voting in the House of Representatives voted to the same effect. A quorum was present and voting in each house.

Thereafter on March 15, 1915, in a suit brought by J. C. Belote, a citizen and taxpayer of the State, against the Auditor and Treasurer of State to restrain the Auditor from issuing and the Treasurer from paying warrants drawn against the appropriation contained in the act, we held that the bill had failed to receive the necessary affirmative vote required by article 5, section 30, of the Constitution, and therefore never became a law. *Belote* v. *Coffman,* 117 Ark. 352.

By reason of this decision no money was ever paid out of the State Treasury upon said appropriation, but the commissioners proceeded with the completion of the building and the assembling of the exhibit, which it maintained with entire success at the exposition throughout its duration. Thereafter, in order to reimburse those persons who had prior to the passage of Act No. 82 of 1915 loaned and advanced to said commission money which was used in the collection and maintenance of said exhibit the General Assembly passed an act, which was approved by the Governor on February 27, 1919, entitled "An act to provide for the payment of the indebtedness incurred by the Arkansas Commission to the Panama-Pacific International Exposition," appropriating for the repayment of the said persons and citizens who had made loans and for the payment of certain obligations incurred by the commission, the sum of $23,384.33. This act directed the Auditor to draw his warrant on the Treasurer

in favor of the Southern Trust Company as trustee for persons having claims against said commission, the number and amount of each being set out in the preamble of the act. In the passage of said act of 1919, twenty-eight members of the Senate voted that it become a law, there being no votes to the contrary; and in the House of Representatives sixty members voted that it become a law, and twenty-eight voted to the contrary.

The petition concluded with the allegation that notwithstanding the passage of said act the Auditor has refused to issue his warrant on the Treasurer as required by said act, whereupon it was prayed that a writ of mandamus issue compelling him to do so.

To the above petition the Auditor filed a demurrer on the ground that it did not state facts sufficient to entitle the petitioners to the relief prayed. The demurrer was overruled, and upon the Auditor declining to plead further, the court entered an order requiring him to draw and deliver his warrant as prayed in the petition, and this appeal has been prosecuted from that order.

The present appeal does not involve the section of the Constitution construed in the case of *Belote* v. *Coffman, supra;* but the Auditor's refusal to draw his warrant is based upon section 26, article 5, of the Constitution, which reads as follows: "No extra compensation shall be made to any officer, agent, employee or contractor after the service shall have been rendered or the contract made; nor shall any money be appropriated or paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws; unless such compensation or claim be allowed by bill passed by two-thirds of the members elected to each branch of the General Assembly."

It will be borne in mind that the Senate consists of thirty-five members and the House of one hundred, so that this act of 1919 did not receive the vote of two-thirds of the members elected to the House.

On behalf of appellees it is insisted that, while the appropriation contained in the act of 1915 failed because

it did not receive the affirmative vote of two-thirds of those present and voting in the House of Representatives, yet a valid act was passed which legalized the work of the commission up to the time of its passage and conferred authority for the continued performance of its duty and authorized the obligations thereafter incurred. The correctness of this contention is the point at issue.

As applied to the facts in this case, the section of the Constitution under consideration (section 26, article 5), means that the Legislature cannot authorize the payment of any claim against the State unless a pre-existing law authorized the contract under which the claim was incurred except by a bill passed by two-thirds of the members elected to each branch of the General Assembly; in other words, its effect is to prevent the Legislature from making appropriations in satisfaction of contracts not authorized by some law existing at the time the contract was made, except upon the vote just stated. The question at issue may, therefore, be stated as follows: Did the Commission, under the act of 1915, have the authority to make the contracts upon the credit of the State covering the claims which the act of 1919 attempted to pay?

The rule of construction applicable here is the one applied by us in the case of *Cotham* v. *Coffman,* 111 Ark. 108, in which case we said: "If the proviso requiring Garland County to assume the payment of two-thirds of the salary of the judge of that circuit is unconstitutional and void, what becomes of the act? Does that fact render the whole act void? The rule in such cases has been stated by Judge Cooley in his work on Constitutional Limitations to be as follows: '* * * * Where, therefore a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be

contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' Cooley's Constitutional Limitations (6 ed.), p. 210. This rule has been followed in innumerable cases in the various courts, and by this court in the following cases: *L. R. & Ft. Smith Rd. Co.* v. *Worthen,* 46 Ark. 329; *State* v. *Marsh,* 37 Ark. 356; *State* v. *Deschamp,* 53 Ark. 490; *Cribbs* v. *Benedict,* 64 Ark. 555; *Wells Fargo & Co.* v. *Crawford County,* 63 Ark. 576."

In the application of the rule quoted in the case from which we have quoted it, we held that the constitutional and unconstitutional portions of the act there construed were separable, and we gave effect to the constitutional part. But do we have the same result here?

The title of the act of 1915 indicates the prime and controlling purpose was to appropriate money; and while

the title of an act is not controlling in its construction it is always proper to look to the title in determining its meaning. *School District* v. *Howard,* 124 Ark. 475. This is true also of the preamble, where we find the recital that, "Whereas, a legislative appropriation is the fairest and most equitable method of raising the necessary funds, each citizen thereby contributing according to his assessed wealth, which if equally distributed would amount to only a few cents to each individual, therefore, 'Be it enacted, etc.' " The purpose expressed both in the title and preamble is so interwoven in the body of the act that we are constrained to conclude that the act as a whole contemplates the disbursement of the funds appropriated in the section of the act (section 6) which contained the appropriation, and that the other sections contain the details and directions for the expenditure of the appropriation, so that if section 6 is stricken out the legislative purpose would be so far defeated that the Legislature would not have passed the act with this section omitted.

The first section defines the duties of the commission and concludes with the proviso that "no commissioner or county representative heretofore or hereafter appointed shall receive any compensation for their services save while they are in the actual service of said commission and engaged in the work of collecting exhibits or in charge of said Arkansas building or exhibits." The payment here provided for was manifestly contemplated to be made out of the appropriation which was contained in section 6 of the act.

Section 2 provides for the display of the exhibits and approves the action of the commission in employing an architect to construct the State building. Section 3 provides for the employment of the necessary assistants in displaying the exhibits and in distributing advertising matter to visitors; but it is obvious that these expenditures were authorized in view of the appropriation which the act contained.

Confirmation of this view is coerced when section 4 is analyzed. That section provides for keeping an ac-

count of all proceedings and for the audit of all expenses and that "the salaries of the secretary, assistants, employees and help shall be paid by warrants drawn on the State Auditor, signed by the commissioner, to be paid out of the fund hereinafter appropriated for the purpose therein expressed; and said commission shall keep an exact account of all the expenditures of all the money by them ordered paid, and at the close of said Panama-Pacific International Exposition, said commission shall furnish to the Governor an itemized statement of all moneys drawn by them from the State, under said appropriation, and the purposes for which drawn, which shall be sworn to by the Commissioner-General and attested by the Secretary. That the Commissioner-General and Treasurer of said Commission shall enter into a lawful bond to the State of Arkansas, to be approved by the Auditor of State, in the sum of ten thousand dollars for the faithful performance of the duties imposed upon them by the provisions of this act."

Section 5 specifies the amount of the salaries and wages of the officers and employees authorized by section 4. Section 6 contains the appropriation; while section 7 —the last section—contains the emergency clause undertaking to put the act immediately into effect.

Without the appropriation contained in section 6 the whole legislative scheme fails, as this is the section which furnishes the motive power, the essential funds to make the remainder of the act effective, and when that section falls, the entire act falls with it, because the use of these funds is so inseparably connected with the whole legislative plan that no valid and enforceable law remains without it.

The judgment of the court below will therefore be reversed and the petition will be dismissed.

ARKANSAS LIGHT & POWER COMPANY v. COOLEY.

Opinion delivered April 21, 1919.

1. ELECTRICITY—WATERS AND WATERCOURSES—EFFECT OF FRANCHISE.—A franchise granted by a city council to a public service company to supply water and light to the city and its inhabitants at certain rates, when accepted, becomes a contract between the municipality and the grantee, and the conditions therein are binding, the same as the terms of any other contract, both on the municipality and the company.
2. MUNICIPAL CORPORATIONS — ORDINANCES — YEA AND NAY VOTE.—Under Kirby's Digest, section 5473, providing that, on the passage of an ordinance to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded, ordinances providing for a raise in water and light rates, in the passage of which the yeas and nays were not called, are void.
3. ELECTRICITY—WATERS AND WATERCOURSES—MODIFICATION OF CONTRACT.—A franchise granted by a city to a public service company of a right to furnish water and electric lights, being a contract between the city and the company, may be modified by an ordinance raising the water and light rates, when accepted by the company.
4. CONSTITUTIONAL LAW—VESTED RIGHTS IN CONTRACT.—A grant of a franchise by a city council to a public service company to furnish water and light at stipulated rates to the inhabitants does not give the property owners such a vested right as will entitle them to enjoin the company from raising its rates in accordance with a subsequent ordinance.
5. MUNICIPAL CORPORATIONS—LEGISLATIVE POWER.—A city council, in the exercise of its legislative power, as in granting or modifying a water and light franchise, is vested with a discretion which can be controlled by the courts only after abuse.

Appeal from Clark Chancery Court; *Jas. D. Shaver*, Chancellor; reversed in part.

STATEMENT OF FACTS.

C. F. Cooley, a resident and property owner of the city of Arkadelphia, brought this suit in equity on behalf of himself and all other persons whose rights are similarly affected, against the Arkansas Light & Power Company for cutting off the light and water furnished by that company. The facts are as follows: On September 10,

1914, the city council granted the Arkansas Light & Power Company a franchise to establish and operate in the city of Arkadelphia an electric light system for a period of fifty years, and in the ordinance granting the franchise, a maximum rate was established which the company was permitted to charge private consumers. The franchise was accepted by the company and it has operated under it ever since. At the same time and for the same period of years the said company was granted a franchise to provide for a water supply to the city of Arkadelphia and the inhabitants thereof. The rates which the company might charge private consumers were prescribed in the ordinance. This ordinance was accepted by the Arkansas Light & Power Company and it has operated a waterworks system under it ever since.

On August 5, 1918, the common council of the city of Arkadelphia passed an ordinance empowering the said company to make a greater charge for electric lights during the period of the war between the United States and Germany and for six months after the termination of said war. A like ordinance was passed at the same time providing for an increase of rates for the water furnished private consumers. The records of the city council do not show that the yeas and nays were called and recorded on the passage of either of the ordinances of the date of August 5, 1918, raising the rates to be charged by the company respectively to consumers of electric light and water.

C. F. Cooley was a resident and property owner in the city using both electric light and water from the company. He refused to pay the increased charges provided for in the ordinance of August 5, 1918, and the company threatened to cut off his electric lights and water for his failure so to pay. Hence this lawsuit.

The chancellor was of the opinion that the ordinances of August 5, 1918, providing for an increase of water and electric light rates were not passed by the city council in the manner provided by law and were therefore void.

It was therefore decreed that the Arkansas Light & Power Company be perpetually enjoined from discontinuing the services of water and electric current to C. F. Cooley on account of his failure to pay the increased rates for water and light provided for by the ordinances of August 5, 1918.

The defendant company has appealed.

Callaway & Huie, for appellant.

The city council in the passage of the two ordinances were exercising the "police power" of the city. Unless they were contractual they are *prima facie* valid. The minutes of the city show that they were duly passed and recorded. Certified copies were duly introduced in evidence. Kirby's Digest, § 5471; 116 Ark. 125; 94 U. S. 113; 143 *Id.* 517; 219 *Id.* 104; 233 *Id.* 389; 204 S. W. 386; *Ib.* 1074; 31 Cyc. 902; 28 *Id.* 692. The two ordinances were duly passed and constituted a contract between the citizens and the appellant. They were accepted by the grantee and bound the grantee for a term of years and gave it six months to comply with the terms of the contract, and the decree should be reversed.

T. N. Wilson and *McMillan & McMillan,* for appellee.

1. The ordinances were both void. Kirby's Digest, § 5473. The "ayes and nays" were not called and recorded. 40 Ark. 105; 105 *Id.* 506-511. The provision is mandatory and the record shows that the yeas and nays were not called and recorded. 105 Ark. 506-511.

2. The original franchises were contracts. Kirby's Digest, § 5448; 101 Ark. 223. The amendatory ordinances resulted in granting new franchises and were not passed as prescribed by law. Kirby's Digest, § 5448; 75 Ark. 340. The council had no power to increase the rates. 5 Ark. 595-599; 101 *Id.* 223. The ordinances should have been submitted to a referendum vote. Act March 6, 1913, Acts 1913, p. 562.

HART, J., (after stating the facts). The chancellor was right in holding that the ordinances of August 5,

1918, providing for a raise in water and light rates were void because upon their passage the yeas and nays were not called and recorded. A grant by a city council to a public service company of a franchise to supply water and light to a municipality and the inhabitants thereof at certain stipulated rates when accepted becomes a contract between the municipality and the grantee, and the conditions therein are binding, the same as the terms of any other contract, both on the municipality and the company. *Lackey* v. *Fayetteville Water Co.,* 80 Ark. 108; *Little Rock Ry. & Elec. Co.* v. *Dowell,* 101 Ark. 223, and McQuillin on Municipal Corporations, vol. 4, par. 1672.

Section 5473 of Kirby's Digest provides that on the passage of every law or ordinance, resolution or order, to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded. This section has been held to be mandatory and its purpose has been stated to be to make the members of the council feel the responsibility of their action when important measures are before them, and to compel each member to bear his share in the responsibility by a record of his action which should not afterwards be open to dispute. *Cutler* v. *Town of Russellville,* 40 Ark. 105, and *Oglesby* v. *Fort Smith,* 105 Ark. 506.

The record in the present case fails to show that the yeas and nays were called and recorded upon the passage of the two ordinances on August 5, 1918, and both ordinances are, therefore, void.

It is also contended by counsel that the water and light rates could not be raised during the life of the franchise already granted to the company by the passage of an ordinance to that effect by the city council when accepted by the defendant company. In this conclusion we think the chancellor was wrong. As we have already seen the grant to the defendant company in the first instance, of the right to furnish water and electric lights to the city of Arkadelphia and its inhabitants when accepted became a contract between the municipality and the defendant company. In making the contract the mu-

nicipality was acting for the private benefit of itself and its inhabitants and its contracts of that character are governed by the same rules that govern contracts of private individuals. Therefore, like other contracts, a contract between a municipality and a public service company may be modified by mutual consent. McQuillin on Municipal Corporations, vol. 4, par. 1717 and 1723. This is the effect of our holding in *Little Rock Ry. & Elec. Co.* v. *Dowell,* 101 Ark. 223. In that case it was held that where a city, in granting a franchise to a street car company, stipulated for free transportation of the mail carriers, the latter have no such interest in the contract as will entitle them to enjoin the city from releasing the street car company from its obligations to carry them free.

The court further held that a city council in the exercise of its legislative power, as in granting or modifying a street railway franchise, is vested with a discretion which can be controlled by the courts only after abuse. The court said that when the exercise of the power and discretion of the council is attacked in the courts, a presumption must be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public. The reason is that any other theory would be to substitute the judgment and discretion of the courts for the judgment of the members of the council with whom the Legislature has lodged this power. The same principle was announced in *Asher et al.* v. *Hutchinson Water, Light & Power Co.* (Kan), 61 L. R. A. 52. In that case the court held that a contract by ordinance between a city and a water company, that the latter will lay water mains and supply the inhabitants with water on certain streets of the city, may, after such mains are laid, be so modified and changed by the city and water company as to require the water company to remove its mains from certain streets, where, in the judgment of the council, public necessity no longer requires their continuance, to other portions of the city where public necessity requires that mains should be laid,

and that injunction will not lie at the suit of an individual to prohibit the city and water company from making such change, notwithstanding it may greatly decrease the value of his property. In discussing the question the court said: "In such cases there is no contractual relation between the city and the individual upon which the principle contended for by plaintiff can rest. It is true that by some of the conditions of the contract the individual is collaterally interested, but as to such the contractual relation is not between the city and the individual, but between the defendants and the individual. An individual can acquire no vested right as against the public in the continued service of a public utility. Such a doctrine, once admitted, would destroy the convenience as a public utility. It would then become hampered, and subject to the control of the individual, and made to subserve such interests, to the detriment of the public welfare. It follows that there was no error in refusing the injunction."

The ordinances which have for their purposes the raising of the water and light rates were introduced in the city council upon the application of the defendant company and their terms and conditions were fully accepted by the company after they had been passed by the council and on this account such ordinances, if they had been properly passed, would have become valid and binding upon the parties to them. The property owners had no vested right in the contracts between the city and the public service company and it is not claimed that an unconscionable, extortionate, or unreasonable rate was provided in the ordinances.

It follows from the views expressed in the opinion that the decree must be affirmed.

BUNCH v. JOHNSON.

Opinion delivered April 21, 1919.

1. EJECTMENT—TITLE OF PLAITIFF.—In a suit in ejectment in which the record does not show that plaintiffs or their grantors were ever in the actual possession of the land in question, plaintiffs must depend for recovery upon the strength of their record title, and not upon the weakness of defendant's title.
2. EJECTMENT — SUFFICIENCY OF DESCRIPTION.—The description of land in a judgment in ejectment as "four-fifths of the east half of section 27, township 15 north, range 10 east, 256 acres," is insufficient to identify or locate "the south one-fifth of the east one-half of section 27, township 15 north, range 10 east."
3. PUBLIC LANDS—TITLE OF LEVEE DISTRICT—DONATION ACT.—Land could not pass to a levee district under a donation from the State where the State had previously sold it to another.
4. DEEDS—DESCRIPTION OF LAND—SUFFICIENCY.—A description in a deed as "south part of southeast quarter of section 27, township 15 north, range 10 west, 55 acres," is not sufficient to designate "the south one-fifth of the east one-half of section 27, township 15 north, range 10 east."
5. DEEDS—AFTER-ACQUIRED TITLE.—Where the grantor in a quitclaim deed had no interest in the property described therein at the time of its execution, but subsequently acquired title, such title did not inure to the benefit of his grantee.

Appeal from Mississippi Chancery Court, Chickasawba District; *Archer Wheatley,* Chancellor; affirmed.

R. A. Nelson, for appellants.

Appellants claim title as heirs of Minerva Bunch and also through their deed from the St. Francis Levee District. The appellees claim through the confirmation of title in A. J. Johnson in 1915 and also by estoppel of appellants' ancestor by *laches.*

1. Appellants' ancestor was guilty of no *laches* and they are not estopped. There was no forfeiture to the State at the time claimed by Johnson and he obtained no deed and his claim is not even color of title and the payment of taxes availed him nothing. The description set out in the forfeiture for taxes, 1882-3, is not sufficient. It is void on its face. The tax deed was void. 117 Ark.

151; 85 *Id.* 8; 83 *Id.* 196; 77 *Id.* 570. "Part" of particular division or subdivision is no description and a deed therefor is not even color of title. 83 Ark. 334. Plaintiffs were not barred by adverse possession. The burden was on defendants to show the bar. 106 Ark. 344; 62 *Id.* 56.

2. The failure of Minerva Bunch to pay her taxes and the payment of the taxes by Johnson did not bar appellants. 81 Ark. 296; 102 *Id.* 60; 103 *Id.* 251; 126 *Id.* 86. The payment of taxes by Johnson without color of title did not bar plaintiffs. 84 Ark. 320; 61 Ark. Law Rep. 563.

Minerva Bunch was not estopped by *laches*, nor are her heirs. *Laches* is not mere delay, but delay that works disadvantage to another. So long as the parties are in the same condition, one of them claiming title to land may assert it at any time within the limits of the law. 126 Ark. 86. The delay of Mrs. Bunch to assert her rights did not work to the disadvantage of Johnson, but on the contrary her failure to assert her rights worked to his advantage. *Laches* cannot be imputed to one justifiably ignorant of the facts creating his right of action and who has therefore failed to assert it. 16 Cyc. 169.

Johnson obtained no rights by his confirmation in 1915, but if so plaintiffs filed their petition to set aside the confirmation and set up title in themselves in time. 80 Ark. 411.

Appellants concede that Johnson should recover tract No. 1, which he had under fence for more than seven years, but as to Nos. 2 and 3 appellants should recover, as the payment of taxes alone by Johnson without color of title does not give title. Cases *supra.* Kirby's Digest, § 5056. The patent issued December 18, 1916, is a duplicate patent issued in lieu of the original certificate dated November 15, 1852. The title was transferred by the State to the levee district by the Acts of 1893 and 1895 and the title remained there until 1916, when the lands were conveyed to C. B. Bunch. Neither the forfeiture to the State for taxes of 1912 nor the deed of the

commissioner to C. B. Bunch in April, 1916, constituted color of title and both are void for uncertainty. The levee district is not estopped from asserting its title and its vendees are not estopped, as action was commenced within six months after title was acquired from the levee district and there were no *laches*. 93 Ark. 490; 128 *Id.* 555. As appellants are not barred by *laches* nor limitation, equity will follow the law. The decree should be reversed as to tracts Nos. 2 and 3, and appellants' motion to set aside the confirmation of title in Johnson should be sustained and appellants be permitted to defend against such confirmation.

A. G. Little and *P. A. Lasley,* for appellees.

Mrs. Bunch, appellants' mother, never owned the land nor had title. Plaintiffs must recover on the strength of their own title. 62 Ark. 57. Appellees are in actual possession of the lands and appellants must show a better title—a record title.

Bowen's deed to Moody was a quitclaim deed and only conveyed the title he had at the time, and any title subsequently acquired did not inure to the grantee. 76 Ark. 417; 94 *Id.* 306. A quitclaim deed will not estop one from asserting title subsequently acquired through a patent, when at the time it was executed the grantor had no interest, legal or equitable, but a mere right after the fulfillment of the statutory requirements to receive the title. 130 N. W. 837; 70 Mo. 52.

Appellants have failed to show title in their mother or themselves, but they are barred by gross *laches.* 5 Pomeroy Eq., par. 21-27. Twenty-eight years is an unreasonable delay. The decree below is right and should be affirmed.

HUMPHREYS, J. Appellants, sole and only heirs of Minerva E. Bunch, deceased, instituted suit in ejectment against appellees in the circuit court of Mississippi County, Chickasawba District, Arkansas, to recover the south one-fifth of the east one-half of section 27, township 15 north, range 10 east, in Mississippi County, containing

64 acres. Appellants alleged ownership and deraigned their title through *mesne* conveyances from the United States government to their mother; also claimed title under deed of date April 29, 1916, from C. B. Myers, State Land Commissioner, to C. B. Bunch, and under deed from St. Francis Levee District of date June 12, 1916, to C. B. Bunch.

Appellee A. J. Johnson filed answer denying all the material allegations of the complaint and claiming title under donation tax deed from the State of Arkansas of date June 17, 1892; under confirmation decree rendered by the chancery court of said county at the September, 1915, term thereof; and under the seven-year statute of limitations.

Appellee R. E. Brisendine also filed answer denying all the material allegations in the complaint and pleading title to the east half of the south one-fifth of said tract of land through *mesne* conveyances from A. J. Johnson and under the seven-year statute of limitations; also alleged betterments made under color of title and in good faith to the value of $2,000 on that portion of the land claimed by him.

The other appellees filed answer claiming rights as tenants under appellees, A. J. Johnson and R. E. Brisendine.

Appellants demurred to that portion of the answer of A. J. Johnson setting up the decree of confirmation. The demurrer was overruled.

Appellants then filed a motion to transfer the cause to the chancery court, and, by consent, the cause was transferred.

Thereafter, appellees Johnson and Brisendine, by separate answers, pleaded *laches* on the part of appellants and their grantors as a further defense.

The cause was heard by the court upon the depositions of certain witnesses showing that appellees nor their grantors had ever been in possession of the property; evidence responsive to the issues of limitations and *laches;* the following stipulation of the parties, to-wit:

"That the appellants claim title to the land sued for herein, under the following chain of title, and that the following deeds and conveyances were actually and lawfully executed and now appear of record. United States of America to the State of Arkansas, Swamp Land Patent, dated September 20, 1850; by patent from the State of Arkansas to the heirs and legal representatives of Chas. Bowen dated December 18, 1916; by quitclaim deed from Chas. Bowen and wife to G. E. Moody dated February 1, 1881, by quitclaim deed from G. E. Moody and wife to Ellen Patterson dated January 31, 1881; by warranty deed from Ellen Patterson to Minerva E. Bunch dated February 14, 1882; that the appellee, R. E. Brisendine, claimed title to the land under the following chain of title: By warranty deed from A. J. Johnson and wife to R. L. Reeder, dated November 29, 1910; by warranty deed from R. L. Reeder, single, to F. P. Satterfield, dated February 24, 1911; by warranty deed from R. L. Reeder and F. P. Satterfield, both single, to F. M. Davis, dated October 6, 1913; by warranty deed from F. M. Davis and wife to R. E. Brisendine, dated May 2, 1914;" and the following documentary evidence: Decree of the Mississippi Chancery Court in the case of *Listen, as Collector* v. *Archillion et al.,* condemning and ordering sold for delinquent levee taxes for the year 1893 four-fifths of the east half of section 27, township 15 north, range 10 east; the county clerk's certificate of forfeiture of part of east half of said section, township and range, to the State of Arkansas for the non-payment of the taxes for the years 1882 and 1883; donation deed from C. B. Myers, State Land Commissioner, to A. J. Johnson, to part of the east half of said section, township and range, forfeited to the State for taxes for the years 1882 and 1883; deed for forfeited lands from Wm. B. Owen, Commissioner of State Lands, to appellant C. B. Bunch to the south part of the southeast quarter of said section, township and range, forfeited for taxes of 1912; patent from Wm. B. Owen, Commissioner of State Lands, to the heirs of Chas. Bowen, deceased, dated December 18, 1916, reciting that

it was issued on a duplicate certificate dated the 18th day of December, 1916, and numbered 2853, in lieu of an original certificate dated the 15th day of November, 1852, for the southeast quarter of said section, township and range. On September 3, 1918, the court found the issues of law and fact in favor of appellees and dismissed appellants' suit, from which an appeal has been prosecuted to this court.

There is nothing in the record from which it can be inferred that appellants or their grantors were ever in the actual possession of the real estate in question. They must, therefore, depend, for a recovery, upon the strength of their record title and not the weakness of appellees' title. *Wolf* v. *Phillips,* 107 Ark. 374; *Brasher* v. *Taylor,* 109 Ark. 281. Appellants cannot recover on the strength of their title emanating from the levee board, because there is no showing that the levee board ever acquired the title from the State of Arkansas either by forfeiture for the nonpayment of taxes or under the donation act of 1893. The only evidence in the record tending to show that there was a forfeiture to the levee board for taxes is contained in the decree of the chancery court of Mississippi County, Arkansas, rendered in the spring term of 1895, in the case of *Listen, as Collector* v. *Archillion et al.,* in which lands were condemned for delinquent levee taxes for the year 1893. The description of the land in the decree is as follows: "Four-fifths of the east half of section 27, township 15 north, range 10 east, 256 acres." This description was insufficient to identify or locate the land. *King* v. *Booth,* 94 Ark. 306. The deed from the St. Francis Levee Board was based upon this decree and passed no title to C. B. Bunch. The title to the land did not pass to the St. Francis Levee Board under the donation act of 1893 because prior to the passage of that act, to-wit: On the 15th day of November, 1852, the State of Arkansas had issued a certificate of purchase for said land to Chas. Bowen. This certificate of purchase was outstanding at the time the donation act of 1893 was passed and therefore the title to the real estate did not pass under the act to the

St. Francis Levee Board. Not having acquired title itself to the land in question, the St. Francis Levee Board passed no title to said land by its deed to C. B. Bunch. Neither can appellants recover on the strength of their title evidenced by deed from Wm. B. Owen, Commissioner of State Lands, to appellant C. B. Bunch, for the description of the land therein is insufficient to designate it. The description contained in that deed is: "South part of southeast quarter of section 27, township 15 north, range 10 west, 55 acres." Upon examination of appellants' chain of title through *mesne* conveyances from the Government of the United States to their mother, Minerva E. Bunch, as set forth in the stipulations filed herein, it appears from the deed from G. E. Moody, conveying said real estate to their grandmother, Ellen Patterson, bore date of January 31, 1881. The conveyance was made by a pure quitclaim deed. At the time of the execution of the quitclaim deed by G. E. Moody, he had no title whatever to the land in question. He acquired title himself thereto on the 1st day of February following, by quitclaim deed from Chas. Bowen. As the quitclaim deed from G. E. Moody only purported to convey such title as he had on January 31, 1881, and, not having any, conveyed nothing, the after-acquired title did not inure to the benefit of Mrs. Ellen Patterson. *Wells* v. *Chase,* 76 Ark. 417; *King* v. *Booth,* 94 Ark. 306. It follows the court was correct in holding that appellants did not have record title of sufficient strength upon which to recover. Under this view of the law, it is unnecessary to discuss the character of title held by appellee, or to determine the sufficiency of the proof to sustain the pleas of the statute of limitations and *laches.*

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

LITTLE ROCK CHAMBER OF COMMERCE v. RELIABLE FURNITURE COMPANY.

Opinion delivered April 21, 1919.

1. JUDGMENT—VACATING JUDGMENT BY DEFAULT.—A petition under Kirby's Digest, section 4431, subdivision 7, to vacate a default judgment, when filed after expiration of the term, must not only show lack of service upon defendant and his ignorance of the suit's pendency before judgment is rendered, but also a valid defense to the cause of action.
2. PROCESS—EFFECT OF MISTAKE IN RETURN.—Where the return of service incorrectly states the name of the person intended to be served, the rule that the return is *prima facie* true does not apply, and such return, owing to the mistakes, will not raise a presumption that the service was upon the proper person.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The findings of fact of a chancellor will not be set aside on appeal unless they are clearly against the preponderance of the evidence.
4. PROCESS—EVIDENCE—SUFFICIENCY.—A chancellor's finding that defendant's manager was not served with process was not against the preponderance of the evidence where the officer making the service did not testify until a year afterward and the return did not name such manager as the person served, and the latter testified positively that he was not served.
5. JUDGMENT—VACATING DEFAULT JUDGMENT.—A defendant will not be estopped by failure to appear at the same term to move to set aside a default judgment for the lack of service where it was ignorant of the suit's pendency before the judgment was rendered, though it had notice before the term expired.
6. CORPORATIONS — SUCCESSORS — ASSUMPTION OF LIABILITY.—Where the assets purchased and liabilities assumed by a corporation from another corporation did not include liability for a lot agreed to be purchased by its predecessor, such corporation did not assume the liability under the contract.
7. CORPORATIONS—REINCORPORATION AND REORGANIZATION—EVIDENCE.—Where an independent corporation purchased all the assets and assumed all the liabilities of another corporation that were listed by it for sale, evidence *held* sufficient to show that the purchasing corporation was not a reorganization or merger of the other corporation, although an officer of the purchasing corporation testified that he and associates became members of the other corporation and later reorganized it.

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

John P. Streepey, for appellant.

1. Defendant was properly served with summons, so it had notice of the pendency of the suit before the decree was taken. The evidence shows that it was served on an officer of the appellee. The return of the sheriff shows this and his return is at least *prima facie* conclusive. 102 Ark. 255.

2. Appellee showed no valid defense to the suit, the original action. 201 S. W. 122; 116 Ark. 545-561.

Grover T. Owens, for appellee.

1. Appellee was not duly served with summons and had no notice before decree. Kirby's Digest, § 4431, subdiv. 7; 63 Ark. 323.

2. The finding of the chancellor upon a question of fact should not be disturbed. The defense interposed was not a valid one. The contract was not entered into by the appellee, as Nordlinger was without authority to enter into a contract for the purchase of real estate. It is specifically alleged in the answer that the by-laws of the corporation did not authorize it and this is undisputed. The question was thus put in issue whether an individual of a corporation had the authority to bind the corporation by an unauthorized contract. The proof is undisputed that the contract was unauthorized. An officer of a corporation has no authority other than that specifically designated to him by the by-laws. He is not empowered to bind it by his signature to contracts unless the authority is conferred by charter or directors and there was no custom to authorize him in such acts. 62 Ark. 23; 14 L. R. A. 356.

3. The appellee merely purchased the assets of the Adair Company and assumed certain liabilities *listed* in a detailed statement. This liability is not *listed* and was not assumed. The chancellor was correct in vacating the judgment.

HUMPHREYS, J. On the 27th day of February, 1917, appellant instituted suit against appellee, successor to the Adair Furniture Company, in the Pulaski Chancery Court, to enforce the specific performance of a subscription contract of the Adair Furniture Company, of date February 29, 1912, to purchase from appellant $250 worth of real estate. It was alleged, in substance, that, in order to raise a fund for development purposes, the Adair Furniture Company entered into a contract with appellant to purchase $250 worth of property at its probable value on the 1st day of January, 1917, to be fixed by an appraisement committee, which property might be selected by said furniture company, but, upon failure to select, might be allotted to it; that, failing to select, lot 14, block 10, Chamber of Commerce Addition to the city of Little Rock, Arkansas, was allotted to it under the terms of the contract; that appellee took over the assets and became responsible for the obligations of the Adair Furniture Company, but refused to accept and perform said subscription contract.

Summons was issued against appellee and placed in the hands of the sheriff of Pulaski County for service. The following return was made upon the summons:

"State of Arkansas,

"County of Pulaski.

"I have this 20th day of March, A. D., 1917, duly served the within summons at this county by delivering a copy to H. A. Ortmeyer, manager of the Reliable Furniture Company in this county.

"W. G. Hutton, Sheriff,

"Sol Wormser, D. S."

On the 9th day of March, 1918, a regular day of the October term of said court, a judgment by default for $250 was rendered against appellee and same was declared a lien upon said lot, the lien foreclosed and the lot ordered sold.

On the 15th day of April, 1918, a day of the regular April term of said court, appellee filed a petition, based on the 7th subdivision of section 4431 of Kirby's Digest,

to vacate the judgment rendered on the 9th day of March, 1918. It was alleged in the petition, first, that the judgment was rendered without notice to appellee; second, that, in the fall of 1913, it succeeded, by purchase, the Adair Furniture Company in business, but that it did not assume the liability of the subscription contract, and did not purchase the lot in question as one of the assets of said furniture company; third, that the contract was signed by S. C. Nordlinger without any authority from the board of directors of said Adair Furniture Company.

The cause was submitted to the court upon the pleadings, exhibits thereto and evidence adduced, upon which the court decreed that the judgment rendered on the 9th day of March, 1918, be vacated, set aside and held for naught, and that the original complaint be dismissed. From the decree, an appeal has been prosecuted to this court, and the cause is here for trial *de novo*.

The evidence responsive to the issues to be determined on appeal is, in substance, as follows: The Adair Furniture Company, a corporation doing a furniture business in Little Rock, Arkansas, on the 29th day of February, 1912, signed a subscription contract binding itself to purchase $250 worth of real estate from appellant at its probable value on the 1st day of January, 1917, to be fixed by an appraisement committee; that the contract provided for the furniture company to select the property, but, failing to do so, the property might be allotted to it; that, under the terms of the contract, lot 14 aforesaid was allotted to it; that the subscription contract was not listed on the books of the Adair Furniture Company as one of its liabilities and that the lot allotted to it was not carried on the books as an asset; that, in the fall of 1913, appellee, a corporation, purchased the assets and assumed the liabilities of the Adair Furniture Company, according to a list of the assets and liabilities made at the time by J. A. Scroggins, which list was certified and approved by a public accountant, after making a complete audit of the affairs of the Adair Furniture Company; that the statement made by Scroggins and said accountant did not

carry or show the lot as an asset or the subscription contract as a liability; that the subscription contract was signed for the Adair Furniture Company by S. C. Nordlinger, its vice president, at the instance of L. A. Adair, its president, but without authority or direction from the board of directors of said corporation; that the subscription contract aforesaid was, on the — day of ——, 1917, presented to appellee for acceptance, but was refused; that appellee also refused to perform said agreement. Sol Wormser, the deputy sheriff who served the summons, testified that he served it upon A. J. Ortmeyer, who was then sitting in the court room, but that, through mistake, he returned it as having been served on H. A. Ortmeyer. He gave his testimony about one year after having served the summons. A. J. Ortmeyer testified that he was a director and manager of the Reliable Furniture Company, appellee herein, at the time the summons was alleged to have been served on him; that the summons was not served on him by the deputy sheriff and that he had no notice whatever of the pendency of the suit until he read in a newspaper that a decree had been entered against appellee; that he had a good defense and would have defended the suit had he known anything about it; that, at the time the summons was alleged to have been served on him, two of his brothers were working for appellee but they had no connection whatever with the company; that their initials were, respectively, H. W. and O. R. In addition to the evidence of A. J. Ortmeyer, recited above, and other evidence given by him, as shown by the original transcript in the case, it was stipulated that he also testified: "Myself and associates became members of the firm of Adair Furniture Company when Mr. Nordlinger left the company. We later reorganized the company as the Reliable Furniture Company, took over all of its assets and had a statement made of all of the debts and liabilities. This claim of the Little Rock Chamber of Commerce did not appear as one of the debts of the Adair Furniture Company and was not on its books."

Section 4431 and the 7th subdivision thereof, under which the petition to vacate the judgment was filed, is as follows:

"The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order:

* * * * * * * * * * *

"*Seventh.* For unavoidable casualty or misfortune preventing the party from appearing or defending."

The petition to vacate the judgment having been filed after the expiration of the term at which it was rendered, it was necessary for appellee not only to show that summons was not served upon him and that he had no knowledge of the pendency of the suit before the rendition thereof, but that he had a valid defense to the cause of action. *Holman* v. *Lowrance,* 102 Ark. 252.

It is contended by appellant that the court erred in finding that appellee was not served with summons. Upon conflicting evidence, the chancellor found that the summons was not served upon A. J. Ortmeyer, manager of appellee. It is true, as suggested by learned counsel for appellant, that an officer's return of summons is regarded as *prima facie* true and that the burden of proof rests upon the one attacking the service. In the instant case, however, it is conceded that the return of the officer was incorrect in that it stated that the service was had upon H. A. Ortmeyer, when, according to the evidence of the deputy sheriff, it should have stated that it was served upon A. J. Ortmeyer. On account of the admitted mistake in the return of service, the rule, that it is *prima facie* true, can be of no assistance in the case at bar. On the contrary, the very fact that it contains a mistake has the effect of weakening the testimony of the deputy sheriff rather than strengthening it. The rule is well established in this State that "The findings of the chancellor will not be set aside by this court unless they are clearly against the preponderance of the evidence." In elucidating the rule, this court said in the case of *Leach* v. *Smith,* 130

Ark. 465, that "This simply means that on a trial anew of the issues of fact in a chancery cause on the record as presented to this court on appeal, unless it is clear to our minds, that is, unless we are fully convinced as to which of the parties litigant is entitled to a decision, we accept and adopt the findings of the chancellor as our own and treat them as conclusive." We are unable to say in the case at bar that the findings of the chancellor are clearly against the weight of the evidence. The return, owing to the mistake contained in it, in no way supports the evidence of the officer. There were two brothers of A. J. Ortmeyer working at appellee's place of business, and the chancellor may well have concluded that, since the officer made a mistake in the initials of A. J. Ortmeyer in making his return, he may have been mistaken as to the identity of the person. The officer did not give his testimony until nearly a year after the service was made. Appellee testified positively that he was not served with process and that, had he been served, he would have defended. The evidence is so evenly poised that we are unable to say where the preponderance lies. The chancellor has found the preponderance with appellee. Under the well established rule in that situation of the evidence, we must be guided by the finding of the chancellor. But it is contended that appellee is precluded from attacking the service, because it had notice that the judgment was rendered against it and did not appear at the same term of court and move to vacate the judgment. Appellee had no notice of the pendency of the suit before the decree was rendered against it. It is only in the event that defendants have notice of the pendency of suits against them before the rendition of judgments or decrees against them that they are estopped from assailing the decrees thus rendered without service. If they have no notice of the pendency of the suit until after the rendition of the judgment or decree, they can appear either at the same term or after adjournment and move to vacate the judgment or decree, provided they bring themselves within the requirements of the statute. Appellee did so in the instant case.

It is also insisted that the court erred in holding that appellee was not obligated upon the subscription contract signed for the Adair Furniture Company by its vice-president, S. C. Nordlinger. The only theories upon which the Reliable Furniture Company, the appellee herein, can be held responsible on the subscription contract entered into by the Adair Furniture Company, its predecessor in business, are, first, that the Reliable Furniture Company assumed the liability at the time it purchased the assets of the Adair Furniture Company; and, second, that the Reliable Furniture Company was a mere reorganization or continuation of the first corporation.

(1) The undisputed evidence in the record is to the effect that appellee, at the time it purchased the assets of the Adair Furniture Company, in the fall of 1913, did not assume the liability under the subscription contract. The lot in question was not carried on the books as an asset nor the contract on the books as a liability. The only assets purchased and liabilities assumed were those contained in the list prepared by J. C. Scroggins and found to exist by the expert accountant. The lot was not included in the list as an asset nor the subscription contract in the list as a liability. So, there was no assumption of the contract by appellee.

(2) The subscription contract was signed in 1912, at the time S. C. Nordlinger was connected with the corporation. Thereafter, Nordlinger left the company and A. J. Ortmeyer and his associates became interested therein. In the fall of 1913, A. J. Ortmeyer and his associates organized the Reliable Furniture Company and purchased the assets and assumed the liabilities listed at that time by J. C. Scroggins and certified and approved by a public accountant. It is apparent from a careful reading of the evidence of both J. C. Scroggins and A. J. Ortmeyer that appellee was organized as an independent corporation and purchased all the assets and liabilities thus listed from the Adair Furniture Company in the fall of 1913. We do not think it can be reasonably inferred from the stipulation amending the record, when

read in connection with the other evidence, that the Reliable Furniture Company was reorganized as a mere continuation of the Adair Furniture Company. On the contrary, it appears that the Reliable Furniture Company purchased the listed assets from the Adair Furniture Company and assumed its listed liabilities. The very fact that all the assets and liabilities were listed for purposes of sale indicate that the two corporations were dealing with each other as independent entities. We do not think the facts in the record, as amended, justify the inference that there was a mere merger. It is true, in the stipulation amending the record, A. J. Ortmeyer testified that "Myself and associates became members of the firm of Adair Furniture Company when Mr. Nordlinger left the company. We later reorganized the company as the Reliable Furniture Company, took over all of its assets and had a settlement made of all the debts and liabilities." The use of the word "reorganized" in the connection used and in the light of the other evidence, meant that the Reliable Furniture Company, as an independent corporation, purchased certain assets from and assumed certain liabilities of the Adair Furniture Company, and did not mean that the Reliable Furniture Company absorbed the Adair Furniture Company.

Under this view of the evidence, it is unnecessary to discuss whether or not the Adair Furniture Company was bound by its obligation on the subscription contract signed by its officers without authority of the directors.

No error appearing, the decree is affirmed.

WALTER v. ADAMS.

Opinion delivered April 21, 1919.

1. USURY—EVIDENCE.—In a suit to have a deed absolute declared a mortgage and set aside for usury, the chancellor's finding as to the amount of the loan *held* not against the preponderance of the evidence.

2. USURY—CONTRACT ORIGINALLY VALID.—Collection of usurious interest under a subsequent contract did not invalidate a prior lawful contract.

3. ESTOPPEL—RELIANCE ON PAROL CONTRACT.—One seeking to have a deed declared a mortgage under a parol contract to reconvey on repayment of the money received with ten per cent. interest cannot object to the recovery of interest at that rate because the agreement was not in writing, as required by Kirby's Digest, § 5380, since he relies upon the agreement for equitable relief.

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

Asa C. Gracie, for appellant.

The deed though absolute was intended only as a mortgage and the debt secured was usurious and void and appellant is entitled to recover back all he had paid under the void contract. 117 Ark. 304; 106 *Id.* 166; 1 Jones on Mort., § 257; 128 Ark. 67. The intention of the lender of money is determined from his acts. The facts show usury clearly. 62 Ark. 370; 41 *Id.* 341; 132 *Id.* 377. The form of the contract is not material if all the facts and circumstances show usury. 132 *Id.* 377. Appellee was only entitled to interest on $135, the amount loaned or upon not to exceed $150 at most. The law will not permit usury to hide behind *a sale.* 46 Ark. 50; 66 *Id.* 460. See also 36 Cyc. 941; 83 Ark. 31; 54 *Id.* 566; 91 *Id.* 458; 51 *Id.* 534; 194 S. W. 29. The decree shows usury on its face. The agreement for a loan was an *oral* one and it was error to allow 10 per cent. interest in the decree. 57 Ark. 550. The deed should be canceled as a cloud upon appellant's title and appellant should recover all he has paid under the void contract with interest and costs. Cases *supra.* 39 Cyc. 941 and cases cited, note 54.

H. K. Toney, for appellee.

The evidence sustains the finding of the chancellor and the decree should be affirmed, but the great preponderance of the evidence would have justified a decree that appellee paid $190 as a full consideration for sale and purchase of the property and that the deed had

become absolute and appellant's right to repurchase or redeem were lost after the expiration of one year.

SMITH, J. The appellant instituted this action in the Jefferson Chancery Court for the purpose of having a deed executed by him to the appellee on the 5th day of June, 1915, declared a mortgage and canceled as being a conveyance securing a usurious debt. It was alleged that on June 5, 1915, appellee loaned appellant $135 for a period of one year and as security therefor took a deed, which was represented to be a trust deed, conveying two lots owned by appellant. The consideration was recited in the deed to be $190. Appellee answered that the deed evidenced the contract made between the parties but admitted that a contemporaneous agreement had been made by which he was to reconvey the lots, provided the money was repaid within one year.

Upon conflicting testimony the court below found that the deed was intended as a mortgage, and fixed a period within which the lots might be redeemed after allowing appellant credit for the payments made to appellee. No cross-appeal was taken by appellee; but appellant insists on his appeal that the contract was usurious and that the mortgage should therefore be canceled.

Appellant introduced in evidence two receipts written by him and signed by appellee, which read as follows:

"This is to certify that Allen Walter paid the interest on money loaned on property until May 30, 1917, amount $20."

"Received of Allen Walter $25 on interest for staying the account, May 30th until 1918."

Appellant also insists that in addition to the payments evidenced by these receipts he paid $55 interest in advance. The testimony is not clear that the sum loaned was $190, but the scrivener testified that the parties stated at the time the deed was executed that the sum advanced appellant was $190, and appellee so testified, and while there is some uncertainty as to how and when the excess over the $135, which appellant admits receiving, was paid,

we cannot say that the chancellor's finding, that the sum loaned was $190, is clearly against the preponderance of the evidence.

Appellant remained in possession of the lots and paid the taxes and collected the rents, but was unable to pay the sum borrowed at the end of either the first or the second year, and he says that by way of forbearance and to secure a further extension of time he made the payments evidenced by the receipts set out above; and he now contends that as these payments each exceed ten per cent. of the sum loaned and were made to cover the interest for the year in which the payments were made this exaction of usurious interest invalidated the original loan. We have held to the contrary, however, in the following cases: *Johnson* v. *Hull,* 57 Ark. 550; *Tillman* v. *Thatcher,* 56 Ark. 315; *Humphrey* v. *McCauley,* 55 Ark. 143; *Marks* v. *McGehee,* 35 Ark. 217. The doctrine of these cases is that the taint of a subsequent usurious contract does not invalidate a prior lawful contract, so that if a subsequent contract, executed in total or partial satisfaction of a prior valid contract, be void because usurious the creditor may sue upon and enforce the original debt.

The court computed the interest upon the $190 at 10 per cent. and after allowing credit for the payments made gave judgment for the balance. This finding is assailed upon the ground that as no writing evidenced an agreement to pay interest at any rate, the interest cannot be computed at a rate exceeding 6 per cent. and in support of this contention appellant relies upon section 5380 of Kirby's Digest and *Johnson* v. *Hull,* 57 Ark. 550.

The statute cited has no application here, for here the party who asks relief can obtain it only by an affirmative showing that he had borrowed money for which he had agreed to pay 10 per cent. per annum, to secure which he had executed a deed, but that the deed having been executed by way of security for the repayment of the loan was in fact only a mortgage. Courts of equity grant relief in such cases upon sufficient proof of the intent of the parties upon the ground that it would be a fraud to per-

mit one to retain property as having been conveyed by deed which had in fact only been conveyed by way of security, under an instrument intended as a mortgage. This court has granted relief of this character in a number of instances, but in so doing we have in each case applied the equitable doctrine that he who seeks equity must do equity, and the relief prayed has been granted upon condition only that the party seeking the reformation of a deed first perform the obligations which he assumed when the writing sought to be reformed was executed. *Williams* v. *Prioleau,* 123 Ark. 156-161; *Sturdivant* v. *McCorley,* 83 Ark. 278-282; *Sturdivant* v. *Cook,* 81 Ark. 279-285; *First National Bank* v. *Waddell,* 74 Ark. 241-252; *Grider* v. *Driver,* 46 Ark. 50; *Anthony* v. *Lawson,* 34 Ark. 628; *Anthony* v. *Anthony,* 23 Ark. 479; *Jones* v. *McLean,* 18 Ark. 456; *Ruddell* v. *Ambler,* 18 Ark. 369.

The court below so decreed and the decree is therefore affirmed.

HORSEMAN *v.* HINCHA.

Opinion delivered April 21, 1919.

1. EJECTMENT—MATTERS TO BE PROVED.—In an action to recover land, where defendant denied only one link in the chain of title, it was unnecessary for plaintiff to introduce proof of any conveyances except the one put in issue.
2. ADVERSE POSSESSION—JURY QUESTION.—In an action to recover possession of land, where defendant claimed by adverse possession, a peremptory instruction for plaintiff under the evidence *held* erroneous.
3. ADVERSE POSSESSION—PERIOD—TACKING POSSESSION.—It is not essential to a successful claim of adverse possession that the land should have been occupied by either of the parties for the full statutory period, or that the conveyance from one to the other should be by deed, for the separate possession of each of them could be tacked together for the purpose of making out the full statutory period.
4. ADVERSE POSSESSION—TACKING POSSESSION.—An executed parol agreement by one to surrender possession to another is sufficient to constitute such continuity of possession and privity between the parties as to authorize tacking of possession and completion of title by limitation.

5. ADVERSE POSSESSION—ENCLOSURE—NATURAL AND ARTIFICIAL BARRIERS.—In establishing adverse possession of land, it is no objection that natural barriers are taken advantage of, if the natural, together with the artificial, barriers used are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession.

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

S. A. D. Eaton and *Jerry Mulloy*, for appellant.

1. The court erred in taking the case from the jury and directing a verdict.

2. It was error to withdraw and exclude from the consideration of the jury that part of J. S. Fry's testimony relative to the acts of Fry Brothers in exercising ownership over the land and instructing the jury that it would not consider it for the reason that there was no evidence at that time tending to show that they did so under claim of ownership. The law is contrary to the declaration of the court. Under the evidence it was error to direct a verdict. 89 Ark. 368; 96 *Id.* 451; 105 *Id.* 213.

Campbell & Pope, for appellee.

Appellant did not deny the execution of any deed or muniment of title pleaded by appellee except the deed from A. F. Rickman to appellee. The Rickman deed was the only one introduced in eveidence because none of the others were denied by appellant. Appellant went to trial on the allegation of seven years adverse possession, but the evidence only shows about one year's possession before suit and the man from whom appellant claimed title had only been in possession three years. The proof as to Fry Brothers' possession was not sufficient, as they were strangers to the record without any deed or color of title, nor was it competent against appellee's claim and proof of more than seven years open and adverse possession under color of title. Proof of a parol transfer of title from Fry Brothers was not competent and the court so properly held. 29 Ark. 500; 41 *Id.* 393; 46 *Id.* 96; 70 *Id.* 319; 77 *Id.* 551; 76 *Id.* 333; 54 *Id.* 444; 59 *Id.* 165; 70 *Id.* 232; 33 L. R. A. 821; 124 Tenn. 57; 21 R. C. L., p.

608, § 152; Pomeroy Rem. & Rights, etc., § 554. The case in 70 Ark. 232 is this case exactly. It was not error to refuse appellant the right to establish a defense not even suggested in his answer. 60 Ark. 526; 68 *Id.* 314; Pomeroy on Rem. & Rem. Rights, § 554. The court properly directed a verdict, as there was no case for a jury. *Supra.*

McCULLOCH, C. J. Appellee instituted this action in the circuit court of Randolph County to recover possession of a tract of land in that county described as the northeast quarter of the southwest quarter (NE. ¼ SW. ¼), section 30, in township 20 north, range 1 west, containing 38.32 acres, of which appellant is alleged to wrongfully hold possession.

In the complaint appellee deraigned title from the Government of the United States and claimed immediately under a deed from one Rickman. Appellant answered denying that Rickman conveyed the land to appellee, and also claimed title by adverse possession for more than seven years and pleaded the statute of limitation. During the progress of the trial appellant amended his answer by permission of the court so as to allege that the land in controversy was formerly occupied by the members of a copartnership under the style of Fry Brothers, who held the land in adverse possession and conveyed to J. S. Fry, who occupied the same for about three years from the time of his purchase, in November, 1914, from Fry Brothers, until he sold the land to appellant in April, 1917.

The case was tried before a jury, and, after the introduction of testimony had been completed, the court instructed the jury to return a verdict in favor of appellee, which was done and judgment in appellee's favor was accordingly rendered.

It is contended in the first place that appellee failed to establish his chain of title in that he introduced none of the deeds except the deed from Rickman; but counsel for appellee correctly answer this contention by showing

that appellant did not in his pleadings deny the allegations of the complaint with respect to any of the conveyances in the chain of title except the conveyance from Rickman to appellee, and to sustain the issue on that point appellee introduced the Rickman deed, which was sufficient under the pleadings to make out his chain of title. It then devolved on appellant to make good his plea of title by adverse possession.

According to the undisputed testimony, appellee owns lands adjoining the land in controversy on the north and west, and appellant owns the lands adjoining it on the south. There is a fence on the line between this land and the tract owned by appellee on the west, and also on the north line of this land between it and the land of appellee. There is also a fence about a quarter of a mile to the south of this land running parallel with the south line. The north and south fences just mentioned connect with the fence on the west and extend eastward to the banks of a certain river or creek which forms the east boundary line of this tract.

The testimony adduced by appellant tended to show that Fry Brothers took actual possession of the land in controversy more than seven years before the commencement of this action and occupied the same, claiming to be the owners thereof until they sold the land by parol agreement to J. S. Fry, who took possession and occupied it claiming to be the owner until he conveyed it to appellant in April, 1917, a little less than a year before the commencement of this action. The testimony also shows that a little more than seven years before the commencement of this action there arose a question as to whether the fence on the west line of this tract between it and appellee's land was really on the correct line, and by agreement between Fry Brothers, the then occupants of this land, and appellee, the line was run out by a surveyor and the fence was rebuilt on the correct line thus ascertained. Appellee then had in cultivation a small part of this land containing about one-quarter of an acre in the northwest corner, and when the survey was made and the

fence was rebuilt it cut off this tract in cultivation from the other lands of appellee, and he ceased to cultivate it, or to assert any further claim to it. The testimony tended to show that appellee agreed to this survey and made no claim to any of the lands in controversy.

The court erred in taking the case from the jury by peremptory instruction. The evidence was sufficient to show that appellant, and those under whom he claimed title, actually occupied the land under claim of title for more than seven years prior to the commencement of this action. It was not essential to the successful claim of adverse possession that either of the parties should have occupied the land for the full statutory period, or that the conveyance from one to the other should have been by deed, for the possession of each of them separately could be tacked together for the purpose of making out the full statutory period, and a parol agreement surrendering possession by one to another was sufficient to constitute such continuity of possession and privity between the parties as to authorize the tacking of possession and completion of title by limitation. *Robinson* v. *Nordman,* 75 Ark. 593; *Wilson* v. *Rogers,* 97 Ark. 369.

The land was not cultivated by appellant and those under whom he claims title, and their possession consisted of raising stock on the lands and taking timber therefrom. The land is hilly and rocky, and only a few acres of it is fit for cultivation. The evidence adduced by appellant tends to show, however, that the land was enclosed by fences on three sides and by the river, a natural boundary, on the other side. The fences on the north and west side were on the boundary and the river on the east constituted a boundary, and the fence on the south side ran through the other lands of appellant, so the tract in controversy was completely surrounded by the three fences and the river.

The rule on this subject has been announced by this court in the case of *Dowdle* v. *Wheeler,* 76 Ark. 529, where it is held (quoting from the syllabus), that in "establishing adverse possession of land, it is no objection

that natural barriers are taken advantage of, if the natural, together with the artificial, barriers used are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession."

Measured by that rule, we are clearly of the opinion that the testimony adduced before the jury was sufficient to sustain the issue presented by appellant's answer, and to warrant a verdict in his favor.

The court also erred in excluding the testimony of J. S. Fry, which tended to support the contention that those under whom appellant claimed possession actually occupied the same under claim of ownership.

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

JOHNS v. PATTERSON.

Opinion delivered April 21, 1919.

1. MASTER AND SERVANT—ENTICING AWAY SERVANT.—Acts 1905, p. 726, punishing one who entices a laborer or renter of another to leave his employer or the leased premises before the expiration of his contract, is not in conflict with the Federal peonage act.
2. MASTER AND SERVANT — ENTICING AWAY SERVANT.—Under Acts 1905, p. 726, denouncing the enticement of a servant or tenant from his employment or tenancy before the expiration of his contract, conviction of the misdemeanor as defined in the act is not a prerequisite to bringing a civil action for damages.
3. MASTER AND SERVANT—ENTICING AWAY SERVANT—INSTRUCTIONS.—In an action for enticing a servant to leave employment before expiration of his contract, a requested instruction to find for defendant if the servant had already left plaintiff's employment when defendant hired him is correct.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley,* Judge; reversed.

STATEMENT OF FACTS.

H. C. Patterson brought an action against F. Johns to recover damages for enticing and inducing Nathaniel Meyers to leave his employment.

According to the testimony of H. C. Patterson himself, he made a contract with Nathaniel Meyers to work a crop for him on the shares during the year 1918. Meyers worked with him until some time in May. He then left Patterson's farm and went to work for the defendant Johns. At the time Meyers left Patterson, he owed the latter $51. Patterson went to see Johns about his employment of Meyers and Johns refused to either turn him off or to pay his account to Patterson. Meyers was not dissatisfied and had had no row with Patterson at the time he left him. Patterson tried to get Meyers to come back and work his crop, but the latter refused to do it.

The defendant Johns was a witness for himself and testified that Meyers had already left Patterson's place when he hired him; that he did nothing to prevent Meyers from going back to Patterson; that Patterson came to see Meyers about going back to his place and that he told him that he would not work for him at all and that there was no use to talk to him any further about it; that he employed Meyers by the day and paid him every night; and that he kept Meyers employed for several months after he had left Patterson.

The case was tried before a jury which returned a verdict for the plaintiff in the sum of $51, and from the judgment rendered the defendant has appealed.

J. T. Coston, for appellant.

1. Section 5960, Kirby & Castle's Digest, is unconstitutional in that it imposes a hardship on the laborer by forbidding all others to employ him, while it imposes no penalty and no hardship on the landlord for wrongfully discharging him.

2. It is void because it conflicts with the peonage United States statute and is class legislation. 60 S. E. Rep. 21-25; 1 U. S. Compiled Stat., § 1990; 235 U. S. 143; 95 *Id.* 268; 219 *Id.* 244-5.

3. Johns was not liable until convicted. 29 Am. Rep. 431; 21 Mo. 76; 24 N. Y. Sup. 654; 36 Iowa 654; 36 Iowa 508.

4. There was no contract for a "specified time," and Johns was not liable unless there was. The court erred in giving instruction No. 1 and in refusing instructions asked by defendant.

W. J. Driver, for appellee.

The courts have settled all the legal propositions and the jury by their verdict have settled the facts.

The statute is not unconstitutional and is not class legislation. 72 Ga. 482; 7 Miss. 245; 104 N. C. 725; 79 Ala. 271; 86 Ark. 436.

HART, J., (after stating the facts). The statute under which this action was brought reads as follows:

"If any person shall interefere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises before the expiration of his contract without the consent of the employer or landlord, he shall upon conviction before any justice of the peace or circuit court, be fined not less than twenty-five nor more than one hundred dollars, and in addition shall be liable to such employer or landlord for all advances made by him to said renter or laborer by virtue of his contract, whether verbal or written, with said renter or laborer, and for all damages which he may have sustained by reason thereof." Acts of 1905, p. 726.

It is earnestly insisted that this statute is unconstitutional because it conflicts with the peonage act of Congress, which reads as follows:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or la-

bor of any person as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

We do not think that the contention of counsel for the defendant is well taken. A comparison of the two statutes will show that they have wholly different objects in view. Congress undertook to prevent, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or any obligation. In other words, the gist of the offense denounced by the act of Congress is the holding of persons in unwilling servitude in payment of a debt. *United States* v. *Reynolds,* 235 U. S. 133.

On the other hand the State statute was enacted for the purpose of providing a penal and civil liability against third persons who with knowledge of an existing contract of employment induce the laborer to quit to the injury of the employer. This rule is recognized by Blackstone in the following language:

"The retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal, act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time; the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case; and he may also have an action against the servant for the non-performance of his agreement." Lewis' Blackstone, vol. 2, p. 1137, book 3, p. 142.

The same principle is applicable where one man hires another to work on his farm and another man knowing of such contract of employment entices, hires, or induces such laborer to leave the service of his first employer during the time for which he was so employed. A clear statement of the rule is made in *Walker* v. *Cronin,* 107 Mass. 555, as follows:

"It is a familiar and well established doctrine of the law upon the relation of master and servant, that one

who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description."

Peonage is based upon a condition of compulsory service by the debtor for the payment of his debt. The State statute under consideration has no such purpose; but was enacted for the purpose of fixing the criminal and civil liability of a third party for the violation of contracts of service. Our State statute was based upon the common law rule above stated and was upheld by this court in the following cases: *Tucker* v. *State*, 86 Ark. 436; and *Park* v. *Depriest*, 138 Ark. 86. For other cases sustaining the constitutionality of similar statutes, see Labatt's Master and Servant (6 ed.), vol. 7, secs. 2614-2627, inclusive, and 26 Cyc. 1580.

In the first mentioned case the court held that the words, "knowingly employ," are used in the statute in connection with other words which imply that the employment must be done as an interference with the laborer's performance of his prior contract with another, or as an enticement of the laborer away from his employer, or as an inducement of the laborer to leave the service of his employer. It was further said that it was not intended as a punishment for merely giving employment to a laborer during the unexpired term of his broken contract with another person.

In the last mentioned case it was in effect, held that to constitute enticement of a servant from his master's service, under the statute, the enticement must be made while there exists a valid contract for continued service known to the defendant, or he must be hired by another knowing that his former service is not terminated. It

was expressly held that after the laborer has of his own accord left his first employer and while he is out of such service, he cannot be enticed from it. The essence of peonage is the compulsory service in payment of a debt. So it will be seen that neither the plain language of the statute, nor the construction placed upon it by the court makes it in any sense in conflict with the peonage act of Congress.

It is next contended by counsel for the defendant that under the language of the statute that conviction of the misdemeanor is a prerequisite to the bringing of a civil action. It is contended that it was the intention of the Legislature to make both the penalties depend upon a conviction after a public prosecution. We do not think that contention is in accord with the plain and natural meaning of the language used in the act. The injured person is not a party to the criminal prosecution and cannot control it. The charge might be dismissed without his consent and he could prosecute no appeal from a judgment in favor of the defendant. The doctrine of reasonable doubt prevails on the trial of a criminal case while in a civil action for the tort a preponderance of the evidence in favor of the plaintiff would entitle him to a verdict. A civil action differs in such important particulars from a criminal one that it seems to us that the Legislature would have used plainer and more appropriate language if it had intended a conviction in a criminal court to be a prerequisite to the bringing of a civil action by the party injured. This is especially true when we remember that the party injured already had a common law remedy in a case like this which was complete although changed in some respects by the statute. As bearing on the question, see *Armstrong* v. *State,* 54 Ark. 364.

The next assignment of error is that the judgment should be reversed because the court refused to give the following instruction:

"If you find that the negro had already left the employ of the plaintiff at the time the defendant hired the negro, your verdict will be for the defendant."

This instruction was not covered by any other instruction given by the court. As stated by the court in the cases cited above, after the servant has of his own accord left such service and while he is out of it, he cannot be enticed from it and cannot be knowingly hired while he is in such service. The instruction was therefore correct, and should have been given to the jury. It is obvious that the refusal to give the instruction was prejudicial to the rights of the defendant and for the error in refusing to give it to the jury, the judgment must be reversed and the cause remanded for a new trial.

LEMLY v. WORKS.

Opinion delivered April 21, 1919.

1. TENANCY IN COMMON—CONTRIBUTION—BETTERMENTS.—In an action aginst a cotenant for contribution for improvements, the chancellor's finding that the improvements were not necessary repairs but a betterment to the building and made without notice to defendant or defendant's agreement thereto, *held* not clearly against preponderance of the evidence.
2. TENANCY IN COMMON—IMPROVEMENTS—INDEMNITY.—A tenant in common has a right to improve the land without the consent of his cotenant, but has no lien therefor, and can be indemnified only by partition so as to have the improvements allowed to him or to have compensation for them if thrown into the common mass.
3. SAME—CONTRIBUTION.—A tenant in common cannot compel contribution from his cotenant for improvements made without consulting the latter, and with the latter's consent.
4. SAME—CONTRIBUTION FOR REPAIRS.—A tenant in common cannot recover from his cotenant either at law or in equity for necessary repairs made, in the absence of an agreement to join therein.

Appeal from Garland Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

L. E. Sawyer, for appellant.

1. A cotenant can maintain a suit for contribution for the cost of improvements made on the common property which were necessary to maintain the rental value,

when the cotenant is receiving continuously her share of the rents.

2. The proof shows that the improvements were necessary to maintain the rental value. 31 Ark. 562. A partition suit was unnecessary. The building was old and dilapidated and the improvements were necessary to maintain the rental value, as the testimony shows. 23 Ark. 212; 21 *Id.* 556. The improvements were made on notice to appellee and with her consent. 157 N. Y. 104; Am. St. 500. Appellee was directly benefited by the improvements. 31 Ark. 562 and cases *supra.*

C. C. Sparks, for appellee.

Appellee never consented to the improvements, nor were they necessary, and appellee was not liable for contribution. The opinion of the chancellor settles all questions raised and its findings are conclusive. 42 Ark. 120; 136 Am. St. 768.

WOOD, J. This action was begun by the appellant against the appellee in the circuit court.

The appellant alleged that he and the appellee were owners of a certain building in the city of Hot Springs; that appellant at the request of the appellee made certain improvements on the building, which amounted in the aggregate to the sum of $582, one-half of which was due from appellee to appellant, for which he prayed judgment.

The appellee answered admitting that she was the owner of an undivided one-half interest in the building, but denied that the appellant made the improvements on the building at her request, and denied that she was indebted to the appellant as alleged in his complaint.

The cause was transferred without objection to the chancery court and was tried by that court, and from a decree rendered in favor of the appellee is this appeal.

The undisputed facts are substantially as follows: The appellant and the appellee were tenants in common, each owning an undivided one-half interest in a two-story brick building on Central avenue in the city of Hot

Springs. The building had two stores on the ground floor. One of these stores, known and designated in the record as the "Lemly store," was occupied by the appellant as a drug store, the other, known and designated in the record as the "Roberts store," was rented and used by doctors for their offices. The whole of the second floor was also rented and occupied as doctors' offices. Several years before appellant purchased a one-half interest in the building he had occupied the same storeroom as the tenant of the then owners and he continued to occupy it as a drug store from the time of his purchase until the institution of this suit. The improvements were made at the instance of the appellant and paid for by him. They consisted of a plate glass front and a metal ceiling to the storeroom occupied by appellant, costing him the sum of $582, which was not an unreasonable charge.

The appellant testified that these improvements were absolutely necessary; that the building was thirty-one years old; that the new ceiling was necessary because the old ceiling was plank, out of date, and gave the store a cheap, countrified appearance. It was necessary to make the improvements to modernize the store, draw trade, and thus enhance the value of the building. The store was located in the business portion of the town. All the other drug stores near him had been improved except one which was too small to put in a modern front. The property was increased in value, and if he had vacated the store it would have been necessary to make the improvements in order to secure a suitable tenant. He did not vacate the store because he owned one-half of the building. The rents on all buildings on that portion of the street had been reduced in the last five years and the landlords had to make any kind of improvements tenants desired in order to retain them. Appellant had never discussed with appellee the matter of improvement. All the business was transacted with Avery, appellee's agent. Avery was present at the time the front was being put in and witness told Avery about it and he made no objection to it.

In his cross-examination appellant testified that he "had understood all the time that his use of the drug store set off the rents of the Roberts store which went directly to the appellee. No bill for rent had been presented to him for fifteen years until that time (1914). It was tacitly understood that the rents from the Roberts store, received by appellee, was to set off his use of the drug store. This understanding was with Avery and his partner, Lake. Mrs. Work received the entire rent from the room occupied by Doctor Roberts. Lake, when he told him to charge him up with $25 a month and give it to appellee, replied that he was a d—— fool to do it. Understood verbally that if the Roberts store produced no rent, he would have none to pay, or if it rented for $150 a month, appellee would have gotten the benefit of it, that Avery would not have given him a cent of it. This statement rendered by Avery accounting for rent of the other store and charging him with $100 was the first statement of the kind he had ever received and brought about the controversy over the rent that was arbitrated. Had no agreement with Avery in writing that the rent of one store was to set off the other."

Witness Avery testified, in substance on behalf of the appellee; that he was the agent of the appellee and appellant for the collection of the rents on the building; that the steel ceiling and glass front were made without his being consulted, being undertaken without his knowledge. Appellant told him that he was putting it in at his own expense. As a real estate agent, he did not consider that the improvements made by appellant were necessary. It was a betterment to the building. Appellant had paid no additional rent after the improvements.

The daughter of the appellee testified, that she had a conversation with appellant at the time that he was putting in the front; that she was passing the store and appellant stopped her and told her that he was putting in a front. Told her to come in and showed her the metal ceiling. He also told her that he was doing it at his own expense, and that at any time the appellant wanted to

come in on it she could. She replied that she didn't want to come in on it.

The appellant in rebuttal denied that he had ever stated to Avery or to the daughter of appellee that he was making the improvements on the building at his own expense.

There was much testimony concerning an arbitration of differences between the appellant and appellee growing out of a charge made by the appellee against the appellant for rents and also in regard to a written lease contract which had been entered into between them subsequent to the improvements. But in the view which the court takes of the case this testimony does not throw any light upon the present controversy, nor is it necessary to set out in detail any more of the testimony for we are convinced that the appellant cannot recover under any view of the testimony, even the most favorable to him.

The chancellor found that after the purchase by the plaintiff, Avery remained the agent of the appellee and collected all the rents from the tenants for both appellee and appellant and divided the rents equally between them; that the appellant paid no rent but was charged with one-half of the rents of the storeroom, or rather the storeroom rents were charged and all rents added together and divided after the payment of all expenses; that the front put in by appellant was not necessary as repairs for the preservation of the building; that the improvements were a betterment to the building by way of appearances but that the storeroom had not been rented for any more after the improvements were made; that the storeroom would be sought after if for rent now more than before the improvements were made; that the appellant made the improvements without any notice to the appellee that he was going to make them, and that the appellee nor her agent had any information at the time or for a long time thereafter that the appellant looked to the appellee to pay one-half of the costs thereof, which she had never agreed to do; that the appellee labored under the impression that the appellant was putting the improvements in

at his own expense and was not going to look to the appellee to pay any part thereof.

It cannot be said that the findings of fact by the chancellor are clearly against the preponderance of the evidence.

This court early decided that a tenant in common having a right to improve the land without the consent and against the will of his cotenant but having no lien upon it for his improvements can only be indemnified therefor by partition in equity so as to have the improvements allowed to him or to have compensation for them if thrown into the common mass. *Drennen et al.* v. *Walker et al.,* 21 Ark. 539-559. See also *Jones* v. *Jones,* 23 Ark. 212; *McDearman* v. *McClure,* 31 Ark. 559-562.

No such issue was raised by the pleadings and the proof in this case. Appellant is not seeking a partition of the property, he is asking contribution of appellee, a coowner having an equal interest, for her *pro rata* share to pay for the cost of improvements which appellant made without consulting the appellee or her agent and to which neither consented. Contribution cannot be had either at law or in equity under such circumstances.

The rule is well stated in *Cosgriff* v. *Foss,* 152 N. Y. 104, 57 Am. St. R. 500: "At common law a tenant in common who has made permanent improvements as distinguished from ordinary repairs, upon the common property cannot recover from his cotenant any part of his expenditures for that purpose unless they were made at the request or with the consent, expressed or implied, of the latter."

The improvements in controversy, as shown by the undisputed evidence were not made in the way of necessary repairs but for the purpose of enhancing the value of the property. Appellant claims that this was for the common benefit, but even if this were true it would not entitle him to contribution, for in the case of necessary repairs a cotenant cannot recover of another, in a direct action either at law or equity, a *pro rata* share of the expenditures for such repairs in the absence of any agree-

ment to join therein. Much less can such recovery be had for improvements as distinguished from ordinary repairs. *Ward* v. *Ward,* 40 W. Va. 611, 52 Am. St. R. 911, 29 L. R. A. 449, and note cases.

Mr. Freeman in an exhaustive note to the above case (52 Am. St. R., p. 935) among other things has this to say:

"That for improvements made or services rendered by a cotenant, he cannot maintain any action which will result in a personal judgment against any of his fellow tenants unless he can prove an express promise to pay or such a state of circumstances that a promise should be implied, and it will not be implied either from the making of improvements or from their utility or necessity." Citing many cases. See also *Brown* v. *Cooper,* 98 Iowa 444-456; *Cooper* v. *Brown,* 143 Iowa 482, 136 Am. St. R. 768. Case notes to *Cleland* v. *Clark,* 81 A. St. R. 185; 6th R. C. L., p. 1049, sec. 12.

Moreover, according to appellant's own testimony, the "Lemly store" by the "tacit understanding" or acquiescence of the appellee was set apart for the benefit of the appellant and the "Roberts store" was set apart for the benefit of the appellee. According to appellant's version of the facts, he was not to share in the rents from the Roberts store nor was the appellee to share in or get any benefit from the use of the Lemly store. The use of the latter by the appellant was to offset the rents from the former, which would go directly to the appellee.

If it be conceded that the above arrangement was the correct status of the parties as to the stores, the appellant would certainly have no right to make improvements upon the store occupied by him, and then call upon the appellee to contribute a *pro rata* share for the cost of such improvements. There is no rule of law that sanctions such a charge.

Therefore, the decree of the chancery court dismissing appellant's complaint for want of equity, is in all things correct, and it is affirmed.

OSBORNE v. FAIRLEY.

Opinion delivered April 28, 1919.

1. VENDOR AND PURCHASER—MISTAKE OF LAW.—A contract of sale will not be set aside merely because the vendor did not understand the meaning of legal terms employed therein where it is not contended that the purchaser did not understand the quoted words, and there is no evidence that he took advantage of the vendor's ignorance of the terms and had them inserted for the purpose of reaping some advantage.
2. SPECIFIC PERFORMANCE—PARTIAL PERFORMANCE.—Though a vendor was unable within the 60 days agreed upon, to furnish a marketable title to the land purchased, the purchaser was entitled to part performance and compensation for failure of the vendor to perform as to the residue.
3. VENDOR AND PURCHASER.—Only in the event that the vendor had tendered an abstract of title and deed to the purchaser, and the latter had failed or refused to accept the same, could the vendor exact a forfeiture of earnest money.

Appeal from Craighead Chancery Court, Eastern District; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

On June 30, 1916, the appellant and the appellee entered into a contract, by which the appellant agreed to sell to the appellee a certain tract of land in Craighead County, Arkansas.

After reciting the agreement between appellant, as party of the first part, and appellee, as party of the second part, and describing the land, the contract further provides:

"The consideration of said sale being the sum of twelve hundred and no-hundredth dollars; paid as follows: A one-hundred-dollar check and this contract to be left on this date with Dr. Grady, at the Citizens Bank of Monette, and eleven hundred dollars; to be paid in sixty days, upon the said party of the first part furnishing the said party of the second part, a warranty deed, and abstract of title, the abstract to be approved by the attorney of the said party of the second part, provided, that should the party of the second part fail to carry out

his contract the one-hundred-dollar check is to be paid over to the party of the first part, said party of the second part having no claim on it after the sixty days."

Something over a month after the expiration of the sixty days, the appellant furnished the appellee an abstract of title to the lands in controversy, which was not approved by the attorney of the appellee by reason of certain alleged defects, which are set forth by him in a letter to the appellee, and which the parties agree appear in the abstract.

The appellant made no effort to cure the alleged defects in the abstract, being under the impression that the making of the abstract complied with his contract. As appellee did not accept the abstract, the appellant refused to proceed further, and treated the rights of appellee as forfeited and cashed the one-hundred-dollar check, drawn by the appellee in appellant's favor, which had been deposited by the appellee in the bank in compliance with his contract.

Appellee brought this suit on April 3, 1917, against the appellant for specific performance, setting forth in his complaint the contract above mentioned, alleging compliance, on appellee's part, with the terms of the contract, and its breach by the appellant. Among other things the appellee alleged that the title to the land in controversy while not yet approved by the appellee was capable of being placed in the condition where it would receive his approval, by appellant bringing suit to confirm the title, which appellant had refused to do; that the appellant was a married man and his wife had an inchoate right of dower in the premises; that there were certain drainage taxes due on the land which should have been paid, and which were due at the time the contract was entered into. Appellee alleged that he was ready, willing, and able to comply with the terms of the contract on his part and tendered in his complaint the balance of the purchase money, less the sum of $75 the approximate cost of the confirmation suit. He prayed that the appellant be required to convey to the appellee the land in suit.

The appellee also filed an application for a temporary restraining order, setting up that the appellant was insolvent and was cutting down and removing from the land valuable timber. This application for a restraining order was granted by the court.

The appellant answered admitting that he entered into the contract set forth in the complaint but denied all the other material allegations, and among other things alleged that at the time he (appellant) cashed the check for $100, deposited in the bank as a forfeit by the appellee, that he honestly believed that he was justly entitled to the money, believing that he had fully complied with his contract and that the appellee had breached his. He tendered in court the sum of $100, with interest from the 20th day of November, the date same was cashed by him. He alleged that the minds of the parties did not meet upon the points of the contract and that at the time he signed the same the appellant did not understand the legal meaning of the words "warranty deed;" that appellant believed that all he was required to do under the contract was to furnish an abstract of title to the lands as it then existed. By way of cross-complaint he set up that he was damaged by reason of the temporary restraining order preventing him from clearing his land and cutting and removing timber therefrom in the sum of $1,000, for which sum he prayed judgment and also prayed that the complaint be dismissed for want of equity.

The appellee denied the allegations of the cross-complaint.

The above were substantially the issues raised by the pleadings.

The court found as follows: "That the plaintiff has deposited in this court a sufficient sum to pay the balance due by him on the purchase price of said land; that the sum of $49.49 is balance due for the drainage taxes assessed against said land for the year 1915 after deducting $5.71, amount paid by defendant for 1917 State and county taxes, and should be deducted from the balance due otherwise to defendant; that the defendant was

72 years of age when the contract should have been performed, a married man, and that his wife was sixty-seven years of age at that time; and that she now refuses to join in the execution of a deed, and that value of her contingent dower interest is $66.29, which should also be deducted from the sum otherwise payable to the defendant."

The court, thereupon, entered a decree ordering that the sum of "$984.22 be paid to the defendant, J. M. Osborne, and that thereupon all his right, title in and to said land be divested out of him and vested in the plaintiff, O. M. Fairley; and that the defendant pay all costs, and that said plaintiff be given immediate peaceable possession of said premises."

The court further ordered that the plaintiff take nothing on his claim for compensation for defect of title on account of any alleged necessity for confirmation of said title. The decree further recites that "plaintiff in open court agrees to waive any such deduction."

From this decree the appellant prosecutes this appeal.

W. E. Tumlin and *H. W. Applegate,* for appellant.

1. Appellant has done everything that his agreement called for except in so far as he was prevented by appellee and it was not necessary for him to do more, and the refusal and failure of Fairley to accept entitled Osborne to declare the contract terminated. The law is elemental and the equities are with Osborne. 12 Ark. 421 (551); 125 *Id.* 589; 49 *Id.* 306; 19 *Id.* 51 (59); 34 *Id.* 663 (676); Am. Ann. Cases, 1913, A. 357; 17 L. R. A. 207; 6 L. R. A. (N. S.) 403; 24 *Id.* 91.

2. The motion to retax the costs should have been granted. Under the facts and equities plaintiff should pay all the costs.

3. Damages should have been awarded because of the restraining order. The cause should be reversed and dismissed.

John W. Gann, Jr., Basil Baker and *Horace Sloan,* for appellee.

1. Under the contract appellee was entitled to a marketable title. 66 Ark. 433; 63 *Id.* 548; a *clear record title.* A title by adverse possession is not such. 121 Ark. 482. The outstanding dower right of the wife made the title unmarketable. 85 *Id.* 289.

2. Confirmation of the title was necessary. Appellant only has a "colorable" title. The general rule in equity permitting partial performance with compensation for defects would include the cost of a proceeding to make the title marketable. A vendor should not be heard to urge the defective nature of his title as giving rise to an equity in his favor. 45 Ark. 17; 36 Cyc. 746; 1 Swanst. 54. Partial performance with compensation for defects should be granted. 2 Beavan 302; Story Eq. Jur. (7 ed.), § 719.

3. The court erred in not deducting the cost of confirmation proceeding, but appellant cannot complain of this. 5 Vesey 508; 10 *Id.* 505.

4. The old common law strictness as to the necessity of plaintiff making an exact tender of everything and asking nothing is not adhered to in equity where substance and not form is looked to. 73 Ark. 491; 83 *Id.* 340.

5. No tender was necessary here before suit where the vendor absolutely refuses to proceed further with his contract. 36 Cyc. 705; Ann. Cases, 1913 C., 642-7; 36 Cyc. 702.

6. Under the contract tender of deed was a condition precedent to tender of purchase money. But it was admitted a proper tender was made.

7. There was no want of mutuality in the contract of sale. 6 Pom. Eq. Jur., § 769. The contract was more than a mere option to purchase. The insertion of a clause that an abstract be furnished and the title approved by the purchaser's attorney does not convert the contract into an option. 94 Ark. 263-268; 119 *Id.* 418-428.

The case in Ann. Cases, 1913 A, 357, is clearly distinguishable from this. See also 208 S. W. 798; 144 Ill.

213; 33 N. E. 27; 80 Ark. 209-211; Pomeroy Spec Perf., § 169; Waterman Spec. Perf., § 200; 206 S. W. 896.

Appellant's title was not disapproved. It was approved subject to meeting certain requirements. Specific performance should be decreed if the vendor is able to make a good title at the hearing. 7 Ves. 202; 3 Allen (Mass.) 25; 1 Russ. Myl. 293; 36 Cyc. 718.

8. The contract price represented the fair market value of the land at the time of the contract. Mere inadequacy of consideration is no ground for refusing specific performance. 21 Ark. 110, 116. A subsequent increase in value is no cause for refusal to perform. 21 N. C. 237; 28 Am. Dec. 613. See also 106 Pac. 270; 81 Kan. 569; 152 Pac. 657; 96 Kan. 591; 155 Pac. 807; 133 N. W. 340; 128 *Id.* 611; 116 N. E. 658; 279 Ill. 268; 12 Me. 441; 5 W. Va. 547; 65 Am. Dec. 303; 165 N. W. 625; 96 S. W. 577; 137 Fed. 731; 70 C. C. A. 165.

9. Equity will not refuse specific performance merely because of a bad bargain on the vendor's part. 156 N. W. 813.

10. If appellant failed to understand the legal significance of his contract, it was but a mistake of law, and ignorance is no excuse. 74 Ark. 336.

11. Appellee has always been ready and willing to do all things required of him, but appellant has attempted to avoid his contract. He has no equities and the decree should be affirmed.

WOOD, J., (after stating the facts). The appellant alleges in his answer that the minds of the parties to the contract did not meet upon the points of the contract, and that "he did not enter into or sign the contract understandingly," and did not understand the legal meaning of the words "warranty deed" nor of the words "abstract of title to be approved by the attorney of the party of the second part."

The appellant does not allege and prove that any fraud was practiced upon him by the appellee in the execution of the contract. If it be conceded that appellant

did not understand the meaning of the words above set forth and of the legal requirements which the use of these words in the contract devolved upon him, yet, this would be purely a mistake of law and not of fact, and a mistake, too, of the appellant and not of the appellee. The appellant does not deny the contract and that the words set out above were used in the contract, the legal effect of which he says he did not comprehend.

There is no contention that the appellee did not fully understand the meaning of these words or that he intended that they should be used in any other sense than that of their ordinary legal import. If there had been any evidence that the appellee knew and took advantage of appellant's alleged ignorance of the meaning of these terms and had them inserted in the contract to reap some advantage of the appellant, the case would be different and would justify a denial of the relief sought by the appellee on the ground of fraud. *State* v. *Paup et al.*, 13 Ark. 129, 137-8.

But here, as before stated, the appellant does not even allege or prove a circumvention or fraud by which he was induced to enter into the contract. The most that can be said of his contention on this point is, that he is seeking to be relieved from the partial performance of his contract on the ground of a misapprehension by him of the legal purport of certain terms which the contract contains. If appellant were seeking reformation of the contract to conform to his contention he would not be entitled to such relief under the pleadings and proof in this case. See *McGuigan* v. *Gaines*, 71 Ark. 617; *Varner* v. *Turner*, 83 Ark. 131; *Cherry* v. *Brizzolari*, 89 Ark. 309; *Frazier* v. *State Bank of Decatur*, 101 Ark. 135; *Lewis Werner Saw Mill Co.* v. *Session*, 120 Ark. 105.

Therefore, construing the contract as written, the only question upon final analysis is whether or not, under the pleadings and proof in the case after a failure upon the part of the appellant to furnish the appellee a warranty deed and abstract within sixty days showing a marketable title to the land in controversy, and upon his

refusal thereafter to furnish a warranty deed and abstract showing a marketable title, the appellee was entitled to a partial performance of the contract by having the appellant divested of such title as he had upon the payment to him of the balance of the purchase money specified in the contract with deductions for such defects as the appellee was not willing to waive.

The law applicable in such cases, as shown by the authorities, is aptly summarized by the attorneys for the appellee as follows: "Where the vendee is willing to accept less than a marketable title, he will be granted partial performance so far as circumstances permit with compensation for the residue, provided that in so doing the court is not making an impracticable or unenforceable order which would be the case; (1) where it is impossible to ascertain the proper amount of compensation, or (2) where the consent of a stranger to the contract would be required to decree partial performance, or (3) where the interest of the vendor in the premises is so insignificant as to make the case one for damages rather than for partial performance."

Judge Story says: "The general rule (for it is not universal) in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation, for any deficiency in the title, quantity, quality, description, or other matters touching the estate. But if the purchaser should insist upon such a performance the court will grant the relief only upon his compliance with equitable terms. 2 Story's Equity Jurisprudence (15 ed.), sec. 1057; 36 Cyc. 740; *Wood* v. *Griffith,* 1 Sawnst. 54.

Our own court in line with this doctrine held that in a suit for specific performance in a contract for sale, where the vendor's wife refuses to join in the deed to convey her dower interest, the vendee may accept the conveyance as far as it is in within the power of the vendor to give and have an abatement of the purchase price

to the extent of the value of the contingent interest of the wife. *Hirschman* v. *Forehand,* 114 Ark. 436.

The obligations under the contract upon the appellant to furnish a warranty deed and an abstract of title, was for the benefit of the appellee only. The appellee could, therefore, waive the same and insist upon the appellant conveying to him such title as he had; for under the contract the appellant sold the land in controversy to the appellee and agreed to furnish him a warranty deed. It was the right and province of the appellee, instead of insisting on a warranty deed and abstract showing marketable title, to accept such title as the appellant had with compensation for such defects, as the value of the wife's dower, and assessments for drainage which were due and unpaid when the contract was executed, the amount of which was plainly ascertainable and not in dispute. *St. Louis R. Co.* v. *Beidler,* 45 Ark. 17-31; *Bennett* v. *Fowler,* 2 Beau. 302.

Construing the contract as one which left it optional with the appellee as to whether or not he would pay the balance of the purchase money when the appellant furnished a warranty deed and abstract, nevertheless, the contract was one based upon a sufficient consideration and bound the appellant to make the abstract showing marketable title, and warranty deed within the time specified. *Myer* v. *Jenkins,* 80 Ark. 209; *Ashcraft* v. *Tucker,* 136 Ark. 447, 206 S. W. 896.

If appellant had tendered the deed and abstract to the appellee and the appellee had failed or refused to accept the same, in that event only could the appellant have exacted the forfeiture of $100.

The findings of fact by the court are correct and we, therefore, approve and adopt the same as our own. The trial court was guided by the principles of law here announced in rendering its decree, and the same is affirmed.

MILLER v. ILLINOIS BANKERS' LIFE ASSOCIATION.

Opinion delivered April 28, 1919.

1. INSURANCE—EXCEPTION OF WAR RISK—VALIDITY.—A policy of life insurance which exempted the insurer from liability for death in the military or naval service of the government is not void as against public policy.
2. INSURANCE—DEATH IN MILITARY SERVICE.—Death of insured from pneumonia at a camp in the United States while in the military service during the war with Germany was "in the service in the army or navy of the Government in the time of war" within an exception in a policy of life insurance.
3. INSURANCE—EXEMPTION PROVISION—ACCEPTANCE OF PREMIUMS AS WAIVER.—By accepting premiums with knowledge that insured was serving in the army, the insurer did not waive a provision exempting it from liability for death in the military service.
4. INSURANCE — AUTHORITY OF AGENT TO INTERPRET POLICY.—The county agent of a life insurance company was without authority to issue policies or interpret their terms, had no apparent authority to bind the insurer by a statement as to the meaning of a clause of the policy exempting the insurer from liability for death in the military service in time of war.

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

W. P. Strait, for appellants.

1. The court erred in holding that under the testimony there was no question of fact for the jury, and in taking the case from the jury and in holding that appellee was only liable for the amount of premiums paid by assured. It was not exempted from liability for death from natural causes while in the military service. The company is bound by the acts of its agent Scroggins, and his knowledge was its knowledge. It is bound by the acts of its agent, as he acted within the scope of his authority. 103 Ark. 86; 96 *Id.* 456; 31 Cyc. 1645; 1 Clark & Sykes on Agency § 200; 63 Iowa 340; 9 Ala. 279; 93 Ark. 521. The agent at the time he made the representations and induced the assured to pay the premiums knew that the assured was in the military service and that the Government was at war, and his knowledge is imputed to

the company. 111 Ark. 443; 79 *Id.* 315; 88 *Id.* 554; 71 *Id.* 295; 104 *Id.* 538; 57 *Id.* 11; 71 *Id.* 295; 56 *Id.* 581; 102 *Id.* 146. If any negotiations or transactions are had with the assured after knowledge of the conditions, the company recognizes the validity of the policy and acts based thereon the forfeiture is waived and the company is liable. 94 Ark. 277; 65 *Id.* 54; 99 *Id.* 476; 67 *Id.* 584.

2. Whether Scroggins was acting within his authority or not in leading assured to pay his premiums was a question for a jury. 99 Ark. 476; 81 *Id.* 160. It was not the province of the court, but of the jury to determine whether or not the agent in making the representations which induced payment of the premiums and in collecting same was acting within the scope of his actual authority. 13 L. R. A. (N. S.) 840.

3. The company is estopped. 79 Ark. 315. The acts of the agent bind the company after knowledge. 24 Am. Rep. 784; 85 Mo. App. 155. Where the terms of the application or policy are ambiguous and the agent interprets them and thus induces the assured to pay the premiums, the company is liable in case of loss. 13 L. R. A. (N. S.) 850, note. The nearest parallel case we find is in 66 Ark. 597.

4. The clauses limiting liability are against public policy and void.

Webber & Webber, for appellee.

1. The clauses limiting liability are not void as against public policy and the company is not estopped by the acts of its agent. 3 Cooley Briefs on the Law of Insurance 2217-18, 2231; 4 *Id.* 2231, 3275; 4 Joyce on Ins. (2 ed.) 3818-20-1-5; 148 Ill. App. 189; 243 Ill. 411; 126 Ill. App. 572; 25 Cyc. 823; 102 Ill. App. 280; 100 *Id.* 22; 48 *Id.* 148.

2. Scroggins' acts were not a waiver of the forfeiture. 159 S. W. 1113. He was not a general agent, but only a special agent and had no authority to waive.

McCULLOCH, C. J. Appellant instituted this action against appellee to recover on a life insurance policy

issued by the latter on March 6, 1915, to Arl E. Miller, who died at Camp Beauregard, Louisiana, on December 26, 1917, while in the military service of our Government. Death of the insured resulted from pneumonia.

The facts of the case are undisputed, and the trial court decided that there was no liability under the policy, except to the extent of the small sum paid to the company by the insured as premiums. The policy contained the following clause:

"It is expressly provided that death while in the service in the army or navy of the Government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the company thereon."

There is another clause in the policy which reads as follows:

"This policy shall be incontestible two years from its date except for non-payment of premium calls, or death while engaged in or caused by violation of the law or while in the service of the army or navy of any government which is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the association thereon."

The application contained a clause similar to the one last quoted. The clauses quoted above are not entirely consistent with each other in that the one first quoted provides for an exemption from liability on account of death of the assured while in the army or navy service of the Government "in time of war," and the other two clauses contain much broader provisions, exempting the company from liability for death while in the army or navy of the Government without restriction as to it occurring during time of war. The death of the assured occurred while he was in the military service of this Government during the period of the war with the Central Powers of Europe, and it is unimportant, therefore,

to attempt to reconcile the apparently conflicting clauses or to determine which of them controls.

It is suggested by learned counsel for appellant that the above mentioned provisions exempting the company from liability under the circumstances named ought to be held void for the reason that it is against public policy to permit such contracts of insurance to be made, in that the tendency is to prevent voluntary enlistments in the army or navy of the Government, or to induce the holder of such a policy to evade or resist involuntary enlistment under the draft laws. We do not think the argument is well founded. An insurance company has the right to select the particular risks it is willing to assume, and there is no public policy against a contract of this sort exempting the insurance company, in advance, from liability for death of the insured while in the military or naval service of the Government. The stipulation does not provide for a forfeiture of the policy, but merely for an exemption from liability under certain circumstances and conditions. It holds out no inducements to the assured to refrain from enlistment in his Country's service, and does not constitute, in any sense, an agreement not to enlist or to evade the draft law. No authorities are cited by counsel in support of the contention, and we are unable to find any cases in which the question has been raised. The subject of exemptions from liability on insurance policies in case of service in the army or navy is discussed by Mr. Joyce in his work on the Law of Insurance (Vol. 4, Sec. 2237), but there is no suggestion there by the author of any question of doubt about the validity of such a provision. There is likewise a discussion on the subject in Cooley's Briefs on the Law of Insurance (Vol. 3, p. 227, *et seq.*), but nothing is said by that author about the possibility of those provisions being held to be void. We find two cases on the subject, in one of which the insurance company was held not to be liable under such an exemption (*LaRue* v. *Insurance Co.*, 68 Kans. 539); and in the other (*Welts* v. *Conn. Mutual Life Insurance Co.*, 48 N. Y. 34) the company was held

liable for the reason that the death of the insured did not fall within the terms of the exemption as interpreted by the court rendering the decision. In each of the cases the assured was in the service of the Government during the pendency of war, but in one of the cases it was decided the assured was not in the military service, and that the case was for that reason not within the exemption.

The trial court was, therefore, correct in the present case in holding that the death of the insured fell within the exemption clause set forth in the policy.

The principal contention of counsel for appellant is that there was a waiver of the exemption provision of the policy. In support of that contention in the trial below appellant introduced as a witness Mr. Scroggins, who testified that he was the agent of the insurance company at Morrilton, where Arl E. Miller resided, and that he stated to Miller, in response to an inquiry by the latter after he had enlisted in the army as to whether or not under the terms of the policy the full amount would be paid in the event of death while in that service, that he (witness) construed the policy to mean that there was only an exemption in case of death of the assured in battle, and that the exemption clause did not apply to death from natural causes. The exact statement of the witness was as follows: "He asked me if the policy would be good in event of his death in the service, and I told him that it was my construction of the war clause in this policy, if he died of natural causes it would be paid, but if he died by violence while in battle, it would not. I also called his attention to the Fulkerson claim as my conclusion of the matter. And he says, 'Well, if it won't be good I don't want to pay any more, but if it will I want to continue my policy.' And I told him it would be good in event of his death by natural causes. So one year's premium was paid to me a few days later almost on the same spot of ground. * * * Mr. Ben Fulkerson had a policy. He volunteered in the service at Jefferson Barracks, Mo., in September, 1916, and this country was

not at war that time, and he died of contagious disease in the army and the company paid this claim."

The witness testified that he was the county agent for the company, and that his duties were to solicit insurance, forward applications to the home office of the company, and deliver policies sent to him from the home office for that purpose, and to collect the initial premiums on delivery of a policy. He also testified that he sometimes collected premiums on policies already delivered, but that this was generally for the convenience of the parties, though the company paid him a commission on all such collections.

It will be observed that the provisions of the policy now under consideration is not for a forfeiture, but is merely an exemption from liability on account of death occurring under certain circumstances. It is not a case where acceptance of premiums with knowledge of the forfeiture constitutes recognition of the continued valid existence of the policy; nor does the case fall within the principle that a forfeiture is waived where an insurance company when it enters into a contract has knowledge through any of its authorized agents of facts which would work a forfeiture. *Peoples Fire Ins. Assn.* v. *Goyne,* 79 Ark. 315; *Lord* v. *Des Moines Fire Ins. Co.,* 99 Ark. 476; *Peebles* v. *Eminent Household of Columbian Woodmen,* 111 Ark. 435.

There was no forfeiture provided for at all, but the company had, as before stated, the right to stipulate under what circumstances it should be liable. The assured had the right to pay the premium and continue the policy in force while he was in the military service of the Government, notwithstanding the exemption of the company from liability for death occurring during the period of that service, and the mere acceptance by the company of the premium with knowledge of the fact that the assured was in the military service of the Government did not constitute a waiver of the stipulation in regard to exemption. In other words, when the assured paid his premium, his policy was kept in force, and

would have remained in force if the assured had survived the period of his service in the army.

Conceding, therefore, that the knowledge of Scroggins, the agent of the company, was the knowledge of the company itself, there was no waiver on account of acceptance of the premium with knowledge of the fact that the assured was serving in the army. The statement of Mr. Scroggins to the assured on the occasion mentioned by Scroggins as to his interpretation of the exemption clause of the policy was not binding on the company, for it was not done within the apparent scope of the agent's authority. There is not the slightest evidence that the statement was made for the fraudulent purpose of inducing Miller to pay the premium, or that it was not made in good faith in response to Miller's inquiry. It was only an expression, given in obvious good faith, of the personal opinion of the witness as to the proper construction of the language of the policy. Scroggins had no authority to issue policies or to alter or interpret the terms thereof. The policy had already been issued and delivered more than two years before this conversation occurred, and the agent had no duty to perform with respect to the matter, and it was entirely beyond the apparent scope of his authority to advise the assured as to the legal effect of the various clauses in the policy. *Home Fire Ins. Co.* v. *Wilson,* 109 Ark. 324.

Counsel rely especially on the case of *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588, where the court held that knowledge on the part of the company at the time of the issuance of an accident policy that certain risks necessarily pertained to the occupation and employment of the assured, constituted a waiver of a provision in the policy exempting the company from such liability.

We think that decision has no application to the facts of the present case, for in that case the policy would have had no force at all unless it embraced the risks mentioned in the exemption clause, and the knowledge of the company of the existence of facts which brought the

circumstances of the assured within the exemption clause necessarily operated as a waiver by treating the policy as being in force notwithstanding the facts which would render it inoperative. Here we have a case, as before stated, where the policy remains in force, notwithstanding the temporary existence of conditions, i. e., the service by the insured in the army, which exempted the company from liability, and the mere acceptance of premiums with knowledge of that service did not constitute a waiver of the exemption.

Our conclusion is that the circuit court was correct in its decision, and the judgment is, therefore, affirmed.

DONIPHAN LUMBER COMPANY *v.* CLEBURNE COUNTY.

Opinion delivered April 28, 1919.

1. TAXATION—UNIFORMITY.—Under Constitution, article 16, section 5, there must be uniformity in laying taxes upon taxable property, and an assessor or assessment board cannot discriminate against one tract of land in favor of all other property of the same kind in the county.
2. APPEAL AND ERROR—QUESTIONS OF FACT—REVIEW.—Findings of fact by the circuit court will not be disturbed on appeal if sustained by sufficient legal evidence.
3. TAXATION—REVIEW OF ASSESSMENT—BURDEN OF PROOF.—In a proceeding to review an assessment of lands as discrimnatory, the burden is on petitioner to show that such assessment was unfair as compared with the assessment of other lands of same kind similarly situated.
4. TAXATION—REDUCTION OF ASSESSMENT—COSTS.—In a proceeding under Acts 1917, p. 1243, § 8, to reduce an assessment on lands, though the assessment is found to be discriminatory, there is no authority to tax the costs against the county.

Appeal from Cleburne Circuit Court; *Jno. I. Worthington,* Judge; affirmed.

Brundidge & Neelly, for appellant.

1. The assessment was arbitrary and unfair, higher than other lands of the same quality in the neighborhood. 124 Ark. 569; 119 *Id.* 362; 127 *Id.* 349.

2. It was error to tax the costs against appellant. Act 234, Acts 1917. The assessment was reduced and the costs should have been awarded against the county. S. & H. Dig., § 787 *Ib.* par. 810-811; 50 Ark. 416; 9 Wall. 655.

W. R. Casey, for appellee.

1. The testimony is not properly abstracted. The findings and judgment are sustained by the evidence and will not be disturbed. 90 Ark. 512; 96 *Id.* 606. Appellant has failed to duly assign the errors complained of and they may be treated as abandoned. 2 R. C. L. 178; 99 Ark. 490.

2. In the absence of a statute no judgment can be rendered against a county for costs. 7 R. C. L. 789; 120 Ark. 506. This was not a claim against the county. 66 Ark. 243. There is no statute authorizing a judgment against the county for costs. Kirby's Dig., § 965 does not apply. This was a special action under Act 234, Acts 1917. 110 Ark. 117; 46 *Id.* 383; Kirby's Dig., § 967. Under the law and proof the judgment should be affirmed.

HUMPHREYS, J. On the 1st day of October, 1917, appellant filed a petition in the Cleburne County Court, which was the next succeeding term of court after the assessment and valuation of its property for purposes of taxation, under section 8, Act No. 234, Acts of 1917, seeking to reduce its assessment by the assessor and Boards of Assessment to a fair valuation in the following townships in said county: Center Post, Morgan, Francis, Clayton, Saline, Mountain, Pine and River Bend, particularly describing each tract of land and the assessed value thereof. It was alleged in the petition that a good portion of the lands in question were lands from which the timber had been removed, or what is known as "cut-over" lands, and that they were assessed generally at the value of improved lands in cultivation in the same vicinity and community, and, in some instances, assessed at a greater amount than such lands. On November 7th, which was a day of the regular October, 1917, term of said

county court, the matter was submitted to the county court upon the petition and the testimony of the various members of the assessment boards of the townships mentioned in petitioner's petition, together with the evidence of B. R. Smith, county tax assessor, upon which the court sustained the assessment made by said Boards of Assessment in all the townships set forth in appellant's petition, except Clayton township, in which township the valuation was reduced to the valuation as originally assessed by appellant. From the judgment sustaining the assessment of the several boards, appellant appealed to the Cleburne Circuit Court by filing an affidavit and executing a bond conditioned that it would prosecute the appeal and save the county all costs on account of the appeal. In the circuit court, appellant filed petition for injunction, or restraining order, to prevent the tax collector from collecting the taxes upon the assessment returned by the several boards. The collector was temporarily restrained under injunction bond given by appellant.

At the September, 1918, term of the circuit court of said county, the cause was heard *de novo* by the court upon the petition and the several witnesses introduced by appellant and appellee. No finding was made, or judgment rendered, pertaining to the assessment of the lands in Center Post township. The assessments of the lands returned by the several boards in Morgan, Saline and River Bend townships was affirmed. The court reduced the assessment of appellant's lands in Francis township to $2.60 per acre, in Mountain township to $2.90 per acre, and in Pine township to $3.90 per acre; also rendered judgment against appellant for the costs of the proceeding. From the findings and judgment aforesaid of the circuit court, an appeal has been duly prosecuted to this court.

The contention of appellant is that its property, in the several townships set out in the petition, was assessed by the several Boards of Assessment at an unfair valuation in comparison with lands of the same kind and char-

acter similarly situated, belonging to other parties. It is provided by the Constitution of the State of Arkansas that "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." Under the Constitution, statutes and adjudications of this State, there must be uniformity in laying taxes upon taxable property. The assessor or assessment boards cannot discriminate against one tract of land in favor of all other property of the same kind in the county. *Drew County Timber Co.* v. *Board of Equalization of Cleveland County,* 124 Ark. 569, and cases there cited in support of the rule thus announced. Unless the undisputed facts in the case establish that the findings and judgment of the circuit court are erroneous, this court cannot reverse on appeal. The case falls within the general rule that the findings of the trial court will not be disturbed by this court on appeal where the findings are sustained by sufficient legal evidence. *St. Louis & San Francisco Rd. Co.* v. *Ft. Smith & Van Buren Bridge Dist.,* 113 Ark. 493; *Mo. Pac. Rd. Co.* v. *Conway County Bridge Dist.,* 134 Ark. 292; *C. R. I. & P. R. Co.* v. *Road Imp. Dist. No.* 1, 137 Ark. 587, 209 S. W. 725. Under the rule thus announced, it is only necessary in the instant case for us to examine the record sufficiently to ascertain whether the findings and judgment of the trial court are sustained by sufficient legal evidence. It goes without saying that it was incumbent upon appellant, in attacking the assessments of the several boards, to show by proof that the valuations placed by them upon the several tracts of land were unfair and inequitable when compared with the valuations placed upon other lands of the same kind and character similarly situated. Appellant introduced no proof at all as to the values of its lands in Center Post township and no evidence showing that the valuations placed upon its lands in Morgan, Saline and River Bend townships by the Boards of Assessment were discriminatory as compared with lands belonging to others, of the same kind

and character similarly situated. For the reason that appellant wholly and entirely failed to sustain the allegation in its complaint that its lands in Center Post, Morgan, Saline and River Bend townships were inequitably assessed, it follows that the finding and judgment of the county court, pertaining to the assessed value of the lands in Center Post township was final, and the finding and judgment of the circuit court, sustaining the assessed values of said lands in Morgan, Saline and River Bend townships, must be affirmed. The evidence which is legally sufficient to sustain the judgment of the court in reducing the assessment of appellant's lands in Francis township to $2.60 per acre, in Mountain township to $2.90 per acre, and in Pine Township to $3.90 per acre, is that of John W. Gunn. He stated, in substance, that he selected from the assessment lists 17,275 acres in Mountain township, 13,439 acres in Francis township, and 9,613 acres in Pine township belonging to other parties, both residents and non-residents, of about the same value as the company's lands, and found that they had been assessed by the several boards at an average of $2.90 per acre in Mountain township, $2.59 per acre in Francis township, and $3.91 per acre in Pine township; that, in making this average, he had not included bottom lands because the company owned no lands of that character; that, in selecting the lands of other parties around over the townships for purposes of comparison, he did so with a view to getting an average assessment valuation of lands similar to the lands owned by appellant. The assessments, as reduced by the court, fairly and equitably equalized the assessed valuation of the company's lands in Francis, Mountain and Pine townships with lands of about the same kind, character and value, belonging to other parties in said townships.

It is also insisted by appellant that the judgment should be reversed because the court adjudged the costs of the proceedings against appellant. In support of its contention in this regard, appellant has cited the case of *Jefferson Countu* v. *Philpot*, 66 Ark. 243. That suit was

for the enforcement of a claim against the county and in a case in which it was proper to render a judgment against the county. The court properly ruled in that case that the costs followed the judgment. Kirby's Digest, sec. 965. This section of Kirby's Digest, however, is not applicable to special statutory proceedings. *Fancher* v. *Kenner*, 110 Ark. 117. The proceeding in the instant case is a special proceeding authorized by section 8 of Act 234, Acts 1917. That act, in so far as it defines the special proceeding, is as follows: "Any person who shall be aggrieved by the action of the assessor and Boards of Assessment and Valuation, in valuing his property, may appeal to the county court, which shall have the same power now exercised by law to correct any error or injustice that may be done any person, by filing his petition in said court," etc.

No authority is found in the act for the rendition of a judgment against the county. Nor does the act itself impose any liability upon the county for costs. No authority existed for taxing costs against the county unless imposed by the act. *Chicot County* v. *Matthews, Sheriff*, 120 Ark. 506.

No error appearing, the judgment is affirmed.

EVANS *v.* WELLS.

Opinion delivered May 5, 1919.

1. HUSBAND AND WIFE—GIFT BY WIFE—RECOVERY BY WIFE'S HEIRS.—The heirs of a deceased wife cannot recover from her surviving husband money given to him by her during her lifetime.
2. WITNESSES—COMPETENCY—HUSBAND AND WIFE—WAIVER OF OBJECTION.—In an action by a deceased wife's heirs against her husband to declare a trust in lands purchased by him with her money, it was not error to permit him to testify that she gave him the money where such heirs elicited the testimony.
3. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—EVIDENCE.—In an action by the heirs of a deceased wife against the surviving husband to recover the wife's money, a finding that the wife had given the money to the husband *held* not clearly against the preponderance of the evidence.

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

G. B. Oliver, for appellants.

1. There is no evidence of a gift from the wife to the husband. It was the property of the wife the same as if a *femme sole.* Kirby's Digest, § § 5207-5227-9; 116 Ark. 142-152. The evidence is not clear and satisfactory. 84 Ark. 355-8; 101 *Id.* 451-6. The burden was on him to show a gift from the wife and he has failed. He was not a competent witness. Kirby's Digest, § 3905; 81 Ark. 147-153. But if competent it was not *clear* and *satisfactory,* and is not corroborated at all. 7 C. J.; § 394; 174 S. W. 492. Appellee's testimony is contradictory and contradicted by many witnesses. The decree should be reversed and a decree rendered here against appellee for $5,000 and interest.

Jerry Mulloy and *S. A. D. Eaton,* for appellee.

1. A trial *de novo* in chancery requires a full abstract of the testimony. The abstract filed here does not comply with the rules of this court, and the decree should be affirmed under Rule 12.

2. The evidence does not warrant a finding upon which a trust could be declared in the lands of appellee. The question is one of fact, and a gift to appellee by the wife was established. The findings of a chancellor will be sustained unless clearly against the preponderance of the evidence. 89 Ark. 309; 116 S. W. 668; 91 Ark. 69; 120 S. W. 400; 91 Ark. 149; 120 S. W. 400-843; 103 Ark. 473; 142 S. W. 567. The evidence clearly shows a gift to appellee by the wife. The testimony of Wells was given by him as a witness for appellants. 33 Ark. 91; 32 *Id.* 337; 53 *Id.* 99; 131 S. W. 44; 132 *Id.* 462; 142 S. W. 1122. No specific objections were made to his testimony. 124 Ark. 26; 186 S. W. 312; 112 Ark. 305; 169 S. W. 83. The wife being dead, there is no merit in the objections to appellee's testimony. 75 Ark. 127; 86 S. W. 818; 41 Ark. 177; Rodgers on Dom. Rel., § 302; 29 Ark. 603; 40 Cyc. 2230 (10).

3. The testimony of appellee that the money was a gift is supported by *all* the conditions and circumstances of the case.

4. Appellants were guilty of *laches* in waiting so long. 109 S. W. 651.

5. No fraud or coercion is shown on the part of Wells, but the testimony shows that Mrs. Wells intended a gift, and did give the money to her husband. 75 Ark. 127; 86 S. W. 818; 183 *Id.* 746; 130 *Id.* 515; 142 *Id.* 848.

SMITH, J. Appellee G. W. Wells was married to Millie Harbison, a widow, on August 21, 1900, at which time she owned forty acres of land in her own right and had dower and homestead in two hundred acres more. On October 27, 1905, she sold her interest in these lands for five thousand dollars cash, and on October 30 deposited this money in the Bank of Corning in the name of Millie and G. W. Wells, the latter of whom at the time had an individual account with the Bank of Corning. This five thousand dollars was at various times and in various amounts beginning March 27, 1906, and ending December 7, 1909, passed to the credit of G. W. Wells' individual account by means of debit slips and by him checked out. Mrs. Wells died without descendants on April 25, 1912, and her heirs, who are the appellants here, began this suit on May 12, 1916, to recover this money and to have a trust declared in their favor against certain lands which G. W. Wells had purchased, upon the ground that the lands had been purchased with portions of this money. The answer denied the use of any of this money in the purchase of the lands, but admitted the appropriation of the deposit and alleged that Mrs. Wells had given him the money and that he had expended it for their common use and benefit.

The plaintiffs filed two amendments to their complaint, consisting of interrogatories propounded to the defendant, all of which he answered under oath as he was requested to do. These questions and answers related to the acquisition and dispostion of the deposit. The

court dismissed the complaint as being without equity, and this appeal has been duly prosecuted to reverse so much of the decree as found that Mrs. Wells had given the deposit to appellee. No complaint is made here of the finding adverse to appellants' contention that no trust existed in the lands.

Appellants cite sections 5207 and 5227 of Kirby's Digest as being applicable and controlling under the issues joined in the case. The first of these sections is Section 7 of Article 9 of the Constitution, which gave to any *femme covert* the same property rights enjoyed by *femme soles;* while the second section is taken from Act No. 91 of the Acts of 1875, p. 172, entitled, "An act to protect married women in the enjoyment of their separate property." We think, however, that the sections of the digest referred to are of no controlling importance here. Indeed, section 5207, which provides that the fact that a married woman permits her husband to have the custody and management of her separate property shall not, of itself, be sufficient evidence that she has relinquished her title to said property, but that there shall be a presumption of agency, also provides that this presumption may be rebutted by any evidence establishing a sale or gift by the wife to the husband of such property. So that the question to be decided is one of fact, which may be stated to be, Did Mrs. Wells give this money to her husband?

Appellants now complain that appellee was permitted to testify that his wife did in fact give him this money as being in violation of section 3095 of Kirby's Digest. But if this be true, and we do not so decide (*Hannaford* v. *Dowdle,* 75 Ark. 131), appellants are in no position to complain, as they developed this testimony on their original examination of appellee as a witness as well as in the answer which appellee filed to the interrogatories propounded in the complaint.

The testimony is discussed at length in the briefs and appellants call attention to alleged discrepancies in appellee's testimony, and it is insisted that his testi-

mony should be disregarded on that account. Much stress is also laid on the fact that appellee testified that his wife wrote a letter to the bank advising that she had given to her husband the money she then had on deposit, whereas the president and cashier of the bank testified that they had no recollection of having received such a letter and that the letter could not be found in their files. Appellee testified that much of this deposit was used to pay traveling and medical expenses of his wife, who was an invalid during a large part of the time they were married; and there was testimony that it was appellee who was the invalid and not his wife and that the money was spent on him and not on her. But it is almost undisputed that a comparatively large amount of the money was spent in this way, and it is unimportant on which spouse it was spent. The important question is whether Mrs. Wells had given the money to appellee and knew that he was spending it. The circumstances and habits of appellee and his wife make it highly probable, indeed almost certain, that she must have known that appellee was using the money, and that the deposit was being exhausted, and that the last of the money had been transferred to the individual account of appellee three years before the death of his wife. The testimony is undisputed that Mrs. Wells deposited the check with the bank, not to her individual account and credit, but to the joint account and credit of herself and her husband, and the president of the bank testified that Mrs. Wells directed the transfer of the first thousand dollars transferred from the joint account to appellee's individual account. The remainder from time to time was transferred under the directions of appellee. There was testimony that Mrs. Wells had stated that she had no relatives except some cousins (these appellants) who wouldpass her on the road without speaking to her and that she did not intend for them to have any of her property. It was also shown, and not denied, that the bank rendered statements at various times of the account, seven of which statements are made exhibits to appellee's depositions. The state-

ments show a constantly decreasing balance, and appellee testified that they were all received through the mail and that his wife saw them all and knew how the money was used. A portion of appellee's testimony as abstracted makes it appear that appellee testified that his wife was dissatisfied with his appropriation of this money; but we think this is not the effect of his testimony when taken as a whole. Indeed, the officers of the bank testified that Mrs. Wells never at any time made any objection to the transfer of the funds from one account to the other, although the account had been practically depleted by the end of 1907 and the final balance of two hundred dollars was transferred in 1909 and Mrs. Wells did not die until 1912.

Inasmuch as this suit was not brought for more than four years after the death of Mrs. Wells, appellee has interposed the defense of *laches*. We do not decide that question, however, as we think the finding of the court below, that Mrs. Wells had given this money to her husband, is not clearly against the preponderance of the evidence, and it follows, therefore, that the decree must be affirmed on that account, and it is so ordered.

FERNWOOD MINING COMPANY *v.* PLUNA.

Opinion delivered May 12, 1919.

1. STATUTES—CONSTRUCTION OF LANGUAGE.—When the Legislature uses words which have a fixed and well known legal signification, they are presumed to have been used in that sense unless the contrary intention clearly appears.
2. STAY BOND—CONSTRUCTION OF STATUTE—"PERSONAL INJURY."—Under Acts 1909, No. 202, providing that "no stay shall be allowed against * * * a judgment for personal injury or injuries resulting in death caused by neglect or default of another," the words "personal injury" denote an action for bodily harm not resulting in death, and the words "injuries resulting in death" refer to the special statutory action growing out of death caused by the wrongful act of another.

Appeal from Johnson Chancery Court; *Jordan Sellers,* Chancellor; stay bond quashed.

HART, J., (On motion to quash the stay bond granted). Appellee was severely injured while working as an employee of appellants in their mine in Johnson County, Arkansas. He sued them for damages and recovered judgment in the circuit court for $25,000, and the judgment was affirmed in this court. The question now presented for the determination of the court is whether or not appellants are entitled to a stay of judgment for six months under section 3253 of Kirby's Digest as amended by Act 202 of the Acts of 1909. See *Parker* v. *Wilson,* 99 Ark. 344.

The act in question read as follows:

"No stay shall be allowed upon a judgment or decree against any collecting officer or attorney at law, or agent for a deliquency or default in executing or fulfilling the duties of his office or place, or failing to pay over money collected by him in such capacity, or against a principal by his surety, or of a debt due by obligation having the force of a judgment, or of a judgment or decree for specific property, or for the property or its value, or a judgment or decree enforcing a lien in favor of a vendor or mortgagee, or a judgment for personal injury or injuries resulting in death caused by neglect or default of another. In the cases mentioned in this section which a stay is not allowed, the execution shall be so endorsed by the clerk." Acts of 1909.

The only change in the section of Kirby's Digest just referred to made by the Legislature of 1909 is the inclusion in the section of these words, "or a judgment for personal injury or injuries resulting in death caused by neglect or default of another." It is the contention of counsel for appellants that the adjective "personal" qualifies both the words "injury" and "injuries." Hence they contend that the statute does allow a stay in personal injury cases of this character, and that only

injuries resulting in death caused by the neglect of another are excepted by the provisions of the statute.

On the other hand, it is contended by counsel for appellee that the words "personal injury" denote an action for negligently causing bodily harm not resulting in death; and the words "injuries resulting in death" refer to the special statutory action growing out of death caused by the wrongful doing of another referred to above.

It is a settled rule of construction of statutes that when the Legislature uses words which have a fixed and well known legal signification, they are presumed to have been used in that sense, unless the contrary intention clearly appears. *State* v. *Jones,* 91 Ark. 5; *Townsend* v. *Penrose,* 84 Ark. 316; *Beasley* v. *Equitable Securities Company,* 72 Ark. 601, and *Buckner et al.* v. *Real Estate Bank,* 5 Ark. 536.

Our statute does not define the meaning of the term "personal injury" as is the case in New York and other states.

Blackstone says that the right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. Lewis' Blackstone, Vol. 1, *129. A violation of these rights at common law is called an "injury to the person" or "personal injury" as contradistinguished to a wrong to a person's property rights. In the ordinary acceptation of the term and the one almost universally used by the legal profession, the words "personal injury" denote bodily harm not resulting in death and an action for "personal injury" or for "personal injuries" mean an action for negligently causing bodily harm not resulting in death.

On the other hand, the common law never designated an action for negligently causing death as an action for "personal injury." Such an action was unknown to the common law and is a creation of statute. It was long ago settled in this State that the right to recover when death ensued did not exist in the character of cases like the

present. At common law an action for the recovery of damages for the wrongful killing of a human being was the result of the statute of 9 and 10 Victoria passed in 1846 and known as Lord Campbell's Act. That act, in effect, provides that an action may be maintained whenever death is caused by the wrongful act or neglect which would have entitled the person injured to maintain an action if death had not ensued and such action is for the benefit of certain named persons. Statutes substantially similar to Lord Campbell's Act in these respects have been enacted in a majority of the States, including our own. *Davis* v. *Railway,* 53 Ark. 117. So it will be seen that there is a legal distinction between the meaning of the term "personal injury" and the words "injuries resulting in death." We do not think there is anything in the language of the act to indicate that the words were used by the Legislature in other than their common or legal acceptation. The conjunction "or" between the term "personal injury" and the words "injuries resulting in death" thus joins as alternatives terms expressing unlike things or ideas which is one of the meanings given it in the dictionary. Then the words "caused by neglect or default of another" relate to or modify both terms. In the application of this well known rule of construction we think it is plain that the Legislature intended that an action like the present one should be included in the term "personal injury" and use the term "personal injury" to mean an action wherein a living party who is before the court has sustained an injury to his person and that the term "injuries resulting in death" refers to the action for negligently causing death given by section 6285 of Kirby's Digest. Even if it should be said that the term "personal injury" should be given its broadest meaning as at the common law, it will be seen that it does not include the statutory action for wrongfully causing death.

The construction we have given the act harmonizes it by leaving no redundant words in it and giving to the

words used their well understood and commonly accepted meaning.

It follows that the motion to quash the stay bond will be granted.

McCULLOCH, C. J., (dissenting). The subject was dealt with by the lawmakers according to their unrestricted will, and there is no reason for attributing to them any intention other than that plainly expressed in the language of the statute. The statute in general terms declares the right of a judgment debtor to stay the judgment against him in all instances except those expressly mentioned, among others, "a judgment for personal injury or injuries resulting in death caused by neglect or default of another." It seems to me that according to ordinary rules of interpretation the words "resulting in death" modify all that goes before on the subject embraced. It must be and is conceded on all sides that the words "caused by neglect or default of another" relate back to and modify all that goes before, and if that be true, the preceding words "resulting in death" must also modify the words "personal injury" as well as the words "injuries." If the word "or" had been intended to disjoin the words "personal injury" from the word "injuries" so as to make the words "resulting in death" relate solely to the latter, then the words "caused by neglect or default of another" should also be so construed, but that would lead to an illogical result, and the mention of it shows, I think, that the construction given to the statute by the majority is incorrect.

It is plain to my mind that the framer of the statute meant to use the two words "injury" and "injuries" to denote singular and plural, unnecessary, it is true, but a form of expression often resorted to. There is nothing to indicate that the language used was meant in any technical sense, or meant in any sense except that judgment for injury or injuries resulting in death caused by neglect or default of another should be exempted from

the general operation of the statute. It is peculiar to assume that the framer of the statute intended to change the number from singular to plural in describing the two different kinds of judgments. Such is not the ordinary inference to draw from the use of both singular and plural numbers, for the natural drift of mind in framing a sentence is to follow the same form and continue the use of the number first adopted. It is more reasonable to suppose that it was meant to use the singular and plural with reference to the same subject, rather than that the different numbers should be used with reference to two different subjects.

Again, the contention adopted by the majority leads to the result, as is so forcefully said by counsel, that the word "personal" does not qualify the word "injuries" at all, and is limited in its operation to the word "injury." It is hardly conceivable that the Legislature would have made such a distinction.

If it was intended to exempt two different kinds of judgments from the allowance of stay, as the majority now hold, that is to say recoveries of judgments by individuals for injuries to their own persons caused by the neglect or default of another, and judgments rendered in favor of the next of kin or the personal representatives of decedents for injuries caused by neglect or default of another which resulted in the death of such decedents, then much more explicit and appropriate language would have been used to express that meaning. The plain English of the clause is, I think, that all judgments for personal injuries resulting in death are within the exemption and that all others may be stayed. The framer of the statute had his own reasons for making the distinction in the kinds of judgments to be exempted from stay and it is not within our province to inquire into those reasons, for the legislative will on the subject is supreme, whether reasonably or arbitrarily exercised.

Mr. Justice SMITH concurs in these views.

WEBB v. STATE.

Opinion delivered May 12, 1919.

1. WITNESS—IMPEACHMENT—CROSS-EXAMINATION.—In a prosecution for illegally disposing of alcoholic liquor, the prosecuting attorney was properly permitted on cross-examination to ask defendant if he had not tried to escape and if he had not carried saws into the jail and given them to other prisoners.

2. INTOXICATING LIQUORS—EVIDENCE OF ILLEGAL DISPOSITION.—Evidence *held* sufficient to sustain a conviction for an illegal disposition of whiskey where it tends to prove that defendant and another gave whiskey to persons for assistance in piloting an automobile loaded with whiskey.

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

STATEMENT OF FACTS.

The section of the statute under which the indictment in this case was returned reads as follows:

"After January 1, 1916, it shall be unlawful for any person, firm or corporation to manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away of any alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors within the States of Arkansas." Acts of 1915, p. 98.

Eb Boles, a witness for the State, testified that he saw the defendant and a companion named Lexington in an automobile on the 24th day of December, 1918; that they asked how to go to Bradford and that he asked them if he could go with them and show them the way; that they replied that he could and he rode with them until their automobile broke down; that while riding with them in the automobile, they gave him a drink of whiskey out of a quart bottle and that when he and his companion got ready to leave they gave them a pint apiece; that the defendant and Lexington were both in the car, but that he does not remember which one of them gave him

the whiskey; that the back end of the automobile was loaded, but he did not know what it was loaded with.

On cross-examination Boles testified that he showed the defendant and Lexington how to get along the road to Bradford and that they gave him some whiskey, but he did not remember whether the defendant or Lexington actually handed him the whiskey.

T. C. Plant, the sheriff of White County, testified that he arrested the defendant just north of Bradford in White County, on Christmas day in 1918; that the defendant was in charge of an automobile which was filled with whiskey; that it contained about 324 pints and 20 some odd quarts; that at the time the defendant was arrested, Lexington had gone to Little Rock for repairs on the car.

Roy Webb, the defendant, testified for himself. He admitted that he was in the car and that he had gone to St. Louis to drive the car back for Lexington. He stated that before they got to Bradford in White County they met some men who wanted to ride to town and Lexington let them ride; that Lexington took out a quart of whiskey and that he and the men drank together; the defendant did not drink; that when the car broke down, Lexington took out two pints of whiskey and gave each one of them a pint; that he did not have any interest in the whiskey; that he had been driving into the State second hand automobiles for Lexington for about three months, which had been purchased outside of the State; that he went to St. Louis with Lexington for the purpose of driving the car back.

On cross-examination he admitted that he tried to escape as soon as he was placed in jail; that he had some saws which he brought to the jail and gave to the other prisoners. It was shown that when the car broke down the whiskey was taken out of it and placed in a house near by and that the defendant was placed in charge of the car and the whiskey. The defendant admitted on cross-examination that some men came up there and

took whiskey away from the house while he was in charge of it, but that it was not his whiskey.

The jury returned a verdict of guilty, and from the judgment rendered the defendant has appealed.

W. F. Terral, for appellant.

1. The testimony of the only two witnesses, Sheriff Plant and Eb Boles, does not show that appellant violated the law and the conviction is contrary to the testimony that was competent. The only witness who pretended to know anything about any whiskey being given away was not positive that appellant gave him any whiskey. He was doubtful and all the other testimony was incompetent, relating to other crimes. This was not competent. Neither good nor bad character can be proved by specific acts or deeds. The prosecution cannot resort to the accused's bad character as a circumstance from which to infer guilt. 120 Ark. 492; *Ib.* 458; 91 *Id.* 555. Appellant did not put in evidence his good character, and the State had no right by way of contradiction to show his bad character. 100 *Id.* 321.

2. Neither good nor bad character can be shown by specific acts or deeds. 88 Ark. 261; 120 *Id.* 458. It was error for the State to prove other crimes committed by appellant. It was not competent to prove the offense by the admission of appellant's other crimes upon the charge of giving away whiskey. Greenleaf on Ev. (15 ed.), § 53 b; 39 Ark. 278; 37 *Id.* 261. He was not a violator of the act, even if he did give Boles the whiskey, and could not be guilty of anything more than procuring whiskey. 130 Ark. 204. The testimony failed to show that appellant had any interest of any kind in giving away the whiskey, and failed to show any motive that would induce him to bring about the transaction charged. 132 *Id.* 135. The Legislature did not intend to make it a felony to give away whiskey, but to prevent selling any article as a subterfuge at an exorbitant price and giving away whiskey with the purchase. *Supra.*

Gardner K. Oliphint, Amicus Curiae.

The mere giving away whiskey is not a violation of Act No. 30, Acts 1915, p. 98. Such was not the intention of the act. 3 Ark. 285-308; 32 *Id.* 462-4-5; 65 *Id.* 521, 536-9; Lieben's Hermaneutics 103; 124 Ark. 20-24. See also 125 *Id.* 77-85; 160 Fed. 260-3; Kirby's Dig., § § 7792-7817; 1 Blackstone (Com.) 58-60; 102 Ark. 373-7; 143 U. S. 457; 7 Wall 482; 106 Ark. 517; 109 *Id.* 556. Statutes should be construed according to their reason and spirit. 48 Ark. 307; 94 *Id.* 426; 2 Cr. 358; 26 Conn. 376; 102 Cal. 12; 7 Exch. 475; 25 Atl. 140; Joyce on Intox. Liquors, § 79; 15 R. C. L., § 19; 70 Am. St. 743; 173 Pac. 73; 79 So. Rep. 753; 3 B. & Ald. 266.

John D. Arbuckle, Attorney General; *Robert C. Knox,* Assistant, and *T. W. Campbell,* for appellee.

1. No objection to the instructions is made in appellant's briefs. There are no errors in the admission of testimony and the evidence proves that appellant gave away whiskey in violation of the Bone Dry Act.

2. There was no error in the cross-examination of appellant. Kirby's Digest, § 1561.

3. It is unlawful to give away whiskey in this State. Acts 1915, No. 30, § 2; 4 L. R. A. 543; 76 S. W. 984. The act forbids the giving away as well as the selling.

HART, J., (after stating the facts. It is first earnestly insisted by counsel for the defendant that the court erred in permitting the prosecuting attorney to ask the defendant if he had not tried to escape and if he had not brought some saws into the jail and given them to the other prisoners for the purpose of escaping. It appears from the record that the defendant was first arrested near Bradford in White County and subsequently released from custody. He was arrested again at Little Rock charged with the same crime and carried to White County and placed in the jail there. He was asked if he had not tried to escape and answered that he had not. He was also asked if he had not carried saws into the jail and given them to the other prisoners. He replied

that he had not; that he just carried the saws into the jail and laid them down and they had picked them up. He was asked how many saws he brought into the jail and he answered three. There was no error in the admission of this testimony. It is true as contended by counsel for the defendant, that the court has uniformly held that the State cannot resort to the bad character of the accused as a circumstance from which to infer guilt. The reason is that such testimony is not evidence of the defendant's guilt and that it might result in his being overwhelmed by prejudice instead of being tried upon the evidence affirmatively showing his guilt of the offense with which he is charged.

The evidence objected to was not admitted for this purpose and the decision of that point is not before us. The witness took the stand in his own behalf and the questions were asked him on cross-examination. When he took the witness stand himself, he was subject to all the rules of examination and impeachment of any other witness. The court has frequently held that a witness may be cross-examined as to his particular acts or conduct that are relevant to the impeachment of his character for truth, although they are wholly disconnected with the cause on trial. Great latitude is allowed in the cross-examination of a witness touching his conduct and habits so as to reflect light upon his credibility. *Rhea* v. *State,* 104 Ark. 162, 181; *Turner* v. *State,* 128 Ark. 565; *Ware* v. *State,* 91 Ark. 555; and *McAlister* v. *State,* 99 Ark. 604.

It is next insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict. It is the contention of counsel for the defendant that the statute which we have copied above is directed against a gift of liquor as a subterfuge to evade the prohibition against selling it.

On the other hand, it is contended by the Attorney General that a gift of liquor made solely as a matter of courtesy or act of hospitality, or the like, is within the prohibition of the statute. We do not deem it necessary

to decide this question, for if it be assumed that the defendant's construction of the statute is correct, still the evidence adduced by the State was sufficient to support a verdict of guilty.

It is the contention of the defendant that he was not interested in the sale or giving away of the liquor and was only hired to drive the automobile back into the State.

On the part of the State it was shown that a considerable quantity of whiskey in quart and pint bottles was in the automobile and that the prosecuting witness and his companion were directing the operators of the automobile along the road until the automobile broke down. When they separated they were each handed a pint bottle of whiskey and they had also been given some drinks out of a quart bottle. The jury might have inferred that the whiskey was given them in exchange for their services in piloting the automobile to Bradford. The defendant was found in charge of the whiskey and admitted that people went into the house where it was stored and took away bottles while it was in his charge. He also admitted that his companion had been going out of the State for some months and buying second-hand automobiles and that he had been driving them back into the State. He does not state whether all these second-hand automobiles contained whiskey as did the one in the instant case. Certainly the jury would have been warranted in finding Lexington—had he been on trial—guilty of the illegal traffic in whiskey.

When all the surrounding circumstances are considered the jury was justified in finding that the defendant was also interested in the giving away of the whiskey and consequently the jury was justified in finding him guilty under his own construction of the statute.

It follows that the judgment must be affirmed.

DICKERSON v. TRI-COUNTY DRAINAGE DISTRICT.

Opinion delivered May 19, 1919.

1. STATUTES—CONFLICT.—Where statutes conflict the later statutes must prevail.
2. EMINENT DOMAIN—COMPENSATION FOR TAKING—REMEDY.—Constitution, article 2, section 22, declaring that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor," relates entirely to the owner's right to compensation, but not to the remedy therefor.
3. SAME—TAKING PROPERTY FOR DITCH.—Taking property for a drainage ditch falls within the State's right of eminent domain, and the right may be exercised without notice to the property owner and without giving a hearing upon that question.
4. SAME—LEGISLATIVE METHOD FOR ASCERTAINING COMPENSATION.—Where the Legislature provides a method for ascertainment of compensation to be allowed owners for land taken under eminent domain for construction of drainage ditches, the constitutional guaranties are complied with.
5. CONSTITUTIONAL LAW—DUE PROCESS—DITCH LAW.—The provisions for appeal and for jury trial in Acts 1909, p. 829, constitutes due process, though the act provides that where the commissioners make no return of damages to any particular tract of land, "it shall be deemed a finding by them that no damages will be sustained."
6. DRAINS—TAKING PRIVATE LAND—RIGHT OF APPEAL.—A proceeding to obtain privately owned land for ditches for drainage districts is *in rem,* and when the statutory notices are properly given, all property owners become parties, and have the right of appeal, whether they actually appear at the hearing or not.
7. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—JURY.—Constitution, article 12, section 9, guaranteeing jury trial in condemnation proceedings, applies to condemnation proceedings by private corporations, and not to proceedings by a drainage district for the taking of private property for a ditch.

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

C. W. Norton, for appellant.

1. The Crittenden Circuit Court was without jurisdiction.

2. It did not in fact make any judgment concluding the question of plaintiff's damages.

3. Plaintiff's failure to appear and assert his damages did not affect his right to be paid for his land. Act 279, Acts 1909, § 8; 101 N. W. 2. The county court had exclusive jurisdiction. Art. 7, § 28 Const.; 79 Ark 158; 111 *Id.* 149. The circuit court made no judgment concluding the question of plaintiff's damages for the land taken and there has been no adjudication of compensation to which he was clearly entitled. 184 S. W. 453. Plaintiff's right is a personal one, not an adjunct to the land and could not be affected by any judgment without jurisdiction of plaintiff's person, and he was not present.

A. B. Shafer, for appellee.

A drainage district is not a corporation and art. 12, § 9, Constitution does not apply. 64 Ark. 555; 44 S. W. 707; 78 Ark. 580; 94 S. W. 711; 204 Fed. 299-305. Drainage districts are not corporations. Acts 1909, No. 279. The State may, through its agencies take property without first making compensation. 32 Ark. 17-25; 186 S. W. 604. See also 17 Ark. 572; 167 U. S. 548; 8 Wendell (N. Y.) 85; 22 Am. Dec. 622; 14 Ohio 147; 45 Am. Dec. 529.

2. The district was properly organized in the Crittenden Circuit Court. 111 Ark. 149; 163 S. W. 512; Acts 1909, No. 279. Plaintiff failing to appear, or plead or appeal acquiesced in the proceedings. 128 Cal. 477. The State and its agencies are only required to make just compensation, but in doing so may take into consideration the benefits accruing to land without a jury. Wigmore on Ev., Par. 1353-4, 2492. The cases cited by appellant do not apply, as Mississippi and Nebraska both require compensation before property can be taken, but there is no such provision in our Constitution except as to "Corporations"; and as we have seen drainage districts are not corporations, but State agencies.

McCULLOCH, C. J. Tri-County Drainage District is, as its name implies, a drainage improvement district, and was established by order of the circuit court of Crittenden County pursuant to the general statutes of the State authorizing the creation of such districts. Acts

1909, p. 829, Acts 1911, p. 193, Acts 1913, p. 738. The district embraces lands in Crittenden, Cross and St. Francis counties. Appellant is the owner of a certain tract of land situated in the district and in St. Francis County, and he instituted this action to recover the value of about nineteen acres of land alleged to have been taken and used by appellee drainage district in the construction of one of the ditches which constitutes the drainage system authorized in the organization of the district. Appellee filed an answer in which appellant's ownership of the land was admitted, and it was also admitted that the land was taken for use in construction of the ditch, but other proceedings were pleaded in the answer as a bar to the right of appellant to recover compensation in this action. The court overruled the demurrer to the answer and appellant elected to stand upon the demurrer and suffered judgment to be rendered against him, from which an appeal has been prosecuted to this court.

The statute under which the drainage district was organized provides, in substance, that a drainage district may be created upon the petition of property owners and that after the preliminary survey is made and filed showing the extent of the improvement, notice of the hearing shall be given by publication, and that on the day mentioned in the notice a public hearing shall be held by the court and that owners of property in the proposed district may protest against its organization. Upon that hearing the court either establishes the district or refuses to do so, and when the district is established by an order of the court a board of commissioners is named for the purpose of carrying out the project. Where the district is to embrace lands in a single county the proceedings are to be had in the county court, but where the district embraces lands in more than one county, the statute provides that the proceedings shall be had in the circuit court of one of those counties, and that in the latter case the words "county court" and "county clerk" where found in the statute shall mean "circuit court" or "circuit clerk." The statute provides for an appeal by any

property owner from the order of the court either creating or establishing the district. The statute then provides that upon the creation of a district and the appointment of a board of commissioners, said board shall prepare plans for the proposed improvement and procure estimates as to the cost thereof. One of the provisions in that respect reads as follows: "Such plans and specifications shall show, not merely the location, width and depth of the ditches, but the work to be done in removing obstructions from water courses, building of pumping stations, flumes, floodgates, and fences to protect the ditches, together with all other work contemplated." Sec. 4, Acts 1911, *supra*. These plans are to be filed with the clerk of the court accompanied by a map showing the location of all main and lateral ditches, and specifications describing the character of improvement to be made, the width and depth of the ditches, and the probable cost of all the work to be done. Those parts of the statute which relate to the assessment of damages, if any, to the lands in the district read as follows:

"The commissioners shall also assess all damages that will accrue to any land owner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such assessment of damages as to any tract of land, it shall be deemed a finding by them that no damage will be sustained. * * *

When their assessment is completed the commissioners shall subscribe said assessment and deposit it with the county clerk, where it shall be kept and preserved as a public record. Upon the filing of said assessment the county clerk shall give notice of the fact by publication, two weeks in some weekly newspaper issued in each of the counties in which the lands of the district may lie. Said notice shall give a description of the lands assessed for drainage purposes in said district; that the owners of said lands, if they desire, may appear before the county court on a certain day (naming the day) and present complaints, if any they have, against the assessment of any lands in said district.

Any owner of real property within the district who conceives himself to be aggrieved by the assessment of benefits or damages or deems that the assessment of any land in the district is inadequate, shall present his complaint to the county court at the first regular, adjourned or special session, held more than ten days after the publication of said notice; and the said court shall consider the same and enter its finding thereon, either confirming such assessment or increasing or diminishing the same; and its finding shall have the force and effect of a judgment, from which an appeal may be taken within twenty days, either by the property owners or by the commissioners of the district." Sec. 1, Act of 1913, *supra.*

Section 8 of the Act of 1909, *supra,* read as follows:

"Any property owner may accept the assessment of damages in his favor made by the commissioners; or acquiesce in their failure to assess damages in his favor, and shall be construed to have done so unless he gives to said commissioners within thirty days after the assessment is filed, notice in writing that he demands an assessment of his damages by a jury; in which event the commissioners shall institute in the circuit court of the proper county an action to condemn the lands that must be taken or damaged in the making of such improvement; which action shall be in accordance with the proceedings for condemnation of rights-of-way by railroad, telegraph and telephone companies, with the same right of paying into court a sum to be fixed by the circut court or judge, and proceeding with the work before assessment by the jury. If there is more than one claimant to the lands, all claimants may be made parties defendant in such suit, and the fund paid into court, leaving the claimant to contest in that action their respective rights to the fund."

We must, in the state of the pleadings before us, treat it as conceded that the terms of the statute were complied with concerning the assessment of damages to lands taken or damaged in the construction of the improvement, but appellant seeks to uphold his right of ac-

tion under the Act of 1905, p. 143, which provides that whenever any levee or drainage district "may have appropriated, or shall appropriate any land for right of way for the construction and maintenance of either levees, ditches, canals, or drains, and constructed levees or drains thereon, without having procured the consent of the owner, or owners, of such land to construct the levees, or drains, or procured the right-of-way, either by purchase, donation or condemnation, such owner, or owners, where their cause of action has not been barred by the statute of limitation, shall have a cause of action against such * * * levee or drainage district for the market value of the land at the time it was actually occupied."

The Act of 1909 is the last expression of the legislative will on this subject and the statute of 1905 must yield to the extent that it may be found to be in conflict with it. Whether or not there is in fact any irreconcilable conflict in the statutes, we need not now stop to decide. The former statute was construed by this court, and its validity upheld in the case of *Young, Admr.,* v. *Red Fork Levee District,* 124 Ark. 61.

According to the allegations of the complaint, appellant's land has already been taken and used in the construction of the improvement, and there is not involved in this controversy any question about the method of taking. The only question involved relates to the compensation for the property thus taken for the public use. The statute hereinbefore referred to provided a method for the ascertainment of damages or the compensation to be rendered to the owner of property taken or damaged, and we discover no sound reason why that statutory method should not be upheld. It provides for an appraisement of damages by the Board of Commissioners and for a report to the court which established the district, and where the proceedings are pending, and each property owner is given a hearing after the publication of notice. Two remedies are provided for an aggrieved property owner; first, an appeal to the higher court, and,

next, the right within a certain time to demand a jury for an appraisement of the damages.

The only constitutional provision on the subject is found in section 22, article 2, declaring that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." This constitutional provision relates entirely to the right of the property owner to have compensation, and it has nothing to do with the remedy afforded to the injured property owner, and that matter is left entirely to the legislative will. Taking property for public use of this character falls within the State's right of eminent domain, and we have held that that right may be exercised without notice to the property owner or without giving a hearing upon that question. *Sloan* v. *Lawrence County,* 134 Ark. 121. It is, of course, not to be implied from that decision that the right to compensation may be ignored by the Legislature, but where a method is provided for the ascertainment of compensation to be allowed, all constitutional guaranties are complied with, and the right to exact compensation is made effectual. The method of ascertaining compensation prescribed in the act of 1905, *supra,* was somewhat similar in principle to the method prescribed in the statute now under consideration, and we upheld its validity in the case of *Young, Admr.,* v. *Red Fork Levee District, supra.*

The drainage statute provides, as has already been shown, that where the commissioners make no return of damages to any particular tract of land "it shall be deemed a finding by them that no damage will be sustained." This provision relates merely to the form of the report of the commissioners, and is, we think, entirely within the legislative power. The requirement is that where damages are found by the commissioners they shall report the amount, but where no damages are found, or where the benefits exceed the damages and the assessment to be levied, no finding need to be reported as to that particular tract.

We are unable to discover any violation of the rights of the property owners in prescribing this form of report, for when read in the light of the statute, any property owner in examining the report of the commissioners will know that there has been a finding against him as to damages to his property where no amount is specified. The provision for an appeal or for an appearance and demand for a jury amply protects the rights of property owners and constitutes due process of law. The whole proceeding is one *in rem,* and when the notices provided for in the statute are properly given, all owners of property thereby becomes parties to the proceeding and have the right of appeal whether they actually appear at the hearing or not. *Foster* v. *Bayou Meto Drainage District,* 132 Ark. 141.

The principle involved in this case has been declared in the decision of this court in *Young, Admr.,* v. *Red Fork Levee District, supra,* in construing the act of 1905. That statute provided that levee and drainage districts, after selecting the route for the improvement, should, upon failure to obtain the consent of the owners of the property to be taken, present their petition to the judge of circuit court who should appoint a board of appraisers composed of three land owners, and that the appraisement of said board when approved by the court should become final unless the interested land owners appeared and demanded a trial. In passing on that statute the court said: "We discover no reason for declaring this legislative provision invalid. It is contended that its provisions wrongfully deprive the owner of a trial by jury for the ascertainment of damages, but the answer is that the act itself provides that there shall be a jury trial in the event the owner appears within the time given and demands such trial. There is no express provision of our Constitution requiring the assessment of damages by a jury in this class of proceedings. The constitutional guaranty of trial by jury in condemnation proceedings relates only to condemnations by private corporations. Article 12, section 9, Constitution of 1874. In other words, the

statute is valid in all respects material to this controversy because it gives the land owner a day in court by personal service if he resides in the county and is known, and by publication where it is a proceeding *in rem;* and also he is given a day in court by proper service of summons or warning order in the event of uncertainty as to ownership and the payment of the money to the clerk of the chancery court. Every constitutional requirement is therefore covered in the statute."

The act under consideration in that case provided for actual service of notice on land owners residing in the county, whereas the present statute provides only for published notice, but that difference is not material, as it is a proceeding *in rem,* and constructive service is as effectual as actual notice for the purpose of bringing into court the interested parties. *Foster* v. *Bayou Meto Drainage District, supra.* The same principle has been announced by this court in decisions with respect to condemnation proceedings in laying out public roads under orders of county courts. After publication of notice of the presentation of petition for laying out a road, the county court appoints viewers to select the route and assess the damages, giving notice to interested land owners, who have an opportunity to appear in court and object to the confirmation of the appraisement made by the viewers, or to appeal from an adverse ruling of the court. Our decisions on that subject have been that the original notice confers jurisdiction upon the county court of the subject-matter and that the property owners are bound by the subsequent proceedings, whether they appear in court or not, even though there is a failure to give notice of the appraisement, that being treated as a mere irregularity which does not defeat the validity of the proceedings. *Howard* v. *State,* 47 Ark. 431; *Lonoke County* v. *CarlLee,* 98 Ark. 345; *Road Improvement District* v. *Winkler,* 102 Ark. 553.

The statute now under consideration confers jurisdiction on the circuit court where the lands are situated in several counties, and we have upheld the statute in

that respect. *Grassy Slough Drainage District* v. *National Box Company,* 111 Ark. 149.

Decisions of courts of other States have been cited which might appear to be in conflict with the views we have expressed, but in those States there are constitutional provisions which require payment of compensation before the taking or damage of property for public use, but we have no such provision in our Constitution. Section 9, Article XII, of the Constitution which prohibits the appropriation of property to the use of any corporation until compensation "shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction" does not apply to anything except condemnation proceedings by private corporations. *Cribbs* v. *Benedict,* 64 Ark. 555; *Ritter* v. *Drainage District,* 78 Ark. 580.

We are, therefore, of the opinion that the statute under consideration is valid, and that appellant has had his day in court for the ascertainment of damages for the taking of his property, and that he is barred from prosecuting the present action. The circuit court was correct in so deciding, and the judgment is affirmed.

HART, J., (dissenting). Mr. Justice Wood and the writer, after giving this case that careful consideration which its importance demands, have reached the conclusion that the act is unconstitutional and void and therefore feel impelled to dissent. We are not unmindful that it is the duty of courts to hold an act constitutional where from the language used by the Legislature it is susceptible of that construction; but with equal propriety it may be said that the framers of the act must listen to the voice of the Constitution in passing it.

Article 2, section 22, of our Constitution reads as follows:

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

The parts of the statute which contravene this section of the Constitution are in section 7 and section 8 of the act. See Acts of 1909, p. 829. The part of section 7 referred to is as follows:

"The commissioners shall also assess all damages that will accrue to any land owner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such assessment of damages as to any tract of land, it shall be deemed a finding by them that no damage will be sustained."

Section 8 is as follows:

"Any property owner may accept the assessment of damages in his favor made by the commissioners; or acquiesce in their failure to assess damages in his favor, and shall be construed to have done so unless he gives to said commissioners within thirty days after the assessment is filed, notice in writing that he demands an assessment of his damages by a jury; in which event the commissioners shall institute in the circuit court of the proper county an action to condemn the lands that must be taken or damaged in the making of such improvement; which action shall be in accordance with the proceedings for condemnation of rights-of-way by railroad, telegraph and telephone companies, with the same right of paying into court a sum to be fixed by the circuit court or judge, and proceeding with the work before assessment by the jury. If there is more than one claimant to the lands, all claimants may be made parties defendant in such suit, and the fund paid into court, leaving the claimant to contest in that action their respective rights to the fund."

The determination of the question of just compensation is in its nature judicial. We think it is readily apparent from the part of section 7 of the act just quoted that it is in conflict with the section of the Constitution quoted above. It is true it provides that the com-

missioners shall assess all damages which will accrue to the land owner by reason of the proposed improvement including all the injuries to the land taken or damaged, still the concluding part of the sentence offends the Constitution. It provides that where the commissioners return no such assessment of damages as to any tract of land it shall be deemed a finding by them that no damage will be sustained. This is legislative dictation and contrary to the Constitution. The vice of the section can best be shown by illustration. For instance, suppose the commissioners for reasons of their own, or through negligence or mistake, fail to estimate the damages to a tract of land or a part thereof appropriated for the right-of-way of the drainage ditch, they would naturally make no return of any assessment of damages as to that tract of land. Under the language of the act their failure to return such assessment of damages is deemed a finding by them that no damage will be sustained. So without any action at all on the part of the commissioners, the owner has his lands taken away from him. This cannot be done. The effect of it would be to take the owner's land away from him by a mere presumption that the commissioners acted, when in fact they might or might not have done so. The question of whether they did act is one of fact and the right of property would not be before and higher than any constitutional sanction if it could be taken away by a mere presumption that the board had acted, when in fact it had not done so. The section provides that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor. Under that part of the statute in question it is readily apparent that this could be done. For whether the commissioners acted or did not act in making an assessment of damages, the statute provides that their failure to act shall be deemed a finding that no damages shall be sustained. Thus the owner's property might be taken without compensation being made him by the mere failure of the commissioners to act. We cannot subscribe to any such doctrine.

We also think that section 8 of the act offends in the same way. It provides that the land owner shall be construed to have acquiesced in the failure of the commissioners to assess damages to his land when it is taken or damaged by the drainage district if he fails to give notice in writing within 30 days that he demands an assessment of his damages by a jury. We do not think that the framers of the Constitution meant that the landowner's property could be taken away from him by mere nonaction on his part.

We therefore respectfully dissent.

WOOD, J., concurs in the dissent.

STATE OF ARKANSAS AND TAX COMMISSION *v.* MISSISSIPPI, ARKANSAS & WESTERN RAILWAY COMPANY.

Opinion delivered May 12, 1919.

1. TAXATION—TRAMROAD.—A tram or log road on private property and not operated as a public carrier, though extended for 12 miles, is not a "railroad" within Acts 1911, p. 233, and was not assessable as such by the Arkansas Tax Commission.
2. TAXATION—AUTHORITY OF TAX COMMISSION.—The only authority possessed by the Tax Commission is that conferred upon it in express terms or by necessary implication.
3. TAXATION—FINALITY OF ORDERS OF TAX COMMISSION.—The findings and orders of the State Tax Commission are final except when attacked for fraud or want of jurisdiction, no appeal being provided.
4. TAXATION—ILLEGAL ASSESSMENT—RELIEF.—Where the Tax Commission, in fixing the assesment of a railroad, has considered and included elements of value of private property not owned or used by the railroad, this action amounted to a taking without process, against which injunctive relief may be had.

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

John D. Arbuckle, Attorney General, and *Jas. R. Yerger,* Special Counsel, for appellant.

The assessment of 19 miles of railroad was proper and valid. 15 Am. St. Rep. 878. The railroad company

owned and operated 19 miles of railroad and it was assessable and taxable.

J. C. Gillison and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

The railroad company was only taxable on 7.37 miles of track, as that was all it owned. It did not build nor own the 12 odd miles. Kirby's Dig., § 6601. The extra 12 miles was owned by the lumber company, and the railroad company was not liable for the taxes on that portion of the track. It never owned nor claimed it. The lumber company owned the mill, the land and the timber before the railroad was built. The lumber company was the owner of the 12 miles of track, and it was assessable by the assessor of the county and not by the Tax Commission.

HUMPHREYS, J. Appellee instituted suit against the collector of taxes in Chicot County, in the Chicot Chancery Court, to enjoin the collector from collecting taxes on more than 7.37 miles of railroad track in that county, alleging that the Arkansas Tax Commission assessed it on a mileage basis of 19 miles, instead of 7.37 miles, of railroad track; and that the assessment was unjust, illegal and void.

The State of Arkansas and the Arkansas Tax Commission were made parties by request and filed an answer in which it was admitted that the assessment was based on a mileage of 19 miles; alleged that appellee owned and operated a railroad of that length in Chicot County; and denied that the assessment was unjust, illegal and void. By way of further defense, appellants pleaded that appellee applied to said Tax Commission for a reduction of the assessment, setting up that it owned only 7.37 miles of railroad in Chicot County, and not 19 miles; that the Tax Commission made an investigation and personal inspection, upon which it dismissed the petition; that the assessment based upon a mileage of 19 miles and dismissal of the petition requesting a reduction to a mileage

basis of 7.37 miles constituted a final adjudication of the assessment not reviewable by the chancery court.

A preliminary order was made by the chancery court, directing the collector to separate the assessment of the property and accept payment of taxes on 7.37 miles of track; and upon the execution of an injunction bond by appellee not to return the balance of the assessment as delinquent.

On November 7, 1918, the cause was submitted to the court upon the pleadings, an agreed statement of facts, and the depositions of Monroe Smith and F. L. Gregory, from which, among other findings, the court found that 7.37 miles of railroad, as assessed by the Tax Commission, belonged to appellee, and that the remaining 12 miles was built, equipped, used and operated exclusively as a tram or log road, by the Bliss-Cook Oak Company, and not owned or operated by appellee as a railroad; that the Bliss-Cook Oak Company had assessed the tram or log road with the county assessor in the manner required by law, and paid all taxes due thereon. A judgment was rendered, in accordance with the findings, exempting appellee from the payment of that portion of the assessment placed by the Tax Commission on appellee railroad in excess of 7.37 miles. From the judgment, an appeal has been duly prosecuted to this court, and the cause is before us for trial *de novo*.

The facts summarized are about as follows: The Chicot Lumber Company, an Illinois corporation, was organized sometime prior to 1902. It owned a large tract of timber land and a lumber mill at Blissville, also two miles of tramway with laterals used by it for hauling its timber to the mill. It conceived the idea of constructing a short railroad for the purpose of doing a railroad business in addition to hauling its own timber to the mill and from the mill to the Iron Mountain Railroad in order to get the proper railroad connections and a proper division of freight rates with the Missouri Pacific Railway Company. As a result, the appellee railroad was organized on January 10, 1902, and the Chicot Lumber

Company subscribed for 98 per cent. of the railroad stock, and bought $200,000 worth of bonds from said railway. Thereafter, the Chicot Lumber Company sold its property, including its railroad stocks and bonds, to A. T. Bliss. On April 19, 1905, the Bliss-Cook Oak Company was organized and purchased the lands, mill, railroad stocks and bonds from A. T. Bliss. Subsequently, F. L. Gregory became manager of the Bliss-Cook Oak Company, as well as the railroad company, took up laterals belonging to the Bliss-Cook Oak Company, and extended the railroad on the right-of-way survey, according to the charter of the railroad company, to a total length of 7.37 miles. As between the companies, the railroad, as thus extended, was treated as the property of the railroad company because it was laid on the right-of-way belonging to said railroad company, and listed by it for taxation with the Arkansas Tax Commission, in the manner provided by law. As thus constructed, the railway company was operated by the Bliss-Cook Oak Company, and, as it became necessary to reach its timber, at its own expense extended the road over its own land and land which it leased from other parties, building it out of about the same kind of rails and ties used in the construction of the first 7.37 miles. The extension made by the Bliss-Cook Oak Company in this manner was twelve miles. This additional extension of twelve miles was treated by the Bliss-Cook Oak Company as its private property and assessed with the county assessor. At the time the Arkansas Tax Commission assessed the 19 miles of railroad as belonging to appellee, the Bliss-Cook Oak Company was operating trains with appellee's equipment over the entire 19 miles of trackage for the purpose of hauling its own timber to the mill, and finished product from the mill to the Iron Mountain Railway. It also hauled cars over a portion of the line for a hickory mill near Blissville, owned by other parties, for which service, it received $8 per car. It did not run passenger trains or freight trains for general traffic. The only freight hauled consisted of logs and materials owned by the

Bliss-Cook Oak Company and from the independent hickory factory located near Blissville. It does not appear that the product hauled for the independent hickory mill was hauled over the twelve-mile extension. During the year 1912, the Interstate Commerce Commission decided that the railroad was not a common carrier but was an auxiliary to the mill owned by the Bliss-Cook Oak Company. Prior to that time, the railroad company had kept a perfect system of accounting, but thereafter kept no books. Appellee was notified to appear before the Arkansas Tax Commission on July 26th for the purpose of assessing the entire mileage of nineteen miles of railroad. By request, the hearing was adjourned until the 3rd day of August, on which date, the whole mileage of nineteen miles was assessed at $53,235. On September 5th following, appellee filed a petition to reduce the assessment from a mileage basis of nineteen to 7.37 miles and requested a personal investigation and inspection of the road. The inspection was made, and, on November 23, 1917, the reduction was refused and petition dismissed.

It is contended by appellants that the twelve-mile extension over the private property of the Bliss-Cook Oak Company, operated in connection with the 7.37 miles owned by appellee, constitutes a railroad within the meaning of Act 251, Acts 1911, and assessable under the provisions of that act by the Arkansas Tax Commission. Section 1 of the act just referred to authorizes the Arkansas Tax Commission to assess the property of railroads "chartered, organized or operated under the provisions of chapter 133 of Kirby's Digest." By reference to that chapter, it is quite apparent that the railroads to be assessed by the Arkansas Tax Commission are railroads operated as public carriers, and not tramways or log roads operated by individuals or private corporations for the sole purpose of hauling their timber to market. It is established by the undisputed evidence in this case that the twelve miles extension was owned by the Bliss-Cook Oak Company, and not by the Mississippi, Arkansas & Western Railway Company, and by the overwhelm-

ing weight of the evidence that the road, as operated by the Bliss-Cook Oak Company, was not operated as a public carrier. It does not appear that passengers and freight were hauled over the twelve-mile extension for pay. So far as the record discloses, the only use made of the twelve-mile extension was to haul logs and lumber belonging to the Bliss-Cook Oak Company. In other words, the twelve-mile extension was used wholly and entirely as a private tram or log road for the benefit of the latter corporation. For this reason, the assessment by the Arkansas Tax Commission of the twelve-mile tram or log road was without authority, an illegal exaction and void. The only authority possessed by the Arkansas Tax Commission is that conferred upon it by statute in express terms or by necessary implication. *Bank of Jonesboro* v. *Hampton,* 92 Ark. 492; *State* v. *Little,* 94 Ark. 217. There is nothing in the statute granting authority, directly or impliedly, to the Tax Commission to assess trams or log roads owned or used for private purposes by individuals or private corporations.

It is contended by appellants, however, that, because the Arkansas Tax Commission notified appellee and the Bliss-Cook Oak Company of the assessment, and because appellee filed a petition, in the form of a letter, to reduce the assessment and requested an inspection of the railroad property, and because the Tax Commission made a personal inspection, considered the matter and denied a reduction, it became a final adjudication of the Tax Commission, which cannot be reviewed by the chancery court. It is true, as suggested, that no appeal is provided from the Arkansas Tax Commission and that its findings and orders are final except when attacked for fraud or want of jurisdiction. *St. L., I. M. & S. R. Co.* v. *Worthen,* 52 Ark. 529. This case, however, comes clearly within the exception because the board has considered and included elements of value, in fixing the assessment, of private property not owned or used by appellee, or any one for it, as a public carrier. This would clearly amount to an illegal exaction or the taking of property without due

process of law. While the State is bound by the assessment made by its officers and assessing boards, unless otherwise provided by statute, individual taxpayers are entitled to injunctive relief against the enforcement of illegal exactions or assessments. *State Board of Equalization et al.* v. *People of the State of Illinois, ex rel. Catherine Goggin et al.*, 58 L. R. A. 513; *State* v. *Little*, 94 Ark. 217.

No error appearing, the decree of the chancellor is affirmed.

FREE v. MAXWELL.

Opinion delivered May 19, 1919.

1. APPEAL AND ERROR—REVIEW—PRESUMPTION.—Where the record does not affirmatively show to the contrary, it will be presumed on appeal that the trial court's findings are sustained by the evidence.
2. COURTS — APPEAL FROM PROBATE COURT — WAIVER OF AFFIDAVIT.—Failure to file an affidavit for appeal from the probate court was waived where the other party proceeds to the trial in the circuit court without objection on that account.
3. COSTS—BOND ON APPEAL.—Where a bond for costs was executed by appellant on appeal from the probate court to the circuit court, it was unnecessary to give an additional bond on appeal to the Supreme Court.
4. EXECUTORS AND ADMINISTRATORS — CLAIMS OF EXECUTOR.—Kirby's Digest, section 109, providing that the probate may allow any claim in favor of an administrator against the estate of his intestate, is broad enough to include equitable demands.
5. HUSBAND AND WIFE—CLAIMS AGAINST ESTATE OF DECEASED HUSBAND.—Under Acts 1915, No. 159, section 1, providing that a married woman may sue and be sued as a *feme sole*, a widow may sue her deceased husband's estate in a court of law.
6. SAME—CLAIMS AGAINST DECEASED HUSBAND'S ESTATE.—Under Acts 1915, No. 159, section 1, providing that a married woman may sue and be sued as a *feme sole*, a widow may sue her husband's estate for money advanced by her before the passage of the act, as the statute is one of procedure only.

7. WITNESSES—TRANSACTIONS WITH DECEASED.—Kirby's Digest, section 3093, relating to transactions with deceased persons, applies in all civil actions, in special as well as in ordinary proceedings, and prohibits a widow from testifying as to transactions with her deceased husband in a proceeding in the probate court against his estate, but does not prevent her from testifying as to her own means and as to the source from which she derived them.

8. EXECUTORS AND ADMINISTRATORS — CLAIM AGAINST ESTATE—EVIDENCE.—In a proceeding by a widow to establish a claim against her husband's estate, evidence *held* sufficient to warrant a finding that he borrowed money from her.

9. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.—A requested instruction on the weight of the evidence was properly refused.

Appeal from Polk Circuit Court; *J. S. Lake,* Judge; reversed.

Pole McPhetridge, for appellant; *I. L. Awtrey* and *W. N. Martin,* of counsel.

A wife cannot sue at law her husband or his estate. She can only sue in equity unless Act No. 159, Acts 1915, be construed so as to confer the power to sue at law. Acts 1915, p. 624, No. 159, p. 624; 30 Ark. 1. While this act enlarges the rights of married women to sue and be sued, it has no reference to the rules of production of evidence. Such statutes are strictly construed. Lewis' Sutherland on Stat. Const., Vol. 2 (2 ed.), pp. 1056-8, § § 572-3. Jurisdiction cannot be created or taken away by implication except where the implication is necessary from the language and purpose of the statute. *Ib.*, § § 67-8, pp. 1050-1. Under our laws a wife cannot testify for or against her husband as to transactions and verbal contracts with her deceased husband. Kirby's Digest, § § 3092, 3095; 84 Ark. 355. The court erred in its instructions, and in allowing the wife to testify as to transactions with her deceased husband and the judgment should be reversed. This cause could not be transferred to equity and the claim of appellee should be dismissed. 70 Ark 8.

Prickett & Pipkin, for appellee.

No bond for costs was filed on her appeal and it should be dismissed. Appellant was not a party below and she has no right to appeal. Act 327, Acts 1909. Kirby's Digest, § 109, was complied with by appellee.

In ordinary cases at law it is true the wife could not testify, but here this is a special proceeding. 18 Cyc. 526, IV b, and cases cited. And there is ample testimony besides the wife's to prove appellee's claim. The appeal should be dismissed and case dismissed or judgment affirmed here.

HUMPHREYS, J. Appellee, widow and administratrix of the estate of Henry Maxwell, deceased, presented a claim, properly authenticated, for $500 and interest against the estate for money loaned her husband in his lifetime. She allowed the claim in her capacity as administratrix. It was then filed with the probate clerk of Polk County. The probate judge made the following indorsement on the claim: "Allowed as 4th class. 6-10-'18." A judgment, which bears no date of making or entry, was rendered by the probate court, allowing said claim as a 4th class claim. On the 9th day of October, 1918, appellant, mother and only heir of Henry Maxwell, deceased, filed a bond for costs, prayed and obtained an appeal from the judgment rendered by the probate court at its October term, 1918, pertaining to the estate of Henry Maxwell, wherein Laura Maxwell was administratrix. Before the cause was called for trial in the circuit court, appellee filed a motion to dismiss the appeal because the record did not identify the appeal as an appeal from the order of allowance made on the 10th day of June, 1918. The motion was overruled and appellee excepted. Appellant then interposed a demurrer to the claim of appellee, challenging her right to sue her deceased husband's estate, and the jurisdiction of the probate court, or the circuit court on appeal, to adjudicate the matter. The court overruled the demurrer and appellant excepted. The exception was noted of record and

saved in appellant's motion for a new trial. The cause proceeded to a hearing *de novo* in the circuit court and was submitted to a jury on the evidence adduced and instructions given by the court, upon which a verdict was returned and judgment rendered in favor of appellee for $600. From the verdict and judgment, an appeal has been duly prosecuted to this court.

A Mr. Farless, brother of appellee, testified that he resided with Henry and Laura Maxwell in 1914, at which time appellee and her husband were teaching school; that appellee was receiving $55 a month, and turned her school warrants over to her husband for the purpose of paying their debts; that Henry Maxwell told him afterwards that he owed his wife money that she had advanced to him in school warrants and that it was his intention to replace the money; that he heard Henry say nothing about the matter before he died; that he died about the 24th day of May, 1918. On cross-examination, he modified his evidence by saying that Henry paid the money on his debts.

Roy Farless, appellee's nephew, testified that he resided with Mr. and Mrs. Maxwell during the time they were teaching a nine-months' school, beginning in 1914; that Mrs. Maxwell received $55 a month for teaching and turned nine warrants, in his presence, over to her husband, Henry Maxwell; that he sold a part of his land for $800 and deposited the money in the bank in their joint names; that, about ten months before his death, Henry Maxwell told him that he intended to live on the money and that he intended to sell the balance of the land and pay Mrs. Maxwell's school money back; that he didn't know whether Mrs. Maxwell got the money deposited in the bank after her husband died.

Appellee testified, over the objection and exception of appellant, that she began teaching school on the 31st day of August, 1914, and continued for nine months at a salary of $55 per month and turned her earnings, from month to month, over to her husband, together with some money she had when they married, the total amount being

$500, for the purpose of paying his indebtedness; that he agreed at the time to pay the money back to her; that he afterwards sold a part of his land and paid some indebtedness he owed, and deposited something like $600 in the bank to their joint credit; that he told her they would live on that money, and, when he sold the other land, he would repay the school money she had advanced to him; that he never repaid it prior to his death. Appellant's exception was noted of record and saved in her motion for a new trial.

It is suggested by appellee that the judgment should be affirmed for the following reasons: First, that the order granting the appeal identifies it as an appeal from a judgment rendered at the July, 1918, term of court, and not from the allowance made on the 10th day of June, 1918; second, that the record fails to show that an affidavit for appeal was filed before the appeal was granted by the probate court; third, that no bond for costs was filed in the circuit court before the appeal to this court was granted.

(1) It does not appear that a judgment was rendered by the court allowing appellee's claim on June 10, 1918, as suggested by appellee. The probate judge made the following indorsement on the claim as of that date: "Allowed as fourth class." The judgment allowing the claim incorporated in the transcript bears no date. The order granting the appeal refers to a judgment rendered at the July, 1918, term of court in the matter of the estate of Henry Maxwell, wherein Laura Maxwell was administratrix. In overruling the motion to dismiss the appeal, the court found and recited in its judgment that appellant had appealed as the sole heir of the estate of Henry Maxwell, deceased, from a judgment and order of the probate court of Polk County, allowing the claim of appellee, Laura Maxwell, in the sum of $622.50, against the estate of the said Henry Maxwell, deceased, which claim was, by the probate court, placed in the fourth class. It is impossible for us to know upon what evidence the court made this finding. Where the record does not affirma-

tively show that the findings of the court are contrary to it, or negatived in it, this court must presume that the findings are sustained by the evidence.

(2) If no affidavit for appeal was filed before the appeal was granted by the probate court, appellee waived the filing thereof by proceeding to trial in the circuit court without objection on that account. *Ex parte Morton,* 69 Ark. 48; *Stricklin* v. *Galloway,* 99 Ark. 56; *Wulff* v. *Davis,* 108 Ark. 291.

(3) According to the recital in the matter of the probate court granting an appeal, appellant gave a bond for costs, required by Act 327, Acts 1909. This bond bound appellant and her sureties for all costs that might accrue, either in the Polk Circuit Court or the Supreme Court of the State. It was therefore unnecessary to give an additional bond as a prerequisite to granting an appeal to the Supreme Court by the circuit court. Appellee has called our attention to the latter clause of section 1 of said act, which is as follows: "And any such heir, legatee, devisee or judgment creditor of an estate may likewise upon executing bond for costs prosecute an appeal to the Supreme Court from the circuit court." The heirs, legatees, devisees or judgment creditors referred to in this clause have reference to those who had not become parties and filed the necessary bond before the cause reached the circuit court on appeal, and not to those who had already become parties and filed the necessary bond before the appeal was granted by the probate court. Appellant insists that the trial court erred in holding that appellee had capacity to sue her deceased husband's estate in a court of law. Section 109 of Kirby's Digest provides for a special proceeding by which the probate court may allow any claim in favor of an administrator against the estate of his intestate. The statute is broad enough to include equitable demands. The language is that any demand may be established against the intestate by the administrator or executor. Even if this were not so, section 1, Act 159, Session Laws of 1915, provides that a married woman may sue and be sued as a *femme sole.*

In construing the statute, this court said in *Fitzpatrick* v. *Owens,* 124 Ark. 167, that the lawmakers "evidently meant to confer upon her (a married woman) the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried." This court said in *Holland* v. *Bond,* 125 Ark. 526, in reference to Act 159, Acts 1915, that the act "in the broadest terms enables a married woman to sue and be sued." The suggestion that the money was advanced by appellee to her husband before the passage of this act can have no effect as to her right to sue. In that respect, the statute is one of procedure, and no one has a vested right in methods of procedure.

Our construction of section 109 of Kirby's Digest, just announced, renders it unnecessary to discuss appellant's further contention that the probate court had no jurisdiction to entertain and allow the claim.

Again, appellant insists that the court erred in admitting the testimony of Laura O. Maxwell pertaining to a transaction between herself and her husband in his lifetime. Appellee, as a claimant, was not entitled to testify in reference to transactions between herself and her intestate husband in an action against herself, as administratrix. That part of appellee's evidence showing that she had money of her own when she married and that she taught school for nine months at $55 a month and received warrants in payment of her services was admissible. *Nunnally* v. *Becker,* 52 Ark. 550. That part of her evidence touching upon the transaction between herself and her husband in his lifetime was inadmissible. Kirby's Digest, section 3093; *Nunnally* v. *Becker, supra.* The statutory inhibition against the evidence applies in all civil actions, special as well as ordinary proceedings. Without considering her own evidence tending to show that she loaned her husband $500 and that he owed her that amount when he died, it can not be said that her claim was fully established by the undisputed evidence. Therefore the court committed prejudicial error in admitting that part of her evidence over the objection of

appellant. Appellee let her husband have the money in 1914-15, took no note or other evidentiary of indebtedness, received no interest and made no demand for its repayment. Her brother testified, in his direct testimony, that the money was used to pay their debts. Her brother and nephew both testified that, when her husband sold a part of the land, he deposited the money to their joint credit in the bank. The jury could have drawn the inference from this testimony that appellee permitted her husband to so use her money that it became his own; or that, if borrowed, he repaid it.

Appellant requested a peremptory instruction upon the theory that, omitting the evidence of appellee, the evidence was insufficient to support the verdict. The evidence of appellee's brother and nephew tended to show that appellee loaned her husband $495 in monthly amounts of $55 per month, beginning in September, 1914, and that he made acknowledgment of the indebtedness ten months before his death, and expressed the intention of repaying it as soon as he sold the balance of his real estate. Upon the record made, the jury might have drawn the inference from the legal evidence that Henry Maxwell owed his wife $495 and interest at the time he died. For the reasons given, the court did not err in refusing to give the peremptory instruction requested by appellant.

Lastly, appellant contends that the court erred in refusing to give her requested instruction No. 2. The court properly refused the instruction because it charged the jury on the weight of the evidence.

For the error indicated, the judgment is reversed and the cause remanded for a new trial, unless, upon remand, the court should find that the appeal was not taken from a judgment rendered at the July, 1918, term of the probate court, allowing the claim, in which event, the court will sustain the motion to dismiss the appeal.

RHODES *v.* BARTON.

Opinion delivered May 19, 1919.

HIGHWAYS—JURISDICTION OF COUNTY COURT.—Act No. 55 of 1919, creating Road Improvement District No. 9 in Crittenden County, *held* not to infringe upon the jurisdiction of the county court over county roads, since it provides that any changes in the public roads made by the commissioners must be approved by the county court.

Appeal from Crittenden Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

Harry Spears, for appellant.

The act is unconstitutional and void because it delegated the right to the commissioners to select the roads to be improved. It usurps the jurisdiction of the county court, which is exclusive. 118 Ark. 119; 120 *Id.* 44. It was error to sustain the demurrer. The decree should be reversed and a decree entered here enjoining appellees as prayed.

A. B. Shafer and S. V. Neelley, for appellees.

Article 7, section 28, Constitution, is not self-executing. The Legislature has power to prescribe how roads shall be built and improved. 92 Ark. 93; 122 S. W. 241; 117 *Id.* 544; 89 Ark. 513; 118 *Id.* 119; 176 S. W. 676.

The cases cited by appellant are not in point.

The Legislature can designate a road to be improved or delegate it to commissioners as an agency of the State. 125 Ark. 325; 188 S. W. 822; 120 Ark. 277; 179 S. W. 486.

Act No. 55, Acts 1919, expressly guards the exclusive jurisdiction of the county court and is not unconstitutional. The plans, etc., are to be approved by the county court and when the road is completed it is to still exist and be preserved in repair by the county court. The commissioners are merely agents of the county court to improve the road and keep it in repair. On the whole case the decree is right and should be affirmed.

The provisions of the act are in accordance with Acts 1911, p. 365, amending Kirby's Digest, section 7328. This act was held constitutional in 203 S. W. 260.

HUMPHREYS, J. Appellant, an owner of lands in Road Improvement District No. 9 in Crittenden County, created by Act No. 55, Acts 1919, of the General Assembly of Arkansas, instituted suit in the Crittenden Chancery Court against appellees, commissioners of said district, to enjoin them from taking any steps under said act. It was alleged in the complaint that the act empowered appellees to select the roads in the district which are to be improved, which delegation of authority rendered the act void because it interfered with the constitutional jurisdiction of the county court.

Appellees filed a general demurrer to the complaint, which was sustained by the court.

Appellant declined to plead further and the complaint was dismissed for want of equity. From the decree of dismissal, an appeal has been prosecuted to this court.

It is insisted by appellant that the act in question is void because the Legislature delegated the right to the commissioners to select the roads to be improved within said district. The authority challenged as unconstitutional is conferred in section 8 of said act on the commissioners "to determine what roads within their respective districts it is most necessary to improve at the present time, and when they have determined what roads they deem it best to improve, they shall make plans for the improvement thereof, and when their plans are completed they will file the same, with a plat showing the outlines of the district and the course of the roads which they contemplate improving, and accompanied by specifications giving the details of the work and an estimate of the costs thereof with the county clerk of Crittenden County. Said plans shall also be submitted to the State Highway Department, and if approved by it, shall be deemed a Federal and State Aid Highway project, and the commissioners of each of said districts shall lay the plans before the county court of Crittenden County, and if said county court approves the same, they shall be the plans and specifications of the district, and the approval of said

plans shall operate as the laying out as a public highway of any new road which may appear upon said plans, * * *" There is nothing in the section just quoted which indicates the usurpation of the exclusive, original jurisdiction of the county court over the public roads of the county. The act requires that the selection of the roads by the commissioners and their plans for the improvement thereof must be submitted to, and approved by, the county court before they can become the improvements of the district. The statute does not substitute a tribunal for the county court and confer upon it the exclusive, original jurisdiction conferred upon the county court by the Constitution of the State. The selection of the roads and the plans for improving them are in the nature of suggestions and in no sense restrictions upon the judgment or discretion of the county court. In upholding the constitutionality of a statute similar to the one in question, in the recent case of *Sallee* v. *Dalton,* 138 Ark. 549, 213 S. W. 762, this court interpreted the statute as invoking, and not invading, the jurisdiction of the county court. The court took occasion to say that the effect of such a statute "was not to compel the county court to accept the judgment of the Board of Commissioners in the selection of routes;" also, that its effect was "not absolutely to impose the will of the commissioners upon the county court in the changing of roads or the establishment of new roads." The identical question involved in the instant case was adjudicated in the case of *Sallee* v. *Dalton, supra,* and that case rules this.

The constitutionality of the act in question has not been assailed on any other ground than the one assigned and discussed in this opinion, so we have refrained from discussing the validity of its other provisions.

The decree is affirmed.

Judge SMITH did not participate, being disqualified.

C. H. ROBINSON COMPANY v. HUDGINS PRODUCE COMPANY.

Opinion delivered May 19, 1919.

1. SALES—ACCEPTANCE.—Where a produce company bought a carload of apples from defendant, not knowing that defendant was the agent of the owner until the car arrived, and it accepted the shipment only after being notified by an agent of the United States Government that it must receive the apples in order to conserve food during the war with Germany, the produce company is entitled to treat the contract as one between the agent and itself, and to make any defense against the intervening owner which it could have made against the agent.
2. EVIDENCE—EXPERT TESTIMONY.—A witness who has handled apples for over 27 years is entitled to give his opinion as to when certain apples were frozen and that it takes the decay in frozen apples some time to show.
3. SALES—DAMAGES—QUESTION FOR JURY.—In an action by a buyer of apples for damages, the question whether or not the apples were frozen before they were loaded into the car for shipment *held* for the jury.
4. SALES—MEASURE OF DAMAGES.—In an action by a consignee of apples received in an unmarketable condition, the correct measure of the buyer's damages is the difference between the contract price and the amount they brought when sold for the best price obtainable.
5. APPEAL AND ERROR—CONTINUANCE—DISCRETION OF COURT.—The granting or refusing of a continuance is within the discretion of the trial court, and will not be reviewed on appeal, save for for abuse of discretion.
6. CONTINUANCE — ABUSE OF DISCRETION.—Where the witness for whose absence a continuance was asked lived beyond the court's jurisdiction so that it would have been necessary to take their deposition, and the motion for continuance, read as testimony, set forth their testimony fully, the court did not abuse its discretion in refusing a continuance.
7. SAME—ABSENCE OF COUNSEL.—The court did not abuse its discretion in refusing a continuance on account of sickness of chief counsel where the case was thoroughly prepared for trial by other counsel.
8. TRIAL—INSTRUCTIONS—REPETITION.—It was not error to refuse requested instructions covered by an instruction given.

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

STATEMENT OF FACTS.

This was a suit in attachment brought by the Hudgins Produce Company, a domestic corporation, against C. H. Robinson Company, a non-resident corporation, to recover the sum of $526.40 damages alleged to have been occasioned by the spoiled condition of a car of apples which the plaintiff had purchased from the defendant.

The defendant, C. H. Robinson Company, filed an answer denying the material allegations of the complaint and alleged that the plaintiff, Hudgins Produce Company, had purchased the apples in question through it as a broker from the Wenatchee Produce Company, a corporation domiciled at Wenatchee, Washington.

The Wenatchee Produce Company intervened claiming the proceeds of the car of apples except the sum of $30 brokerage due the C. H. Robinson Company.

The facts are as follows: The C. H. Robinson Company is a non-resident corporation doing a brokerage business with a branch office at Kansas City, Missouri. Wenatchee Produce Company is a corporation domiciled at Wenatchee, Washington, and is engaged in the business of selling apples by carload lots. The Hudgins Produce Company is a domestic corporation engaged in selling apples and other produce at Texarkana, Arkansas. On February 21, 1918, C. H. Robinson Company, from its office at Kansas City, Missouri, wired the Hudgins Produce Company at Texarkana, Arkansas, its offer of a car of apples. The Hudgins Produce Company wired its acceptance of the offer. On the 13th day of February, 1918, the Wenatchee Produce Company loaded a car of apples at Wenatchee, Washington, and consigned same to itself at Kansas City, Missouri. On the 23rd day of February, 1918, the C. H. Robinson Company, by an agreement with the Wenatchee Produce Company, changed the destination of this car of apples from Kansas City, Missouri, to Texarkana, Arkansas, in fulfillment of its contract with the Hudgins Produce Company. An inspection of the car of apples was allowed. On the same day, the C. H. Robinson Company wrote from its office at Kansas City, Mis-

souri, to the Hudgins Produce Company at Texarkana, Arkansas, notifying the latter that it had diverted the car of apples to Texarkana, Arkansas, and had drawn a draft on the Hudgins Produce Company for $526.40, the price of the car of apples. The car of apples was consigned to the shipper's order at Texarkana, Arkansas, with directions to notify the Hudgins Produce Company. The draft with the bill of lading attached was sent to the latter company. The car of apples arrived at Texarkana on the 11th day of March, 1918. An inspection was made by the Hudgins Produce Company and the apples were found to be in bad condition.

Several witnesses testified that they examined the apples and that most of them were rotten on the inside; that they were not in a merchantable condition; that most of them appeared sound on the outside but were rotten on the inside and were not fit for sale in the usual way.

The Hudgins Produce Company first refused to receive them on account of their damaged condition. They were notified by the food administrator of the county that under the rules and regulations of the United States Government during the war with Germany, that they would have to accept the apples in order to conserve the food value of the shipment. The Hudgins Produce Company then paid the freight and expense bill amounting to $408.13 and also paid the draft for the purchase money drawn by the C. H. Robinson Company. The draft for the purchase price of the apples was paid on March 16, 1918. The Hudgins Produce Company bought the apples from the C. H. Robinson Company and did not know that the Wenatchee Produce Company had any claim to them until after the apples had arrived at Texarkana.

Evidence was adduced by the Hudgins Produce Company tending to show that the damaged condition of the apples was due to the fact that they had been frozen either before they were loaded into the car, or after they were loaded into the car, but before the car of apples was diverted to Texarkana, Arkansas. The apples were loaded on board the car on February 13, 1918, and the car

was diverted to Texarkana, Arkansas, on February 23, 1918. During this interval the weather was extremely cold. The Hudgins Produce Company sold the car of apples to the best advantage possible and the amount received lacked $80 of paying the freight charges.

On the part of the defendant and intervener, it was shown that the apples were in good condition when loaded in the car at Wenatchee, Washington, and were also in good condition when the car was diverted from Kansas City, Missouri, to Texarkana, Arkansas. Other facts will be stated in the opinion.

The jury returned a verdict for the plaintiff, Hudgins Produce Company, against the defendant, C. H. Robinson Company, in the sum of $526.40 and found against the interplea of the Wenatchee Produce Company.

The case is here on appeal.

Will Steel and *H. M. Barney,* for appellants.

1. It was error to give plaintiff's instructions. The measure of damages is not properly stated. 35 Cyc. 633; 117 Ark. 442; 79 *Id.* 338; 94 *Id.* 319; 113 *Id.* 170.

2. There were errors in refusing defendant's and intervener's instructions. 78 Ark. 330; 70 *Id.* 65; 76 *Id.* 179; 74 *Id.* 144; 89 *Id.* 108; 70 *Id.* 61; 50 *Id.* 31; 110 *Id.* 265; 2 Mechem on Sales, par. 1322; 118 Ark. 17. See also 14 Ark. 427; 21 *Id.* 499; 22 *Id.* 580.

3. It was error to refuse the continuance. The court abused its discretion on the showing made. On the whole record appellee has no cause of action. See cases *supra.*

Webber & Webber and *W. H. Arnold,* for appellee.

1. There are no errors in the instructions given, and those refused were not the law. The law of this case is lucidly stated in 53 Ark. 159; 22 *Id.* 454. See also Benjamin on Sales, § 894; *Ib.,* § § 899-901; 9 Howard 226; 12 Ark. 699; 81 Ark. 560; 22 *Id.* 454; 53 *Id.* 155; 115 U. S. 363; 13 L. R. A. 224; 95 Ark. 488; 94 *Id.* 318.

2. On the question of damages, see 117 Ark. 445.

3. As to the expense bill, see 79 Ark. 338.

HART, J., (after stating the facts). The first assignment of error is that the judgment should be reversed because the court gave instruction No. 1, which is as follows:

'If you find from the evidence that Wenatchee Produce Company loaded the car of apples in controversy at Cashmere, Washington, and took bill of lading subject to their own order and that the car was shipped February 13, 1918, to Kansas City, and if you further find that Charles H. Robinson Company accepted an order from Hudgins Produce Company for a car of apples on February 23rd, and that under some agreement between Wenatchee Produce Company and said Robinson Company the said car was diverted from its route by the order of Chas. H. Robinson & Company and shipped it to said Hudgins Produce Company and sold it to them; and that said Hudgins Produce Company took and paid for said car and that said shippers, Wenatchee Produce Company, intended that said Robinson should take and sell the same, then you are instructed that said Wenatchee Produce Company cannot recover on on their interplea."

There was no error in giving this instruction. The undisputed evidence shows that the Hudgins Produce Company bought the car of apples from the C. H. Robinson Company and did not know that the Wenatchee Produce Company had any claim to the apples until after the car had arrived at Texarkana and the plaintiff had been notified by an agent of the United States Government that it must receive the car of apples in order to conserve food values during the war with Germany.

The present suit was a suit in attachment by the Hudgins Produce Company against C. H. Robinson Company, but the Wenatchee Produce Company was allowed to intervene and claim the proceeds of the car of apples. This, in effect, amounted to the institution of a suit by the Wenatchee Produce Company against the Hudgins Produce Company for the price of a car of apples. The law is that where an undisclosed principal sues on a contract made by his agent in the latter's own name with the de-

fendant, who had no knowledge of the agency but supposed that the agent dealt for himself, the suit is subject to any defense by the defendant against the agent before he had notice of the principal's rights. *Frazier* v. *Poindexter,* 78 Ark. 241; *Quinn* v. *Sewell,* 50 Ark. 380; and *Beatrice Creamery Co.* v. *Garner,* 119 Ark. 558. The doctrine rests upon the ground that the principal who has permitted an agent to deal with his goods as his own must not only take the contract as the agent made it, but is virtually estopped from alleging that the agent is not the real plaintiff in his (the principal's) suit.

It is next insisted that the court erred in giving instruction No. 3, which reads as follows:

"If you find from the evidence that the apples were in damaged condition when received by Hudgins Produce Company and that such damaged condition existed before the apples were loaded in the car for shipment, or that they were in said condition before the order for the car was accepted by Chas. H. Robinson Company and the car diverted for shipment to Hudgins Produce Company, then you are instructed that plaintiff is entitled to recover from said Chas. H. Robinson Company the damages sustained, if any, and not against the railway company which issued the bill of lading to Wenatchee Produce Company; and you are further instructed that plaintiff had the right to take said car without waiving its claim for damages against said defendant, should you find that the apples or a part of them were not merchantable or reasonably fit for the purpose for which they were purchased."

It is claimed that it was error to give this instruction because it submits to the jury the question as to whether or not the car of apples was in a damaged condition before the apples were loaded in the car for shipment. It is insisted that the undisputed evidence shows that the apples were in good condition when they were loaded in the car for shipment.

It is true the evidence for the defendant and intervener shows that when the car was loaded it was inspected

and the apples were found to be in good condition. The jury might have found, however, from the evidence introduced by the plaintiff, that the apples were in a damaged condition when loaded in the car for shipment. On this point A. F. Elder testified that he was familiar with the handling of shipments of apples by wholesale in the winter time and with the storage of apples, gained by an experience of twenty-seven years. He examined the car of apples in question after it arrived at Texarkana, and found upon inspection that the apples showed decay. He found that the apples in the center of the car showed more decay than did those on the sides of the car. He said that this indicated that the apples were loaded in the car in that condition and that they had been exposed to extreme heat—heated in piles; or had been frozen before packing. That while the apples from the peeling appeared perfectly good, when you opened them up they were bad inside. His opinion was that the decay had set up in the apples three or four weeks before he examined them; that it takes the decay in apples some time to show after they have been frozen. In response to a question on cross-examination he stated that it would be hard to determine the exact time it would take; that it would take real expert knowledge beyond his knowledge to tell that. Because of this answer counsel insist that the witness was not an expert and that his testimony should not be taken to contradict that of the defendants. We do not agree with counsel in the contention.

As we have already pointed out he had gained his knowledge by an experience in handling apples extending over twenty-seven years. He testified in detail about the matter, and from his testimony the court might have found that the apples had been frozen before they were loaded into the car. Although this was a month prior to the time that he had examined the apples, the jury might have found that, although frozen before they had been loaded, the apples did not show their decay at that time. From the testimony of other witnesses the jury might have found that the apples were frozen on the way south

after they had been loaded into the car. It was shown that the weather was extremely cold for ten days after their shipment. It was about one month from the time they were shipped until they arrived in Texarkana. Therefore we do not think that the court erred in giving this instruction.

It is next insisted that the court erred in giving instruction No. 4, which reads as follows:

"If you find for the plaintiff, the measure of damages will be the amount you find from the evidence that plaintiff paid the railway company for freight on delivery of the apples and the amount paid on the draft drawn by Robinson & Company, less whatever amount you find from the evidence that plaintiff realized in the sale of the apples. Your verdict herein should not exceed the amount sued for, $526.40, with interest from March 16, 1918, thereon at the rate of six per cent. per annum."

It is contended that the court should have told the jury that the measure of the plaintiff's damages was the difference between the contract price and the market price of the apples at the time they were delivered at Texarkana. Counsel would have been correct in this contention, provided there had been a market price for them in their condition when received there. The undisputed testimony shows that nearly all of the whole car of apples was in a damaged condition and that it was necessary to sell them at once. All the witnesses said that they were not merchantable apples. The plaintiff sold them for the best price obtainable and the instruction was correct under the evidence in this case. *Meredith* v. *Matthews,* 117 Ark. 442.

It is also insisted that the court erred in not granting the motion for a continuance. It is well settled in this State that the granting or refusing a continuance is a matter in the sound legal discretion of the court below and will not be reviewed on appeal save for an abuse of discretion to the prejudice of the party appealing.

Tested by this well established rule there was no error in refusing to grant the motion for a continuance,

The case had been continued for one term of the court and the witnesses embraced in the motion all lived beyond the jurisdiction of the court so that it would have been necessary to take their depositions. The motion for a continuance was read as testimony to the jury and the testimony of the witnesses appeared in it as fully as it could have been taken in depositions.

It is also insisted that the motion should have been granted because the chief counsel for the defendant and intervener was sick at the time it was necessary to prepare the case for trial and the local counsel was not familiar enough with the facts to properly prepare the case for trial. The record affirmatively shows that the case was as thoroughly prepared for trial as could have been done by any other attorneys.

Therefore there was no error in refusing to grant the motion for a continuance. Counsel for the defendant and intervener requested the court to give many instructions and now assign as error the action of the court in refusing to give them. We do not deem it necessary to discuss them separately. The court fully and fairly submitted the disputed issues of fact in the case to the jury and it has been uniformly held that it is not necessary to repeat instructions to the jury.

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

BLANTON v. FORREST CITY MANUFACTURING COMPANY.

Opinion delivered May 19, 1919.

1. CONTRACTS—MUTUALITY.—There must be mutuality in a contract to make it enforceable.
2. CONTRACTS—ACCEPTANCE OF OFFER.—An offer to sell land for a stipulated price to any person who might desire to purchase same for manufacturing purposes, without any consideration, was not binding until some expense, loss or legal obligation thereunder has been incurred.
3. SUBSCRIPTION—ACCEPTANCE.—The acceptance of a subscription is ineffectual unless made within the subscriber's lifetime.

4. EXECUTORS AND ADMINISTRATORS — CONTRACTS — AUTHORITY OF EXECUTOR. — An executrix cannot create a new liability where none existed before, by binding the estate upon an unaccepted subscription which was ineffectual because not accepted during the subscriber's lifetime.
5. JUDGMENT—COLLATERAL ATTACK.—In determining the validity of a judgment upon collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and subject-matter and those *quasi* jurisdictional facts without allegation of which the court cannot properly proceed and without proof of which a decree should not be made.
6. JUDGMENT—VALIDITY.—A judgment of the probate court ordering specific performance of deceased's subscription agreement to convey land, under Kirby's Digest, section 213, was void where it appeared upon the face of the judgment reciting the subscription that the subscription had never been accepted and was therefore unenforceable.

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

STATEMENT OF FACTS.

Annie Mabel Blanton and John Cecil Blanton brought a suit in equity against Forrest City Manufacturing Company, Forrest City Compress Company and the City of Forrest City to have their interest declared in certain lands in the possession of the Forrest City Compress Company and for an accounting of the rents and profits thereof. The material facts are as follows:

Annie Mabel Blanton and John C. Blanton are the children of Jas. P. Blanton, deceased, who in his lifetime owned the lands in controversy. Jas. P. Blanton made a will in which his wife, Mary E. Blanton, and his two children, Annie Mabel Blanton and John Cecil Blanton are the principal beneficiaries. After directing that all of his just debts and funeral expenses be paid, and giving a bequest of $5 each to his brother and sister, the testator devised to his wife one-half of all the residue of his estate, and to his son, John Cecil Blanton, and to his daughter, Annie Mabel Blanton, each one-fourth of the residue of his estate. By a subsequent clause of the will the testator provided that his wife should have the use

of and control portions of his estate bequeathed to his son and daughter until each should respectively become of age, at which time his wife is directed to pay each of them his or her portion of the estate. The will then directs that the homestead located in Forrest City, Arkansas, should be included as a part of the one-half devised to his wife. The testator appointed his wife as the executrix of his will. On the 8th day of February, 1904, Jas. P. Blanton and Mary E. Blanton, his wife, signed the following instrument in writing:

"J. P. Blanton and wife to W. Gorman, Mayor, *et al.*

"Agreement and option.

"Know all men by these presents, that we, J. P. Blanton and Mary E. Blanton, his wife, of Forrest City, St. Francis County, Arkansas, in order to aid in the locating of industries at said place, do hereby agree with Walter Gorman, as mayor of the incorporated town of Forrest City, and his successor and successors in said office, and such third or other persons as may desire locations hereunder, as follows:

"Beginning at a stake on the half-section line running north and south dividing the northeast quarter and the northwest quarter of section thirty-three (33), township five (5) north, range three (3) east, at a point where said line intersects with the south line of the present right of way of the Choctaw, Oklahoma & Gulf Railway, thence running south 70 degrees west with the said south line of said railroad right-of-way, 2,692 feet to a stake; thence running south 12 degrees and 45 minutes east, 255 feet and 5 inches to a stake; thence north 89 degrees and 45 minutes east 2,557 feet to a stake; thence running north on said half-section line to the place of beginning, containing in all forty-four and fifty-seven hundredths (44.57) acres of land.

"And it is expected that portions of said land will from time to time be wanted by parties desiring to establish manufacturing plants or other industries.

"Therefore, the first parties hereto agree, to accept one hundred dollars per acre for any portion of said land

and to convey the same by good and sufficient warranty deed, upon payment of the purchase money, which shall immediately be due, and any person or persons whose purpose and selection and extent of site has the approval of the mayor and common council of the incorporated town of Forrest City, shall be taken and considered a party to this agreement and stand in the relation of a purchaser by title bond from the first parties thereto, and have immediate right of possession, in advance of execution and delivery of deed, provided the right to select locations thereunder shall be limited to such as are approved by said mayor and common council, within three years from this date.

"Witness the hands of the first and second parties hereto, this 8th day of February, 1904."

Jas. P. Blanton departed this life on the 10th day of May, 1904, and his will was duly admitted to probate, his wife, Mary E. Blanton, being appointed executrix thereof. Subsequent to the death of Jas. P. Blanton, the town of Forrest City by its mayor and common council passed a resolution accepting the donation of the land described in the written agreement above set forth. The resolution authorized the Merchants & Planters Compress Company to purchase ten acres of said tract of land and the company paid to Mrs. Mary E. Blanton therefor the sum of $1,000 and she executed a deed for the same to the company. This was an adequate price for the land at that time.

The Merchants & Planters Compress Company, a corporation doing business at Forrest City, Arkansas, presented to the probate court its petition reciting the above facts and asking for the specific performance of the contract of the ten acres of land, being a part of the land described in the written instrument above set forth. The petition was presented to the probate court at its July term, 1907, and an order was entered of record reciting substantially the facts above set forth and authorizing and directing Mary E. Blanton, as executrix of the estate of Jas. P. Blanton, deceased, to execute to the Mer-

chants & Planters Compress Company a deed conveying to it the ten acres of land in controversy.

Pursuant to this order of the probate court, on the 26th day of July, 1907, Mary E. Blanton executed to said Merchants & Planters Compress Company a deed to said lands. The Forrest City Compress Company is a corporation and is the successor of the Merchants & Planters Compress Company. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendants and dismissed the complaint of the plaintiffs for want of equity. The plaintiffs have appealed.

C. W. Norton, for appellants.

1. The proceedings were ineffectual to divest plaintiffs' title or confer any upon defendants for three distinct reasons:

(1) The so-called option or agreement to sell, was a mere offer to sell, which was not accepted before Mr. Blanton's death, and which did not survive his death.

(2) If it did survive it was not accepted within three years, the time limited, and

(3) If it survived and was accepted within the three years, it was not such a contract for the conveyance of lands, etc., as the probate court could enforce by specific performance against the executrix. 6 R. C. L. 603; Kirby's Digest, § 6137; 6 R. C. L. 604; 1 Elliott on Cont. 394, § 232; 9 Cyc. 285; 21 Am. & Eng. Enc. 926; 89 Ark. 368; 117 S. W. 561.

2. As there was no acceptance prior to Blanton's death, which occurred within three months, it was thereby withdrawn. 39 Cyc. 1189; 1 Elliott on Cont. 42. See also 6 R. C. L. 603; 82 Ark. 573-581.

3. As to the right to rents and profits, see 38 Cyc. 66; 48 W. Va. 108; 35 S. E. 980.

Mann, Bussey & Mann, for appellee.

1. This is a collateral attack upon the judgment of the probate court. The court made the order under Kirby's Digest, section 213. Every recital necessary to give

the court jurisdiction appears in the order, and its judgment cannot be attacked collaterally. This is a rule of property in this State. 52 Ark. 341; 71 *Id.* 480; 73 *Id.* 612; 92 *Id.* 611; 84 *Id.* 32.

The case in 128 Ark. 42-55 settles all the issues here. The probate court had jurisdiction and its judgment is conclusive. The sufficiency of the consideration cannot be inquired into. 1 Elliott on Cont., § 207-9.

2. The writing was a complete executory contract and not a mere offer. The offer was accepted within the time and the contract was executed. There was no equity in the complaint and the court properly dismissed it. *Supra.*

HART, J., (after stating the facts). It is deemed appropriate to state at the outset that Annie Mabel Blanton became 18 years old on the 25th day of August, 1917, and John Cecil Blanton arrived at the age of 21 years on the 30th day of September, 1917. The present suit was commenced on the 24th day of September, 1917.

It may be, also, appropriately stated here that this is not a case of mutual subscription for a given object where the promise of others is a good consideration for the promise of each.

The contract which we have copied in our statement of facts is the basis of this suit. It is well settled that there must be mutuality in any contract to make it enforceable.

It is the contention of counsel for the plaintiffs that the instrument in question was in effect a subscription of the lands and constituted a mere offer which must have been accepted or some expense or legal obligation incurred thereunder in order that a legally enforceable contract might be effected. In this contention we think counsel are correct. The rule is well stated in *Wayne, etc., Collegiate Institute* v. *Smith,* 36 Barb. (N. Y.) 576, there the court said: "Gratuitous promises or propositions to pay money upon condition, or upon the happening of some event, or the doing of some act, or incurring some ex-

pense, loss or legal obligation, become binding as legal and valid contracts upon acceptance and performance of the stipulated condition * * *. Upon this principle all difficulty in regard to this class of subscriptions seems to be obviated, and a recovery upon them can be had without resorting to the questionable expedient of patching up a contract by extrinsic parol evidence, from which to help out the subscription paper by the implication of a promise. The object of the subscription is expressed in the paper itself. The terms upon which the defendant agrees to pay are therein specified. When these terms are complied with, or engagements and liabilities incurred on the face thereof, a complete contract is made, and the liability of the defendant has become absolute."

The rule was recognized and applied by this court in the case of *Rogers* v. *Galloway Female College,* 64 Ark. 627. See also Elliott on Contracts, volume 1, section 228. Many other cases upholding the rule are reviewed in a case note to 17 A. & E. Ann. Cas. at pp. 1076-1078.

There was no consideration for the contract and until the other party incurred some expense, loss, or legal obligation, it did not constitute a binding contract, but was only an offer. An offer without acceptance is not a contract.

The record shows that Jas. P. Blanton died before the terms of the contract were accepted by the town of Forrest City and before that town or the manufacturing companies seeking to benefit by the contract incurred any expense, loss or legal obligations under it. This brings us to the question of whether or not his death amounted to a revocation of the subscription. It is well settled that the acceptance of a subscription is ineffectual unless made during the lifetime of the subscriber. *Grand Lodge, etc.* v. *Farnham,* 70 Cal. 158, 11 Pac. 592; *Pratt* v. *Baptist Soc.,* 93 Ill. 475, 34 Am. Rep. 187; *Twenty-Third St. Baptist Church* v. *Cornell,* 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; *In re Helfenstein,* 77 Pa. St. 328, 18 Am. Rep. 449; Elliott on Contracts, vol. 1, sec. 35, and 39 Cyc. 1189.

In *Pratt* v. *Baptist Soc., supra,* the court said: "Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer, until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires someone capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man."

So in the present case the executrix could not create a new liability where none existed before. She has no authority to bind her husband's estate by a contract which had come to an end by his death and thereby convert an invalid promise of her testator into an enforceable liability of his estate. The contract was a one-sided one and being only an offer or promise, as has been often said, the offer or promise died when the one making it died.

Counsel for defendant seek to uphold the decree upon the validity of the probate order wherein the executrix of the estate of Jas. P. Blanton, deceased, was ordered to make a deed to the Merchants & Planters Compress Company. It is claimed that the order was made pursuant to section 213 of Kirby's Digest conferring upon probate courts the power to decree the specific performance of contracts of deceased persons for the sale of real estate in certain instances upon the petition of their executors or administrators.

It is contended that the complaint in the present case is a collateral attack upon that order and is therefore unavailing to the plaintiffs. In determining the validity of a judgment upon collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and subject-matter, and those quasi-jurisdictional facts, without allegation of which the court cannot properly proceed and without proof of which a decree should not be made. The absence

of the former renders the judgment void upon collateral attack. *Whitford* v. *Whitford,* 100 Ark. 63.

In *Oliver* v. *Routh,* 123 Ark. 189, the court said that 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 by Sections 209-214 of Kirby's Digest. Therefore it was held that the facts essential to the exercise of the special jurisdiction by the probate court must appear upon the record.

The court further held that the probate court is without jurisdiction to render a judgment of specific performance of an executory contract made by the decedent to convey the homestead. The court said that the sections of the digest just referred to contemplate that there should be a valid executory contract to convey land made by the decedent before the probate court can order it to be specifically performed. The court again had occasion to consider this question in *Arkansas Valley Trust Co.* v. *Young,* 128 Ark. 42. In that case the court held that section 213 of Kirby's Digest gives an administrator, with the approval of the probate court, authority to convey land belonging to a decedent to a third party in pursuance of an oral agreement between decedent and the third party where the administrator is satisfied that payment has been made according to the contract.

The court again recognized that the authority given under the statute was a special power to be exercised in a special manner and not according to the course of common law.

In the present case the petition filed in the probate court sets out the written instrument under which the defendant's claim and which we have copied in our statement of facts. This instrument is also recited in the judgment of the probate court as the basis of its action in authorizing and directing the executrix to make the deed and recites that it is done pursuant to the contract in question.

The judgment of the probate court, also, shows that there was no acceptance, either express or implied, by Forrest City or by the Forrest City Manufacturing Company or the Merchants & Planters Compress Company prior to the death of Jas. P. Blanton. As we have already seen the contract lacked mutuality and was therefore unenforceable. The lack of jurisdictional facts appears in the probate judgment, and it is therefore void.

What we have said applies with equal force to the 20 acres claimed by the Forrest City Manufacturing Company, and the same conclusion is reached as to it.

It follows that the decree must be reversed and the cause remanded for further proceedings according to the principles of law and equity and not inconsistent with this opinion.

WALKER v. STATE.

Opinion delivered May 12, 1919.

1. CRIMINAL LAW—REJECTION OF EVIDENCE—WAIVER.—Objection to the court's ruling in rejecting proffered testimony was waived where no exception was saved.
2. SAME—EVIDENCE—OPINION.—Testimony of a witness in a homicide case that he heard deceased make a statement indicating ill-feeling toward defendant was inadmissible, being merely the opinion of the witness that such statement indicated ill feeling.
3. SAME—HARMLESS ERROR—EXCLUSION OF EVIDENCE.—No prejudice resulted from refusing to permit a witness to testify whether he had heard deceased make statements indicating hatred toward defendant where he had previously testified that he had never heard deceased make any statements or intimations that he was going to do any harm to defendant.
4. SAME—EVIDENCE—LETTER.—In a homicide case a letter reflecting upon the character of defendant's daughter was inadmissible where no effort was made to prove that deceased had written the letter or that defendant suspected him of doing so prior to the killing.
5. SAME—ADMISSION OF EVIDENCE—OBJECTION.—The admission of evidence will not be reviewed on appeal if no objection was made or exception saved thereto.

6. HOMICIDE—EVIDENCE—COLLATERAL MATTERS.—In a homicide prosecution, testimony that defendant was angry at other persons than deceased because he believed that they were the authors of a letter reflecting on defendant's daughter was inadmissible where the State had introduced no evidence tending to prove that defendant had killed deceased because he suspected him of writing such letter.

7. HOMICIDE—HARMLESS ERROR—EXCLUSION OF EVIDENCE.—In a prosecution for homicide, the exclusion of evidence that prior to the killing that defendant had not suspected deceased of having written a letter reflecting on defendant's daughter was harmless.

8. SAME—EVIDENCE—MOTIVE.—Proof of motive is not essential to a conviction, but where established it tends to strengthen the case of the prosecution, while its absence is a circumstance favorable to accused.

9. CRIMINAL LAW—NONEXPERT EVIDENCE.—A nonexpert witness could testify to the mental condition of deceased in making a dying statement, after he had stated the facts upon which he based his opinion.

10. SAME—TRIAL—REMARKS OF COUNSEL.—The statement by defendant's counsel in argument that when he asked certain witnesses whether deceased or his wife had written a certain letter reflecting upon the character of defendant's daughter deceased's wife nodded her head so that the jury could have seen it was improper.

11. CRIMINAL LAW—REMARKS OF COUNSEL—ADMONITION OF COURT.—Where defendant's counsel during his argument made a statement of fact not supported by the testimony, upon the prosecutor's objection thereto, a facetious statement by the court that "you can't keep S. (defendant's attorney) from testifying with 40 log chains" was improper; the court should have reprimanded counsel and instructed the jury not to consider his remarks.

12. SAME—REMARKS OF COURT.—The statement of the court above quoted could not have been prejudicial to defendant.

13. HOMICIDE—RES GESTAE.—In a prosecution for homicide, testimony that defendant, after chasing deceased across the street, stated that he had followed deceased to prevent him from getting a club was not admissible as part of *res gestae*.

14. CRIMINAL LAW—EVIDENCE—RES GESTAE.—*Res gestae* are the acts talking about the act, and the words must stand in immediate causal relation to the act, unbroken by interposition of voluntary individual wariness seeking to manufacture evidence for itself.

15. CRIMINAL LAW—INSTRUCTION—GENERAL OBJECTION.—Error in the use of the word "proof," instead of "evidence," cannot be insisted upon on appeal where only a general objection was made.

16. CRIMINAL LAW—INSTRUCTION.—An instruction containing the words "as the proof tends to show" was not objectionable as being on the weight of the evidence, since it is manifest that the word "proof" was used in the sense of "evidence."

Appeal from Clay Circuit Court, Eastern District; *R. E. L. Johnson,* Judge; affirmed.

John W. Brawner, W. E. Spence and *S. R. Simpson,* for appellant.

1. There is much conflict in the evidence as to who brought on the difficulty. It is apparent that deceased was guilty of writing the objectionable letter and was looking for trouble, but it does not appear that defendant had any ill feeling towards deceased or intended to draw him into the difficulty before the quarrel in the courtroom. Under these circumstances malice and ill-will of the deceased to show his state of mind were competent and should have been admitted. 119 Ark. 58; 108 *Id.* 124; 55 *Id.* 603; 69 *Id.* 148; 76 *Id.* 494.

2. The court erred in refusing to permit defendant to prove the contents of the letter about his daughter and in allowing proof by Walker of threats toward deceased. He did not call deceased's name or indicate whom he meant. 82 Ark. 60; 73 *Id.* 152; 52 *Id.* 304.

3. Defendant should have been permitted to explain his mental condition and any threats or statements made while he was mad and at whom he was mad. 16 Ark. 581; 71 *Id.* 117; 38 *Id.* 315-16.

4. The court erred in examining the witness Harlan, indicating by questions asked the facts it wanted to make plain to the jury, which amounted to a desire to impress the jury with the truth of the evidence. 51 Ark. 147; 73 *Id.* 573.

5. It was error to permit Harlan, a non-expert, to give his opinion as to the mental condition of deceased at the time of his so-called dying declaration. He was not qualified as a non-expert. 119 Ark. 466; 120 *Id.* 303; 106 *Id.* 362; 66 *Id.* 494.

6. The court erred in making improper remarks to defendant's attorney while he was making his concluding argument to the jury. The remarks were highly prejudicial and the court made no ruling on the objection made. It was also error to permit defendant to prove that just immediately upon his returning from chasing the deceased across or nearly across a sixty-foot street, he said he followed him to prevent him getting a club. Defendant had just been assaulted and been struck a heavy blow. He had immediately run deceased across the street and had at once returned and walked back to near the place of the fight. Under the circumstances he could not have thought about a defense or anything that might follow anything he had just done. It is connected immediately with the transaction and should have been admitted as *res gestae.* 126 Ark. 337; 98 *Id.* 435; 43 *Id.* 99; 73 *Id.* 409; 66 *Id.* 500.

7. It was error to give instruction No. 16. 114 Ark. 498. It was erroneously copied from that case. The correct instruction appears as No. 15, on page 402 of 114 Ark. It is error to charge juries on the weight of the evidence. See 93 Ark. 320; 34 *Id.* 757. In this case the judge tells the jury that the evidence tends to show that defendant had a grudge against deceased—this was error. *Supra.* Without these objectionable statements there is no evidence of malice, ill will or hatred toward deceased until the difficulty that resulted in the fight. The court's instruction that "the evidence" tends to show a grudge against deceased was wholly unwarranted by the facts proven and contrary to the law. Cases *supra.*

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, and *T. W. Campbell,* Special Counsel, for appellee.

1. There was no error in reference to proof of ill will on part of deceased. The State objected to the questions asked Fred Russell, and the objections were sustained because there was no inquiry as to threats. But no objections were shown by defendant. 73 Ark.

407; 38 *Id.* 221; 39 *Id.* 221. No prejudicial errors are shown in admitting or rejecting evidence. Kirby's Digest, § 2605; 130 Ark. 365.

2. There was no error in refusing to admit the letter in evidence reflecting upon appellant's daughter. It was not shown that it was written by deceased or that he had anything to do with it, and it had no bearing on the case at issue.

3. There was no error in admitting proof of threats. After appellant denied making threats, it was proper to permit the State to prove threats, even though not directed specifically against deceased. 130 Ark. 101.

4. The court properly refused to permit witness Robbins to testify as to the condition of his wife, appellant's daughter. It was immaterial what caused defendant's anger if he was mad.

5. It was not error for the court to examine witness Harlan. 73 Ark. 573.

6. Nor was there any error in allowing Harlan to give opinion evidence. Non-experts may testify as to the mental and physical condition, weakness or strength of the person observed. 11 Ala. 731; 102 Ind. 138; 45 N. H. 148; 47 Iowa 16; 73 Cal. 7; 134 Mass. 198; 53 N. Y. St. 86; 38 Mich. 412; 30 Tex. 284.

7. There was no error in the remarks of the court to counsel for appellant. The bill of exceptions does not properly show the remarks, but the court merely stopped an improper line of argument on the attorney's part with a mild and humorous reprimand for improper conduct.

8. No error in refusing to permit appellant to prove what he said after the altercation with deceased as to his purpose in pursuing deceased. The statement was a self-serving declaration and no part of the *res gestae.* 69 Ark. 648; 1 Wharton on Ev., § 259; 57 Miss. 474; 110 Ind. 358.

9. No error in giving instruction No. 16. Only a general objection was made—no specific objection to any part of it. 74 Ark. 431; 94 *Id.* 169; 95 *Id.* 100; 66 *Id.*

264; 80 *Id.* 225; 116 *Id.* 357; 108 *Id.* 508; 106 *Id.* 362; 110 *Id.* 402; 129 *Id.* 180; 11 Nev. 30; 128 Cal. 83-88; 58 Kan. 805-8; 16 C. J. 953, § 2334; 111 Iowa 71; 153 Ind. 689; 103 Iowa 168; 61 *Id.* 369.

10. The record discloses no errors and the evidence makes a strong case of first degree murder, and appellant is fortunate to escape the death penalty.

WOOD, J. Appellant was convicted of the crime of murder in the first degree, for the killing of one J. C. Bryant, and was, by the judgment of the Clay County Circuit Court, sentenced to punishment at confinement in the State penitentiary for life.

There was evidence adduced by the State tending to show that on the 23rd day of December, 1918, appellant and Bryant were attending the trial of certain parties that was being conducted by a justice of the peace in a certain tin shop in the town of Piggott, Clay County, Arkansas. During the trial, appellant had a knife in his hand whittling.

One of the witnesses testified that he was in the house when Bryant and the appellant first went out on the walk. Appellant walked back a piece, and was talking to somebody. He didn't hear what he said, but heard Bryant says, "How do you know?" and the appellant said, "You come out here and I will show you." Bryant and the appellant went out of the front door, appellant in front and Bryant following at a distance of about six feet. Witness did not hear anything that occurred between them after they got out of the door. Bryant turned and went east, towards town, about fifty feet, stopped and came back. Witness then saw appellant going towards Bryant, he next saw Bryant running across the street and appellant after him. Witness "did not think either was mad at the time the remarks were made between them; did not think Bryant was mad but appellant seemed to be. Neither said anything that indicated that they were mad and about to fight."

Another witness testified that he saw Bryant and appellant going out of the house, and after they got out of the house he heard appellant say to Bryant, "I haven't got a damn thing, if you want me, get on me." Bryant started towards town and the next thing witness saw he was going back towards the tin shop. The next thing he saw Bryant was going backwards and the appellant was going towards him. Bryant made four or five steps backwards and appellant ran him possibly 35 yards.

Another witness stated that he heard the two men quarrelling after they went out of the house, but did not hear anything that was said. He heard the constable tell them to stop quarrelling or he would arrest them. After that he saw them going towards each other. Bryant had his overcoat on his left arm, which he dropped and squared himself and struck toward appellant. The appellant appeared to lean back or was knocked back, and straightened up and struck Bryant a sound lick with his right hand. Bryant struck the appellant about the neck on the right side and appellant struck Bryant, who immediately wheeled and ran.

According to other witnesses for the State, the appellant and Bryant were seen to go out of the house and after going out they were engaged in a dispute, each accusing the other of inviting him out, and daring the other to strike. The altercation at this point was interrupted by the constable, and Bryant went off a short distance in the direction of town, then turned back, whereupon the appellant said to him, "You are coming back to attend to me," and Bryant replied, "I have a right to go back to the courthouse."

One of the witnesses said, that about that time while Bryant was walking away, they renewed the quarrel and witness heard Bryant ask the appellant what he had against him, and the appellant replied, "Your wife's G—— d—— lies." Whereupon Bryant laid down his overcoat and struck appellant. Appellant threw up his arms and gave back from the lick to protect his face,

at which time the appellant must have cut Bryant, though witness did not see the lick.

The court admitted in evidence as the dying declaration of Bryant the following:

"Piggott, Ark., Dec. 23rd, 5 p. m., 1918.

"J. C. Bryant makes the following statement. On this day during the trial of Mrs. Annie Terry before Frank Underwood in Piggott J. M. Walker made several slurring remarks to me and about my wife who were here to be a witness in a similar case against Mrs. Russell and asked me to go out of the house and he would settle. I went out with him and he had his knife, I told him if he would put up his knife and come out and give me a fair fight I would fight him but could not fight a knife. The constable commanded the peace. I walked away but turned to go back Court House to get my wife when I went Pass Walker He cursted me and said you are comeing back to me I told him no—I was going back to the Court Room to get my wife. He said your wife is nothing but a lying bitch and swore a lie on me. I then struck at him but he knocked off my lick and stabbed me and I ran away from him."

There was testimony tending to show that Bryant was a small man, about 5½ feet tall and weighing about 140 pounds, and that appellant weighed 170 pounds.

Witness C. N. Walker on behalf of the State testified without objection that on the morning of the day of the killing appellant asked him if he had heard about the trouble that his (appellant's) daughter was in in the neighborhood, and said, "I am going to kill a d—— s—— of a bitch either today or before this thing is over." Appellant did not say whom he was going to kill. He was talking about some stories that had been circulated about his daughter that reflected on her virtue.

There was testimony tending to prove that the knife, with which appellant killed Bryant, was an ordinary pocket knife, of two-inch blade in length and half inch wide with a keen point.

There was testimony tending to prove that after the trouble was over, the appellant, in telling about the fight, said "he was not excited," that "he did just what he meant to do."

The testimony of the appellant tended to prove that there was trouble between the neighbors and appellant's only daughter from rumors or tales that were told that reflected on her and of which appellant had been informed. He was mad at this, but did not connect Bryant or his wife with the statement. He had no ill will or malice toward Bryant. His neighbors, Mrs. Terry, Mrs. Russell, and his daughter had been arrested on the charge of breach of the peace, and Mrs. Terry was on trial and he was in attendance. He had not, previous to the difficulty, said a word to Bryant that was in any way insulting or that was derogatory or reflected upon him.

The effect of the appellant's testimony, without setting the same out in detail, is that Bryant was the aggressor in the fight; that he invited the fight; that he did not want any trouble with him; that "Bryant looked right straight" at witness, and said, "Walker, d—n you, I aim to kill you;" that Bryant threw his coat off with his hand in his pocket; that witness was watching his left hand; that Bryant hit witness on the left side of the neck; that witness lost his balance and fell backwards, threw his knife up and struck as he fell; did not attempt to strike Bryant any more; that the cutting of Bryant was an accident; that Bryant started to run and witness chased after him a few steps to where there was a club lying in the road. Witness thought that he was going to get the club and chased him until Bryant passed the club, then witness turned back; that he did not intend to kill or seriously hurt deceased or cut him at all; had only struck to protect himself.

The testimony is voluminous and without setting it all out, the above gives the essential facts concerning the encounter, as the testimony may be considered from the viewpoint of the State and also of the appellant.

Appellant asked a witness, Fred Russell, whether or not Bryant in a conversation with the witness made "any statement, whatever, that indicated that he had any kind of malice or ill will towards Walker."

The State objected to the question, and the court sustained the objection, but the appellant did not except to the court's ruling.

Even if the above question were competent we could not review and reverse the ruling of the court in sustaining the objection to it, for the reason that the appellant did not follow his objection with an exception. "If a party does not follow the ruling on his objection by clinching it with an exception, he waives his objection." *Weisenheimer* v. *State,* 73 Ark. 407; *American Ins. Co.* v. *Haynie,* 91 Ark. 47; *McKinley* v. *Broom,* 94 Ark. 147-8.

The appellant asked another witness the following question: "State to the jury whether or not you heard him (Bryant) make any statement to indicate he had any ill feeling or malice or hatred toward this defendant." The court sustained an objection to the question, and appellant duly excepted to the ruling. Whereupon, counsel for appellant stated that he expected to show that the witness would have answered, "Yes." The appellant did not offer to show what statement Bryant made.

In the absence of proof of the statement itself tending to show malice or ill will, the question propounded and an affirmative answer thereto would show no more than that in the opinion of the witness Bryant had made a statement which showed that he harbored malice and ill will towards the appellant. But the opinion of a witness in matters of this kind could not be received as evidence of the fact. Nor would the trial court in the absence of any statement made by Bryant be able to determine whether or not the statement, if made, was prejudicial to appellant's rights. See *Fowler* v. *State,* 130 Ark. 365.

Before the above answer was propounded the trial court had permitted the witness, in answer to a question

propounded by counsel for appellant, to answer that he had never heard Bryant "at any time or place make any threats, statements, or intimations, whatever, that he was going to do any harm, fight, or kill, or do any injury" to appellant. Appellant, therefore, does not make it appear that there was any prejudice in the ruling of the court.

About six weeks before the killing, appellant's son-in-law, Robbins, received a letter reflecting upon the virtue of his wife, appellant's daughter. The court refused to permit appellant to prove the contents of this letter.

There was no attempt upon the part of the appellant to prove that Bryant wrote the letter or that the appellant even suspected that he had any connection with the letter prior to the time of the killing. On the contrary, the appellant himself testified that he did not connect Bryant in any way with the rumors or the information that he had received calling in question the virtue of his daughter. The letter, therefore, could not have thrown any light upon the question as to the motive of the parties to the rencounter, and was wholly irrelevant.

While appellant was testifying, he was asked by the attorney for the State on cross-examination the following question: "Did you go right to old man Walker's restaurant and say to him, 'I am going to kill a d—— s—— of a bitch today?'" The appellant answered, "No, sir, I did not."

Other questions asked show that the above question had reference to the day of the killing.

Counsel for appellant contends in his brief that the court erred in permitting the State to prove by Mr. C. N. Walker that the appellant, on the day of the tragedy, stated that "he was going to kill a d—— s—— of a bitch, either today or before this thing is over with." The record does not show that the appellant objected to this testimony or saved exceptions to the ruling of the court in admitting the same. The alleged error, there-

fore, is one that we cannot review. See *Harding* v. *State,* 94 Ark. 65.

The appellant contends that the court erred in refusing to permit witness Robbins to testify concerning the physical condition of his wife, appellant's daughter; that appellant had been shown the letter which reflected on the virtue of his daughter; that appellant's daughter and the wives of two of his neighbors had become embroiled in a quarrel, which had resulted in their arrest and for which they were being tried on the day of the killing; that appellant's daughter had plead guilty; that appellant did not accuse Bryant or his wife of having written the letter, but that after the killing appellant learned that Bryant and his wife were the authors of the letter.

The above testimony was irrelevant and inadmissible. These were all collateral issues and the court correctly ruled in limiting the evidence to the issue involved, namely, as to whether or not the appellant had killed Bryant after premeditation and deliberation, and with malice or forethought, as charged in the indictment. The State had introduced no evidence tending to prove that the appellant had killed Bryant because he suspected the latter as being the author of the letter, which traduced the character of his daughter. In the absence of such testimony on behalf of the State, testimony to the effect that appellant was angry at other persons, because he believed that they were the authors of the letter, and that he had no ill will towards Bryant, growing out of the writing of the letter, was irrelevant and incompetent.

It occurs to us that the ruling of the court in excluding any testimony tending to prove that the writing of the letter did not furnish a motive for the killing of Bryant was more favorable to the appellant than otherwise. He was not prejudiced as we see it by the exclusion of this testimony and therefore is not in an attitude to complain. If testimony had been adduced to the effect that Bryant was the author of the defamatory letter concerning appellant's daughter, written six weeks

before the killing and that appellant so believed and harbored ill will and malice towards Bryant on that account, it would have strengthened the case for the prosecution, because it would have tended to show a motive for the killing. "While proof of motive is not essential to a conviction, yet, where it is established, it tends to strengthen the case for the prosecution, and, on the other hand, the absence of motive is regarded as a circumstance favorable to the accused." *Stokes* v. *State,* 71 Ark. 117.

Witness Harlan identified a written statement which was introduced in evidence as the dying declaration of Bryant. Counsel on both sides examined the witness with respect to the circumstances under which this declaration was made and reduced to writing. The court then propounded to the witness certain questions which were designed to elicit from the witness information as to the mental condition of Bryant when the writing was being read, so as to enable the court to determine the question of the competency or incompetency of the evidence. We find nothing in the questions that could be construed as an opinion of the court, or an intimation by the court to the jury on any fact which it was necessary for them to decide.

Witness Harlan, over the objection of the appellant, was permitted to testify that Bryant, at the time the written statement was read to him "was in a weak condition," but as witness believed "was mentally at himself." Appellant objected to this testimony on the ground that the witness had not qualified as an expert. The issue involved was not such as could be determined only by the opinion of experts. It was competent for non-experts to testify as to the mental or physical condition of Bryant at the time the alleged dying declaration was made by him. The examination of the witness in detail, which it is unnecessary to set forth, shows that he had stated the facts before giving his opinion as to the mental capacity of Bryant. This was sufficient to bring the testimony within the rule allowing non-experts to be

admitted on the issue of sanity or insanity, where they state the facts upon which their opinion is based. See *Hankins* v. *State,* 133 Ark. 38-63, and cases there cited.

Counsel for appellant in his argument to the jury said, "When I asked certain witnesses whether or not the deceased or his wife wrote the letter about defendant's daughter, the wife of the deceased, who sat behind the prosecuting attorney, nodded her head so the jury could have seen it." The special prosecuting attorney objected.

Counsel for appellant repeated the statement and said that it was true. The special prosecutor again objected, saying, "I don't want Mr. Simpson to testify." The trial judge, thereupon, said, in the presence and hearing of the jury, "You can't keep Simpson from testifying with forty log chains."

The record shows that the above remarks made by counsel for the appellant were not predicated upon any facts adduced in evidence, but were made by the attorney for appellant while arguing the details of offered testimony concerning the letter, which the court had not admitted as evidence.

The trial judge, as the record discloses, upon objection being made to the argument, "remarks in a facetious way, not intending it in any other way," that "it would be impossible to hold Mr. Simpson in the record with 16 log chains," and "permitted him to proceed with the argument just as he desired, and to say whatever he desired to say, notwithstanding the prior ruling of the court."

This whole proceeding was improper. The trial court, instead of allowing the argument to proceed with the facetious comment upon the conduct of the attorney in making it, should have promptly reprimanded counsel when he first began the improper argument and should have instructed the jury not to consider the same.

The most serious business that could possibly engage the attention of our circuit courts is the conduct of trials involving life and liberty. Therefore, it is the duty of

the presiding judge at such trials to see that nothing is said or done which is calculated to disturb the solemnity of the proceedings, to detract from the dignity of the tribunal and to distract the minds of the jury, as a part of it, from the importance of the function which they are to perform. The trial court has plenary power to compel the attorneys of the parties to observe the well-established rules for the production of evidence. If attorneys violate these rules by attempting to supply in argument, what they have failed to prove by testimony, the court cannot correct the error, where the rights of either party are prejudiced, by a facetious reference to the disposition of counsel to transcend the bounds of legitimate argument. The duty of the court is to prevent the argument, if possible, or, if already made, to reprimand or punish counsel for making it; to instruct the jury not to consider it, and, in short, to do everything that can be done to see that the verdict of the jury is in no manner produced or influenced by such argument. "Whenever it occurs to us that any prejudice has most likely resulted therefrom, we shall not hesitate to reverse on that account." *Vaughan* v. *State,* 58 Ark. 353-68. But here, as the record discloses, the court permitted counsel for appellant to proceed with the argument "just as he desired, * * * and [illegible] proceeded with his argument just as if the objection of the prosecuting attorney had never been made." It is inconceivable that the appellant could have been prejudiced by the remarks of the court concerning appellant's counsel. It is easy to see that the State might have been prejudiced by the argument of the appellant's counsel, but appellant had no ground to complain, for the statement by his counsel of fact, outside of the record, was made solely for his benefit and the remarks of the court made in humorous vein, as the record shows, could not have been prejudicial to appellant. At most it could only have been considered as but a mild rebuke to counsel for going out of the record, but the remarks of counsel were not excluded.

There was no error in the ruling refusing to permit a witness to testify that appellant said, immediately upon his return after chasing Bryant across the street, that "he followed him to prevent him from getting a club." This declaration by the appellant was not a spontaneous emanation growing out of the act of stabbing Bryant. The fight was then over and although but a few moments had passed, appellant had had time to reflect and the declaration under the circumstances was in the nature of a self-serving declaration and it could not be properly considered as a part of the *res gestae.* "*Res gestate* are the acts talking for themselves, not what people say when talking about the act. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself." 1 Whart. Ev., Sec. 259; *Elder* v. *State,* 69 Ark. 648-52; *Baker,* v. *State,* 85 Ark. 300; *Spivey* v. *State,* 114 Ark. 267; and other cases cited in 2nd Crawford's Digest, section 88.

Counsel for appellant contend that the court erred in giving instruction No. 16.*

It is insisted that the words "as the proof tends to show" was the expression of opinion by the court on the weight of the evidence.

One witness testified that he heard appellant say just after the killing that he was not excited but did just as he aimed to do, and Bryant in the dying declaration said that appellant had been tantalizing him and using abusive language to him at various times during the day.

*Instruction 16 was as follows: "If the defendant entertained a grudge against the deceased, Bryant, as the proof tends to show, and used language in the hearing of Bryant for the purpose of provoking him to anger, and causing him to bring on an attack whereby the defendant might have the opportunity of killing him, or doing him great bodily injury, then defendant would not be excused or justified in the killing, and would be precluded from claiming the right of self-defense, until he had, in good faith, withdrawn from the combat as far as he could, and had done all in his power consistent with his safety to avoid the danger and avert the necessity of the killing."—(Rep.)

This testimony tends to prove that appellant (to use the language of the instruction) "entertained a grudge against the deceased."

Now the word "proof" in a strictly accurate and technical sense "is the result or effect of evidence, while evidence is the medium or means by which a fact is proved or disproved." But the words "proof" and "evidence" are so frequently used interchangeably and synonymously by the best legal writers as to warrant such use of them, especially where the attention of the court is not specifically directed to the real difference in their meaning by an objection calling for the distinction to be made. See Jones on Ev., p. 4, section 4; Best on Ev., section 10; Words and Phrases, Vol. 3, p. 2522-23; Vol. 6, p. 5684-5, and cases cited.

It is manifest from the context that the court used the word "proof" not in its strict legal sense but in its ordinary acceptation when used as a synonym for "evidence." The court doubtless would have used the words "as the evidence tends to prove" instead of the words "as the proof tends to show," and would have so corrected the instruction if its attention had been called to it. Counsel under a general objection could not predicate error upon the ruling of the court in giving this instruction. *Sons* v. *State,* 116 Ark. 357; *Teel* v. *State,* 129 Ark. 180, and other cases cited in the State's brief.

The court in another instruction told the jury that they were the "sole judges of the weight and sufficiency of the evidence and the credibility of witnesses." So it is clear that the court did not mean, by use of the language to which objection is here urged specifically for the first time, to express an opinion on the weight of the evidence. The court intended merely to tell the jury that there was evidence tending to prove a certain fact, and to leave them to ascertain whether that fact was proved. The language of the instruction when thus construed does not invade the province of the jury, as has been determined by our own court as well as the courts of other jurisdictions. See *Edmonds* v. *State,* 34 Ark. 754;

Hogue v. *State,* 93 Ark. 316-20. Cases in other jurisdictions to the same effect are cited in the Attorney General's brief.

The record does not disclose any errors in the rulings of the trial court prejudicial to the rights of the appellant.

The judgment is, therefore, affirmed.

SMITH, J., dissenting.

WEIL *v.* CHICAGO PNEUMATIC TOOL COMPANY.

Opinion delivered May 19, 1919.

1. CONTRACTS — SALE OF MANUFACTURED PRODUCTS — MUTUALITY.—A contract under which a dealer was given the exclusive right to sell manufactured products of a manufacturer, but with no right to recover loss of profits due to the latter's failure to fill orders, is lacking in mutuality in so far as it was executory.
2. SALES — CONTRACT ON SELLER'S BLANK — CONSTRUCTION.—A contract for the sale of manufactured products, drawn upon the seller's blank forms, should be construed most strongly against the seller.

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

Irving Reinberger and *Bridges, Wooldridge & Wooldridge,* for appellant.

1. The contract was mutual, valid and binding, and could only be canceled as specified therein, and the court gave the clause as to loss of profits the wrong interpretation, one not intended by the parties, and erred in instructing a verdict for appellee. The contract was mutual, and the 60-day clause as to notice was valid and did not destroy the mutuality. 113 Ark. 556-563; 6 R. C. L. 689; 240 Fed. 801; *Ib.* 764-6; 250 Fed. 109; 157 Pac. 823; 145 N. W. 732; 174 Ill. App. 589.

See also 161 N. Y. S. 808; 174 App. Div. 830; 58 L. R. A. 227; 216 Fed. 269; 31 L. R. A. (N. S.) 249.

If the contract was executory it became executed when both parties acted upon it and appellee shipped and appellant received two of the cars he agreed to buy under the contract. He received two trucks ordered and had made a deposit on the third, which was never received. In addition he deposited $1,250 with appellee.

2. The clause prescribing the method to be adopted in case either party desired to cancel was binding alike on both parties, and the sixty days' notice should have been given. The cancellation clause should be construed to mean what the parties intended when they signed it, and unless the method adopted was followed, or a breach committed by appellant, it remained effective until the agreed date of its termination, May 31, 1918. 101 Ill. App. 140 is a case similar to this. See also 46 Ill. App. 327; 26 Ct. Ct. 132. These cases sustain our contention that if appellee desired the contract conceled it was necessary to give appellant the sixty days' written notice, and it could not by a mere statement saying that the contract was canceled, bring it to a close.

3. The provision precluding recovery for "loss of profits or damages from its failure to deliver goods ordered or for cancellation of this agreement," has but one construction, namely, that there should be no liability on part of appellee for loss of profits after their contract had been canceled in accordance with the terms of the agreement, but it could only be canceled in one way by giving appellant sixty days' notice. If one condition of the contract is binding, all of its conditions are binding. The company could not accept an order for 25 cars, $50 being paid on each car, and then for any reason cancel the contract and deny liability because, according to its contention, appellant had agreed not to hold it liable for loss of profits. 53 Ark. Law Rep. 232.

4. The contract was valid, mutual and binding and could only be canceled as specified in the contract, and the court gave the clause as to profits, etc., the wrong interpretation, and for the errors mentioned the judgment should be reversed and a new trial granted.

Mehaffy, Reid & Mehaffy, for appellee.

1. Since appellant admitted his indebtedness on the note and since the jury allowed him all of his counterclaim except loss of prospective profits, the only question left is whether under the contract appellee was liable for loss of profits from its failure to deliver goods to appellant. Appellant cannot recover for loss of prospective profits, because it is so stated in the contract, and this provision is valid and binding. The parties had the right to make such a contract and they are bound by its terms. 104 N. W. 10; 3 Elliott on Const. 15, § 1869. Even had not the contract so provided, yet the law limits the recovery for breach of a contract to those damages which are the proximate and natural result of the breach, and denies recovery for consequences which are remote and speculative. 3 Elliott on Cont., p. 327, § 2131.

Prospective profits are too remote and speculative. *Ib.,* p. 327, § 2131. Profits to be recoverable must have been contemplated by the parties and must not be remote or speculative. *Ib.;* 57 Ark. 203; 78 *Id.* 336; 80 *Id.* 228; 91 *Id.* 427; 97 *Id.* 522; 103 *Id.* 584; 111 *Id.* 474.

2. The contract lacked mutuality and was unenforceable. 7 A. & E. Enc. Law (2 ed.), p. 114; 90 Ark. 508; 96 *Id.* 188; 117 Fed. 58; 114 *Id.* 77; 143 N. Y. S. 1046; 220 N. Y. 749; 194 Fed. 324; 201 *Id.* 499; 237 *Id.* 860.

See also 100 Ark. 510; 102 *Id.* 621; 124 *Id.* 354; 125 *Id.* 305.

SMITH. J. The parties to this litigation entered into a contract which we copy in full, and for convenient reference we have numbered its paragraphs consecutively from 1 to 31. We set it out notwithstanding its extreme length because of the earnest insistence that all of its paragraphs must be read and construed together in order to arrive at the intent of the parties.

DEALER'S AGREEMENT
between the
CHICAGO PNEUMATIC TOOL COMPANY
and
S. C. WEIL, Pine Bluff, Arkansas.
Expires May 31, 1918.

This agreement, made and entered into this first day of June, A. D. 1917, by and between the Chicago Pneumatic Tool Company, a New Jersey corporation, party of the first part (hereinafter called the company) and S. C. Weil, of Pine Bluff, Ark., party of the second part (hereinafter called the dealer), Witnesseth: That,

Whereas, the Company is engaged in the manufacture and sale of Little Giant Motor Trucks, together with spare parts and appurtenances used in connection therewith, and is willing to sell said motor trucks to said Dealer exclusively in the territory hereinafter described.

Now, Therefore, In consideration of the mutual promises of the parties hereto, it is agreed as follows:

THE COMPANY AGREES:

1. To sell to the Dealer upon the terms and conditions hereinafter set forth, and during the period commencing June 1, 1917, and ending May 31, 1918, any number of its said motor trucks and parts and appurtenances used in connection therewith, which the Dealer may desire to purchase for resale by him in the following described territory: Entire State of Arkansas.

2. The Company will not, during said above mentioned period, sell within above described territory any of its said cars or parts and appurtenances used in connection therewith, to any person, firm or corporation other than the said Dealer.

3. To ship any and all cars ordered from it by the Dealer within thirty (30) days from the receipt by it of orders for the same; provided, however, the Company shall not be liable in any way for failure or delay in making shipments caused by strikes, fires or other causes beyond its control, or delays occurring in the

manufacture of its product or in the manufacture and delivery of parts thereof, and the Company shall not be liable for any loss of profits or damage for its failure to deliver goods ordered, or for the cancellation of this agreement.

4. The Company will refer to said Dealer any and all inquiries for relating to said Motor truck which it may receive from any person, firm or corporation residing or being in said above described territory.

5. The Company shall furnish the Dealer with catalogues and other advertising matter prepared by it and relating to said cars and the parts and appurtenances; the amount thereof, however, to be determined by the Company:

THE DEALER HEREBY AGREES:

6. To purchase from the Company immediately upon the execution of this agreement at least ..... of said motor trucks to be used by him in said above mentioned territory for the purpose of demonstration and show exclusively.

7. That he will maintain a repository and repair station for the satisfactory display, care and repair of said motor trucks; respond promptly to all inquiries respecting the purchase of said motor trucks; keep the Company fully informed as to the number of inquiries for, and sales of motor trucks within said territory, and any other matters affecting the interests of the Company in connection with this agreement; sell all motor trucks covered by this agreement, and all their parts and attachments in harmony with the policy of the Company, to maintain the reputation of its products.

8. That he will appoint a Sub-Dealer or establish a branch for the sale and delivery of Little Giant Motor Trucks in every city or town within his territory that may at any time be designated by the Company, in order that the Company's products shall be adequately represented therein. That if the Dealer fails to secure a satisfactory representative for himself in any such city or

town as above provided, the Company shall be at liberty to appoint any other Dealer in such unoccupied territory, in which case Dealer shall not not be entitled to commission or credit for the volume of business handled by such additional Dealer.

9. That he will be responsible to the Company for all acts of Sub-Dealers appointed by him, and that any acts of his Sub-Dealers which, if committed by the Dealer would be in violation of the terms hereof, shall be considered as acts of the Dealer.

10. That in order to secure adequate and uniform service to the users of Little Giant Motor Trucks, all agreements with Sub-Dealers shall be made on forms to be furnished by the Company, containing such of the provisions of this agreement as are necessary for the purpose, and such Sub-Dealer's agreement shall not be put into effect until approved by the Company in writing in like manner as this agreement. All such agreements shall be made in triplicate and one copy filed with the Company immediately upon the execution of same.

11. To purchase from the Company all such motor accessories and repair parts as the Company sells and the Dealer supplies for use on Little Giant Motor Trucks.

12. That accounts for parts shall be due and payable on the 15th of each month for all parts shipped during the preceding month.

13. That he will not alter any motor truck sold by the Company hereunder; that he will do nothing that will in any way infringe, impeach or lessen the value of the patents or trade marks under which Little Giant Motor Trucks or the parts thereof are made or sold.

14. That in respect to sales of Little Giant Motor Trucks for use outside his territory, he will abide by the Company's policy, and further, that he will refer to the Company, whose decision shall be final, all controversies that may arise between him and another Dealer with regard to sales of Motor Trucks outside of said territory, or claims relating thereof; that he will pay all

claims decided by the Company to be due from him within ten (10) days after receipt of notice of the Company's decision. However, nothing herein contained shall be construed as a liability on the part of the Company to any Dealer for such profit.

15. That the Dealer will not deal in Motor Trucks not sold by the Company in such a manner as in the judgment of the Company will prejudice the sale or reputation of Little Giant Motor Trucks, or the good will of the name Little Giant, and as a matter of such business policy shall consult the Company before doing so.

16. That at the end of each month the Dealer will report to the Company the names, addresses and the business in which they are engaged, of all purchasers of Little Giant Motor Trucks; together with factory number of same.

17. That he will not transfer or assign this agreement or any rights hereunder.

THE PARTIES HERETO FURTHER AGREE AS FOLLOWS:

18. That this agreement shall be interpreted and construed according to the Laws of the State of Illinois.

19. The price to be paid by the Dealer for all complete chassis ordered by him from said Company shall be the full list price, less 25 per cent., F. O. B. cars factory, Chicago Heights, Ill., twenty per cent. of said price to be paid at the time order is given and the balance at the time shipment is made, or by sight draft attached to the Bill of Lading.

20. The price to be paid by the Dealer for all parts and appurtenances purchased by him hereunder shall be the full list price, less 25 per cent.

21. The Dealer is not in any manner authorized or empowered to conduct the business in the name of or for the account of the Company, nor in its name, nor on its behalf, to enter upon any contract whatsoever, or to bill goods to third person, nor to make promises or representations with respect to said commercial cars, parts or other goods manufactured or sold by the Company

other than those contained in the current catalogues issued by the Company.

22. It is expressly understood by the Dealer that no car will be sold by him, or shall be resold by him, upon any guaranty or warranty of any kind or nature except as follows:

"The Chicago Pneumatic Tool Company will, for a period of one (1) year, from date of shipment of any car manufactured by it, replace at its factory, at Chicago Heights, Illinois, free of cost except for transportation, such parts of said car, as shall in the sole judgment of the Chicago Pneumatic Tool Company prove to be defective in material or workmanship, and provided further, that such parts shall be shipped to the Company at its factory, when claim is made, charges prepaid, properly tagged, giving the serial number of motor truck from which same was taken, name and address of owner, and such other information as may from time to time be required by the Company. No claims will be allowed or adjustments made by the Company under the terms of this guarantee, unless Dealer's claim is presented, together with the alleged break or service failure within (10) days of discovery and that after the expiration of such ten (10) days no such claims will be allowed. This provision does not apply to parts or equipment not made by the Company, such as tires, rims, magnetos, batteries, coils and other electrical equipment, etc., for which purchaser must make all claims to their respective makers for damages of any nature growing out of this agreement, or for the sale or use of the motor trucks sold by it."

This guaranty shall not in any way apply to or cover any motor trucks which may be in any manner altered or repaired outside of the factory of the Chicago Pneumatic Tool Company or any of its branches.

23. That this agreement shall expire by limitation on May 31, 1918, or may be canceled by either party upon sixty (60) days' written notice given to the other through the usual course of mail or otherwise, provided,

however, that for any violation thereof by either party the other party may terminate the same forthwith. Termination or cancellation of this agreement as herein provided shall immediately cancel all orders for motor trucks, motor truck parts or attachments which may have been received from the Dealer, but which have not been delivered prior to the date of termination of cancellation, including such orders as may have been accepted by the Company. After the termination or cancellation of this agreement, as hereinbefore provided, the continuance of the sale of such motor trucks or the referring of inquries by the Company to the Dealer shall not be construed as a renewal of this agreement, but all orders hereafter accepted by the Company and sales thereafter made by the Dealer shall be governed by the terms and conditions of this agreement.

24. That all claims for shortage must be made by the Dealer within ten days of receipt of the shipment on which shortage is claimed, and that after the expiration of ten days no such claims will be allowed.

25. That the responsibility of the Company for loss of or damages to goods ordered shall cease upon delivery thereof to the common carrier, and that the Company makes no warranties or representations of any kind other than contained in this agreement, as to the goods sold hereunder.

26. That the Company reserves the right to change all list prices at any time.

In witness whereof, the parties hereto have duly executed this agreement the day and year first above written.

Chicago Pneumatic Tool Company,
S. C. Weil, Dealer.

Attest .....

27. ADDENDUM.

Model H-4—1-Ton Chain-Driven Chassis,
Complete $1400.00

Model H-4—1½-Ton Chain-Driven Chassis,
Complete 1500.00

Standard Platform and Stake Bodies for same.....$ 150.00
Standard Open Flare Bodies for same..... 100.00
Standard Open Flare Bodies with Canvas Top for same 150.00
Standard Cabs built on for same..... 50.00
Standard Windshields built on for same..... 25.00
Shown and described in Circular 282.
Model 1-15—1-Ton Worm-Driven Chassis, Complete 1500.00
Furnished with either solid or pneumatic tires.
Model 16—2-Ton Worm-Driven Chassis, Complete 2250.00
This can be furnished with 168-in. wheel base, making length back of driver's seat 140½ inches, at the same price.
Model 17—3½-Ton Worm-Driven Chassis, Complete 3250.00
Model 18—5-Ton Worm or Chain Driven Chassis, Complete 4250.00
Built to order only.
Shown and described in catalogue No. 285.

28. ADVERTISING.

To agree to appropriate a sufficient amount of money to properly advertise locally in newspaper and outdoor publicity with the following understanding:

First. That this amount of expenditure is not to exceed One Hundred ($100.00) Dollars on each complete chassis; and, second, that fifty (50 per cent.) of the moneys so spent are to be charged by us to you.

Or, in other words, for every dollar you are willing to spend we will also spend the same amount as outlined above.

29. YOUR DISCOUNT FROM LIST WHEN SOLD FOR CASH.

First car ordered by you on contract, 15 per cent.

Second car ordered by you on contract, 17½ per cent., with credit memorandum to make first car same price.

Third car ordered by you on contract, 20 per cent., with credit memorandum to make first and second cars same price.

Fourth car ordered by you on contract, 22½ per cent., with credit memorandum to make first, second and third cars same price.

Fifth car ordered by you on contract, 25 per cent., with credit memorandum to make first, second, third and fourth cars same price.

30. YOUR DISCOUNTS FROM LIST WHEN SOLD ON DEFERRED PAYMENT PLAN.

First car ordered by you on contract, 10 per cent.

Second car ordered by you on contract, 12½ per cent., with credit memorandum to make first car same price.

Third car ordered by you on contract, 15 per cent., with credit memorandum to make first and second cars same price.

Fourth car ordered by you on contract, 17½ per cent., with credit memorandum to make first, second and third cars same price.

Fifth car ordered by you on contract, 20 per cent, with credit memorandum to make, first, second, third and fourth cars same price.

31. We would expect you to contract for not less than 25 Little Giant Chassis, same to be taken by you during the period of this contract, which we would make for one year, at intervals to be decided on, but specifications must be furnished 30 days in advance and furnish us a deposit of $50 for each chassis, same to be refunded as you place orders.

We adopt the designations used in the contract and will refer to appellant as the Dealer and to appellee as the Company.

The Dealer had ordered and there had been delivered two trucks, in part payment of which the Dealer had executed his note. A third truck had been ordered, but shipment and delivery had been refused by the Company. In addition, the dealer had executed a note for

$1,250 in accordance with paragraph 31. This note was renewed and later paid by the Dealer; but the note given in part payment of the trucks was not paid, and this suit was brought to enforce its payment. By way of cross-complaint the Dealer prayed judgment for the portion of his deposit made under paragraph 31 which had not been applied to the purchase of trucks as there provided; and, in addition, the Dealer prayed judgment for the loss of profits which he alleged had been sustained as a result of the Company's failure and refusal to fill his order for trucks. Under the direction of the court the jury allowed the Dealer credit for the unapplied portion of his deposit made under paragraph 31, but disallowed anything on account of loss of profits, and the right to recover these profits is the question involved in this appeal.

The court below had the view that paragraph 3, which exempted the Company from damages for its failure to deliver goods as required by other paragraphs of the contract, rendered it void for the lack of mutuality, and that while it controlled the rights and obligations of the parties insofar as they had operated under it, it was unenforceable as against the Company insofar as it was executory. We have reached the conclusion that this is the correct construction of the contract and that the court, therefore, correctly told the jury that there could be no recovery of profits.

It is argued that we should construe this contract most strongly against the Company, as it has used its blank form in its preparation; and so we should. It is also insisted that in arriving at the intent of the parties we should construe the instrument as a whole. And the correctness of this contention is likewise conceded. And it is argued that when this has been done the plan under which the Company proposed to operate has been disclosed, and that if it has no valid and enforceable agreement with the Dealer here it has no valid and enforceable contract with any dealer anywhere. That its plan is to give exclusive rights to sell its goods to agents in

assigned territory. That the purpose and policy of the Company is to sell the largest possible quantity of the output of its factory and as a means to this end has assigned the territory throughout which it proposes to operate to agents who are given the exclusive right of sale in their respective territories and that having adopted this policy, as disclosed by the contract, we should not construe the contract as making its performance optional on the part of the Company.

It must, of course, be true that the contract lacks mutuality if one of the parties thereto has reserved the option of performing or not performing as he pleases, and while, indeed this right is not reserved in terms, we think this is the effect of paragraph 3. What does it matter that the Dealer may have assigned to him exclusive territory in which to sell the Company's goods if "the Company shall not be liable for any loss of profits or damage for its failure to deliver goods ordered or for the cancellation of this agreement?" If the language means what in its ordinary acceptation it apparently says, we have a writing which will determine the rights of the parties insofar as they operate under it but which has in advance excused and exempted the Company from legal liability for its non-performance through failure to deliver the goods ordered.

In 6 R. C. L., sec. 96, p. 691, the law is stated as follows: "Again, a contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality."

And in the case of *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 188, this court said: "A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other." See, also, 7 A. & E. Enc. of Law (2 ed.) 114; Page on Contracts, Vol. 1, secs. 302-6; *St. Louis, I. M. & S. R. Co.* v. *Clark,* 90 Ark. 508.

There appears to have been much litigation in the Federal Courts involving contracts more or less similar to the one now under consideration, and in these cases contracts having clauses similar to paragraph 3 have been held to be void for the want of mutuality. Some late cases which collect a number of others are: *Velie Motor Car Co.* v. *Kepmeir Motor Car Co.*, 194 Fed. 324; *Oakland Motor Car Co.* v. *Indiana Automobile Co.*, 201 Fed. 499; *Wilson* v. *Studebaker Corporation of America*, 240 Fed. 801. See, also, *Goodyear* v. *Koehler Sporting Goods Co.*, 143 N. Y. S. 1046; *Wood* v. *Glens Falls Automobile Co.*, 161 N. Y. State 808. Judgement affirmed.

McCULLOCH, C. J., (concurring). The mutuality in the contract consists of this: The manufacturer obligated itself to assign to the local dealer certain territory—the State of Arkansas—within which the latter was to have the exclusive right, for a given period of time, to sell the manufacturer's products; and, on the other hand, the dealer obligated himself to sell those products, and no others which might come in competition with them; to establish agencies throughout the territory, and to purchase from the manufacturer as many as twenty-five cars at a stated price. The right thus acquired by the dealer was a valuable one, notwithstanding the fact that the manufacturer was, under the express language of the contract, to be exempt from liability for damages on account of failure to deliver cars.

"A contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other party." 6 R. C. L. 689.

It was to the interest of the manufacturer to sell the output of its factory in the various territories assigned to local dealers, and even though there was no corresponding obligation on its part to deliver to this dealer the cars which he might order, yet the obligation to assign this territory exclusively to the dealer, and not to sell to any one else in that territory, constituted suffi-

cient consideration for the various undertakings of the dealer, including the agreement to purchase a certain number of cars. The manufacturer was unwilling to bind itself to deliver any particular number of cars in a given territory for the reason, doubtless, that it could not be definitely known in advance what the sales in various territories would be, but we ought to assume, and the dealer had the right to assume, that the manufacturer would pursue a course consonant with its own interest by delivering as many cars as it could, consistent with its trade advantages in other territories, and the dealer was, therefore, willing to contract for the exclusive right to purchase for resale cars which the manufacturer might find it convenient to furnish in that territory. That constituted a valuable consideration for the whole contract and renders it mutual in its undertakings. There was a corresponding privilege to each of the contracting parties of canceling the contract on notice for sixty days, but that did not destroy its validity. The right to cancel the contract without notice for an appreciable length of time would have rendered the contract wholly nugatory, the immediate right of cancellation being inconsistent with the binding force of the contract, but when notice must be given for a length of time, it makes a valid contract because the obligation remains in force until the expiration of the specified period of notice. *Thomas* v. *Anthony,* 157 Pac. (Col.) 823.

I do not agree with the majority, therefore, that the contract lacks mutuality, but I think that the manufacturer has by plain and unambiguous language in the contract exempted itself from liability "for any loss of profits or damage for its failure to deliver goods ordered," and for that reason the judgment of the circuit court was, upon the undisputed evidence, correct.

SALLEE v. DALTON.

Opinion delivered May 5, 1919.

1. HIGHWAYS—IMPROVEMENT DISTRICT—TERRITORY INVOLVED.—Acts 1919, No. 135, creating a highway improvement district covering territory described as "all of Randolph County west of Current and Black rivers," means all of the territory west of Current river down to its junction with Black river, and all west of Black river below that point.
2. SAME—HIGHWAY DISTRICT—SINGLENESS OF PROJECT.—Acts 1919, No. 135, providing for eleven different roads radiating from the county seat, *held* to be a legislative declaration of the singleness of the project, and not obviously erroneous or arbitrary.
3. SAME—HIGHWAY DISTRICT—INVASION OF COUNTY COURT'S JURISDICTION.—The act above mentioned does not invade the jurisdiction of the county court merely because it includes the greater portion of the county and the major portion of the public roads.
4. SAME—HIGHWAY DISTRICT—JURISDICTION OF COUNTY COURT.—The jurisdiction of the county court is not invaded by an act which provides that commissioners appointed by the Legislature might vary routes of established public roads or establish new routes, provided the county court has the discretion to adopt any proposed variation from the old routes and any new roads.
5. STATUTES—CONSTRUCTION.—Statutes should be so contrued, if possible, that they may not conflict with the Constitution.
6. SAME—INVALID PORTION.—Where an act provides that if any part of it shall be held to be unconstitutional it shall not affect the remainder of the act, this is an expression of the legislative will to put in force every part of the statute found to be constitutional and valid.

Appeal from Randolph Chancery Court; *Lyman F. Reeder,* Chancellor; affirmed.

Jerry Mulloy, for appellant.

1. The act is unconstitutional and void. From its language it cannot be determined with any degree of certainty the territory comprised in the district or meant. The language is uncertain, indefinite and ambiguous. 86 Ark. 172; 110 S. W. 801; 60 *Id.* 27; 68 Ark. 462; 34 *Id.* 224. The territory should be clearly defined and bounded. 28 Cyc. 128-131, 180.

2. A glance at the profile, which is an exhibit, shows that the territory included comprises from four-fifths to five-sixths of the entire area of Randolph County, or 633 square miles. The act contemplates repair of old roads, the establishment and construction of many new ones, aggregating 110 miles, with necessary bridges and culverts. Section 2 limits the expenditure to $3,000 per mile, such provision, however, not applying to the proposed roads from Pocahontas to McIlroy's Ferry and from Maynard to Richardson's Ferry and Bigger's Ferry, and not including interest on money borrowed. The most conservative estimate possible fixes the total expenditure at $330,000 and this wholly without regard for any additional cost which might be incurred in the improvement of the roads excepted from the limitation above referred to, the cost of bridges and cost of condemnation and laying out new and unestablished roads, and expenses of engineering, commissioners, attorneys' fees, etc., thus indicating an initial cost of say $380,000, or "frenzied finance."

3. The act attempts to usurp the jurisdiction of the county courts. Const., art. 7, § 28; 117 S. W. 544; 132 *Id.* 444; 89 Ark. 513; 177 S. W. 424. The act is an infringement upon the constitutional authority of the county court and void. Cases *supra.* See also 50 Ark. 116; 6 S. W. 519; 97 Ark. 322; 86 *Id.* 1; 176 S. W. 676; 134 S. W. 618. The Legislature cannot create a district, irrespective of its territorial extent, for the establishment of a new public road, and impose upon the county court the cost and maintenance of same. 132 S. W. 444; 117 *Id.* 544, and cases *supra;* 177 S. W. 424, etc.; 203 S. W. 260.

4. The Legislature cannot add to or take from the constitutional jurisdiction of the court. 15 C. J. 858; 94 Ark. 65; 126 S. W. 90; 27 Ark. 202; 2 *Id.* 93; 117 S. W. 426.

J. J. Lewis and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

There is no reason why the Legislature should not sanction the making of any number of improvements by

the same district. The decision in 86 Ark. 331 that an entire county could not be formed into one road district is *obiter*. 118 Ark. 294 does not apply. See 95 Ark. 496; 102 *Id.* 306; 125 Ark. 325; 201 S. W. 808; 209 *Id.* 81; 130 Ark. 507; 201 S. W. 808. The present act does not offend either the rule of territorial extent or surety. No new roads were laid out by the act. The county court on petition can still lay them out and the burden of maintaining them is still upon the county court. If new roads are opened or old ones changed the damages must be paid by the district. The words "all lands" cannot include personal property. The act is not void.

McCULLOCH, C. J. The General Assembly of 1919 enacted a special statute (Act No. 135) creating a road improvement district in Randolph County designated as Western Randolph County Road Improvement District covering territory described as "all of Randolph County west of the Current and Black rivers." The statute authorizes the improvement of eleven connecting highways, four of which radiate from Pocahontas, the county site, and the others connect with those roads.

The validity of the statute is challenged by appellant, an owner of real property within the district, who instituted this action in the chancery court of Randolph County to restrain the commissioners of the district from proceeding to organize and construct the improvement and levy assessments, etc. The district covers about three-fourths of Randolph County, being, as shown in the record, all the uplands of the county, and the bottom lands of the county lie east of the rivers mentioned. Six of the roads are described in the statute as being old-established public roads, but the several routes for the other five roads are to be selected by the commissioners, the termini of each of those roads being, however, definitely stated. The first road mentioned in the statute is described as follows: "A road from Pocahontas to McIlroy's Ferry on Current River, following the old road as nearly as practicable." The other five

established roads are described in similar language, giving the termini of each, and the descriptive clause in each instance concludes with the words "following the old road as nearly as practicable."

The case was tried on an agreed statement of facts in which it is stipulated, among other things, that the roads "to be improved as mentioned and described in said act are now regularly established and existing public highways, and before any other or different route can be adopted by the commissioners of said district, the county court of said county must open, lay out and establish same in the manner required by law." It is contended here that the above clause of the agreement refers only to the six established roads, and not to the other five roads to be selected by the commissioners. We do not, however, deem that matter important under the view we take of the law applicable to the case. There are two of the sections (3 and 5) which are especially pertinent to the controversy, and which read as follows:

"Section 3. If any part of said road has not been laid out as a public road, it is hereby made the duty of the county court of Randolph County to lay the same out in accordance with Act No. 422 of the Acts of the General Assembly of the State of Arkansas for the year 1911, entitled 'An Act to amend section 7328 of Kirby's Digest of the Statutes of Arkansas,' approved May 31, 1911."

"Section 5. It is made the duty of said commissioners to proceed as rapidly as possible with the improvement of the road hereinbefore described, improving it in such manner as they deem to the best interests of the property owners, and they shall also maintain said road in good condition after its completion. As soon as possible, the commissioners of said district, shall form their plans for the improvement with the aid of the State Highway Department and of such engineers as they see fit to employ, and shall file the same with the county clerk of Randolph County, along with specifications and an estimate of the cost. If said commis-

sioners deem it to the best interests of the district to vary the line of the road, as hereinbefore laid out, they may report that fact to the county court of Randolph County, and in that event, if the county court approves of the report, it may make an order changing the route of the road, and if necessary, it shall, in that event, lay out the new road in the manner hereinbefore provided."

It is first contended that the statute is void for the reason that the territory is not definitely described, in that there is a well-founded doubt whether or not the territory between the two rivers mentioned is to be included in the district. We do not think there is any ambiguity in the language of the statute or any doubt whatever about the territory to be embraced in the district. Black River flows southwesterly across the southeastern part of the county. Current River is west of Black River and also flows in a southwesterly direction and empties into the Black in Randolph County about midway between Pocahontas and the eastern line of the county. The language in the statute "West of the Current and Black Rivers" undoubtedly means all of the territory west of Current River down to its junction with Black and all west of Black below that point. It does not include the lands lying between the two rivers.

It is also contended that the territory is so extensive and covers such a great portion of the county, that it provides for so many different roads and is a project of such great magnitude that the improvement of these roads cannot be treated as a single improvement so as to be the subject-matter of one district. The statute constitutes a legislative determination of the singleness of the project, and we cannot say that the decision of the lawmakers is obviously erroneous and arbitrary. The roads, as before stated, radiate from the county site, which is the principal town in the county, and perhaps the center of population and business, and they afford transportation facilities for all of the lands of like character in the county. The other roads connect with the four main ones. The case is definitely ruled, we think,

by former decisions of this court. *Conway* v. *Miller County Highway & Bridge District,* 125 Ark. 325; *Bennett* v. *Johnson,* 130 Ark. 507; *Marshall* v. *Baugh,* 133 Ark. 64; *Tarvin* v. *Road Improvement District No. 1 of Perry County,* 137 Ark. 354, 209 S. W. 81.

The courts have nothing to do with the policy of creating large districts for the construction of improvements at enormous costs to the owners of land. That is a matter which addresses itself entirely to the Legislature, the presumption being that the will of the owners of property was considered in the enactment of the statute. The only thing with which we have to do is the question whether or not the act is within the constitutional powers of the Legislature.

The principal attack made on the validity of the statute is that it constitutes an invasion of the jurisdiction of the county court over the roads and highways conferred by the Constitution. Section 28, article 7, Constitution of 1874. It is said that this jurisdiction is invaded for the reason, first, that the greater portion of the county is covered by the district, and that it includes most of the roads and takes them out of the jurisdiction and control of the county court. Counsel for appellant rely on *Road Improvement District No. 1* v. *Glover,* 89 Ark. 513, and *Swepston* v. *Avery,* 118 Ark. 294, as sustaining their contention in this respect, but such is not, we think, the effect of those decisions. In the first of the cases just cited we held that the whole of a county could not be organized into an improvement district for the purpose of establishing new roads and imposing them upon the county court as a part of the highway system of the county. In the other case we decided that substantially all of a county could not be organized into an improvement district with authority to determine what roads should be improved and assess the cost of the improvement of any road selected by the commissioners of the district against the property of the district in proportion to its value. Here we have a different question presented. Certain roads are designated for im-

provement and the cost is to be imposed on the land in the district according to actual benefits, to be assessed by a board of assessors. The commissioners are authorized to vary the routes along established highways and to select routes for certain roads which are to be established, but, as will be presently shown, this is not authorized as against the judgment of the county court, and the statute does not authorize the establishment by the commissioners of public roads and imposing them on the county court as a part of the highway system of the county.

The other reason stated why the act constitutes an invasion of the jurisdiction of the county court is the one just suggested, viz., that it authorizes the commissioners to vary the routes of the public roads and to establish new roads. This, however, is not the effect of the statute, when properly interpreted. Sections 3 and 5, when considered together, show clearly that it was not the purpose of the lawmakers to compel the county court to accept the judgment of the Board of Commissioners in the selection of routes, but that, on the contrary, the county court is to exercise its judgment and discretion in that matter, and to act in accordance with the methods prescribed in another general statute. Kirby's Digest, section 7328, as amended by Act No. 422 of the session of 1911, is especially referred to, and that contains the authority of the county court in matters of establishing and altering public roads and points out the method of doing so. The statute now before us compels the county court to act upon the proposals to establish a new road or to vary the route of an old one, but does not compel the county court to adopt such proposals against its own discretion and judgment. The language of section 5 provides that the report of the plans for the improvements is to be filed with the county court. That section refers specifically to the changing of the routes or establishing roads in conferring specific authority upon the county court, providing that the county court must approve the report before it

orders the change in the route, but the section continues further to authorize the county court to lay out a new road.

We are of the opinion, therefore, that sections 3 and 5 should be read together, and that they do not absolutely impose the will of the commissioners upon the county court in the changing of roads or the establishment of new roads, but that the constitutional jurisdiction of the court itself is invoked by this statute instead of the statute constituting an invasion of the jurisdiction of the court.

In reaching this conclusion we are adopting the well-settled rule of interpretation stated by Judge Cooley in his work on Constitutional Limitations (7 ed., p. 236) and so often approved by this court as follows: "The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For, as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect."

Of course, it goes without saying, that it constitutes no invasion of the jurisdiction of the county court to authorize the improvement of highways established by order of that court.

There is another reason why material parts, if not all, of this statute should be upheld, even if the assailed portions of the statute were void. There is a section of the statute which reads as follows: "Section 27. If for any reason any provision of this act shall be held to be unconstitutional, it shall not affect the remainder of the act; but the act, insofar as it is not in conflict with the Constitution, shall be suffered to stand."

In the case *of Snetzer* v. *Gregg,* 129 Ark. 542, we passed on the question of partial unconstitutionality of a statute and held that a provision similar to the one in the present statute, giving expression to the legislative will to put into force every part of the statute found to be constitutional and valid, was effective to preserve intact parts of statutes found to be valid, even though other portions of the same statute were violative of the Constitution.

This statute authorizes the assessment of the benefits to all lands in the district, and classifies as land "all railroads, tramroads, telegraph, telephone and pipe lines." No question is raised in the present litigation as to the correctness of that classification, and we do not decide that question. We merely mention it for the purpose of showing that it is not necessary to pass upon every provision of the statute in order to determine the constitutionality of those provisions which are expressly assailed in this litigation.

The chancery court was correct in deciding that the statute was not open to attack on the grounds herein discussed, and the decree is therefore affirmed.

HART, J., (dissenting). The dissent of Mr. Justice Wood and the writer in this case is that the act in question is mandatory in its terms and substitutes the judgment of the commissioners for the district for that of the county court in violation of article 7, section 28 of our Constitution, which reads as follows:

"The county court shall have exclusive original jurisdiction in all matter relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except cases otherwise herein provided."

In construing this section the court has uniformly held that, while the Legislature may prescribe the method of procedure in laying out public roads and altering those already established, it has no power to interfere with the discretion given the county court in the matter under the sections of the Constitution quoted above. *Road Improvement District No. 1* v. *Glover,* 89 Ark. 513; *Parkview Land Co.* v. *Road Improvement District No. 1,* 92 Ark. 93, and *Craig* v. *Greenwood District of Sebastian County,* 91 Ark. 274.

In the last mentioned case the court said:

"The Constitution of the State wisely leaves it to the county court to determine when and where public roads shall be established and, when once established, what alterations thereof shall be made. Expense of care of public highways cannot be forced upon a county, nor can compensation for land taken for such purposes be demanded of a county without the concurring judgment of the county court establishing the road."

This principle has been approved in our later decisions bearing on the question. In our judgment the majority opinion does not set out all the sections of the statute necessary for its correct interpretation. Therefore we set out sections 1, 3 and 5, which we consider necessary to a proper decision of the question of whether the statute takes away from the county court its discretion in laying out and establishing roads and altering those already established. Section 1 reads as follows:

"All of Randolph County west of Current and Black rivers be formed into a road improvement district for the purpose of macadamizing with crushed rock or gravel and with the necessary bridges, the following roads in Randolph County.

(1). A road from Pocahontas to McIlroy's Ferry on Current River, following the old road, as nearly as practicable.

(2). From Pocahontas to Maynard *via* Brockett, following the old road as nearly as practicable.

(3). From Pocahontas to Elm's Store *via* Lorine, Eleven Points and Dalton, following old road as nearly as practicable.

(4). From Pocahontas to Imboden *via* Birdell to Spring River, which is the county line between Randolph and Lawrence counties (Imboden being just across the river and in Lawrence County), following the old road as nearly as practicable.

(5). A road from Dalton south to the intersection with the last named road, at the most convenient point.

(6). A road from Dalton to Ravenden Springs, following the old road as nearly as practicable.

(7). A road from Maynard southeast, dividing near Current River and going to Richardson's Ferry and Biggers' Ferry, following the old road as nearly as practicable.

(8). A road from Pocahontas to Noland, following the Pocahontas and Imboden road to a point about two (2) miles west of Pocahontas thence in a southerly direction to Noland.

(9). A road leaving the road between Pocahontas and Dalton at a point to be selected by the commissioners and running west across Eleven Point River to intersect the road running from Dalton to Imboden.

(10). A road connecting Warm Springs with the road from Pocahontas to Maynard at a point to be selected by the commissioners.

(11). A road from Maynard to the Missouri State line to be selected by the commissioners.

Said roads will follow the best route attainable and adhere to the existing roads as near as practicable."

Section 3 is as follows:

"Section 3. If any part of said road has not been laid out as a public road, it is hereby made the duty of the county court of Randolph County to lay the same out in accordance with Act No. 422 of the acts of the General Assembly of the State of Arkansas for the year 1911, entitled, 'An act to amend section 7329 of Kirby's

Digest of the statutes of Arkansas,' approved May 31, 1911."

Section 5 is as follows:

"Section 5. It is made the duty of said commissioners to proceed as rapidly as possible with the improvement of the road hereinbefore described, improving it in such manner as they deem to the best interests of the property owners, and they shall also maintain said road in good condition after its completion. As soon as possible, the commissioners of said district shall form their plans for the improvement with the aid of the State Highway Department and of such engineers as they see fit to employ, and shall file the same with the county clerk of Randolph County, along with specifications and an estimate of the cost. If said commissioners deem it to the best interests of the district to vary the line of the road, as hereinbefore laid out, they may report that fact to the county clerk of Randolph County, and in that event, if the county court approves of the report, it may make an order changing the route of the road,and if necessary, it shall, in that event, lay out the new road in the manner hereinbefore provided."

It is a cardinal rule of construction that an act should be read from its four corners in interpreting the language used by the Legislature. Section 1 of the act provides for the establishment and improvement of a road from Pocahontas to McIlroy's Ferry on Current River, following the old road as nearly as practicable. So, too, in the roads provided for in subdivision 2, 3, 4, 5, 6, and 7, the direction is that the old road shall be followed as nearly as practicable. It will be seen that gives the commissioners the power to change the old roads if the road as already established by the county court is not deemed practicable by them. This construction is borne out by the directions given in the subsequent subdivisions of section 1.

Subdivision 8 provides for a road from Pocahontas to Noland, following the Pocahontas and Imboden road to a point two miles west of Pocahontas, thence in a

southerly direction to Noland. It will be observed that the concluding part establishes a new road in a southerly direction to Noland.

Section 9 provides for a new road leaving the road between Pocahontas and Dalton at a point to be selected by the commissioners and running west across Eleven Point to intersect the road running from Dalton to Imboden.

Section 10 provides for a road connecting Warm Springs with a road from Pocahontas to Maynard at a point to be selected by the commissioners.

Section 11 provides a road from Maynard to the Missouri State line, to be selected by the commissioners.

So it will be seen that as to the last named four roads the commissioners are directed to lay out new roads. The section concludes by providing that said roads will follow the best route obtainable and adhere to the existing roads as near as practicable. This language plainly gives the commissioners power to lay out new roads and to alter those already established when in their judgment the existing road is not a practicable one. This, in effect, substitutes the judgment of the commissioners for that of the county court and is in direct violation of the section of the Constitution quoted above.

On this point in *Cox* v. *Road Imp. Dist. etc.*, 118 Ark. 119, the court, upon motion for a rehearing said:

"It is first contended that the proceeding is void because its purpose is to authorize the construction of new roads. If such is its purpose, then the proceedings are void. In the case of *Road Imp. Dist.* v. *Glover, supra,* it was held that road improvement districts could not be formed and authorized to lay out and establish new public roads and impose upon the county court the duty to maintain them."

It is said that section 3 still leaves it within the discretion of the county court as to whether new roads shall be laid out or alterations shall be made in old roads. We do not think the language of that section is susceptible to that construction. It plainly says that if

any part of said road has not been laid out as a public road, it is made the duty of the county court of Randolph County to lay the same out in accordance with the general act of the Legislature with reference to laying out public roads. It will be readily seen that the language is mandatory and makes it obligatory upon the county court to lay out the roads as established by the commissioners. Of course, it does direct the county court to follow the method of procedure prescribed by the general act in laying out roads, but this does not change the mandatory character of the language. It is in plain terms made the duty of the county court to lay out the roads as established by the commissioners. The direction to follow the usual mode of procedure in doing so does not leave any discretion to the county court in deciding whether or not the roads as established by the commissioners are to the best interest of the public.

This instruction is borne out by the language used in section 5. Section 5 gives the power to the commissioners to change the road after they have once established it. The language used is that if the commissioners deem it to the best interest of the district to vary the line of the roads as hereinbefore laid out, they may report that fact to the county clerk, and if the county court approves the report it may make an order changing the route of the road. The words "as hereinbefore laid out" refer to the first laying out of the roads by the commissioners provided for in section 1. The evident intention of the Legislature was to give the commissioners the power to change the road if they should later decide that they had made a mistake in laying it out as provided in section 1. We are of the opinion that the language of the act is mandatory, and has so limited the power of the county court with respect to laying out roads and altering those already established as to destroy its freedom of judgment in the matter.

It is clear from the language used that it was the intention to make any adjudication by the county court

the result of dictation by the commissioners, and this the Constitution does not allow.

As we have frequently said, this jurisdiction was appropriately given to the county court. Otherwise the conflicting interests of various towns and localities in the county through which the country roads run might prevent such a location of them as would be for the public good. Under our Constitution counties are units of government, and it was deemed best to place their internal affairs, and as well the laying out of roads, in the county courts, to the end that a uniform system of roads might be established which would best subserve the public interest.

As stated in *Thompson* v. *Grand Gulf Railroad and Banking Co.*, 3 Howard (Miss.) 240, "To determine between the Constitution and the Legislature is often embarrassing, and always demands a cautious and deliberate investigation. In the inquiry is involved the highest function of the judicial department. The acts of the Legislature should be sustained, if possible; the Constitution must be preserved inviolate."

Therefore we respectfully dissent from the opinion of the majority.

MISSOURI PACIFIC RAILROAD COMPANY *v.* CAREY.

Opinion delivered May 5, 1919.

1. RAILROADS — INJURIES TO PERSONS WORKING ABOUT CARS — EVIDENCE.—In a suit for injuries to an employee of a consignee by the falling of a freight car door, evidence that the door could not be latched because it was sprung, and that the railroad company had nailed cleats on it to support it *held* sufficient to show that it was out of repair, and that defendant knew or had ample time to discover the defect by proper inspection.
2. SAME — INJURIES TO PERSONS WORKING ABOUT CARS — ASSUMED RISK.—Where a consignee's employee unloading lumber from a freight car discovered that a car door was unlatched, but upon observing certain cleats concluded that they would prevent the door from falling, and continued working until injured by the

door falling, it was a question whether he was guilty of contributory negligence, and whether he assumed the risk.

3. TRIAL—REQUEST FOR INSTRUCTION—REPETITION.—It was not prejudicial error to refuse an instruction covered by another instruction given by the court.

4. RAILROADS—ACTION FOR INJURIES—INSTRUCTION.—In a suit by a consignee's employee for injuries from a falling car door, defendants' requested instruction that it would not be liable unless it knew the door was unfastened was properly refused where the negligence charged and proved was in permitting the gate to get out of repair so that it could not be fastened.

5. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—An instruction on assumed risk which omitted the question of appreciation of danger *held* properly refused.

6. SAME—ASSUMED RISK—INSTRUCTION.—In an action for injuries to the person, an instruction that the jury should find assumed risk if they found the facts as recited *held* erroneous as invading the province of the jury.

7. TRIAL—INSTRUCTION—ASSUMPTION OF RISK.—An instruction directing the jury to find for plaintiff unless they find him guilty of contributory negligence *held* erroneous as assuming that defendant was negligent.

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

Thos. B. Pryor and *W. P. Strait,* for appellant.

1. There was no proof of negligence on the part of the railway company, but the evidence shows a case of assumed risk and contributory negligence on part of the party injured.

2. The court erred in its instructions to the jury and in refusing those asked by defendant. If there were any defects in the door they were patent, and plaintiff assumed the risk. 82 Ark. 11; 65 *Id.* 98; 125 Id. 95.

A servant assumes the ordinary risks incident to the service and of defects known to him which are open and patent. 82 Ark. 16; 90 *Id.* 387; 68 *Id.* 316; 57 *Id.* 505; 61 *Id.* 53; 103 *Id.* 103; 107 *Id.* 528; 108 *Id.* 377; 93 *Id.* 208 ; 100 *Id.* 465; 95 *Id.* 560; 57 *Id.* 76; 123 *Id.* 119. The case in 103 Ark. 100 is not in point.

3. The law of this case was not properly given in the court's charge to the jury. 79 Ark. 437; 51 *Id.* 467; 44 *Id.* 529; 99 *Id.* 274.

Edward Gordon and *Mehaffy, Reid & Mehaffy,* for appellee.

The verdict is sustained by the evidence, and there is no error in the court's charge to the jury. 83 Ark. 61; 117 *Id.* 504; 126 *Id.* 377; 75 *Id.* 325. As a whole the instructions state the law. 77 *Id.* 558; 168 S. W. 116. A clear case of negligence was made by the evidence under the law. The questions of negligence and contributory negligence were properly submitted to the jury and the verdict is right.

HUMPHREYS, J. Appellee instituted suit against appellant in the Conway Circuit Court to recover damages for an injury to his foot and leg, caused by the falling of an end gate or door of an open freight car, due to the alleged negligent condition of repair of the car, end gate and its parts.

Appellant filed answer, denying that it negligently permitted the car gates, or their parts, to get out of repair, or that they were out of repair at the time of the injury. In addition to denying these and all other material allegations in the complaint, it pleaded assumed risk and contributory negligence by appellee. The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, upon which a verdict was returned in favor of appellee for $3,000, and judgment rendered in accordance therewith. From the verdict and judgment, an appeal has been prosecuted to this court.

At the time appellee received the injury, he was unloading a car of lumber for J. H. Imboden & Son, which had been placed by appellant, delivering carrier, on its side track at Morrilton, for the purpose of being unloaded by the assignee, who was appellee's employer. The car contained three tiers of lumber loaded lengthwise in, and higher than the sides of, the car. The car was sitting east and west. The end gates or doors, were con-

structed of heavy iron which fitted into angle-irons or side frames at the ends of the car, and were secured at the top by means of latches on the outside, and hung on hinges at the bottom, so that the gates, or doors could be opened by unlatching and lowering them to the floor.

There is a difference between counsel as to the testimony of appellee in certain particulars. After a careful reading of his evidence, we think he testified, in substance, that he climbed upon the west end of the car of lumber for the purpose of examining it and discovered one latch on the west door or end gate unfastened. He began unloading the tier of lumber stacked in the east end of the car, leaving the other two tiers intact. When the east end was unloaded to the top of the side of the car, he discovered the east door, or end gate, was unfastened and leaning toward the lumber. It was against one piece of the lumber, but not touching the rest of it. He unloaded the north side of the tier of lumber until he was standing on the floor. He then tried to close the door for the purpose of latching it but was unable to push it back into the angle-irons, or sockets, so that it could be latched, because the door was sprung. At this time, he discovered a cleat nailed in a diagonal position on each side of the car, one end resting on the floor and the other near the top of the door for the purpose of preventing the door from falling to the floor. The cleats were one-fourth of an inch thicker than the angle-irons, or side frame, so that appellee concluded if the door should fall, it would catch on the ends of the cleats. After observing the cleats and reaching this conclusion, he made no further effort to latch the door, but continued to unload the tier of lumber next to the door with the same feeling of security as if the door had been closed and latched. When he picked up the last piece of lumber in the tier, the gate fell to the floor, passing between the cleats, and, in doing so, broke his leg just above the ankle and crushed his ankle and foot. Either on the same, or the next day, Edward Gordon and L. O. Watson inspected the door of the car while it was standing on the

side track at Morrilton, and were unable to push the door into the angle-irons, or sockets, and latch it, because the door was sprung.

F. M. Huckleberry, claim agent of appellant, and J. H. Ganner, a photographer at Russellville, who made several photographs of the car gate, showing the door, or end gate, partially open, as well as closed, testified that they were able to open and close and latch the door when they examined the car at Russellville shortly after the injury; that, on account of coal dust under the door at one corner, it made the door a little hard to close; that the door was shorter than the distance between the cleats by about an inch and a quarter on each end. The photographs evidenced the latter statement to be correct. The car was inspected at the Union Depot yards at Little Rock on November 28th, and again on December 31st by car inspectors in the employ of appellant, and found to be in a good state of repair. The inspectors discovered a bulge in the center of the door, as if something heavy had fallen on it, but it was testified that the bulge did not prevent the door from being closed.

Appellant requested the court to charge the jury to return a verdict for it under the record made, and insists that the court erred in refusing to give its peremptory instruction, for the alleged reasons that the undisputed evidence showed, first, that the end gate, or door, was not defective or out of repair, or, if so, that appellant did not know it, or had not had sufficient time by reasonable inspection to discover the defect; second, that appellee discovered the defect and appreciated the danger before he began to unload the car, and assumed the risk incident to the service; third, that he did not exercise the precaution of latching or propping the gate, or door, or standing out of the reach thereof, and, through that negligence, contributed to his own injury.

(1) Three witnesses testified that the door was sprung so that it could not be forced into its socket or frame and latched. This was sufficient legal evidence to support the finding that the door was out of repair. It

was properly inferable from the evidence that cleats had been nailed on the inside of the car diagonally from the floor to the top of the door, that appellant had discovered the defect and nailed the cleats there to prevent the door from falling. This was sufficient legal evidence to support the finding that appellant knew of the defect or that sufficient time had elapsed for appellant to discover it by proper inspection.

(2) Under our construction of appellee's evidence as a whole, he did not discover the latches on the east door unfastened before he began to unload the lumber. The latches he discovered unfastened were on the west door and he discovered them when climbing on the car of lumber to examine it. The discovery that the east door was unlatched and leaning inward, was made after he had unloaded the tier of lumber in the east end of the car down to a level with the top of the door. This discovery, however, did not place appellee in danger so long as there was sufficient lumber left in the east tier to catch the door in case it fell. Appellee continued to unload from the north side of the tier into a dray wagon until he reached the floor on that side. He then tried to push the door into the socket and fasten the latches, but was unable to do so. At that particular time, he discovered the cleats which he concluded were nailed there to catch the door and prevent it from falling. He continued the unloading, thinking the cleats would catch the door and felt as safe in the prosecution of his work as if the door had been closed and latched. As he picked up the last stick of lumber, the door fell on his leg and foot, breaking the leg just above the ankle and badly crushing the ankle and foot. While appellee discovered the defect in the door, or gate, after partially unloading the car, he observed the cleats, which were placed there, according to his best judgment, to prevent the gate from falling; so, it cannot be said, under these circumstances, that the danger was so obvious that appellee must be deemed in law to have accepted the risk. Especially is this so after he had commenced to unload the lumber.

C., R. I. & P. Ry. Co. v. *Lewis,* 103 Ark. 99. In announcing this conclusion, we do not mean to intimate that the question of assumed risk is in the case.

(3) Appellee testified that he was familiar with the character of car he was unloading and that he was familiar with the character of work he was doing; that he knew that the gate, or door, was heavy and would fall to the floor unless latched or prevented from doing so by cleats which were nailed on the inside of the car; that he thought the cleats would prevent the gate from falling, and continued his work under the belief that he was as secure from danger where he was standing, by reason of the cleats, as if the gate, or door, had been latched. Under these circumstances, it cannot be said, as a matter of law, that the danger was so obvious that an ordinarily prudent person would not have continued to work in exactly the same way appellee did. This makes the question of contributory negligence in the instant case one for the jury, because fair-minded persons might well differ as to whether an ordinarily prudent person would have continued the work after discovering the defect in the door, and the cleats nailed on the inside of the car, for the purpose of preventing the door from falling to the floor. *St. L., I. M. & S. R. Co.* v. *Martin,* 61 Ark. 549; *St. L., I. M. & S. R. Co.* v. *Hitt,* 76 Ark. 224; *St. L. & S. F. Rd. Co.* v. *Carr,* 94 Ark. 246; *Doniphan Lumber Co.* v. *Henderson,* 100 Ark. 53.

Appellant insists that the court erred in refusing to give instruction No. 4, requested by it, defining culpable negligence. The instruction requested conforms to the reasons assigned for the rule in the case of *Little Rock & Ft. Smith Rd.* v. *Duffey,* 35 Ark. 602. The instruction itself contains no error, unless it be that, in the form asked, it is argumentative. We do not think the court erred, however, in refusing to give it, because instruction No. 2, given by the court, was a complete and full definition of culpable negligence.

Again, appellant insists that the court erred in refusing to give instruction No. 6, requested by it, carry-

ing the idea that a master cannot be held responsible for a defective condition of the working place of the servant unless the master had discovered, or could have discovered, the defect by the exercise of ordinary care. Appellant cites the case of *Bauschka* v. *Western Coal & Mining Co.*, 95 Ark. 477, in support of the instruction. The rule announced in that case carried the idea suggested and is a correct rule of law, but the instruction, as requested, exempted appellant from liability unless it knew that the door was unfastened or that it had remained unfastened a sufficient length of time so that by the exercise of ordinary care appellant could have discovered and corrected the defect. This instruction, as drawn, was improper, because the gist of the negligence charged and proved was that the negligence consisted in permitting the gate to get out of repair so that it could not be pushed into its sockets and fastened, and not the fact that it was unfastened.

Again, appellant insists that the court erred in not giving instruction No. 10, requested by it, announcing the doctrine of assumed risk. This instruction was erroneous for several reasons, one of which is that it left out the question of appreciation of danger. Another is that upon the finding by the jury of a given state of facts recited in the instruction, they were instructed to find that appellee assumed the danger. It was within the province of the jury, and not the court, to say whether or not appellee assumed the danger under the facts and circumstances revealed by the evidence. The court did did not err in refusing to give said instruction.

We deem it unnecessary to discuss any other assignments of error except the insistence of appellant that the court erred in giving instruction No. 6. That instruction is as follows:

"You are instructed that negligence is the doing something that a man of ordinary prudence would not do under the circumstances, or the failure to do something which a man of ordinary prudence under the circumstances would do; and, if you find from the evidence

in this case that Carey was doing what a man of ordinary prudence would have done under the circumstances, he is not guilty of contributory negligence, and your verdict must be for the plaintiff."

In addition to a general objection, appellant specifically objected to this instruction because it "directed the jury to find for appellee unless they found him guilty of contributory negligence." We think the effect of the instruction, as drawn, was to assume, on the part of the court, that appellant was guilty of negligence, and to instruct the jury to return a verdict for appellee, unless they found him guilty of contributory negligence. This instruction was erroneous and in direct conflict with the other instructions given by the court. It is impossible to harmonize the law announced in conflicting instructions. The jury cannot tell which instruction they should follow. *St. L., I. M. & S. R. Co.* v. *Hitt,* 76 Ark. 224; *St. L. Sw. Ry. Co.* v. *Graham,* 83 Ark. 61; *Helena Hardwood Lumber Co.* v. *Maynard,* 99 Ark. 377.

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

KRAUSE v. THOMPSON.

Opinion delivered May 5, 1919.

1. SCHOOLS AND SCHOOL DISTRICTS — CONTROL OF LEGISLATURE. — If Constitution, article 14, section 1, pledging the State to "maintain a general, suitable and efficient system of free schools, whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction" applies to the arrangement and management of school districts, it does not hamper the Legislature, whose control over the organization of school districts is supreme.
2. SAME—EQUALITY OF FACILITIES—School facilities must be afforded where taxation for maintenance is imposed, but approximate equality and uniformity is all that can be required, especially in location and maintenance of rural schools.
3. SAME—DIVERSION OF SCHOOL TAXES.—Acts 1919, No. 119, readjusting school districts, does not violate Constitution, article 14, section 3, prohibiting diversion of school taxes, in that, in sec-

tions 4 and 5 of the act, a temporary arrangement is made for maintenance of schools in a district which is added to another, the expense to be borne by the latter, which receives the taxes.

4. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.—Acts 1919, No. 119, readjusting school districts, does not impair the obligation of existing contracts of teachers of a district added to another, for, if any equities exist in favor or such teachers, they could still be properly adjusted.

5. APPEAL AND ERROR—REVIEW—CORRECT DECISION BUT WRONG REASON.—Where the chancellor properly sustained a demurrer to a complaint, but assigned an erroneous reason therefor, the cause will be affirmed.

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

J. W. Coffman and *Covington & Grant,* for appellants.

1. The act is unconstitutional and void. It violates Art. 14, § 1, of the Constitution; also Art. 14, § 3. 120 Ark. 81-89; 124 *Id.* 475-7; 61 *Id.* 21; 112 *Id.* 437-441. If the act is upheld without sections 4, 5 and 9 it will not express the will of the Legislature, because these sections deal with matters that are not found elsewhere in the act, and the whole act must be construed together. The act plainly discriminates in favor of the schools at Lamar. This cannot be done. 103 Ark. 298-305. See also 97 Ark. 71-75. It violates the due process of law and equal protection clause. 86 Ark. 464; 217 U. S. 79; 81 Ark. 304; 211 U. S. 539. It infringes fundamental rights and violates the 14th Amendment to the U. S. Constitution. 74 Ark. 174; 204 U. S. 241.

2. The act and the compulsory school law cannot be read together. 204 S. W. 625.

3. It violates the obligations of contracts. 124 Ark. 80-89.

4. The chancellor erred when he eliminated sections 4, 5 and 9 and upheld the other sections. 111 Ark. 108-119. The act is unconstitutional as a whole. Equal advantages should be given all the school children in Lamar and out in the country.

Geo. O. Patterson and *Evans & Evans,* for appellees.

1. The act is not unconstitutional. The Legislature has unrestricted power over school districts, their boundaries and the legislation is not affected by a failure to adjust all equities between the new and old districts. 111 Ark. 379; 129 *Id.* 185; 97 *Id.* 71; 93 *Id.* 109; 124 *Id.* 475; 103 *Id.* 298. The act violates no provision as to equality or uniformity or disbursement of funds. 120 Ark. 80; 37 L. R. A. (N. S.) 1110.

2. The act is presumed constitutional. 27 Ark. 202; 25 *Id.* 246. It is not shown unconstitutional. 39 Ark. 353; 93 Id. 612; 99 *Id.* 1. See also 100 *Id.* 175; 86 *Id.* 231; 86 *Id.* 412; 85 *Id.* 171; 66 *Id.* 466; 76 *Id.* 197; 77 *Id.* 250; 84 *Id.* 364.

3. The whole act is constitutional, but if certain sections are unconstitutional they should be stricken out and the remainder of the act be held valid. 129 Ark. 185; 126 *Id.* 260; 111 *Id.* 108.

4. The act, if special legislation, was properly passed and is constitutional. 48 Ark. 371; 66 *Id.* 579; 72 *Id.* 119; 92 *Id.* 1; 103 *Id.* 529; 78 *Id.* 118; 72 *Id.* 119; 103 *Id.* 127; 127 *Id.* 226.

5. Courts do not determine the wisdom or justice of legislation. 210 U. S. 281; 70 Ark. 549; 72 *Id.* 195; 65 *Id.* 521; 72 Ark. 195.

6. See also 102 Ark. 411. Neither by paragraph nor as as a whole does the complaint state a cause of action. None of the sections are violative of our Constitution, and the act should be sustained. *Supra.*

McCULLOCH, C. J. This appeal involves an attack on the validity of an act of the General Assembly of 1919 (Act No. 119) changing certain school districts in Johnson County. The statute abolishes Pittsburg School District No. 41 and annexes the territory thereof to Lamar Special School District No. 39. It abolishes Oakland Special School District No. 19 and annexes the greater portion of the territory to Lamar Special School District No. 39, and the remainder to Clarksville Special

School District No. 17. It detaches a portion of Breckenridge School District No. 21 and annexes the detached portion to Clarksville Special School District No. 17. Sections 4 and 5 of the statute, which enter largely into the consideration in ascertaining the validity of the statute as a whole, read as follows:

"Section 4. Until such time as the patrons of Pittsburg School District No. 41 and Oakland Special School District No. 19 which are hereby annexed to Lamar Special School District No. 39, shall by a majority petition request their discontinuance, public schools shall be taught in each for a period not exceeding seven months during each year at the places where schools have heretofore been taught and during such seasons as the patrons or a majority thereof may desire, and for such purpose not more than two teachers shall be employed by Lamar Special School District No. 39, and paid by said district for each of such schools. Such teachers shall be employed upon the recommendation of a majority of the patrons of each school and shall be paid the same salary as teachers in the public schools of Lamar are paid for like or similar services, but shall not be required to teach any study not taught in the 8th Grade of the Common School Course.

"Section 5. Until such time as the schools provided for in Section 4 of this Act are discontinued, all revenues accruing to that part of Oakland Special School District No. 19, which is by this Act annexed to and made a part of Clarksville Special School District No. 17 shall be paid to Lamar Special School District No. 39, for the purpose of maintaining the school in said Oakland Special School District, thereafter the same shall be paid to Clarksville Special School District No. 17 and applied as other funds of said District."

Section 6 provides that upon the discontinuance of the schools mentioned in section 4, pupils residing in any portion of the annexed territory shall be furnished with convenient means of transportation over a certain

road now being constructed and improved. Section 9 reads as follows:

"Until such time as a public school shall be discontinued in Oakland Special School District No. 19 any students residing within the territory of said District herein annexed to Clarksville Special School District No. 17, may, upon their request made to the Board of Directors of said Clarksville District, be received into the schools of said District upon the same basis as students residing therein prior to this annexation."

This action was instituted by the directors of the several districts as they existed before dismemberment under the statute, and certain property owners and school patrons of each district also joined in the attack. The chancellor sustained a demurrer to the complaint, and appellants declining to plead further, the complaint was dismissed for want of equity, but the decree recites a finding by the court that sections 4, 5 and 9 of the statute are void, but that the remainder of the statute is valid.

The statute is assailed in the first place on the ground that it violates section 1, article 14 of the Constitution which pledges the State to "maintain a general, suitable and efficient system of free schools, whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction." If this section applies at all to the arrangement and management of school districts, it certainly does not hamper the Legislature in its control over that subject. We have frequently held that the legislative control over the organization of school districts and changes therein is supreme. *School District No.* 4 v. *School District No.* 84, 93 Ark. 109; *Norton* v. *Lakeside Special School District,* 97 Ark. 71; *Special School District No. 2* v. *Special School District of Texarkana,* 111 Ark. 379; *Jones* v. *Floyd,* 129 Ark. 185.

School facilities must, of course, be afforded where taxation for the maintenance of the schools is imposed, but precise equality and uniformity is unattainable, espe-

cially in the matter of furnishing school facilities, for the reason that necessarily the location of rural schools is more accessible to some of the patrons than to others. Approximate equality and uniformity is all that is expected or required. There are no facts set forth in the complaint which would show such an arbitrary abuse of the legislative power in readjusting the districts as would justify the courts in interfering for the purpose of thwarting the legislative will.

Again it is urged that the statute is violative of that part of section 3, article 14, of the Constitution which prohibits the appropriation of school taxes "to any other purpose" or "to any other district than that for which it was levied;" and that it impairs the obligation of contracts with teachers in the old districts. It will be noticed that section 5 of the statute gives the school taxes on the property in the old Oakland Special School District to the Lamar District for the purpose of maintaining the school in that territory until they should be discontinued upon petition of the patrons, and when those schools are dicontinued the taxes on that part of the territory in Clarksville Special School District shall go to that district. This is not a violation of the provision of the Constitution which prohibits the diversion of school funds. This is a mere temporary arrangement while the school children in the territory transferred to Clarksville Special School District are being given facilities at the expense of the Lamar District. It is true that the tax is to go to Lamar District, but it is to be used entirely for the maintenance of the school for the children in the territory where the property is situated. It is no more an illegal diversion of the funds than the transfer of children and school funds from one school district to another under the statute (Kirby's Digest, sections 7639, 7640 and 7641) which this court has frequently upheld. *Gacking* v. *School District of Fort Smith,* 65 Ark. 427; *Norton* v. *Lakeside Special School District, supra; Special School District* v. *Eubanks,* 119 Ark. 117.

We held in one case that the transfer of a landowner's school tax did not transfer the land itself so as to change the boundaries of the district, and that that did not constitute a wrongful appropriation of the funds of one district to another. *School District No. 4* v. *School District No. 84, supra.* It is clear from the language of the statute that the patrons of the school residing in that part of the Oakland District which is annexed to Clarksville District are to be allowed school facilities until there is a discontinuance of the schools in that territory, as provided in section 4; but section 9 also accords the right of those patrons to transfer to the Clarksville District the same as if they were residents of another adjoining district.

There is no impairment of the obligations of any contract, for, if there are any equities arising out of contracts, they can yet be properly adjusted. *Special School District No. 2* v. *Special School District of Texarkana, supra.*

This disposes of all the objections made to the statute as a whole, and we are of the opinion that the act is valid.

The chancellor expressed his opinion in the recitals of the decree that certain sections are void, but that the remaining sections are separable and valid, and for that reason sustained the demurrer to the complaint. This is just an instance of an unsound reason being given for a correct decree, and does not call for a reversal of the decree. We hold that the statute is valid as a whole and do now so declare. The decree dismissing the complaint for want of equity is, therefore, correct, and the same is affirmed.

CHILDS v. NEAL.

Opinion delivered May 5, 1919.

1. TRIAL—ARGUMENTS OF COUNSEL—APPEAL TO PREJUDICE.—In an action for breach of a contract where the evidence was conflicting, plaintiff's attorney during his argument to the jury stated that defendant, a banker within the draft age, while evading the military service of his country, was trying to cheat the plaintiff, who was offering his life in his country's cause, and inquired as to which of the two the jury would believe. *Held* highly improper.
2. TRIAL — REMARKS OF COUNSEL — ACTION OF COURT. — The court should have more emphatically condemned the above statement than by merely stating that the argument was improper.
3. TRIAL — IMPROPER ARGUMENT — OBJECTION.—Where no objection was made by defendant's counsel to improper argument of plaintiff's counsel, and no exception was saved thereto, the matter will not be considered upon appeal.

Appeal from Clark Circuit Court; *Geo. R. Haynie,* Judge; affirmed.

W. E. Haynie and *McMillan & McMillan,* for appellant.

1. The verdict is excessive, as the testimony does not support a recovery for the amount found by the jury. This is not a case where a *remittitur* will cure the error, as it cannot be said that appellee's right to recover is free from doubt. 65 Ark. 619-629.

2. The remarks of counsel were highly improper and of such a character that no rebuke could destroy their sinister influence. 74 Ark. 256; 72 *Id.* 427; 61 *Id.* 130; 75 *Id.* 578; 65 *Id.* 619; 61 *Id.* 137; 71 *Id.* 415.

McCULLOCH, C. J. Appellee recovered judgment against appellant in the trial below for compensatory damages for an alleged breach of a contract between the two parties whereby appellee was to paint a house for appellant. The recovery was for the sum of $100. Two grounds for reversal are argued. One, that the evidence is not sufficient to sustain the verdict of the jury; and the other that appellee's counsel was guilty of prejudi-

cial misconduct in the closing argument to the jury. These grounds will be discussed in the order named.

Appellant was building a residence in the town of Gurdon and contracted with one Barringer for the construction of the house, including the painting, canvassing and papering, for which Barringer sub-contracted with appellee for the price of $425. This included both labor and material. Appellee started the paint work under his contract with Barringer and did a little of the priming before Barringer quit the contract. Appellant then requested appellee to complete the job of painting, convassing and papering, and agreed to pay appellee for that work at the price mentioned in the contract with Barringer. This much is undisputed. Appellee proceeded with the work pursuant to his contract with appellant, and after doing a small portion of the work, and receiving $20 payment on the contract, appellant discharged him and refused to permit him to complete the job.

The only issues of fact in the case were as to which party broke the contract and what damage, if any, accrued from such breach. Appellant contended that appellee failed to do the work expeditiously so as to keep up with the carpenters, and that he discharged appellee on that account; but, on the contrary, appellee contends that he was doing his work expeditiously and that the carpenters on the job hindered him from doing the painting, and that appellant discharged him without fault on his part. That issue has been settled by the verdict of the jury upon legally sufficient evidence. But it is argued that the evidence is not sufficient to warrant the recovery of the amount of damages allowed by the jury. This depends upon the weight of appellee's own testimony. He stated in his testimony that the material would have cost $225, and that if he had been permitted to continue the work and complete the job he would have earned $200. On cross-examination he admitted that he had other jobs of work at the same time which he was carrying along and employed other workmen to assist him.

It is argued by counsel for appellant that if appellee had employed men to do the work at the customary prices he would not have made any profit on the job, and also they argued that appellee was, according to the testimony, engaged in jobs of painting for other people. It is true appellee testified that he had other work on hand, but he also stated that he could and would have earned $200 if he had been permitted to go on with this job. The jury might have found from his testimony that he could and would have done this work himself without interference with his other jobs, but the jury modified his claim by allowing him only half of the amount he testified he would have earned. We cannot say that the evidence, putting it in its strongest light, is insufficient to sustain the recovery of $100.

The record recites that one of the attorneys for appellee in his closing argument to the jury made the statement that "defendant, a banker, within the draft age, who, while evading the military service of his country, was trying to cheat the plaintiff, who was offering his life in his country's cause," and asked the jury which of the two they would believe. The record further recites that at the time the above remarks were made "counsel for defendant arose to object, but before he could make objection the court stated to counsel that the argument and statement was improper." This is all that the record recites on the subject. No request was made by counsel and no exception was saved. However, the remarks were incorporated as grounds for new trial in the motion subsequently filed. The remarks of counsel were highly improper, and should have been more emphatically condemned, if the brief statement in the record correctly reflects the substance of the court's admonition, but the objections now made to the remarks as grounds for reversal are not available in the present state of the record.

Judgment affirmed.

FORT SMITH LUMBER COMPANY v. STATE OF ARKANSAS EX REL. ATTORNEY GENERAL.

Opinion delivered May 5, 1919.

APPEAL AND ERROR—FORMER APPEAL—LAW OF THE CASE.—A decision on a former appeal, rendered on the pleadings, that a corporation holding stock in other corporations must pay taxes on the same though the other corporations were taxed *held* the law of the case on a subsequent appeal, where the issues were the same.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

Hill, Brizzolara & Fitzhugh, for appellant.

1. Under the decision in 128 Ark. 505 we are entitled to a decree for defendant. There is nothing in the former decision of this case that is conclusive of this case. 131 Ark. 40. The decree is in violation of article 16, section 5, Constitution of Arkansas. 73 Ark. 515; 97 *Id.* 254; 128 *Id.* 505; 131 *Id.* 40.

2. Taxation of the capital stock and property of a corporation and of its shares of stock is double taxation and not allowable. 97 Ark. 254; 128 *Id.* 505-513. The words "capital stock" mean the aggregate value of the shares of stock in the hands of shareholders, and is the basis for taxation purposes after deducting the value of the tangible property which is assessed specifically and separately. 73 Ark. 515; 78 *Id.* 187; 126 *Id.* 611; 160 Pac. 971; 128 Ark. 505; 131 Ark. 40.

3. The agreed statement of facts recites that the lumber company each year made out the return required by section 6036, Kirby Digest. This report gave the market value of the corporate stock or in lieu thereof the true value of all the corporate stock and all the tangible property of the corporation and disclosed all stock owned in the railway company and investment company. This was all assessed at 50 per cent. of its true market value, and each assessment was also 50 per cent. of the value of the stock of the lumber company and investment company. 87 Ark. 484. No person is required to list for taxation any stock in a corporation where the corpo-

ration is required to list or return its capital and property. Kirby's Digest, § § 6872-6902; 87 Ark. 484; 97 *Id.* 262; 244 U. S. 499. Here there was double taxation. 240 U. S. 522; 198 *Id.* 341; 188 *Id.* 385-730; 232 U. S. 1; 240 *Id.* 532. See also 198 U. S. 341.

John D. Arbuckle, Attorney General, *Robert C. Knox,* Assistant; *George Vaughan, Frank Pace* and *T. M. Seawell,* for appellee.

1. On the question of *ultra vires,* one corporation has no power to purchase and hold stock in another unless the power is clearly granted by its charter. 7 R. C. L. 547-553; 81 Ind. 500; 6 N. W. 675; 30 Am. Rep. 270; 53 N. W. 1150; 18 L. R. A. 778. The charter consists of its articles of association and the general law under which it is organized. 87 Ark. 587-591; 113 S. W. 796; 67 N. E. 207-210; 31 Ind. App. 34; 136 Ill. App. 606; 124 Ia. 107; 99 N. W. 290. There is no authority in Arkansas for one corporation to purchase and hold stock in another.

2. Holding companies have no legal status in Arkansas. 71 Ark. 379; 74 S. W. 518.

3. The general rule is that one corporation has no power to acquire and hold stock in another, unless the power is expressly granted by law or necessarily impied. 71 Ark. 379; 175 U. S. 40; Morawitz on Corp., § § 431-2; 1 Cook on Corp., § § 315-16-17; 7 A. & Eng. Law (2 ed.) 810-13; 96 Ark. 1; 130 S. W. 585; 30 L. R. A. (N. S.) 694; Ann. Cases 1912 B. 488.

4. Defendant's funds were invested in excess of its chartered powers, and the employment of any of the funds of the lumber company in stock of the railway company was *ultra vires,* and *a fortiori* was the acquisition of all the stock of the railroad. Kirby's Dig., 6936, 6547; 128 Ark. 505; 50 N. J. Eq. 656.

5. Defendant is a manufacturing corporation and falls within the general class required to list all its property for taxation. Kirby's Dig., § 6936, as amended by Act March 11, 1915, Acts 1915, p. 615; 128 Ark. 505.

The assessment of all its shares collectively is requested by law. *State* v. *Bodcaw Lbr. Co.*, ms. op. No deduction is allowed. 73 Ark. 515. For the rule in other States, see 204 Pa. 36; 53 Atl. 517; 60 W. Va. 357; 55 S. E. 398; 155 N. C. 53; 70 S. E. 1079; L. R. A. 1915 C.380-385; 99 Ala. 1; 42 Am. St. Rep. 17; 97 Ark. 254-259, 260; 87 Ark. 484.

5. All property is subject to taxation; there is no exemption by law. The court erred in sustaining the demurrer.

SMITH, J. Upon the remand of the cause of *State ex rel. Attorney General* v. *Fort Smith Lumber Company*, 131 Ark. 40, the parties prepared the following agreed statement of facts upon which the cause was submitted:

"1. That the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company were each, for the years mentioned in the complaint, corporations existing and doing business in the State of Arkansas, and each was duly organized under the laws of Arkansas, the Fort Smith Lumber Company and Choctaw Investment Company being organized under section 837 and following sections of Kirby's Digest providing for the organization of corporations for manufacturing and other business, and the Central Railway of Arkansas being organized under chapter 133 of Kirby's Digest providing for the incorporation of railroad companies. That the Fort Smith Lumber Company was authorized by its articles of incorporation, among other powers, 'to own, buy, sell and deal in real estate and other property; to engage in the mercantile business and conduct commissaries; to own, buy, sell and deal in stocks, bonds and securities of other corporations.' That all of the assets of the Fort Smith Lumber Company, Central Railway of Arkansas and the Choctaw Investment Company of every kind, nature and description were during the years mentioned in the complaint situated in the State of Arkansas, and that none

of said corporations owned any assets outside of the State of Arkansas.

"2. That the Fort Smith Lumber Company owned 260 shares of stock in the Central Railway of Arkansas during the years hereinafter mentioned and prior to 1909 the Central Railway of Arkansas made annual report to the State Board of Railway Commissioners, and said State Board of Railway Commissioners each year made an assessment of its property until 1909, when the Tax Commission was created, and thereafter said Railway Company made its report to the Tax Commission and the Tax Commission each year made the assessment of the railroad property; that each year hereinafter mentioned the Central Railway of Arkansas made its annual report, pursuant to statute, to said taxing body. That each year the Central Railway of Arkansas was assessed fifty per cent. of the true market value of all of its assets, real, personal and mixed, and including tangible and intangible property and that said asssment of fifty per cent. of the true market value of its assets was also fifty per cent. of the true market value of the stock of said Central Railway of Arkansas. That all other railroad property in the State of Arkansas was assessed during each of the years on the basis of fifty per cent. of the true market value of all of its assets, real, personal and mixed, including tangible and intangible property. That the railroad company paid each year the full amount of the assessment against it. That the Central Railway of Arkansas paid no other taxes than that assessed against it by the Board of Railroad Commissioners or Tax Commission, the same being an assessment upon all of the property of whatsoever kind of the railroad company.

"3. That the Fort Smith Lumber Company owned stock in the Choctaw Investment Company in different amounts during the several years hereinafter mentioned. That all of the assets of the Choctaw Investment Company consisted of timber lands, and it owned no personal property or any other property than said timber

lands. That said lands were assessed by the assessors in the various counties in which the same were situated, and at the time the assessment was finally determined by the county courts on appeal from the Board of Equalization. That the lands of the Choctaw Investment Company were each year assessed at fifty per cent. of their true market value, and the lands in the counties wherein said lands were situated throughout the State were assessed on a basis of fifty per cent. of their true market value. That the assessment of fifty per cent of the true market value of said lands was also fifty per cent. of the value of the stock of the Choctaw Investment Company. That the Choctaw Investment Company paid no other taxes than that assessed on said real estate, the same being all of its property.

"4. That the Fort Smith Lumber Company each year made its return as required by section 6936 of Kirby's Digest and amendatory act thereto. That it did not return for assessment the stock owned by it in the Central Railway of Arkansas or in the Choctaw Investment Company, as all of the property of the Central Railway Company and of the Choctaw Investment Company were separately assessed. It made a full disclosure of its holding of the stock in the Central Railway of Arkansas and the Choctaw Investment Company to the taxing officials who made the assessment against the Fort Smith Lumber Company. Excepting the stock owned by the Fort Smith Lumber Company in the Central Railway of Arkansas and in the Choctaw Investment Company, the assets of the Fort Smith Lumber Company, real, personal and mixed, including tangible and intangible property, were for each of the years hereinafter mentioned assessed for fifty per cent. of their true market value, and said fifty per cent. of the true market value of the assets was also fifty per cent. of the value of the stock of the Fort Smith Lumber Company, less the value of the stock owned by it in said Central Railway of Arkansas and Choctaw Investment Company. That all other property in the State of Arkansas of sim-

ilar kind and similarly situated as the assets of the Fort Smith Lumber Company was assessed on a basis of fifty per cent. of the true market value. That the Fort Smith Lumber Company each year, as hereinafter mentioned, paid the full amount of taxes assessed against it by the taxing authorities, which in some instances was fixed by the county court on appeal from the Board of Equalization."

Then follows a stipulation showing the market value of the stock of the railway company and of the investment company during the years covered by this suit.

"6. It is agreed that should the court under the foregoing statement of facts hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Central Railway of Arkansas, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit 'A' hereto; and that should the court hold the Fort Smith Lumber Company liable for taxes on the value of stock owned by it in the Choctaw Investment Company, that the value of said stock and the rate of tax thereupon and the amount thereof is as set forth in Exhibit 'B' hereto."

(Exhibits "A" and "B" are not copied, as there is no controversy about the calculations there made).

"7. It is agreed that the foregoing facts are all the facts which are material for the determination of the issues herein."

The court found the appellant lumber company liable for the taxes set out in the exhibits and entered a decree accordingly, from which this appeal has been prosecuted.

On behalf of the State it is now insisted that no new issue is presented for our decision and that the opinion on the former appeal is the law of the present case. On the former appeal the case was decided on the pleadings; while here the issues are presented in an agreed statement of facts. But we think no issue is now presented which was not involved in, and disposed of by, the opinion on the former appeal. In that opinion we there said: "It is alleged in the complaint that the said corporation

failed to assess the whole of its capital stock for taxation, as required by statute, and deducted from the value of the capital stock, as assessed, amounts invested in shares of stock in certain other domestic corporations.

"The allegations are that the defendant owned shares of stock in the Central Railway Company, an Arkansas corporation, of the value of $260,000, and also owned shares of stock in the Choctaw Investment Company, another domestic corporation, of the value of $104,000, and that in assessing its property for taxation it deducted the value of all those shares of stock from its capital stock.

"The defendant denied in the answer that any of its property had escaped taxes for former years, but admitted that it owned shares of stock in the other corporations named, and alleged that those shares of stock were purchased with proceeds of the earnings of the corporation, not with the original capital stock, and that it has regularly assessed for taxation its original capital stock at par value, as well as its other property, except the shares of stock in the other corporations. It is admitted in the answer that the value of the shares of stock in other corporations are not assessed, but is deducted from the valuation of the capital stock of the corporation other than its original capital stock."

And the identity of the issues appear from the following statement in the former opinion:

"The pleadings in the case, therefore, present the question whether a domestic corporation, in returning its capital stock for taxation, may deduct investments of its surplus in shares of stock in other corporations in the State. The right to make such deduction is asserted under authority of the statute which provides that 'no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise which (he) is required to list, any share or portion of the capital stock of 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, section 6902."

We there said that the question involved appeared to have been fully decided against the lumber company's contention in the case of *Dallas County* v. *Home Fire Ins. Co.,* 97 Ark. 254, and the further discussion of the issues here involved would result only in a repetition of the argument there made.

As distinguishing this case from the former one it is pointed out that it now appears from the agreed statement of facts that the stock in the appellant lumber company had no intangible value inhering in it over the value of the property taxed and, therefore, the full taxation of it included every element of value and that to refuse to deduct the value of stocks owned by the lumber company results in twice taxing that much of the stock or property of the lumber company which was invested in corporations which were separately assessed and taxed. This, however, is the very point in issue; and while it is presented differently it is the question decided on the former appeal as appears from the following quotation from that opinion:

"Of course, it would constitute double taxation, as was said in the Dallas County case, to tax the shares of stock in other corporations held by this corporation and also its capital stock, but the failure to deduct the value of such shares of stock from the capital stock is not tantamount to assessing the shares of stock in the other corporations."

The decree of the court below is, therefore, affirmed.

WOOD and HART, JJ., dissent.

SMITH v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered May 5, 1919.

1. RAILROADS—CROSSINGS—CONTRIBUTORY NEGLIGENCE.—A traveler approaching a railroad crossing is bound to exercise such care and prudence as an ordinarily prudent man would exercise, under the circumstances, in looking and listening for approaching trains and stopping, if need be, before going on the crossing, and if he fails to do so, he is guilty of negligence barring a recovery, although the railroad company is guilty of negligence.
2. RAILROADS — CROSSING — ACCIDENT—CONTRIBUTORY NEGLIGENCE.—Where plaintiff, injured at a railroad crossing, testified that he looked and listened for an approaching train before turning on the crossing, and that he did not see or hear one, and the testimony showed that his vision was partially obscured by trees and that the train approached the crossing at an unusually high rate of speed without signaling for the crossing, it was a question for the jury whether defendant was guilty of contributory negligence in going upon the crossing.
3. RAILROADS—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE. —A traveler at a railroad crossing has a right to rely to some extent upon the statutory signals being given, which would give him notice of the approach of a train.

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

STATEMENT OF FACTS.

John Smith sued the Missouri Pacific Railroad Company for damages for injury to himself and to his automobile caused by a collision with one of the defendant's trains at a public crossing in the town of Swifton, Arkansas. The facts are as follows:

On the 28th day of February, 1918, at about 9:30 o'clock in the morning, John Smith started across the railroad track at a public crossing north of the depot in the town of Swifton, Arkansas, in a seven-passenger automobile. A southbound train struck the hind wheel of the automobile as it was passing over the main track of defendant's line of railroad and demolished the automobile and severely injured Smith. Swifton is a town of about six hundred inhabitants. The railroad track runs north and south directly through the town. The depot

is on the west side of the track and there are two public crossings in the town, one north and one south of the depot. The track is straight for a considerable distance north of the depot. There is a gin on the right side of the right-of-way of the railroad near the north crossing. It was in operation on the day of the injury and there were a good many people in town. It was very dry and the atmosphere was filled with smoke and dust. On the morning of the injury John Smith went to town in his automobile and stopped on the east side of the railroad track opposite the depot. He put some things in his automobile and then went north along a public street parallel with the railroad track. The track was perfectly straight for 10 or 12 miles north of the crossing. As he went up the street some trees just outside of the right-of-way and some telegraph poles on the right-of-way on the east side of the railroad track obstructed his view to the north to some extent. Smith drove his automobile up the street facing the way the train was coming and when he got to the crossing he turned to the left to go across the railroad track. He was going 10 or 12 miles an hour up the street parallel to the railroad track, but slowed down to five or six miles an hour when he made the turn to go on the crossing. He first crossed the passing track and when he got on the main track, the hind wheels of his automobile were struck by a southbound train. Smith looked and listened for a train until he turned on to the crossing, but did not see nor hear one until the train was right on him and it was too late to get off of the track. The train was going at the rate of fifty miles an hour at the time it struck the plaintiff. Its usual schedule time was forty-two miles an hour.

Other witnesses corroborated the plaintiff as to the speed of the train and as to the fact that smoke and dust obscured the view of the train.

Several other witnesses testified that no warning of the approach of the train was given by ringing the bell or blowing the whistle.

On the other hand both the engineer and fireman testified that the engineer blew one long blast of the whistle for the station, then four blasts for the crossing as required by the statute; that just after the engineer blew the whistle for the station that he set the bell to ringing and never shut it off until the train was stopped; that the bell on the engine rings automatically; that the engineer was on the right hand side of the engine and although keeping a lookout, he could not see the plaintiff until the train was right on him; that the fireman was also keeping a lookout and that as soon as he saw the plaintiff was going to drive upon the track, he gave the alarm to the engineer and that everything that was possible to do was done in order to stop the train and avoid injuring the plaintiff; that he at first thought that the plaintiff was not going to try to cross the track ahead of the engine and believed that he would stop at a safe distance away from the track; that he gave the alarm as soon as he discovered that the plaintiff intended to cross.

The court directed the jury to return a verdict for the defendant and from the judgment rendered the plaintiff has appealed.

W. A. Cunningham and *W. P. Smith,* for appellant.

It was error to instruct a verdict for defendant. A case for a jury was made by the evidence giving it its strongest probative force in appellant's favor and the judgment should be reversed for a new trial by a jury. No bell was rung or whistle sounded. It was dark and dusty, the speed was excessive and a proper lookout was not kept. Appellant was not guilty of contributory negligence at a public crossing. There were questions for a jury on the evidence and should be submitted to a jury upon the conflicting evidence. *Bush* v. *Brewer,* 136 Ark. 246; 74 Ark. 408; 89 *Id.* 496; 92 *Id.* 445. The evidence shows that due diligence was not used, nor due precautions taken for plaintiff's safety and to avoid the injury and a case was made for a jury.

Troy Pace, for appellee.

1. The operatives of a train have the right to assume that a traveler approaching the track when a train is coming in plain view will stop before he goes upon the track until it passes. If after discovering the peril the trainmen exercised due and ordinary care to avoid the injury, the company is not liable. 92 Ark. 440-445.

2. The law of this case is well settled and a verdict was properly instructed. 206 S. W. 43; 111 Ark. 129; *Ib.* 134; 112 *Id.* 452; 110 *Id.* 161; 130 *Id.* 586; 207 S. W. 440; 168 *Id.* 135. Unless the testimony of the trainmen is arbitrarily disregarded the trial court could do nothing less than instruct a verdict. 78 Ark. 237.

HART, J., (after stating the facts). The only question necessary to consider on the appeal is whether the court erred in giving a peremptory instruction to find for the defendant. The action of the court in directing a verdict for the defendant was upon the theory that under the facts disclosed the plaintiff was guilty of contributory negligence as a matter of law. No inflexible rule can be laid down as to when or under what circumstances a traveler at a public railroad crossing will be free from contributory negligence in going over the crossing; but each case must necessarily depend upon its own particular facts. As a general rule a traveler on a street or highway approaching a railroad crossing is bound to exercise such care and prudence as an ordinary prudent man would exercise under the circumstances in looking and listening for approaching trains and stopping, if need be, before going on the crossing, and if he fails to do so, he is guilty of contributory negligence barring a recovery, although the railroad company itself is guilty of negligence. In the present case the plaintiff testified that he did look and listen for an approaching train before turning on the crossing, but that he did not see or hear one.

Counsel for the defendant claim that plaintiff's testimony in this respect is not entitled to any probative force because the railroad track was straight for several miles north of the crossing and that he was bound to have seen the train had he looked for it. It will be remembered that the plaintiff drove northward on the street parallel with the railroad track and that he said there were some trees just outside of the right-of-way and some telegraph poles inside the right-of-way which obscured his vision to the north. In addition to this he listened for the statutory signals for the crossing to be given and did not hear them. It is true he did not look for the train when he got on the crossing; but the track to the north was straight and plaintiff had been looking in that direction for the train and listening for its approach or signals thereof as he drove up the street. When he did not see or hear the train as he drove on the crossing, the jury might have found that he was justified under the circumstances in thinking there was no train coming near enough to prevent his crossing in safety and that it would be best for his safety to devote his whole attention to driving his car over the crossing. He has only thirty-five yards to go and it will be remembered that the train struck the hind wheels of his automobile, thus showing that in another instant he would have been across.

Other witnesses testified that no warning of the approach of the train was given by blowing the whistle or ringing the bell for the public crossing as required by the statute.

The undisputed evidence shows that the train was going at a speed of fifty miles an hour when its schedule time was forty-two miles an hour. The fact that no warning of the approach of the train to the public crossing was given and that the train was moving at an unusually high rate of speed were essential elements for the consideration of the jury in determining whether the plaintiff was guilty of contributory negligence. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Kimbrell,* 111 Ark.

134, and *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Roddy,* 110 Ark. 161.

It was also shown that the air was full of dust and smoke on the morning in question and that this, in a measure, formed a curtain which obstructed the view to the northward and thus prevented the plaintiff from seeing the approaching train until it got nearly upon him; at least the jury might have found this to be true. The plaintiff had a right to rely to some extent upon the statutory signals being given by the railroad company which would give him notice of the approach of the train. When all these facts and circumstances are considered, we think it was open to the jury to say whether or not the plaintiff was guilty of contributory negligence. See *Arkansas Central Ry. Co.* v. *Williams,* 99 Ark. 167, and *Bush* v. *Brewer,* 136 Ark. 246.

It follows that the court erred in directing a verdict for the defendant, and for that error the judgment must be reversed and the cause remanded for a new trial.

KINDRIX v. STATE.

Opinion delivered May 12, 1919.

1. CRIMINAL LAW—LIMITING NUMBER OF IMPEACHING WITNESSES.—In a prosecution for manufacturing whiskey, it was not an abuse of discretion for the court to limit the number of witnesses for the purpose of impeaching the prosecuting witness, where the court announced its intention before any witnesses were called.
2. SAME—TRIAL—COMMUNICATIONS WITH JURY.—It is reversible error for the trial judge to communicate with the jury, in the defendant's absence, in regard to their verdict.
3. SAME—RENDITION OF VERDICT—EXAMINATION OF JUROR.—Kirby's Digest, section 2419, providing for polling of the jury, the court is not limited to receiving the answer "Yes" or "No," but is limited to ascertaining whether the verdict is the juror's verdict, without examining the juror as to how the verdict was arrived at except as to whether it was arrived at by lot.
4. SAME—SEPARATION OF JUROR.—The separation of a juror from his fellows for the purpose of asking the sheriff to inform the court that he was sick was not error where he did not discuss the case with any one during such separation.

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

Norwood & Alley, for appellant.

1. The court was guilty of misconduct in its dealings with the jury. It conversed with the foreman and jury when the verdict was rendered. The conduct was improper and calls for reversal. 20 L. R. A. (N. S.) 429; 11 Am. Dec. 185; 124 Mass. 567; 51 N. Y. 558; 12 Ind. 563; 23 Ill. 349; 14 Ohio 511; 262 *Id.* 392; 143 Ky. 503; 163 Mo. App. 123; 17 L. R. A. (N. S.) 609; 40 *Id.* 239.

2. It was error to allow the separation of the jurors. 44 Ark. 115.

3. It was an abuse of discretion to limit the number of witnesses to five. 1 Wharton on Ev. 505; 10 L. R. A. 576.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. There was no improper conduct by the judge. Kirby's Digest, § 2423; 130 Ark. 48; 109 *Id.* 193; 126 *Id.* 562; 67 *Id.* 266-272.

2. It was shown that no improper influence reached the jury while separated. 73 Ark. 501-511.

3. There was no abuse of discretion by the court in limiting the number of witnesses. 53 Ark. 161-178; Thompson on Trials, § § 352-3.

SMITH, J. Appellants were indicted and convicted for manufacturing whiskey. At their trial they had nine witnesses present for the purpose of impeaching S. H. Williams, the witness on whose testimony the prosecution relied for a conviction; but the court stated in advance of the introduction of this impeaching testimony that appellants would be allowed to introduce only five witnesses for this purpose. The number of witnesses allowed by the court were introduced and testified to the bad character of the witness for the State and that they would not believe him on oath. Appellants offered the testimony of four more witnesses to the same effect, but the

court refused refused to permit them to testify. Three witnesses testified that the witness Williams had a good reputation.

Upon the return of the verdict of the jury the record contains the following recital:

"After hearing the instructions of the court and the arguments of the counsel, the jury retired to consider of their verdict and on the following morning returned into court with a verdict finding the defendants guilty as charged, and 'we, the jury, also recommend that they be pardoned at the expiration of six months of their term.'

Mr. Norwood: Just one minute. Mr. Smith (addressing one of the jurors), I will ask you if during the deliberation of this case if you didn't see the judge and ask him if the jury would find the defendant guilty and recommend a pardon if the judge would recommend that he be pardoned at the end of three or six months?

Mr. Smith: I asked the judge if we could come to terms if the jury could do that, if he could recommend—

Mr. Norwood: I want the court to consider this as evidence on my motion for a new trial.

The Court: I expect you could get at that better by objecting to the receiving of the verdict and introduce your testimony later.

Mr. Norwood: I object to receiving that verdict and them giving that reason now and I want this considered at the same time on my motion for a new trial.

The Court: That verdict now applies to both of the defendants; is that the understanding of all the jury?

The jury: Yes, sir.

(By request the jury are polled and all say that it is their verdict.)

Mr. Norwood: I want to prove by the jury that it was reported to them that it would be recommended that a pardon be granted and that induced them to reach their verdict.

The Court: We will let you introduce them as witnesses if you want to, right now.

"——— Smith, being duly sworn, testified as follows:

"By Mr. Norwood: Q. Mr. Smith, you acted as foreman of the jury?

"A. Yes, sir.

"Q. Didn't you, about an hour before you returned your verdict into court, discuss the matter with the trial judge and tell him that the jury would probably return a verdict of guilty and recommend a pardon and want to know if the court would recommend it?

"A. I didn't ask if he would recommend it; I asked if we could do that. I asked if we could make that recommendation ourselves.

"Q. Didn't you know you had a right to recommend anything you wanted to?

"A. I don't know; I just wanted to ask him at the request of the jury.

"Q. The court told you if they would recommend a pardon at the end of three or six months that the court would recommend it too?

"I didn't understand it that way, what I wanted to know, and I think the jury all understands that.

"The Court. Just have him state what statement he made to the jury.

"Q. What did you tell the jury the court told you?

"A. I told the jury that the court said that we could do that all right.

"Q. And didn't you tell the jury that the court said he would recommend a pardon?

"A. The judge said he thought that the court and the prosecuting attorney would both recommend a pardon. I didn't ask him to recommend it. We merely wanted to know whether we could make such a disposition as that of the case.

"Q. Didn't that influence the jury to return a verdict, the fact that the court and the prosecuting attorney would recommend it and that you all were allowed to recommend it?

"A. It did a part of them.

"Q. Didn't you discuss the case with the sheriff last night and tell him how some of the jurors stood and tell him how you voted on the first ballot?

"A. No, sir, I did not; I don't think we discussed the case at all. The sheriff was up here two or three different times, but we were not deliberating at that time though. I don't remember saying anything to the sheriff about how about we stood."

Thereupon jurors Summitt, Chitwood, Prowse and O'Neill were examined and substantially corroborated the testimony of foreman Smith.

As ground for a new trial it was also alleged that one Gibbs, a member of the jury, had been permitted to separate from his fellows and while thus apart from them discussed the case with the sheriff. The testimony on that issue, however, only tended to show that Gibbs was sick and desired the sheriff to so inform the court to the end that the jury might be discharged, and it was shown that the juror did not discuss the case with the sheriff or any other person except his fellow jurors.

The court did not abuse its discretion in limiting the number of impeaching witnesses to five, especially as the announcement of the intention so to do was made before any of these witnesses were called. This testimony related to a collateral issue about which the court had the right to impose a reasonable limitation, and we do not think the limitation imposed constituted an abuse of the discretion which the court had. Thompson on Trials, sec. 353.

It is, of course, not only improper, but is error calling for the reversal of the judgment, for the court to communicate with the jury in the absence of the defendant any directions in regard to their verdict. *Hinson* v. *State,* 133 Ark. 149; *Pearson* v. *State,* 119 Ark. 152. And so here, the judgment would have to be reversed if there was any legal competent testimony that in the absence of the defendant the court had had a communication with the jury in which they were instructed in regard to the verdict to be returned. Appellant says that such was

the character of the communication between court and jury shown by the testimony set out above. But we do not stop to inquire whether this is true or not for the reason that this is not such testimony on that subject as we have the right to consider. Here the verdict of the jury had been read, whereupon the proceedings were had which we have set out in full. The statute provides for a poll of the jury and section 2419 of Kirby's Digest on that subject reads as follows:

"Upon a verdict being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his verdict, and if one answers in the negative the verdict cannot be received."

We do not interpret this statute to mean that the inquiry of the clerk or judge is limited to receiving the answer "yes" or "no" from the juror as to whether the verdict returned is his verdict or not; but we do hold that the inquiry is limited to the ascertainment of the fact whether the verdict returned is the juror's verdict and that it is not proper or permissible under the statute to inquire of the juror how the verdict was arrived at except, indeed, that the juror may testify whether the verdict was arrived at by lot. Section 2423, Kirby's Digest; *Wingfield* v. *State,* 95 Ark. 71; *Harris* v. *State,* 31 Ark. 196; *State* v. *Bogan,* 12 La. Ann. 264; *Bean* v. *State,* 17 Tex. Cr. Apps. 60; *Bassham* v. *State,* 38 Tex. 622.

A number of States have statutes on the subject, while others regulate their practice by the common law. In Massachusetts, for instance, even in a capital case the right of polling the jury is denied upon the ground that no such right existed at common law, there being no statute on the subject. *Commonwealth* v. *Roby,* 12 Pick. 496; *Commonwealth* v. *Costley,* 118 Mass. 1.

Other courts in construing statutes similar to our own discuss the policy of the lawmakers in their enactment, and it is shown in these cases that it has not been deemed wise to permit the integrity of trial by jury to be destroyed by permitting a litigant to question the ju-

ror as to his verdict except to determine that the verdict returned is in fact the juror's verdict and was not arrived at by lot.

In volume 2, Bishop's New Criminal Procedure, section 1003-(3), the law is stated as follows: "3. Polling, —'If,' says Hale, 'the jury say they are agreed, the court may examine them by poll; and,' he adds, what is not law now, 'if in truth they are not agreed they are finable.' Thereupon any juror may dissent, even in the case of a sealed verdict. This practice is followed in most of our States; in some, only at the discretion of the court; in probably most it may be demanded by either party, and the court cannot refuse it. The question to the juror is simply, 'Is this your verdict?' If one dissents, the panel should be sent back for further deliberation. A juror cannot be asked as to misconduct of the jury. The right continues till the verdict is recorded or the jury dispersed. There are States wherein this practice is not accepted."

An interesting case on the practice of polling a jury is that of *State Life Ins. Co.* v. *Postal,* 84 N. E. 156, and the same case in the same voulme at page 1093. The second opinion was an opinion on rehearing and was devoted to a consideration of the inquiry proper to be made on polling a jury. This is a well considered opinion and cites a large number of cases. After quoting from the case of *Labar* v. *Koplin,* 4 N. Y. 547, a statement of the law to the effect that it is the absolute right of a party to have the jury polled on their bringing in their verdict but that the object of polling the jury is to ascertain if the verdict which has just been presented is their verdict or, in other words, if they still agree to it, and not to ask them what their verdict means nor to question them as to their intention in finding it, the court, through Hadley, J., proceeded to say: "This being the intent and purpose of the law, the exact form of the question to be propounded would seem immaterial so long as the answer pertinent thereto would be in exact line with such intent and purpose. This is illustrated by the fact that the form of the

question varies in different jurisdictions as well as in different courts of the same jurisdiction, although all agree upon the purpose and limitations of the poll. But the one in most common use is the simple question, 'Is this your verdict,' and several hold, with *Bowen* v. *Bowen,* 74 Ind. 470, that this covers the whole scope of the inquiry and is all that a party has a right to ask. And while we are unqualifiedly of the opinion that it is a much safer practice for our courts to confine themselves to this simple form of inquiry, yet we do not hold, and we do not understand the Bowen case to hold, that the inquiry must necessarily be in those exact words, and that the same inquiry may not be couched in different language.''

We need not consider here how otherwise than by the testimony of a juror the fact of an improper communication between court and jury may be established, as no such question is presented by the record, and we think the question which the present record does raise is disposed of when we say that such proof cannot be made by the juror. Section 2423, Kirby's Digest; *Jenkins* v. *State,* 131 Ark. 312, 319; *Speer* v. *State,* 130 Ark. 457, 458, 464; *Triplett* v. *Wesson,* 128 Ark. 233; *Rieff* v. *Interstate Business Men's Acc. Assn.,* 127 Ark. 254; *Barnett Bros.* v. *Western Assurance Co.,* 126 Ark. 562; *Capps* v. *State,* 109 Ark. 193, 197; *Osborne* v. *State,* 96 Ark. 400; *Griffith* v. *Moseley,* 70 Ark. 244; *Ward* v. *Blackwood,* 48 Ark. 396; *St. L., I. M. & Sou. R. Co.* v. *Cantrell,* 37 Ark. 519; *Fain* v. *Goodwin,* 35 Ark. 109; *Clark* v. *Bales,* 15 Ark. 452, 457; *Pleasants* v. *Heard,* 15 Ark. 403; *Atkins* v. *State,* 16 Ark. 591, 592.

Although the juror Gibbs did separate from his fellows it is affirmatively shown that no improper communication occurred between him and the sheriff, and the court below properly held that no error had been committed in this resepect.

Upon a consideration of the whole case no reversible error is found and the judgment of the court below is affirmed.

COOPER v. RUSH.

Opinion delivered May 12, 1919.

1. SUBROGATION—PAYMENT OF NOTE BY SURETY—BURDEN OF PROOF.—In an action by a surety on a note, where the complaint alleges that he paid a judgment on the note against him and his principal, and that he had the judgment assigned to himself, which allegations are denied by defendant, plaintiff has the burden of proving the assignment of the judgment to him.
2. LIMITATION OF ACTIONS—RIGHT TO CONTRIBUTION.—The right of action for contribution accrues when one surety pays more than his share of the common liability.
3. SAME—CONTRIBUTION.—The three-year statute (Kirby's Digest, § 5064) applies to a right of action by one surety on a note against another for contribution; the liability being implied.

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

STATEMENT OF FACTS.

This is an action at law by a surety who claims that he has paid the amount of a judgment obtained against him and his principal.

According to the allegations of his complaint, on the 31st day of January, 1914, the Citizens National Bank of Hot Springs obtained judgment in the Garland Circuit Court against L. D. Cooper, C. C. Rush and C. G. Bryan for the sum of $1,532.58 and the accrued interest. The judgment was obtained in a suit on a certain promissory note executed and delivered to the bank by C. G. Bryan and C. C. Rush on April 19, 1913, for the sum of $3,500 for money borrowed from said bank by Bryan and Rush. L. D. Cooper endorsed said note as surety and paid to the bank the amount of its judgment and had the same assigned to him. The complaint further alleges that no part of the judgment had been paid to the plaintiff, Cooper, and he prays judgment against the defendant, Rush, for the amount sued for.

The defendant demurred to the complaint and also filed an answer. In his answer the defendant admits that judgment was rendered against the plaintiff, himself and C. G. Bryan in favor of the Citizens National Bank for

the sum of $1,532.58 and the accrued interest as alleged in the complaint. Defendant avers that he was a co-surety with the plaintiff on said note. He denies that the plaintiff voluntarily paid such judgment, but alleges the truth to be that the same was collected by the sheriff of Garland County upon execution. He denies that said judgment was ever assigned to the plaintiff. The defendant, also, pleaded the statute of limitations.

The case of the *Citizens National Bank* v. *C. C. Rush, C. G. Bryan and L. D. Cooper* was appealed to the Supreme Court and the judgment was affirmed on July 13, 1914. See *Rush* v. *Citizens National Bank,* 114 Ark. 170. It was agreed between the parties hereto that the transcript in that case should be read in evidence in the case at bar in so far as the same was applicable.

According to the evidence adduced by the plaintiff in that case, Bryan and Rush executed the note as principals and Cooper endorsed it for them.

According to the testimony of Rush, he only signed the note as surety. An execution was issued in the circuit court judgment in the case of *Citizens National Bank* v. *C. C. Rush et al.* and returned satisfied by the sheriff on April 20, 1914.

The present case was submitted to the court sitting as a jury. The court found that the action was barred by the statute of limitations and dismissed the complaint of the plaintiff.

From the judgment rendered, the plaintiff has duly prosecuted an appeal to this court.

L. E. Sawyer, for appellant.

1. The cause of action was not barred by limitation, as the suit was not on implied contract but was a suit based on a judgment assigned to appellant. 16 Ark. 72; 23 *Id.* 531; 1 Brandt on Sur. & Guaranty (2 ed.), 348, § 230; Freeman on Judg. (3 ed.), 495, § 470, etc.

The limitation on suits upon judgments is ten years and not three. Kirby's Digest, § 5073.

2. Summary remedies are not exclusive. 32 Cyc. 264 (111). Appellant had the right to have the judgment assigned to him, as he paid it and is not barred by our statute. 96 Ark. 268; 106 Fed. 794.

3. The cause was not barred by *res adjudicata* as to the relationship of surety and principal as sought to be shown by the old transcript introduced in evidence. That question was not raised by the pleadings nor any motion in the original cause. Appellant had the right to have the judgment assigned to him and to keep it alive either by execution suit or otherwise and is not barred by our statutes of limitations. The cases in 16 Ark. 72 and 23 *Id.* 531 do not apply, as this was not a suit in *assumpsit* on the implied contract, but on a judgment duly assigned. Brandt on Sur. & G., § 230 (2 ed.), and Freeman on Judgments (3 ed.), § 470; Kirby's Digest, section 5073.

R. G. Davies, for appellee.

The facts before the court showed that there was no assignment of the judgment. Kirby & Castle's Digest, § 5186. There was nothing to assign, as the judgment was satisfied by execution. The skeleton bill of exceptions here cannot be considered. The motion for new trial was not filed within three days and the facts are not before this court. But the suit is barred by our statute. 23 Cyc. 1414; 39 Ark. 238; 68 *Id.* 71. The court below had all the evidence before it and properly held that the suit was barred and the judgment should be affirmed, as there is no bill of exceptions. 91 Ark. 405; 16 *Id.* 86, 293; 20 *Id.* 636; 50 *Id.* 107; 57 *Id.* 544; 96 *Id.* 271; 28 *Id.* 530; 23 *Id.* 530; 23 Cyc. 1470.

A judgment once paid off cannot be assigned. 16 Ark. 216. See also 25 Miss. 63; 6 Rob. (N. Y.) 552; 5 Rawles (Pa.) 131; 123 Ark. 77; 113 *Id.* 488; 93 *Id.* 62; 7 *Id.* 81; 23 Cyc., pp. 1491, 1595-6; Daniels on Neg. Inst., § 704 a; 94 Ark. 333.

HART, J., (after stating the facts). The circuit court held that the plaintiff's cause of action was barred by the statute of limitations. The plaintiff sought to

avoid the bar of the statute by alleging in his complaint that he had paid the judgment against himself, the defendant and C. G. Bryan, and had the same assigned to himself. He claims that he should be subrogated to all the rights and remedies of the judgment creditor, whose debt he paid, and that he is in fact a substituted judgment creditor. Therefore he claims that section 5073 of Kirby's Digest, the ten-year statute of limitations applicable to judgments, governs here.

On the other hand defendant denied that the judgment had ever been assigned to the plaintiff. He claims that section 5064 of Kirby's Digest, the three-year statute of limitations applicable to implied contracts not in writing, rules the present case.

The burden of proof was upon the plaintiff to show that he had procured an assignment of the judgment to himself. The law does not itself make the assignment because the plaintiff might have paid off the judgment and might have procured the judgment creditor to assign the judgment to him; but it devolved upon the plaintiff to establish the fact by proof. This he failed to do.

The court found in favor of the defendant on his plea of the statute of limitations. The case was tried before the court sitting as a jury and according to the defendant's evidence he was a cosurety with the plaintiff on the note. The right of action for contribution accrues when one surety pays more than his share of the common liability. In most of the cases it is said that the contract for contribution between sureties is one which the law implies for their mutual protection and indemnity. Nearly all the cases agree, however, that no cause of action arises until payment by one of their common debt and the statute of limitations begins to run against an action to enforce contribution at the time of such payment. *Woods* v. *Leland,* 1 Metc. (Mass.) 387, and *Mentzer* v. *Burlingame* (Kan.), 81 Pac. 196, and case note. Numerous decisions which we have read are cited in the note in support of the principal case.

It follows then that there was an implied liability only against the defendant, and the three-year statute of limitations governs. *Dismukes* v. *Halpern,* 47 Ark. 317, and 32 Cyc. 299. The record shows that the plaintiff paid the judgment on the 20th day of April, 1914. The present suit was commenced on July 23, 1918. Consequently more than three years had elapsed between the time when the plaintiff's cause of action accrued and the time when he commenced this suit.

Therefore the court was right in sustaining the defendant's plea of the statute of limitations and the judgment must be affirmed.

SWIFT & COMPANY *v.* COX.

Opinion delivered May 12, 1919.

1. JUSTICES OF THE PEACE—APPEAL—AMENDMENT OF PLEADINGS.—Upon appeal form a justice of the peace to the circuit court in an attachment case, it was not an abuse of discretion to permit the defendant to file an affidavit controverting the grounds of attachment, as the circuit court may permit the pleadings to be amended, so long as new causes of action or new set-offs are not allowed.
2. ATTACHMENT — FORM OF BOND.—Whether a bond given by defendant in an action of attachment was made under Kirby's Digest, § 362 or § 372, is unimportant where the attachment was discharged.
3. EXEMPTIONS—AMENDMENT OF SCHEDULE.—Where a debtor's schedule of exemptions claimed property in excess of the statutory exemption, the court properly permitted an amendment which excluded enough property to bring the remainder within the limit.
4. SAME—PARTNERSHIP PROPERTY.—A debtor cannot claim his chattel exemptions in partnership property until his interest therein has been ascertained and segregated.

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

W. H. Dunblazier, for appellant.

1. It was error to overrule appellant's motion to sustain the attachment on the ground that appellees had

failed to file affidavit or answer under oath denying the grounds of attachment as provided in sections 414, 416, Kirby's Digest, and in permitting appellees, after the trial was in progress, to file pleadings when they had been waived. *Ib.* The attachment should have been sustained when appellees failed to file their affidavit or answer under oath. *Ib.;* 90 Ark. 454.

2. It was error to allow the exemptions claimed by Cox and allow a supersedeas. The justice ordered the amended schedule, the exceptions to the report of appraisers and certified copy of the chattel mortgage stricken from the files and appellant failing to appeal from this order the same could not be considered by the circuit court with no evidence other than the verification of the original schedule to support it. The order should stand. It was not amended as contemplated by Kirby's Digest, section 3907. Neither the amended schedule, nor exceptions to the report of appraisers, are authorized by law, and are inconsistent with the original schedule filed, and could not be considered by the circuit court. Kirby's Digest, § 3915.

3. It was error to refuse to order the partnership property levied on sold and the proceeds applied to payment of the judgment, partnership property not being subject to schedule.

4. There was ample evidence to sustain the attachment. Kirby's Digest, seventh ground for attachment. The complaint should be treated as amended to conform to the evidence. 29 Ark. 323; 40 *Id.* 352. The sale of the property had been made prior to the trial.

5. The court erred in sustaining objections to interrogatories propounded by appellant's counsel in an attempt to prove that appellees were about to sell their property or otherwise dispose of it with intent to defraud creditors, etc. 90 Ark. 454.

J. E. Cox pro se.

1. The trial before the justice was without formal affidavit denying the grounds of attachment, but testi-

mony was taken and the attachment dissolved. All objections were waived, but the trial in the circuit court was *de novo* and there appellee was properly allowed to file his formal affidavit denying the grounds of attachment, etc. Kirby's Digest, sections 416, 4580. All objections were waived. 35 Ark. 109; 52 *Id.* 318; 30 *Id.* 560; 42 *Id.* 485. Amendments are allowable. 44 Ark. 375. The trial in the circuit court, was *de novo* on the merits and technical objections to the form of procedure are futile. 46 Ark. 38; 35 *Id.* 501.

2. There was no error in sustaining the schedule and ordering supersedeas. The amendment was properly allowed. No judgment was asked on the bond. The judgment is right on the whole case. *Supra.*

SMITH, J. Appellant sued appellees, J. E. Cox and J. A. Ray, co-partners doing business as Cox & Ray and operating a butcher-shop in Fort Smith, before a justice of the peace, on an open account for $290, and at the same time sued out an attachment against the fixtures and goods on hand, on the ground that they were about to dispose of these partnership assets with the fraudulent intent of cheating their creditors. The possession of the attached property was returned to Cox upon the execution of the following bond:

"We undertake to pay to the plaintiff, Swift & Company, such sums of money, not exceeding five hundred eighty ($580) dollars, as may be adjudged to him in this action, or that the property, viz., as per list attached and made a part hereof, attached hereto shall be forthcoming and subject to the order of the court for the satisfaction of such judgment as may be rendered in this action, on the day of sale, whichever shall be directed by the court."

Judgment for the amount sued for was rendered by default; but the attachment was not sustained. Execution was immediately issued and levied upon the attached

of property which he claimed to own and which he claimed as his exemptions. This schedule included the attached

property. The justice did not sustain the claim of exemptions; whereupon both parties appealed, appellant from the judgment on the attachment and appellee from the denial of his exemptions.

No affidavit was filed in the justice court controverting the grounds for attachment recited in the affidavit therefor, and appellant filed a written motion in the circuit court that the attachment be sustained for the want of the controverting affidavit. The court first took the view that the right to make this motion had been waived inasmuch as it had not been made in the justice court, but later granted appellee Cox permission to file this affidavit, and the affidavit was then filed, to which action of the court exceptions were duly saved. The cause was submitted to the court sitting as a jury by consent, and the court dissolved the attachment and sustained the claim of exemptions in the attached property, and this appeal has been duly prosecuted.

Judgment is now asked upon the bond set out above upon the ground that it imports an obligation to pay the debt notwithstanding the attachment has been dissolved. And complaint is also made of the action of the court in permitting appellee to amend his schedule; and in sustaining the claim of exemptions based upon the amended schedule.

No abuse of discretion was committed by permitting appellee to file the controverting affidavit in the circuit court. The appeal took the case to the circuit court for a trial *de novo,* and the filing of this affidavit did not offend against section 4682 of Kirby's Digest, which provides that "The same cause of action, and no other, that was tried before the justice shall be tried in the circuit court upon the appeal, and no set-off shall be pleaded that was not pleaded before the justice, if the summons was served on the person of the defendant." The circuit court may permit amendments of the pleadings and allow new issues to be made, keeping clear of new causes of action and set-offs not presented in the court below.

Railway v. *Hall,* 44 Ark. 375; *Birmingham* v. *Rodgers,* 46 Ark. 254; *Meddock* v. *Williams,* 91 Ark. 93.

The briefs discuss the question whether the bond set out above was executed under section 362 or 372 of Kirby's Digest, it being insisted that while appellee intended to execute the bond authorized by section 372 he has in fact executed the one authorized by section 362. This question is unimportant, as liability on the bond executed under either section would be discharged by the dissolution of the attachment, and the attachment was dissolved.

Complaint is made of the action of the court below in permitting appellee to file an amendment to his schedule in which he waived his claim of exemptions to portions of the property there described. The justice of the peace had caused the property listed in the schedule to be appraised, and its value as thus ascertained exceeded five hundred dollars, the maximum amount which could be claimed as exempt. The amendment to the schedule which the circuit court permitted appellee to make excluded from the property claimed as exempt certain property bought by Cox & Ray, the title to which had been reserved by the vendor and certain other articles upon which they had executed a mortgage. Omitting the articles upon which there was a mortgage and a vendor's lien, the remainder did not equal five hundred dollars in value. The court properly permitted this amendment to be made.

It does not follow, however, from what we have said that the court properly sustained the claim of exemptions. Indeed, under the undisputed testimony, as the same appears in the record before us, this should not have been done. It was admitted of record in the trial that Cox and Ray were partners, and no attempt was made to explain how, if at all, Cox acquired the interest of Ray. Indeed, questions were propounded to Cox by appellant which afforded the opportunity to make this explanation, but an objection to this testimony made by Cox's attorney was sustained, and we have a record containing an admission of a partnership with an attempt by one of the

partners to claim as exempt the partnership assets against a partnership debt. In the case of *Farmers' Union Gin & Milling Co.* v. *Seitz,* 93 Ark. 329, we said (to quote the syllabus): "A debtor is entitled to claim his chattel exemptions in partnership property when his interest therein is ascertained and segregated."

But this right exists only when this interest has been ascertained and segregated, for the right of exemption does not exist so long as the property claimed as exempt is partnership property. *Richardson* v. *Adler,* 46 Ark. 43; *Porch* v. *Arkansas Milling Co.,* 65 Ark. 40. So the judgment here must be reversed and the cause remanded for a trial of this issue, the burden being on the claimant to establish his right of exemptions. *Porch* v. *Arkansas Milling Co., supra.*

APPENDIX

I.

OPINIONS NOT REPORTED.

Alexander *v.* State, appeal from White Circuit Court; J. M. Jackson, Judge; affirmed, May 5th, 1919, *per* Humphreys, J.

Barnett Bros. *v.* Porter; appeal from Hot Spring Circuit Court, W. H. Evans, Judge; affirmed, April 7, 1919, *per* Smith, J.

Edwards *v.* Harris; appeal from Conway Circuit Court, A. B. Priddy, Judge; affirmed, May 19, 1919, *per* McCulloch, C. J.

Home Life & Accident Co. *v.* Pascoe; appeal from Independence Circuit Court; Dene H. Coleman, Judge; reversed, May 5, 1919, *per* Hart, J.

Kellett *v.* St. L. & St. F. Rd. Co., appeal from Sharp Circuit Court, Northern District; John B. Baker, Judge; reversed May 5, 1919, *per* McCulloch, C. J.

Missouri Pacific Rd. Co. *v.* Jenkins; appeal from White Circuit Court; J. M. Jackson, Judge; affirmed March 31, 1919, *per* Wood, J.

II.

CASES DISPOSED OF ON MOTION

J. R. Holden *et al. v.* T. J. Gregg *et al.*; Jackson Chancery Court; Geo. T. Humphries, Chancellor; appeal dismissed on appellant's motion, March 3, 1919; *per curiam.*

E. Spicer *v.* Willie J. Garrison; Sevier Circuit Court; J. S. Lake, Judge; appeal dismissed under Rule Seven, March 10, 1919; *per curiam.*

Geo. W. Hunter as Receiver, and Louisiana & Northwest Railroad Company *v.* Mrs. Saline McLeod; Columbia Circuit Court; C. W. Smith, Judge; settled and appeal dismissed on appellant's motion, March 24, 1919; *per curiam.*

Steve Goad *v.* The State of Arkansas; Logan Circuit Court, Northern District; James Cochran, Judge; appeal dismissed, April 7, 1919, on suggestion of appellant's pardon subsequent to lodgment of transcript; *per curiam.*

A. W. Cochran *v.* G. H. Matheny *et al.* as Commissioners of Road Improvement District No. 1 of Sharp county; Sharp Chancery Court; Geo. T. Humphries, Chancellor; appeal dismissed for non-compliance with Rule Nine, April 14, 1919; *per curiam.*

United States Auto Company *v.* F. T. DeShong and W. E. Taylor as Sheriff; Pulaski Chancery Court; J. E. Martineau, Chancellor; appeal dismissed for non-compliance with Rule Nine, May 5, 1919; *per curiam.*

J. R. Hill *v.* John M. Elliott, Chancellor; prohibition to Jefferson Chancery Court; dismissed on petitioner's motion, May 19, 1919; *per curiam.*

Chester Gleghorn *v.* The State of Arkansas; Lawrence Circuit Court, Eastern District; Dene H. Coleman; Judge; affirmed for non-compliance with Rule Ten, May 26, 1919; *per curiam.*

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