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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

RURAL SPECIAL SCHOOL DISTRICT NO. 85 *v.* TATUM.

Opinion delivered May 12, 1919.

1. SCHOOLS AND SCHOOL DISTRICTS—RURAL SCHOOL DISTRICTS.—A rural special school district can be established only out of territory not already incorporated in a special school district; and such district, when once established, cannot be dismembered by including a portion of its territory within the boundaries of another rural special school district.
2. SAME—SINGLE SCHOOL DISTRICT—EFFECT OF ORDERING ELECTION.—The territory embraced within a petition for the creation of a new single school district cannot, after the election has been ordered, be invaded by an attempt to create another district out of a part of the territory.

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

STATEMENT OF FACTS.

This appeal involves the validity of certain rural special schools districts in Union County, Arkansas.

On the 24th day of May, 1918, the number of electors required by the statute filed their petition with the county judge of Union County asking that certain territory be organized into a single school district. The petition was accompanied by a map showing the territory asked to be made into the single school district. It was proposed by the petitioners to form Rural Special School District No. 85 out of part of the territory then embraced in common school districts Nos. 4, 47, 52 and 84. On May 25, 1918, petitions were filed respectively by the requisite number of electors of common school districts 52 and 84 with the county judge asking that each of said districts be incor-

porated into a rural special school district and that they bear their common school district numbers when so organized. Each of these petitions was accompanied by a map showing the territory of the proposed district as required by the statute. On May 27, 1918, the electors respectively of common school districts Nos. 4 and 47 filed a petition and map with the county judge, in the manner required by the statute, asking that each of said districts be organized into a rural special school district and that each bear its common school district number when so organized. On May 29, 1918, the county judge acted on all five of these petitions ordering elections to be held in each of said districts within the time provided by the statute. An order was made that the elections in districts Nos. 4, 47, 52 and 84 should be held on the 8th day of June, 1918. The county judge made the order for the election in these districts before he made an order for an election to be held in proposed district No. 85. The election in proposed district No. 85 was ordered to be held on the 11th day of June, 1918. The elections in all of the said districts were duly held as required by the statute and a majority of the votes cast at each election was in favor of the organization of the single school district.

The plaintiffs brought this suit in equity against the defendants. In their complaint they set out the facts above stated and allege that they are the directors of Single School District No. 85. The object of the suit is to restrain George S. Tatum, one of the defendants, as county clerk of Union County, from placing any of the funds arising from the territory embraced in Rural Special School District No. 85 to the credit of either of the Rural Special School Districts Nos. 4, 47, 52 and 84, and also to enjoin the defendant, Jim Dumas, as county treasurer of Union County, from paying out any of the funds of district No. 85 to districts Nos. 4, 47, 52 and 84.

The chancellor was of the opinion that proposed Single School District No. 85 had never been legally formed and had no existence as a legal entity. It was therefore decreed by the court that the complaint of the plaintiff

be dismissed for want of equity. The plaintiff has appealed.

W. A. Spear and *Powell & Smead,* for appellants.

1. The organization of Special Rural District 85 takes precedence over the districts, 4, 47, 52 and 84, having first filed its petition and in every way complied with the law, its organization relates back to the filing of its petition on May 24, 1918, and takes precedence over the petitions filed subsequently, notwithstanding the court in fixing the dates of the elections fixed an earlier date.

2. If so formed it takes precedence and is entitled to the school funds in the hands of the collector. 121 Ark. 581. This case is controlling and settles the question and the decree should be reversed and plaintiff's prayer for injunction granted.

Neill C. Marsh and *W. C. Medley,* for appellees.

1. 121 Ark. 581 does not control this, as the facts are not similar.

2. The county judge revoked and canceled the order calling an election in proposed district 85.

3. Appellant had no cause of equity jurisdiction, as it had an adequate remedy at law. The cases cited by appellant do not apply. The election was ordered in appellee districts prior to the date the petition of appellant was presented. The mere filing of a petition describing territory is not sufficient. The ordering of an election is necessary. 121 Ark. 581 is not controlling, but 123 *Id.* 570 is conclusive and the decree should be affirmed.

HART, J., (after stating the facts). The decree of the chancellor was right. In *Special School District No.* 79 v. *Special School District No.* 2, 121 Ark. 581, the court, following *Crow* v. *Special School District No.* 2, 102 Ark. 401, held that rural special school district can only be established out of territory not already incorporated in a special school district, and that such district when once established cannot be dismembered by including a portion of its territory within the boundaries of another rural special school district.

The court further held that the law did not contemplate that there should be more than one election ordered at a time for the establishment of a particular territory into a rural special school district, nor that, after a petition had been presented for the organization of such special district with the map showing the territory asked to be included therein, any other petition for the inclusion of any such territory into another rural special school district should be considered by the county judge, nor an election ordered therein until the election ordered upon the petition first presented should have been held.

It is contended by counsel for the plaintiff that this decision does not control the instant case because the petition for the formation of Single School District No. 85 was filed before the petitions in the other districts were filed. This does not make any difference. It is not the filing of the petition, but the presentation thereof and the judgment of the court therein which closes the door to the presentation of other petitions until the election provided for in the petition first acted on shall have been held. This was the construction placed upon the decision in *Rural Special School District No.* 17 v. *Special School District No.* 56, 123 Ark. 570. In the latter case the court, referring to the former, said that the court had recently held that the territory embraced within a petition for the creation of a new single school district cannot, after the election has been ordered, be invaded by an attempt to create another district out of a part of that territory.

It follows that the decree must be affirmed.

SKILLERN v. THE WHITE RIVER LEVEE DISTRICT.

Opinion delivered May 12, 1919.

1. STATUTES—RE-ENACTMENT.—Acts 1919, No. 166, increasing the benefits in a certain levee district, although relating to the same subject-matter as Special and Private Acts 1911, p. 215, does not violate Constitution, article 5, section 23, requiring the re-enactment and publication at length of laws which are revived, amended, extended, or conferred, since such act does not amend the earlier act, but is an independent enactment.

2. LEVEES—ASSESSMENT OF BENEFITS—LEGISLATIVE POWER.—The Legislature may increase the assessment of benefits of a levee district at the rate of 6 per cent. per annum; to be cumulative and continuous until the indebtedness of the district is paid.

3. LEVEES—DELEGATION OF LEGISLATIVE POWER.—The Legislature may increase the benefit assessments of a levee district either directly or through a board of assessors.

4. LEVEES—VALIDITY OF STATUTE INCREASING BENEFITS.—Acts 1919, No. 166, increasing the assessment of benefits of a levee district *held* not void as imposing burdens on property owners in excess of the benefits to the land.

5. STATUTES — CONSTRUCTION — SURPLUSAGE.—Notwithstanding Acts 1919, No. 166, indicates a mistake of fact in regard to an indebtedness incurred because of a previous overflow, the statute must be given effect, the reference to such overflow being surplusage.

6. PLEADING—CONCLUSIONS.—In a suit to restrain a levee district from increasing assessments and issuing bonds, allegations that the indebtedness of the district will be thereby greatly increased to exceed the benefits, without alleging facts which show such to be the case, are insufficient.

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

STATEMENT OF FACTS.

This action was instituted by the appellant against the appellees, as the Board of Directors of the White River Levee District, for the purpose of preventing them from increasing the assessments against his land and from issuing certain bonds.

The White River Levee District was created by Act 97 of the Acts of the General Assembly of the State of Arkansas for the year 1911. The act provided for the assessment of benefits by reason of the levee protection and authorized the levy of an annual tax upon the lands included in the district upon the benefits so assessed. The benefits to the lands, by reason of the building of the levee, were to be ascertained and assessed by a board of assessors chosen by the Board of Directors for that purpose, and, when the assessments were completed, they were to so remain until the next assessment was ordered by the board. The benefits were assessed by the board of assessors at $15 per acre. The district com-

prised several thousand acres of land in the counties of Woodruff, Monroe and Prairie. Act 104, volume 1, Acts 1917, p. 519, authorized the White River Levee District upon the petition of landowners, owning not less than seventy per cent. of the total acreage, to issue certificates of indebtedness to raise money to repair the levee, in emergency, when same had been damaged by overflow or other cause, or was in danger. After the passage of the act of 1917, a petition of the landowners of the district, in conformity with the statute, was filed in the chancery court and the court granted the petition and ordered that certificates of indebtedness be issued to secure funds for the purpose of repairing certain portions of the levee. The certificates of indebtedness thus authorized were not issued and the work of repairing the levee at that time was not performed. The Legislature of 1919 passed Act No. 166, which reads, in part, as follows:

"Section 2. On account of the levee improvement and the other work incident thereto, which has already been completed, and which is largely in excess of the improvement originally contemplated by the district, as well as the improvements now in process of completion, the benefits to the real estate therein, as heretofore fixed and determined, are hereby increased at the rate of six per cent. per annum; such increase of benefits shall be cumulative and shall continue from year to year until the present indebtedness of the district is fully matured and paid, and such annual installments thereof shall be effective on the first day of June of each year.

"Section 3. The majority of the landowners of said district having duly authorized said district to issue certificates of indebtedness not to exceed $100,000 for the purpose of paying the indebtedness of the district incurred during the overflow of 1918, and also for the purpose of raising funds to pay for the present necessary work of raising, strengthening and repairing the levee of said district, the Board of Directors of said district are hereby authorized to borrow a sum of money not in excess of $100,000 for the purpose of funding said certifi-

cates of indebtedness, and to issue therefor the negotiable bonds of the district, payable at such times as they deem best, and bearing a rate of interest not to exceed six per cent. per annum."

The Legislature of 1919 also passed Act No. 178, section 1 of which reads as follows:

"The Board of Directors of the White River Levee District shall have the power to straighten the channel of Cache river as a means of protecting the lands of the district against inundations from the waters of said river, and may issue the bonds of the district in a sum not exceeding $150,000 and bearing interest at a rate not exceeding six per cent. for the purpose of raising the money to do such work."

Appellant was the owner of land in the levee district. He set up the above statutes in his complaint and alleged that the original assessments of benefits amounted to $15 per acre on the lands; that the Board of Directors "are proceeding to increase the benefits assessed" against his lands and other lands of the district six per cent. per year for the year 1919. He alleged that no certificates of indebtedness were issued under the provisions of the act of 1917, but, notwithstanding that fact, the Board of Directors "are attempting to issue and sell the negotiable bonds of the district to the amount of $100,000 under the provisions of Act 166, and $150,000 under Act 178 of the Acts of 1919." He alleged that the issue of bonds in these amounts "will cause the indebtedness of the district to greatly exceed the benefits assessed against the lands of the district by the Board of Assessors; that the same is prohibited in the act creating said district and that, if such bonds are issued and sold, such action of the Board of Directors will create a cloud" upon his title. He alleged that the acts of the board in increasing his assessments and issuing of bonds, above set forth, were unlawful and prayed that the Board of Directors be restrained from so doing.

The appellee demurred to the complaint on the ground that it did not state a cause of action. The court

sustained the demurrer and entered a decree dismissing the same for the want of equity, from which is this appeal.

W. E. Trice, for appellant.

1. Section 2 of act 166 is not valid. It seeks to amend the original act by reference to its title only without re-enacting it. This cannot be done, as it violates the Constitution. Article 23, section 6, Constitution 1874; section 5 Act No. 97. Increasing the assessments under act No. 166 alters the provisions of the original act and is void, as it merely extends the provisions of the old act and does not re-enact them. 52 Ark. 290; 49 *Id.* 131; 58 *Id.* 253.

2. There are no certificates of indebtedness outstanding and the board has no right to issue bonds. Act No. 166, § 3. This section is nugatory, as there are no certificates outstanding.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

1. The provision for an annual increase of assessments of benefits is valid under act No. 166, § 2. 76 Ark. 197; 85 *Id.* 171. There is no constitutional prohibition. 99 Ark. 1; 112 *Id.* 342.

2. Section 3 of the act, 1919, is valid. The intent of the Legislature is clear and it should be upheld. 3 Ark. 285; 11 *Id.* 44; 28 *Id.* 203; 40 *Id.* 431. See also 80 Ark. 150; 86 *Id.* 518; 93 *Id.* 168; 94 *Id.* 422. Mere mistakes or errors will not invalidate an act. 109 Ark. 556. The intention must prevail. *Supra.*

WOOD, J., (after stating the facts). It appears from the allegations of the complaint that the Board of Assessors provided for in act 97 of the Acts of the General Assembly for the year 1911, creating appellee levee district, assessed the benefits to be derived from the protection afforded by the levee improvements contemplated, at $15 per acre. It further appears that the Legislature of 1919, by section 2 of Act No. 166, "passed for the pur-

pose of aiding the White River Levee District," "increased the benefits to the real estate therein at the rate of six per cent. per annum." The act specified that: "Such increase shall be cumulative, and shall continue from year to year until the present indebtedness of the district is fully matured and paid."

Section 5 of act 97, creating the district, provides that the assessments of the Board of Assessors "shall be the assessments of the district until the next assessment shall be ordered by the Board of Directors." It is argued that section 2 of act 166, *supra,* alters and extends the provisions of section 5, *supra,* of the original act, creating the district, without re-enacting and publishing at length that section, and thus violates section 23, article 5 of the Constitution, which provides: "No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." Section 2 of act 166, *supra,* does not purport to, and does not in fact, amend or extend the provisions of section 5 of Act 97 of the Acts of 1911, "by reference to its title only or in any other way." The title of the act under review is "An act entitled an act in aid of the White River Levee District." It is a wholly independent enactment. True its effect is to repeal that part of section 5 of Act 97 of Acts of 1911 which reads: "And their assessment as equalized shall be the assessment of said levee district until the next assessment shall be ordered by the Board of Directors." But this is so because section 2 of act 166, *supra,* is a direct assessment of benefits by the Legislature and is in invincible conflict with that part of section 5 of act 97 last above quoted, which continues the assessment of benefits made by the Board of Assessors "until the next assessment shall be ordered by the Board of Directors." In *Scales* v. *State,* 47 Ark. 131-134, Chief Justice COCKRILL, speaking of the provision of the Constitution now under consideration, said: "It is well settled that this provision does not make it necessary, when a new statute

is passed, that all prior laws modified, affected or repealed by implication by it should be re-enacted." See also the opinion by him in *Watkins* v. *Eureka Springs,* 49 Ark. 131-134. The act therefore is not in conflict with section 23, article 5 of the Constitution.

It is also urged that the Legislature has no power to increase the benefits assessed by the Board of Assessors at the rate of six per cent. per annum and to make same cumulative and continuous until the existing indebtedness matured and was paid. It is the settled law in this State that the Legislature may act directly in assessing benefits to accrue from local improvements which it has authorized, and the "legislative determination should be and is conclusive unless it is arbitrary and without any foundation in justice and reason." *Salmon* v. *Board of Directors,* 100 Ark. 366; *Moore* v. *Board of Directors of Long Prairie Levee District,* 98 Ark. 113, 116-117; *Board of Improvement* v. *Pollard,* 98 Ark. 543, and cases cited. Since under these decisions the Legislature has the power primarily to determine the value of the benefits to be derived from a local improvement, it follows as a necessary corollary to this doctrine that the Legislature may increase the original amount of the benefit assessment whether same was made directly by it or by a board of assessors to which the power had been delegated. The exercise of the power in the first instance did not exhaust it. The Legislature could continue to exercise the power until the purpose in creating the levee district had been consummated. The method prescribed in section 2 of act 166, *supra,* by which the Legislature determined that the amount of the value of the benefits which would accrue to the lands, by reason of the improvement, would be represented by a sum consisting of the original assessment of $15 per acre at rate of 6 per cent. per annum thereon, to be cumulative and to continue from year to year until the indebtedness of the district was mature, was within the province of the Legislature. The amount of the value of the benefits could be easily and definitely ascertained by this method, because it fixed with cer-

tainty the time of the interest to run as the date when the then indebtedness of the district matured. In *Oliver* v. *Whittaker,* 122 Ark. 291, the court held that assessments of benefits could be made to bear interest at the rate of 6 per cent. per annum, under a statute which provided that "the deferred installments of the assessed benefits shall bear interest at the rate of 6 per cent. per annum and should be payable only in installments as levied." In construing this provision, the court said that it was not intended "to authorize the imposition of any burden in excess of the actual value of benefits to the property together with interest on deferred payments." So it may be said here that there was nothing in the language of the act that reveals any intention on the part of the Legislature to impose any burden upon the property in excess of the value of the benefits to the lands.

The appellant further contends that the board had no authority to issue bonds under the third section of Act 166, *supra,* for the reason that at the time of its passage there were no certificates of indebtedness outstanding, inasmuch as the work contemplated by the act of 1917 was never performed and no certificates of indebtedness were actually issued under the authority of such act. But the language of section 3 of act 166, *supra,* shows that the board was authorized to issue certificates of indebtedness in the sum of $100,000 not only for the indebtedness of the district "incurred during the overflow of 1918," but also "for the purpose of raising funds to pay for the present necessary work of raising, strengthening, and repairing the levee of said district."

Although it appears from the allegations of the complaint that the Legislature made a mistake in finding that there was a present indebtedness against the district for work done during the overflow of 1918, yet the language of the third section of the act shows that the Legislature was not under any misapprehension as to the existing necessity of raising, strengthening, and repairing" the levee of the district. There are no allegations of fact in the complaint showing that the necessary work to be done, in

order to effectuate the purpose in building the levee, namely, to protect the lands from overflow, would cost less than the sum of $100,000. To be sure, the Legislature would have no power to authorize the issuance of bonds to liquidate an indebtedness which had not been, and which would never be, incurred. But taking the language of the act as a whole it clearly evinces the purpose to provide a fund to be expended in necessary work on the levee.

Being convinced that such was the intention of the Legislature from the language employed, it is our duty to give effect to the statute, even though some of the language indicates that it was used under a mistake of fact. The words "incurred during the overflow of 1918" should be treated as surplusage, and could and should, be eliminated in order to carry out the manifest purpose of the Legislature. This view is in accord with recognized canons for the correct interpretation of statutes, as announced by the best authors on the subject, and often approved by our own court. See Lewis' Sutherland on Stat. Con., secs. 363 to 384, inclusive, also secs. 489, 490; Endlich on the Int. of Stat., sec. 365, chap. 4, sec. 73, sec. 264, 265; *Bowman* v. *State,* 93 Ark. 168; *Garland Power & Dev. Co.* v. *State Board of R. R. Incorp.,* 94 Ark. 422; *Snowden* v. *Thompson,* 106 Ark. 517; *State* v. *Trulock,* 109 Ark. 556; *Nakdimen* v. *Ft. Smith & Van Buren Bridge Dist.,* 115 Ark. 194; and other cases cited in 4th Crawfords's Digest, p. 4677, sections 53, 54, 55.

It is alleged in the complaint that the issues of bonds under Acts 166 and 178, *supra,* will cause the indebtedness of the district to greatly exceed the benefits assessed against the lands of the district, but no facts are alleged to show that such is the case. In *Moore* v. *Board of Directors of Long Prairie Levee Dist., supra,* we held that the courts cannot review "merely on general allegations that the assessments are arbitrary, excessive, and confiscatory." Facts must be pleaded which show that the decision of the law makers was not merely erroneous, but that it was manifestly outside of the range of the facts.

In disposing of the allegations of the complaint on demurrer and ruling that act 178 of the Acts of 1919, *supra,* is not open to the objection here urged against it, we reserve our decision as to its validity if its constitutionality should be challenged on other grounds.

Finding no error in the ruling of the court, its judgment is affirmed.

NELSON *v.* STATE.

Opinion delivered May 19, 1919.

1. CRIMINAL LAW—REVIEW—SUFFICIENCY OF EVIDENCE.—In a prosecution for violating the law prohibitng the sale of intoxicating liquors, the credibility of the State's witness was a question for the jury; and when he testified as to the sale it cannot be said that there was not substantial evidence to support the verdict.
2. CRIMINAL LAW—OPENING STATEMENT—MISCONDUCT OF COUNSEL.—In a prosecution for selling intoxicating liquor, the prosecuting attorney's opening statement to the effect that the prosecuting witness had information as to the defendant's selling whiskey *held* not objectionable.
3. WITNESSES—CROSS-EXAMINATION OF ACCUSED—FORMER OFFENSES.—Where the defendant, being prosecuted for selling intoxicating liquor, took the stand as a witness, it was proper for the prosecuting attorney to ask him concerning the commission of other offenses for the purpose of reflecting upon his credibility.
4. CRIMINAL LAW—APPEAL—EXCEPTIONS.—Where the record in a criminal case does not show that exceptions were saved concerning matters argued for reversal, such matters will not be considered on appeal.

Appeal from Lonoke Circuit Court; *George W. Clark,* Judge; affirmed.

J. B. Reed, for appellant.

The verdict is not sustained by the evidence. There was no "*substantial*" evidence to sustain it. 50 So. 374. Improper questions were asked and improper remarks were made by the State's attorney. *Ib.* The collateral matters presented to the jury were highly prejudicial and appellant did not have a fair trial. *Ib.*

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. There was no error in the opening remarks of the State's attorney. 66 Ark. 16.

2. Nor any error in permitting the prosecuting attorney to cross-examine defendant as to other crimes. 46 Ark. 141; 58 *Id.* 473; 60 *Id.* 450; 100 *Id.* 321. The court did not abuse its discretion. 75 Ark. 574; *Ib.* 142. But no objections were made and it is too late now. 80 *Id.* 158.

3. There was no error in permitting Len Eagle to testify as to threats made by defendant against the prosecuting witnesses. 34 Ark. 257; 70 *Id.* 107.

4. The evidence sustains the conviction. 82 *Id.* 372; 104 *Id.* 162.

McCULLOCH, C. J. Appellant was convicted of the offense of selling intoxicating liquor, and the principal contention on this appeal is that the evidence was not sufficient to sustain the verdict.

The testimony of one Ross was the only direct testimony tending to establish appellant's guilt. Ross testified that he obtained money from one Mr. Swaim with which to buy whiskey, and that he purchased the whiskey from appellant in Lonoke County, where the venue in the case is laid in the indictment. Ross was rigidly cross-examined, and according to his testimony as copied in the record he was to some extent vacillating and uncertain in some of his statements, but he testified that he purchased the liquor from appellant. His credibility was a question for the jury, and we cannot say that there was not substantial evidence in support of the verdict.

Appellant was introduced as a witness and denied that he sold whiskey, but this contradiction was a question for the jury to determine whether or not appellant was, beyond reasonable doubt, guilty of the offense charged in the indictment.

It is next contended that certain remarks of the prosecuting attorney in his opening statement to the jury before the testimony was introduced constituted prejudicial

error. The remarks objected to, as copied in the record, were as follows: "The prosecuting witness, George Ross, after making and inquiring and having information as to the defendant selling whiskey, and another man by the name of Strong, and talked with him about the matter." The remainder of the statement of the prosecuting attorney is not brought into the record and we have no means of knowing definitely just the connection in which this remark was made, but we assume that it was a part of the preliminary statement leading up to an outline of the testimony of the witness Ross. The substance of the remark is that the prosecuting witness, after receiving information as to the defendant selling whiskey, talked with him about it and proceeded to buy the whiskey. It does not appear to have been an effort on the part of the prosecuting attorney to introduce hearsay testimony, nor does it appear that the remark was made otherwise than in good faith in an attempt of the officer to correctly outline to the jury the testimony which he expected to introduce for their consideration. Good faith is generally the test in passing upon the conduct of such an officer in his preliminary presentation of a case to the jury. *McFalls* v. *State,* 66 Ark. 16. According to the test we do not think that there has been any prejudice to the rights of appellant so as to call for a reversal of the judgment.

Objection is made that the prosecuting attorney was permitted to interrogate appellant on cross-examination concerning the commission of other offenses, but that was for the purpose of reflecting upon his credibility as a witness, and was competent. It has been so decided in numerous cases in this court.

Other matters are argued here as grounds for reversal, but the record fails to show that exceptions were saved concerning those matters.

Judgment affirmed.

GRANT v. BURROWS.

Opinion delivered May 19, 1919.

1. PRINCIPAL AND AGENT—AUTHORITY.—Evidence *held* to establish authority in an agent to rent a certain plantation for a five-year term.
2. FRAUDS, STATUTE OF—PART PERFORMANCE.—The question whether authority to lease land for another for a longer term than one year is immaterial where the lessee complied with the terms of the five-year lease by paying State, county and levee taxes and placing improvements of the value of $6,500.
3. PRINCIPAL AND AGENT — AUTHORITY TO SELL.—Authority conferred upon an agent by the owners of a plantation to represent them in the organization and construction of a levee built across the plantation, in the matter of granting a right-of-way and of agreeing to and receiving damages therefor, did not empower him to sell the plantation.
4. SAME—AUTHORITY TO SELL.—The fact that the owners of a plantation acquiesced in a sale of a part thereof by an agent does not warrant the conclusion that they made him their general agent to sell the plantation without consulting them.
5. SAME—AUTHORITY TO SELL.—Because an agent had general authority to rent certain land it is not inferable that he had authority to execute an option contract for the sale and purchase thereof at some future date.
6. SAME—SPECIAL AGENCY.—General authority cannot be inferred from authority given to perform a particular act.
7. SAME — SPECIAL AGENCY.—One who deals with a special agent whose authority is confined to a single transaction must ascertain the extent of his authority.

Appeal from Miller Chancery Court; *Jas. D. Shaver*, Chancellor; affirmed.

J. M. Carter, for appellants.

1. Dr. Grant had no authority to bind any of the heirs, owners of the place, in any contract with appellee. If he had any authority he exceeded it in leasing it for a period longer than a year. The declarations and transactions of a person are not of themselves evidence of his agency against the principal. 85 Ark. 256. Being the husband of one of the owners does not dispense with the necessity of proving Dr. Grant's authority to act as his

wife's agent in the conduct of her business, or make his statements about his authority to act proof of that fact. 44 Ark. 214.

2. Appellee's contention of the construction of this contract comes squarely within the statute of frauds. Kirby's Digest, § 3664; 114 Ark. 126; 20 Cyc. 227; Tiedeman on Real Property, § 177 and notes; 73 Ark. 302.

An oral agreement to rescind the sale of land is within the statute of frauds. 91 Ark. 139.

One of the owners is incapacitated to bind himself, and his curator is without authority to bind the insane party except through the orders of the district court of Caddo Parish, Louisiana. A curator cannot do what the principal is not authorized to do.

None of the unauthorized acts of the cotenant could bind the others. 91 Ark. 139. See also 81 S. W. 629; 43 N. Y. Supp. 849.

All that could possibly be claimed as authority for Dr. Grant to bind appellants in a lease contract is the knowledge and acquiescence on the part of the heirs that he was assuming to rent and actually renting the place from year to year with the reservation of the right by them to sell and terminate the lease at any time. Appellee admits that such was the understanding under the first contract, and admits that he made no inquiry of appellants, Dr. Grant or any one else as to whether Dr. Grant had authority to make such a vital change in the new contract. The evidence shows that the defendant owners had no knowledge or information whatever that Dr. Grant had undertaken to vary the terms of the old contract by any new one, and appellee admits that he made no inquiry and Dr. Grant never informed appellants nor even his wife that he had undertaken to do so.

The proof shows that appellee has not been injured or damaged by reason of the improvements made and taxes paid because the use of the place since the contract was made was worth much more than the value of the improvements he made under the contract and if he was damaged by reason of part performance, he cannot

charge it to the owners of the land; it would be attributable to his own negligence in failing to ascertain the extent of Dr. Grant's authority. The statute of frauds requires that before the owners are bound by the acts of Dr. Grant that he be lawfully authorized by writing, and if not his acts have no other effect in law or equity than to create a lease not exceeding one year. It was appellee's duty to demand and examine his authority in writing. 86 Pac. 610.

One who deals with an agent is put upon inquiry and must discover the agent's authority. 5 So. Rep. 190; 2 L. R. A. 808; 31 Cyc. 1322.

Dr. Grant's authority was in writing and his instructions were in law brought to the knowledge of appellee and all others dealing with him and his power to bind will be limited by these known instructions or limitations. 85 N. Y. 278; 39 Am. Rep. 657; 50 S. E. 1000.

An agent has no implied authority to do acts that are unusual, extraordinary or unnecessary. For such acts he should secure special authority. 57 Ill. App. 184; 44 Me. 177; 13 So. 282; 51 N. Y. S. 530. See also 31 Ark. 216; 92 *Id.* 320. The case in 103 Ark. 79 is not applicable here.

3. Appellants are not estopped to deny Dr. Grant's authority. They have done nothing to mislead appellee to his detriment. The court erred in holding that appellee had a valid lease until January, 1922, and in dismissing the cross-complaint.

M. E. Sanderson, for appellee.

1. The testimony shows that Dr. Grant had authority to bind appellants by the contract. The court below found that he had authority to act for and was the agent of appellants. Its findings will not be disturbed unless clearly against the preponderance of the testimony. 110 Ark. 355; 89 *Id.* 132; 72 *Id.* 67.

When an agent transacts the principal's business, renting the farm, collecting rents, directing repairs, etc., he is a general agent. 118 Iowa 337; 92 N. W. 58. An agent may prove his agency. 122 Ark. 357. Dr. Grant

proved his agency not only by his acts and declarations but by his general control of the plantation. And his acts were within the scope of both his actual and apparent authority. 103 Ark. 79; 112 *Id.* 63; 13 *Id.* 86; 131 *Id.* 377. See also 132 *Id.* 317; 114 *Id.* 300; 208 S. W. 786.

Dr. Grant's wife was bound by his acts. 56 Ark. 217; 92 *Id.* 315; 103 *Id.* 484; 127 *Id.* 530.

2. The contract does not fall within the statute of frauds. Kirby's Digest, § 3664; 112 Ark. 562; 55 *Id.* 294; 81 *Id.* 70; 91 *Id.* 280; 79 *Id.* 100; 117 *Id.* 500.

On the cross-appeal the court erred in denying appellee the right to purchase. The cases cited, *supra,* settle the question of Dr. Grant's agency and authority and the stipulation in the contract is binding on appellants. A contract of lease which stipulates that the lessee at the expiration of the lease may purchase the land is binding and enforceable. 80 Ark. 209. See also 79 Ark. 100; 55 *Id.* 294. Appellants are bound under the contract as to the lease but not as to the right to purchase and the court below should have rendered a decree for appellee on his cross-complaint.

HUMPHREYS, J. Appellee instituted suit against appellants in the Miller Chancery Court to prevent the sale to a third party of the "California Plantation" on Red River in said county. The basis of the suit was a written contract entered into by and between appellee and one R. L. Grant, of date September 25, 1916, providing, in substance, that appellee should become the tenant of appellants on said property for a period of five years, beginning on the first day of January, 1917, and ending on January 1, 1922, for the use of which appellee was to pay all the taxes on the estate during the period and to clear 200 acres of land and make other valuable improvements. The last clause in the contract was an agreement on the part of R. L. Grant to sell the plantation to appellee at the expiration of the lease for $10 per acre for the lands east of the levee, and $20 per acre for the lands west of the levee.

The final issues presented by the several pleadings and the evidence adduced were (a) whether appellee was a tenant for a five-year term or merely a tenant from year to year; (b) whether appellee had the right to purchase the plantation on or before January 1, 1922.

Upon hearing, the court found and decreed that appellee was a tenant of appellants for a term ending the 1st day of January, 1922, and that appellants were not obligated to sell the lands to appellee. Appellants have appealed from the findings and decree adverse to them, and appellee has prosecuted a cross-appeal from the findings and decree adverse to him.

The plantation was formerly owned by Joseph Boisseau, the father of all the appellants except R. L. Grant, who was his son-in-law. Joseph Boisseau died owning this plantation in the year 1906, leaving seven children, four of whom owned the plantation at the time this suit was instituted. Mrs. Bessie S. Grant owned three-fourteenths, Miss Nettie Boisseau six-fourteenths, Mrs. Augurs three-fourteenths, and Joseph Boisseau, Jr., two-fourteenths. Joseph Boisseau, Jr., was of unsound mind and resided with his duly appointed guardian, W. C. Augurs, who had authority by virtue of his guardianship to lease, but not sell, his ward's interest in said plantation. Dr. R. L. Grant and Bessie S. Grant, his wife, lived at Texarkana, near the plantation, and the other appellants at Shreveport, Louisiana. Dr. R. L. Grant assumed the management and control of the plantation by and with the consent of the other appellants. The place had been neglected and had little productive value. In 1910, Dr. Grant rented the place to M. B. Armstrong for a term of three years. Armstrong was to make certain improvements in lieu of rents, but failed to make them and had to give up the place. In 1911, he rented the property to appellee for a term of five years, to end on the 31st day of December, 1916, the consideration being that appellee should clean up all the ground that had formerly been in cultivation and make improvements, for which he should be paid a certain proportion of the cost in case the prop-

erty was sold and appellee compelled to move off before the expiration of his lease. In 1913, a levee district was organized which included a part of this plantation. The levee was completed in the fall of 1916. In the organization of the district, and the construction of the levee, appellee represented the other appellants in all transactions with the levee board, such as agreeing upon the value of the right-ofway, receiving damages therefor, etc. For purposes of better representing them, the other appellants at the time conveyed him five acres of land within the district. This deed was never placed of record and Dr. Grant never claimed any interest in the lands under it. It was treated as a matter of form only. On the 25th day of September, 1916, several months before the expiration of the old rental contract between R. L. Grant and appellee, appellee and Dr. R. L. Grant entered into the written contract made the basis of this suit. Appellee continued to occupy the place under this written contract, two years, during which time he felled the timber on 100 acres of land inside the levee and placed 10 acres thereof in cultivation, built seven houses, ranging in size from two to five rooms, and in cost from $250 to $1,500, a barn, a crib, fences, etc., drove seven wells in which he placed pumps, and built two overhead cisterns. The total amount expended by him for improvements was about $6,500. He also paid the county, State, and a part of the levee taxes. The plantation produced from 90 to 120 bales of cotton and about 4,000 bushels of corn per year, in addition to a large amount of grass used for pasturage. Appellants authorized Dr. R. L. Grant to control and rent the plantation, but thought the rental contracts were made from year to year with the privilege of selling it at any time. In the exercise of the authority conferred upon him, he managed and rented the property after Joseph Boisseau died in 1906, in the language of some of the witnesses, just as if he owned it. During the long period of his supervision, the other appellants exacted no accounting, required no report concerning the details of his management, nor

the character of rental contracts made by him. Appellants knew in a general way that the property was rented for taxes and improvements. They also knew that appellee had occupied the place for years as tenant and had made valuable improvements thereon. From time to time, they communicated with each other concerning the general management and conduct of the place by Dr. Grant. They also gave him authority to find purchasers for the property, and, during the existence of the written contract with appellee, confirmed a contract of sale made by Dr. Grant to Mrs. Black of 200 acres off of the tract known as the "Kitchen Bend." On several occasions after making the written contract, Dr. Grant urged appellee to take advantage of his option to purchase the land under the contract. Finally, appellee concluded to do so, but discovered that appellants had agreed to sell the plantation to Mr. Young for $30,000, which was $12,000 more than the consideration provided in appellee's option.

It is contended by appellants that Dr. Grant had no authority to make a five-year rental contract for them with appellee, and that, if such authority existed, it was not conferred in writing and therefore void under the statute of frauds. After a careful reading of the evidence, we are convinced that Dr. Grant was a general agent of the other appellants for the purpose of renting the California plantation. He was permitted to control and manage it just as if it were his own place for many years. No restrictions whatever were placed upon him with reference to renting it. The most that appellants say is that they understood he was renting it from year to year with the privilege of selling it at any time. This understanding was due entirely to the carelessness or neglect of the other appellants. They knew of the long tenure of appellee and of the valuable improvements he was placing upon the property, and, in the exercise of the slightest diligence, could have ascertained from Dr. Grant or appellee the character of appellee's occupancy. They do not claim that they expressly placed any restrictions upon Dr. Grant in conferring authority upon him to

manage and control the property. Even if the evidence warranted the conclusion that restrictions had been placed upon him, there is an entire absence of any showing that they notified appellee of the restrictions. The execution of the rental contract for a term of five years was clearly within the apparent, if not the actual, scope of Dr. Grant's authority, and appellants, who were the real owners of the land, are bound by the rental contract. *Forrester-Duncan Land Co.* v. *Evatt,* 90 Ark. 301; *Brown* v. *Brown,* 96 Ark. 456; *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79; *Three States Lumber Co.* v. *Moore,* 132 Ark. 371; *Crossett Lumber Co.* v. *Fowler,* 137 Ark. 418, 208 S. W. 786.

Appellant insists that the contract of rental made by R. L. Grant with J. B. Burrows was void because R. L. Grant had no written authority from the other appellants to lease the land. In support of appellants' contention, our attention is called to section 3664 of Kirby's Digest. This court has held in several cases that authority may be conferred by parol to sell real estate for another. *Daniels* v. *Garner,* 71 Ark. 484; *Kempner* v. *Gans,* 87 Ark. 221; *Davis* v. *Span,* 92 Ark. 213; *Vaught v. Paddock,* 98 Ark. 10. The court, however, has not passed upon the question whether authority to lease real estate for another for a longer period than one year can be conferred in parol, and it is unnecessary to determine that question in the instant case, because, if the statute were applicable, the undisputed proof establishes the fact that appellee complied with the terms of the contract to the extent of paying the county, State and a large part of the levee improvement taxes, and placing improvements to the value of about $6,500 upon the property, which greatly enhanced its value. It has been held that such a partial performance of a rental contract by the tenant takes it out of the operation of the statute of frauds. *Phillips* v. *Grubbs,* 112 Ark. 562; *Storthz* v. *Watts,* 117 Ark. 500.

Appellee, cross-appellant, earnestly insists that the court erred in refusing to decree a specific performance of his option to purchase said lands, and asks for a reversal of that part of the chancellor's decree. There is

an entire lack of evidence showing any general authority conferred on Dr. Grant by the other appellants to sell the California plantation. It is true that authority was conferred upon Dr. Grant to represent the other appellants in the organization and construction of a levee built across the property, in the matter of granting a right-of-way and agreeing to and receiving the damages therefor. This authority had reference to a single transaction, however, and general authority to sell the plantation is not properly inferable from such a special agency. It is also true that the other appellants confirmed and acquiesced in a contract of sale made by Dr. Grant to Mrs. Black, of 200 acres off of the tract in question known as the "Kitchen Bend," but the mere fact that they approved this sale does not warrant the conclusion that they had made him their general agent to sell the land without consulting them; nor can the inference be drawn that, because he had general control and management of the property for rental purposes, he likewise had authority to execute an option contract for the sale and purchase thereof at some future date. This court has said that general authority cannot be inferred from authority given to perform a particular act, and that a person dealing with a special agent whose authority is confined to a single transaction or a particular act must ascertain the extent of his authority and contract accordingly before it will be binding upon the principal. *Liddell* v. *Sahline,* 55 Ark. 627; *Mutual Life Ins. Co.* v. *Reynolds,* 81 Ark. 202; *Jonesboro, Lake City & East. Rd. Co.* v. *McClelland,* 104 Ark. 150; *Three States Lumber Co.* v. *Moore,* 132 Ark. 371.

No error appearing, the decree is in all things affirmed.

HART, J., (dissenting). In this State by statute, parol leases for a longer term than one year are invalid. Section 3664 of Kirby's Digest reads as follows:

"All leases, estates, interest of freeholds, or lease of years, or any uncertain interest of, in, to, or out of any

messuages, lands or tenements, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one year."

This section of the statute of frauds expressly declares that all verbal contracts relating to the title to, or any interest in, lands for more than one year, shall be inoperative. It requires all such contracts to be in writing, signed by the owner, or if by an agent, he must be authorized in writing, signed by the owner, and the contract by the agent must be in writing, and signed by him.

In the case at bar the contract was for five years and was in writing signed by the agent of the parties. No authority in writing was conferred upon the agent to make such contract. The undisputed evidence shows that he had no such authority. It is unnecessary to express an opinion on this statute for the reason that I believe that the doctrine of part performance only applies to such contracts to lease or to renew leases as fall within the statute of frauds.

I do not think that the improvements made refer to and result from the agreement entirely as stated in the majority opinion. The greater part of the houses and some of the other improvements were built by him, not under his contract of lease, but under the belief that he was going to have the option to purchase the land. It is true the improvements which were made under the contract of lease were permanent in their nature and something more than required by ordinary husbandry, but they did not amount during the two years to more than the rental value of the land. Burrows had been renting the land on a lease contract from year to year. The improvements made by him under the lease contract with Dr. Grant were not of such a character and value as to be clearly inconsistent with a continuation of the old relation.

Therefore his continued possession should be referred to his original tenancy, and should not be considered an act of part performance of his contract for a new lease on the land.

GIBSON v. HEMPSTEAD COUNTY.

Opinion delivered May 19, 1919.

DRAINS—COST OF PRELIMINARY SURVEY—LIABILITY OF COUNTY.—Under Acts 1911, p. 193, section 1, a county is not liable for the cost of a preliminary survey where a projected drainage district has not been formed, the petitioners for the district being liable on their bond where the district is not created.

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

U. A. Gentry, for appellant.

1. The county is clearly liable for the expenses of the survey whether the district was formed or not. 106 Ark. 305; 123 *Id.* 250. The case in 122 Ark. 14-22 does not control this, as the facts are different.

2. The amount of the expense is for a jury to say, or for the court sitting as a jury to fix. Acts 1911, Act No. 221.

No question was raised below as to the validity of our statute and the court erred in holding that the county was not liable unless the district was formed. *Supra.*

Steve Carrigan and *Etter & Monroe,* for appellee.

The county is not liable for the preliminary expense unless the district is formed. Act No. 221, Acts 1911, § 1; 106 Ark. 304-5; 122 *Id.* 22; 123 *Id.* 250.

WOOD, J. A petition and bond required by the statute were filed with the county court of Hempstead County, for the proposed creation of a drainage district in Hempstead County, Arkansas.

Giles H. Gibson was duly appointed under the statute as engineer to make a preliminary survey of the territory intended to be embraced in the district. He

made the survey and filed a report with the county court, which was approved in all things by the court, but the court on final hearing of the petition for creation of the district refused to grant the same and dismissed the petition. Afterwards Gibson filed his claim in the county court in the sum of $500 for services as engineer in the preliminary survey.

The county court refused to allow the claim and on appeal to the circuit court judgment was entered in favor of the county, from which is this appeal.

Section 1 of act 221 of the Acts of 1911, among other things, provides that: "When three or more owners of real property within a proposed district shall petition the county court to establish a drainage district to embrace their property, * * * and file a good bond to pay for the expenses of survey of the proposed district, in case the district is not formed, it shall be the duty of the county court to enter upon its records an order appointing an engineer, to be selected by the petitioners; provided, the engineer whom they select is a suitable person, and if not, naming an engineer satisfactory to the court, who shall give bond, etc. All expenses incident to the survey and the cost of publication shall be paid by the county as the work progresses upon proper showing; but all expenses incurred by the county shall be repaid out of the proceeds of the first assessment levied under this act."

The petitioners filed a bond, to the State of Arkansas for the use and benefit of Hempstead County, for the expenses that might be incurred incident to the expense of the preliminary survey of a proposed improvement and conditioned that should the district be formed the obligation was to be null and void, otherwise, to remain in full force and effect.

The language of the statute shows clearly that it was not the intention of the Legislature to make the counties liable for the costs of the preliminary survey of proposed drainage districts where the drainage district is not formed. The statute expressly provides

that the petitioners shall "file a good bond to pay for the expenses of the survey of the proposed district in case the district is not formed."

It is unnecessary to set forth the whole statute, but an examination of it will discover that there is nothing in it to warrant the conclusion that it was the intention of the Legislature to make the county liable for the expenses of a preliminary survey, where the district has not been formed.

The language, to-wit: "All expense incident to the survey and the cost of publication shall be paid by the county as the work progresses upon proper showing," makes it the duty of the county court upon a proper showing to pay for the work incident to the preliminary survey, while the work of such preliminary survey is in progress. But this language was not intended to create a liability against the county for the expense of such preliminary survey where the district was not formed.

On the contrary the language, "but all expenses incurred by the county shall be repaid out of the proceeds of the first assessment levied under this act," shows clearly that the Legislature contemplated that the county was not to be liable for the expense of the preliminary survey where the district was not formed.

While there is some ambiguity in the language of the section, taking it as a whole we reach the conclusion that there is no liability against the county for the expenses of a preliminary survey where the district has not been formed. The language of the act shows that it was the purpose of the Legislature to make the petitioners for the district liable on their bond for the cost of the preliminary survey where the district was not created. The statute expressly provides for a bond to that effect. See *Burton v. Chicago Mill & Lumber Co.*, 106 Ark. 296-305.

Having reached the conclusion, under the undisputed facts, that the statute does not create any liability against the county, the question is not before us as to whether or not the statute would be valid if it did create such liability. Nor is the question before us as

to whether the county is liable where the district has been created.

There was no error in the ruling of the court, and its judgment is, therefore, affirmed.

GOOD ROADS MACHINERY COMPANY *v.* COX.

Opinion delivered May 19, 1919.

1. PROCESS—CONCLUSIVENESS OF SHERIFF'S RETURN.—The recitals of a sheriff's return, made pursuant to Kirby's Digest, section 6381, may be contradicted by other evidence which accompanies it.
2. COUNTIES — RECALLING WARRANTS — PROOF OF PUBLICATION.—A sheriff's return, reciting in detail proper service of notice calling in county warrants for cancellation and reissuance, is sufficient proof of service, though it is accompanied by an affidavit of publication of notice made by the publisher of a newspaper, instead of by the "editor, proprietor, manager or chief accountant" as required by section 4924; such affidavit not being the sole evidence of publication.

Appeal from Greene Circuit Court, First Division; *R. H. Dudley,* Judge; affirmed.

Huddleston, Fuhr & Futrell, for appellant.

The order of cancellation is void because:

(1) The order was not published as required by law.

(2) It was not posted in all the voting precincts as required by law.

(3) No valid proof of publication was made.

(4) The order shows on its face that there was no valid publication of the notice of the order.

(5) The proof was made by the "publisher," when the law requires it to be made by the "manager, proprietor, editor or chief accountant."

The proceedings are not in the course of common law and must be strictly complied with. 51 Ark. 34; 65 *Id.* 353; 72 *Id.* 394; 129 *Id.* 210. There is no presumption of regularity, but the record must show affirmatively that the statutory requirements were complied with. Facts

that should appear of record cannot be proven by parol. 129 Ark. 207; 51 *Id.* 34; 54 *Id.* 627; 65 *Id.* 142; 117 *Id.* 254; 29 Cyc. 1122. The findings and declarations of law are contrary to law and the judgment should be reversed. Cases *supra.*

T. W. Davis, Prosecuting Attorney, and *Jeff Bratton,* for appellee.

The proof of publication shows that the order was published as required by law. Kirby's Digest, § § 1176, 4924; 89 Ark. 69; 115 *Id.* 220. The sheriff's return, the best evidence, shows proper publication as required by law. 107 Ark. 422. As to the effect of the sheriff's return, see 126 Ark. 256. Also 49 *Id.* 453; 50 *Id.* 266; 24 *Id.* 407; 134 *Id.* 100; Kirby's Digest, § 1176. The final judgment shows affirmatively all jurisdictional facts to make the order valid and is supported by the law and facts.

McCULLOCH, C. J. Appellant is the holder of a county warrant of Greene County issued prior to certain statutory proceedings in that county calling in the warrants of the county for reissue or cancellation, and this appeal involves an attack on said order, appellant having failed to appear and present the warrant for reissuance.

The sole point of attack on the validity of the proceedings in the county court is that the affidavit to the proof of the publication of notice was made by the publisher of one of the newspapers in which the notice was published, whereas the statute (Kirby's Digest, section 4924) provides that notices and advertisements required by law be proved by the affidavit of "the editor, proprietor, manager or chief accountant, with a copy of such advertisement annexed, stating the number of times and the date of the papers in which the same was published shall be sufficient evidence of publication."

The sheriff made his return in writing, which recited in detail proper service of the order of the county court in the manner required by statute. Kirby's Digest, sections 1176, 4923. Separate affidavits concerning the

publication in the two newspapers were filed with the return of the officer—the affidavit concerning the publication in one of the newspapers being properly made by the manager of the newspaper, but the other was made by the publisher.

Appellant relies upon the case of *Gibney* v. *Crawford,* 51 Ark. 34, where the rule was laid down that the calling in of county warrants for cancellation or reissue is a special statutory proceeding which, in order to be valid, must be strictly in accordance with the terms of the statute, and that, the statute "having prescribed the manner in which the notice should be given, it could not be given legally in any other manner; and having prescribed what shall be the evidence of the publication it can be proven in no other manner."

In the case just referred to there was no return of the sheriff in the record, and the only evidence of publication was a defective affidavit. The statute in force at that time provided that the affidavit of the "editor, publisher or proprietor, or the principal accountant of any newspaper" should constitute "the evidence of the publication thereof." Mansfield's Digest, section 4359. The statute now in force differs from the one in force at that time in that it merely provides that the affidavit of the parties named shall constitute "sufficient evidence of publication." Kirby's Digest, section 4924. The distinction has been pointed out, and the difference in the effect of the two statutes discussed in the opinion of this court in *Porter* v. *Dooley,* 66 Ark. 1, and in subsequent cases. In *Gibney* v. *Crawford, supra,* it was also pointed out that it is the duty of the sheriff in making his return on the order of the county court calling in warrants to file with his return the affidavits proving the publication in newspapers, and in that case, since there was no return on the record, the affidavits constituted the sole evidence of the proof of publication. In *Baker* v. *York,* 65 Ark. 142, and *Miller County* v. *Gazola,* 65 Ark. 353, it does not appear from the opinion whether or not written returns were made by the sheriff, and the several orders of the

county court were declared to be void because of the defective affidavits concerning the publication in the newspapers. The present case differs from either of those cases in both respects, for here we have the return of the sheriff showing publications of the notice in the manner prescribed by statute. The delivery of the order of the court by the clerk pursuant to the terms of the statute (Kirby's Digest, section 1176) constitutes process which the sheriff must serve as required by law, and the statute directs the sheriff to make a return in writing on all process which comes to his hands. Kirby's Digest, section 6381. It being the duty of the officer to make return of the affidavits of each "editor, proprietor, manager or chief accountant," the recitals of his return may be contradicted by the other evidence which accompanies it. *Nevada County* v. *Williams,* 72 Ark. 394. But in this instance the accompanying affidavit does not contradict the return of the sheriff, for it is defective only in that it was made by the wrong person, and, as the statute does not make the affidavit of the "editor, proprietor, manager or chief accountant" the sole evidence of publication, but only makes it sufficient evidence, it does not contradict the return of the sheriff in the complete statement made therein that the publication was for the requisite number of times, at the proper time, and by a newspaper which had a *bona fide* circulation, as required by the statute.

We are of the opinion, therefore, that the order of the county court is not void, and the judgment of the circuit court was correct.

Affirmed.

SMITH v. BUCKEYE COTTON OIL COMPANY.

Opinion delivered May 19, 1919.

1. APPEAL AND ERROR—AMENDMENT OF PLEADING TO CONFORM TO PROOF.—Pleadings will not be treated as amended on appeal so as to allege a fact which appears only inferentially.

2. MASTER AND SERVANT—NEGLIGENCE OF PHYSICIAN.—An employer having the duty to furnish medical attention to its employees, is not liable for the physician's negligence or lack of skill, but only for failure to exercise ordinary care in selecting a physician.

Appeal from Prairie Circuit Court, Northern District; *Thos. C. Trimble,* Judge; affirmed.

Glen H. Wimmer and *Brundidge & Neelly,* for appellant.

1. It was error to direct a verdict for defendant. There was evidence in plaintiff's favor which should have been submitted to a jury. 89 Ark. 522; 119 *Id.* 590; 65 *Id.* 94; 77 *Id.* 566; 36 *Id.* 451; 35 *Id.* 146; 62 *Id.* 63; 103 *Id.* 401; 92 *Id.* 570; 89 *Id.* 273; 103 *Id.* 401; 119 *Id.* 589; 92 *Id.* 502; 71 *Id.* 445; 120 *Id.* 1; 111 *Id.* 309; 105 *Id.* 526; *Ib.* 136; 120 *Id.* 206; 98 *Id.* 334; Thompson on Negl., § 3842; 118 Minn. 217; 40 L. R. A. (N. S.) 485; 136 N. W. 741.

2. If the complaint was insufficient it should be treated as amended to conform to the proof. 42 Ark. 503; 42 *Id.* 57; 78 *Id.* 346; 65 *Id.* 422; 43 *Id.* 451; 62 *Id.* 262; 88 *Id.* 363.

Cockrill & Armistead, for appellee.

1. The company was not liable for the doctor's negligence and a verdict was properly instructed. 98 Ark. 399.

2. All the plaintiff's evidence was objected to and none of it shows negligence on part of defendant, and the complaint should not be considered as amended to conform to the proof. There is no allegation that defendant was negligent in the selection of a competent physician. The employer's negligence must be alleged and proven.

SMITH, J. Appellant was the plaintiff below and alleged in his complaint that while employed by appellee (the defendant) he was directed to wipe an engine and while doing so got his fingers caught and crushed in the machinery and that thereafter he was directed to go to a physician employed by appellee to treat its injured

employees, and that this physician treated his injuries so carelessly and negligently that the amputation of all the fingers on the injured hand became necessary. In support of these allegations testimony was offered which would have supported a verdict—had the jury so found—that appellant had not been properly and skillfully treated by the physician. But at the conclusion of appellant's testimony the court directed the jury to return a verdict in appellee's favor, and this appeal has been prosecuted from the judgment pronounced thereon.

The testimony in the case appears to have been addressed to the proposition that the physician was negligent and that appellee was liable for this negligence because it directed appellant to consult him. There is no intimation in the pleadings that appellee was negligent in selecting a physician, nor is there any testimony to that effect unless it be by inference that appellee was negligent through having employed a negligent physician, and in appellant's brief cases are cited in which this court has held that pleadings will be treated as amended to conform to the testimony where the testimony is admitted without objection. No offer was made to amend the pleadings in the court below, nor was it there insisted that the pleadings should be treated as amended to conform to the testimony, and we think that no policy, however liberal, of permitting pleadings to be treated as amended to conform to unobjected testimony would require us to treat the pleadings as amended to allege a fact which appears in the testimony, not as a direct affirmation, but only as an inference from the testimony.

We have a case, therefore, in which the pleadings and proof show only that an injured employee was directed to, and placed in charge of, a physician who was guilty of negligence in his treatment of the case. But this allegation and this proof did not make a case for the jury. Where the employer owes his employee the duty of furnishing medical attention, or undertakes to discharge that duty, he does not become liable for the

physician's negligence or lack of skill, but is liable only when he fails in the discharge of his duty to exercise ordinary care to select a physician possessing the requisite skill and learning and one who would give the patient the attention and treatment which the case requires. This is the doctrine of the case of *Ark. Midland Ry. Co.* v. *Pearson,* 98 Ark. 398, and of *St. L., I. M. & S. R. Co.* v. *Taylor,* 113 Ark. 445. The judgment of the court below is, therefore, affirmed.

JOHNSON COUNTY *v.* BOST.

Opinion delivered May 26, 1919.

1. CLERKS OF COURT—FEES—PENALTY FOR EXTORTION.—Kirby's Digest, section 1888, imposing a penalty for excessive charges by any officer, has no application to an action by a county against the circuit clerk to set aside judgments allowing claims for services and warrants issued pursuant thereto; the statute being designed for the protection of individuals against whom extortionate demands are made by officers.
2. EQUITY—WRONGFUL EXACTION—SUIT BY COUNTY.—Equity has jurisdiction of a suit to recover from a circuit clerk amounts allowed by the county court on fraudulent and illegal claims for services rendered.
3. SAME—ALLOWANCE OF CLAIMS BY COUNTY COURT—MULTIPLICITY OF SUITS.—On the ground of multiplicity of suits, equity has jurisdiction of a suit to set aside orders of the county court allowing claims of the circuit clerk for fees which he could not legally exact.
4. APPEAL AND ERROR — BURDEN OF PROOF.—On cross-appeal, the appellee has the burden of abstracting the testimony to show that the findings of which he complains were erroneous.
5. EQUITY—FRAUD IN PROVING ALLOWANCES.—In a suit by a county against a circuit clerk to recover for illegal exactions, evidence showing that defendant systematically padded his accounts was sufficient to constitute fraud authorizing relief in equity.
6. CLERKS OF COURTS—FEES—ACTIONS.—Kirby's Digest, section 7174, declaring that wherever any error shall be discovered in the settlement of any county officer with the county court it shall be the duty of the court at any time within two years from such settlement to reconsider and adjust the same, applies only to

settlements of officers handling revenue, and will not preclude equity from granting relief against illegal exactions from the county by the circuit court.

Appeal from Johnson Chancery Court; *Jordan Sellers,* Chancellor; reversed in part and affirmed.

H. H. Ragon, Prosecuting Attorney, and *Hugh Basham,* for appellant.

1. A suit in chancery may be maintained to set aside an allowance in the county court for fraud, collusion or mistake. The court had jurisdiction here. 37 Ark. 532; 19 *Id.* 311; 77 *Id.* 328. The court found that the charges were fraudulent and properly found that appellant should have judgment for the $829.80, but erred in refusing judgment for $144.75, under section 7174 of Kirby's Digest. The county having paid the warrants, it would have done no good to set aside the judgments. It makes no difference how long a judgment or order of allowance has been made if the warrants have not been paid or canceled under the statute authorizing the county court to call in the warrants. When the warrants are presented the court has jurisdiction to go into the matter and allow just the amount that should have been allowed when the claim was originally presented for allowance. 37 Ark. 532; 77 *Id.* 328. But where the warrants have all been paid and canceled as here judgment should have been given for the $144.75.

2. It was error to dismiss the prayer for judgment for the penalty prescribed by section 3502 of Kirby's Digest for the 3,012 items of illegal fees demanded and received by appellee. We have not overlooked 132 Ark. 473, 95 Ark. 426, and other cases prior thereto, but these cases are not cases where the remedy is not entirely adequate at law, being only for a single penalty. Here it will be necessary to go over 150 or 200 fee bills and seek out the items of illegal charges in each and have the court declare the law as to each item and depend, in a great measure, on the jurors, keeping these items in their minds, which would be impossible,

and hence the remedy at law would be utterly inadequate, and equity will enforce penalties where there is no adequate remedy at law. It is true appellant could bring a suit on each fee bill, but equity abhors a multiplicity of suits. 53 Ark. 306.

3 Equity will take jurisdiction where long accounts are involved and where justice can be more easily and properly administered in equity by referring matters to a master under the directions of the court as here. 82 Ark. 547; 129 *Id.* 202. But if in error as to this the court should have transferred this branch to the law court as appellant asked to be done. In fact, the court did make such order but subsequently set the order aside and dismissed this branch of the case over appellant's objections.

4. Appellee has escaped liability on account of limitation on 2,982 illegal charges. Kirby's Digest, section 5068, which is practically half of the illegal charges found against him by the master.

5. The clerk cannot charge for recording, filing or indexing indictments, nor for certificate of record of indictments. 73 Ark. 603; 57 *Id.* 495. Nor can he charge for certificates of attendance to witnesses. 57 *Id.* 495. Nor for continuance unless order made by the court. 56 *Id.* 249. He cannot charge for filing papers. 32 Ark., bottom p. 52.

As found by the master, appellee collected illegal fees amounting to $672.40 on allowances in which warrants had been issued but not canceled, for which no judgment was allowed in the chancery court.

Jesse Reynolds and *G. O. Patterson,* for appellee.

1. Appellee's demurrer should have been sustained. This suit was instituted under section 1888, Kirby's Digest.

There is no proof of any corrupt intent.

2. This suit is barred by limitation. Kirby's Digest, section 5068; 59 Ark. 165.

3. The complaint does not state a cause of action to justify a court of equity to set aside a judgment of another court. 37 Ark. 540. Appellant does not allege accident or mistake, and does not allege fraud in the pronouncement of the judgment, but in the filing of the claims. While chancery courts have jurisdiction of fraud, they do not relieve against accident or mistake unless the other party is without fault or carelessness on his part and has not lost his right to appeal through no fault of his own. If appellant desired to review the judgments, he lost his right to review by appeal or certiorari by its own carelessness and negligence. 61 Ark. 347 Courts of equity do not interfere for the correction of mere errors which might be corrected by appeal, or on account of irregularity in settlements, which, although illegal, have not been prompted by fraudulent intent, etc. 42 Ark. 186; 36 *Id.* 383. See also 93 *Id.* 234; 118 *Id.* 524; 93 *Id.* 14; 73 *Id.* 523; 90 *Id.* 166; 94 *Id.* 588; 103 *Id.* 446; 26 *Id.* 63; 33 *Id.* 575; *Ib.* 727; 68 *Id.* 495; 39 *Id.* 256; 128 *Id.* 639; 193 S. W. 503; 35 Ark. 107; 90 *Id.* 261; 104 *Id.* 303.

The court properly dismissed the complaint as to penalties. 95 Ark. 567; 132 *Id.* 173. The cause should be reversed on the cross-appeal for errors in the findings prejudicial to appellee. Cases *supra.*

McCULLOCH, C. J. Appellee was circuit clerk of Johnson County for two terms, beginning on October 31, 1912, and ending October 30, 1916. During his said terms he presented to the county court for allowance numerous accounts for services rendered in criminal cases pending in the Johnson Circuit Court, and the present action is one instituted against him in the chancery court of that county by the prosecuting attorney, in the name of the county, to set aside judgments allowing said claims, and warrants issued pursuant thereto, and to recover from appellee the amount of items in the accounts alleged to be fraudulent and illegal.

There are 388 paragraphs in the complaint, each relating to a separate account filed by appellee in the

county court, and it is alleged that each account set forth in the several paragraphs contains items which are specified, and which were either wholly unauthorized by law or were unfounded in fact, and that the allowances were obtained by fraud. Appellee demurred to the complaint, but the demurrer was overruled and an answer was filed in which the allegations of fraud and illegality in the allowances were denied, but upon a hearing of the cause the court declared the law applicable to the issue in the case and referred the matter to a master to state an account as to the amount of items in appellee's account which were wrongfully allowed, according to the principles of law announced by the court. The master made his report, showing the following findings of fact concerning the allowances of the county court to appellee:

"Illegal fees allowed up to two years before the filing of the complaint	$829.80
"Illegal fees allowed within two years of the filing of the complaint in which warrants have been paid and canceled	144.75
"Illegal fees allowed within two years of filing of complaint in which warrants have been issued but not canceled	672.40
"Statement of penalties:	
"Penalties on all claims allowed up to two years before filing of complaint	2982
"Penalties on all claims allowed within two years before filing of complaint on which warrants have been paid and canceled	966
"Penalties on claims allowed within two years before filing of complaint in which warrants have been issued but not paid	2046
"Total penalties	5994"

Exceptions were filed by appellee, and the court rendered a final decree against appellee for the recovery of $829.80, the first item of the master's report. The item of $672.40 for fees allowed within two years of the commencement of this action as to warrants which had not been canceled was not embraced in the complaint, as we understand, and the court did not enter any decree thereon. The court decided in appellee's favor as to the other items reported by the master.

The appeal prosecuted by appellant challenges the correctness of the court's adverse ruling on the items mentioned in the master's report, and appellee has obtained a cross-appeal attacking the correctness of the item of $829.80, sustained by the court against him.

The first question which presents itself is the one raised by appellee's demurrer challenging the jurisdiction of the chancery court. It is said that the action is based on the provisions of the statute (Kirby's Digest, section 1888), which reads as follows:

"If any officer shall charge, demand or receive any more or greater fees for his services than are allowed by law, or shall demand, charge or receive any such fees without having performed the services for which the same are charged, such officer, for every such offense, shall forfeit to the party injured, or against whom the same may be charged, the amount of fees illegally charged, and five dollars for each item illegally demanded, charged or received, with cost, to be recovered by action, and shall also be subject to an indictment for extortion."

Learned counsel for appellant seek to sustain the action on the force of that statute and insist that the court erred in refusing to render decree for the penalty prescribed in that statute. We are of the opinion, however, that the statute in question has no application to suits by the county to recover for fees illegally demanded from the county by one of its officers. The statute was designed for the protection of individuals against whom extortionate demands are made by public officers.

Claims against a county for fees of such officers can only be collected by presentation to the county court for allowance, and that court passes judicially on the claims, which affords the county ample protection against unjust demands. It was not intended to prescribe a penalty for presenting to the county court a false claim. There is another statute (Kirby's Digest, section 1889) which penalizes such wrongful conduct on the part of a public officer and prescribes a different punishment from that prescribed in the statute just quoted.

It follows that the chancery court was correct in refusing to render decree for the penalty prescribed in this statute, but we think that the jurisdiction of the chancery court is sustained on other grounds.

In the case of *State, use Izard County* v. *Hinkle,* 37 Ark. 532, Chief Justice ENGLISH stated the rule on this subject as follows:

"An order of allowance made by the county court, may be reviewed or opened in several modes:

"*First.* By appeal to the circuit court.

"*Second.* It may be quashed on *certiorari* by the circuit court, where it appears from the face of the record that the claim allowed was not, by law, a charge against the county, and the court had no authority or discretion to allow it upon any evidence that might have been introduced.

"*Third.* The statute empowers the county courts, as often as once in three years, to call in all outstanding warrants, to examine and cause them to be renewed, if legally issued, and, if not, to reject them. Thus the Legislature has empowered county courts to review allowances made at previous terms, and, if made without authority of law, to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued.

"*Fourth.* An order of allowance may be opened in chancery, as any other judgment, for fraud, accident or mistake, on a proper case made."

In the opinion in that case there was no further elaboration of the jurisdictional grounds of "fraud, accident or mistake." Undoubtedly the rule established by this court with respect to setting aside judgments of courts for fraud means fraud in the procurement of the judgment, and not merely fraud in the original cause of action. *Scott* v. *Penn,* 68 Ark. 492; *James* v. *Gibson,* 73 Ark. 440. There is, however, a modification of that rule with respect to the judgments of county courts in the allowance of claims against the county, and in the recent case of *Monroe County* v. *Brown,* 118 Ark. 524, we stated the law concerning the force and effect of judgments of county courts and the power to set them aside as follows: "The statute is not construed to mean that the county court is authorized to review former judgments of the court for mere errors in the allowance of claims, but they are authorized to reject claims (warrants) which have been illegally or fraudulently issued. In other words, where the claim against the county was one which, under any evidence which might have been adduced, could not have been a valid claim against the county, or where the judgment of allowance was obtained by fraud, it may be set aside and warrants issued pursuant thereto canceled. However, to carry the review beyond that and to permit investigations for mere errors of the court, would make it purely a collateral attack on the judgment, which is not authorized by the statute."

That case was one which came here on appeal from an order of the county court canceling warrants presented for reissuance, but it is applicable as a statement of the law relating to the effect of judgments of that kind, and the power to set aside such judgments of allowance is not confined to the statutory calling-in process, and can be exercised by any court acquiring jurisdiction on other distinct grounds for setting aside such judgments. The judgments of the county court as to items which were wholly unauthorized by law can be set aside in any court acquiring jurisdiction, and so can judg-

ments as to items which were allowed through fraudulent procurement. Jurisdiction of the chancery court is dependent on the inadequacy of a remedy at law. The statutory remedy in favor of the county for calling in the warrants and canceling them when found to have been wrongfully allowed is not adequate, for it may not be deemed advisable by the county court, or necessary, to make a general call for the reissue or cancellation of outstanding warrants. That remedy is, therefore, not necessarily an adequate one and does not bar remedy afforded in chancery.

The record shows that the county court called in the outstanding warrants of the county by order entered May 10, 1917, and August 11, 1917, was specified as the day for presentation of warrants to the court. The present action was instituted between those two dates, and there was a complete and adequate remedy for the correction of these wrongful allowances as to warrants which were outstanding at the time of the call. There was no adequate remedy at law, however, for the county as to warrants which had been paid, and the county was, therefore, entitled to a remedy in the chancery court for the correction of wrongful judgments of allowance.

Multiplicity of actions is another distinct ground for equity jurisdiction which appears in this action. *State* v. *Atkins,* 53 Ark. 303; *Place* v. *State,* 77 Ark. 328.

We are, therefore, of the opinion that the jurisdiction of the chancery court was complete, and that the demurrer of appellee was properly overruled.

The findings of fact of the master and of the court were in favor of appellant and the duty of abstracting the testimony in order to show that those findings were not sustained by the evidence falls on appellee in his attack on the cross-appeal.

It follows from what we have already said that the judgment of the court was correct as to all items for which there was no authority to allow as claims against the county.

The contention of appellee is that as to the other items, where there was legal authority for their allowance, but which are claimed to have been erroneous in fact, the evidence fails to show that there was any fraud practiced on the county court in procuring the allowances. Counsel for appellee abstracted the testimony of appellee himself and of the county judge, where it is shown that the accounts were made out upon customary blanks and that there was no concealment of fact, or fraud, in other words, practiced. We are of the opinion, however, that the fact that appellee was the clerk of the circuit court, and thus occupied a confidential relationship toward the county with respect to his duty in correctly keeping the records of the proceedings of the circuit court and the items for which fees were allowed, and that throughout his two terms he presented very numerous accounts containing illegal and incorrect items, showing that he was systematically padding his accounts, was sufficient to constitute such a fraud as would justify a court in setting aside such judgments allowed.

The court was, therefore, correct in allowing the item of $829.80 for illegal fees allowed up to two years before the commencement of this action. It should also have allowed the item of $144.75. The court seems to have based its ruling in refusing to allow those items on section 7174, Kirby's Digest, which reads as follows:

"When any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, at any time within two years from the date of such settlement, to reconsider and adjust the same."

That section, however, was part of the revenue statute, and only applies to the settlements of officers handling public money. It has no application at all to judgments allowing claims, for it does not contain any authority for a county court to set aside claims within the period named, or any other period.

Decree will be entered here for the sum of $144.75, in addition to the amount decreed against appellee by

the chancery court. In all other respects the decree is affirmed.

HART, J., (dissenting). The county court is the proper forum where the liability of the clerk is to be ascertained and an adjudication in that forum is conclusive against him except that the judgment may be opened up in chancery for fraud, accident, or mistake. The majority opinion recognizes that the rule with respect to setting aside judgments for fraud means fraud in the procurement of the judgment, but it is said that there is a modification of that rule with respect to the judgment of county courts in the allowance of claims against the county. I think this overrules all our early cases bearing on the question.

The case of *Monroe County* v. *Brown,* 118 Ark. 524, is cited to sustain the opinion of the majority. It seems to me that this case takes exactly the contrary view. In discussing the question it cited the cases of *State* v. *Perkins,* 101 Ark. 358, and *Fuller* v. *State, for the use of Craighead County,* 112 Ark. 91. In the former case the State brought a suit in equity against a collector of taxes to set aside, on account of fraud, a judgment of the county court confirming his settlement as collector of the county and to recover the balance due from him. It was alleged and proved that the collector retained as his commission for service 5 per cent. on the amount collected instead of 3½ per cent. and that this gave the chancery court jurisdiction on the ground of fraud. The court held that the county court had jurisdiction to examine the settlement made with the collector and that its judgment confirming the settlement was conclusive of its correctness. The court held that there was no fraud practiced on the county court in securing the confirmation of the collector's settlement and affirmed the judgment of the court below dismissing the bill of the State for want of equity.

In the latter case the court held that a county treasurer was not entitled to a commission on the sale of the

bonds of a drainage district and that the allowance of a commission therefor was a fraud in law against which equity would relieve. The court referred to the case of *State* v. *Perkins, supra,* and said that the county court's error in that case consisted in computing the commission of the collector at 5 per cent. on each separate fund instead of computing it upon the aggregate collection from the graduated basis fixed by the statute. The court recognized that this was an error which should have been corrected by appeal.

In the case of *Izard County* v. *Vincennes Bridge Co.,* 122 Ark. 557, the court recognized these principles of law and expressly held that the county court in calling in warrants was not authorized to review its former judgment for mere errors in the allowance of claims. Hence I cannot agree with that part of the majority opinion which holds that there has been a modification of the well-established rule above set forth.

Again I do not agree with the opinion of the majority which holds that the testimony was sufficient to constitute such a fraud as would justify a court in setting aside the judgment of a county court. I refer to the following language: "We are of the opinion, however, that the fact that appellee was the clerk of the circuit court, and thus occupied a confidential relationship toward the county with respect to his duty in correctly keeping the records of the proceedings of the circuit court and the items for which fees were allowed, and that throughout his two terms he presented very numerous accounts containing illegal and incorrect items, showing that he was systematically padding his accounts, was sufficient to constitute such a fraud as would justify a court in setting aside such judgments allowed."

I presume the language quoted is thought to bring the case within the principle announced in *Place* v. *State,* 77 Ark. 328. In that case suit was brought by the State against the county clerk and the bondsmen on separate bonds for three successive terms. The court said: "The county clerk is the custodian of the books of the county

and the keeper of the various accounts of the county with himself, as well as with all others who have dealings with the county. It is here alleged that the clerk presented and procured the allowance of improper and fictitious accounts, fraudulently issued scrip to himself upon fictitious allowances and upon judgments or allowances which he had fraudulently raised in amount, and that the accounts kept by him are so complicated that it is impossible to point out and designate the various items, or ascertain the liability of the respective bondsmen without the aid of a court of equity and the reference to a master.

"We think these allegations are sufficient to give a court of equity jurisdiction, and justify a joinder of the several sureties in one suit."

The jurisdiction of the chancery court in that case was based on the fact that his accounts ran through three successive terms, and as kept by him were so complicated that it was impossible to ascertain the liability of the respective bondsmen without the aid of a court of equity. No such allegations or proof are made in the present case. The facts bring it squarely within the rule announced in *State* v. *Perkins, supra.* There as here, it was urged that chancery has jurisdiction on the ground of fraud. It was pointed out that the collector and his deputy, who had had experience in making such settlements, and the judge of the county court, all knew that the clerk was charging 5 per cent. commission, and being allowed credit therefor at the time the settlement was made and confirmed.

The court held that this did not constitute evidence of any fraud or concealment practiced upon the court to procure the confirmation of the settlement. So here the record shows that there was no concealment made by the clerk. He exhibited his accounts to the county court and made a full statement to the court of what charges he thought he was allowed under the statute, and the court was fully advised in the matter when he confirmed the settlement. This is shown both by the testimony of

the circuit clerk and of the presiding judge of the county court. It seems to me that the opinion of the majority takes away from the judgment of the county court confirming settlements with county officers the conclusiveness which has heretofore been given them.

LAMBRIGHT v. BALES.

Opinion delivered May 26, 1919.

1. MORTGAGES — SALE UNDER POWER — WAIVER OF REDEMPTION.—Inasmuch as Kirby's Digest, § 5416, gives the right to redeem from a sale under a power contained in a mortgage, and has not provided that such right may be waived in the mortgage itself, it cannot be so waived.
2. SAME — REDEMPTION — WAIVER—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 5420, giving the right of redemption from a sale under foreclosure of mortgage in the chancery court and providing for a waiver of such right in the mortgage is not applicable to a foreclosure sale under a power contained in the mortgage.

Appeal from Sevier Chancery Court; *James D. Shaver,* Chancellor; reversed.

B. E. Isbell, for appellant.

1. Appellant clearly had the right to redeem, as the mortgage was not foreclosed in chancery court. Acts 1889, p. 280; Kirby's Digest, § 5420. Prior to this act Kirby's Digest, section 5416, was the only authority for sales under mortgages, and the act of 1899 did not interfere with the act of 1879 as amended in 1883, but undertook to provide for waiver of redemption. The act of 1899 takes nothing from the law as it stood and adds nothing thereto unless it be the rate of interest required by act of 1879 fixing an arbitrary rate of 10 per cent. to the rate borne by the decree on judgment. Kirby's Digest, § § 5416-5420. The waiver of redemption is binding on the mortgagor only when the mortgage is foreclosed in equity. 60 Ark. 513.

2. As to rents and profits, etc., the mortgagor cannot be improved out of his property. The mortgagee is

entitled to necessary repairs, but not to improvements. 52 Ark. 384; 55 *Id.* 375. The purchaser made the improvements at his own risk and expense. 40 Ark 275; 52 *Id.* 384. The mortgagor is entitled to the rents. 40 Ark. 275; 55 *Id.* 1; 65 *Id.* 129. The decree should be reversed, with directions to allow appellant to redeem and to ascertain the rights of the parties as to rents, improvements, taxes and insurance, etc. *Supra.*

Abe Collins, for appellee.

This case does not depend upon the construction of section 5420 of Kirby's Digest. The right of redemption was waived expressly in the mortgage. 1 L. R. A. 732; 40 N. W. 538. For example of waivers, see 90 Pac. 800; 103 Pac. 1073; 112 N. W. 220; 18 N. E. 223, etc.; 49 S. E. 392; 71 Pac. 218.

Kirby's Digest, § § 5416-17-18 and 19 do not apply to sales under decree of court. 60 Ark. 510. See also 63 *Id.* 355; 54 *Id.* 441; 53 *Id.* 69; 103 *Id.* 550.

The expression that the expression of one thing excludes the other does not apply here, and 20 Ark. 410, 38 *Id.* 205, and 45 Id. 527 are not in point. See 36 Cyc. 1122 i; 68 S. W. 105.

WOOD, J. This action was begun by the appellant against the appellees on November 21, 1917, in the chancery court of Sevier County, Arkansas, to redeem a certain tract of land in Sevier County which was sold on November 30, 1916, by foreclosure proceedings not in the chancery court but under the power contained in the mortgage.

The complaint alleged that the foreclosure was void but this allegation was abandoned, as the appellant did not follow it up with a prayer to set aside the sale nor with any proof to the effect that the conditions of the mortgage had been complied with by him.

The land was purchased by J. L. Bales, who paid therefor the sum of $500. The appellant tendered this sum with interest, and prayed that he be allowed to redeem and be allowed credit for the rental value of the

land for the time the purchaser had been in possession thereof.

The appellees answered, denying appellant's right of redemption and setting up that they had expressly waived such right, but asked that, in case the redemption were allowed, they be permitted to recover certain sums for necessary repairs, improvements, insurance, taxes, etc., all of which are specifically set forth in their answer.

The court found that appellant had made default under conditions of the mortgage, and that the foreclosure sale in all things was in strict compliance with the terms of the mortgage, and that under the terms of the mortgage appellant waived all rights of redemption. A decree was entered dismissing the complaint for want of equity, from which is this appeal.

The mortgage contained the following provision: "All rights of redemption provided for by the laws of the State of Arkansas are hereby waived by the mortgagor herein."

The act of March 17, 1879, section 1, p. 94, regulating the sale of property under mortgages provides: "Real property sold hereunder may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which such property is sold, together with interest thereon and cost of sale."

This section of the act of 1879 was amended in certain particulars, and among others giving the mortgagor, in any mortgage where the sole consideration of the mortgage is money loaned, the right to waive the privilege of redemption by a clause in the mortgage to that effect. Section 1 of the Acts of 1883, p. 157. This particular amendment to section 1 of the act of 1879 by section 1 of the act of 1883, *supra,* appears as section 4763 of Mansfield's Digest. That section was expressly repealed by the act of February 26, 1887.

These various acts regulating the sale of property under mortgages show that the Legislature had in mind the subject-matter of granting to mortgagors the right

of redemption from sales under mortgages, and finally left the law on the right to redeem to stand as it was originally enacted in section 1 of the act of 1879, *supra,* which is now digested as a part of section 5416, Kirby's Digest.

This court, in *Martin* v. *Ward,* 60 Ark. 510-12, held "that a sale under a mortgage or trust deed was a sale by virtue of a power of sale contained in such instrument." There is, therefore, no authority in the law for a waiver of the right of redemption from the sale made under power contained in the mortgage, which right of redemption is expressly given to the mortgagor by the statute regulating such sales.

Inasmuch as the Legislature has given the absolute right of redemption from sales under mortgage and has not provided that such right may be waived in the mortgage itself, it cannot be so waived.

The granting of such right, however, is peculiarly for the benefit of the mortgagor, and as to whether he could waive such right by contract and for a consideration separate and independent of the mortgage is not before us.

The sale from which redemption was sought was under the power contained in the mortgage. The statute, according to which such sales must be conducted, grants the right of redemption without providing for waiver. The history of this provision, *supra,* shows that the Legislature, by the express language of the act giving the right of redemption from the sale under the mortgage, intended to exclude the idea that there could be a waiver of such right in the same instrument. Because when the Legislature in 1887 expressly repealed the provision of the act of 1883 granting to mortgagors the right to waive the privilege of redemption, by a clause in the mortgage to that effect, in cases where the sole consideration of the mortgage was money loaned, it evinced a purpose not to allow a right of waiver at all in the mortgage instrument and to leave the act of 1879 in this respect as originally enacted. This result follows under the

familiar rule of "*expressio unius est exclusio alterius.*" *Watkins* v. *Wassell,* 20 Ark. 40.

A sale under a decree of court is not a sale under a mortgage. *Martin* v. *Ward, supra; Johnson* v. *Meyer,* 54 Ark. 441. Therefore, the act of 1899 (section 5420, Kirby's Digest), giving the right of redemption from such sales by foreclosure of mortgages in the chancery court and providing for a waiver of such right is not applicable to the facts of this record since this was a foreclosure under the power contained in the mortgage.

It follows that the court erred in holding that appellant waived his right of redemption, and therefore had no right to redeem from the sale.

The trial court, having decided that the appellant had no right to redeem, did not pass upon the other issues, and we have not done so.

For the error indicated the judgment is, therefore, reversed and the cause will be remanded with directions to allow the appellant to redeem, with permission, if the parties so elect, to amend their pleadings and take further proof concerning the issues of tender, rents, improvements, etc.; and have further proceedings according to law and under the familiar rules of equity in regard to tender as announced by this court in *Wood* v. *Holland,* 53 Ark. 69; *Wood* v. *Holland,* 57 Ark. 198; *Wood* v. *Holland,* 64 Ark. 105; *Danenhauer* v. *Dawson,* 65 Ark. 129, and upon the issue as to rents, improvements, etc., as announced by this court in *Daily* v. *Abbott,* 40 Ark. 275; *Robertson* v. *Read,* 52 Ark. 584; *Harrell* v. *Stapleton,* 55 Ark. 1; *Reynolds* v. *Reynolds,* 55 Ark. 375; *Danenhauer* v. *Dawson, supra.*

BROWN & HACKNEY *v.* DAUBS.

Opinion delivered May 26, 1919.

1. EVIDENCE—AMBIGUITY OF CONTRACTS.—Where a contract conveyed "all the gum timber on all the above described lands measuring 20 inches in diameter above 12 feet from the stump," parol evidence was admissible to prove that it was not intended that gum timber under 20 inches in diameter above 12 feet from the stump should be conveyed, the contract being ambiguous.
2. SAME—AMBIGUITY OF CONTRACT.—Where a vendor conveys all the timber save hickory timber on certain land "and all the gum timber * * * measuring 20 inches in diameter above 12 feet from the stump, parol evidence was inadmissible to show that oak timber under 20 inches in diameter 12 feet from the stump was conveyed, there being no ambiguity as to such oak timber, though there was ambiguity as to the gum timber.
3. SAME—WRITTEN CONTRACT—PAROL TESTIMONY.—The general rule is that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract; but this rule does not prevent the introduction of parol evidence, to ascertain the meaning of the parties as expressed in the written instrument.
4. SAME—AMBIGUOUS CONTRACT—PAROL TESTIMONY.—Parol evidence is competent to show the relations of the parties and attendant circumstances as an aid in interpreting or construing a written instrument which is uncertain or ambiguous.
5. TROVER AND CONVERSION — INNOCENT TRESPASSER — DAMAGES.—Where timber has been cut by an innocent trespasser, the measure of damages, where delivery cannot be had is the value of the property in its converted form less the labor expended on it, provided such expense does not exceed the increase in value.

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

STATEMENT OF FACTS.

W. H. Daubs sued Brown & Hackney, Incorporated, to recover the possession or the value of certain saw logs mentioned in the complaint.

The defendant filed an answer denying that the plaintiff owned the logs, and also filed a bond to retain possession of them.

The material facts are as follows: W. H. Daubs was the owner of about 1,000 acres of timber lands sit-

uated in Cleveland and Dallas counties in the State of Arkansas. In July, 1917, he made a contract in writing for the sale of the timber on these lands to Brown & Hackney, Incorporated, for the sum of $5,100, of which the sum of $2,100 was paid in cash and the balance of $3,000 was evidenced by a promissory note due one year from date. The timber contract, after describing the lands and reciting the consideration, contained the following:

"The said party of the first part does hereby bargain, grant, sell and convey unto the said party of the second part, their successors and assigns forever, all the timber, save the hickory timber, on the northeast quarter of section thirty-five (35) and all the gum timber on all of the above described lands, measuring twenty inches in diameter above twelve feet from the stump, it being understood that all tops of trees left on the ground after the cutting of said timber is to become the property of the said party of the first part, and for the purpose of selling and removing said timber the said party of the second part, their successors to enjoy, for the purpose aforesaid, full and free ingress and egress through and over any portion of said lands leading to the Rock Island Railway or any point the party of the second part may designate to haul and load said timber."

The contract, also, provided that the purchasers should have three years within which to remove the timber from the lands.

The Brown & Hackney Company entered into possession of the lands and began to cut all the oak and gum timber on the northeast quarter of section 35. Daubs ordered the company to stop, claiming that under the terms of the contract that it was only entitled to the oak and the gum timber measuring 20 inches in diameter above 12 feet from the stump. The Brown & Hackney Company continued to cut the timber, claiming that under the language of the contract it was entitled to all the oak and gum timber regardless of size. Hence this lawsuit.

The court was of the opinion that the contract was ambiguous in its terms and permitted the plaintiff to testify that he only sold the oak and gum timber 20 inches in diameter and over 12 feet from the stump and that the contract was so understood by the parties to it; that he owned a small mill which was situated on these timber lands and for that reason did not sell the small oak and gum trees; that the defendant cut and removed from the northeast quarter of section 35 referred to in the contract, a quantity of oak and gum timber under 20 inches in diameter at the ground; that it hauled the logs to Ivan, Arkansas, and loaded them on the cars. The value and quantity of the timber cut by the defendant was also shown by the plaintiff. Other evidence was adduced by the plaintiff tending to corroborate his own testimony.

On the other hand, it was shown by the representative of the defendant company that the parties first negotiated for the timber on the lands other than the northeast quarter of section 35, described in the written contract, and were unable to agree on the price therefor; that the plaintiff then proposed to give him in addition all the timber on the northeast quarter of section 35, except the hickory and all the gum measuring 20 inches in diameter above 12 feet from the stump on all the other lands for the sum of $5,100, and that this offer was accepted; that the written contract was intended to express this agreement.

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

T. D. Wynne, for appellant.

The court erred in holding that the timber contract was ambiguous and susceptible of more than one construction, and in permitting Daubs to testify as to what his intention was in selling the timber and the kind and quantity of timber contrary to the language of the contract, stating the intention of the parties and in stating to the jury that the contract was of doubtful meaning and that it was their province to determine the force and

effect of the terms employed, and also erred in refusing to give the instructions requested by defendants. Instruction No. 4 requested by appellant was improperly refused. The contract was not ambiguous or capable of more than one construction, and parol evidence was not admissible to vary its terms or contradict it. 6 R. C. L. 836; 94 Ark. 493; 116 *Id.* 212; 111 *Id.* 29; 39 *Id.* 447; 52 *Id.* 254; 62 *Id.* 133.

Punctuation and bad grammar do not vitiate a contract. 6 R. C. L. 846. The only doubtful meaning relates to the size of the gum timber sold. It was plainly error to charge the jury that it was for them to determine whether or not appellants had the right to cut oak only 20 inches in diameter and twelve feet from the stump, as the contract was not ambiguous. See cases *supra.*

Paul G. Matlock, for appellee.

The contract is ambiguous and parol testimony was admissible to explain its meaning. The court properly refused instruction No. 4. The cases cited by appellant do not support his contention. 111 Ark. 29; 39 *Id.* 442; 44 *Id.* 447; 52 *Id.* 254; 62 *Id.* 133. These cases are really against his contention. See 70 Ark. 99; 93 Id. 352; 108 *Id.* 552. The verdict is amply sustained by the evidence and should be sustained.

HART, J., (after stating the facts). The court was of the opinion that the timber deed was ambiguous and permitted the plaintiff to testify that he sold the defendant the oak and gum timber on all the lands mentioned in the deed, which was 20 inches and over in diameter 12 feet from the stump, and did not sell on any land the oak and gum timber under 20 inches in diameter 12 feet from the stump.

On the other hand, the defendant claims that he bought all the gum and oak timber on the northeast quarter of said section 35 both over and under 20 inches in diameter. The court also embodied the contention of the plaintiff in its instruction to the jury and left it to the jury to decide whether the contract was as contended for by the plaintiff, or by the defendant.

The court was right in holding the contract to be ambiguous; but was wrong in permitting the plaintiff to testify that it was the intention of the parties to except from the terms of the contract all of the oak timber under 20 inches in diameter 12 feet from the stump in the northeast quarter of section 35, and in submitting the plaintiff's contention, in this respect, to the jury. The contract contains two descriptions of timber sold, each of which is perfectly clear in itself, but which are mutually inconsistent and contradictory. The words, "all the timber save the hickory on the northeast quarter of section 35," when used by themselves are perfectly clear and indicate that all the timber of whatever kind and size which is situated on section 35, except the hickory timber only was sold. The words, "all the gum timber on all of the above described lands measuring 20 inches in diameter above 12 feet from the stump," when used by themselves are equally clear and indicate that only the gum timber measuring 20 inches in diameter, etc., was sold. It is manifest, however, that the two clauses following each other as they do in the contract are contradictory and make the contract ambiguous. If the draftsman had used the words, "all the gum timber on the rest of the above described lands" instead of the words "all of the gum timber on all of the above described lands," it is obvious the contract would have the meaning contended for by the defendant.

On the other hand, if the draftsman had used the words, "all the timber save the hickory timber and the oak and gum timber under 20 inches in diameter," etc., on the northeast quarter of section 35, instead of the words, "all the timber save the hickory timber on the northeast quarter of section 35," it is clear that the contract would have the meaning contended for by the plaintiff; but as above stated, the terms of the contract as they now stand are inconsistent and contradictory.

The general rule is that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a written contract; but where the language of

the contract is ambiguous, this rule does not prevent the introduction of parol evidence to ascertain the meaning of the parties as expressed in the written instrument. This is in application of the settled rule that parol evidence is competent to show the relations of the parties and attendant circumstances as an aid in interpreting or construing a written instrument which is uncertain and ambiguous. *Jones* v. *Lewis,* 89 Ark. 368; *Wood* v. *Kelsey,* 90 Ark. 272; *Wilkes* v. *Stacey,* 113 Ark. 556, and *Selig, Recvr.,* v. *Phillips County,* 129 Ark. 473, and cases cited. The reason that such testimony is received is that it merely aids in determining the true meaning of the language used and does not contradict, vary, add to, or take away from the writing. As said in *Hammond* v. *Capitol City Mutual Fire Ins. Company,* 151 Wis. 62, Ann. Cas. 1914 C., Vol. 33, p. 57, "The meaning so arrived at must not be inconsistent with the language of the writing, but it may limit such language to a particular meaning which is included therein, and exclude another meaning which the language may also bear. The office of such testimony is, within the meaning of the terms employed in the writing, to render certain that which is uncertain, and to determine just what in fact the writing was intended to express."

The rule is well stated in *Boden* v. *Maher,* 105 Wis. 539, 81 N. W. 661, 32 L. R. A. (N. S.) 389, where the court said:

"Parol evidence to vary the terms of a written contract is one thing; such evidence to enable the court to say what the parties to a contract intended to express by the language adopted in making it is quite another thing. The former is not permissible. * * * The latter is permissible, and is often absolutely essential to show the real nature of the agreement. * * * Both rules are elementary and do not conflict in the slightest degree with each other. One prevents a written contract from being varied by parol evidence either in regard to what was said at the time it was made or prior thereto; the other aids in determining what the contract is when its lan-

guage, either in its literal sense or as applied to the fact, is obscure. The one is a rule to preserve the contract as expressed in writing; the other is a rule of construction to determine what the contract, as expressed, is, it being kept in mind that the mutual intention of the parties, so far as the same can be ascertained, governs within the reasonable meaning of the language they chose to express it; and that rules of construction to discover it are not to be resorted to unless there is some ambiguity to be cleared up. A failure to keep in mind the wide distinction between varying a contract by parol evidence and resorting to such evidence in aid of its construction often leads to error."

To allow plaintiff to prove by parol testimony that the oak timber under 20 inches in diameter 12 feet from the stump on the northeast quarter of section 35, was intended to be excepted from the terms of the contract would necessarily contradict the written instrument. To allow him to prove by parol testimony that it was their intention to except the gum timber less than 20 inches in diameter 12 feet from the stump would not contradict the written instrument, but would tend to explain its terms which are, as written, uncertain and ambiguous.

It follows that the court erred in allowing the plaintiff to show that it was the intention of the parties to except any oak timber from the provisions of the contract; but the court should have only allowed him to show that it was their intention to except gum timber less than 20 inches in diameter 12 feet from the stump on the northeast quarter of section 35, and then have submitted to the jury the determination of the question of whether the plaintiff or defendant was right in their respective contentions.

The action of the court in giving instruction No. 3 on the measure of damages is also assigned as error. The instruction reads as follows:

"If you find for the plaintiff, then you should determine from the evidence, first, the amount of timber wrongfully taken under 20 inches in diameter 12 feet

from the stump, and then its proven value on the spur track and at Ivan is the measure of plaintiff's damages, and your verdict should be, if you find for the plaintiff, for the value of the timber at such points at which the timber was piled, namely, the spur track and Ivan."

The defendant, if a trespasser, was under the facts disclosed by the record, an innocent one, and the measure of damages in cases of this sort, where the property has been cut by an innocent trespasser and delivery cannot be had, is the value of the property in its converted form, less the labor expended on it, provided such expense does not exceed the increase in value. *Eaton* v. *Langley,* 65 Ark. 448, and *Randleman* v. *Taylor,* 94 Ark. 511.

It will be noted that the instruction in question did not contain the qualifications prescribed in the cases just cited and for that reason was erroneous.

For the errors indicated in the opinion, the judgment must be reversed and the cause remanded for a new trial.

HANSON v. BROWN.

Opinion delivered May 26, 1919.

1. HOMESTEAD—DEFECTIVE CONVEYANCE—CURATIVE ACT.—Where a husband's mortgage of his homestead was defective for non-joinder of his wife, but the defect was cured by Acts 1893, p. 303, the wife had no homestead interest in the land upon its sale under the mortgage.
2. EVIDENCE—PRESUMPTION.—One is presumed to know the law and to have asserted his rights under it.
3. VENDOR AND PURCHASER—FORFEITURE—WAIVED.—Where a vendor permitted the purchaser's wife and children to remain in possession of the property for sixteen years after breach, he waived his right of forfeiture, though he mistakenly supposed that his wife had a homestead interest in the land.
4. DESCENT AND DISTRIBUTION—PROPERTY SUBJECT TO DESCENT.—A vendee of land in possession under a bond for title has an estate descendible by inheritance.

5. SPECIFIC PERFORMANCE—LACHES.—The surviving wife and children of a purchaser, in possession of land under a bond for title were not precluded by limitation or laches from bringing a bill for specific performance, although their right was not asserted until the bringing of a suit to quiet title by the vendor's assignee; there being no necessity to sue for specific performance earlier.

6. PAYMENT—PURCHASE MONEY—SUFFICIENCY OF EVIDENCE.—In an action by a vendor's assignee against the purchaser's widow and surviving children, to quiet title to land, evidence *held* to show that purchaser had not paid the purchase money.

Appeal from Columbia Chancery Court; *J. M. Barker,* Chancellor; reversed.

STATEMENT OF FACTS.

On the 22nd day of March, 1917, J. G. Brown brought this suit in equity for the purpose of quieting his title to 200 acres of land in Columbia County, Arkansas.

J. T. Hanson and others were made parties defendants to the action and filed an answer denying that the plaintiff is the owner of 160 acres of the lands described in his complaint and also set up facts which entitled them to the specific performance of a contract of sale of the 160 acres of lands to themselves. The material facts are as follows:

The lands originally belonged to A. J. Hanson, deceased. He resided upon the 160 acres of lands in controversy in 1893 with his wife and children, and the lands constituted his homestead. He executed a deed of trust to said lands to J. T. Waller, as trustee, to secure an indebtedness which he owed to J. M. Waller. His wife did not join with him in the execution of this deed of trust. W. D. Stevens as substituted trustee, on the 30th day of April, 1898, sold said lands to J. M. Waller, the beneficiary in the deed of trust, for the sum of $209.60, and on the 6th day of May, 1899, executed to him a deed to said lands. On the 20th day of November, 1900, J. M. Waller entered into an executory contract in writing with A. J. Hanson for the sale of the said lands for the sum of $117. Among other provisions, the contract contained the following:

"One note of this date for $117 due and payable on the 1st day of November, 1901, and in his failure to make said payment when due, then the contract of purchase to cease and $40 rent to be paid for said land for the year 1901, with interest on said notes from date at ten per cent. until paid.

"Now if the said J. M. Waller shall, on the punctual payment of said notes, and all the taxes legally assessed on said land, and surrender to him of this instrument, convey or cause to be conveyed to the said A. J. Hanson, heirs or assigns, the above described premises with warranty of title, then this obligation to be void, otherwise not."

A. J. Hanson entered into possession of the lands pursuant to the contract and continued to live there with his wife and children until just before Christmas in 1900, when he moved from the lands into the State of Louisiana. It is about 25 miles from the lands in controversy to the place in Louisiana where A. J. Hanson moved. A. J. Hanson did not move to Louisiana for the purpose of living there permanently, but he did live there until he died on the 2nd day of October, 1902. In the meantime J. M. Waller had removed to the State of Texas and from that State wrote the following letter:

"Gorman, Texas, September 23, 1902.

"A. J. Hanson, Ware, Ark.

"Dear Sir: As you have knocked me out of selling that land I got from you, you must arrange the matter at once. I will not have any more foolishness about it. I let you have money on that land and have treated you better than I ought to have done, and now I will not suffer you to fool with me any longer. If you do not arrange the matter with Stevens, I will be there myself and will settle the land question in short order, so a hint to the wise is enough. See Stevens at once and have him to write me what you are going to do.

"Yours, etc."

A short time after the death of A. J. Hanson in 1902, his widow and some of his children moved back on the

lands in controversy and have been in possession of the same, either in person or through their tenants, ever since. During a part of this time they paid the taxes on the lands and during a part of it, J. M. Waller paid the taxes.

N. S. Hanson, one of the sons of A. J. Hanson, deceased, testified that he was 33 years of age and that J. M. Waller was his first cousin; that in the fall of 1900 his father went to town with some cotton and sold it; that his father then went to J. M. Waller's house and paid him the balance of the purchase price of the lands in controversy; that he heard J. M. Waller tell his father that this payment made them even; that he told his brother, L. G. Hanson, about this payment.

L. G. Hanson testified that he was notified that the note for the purchase price of the lands was due and unpaid and went to see the agents and attorneys of J. M. Waller about it; that he went home and his brother told him about his father having already paid for the lands; that he then went back and only paid to the agents and attorneys of J. M. Waller the amount necessary to redeem the lands from a tax sale.

J. M. Waller denied that any part of the purchase price of said lands had ever been paid to him. He said that he had allowed the widow and children of A. J. Hanson, deceased, to remain on the lands all these years for the reason that he was informed that she had a homestead interest in them and on that account was entitled to possession of them; that he allowed them to redeem from the tax sale at which he had purchased them, because he had been informed by his attorneys that it was the duty of the widow to pay the taxes by virtue of her homestead interest.

Each party testified as to the amount of taxes paid by himself. Jas. G. Brown, the plaintiff, purchased the lands from J. M. Waller with notice of the claim of the defendants.

The court found that the plaintiff, J. G. Brown, was the owner of the lands in controversy and decreed that his title to the same should be confirmed and quieted.

The court further found that the defendants are not entitled to a specific performance of the contract of November 20, 1900, for the reason that their cause of action was barred by the statute of limitations.

The court further decreed that the plaintiff should pay to the defendants the amount of taxes they had paid on the lands. The defendants have appealed.

J. M. Kelso and *McKay & Smith,* for appellants.

1. Brown purchased the land from Waller with full knowledge of appellants' rights and claims and is not entitled to insist upon a forfeiture. 48 Ark. 413; 87 *Id.* 600; 1 Pom. Eq. Jur., § 452. Waller recognized Hanson as a purchaser and not a tenant and he waived a forfeiture. If a forfeiture was demanded it was after the death of Hanson. 87 Ark. 394. The evidence sustains our contention that there was a waiver of forfeiture in that Waller permitted the Hanson heirs to redeem from him this land which sold for taxes. In addition, he made demand and received of the Hanson heirs payment of the taxes during the years that he paid himself. In this he recognized that they were in possession as purchasers and not as tenants. When Hanson died he was living in Louisiana. It is true that Mrs. Hanson never executed the deed of trust or any conveyance of this homestead, but this deed of trust was validated by the Acts of 1893, and the homestead was effectually conveyed, notwithstanding she did not sign or acknowledge the deed of trust. The only interest she had at her husband's death was dower, and she had no right to possession until her dower was assigned. Kirby's Digest, § 2704; 14 Cyc. 962; 111 Ark. 308; 106 *Id.* 13; 1 Cyc. 1005-6.

2. The statute of limitations was not pleaded by appellee and hence waived the right. 71 Ark. 164; 76 *Id.* 405; 100 *Id.* 543. Where the owner sells land and executes bond for title it is treated as a mortgage in favor

of the vendor to secure the purchase money subject to all the essential elements and incidents of a mortgage as if the vendor had conveyed by absolute deed and taken a mortgage back to secure the purchase money. 13 Ark. 533; 14 *Id.* 633; 15 *Id.* 188; 16 *Id.* 126; 27 *Id.* 61; 29 *Id.* 357; 34 *Id.* 113; 52 *Id.* 381; 66 *Id.* 167; 84 *Id.* 160.

The court erred in not permitting appellants to reclaim by paying the note for $117 and interest.

Stevens & Stevens, for appellee.

Appellants are not entitled to redeem, nor to specific performance. On the failure to pay the note A. J. Hanson became the tenant of Waller under the contract and as he held over after the expiration of his term he could be evicted. 48 Ark. 416; 87 *Id.* 600; 76 *Id.* 579.

Waller was advised that, the widow being in possession, it was her duty to pay the taxes and she had the right to redeem. 128 Ark. 605.

Both parties had abandoned the contract. If it was valid after the death of A. J. Hanson and appellants are not entitled to specific performance or of redemption. 113 Ark. 437; Bower on Waiver, § 212; 27 Cyc. 1820.

The father of appellants was guilty of laches and his heirs are chargeable with laches and the statutes run against the heirs. 55 Ark. 85. Equity denies relief to parties guilty of laches though not pleaded. 88 *Id.* 333. The complaint will be treated as amended to conform to the proof of the statute of limitations. 84 Ark. 37. Even if there was error in holding that appellants were barred by limitation, still if the decree is correct on the whole case, this court will not reverse. 73 Ark. 418; 85 *Id.* 127.

There was a forfeiture during their father's life which barred him from redeeming.

The only act of Waller's that may be considered a waiver of the forfeiture was the letter written at Gorman, Texas, in September, 1902, and received a few weeks later; that in considering this letter a waiver they would be bound by the conditions upon which the waiver

was based and required to accept the conditions named and to show that they did so accept. They did none of the requirements of the letter. They did not offer to redeem until after Waller's vendee sought to quiet his title, but had left the place and had not occupied it since 1907, and in their pleadings claim title by reason of paying taxes on it seven consecutive times. The decree refusing specific performance and the right to redeem is correct and should be affirmed. 128 Ark. 605.

HART, J., (after stating the facts). It appears from the record that in 1893, A. J. Hanson executed to J. T. Waller, as trustee, a deed of trust to the lands in controversy to secure an indebtedness which he owed to J. M. Waller and that his wife never joined him in its execution.

The act to render more effectual the constitutional exemption of homesteads, approved March 18, 1887, provides that no conveyance or mortgage affecting the homestead of any married man shall be of any validity except for taxes, laborer's and mechanic's liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same. Kirby's Digest, section 3901.

The Legislature of 1893 passed an act to cure defective conveyances and acknowledgments which were defective or ineffectual by reason of not having complied with the act of March 18, 1887, above referred to. See Acts of 1893, p. 303. This act has the effect to validate the deed of trust from A. J. Hanson to J. T. Waller to secure an indebtedness to J. M. Waller.

W. B. Stevens, as substituted trustee, sold the lands pursuant to the terms of said deed of trust to J. M. Waller for the sum of $209.60 and executed a deed to him therefor, on the 6th day of May, 1899. On the 20th day of November, 1900, J. M. Waller entered into an executory contract of sale in writing with A. J. Hanson for sale of said lands for the sum of $117. The contract of sale provided that the note for the purchase money should

be due and payable on the first day of November, 1901, and that, upon the failure of A. J. Hanson to pay the note when due, the contract of purchase should cease and $40 rent should be paid for said lands for the year 1901. Under the terms of this agreement the vendor had the power, upon the failure of his vendee to pay the purchase money, to declare the contract of purchase at an end, and thereafter to establish the relation of landlord and tenant between the parties. See *Ish* v. *Morgan, McRae & Co.*, 48 Ark. 413, and *Souter* v. *Witt*, 87 Ark. 593. This, however, Waller failed to do. It is true Waller wrote Hanson a letter in September, 1902, reminding him that he had not paid the purchase money and threatening to take action in the matter at once, but so far as the record discloses, no action was ever taken by him in the premises. This letter was written almost a year after the purchase money became due. Hanson died soon after this letter was written, and in a few months thereafter his widow and some of his children moved back on the lands and have continued in possession thereof in person, or through their tenants, ever since. Waller did not make any attempt to oust them from the land. He gives as an excuse that he was advised by his attorneys that the widow of A. J. Hanson had a homestead interest in the lands and was therefore entitled to the possession of them.

For the reasons already given, it is apparent that Mrs. Hanson had no homestead interest in the lands and it is no excuse that J. M. Waller made a mistake about the law; for he is presumed to know the law and to have asserted his rights under it. His action, therefore, in allowing the defendants to continue in the possession of the lands after so long a period of time will be deemed a waiver of his right to a forfeiture under his contract with A. J. Hanson.

This brings us to a consideration of the prayer of the defendants and cross-complainants for specific performance. A. J. Hanson died intestate, leaving the defendants as his heirs at law. By virtue of the bond for

title from J. M. Waller to himself, he came into the possession of an estate which was descendible by inheritance, which at his death vested in his heirs at law. *Roach* v. *Richardson,* 84 Ark. 37. A. J. Hanson was left in possession of the land under this contract and he continued in possession until his death. His widow and heirs have been in possession in his right ever since. The continuation of their possession, by the tacit consent of J. M. Waller and his vendee, J. G. Brown, until the latter brought this suit to quiet his title and made the defendants parties thereto, was a constant and continued affirmance, on the part of them, that the holding of the defendants and their father was under the bond for title. There was no necessity for the defendants to bring a bill for specific performance until J. M. Waller, or his vendee, J. G. Brown, created the necessity by bringing an action for the lands. *Hargis* v. *Edrington,* 113 Ark. 433. To the same effect see *Waters* v. *Travis,* 9 Johnson's Rept. (N. Y.) 448; *Norman* v. *Bennett* (W. V.), 9 S. E. 914; *Coffey* v. *Emigh* (Col.), 10 L. R. A. 125; *Mudgett* v. *Clay* (Wash.), 31 Pac. 424, and *Western Railroad Corporation* v. *Babcock,* 6 Metc. (Mass.) 346.

Therefore, neither the statute of limitations, nor the doctrine of laches can have any application to the rights of the defendants to maintain their bill for specific performance.

The chancellor, however, found that the defendants had not paid the purchase money, and in this finding we think he was correct. It is true one of the defendants testified that he was with his father when he paid the purchase money in the fall of 1900 just before Christmas. He said that his father went to town with some cotton and after selling it paid off the note. He was 33 years of age when he testified and consequently was only 15 years old when this transaction occurred. J. M. Waller flatly contradicted his testimony and he is corroborated by the circumstances of the case. According to the testimony of N. S. Hanson, the money was paid to J. M. Waller at the latter's house. The note was not de-

livered to A. J. Hanson, but was retained in the possession of Waller. This is inconsistent with the fact of payment. Besides this, A. J. Hanson did not demand a deed, but on the contrary soon moved away from the lands to the State of Louisiana. When all the attending circumstances are considered, we are convinced the chancellor was right in holding that neither the defendants, nor their father ever paid the purchase money. For this reason a decree for the specific performance will not be granted to the defendants except upon their payment of the purchase money together with the accrued interest and the taxes which have been paid by J. M. Waller, or the plaintiff, J. G. Brown.

For the error indicated in the opinion the decree must be reversed, and the cause will be remanded for further proceedings in accordance with this opinion.

POINSETT LUMBER & MANUFACTURING COMPANY v. LONGINO.

Opinion delivered May 26, 1919.

1. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — JURY QUESTION.—In an action for death of an employee from falling into a tank of boiling water, the question whether he was guilty of contributory negligence *held* under the evidence for the jury.
2. SAME—ASSUMED RISK—EVIDENCE.—Evidence held to support a finding that an employee who fell into a tank of boiling water had not assumed the risk of such injury, though he was one of two charged with the duty of closing the doors of the tank.
3. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—In an action for death of employee occasioned by falling into a tank of boiling water, instructions that plaintiff could not recover if he was guilty of negligence in being ignorant of the fact that the door of the tank was open was sufficiently favorable to defendant.
4. SAME—ASSUMED RISK—FELLOW SERVANT'S NEGLIGENCE.—By statute an employee does not assume the risk of negligence of a fellow servant.
5. SAME—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—In an action for death of an employee from falling into a boiling water tank, the question whether he was negligent in assuming that the door had been closed by a fellow servant *held* for the jury.

6. WITNESSES—COMPETENCY—PHYSICIAN.—In an action for death where the validity of a release executed by deceased while suffering from injuries was involved, testimony of his attending physician as to his mental condition at the time of executing the release was incompetent.

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

J. T. Kelley, Hughes & Hughes and *Lamb & Frierson,* for appellant.

1. The danger from falling through an open door into the tank was patent and visible and was a risk assumed by Longino. 4 Thompson on Negligence, § § 4608-10. Deceased was of full age and intelligent and accepted the risk knowingly. 5 *Id.,* § 4644. The rule laid down has been adopted by this court. 97 Ark. 486-8; 57 *Id.* 503; 105 *Id.* 526-532; 77 *Id.* 367 (374).

Plaintiff was experienced and intelligent. The danger was patent and visible and it was one of Longino's duties to keep the doors closed. When the doors were closed there was no danger and it was his duty to keep them closed. 122 Ark. 552 (556); 93 *Id.* 140 (152).

Instruction No. 8 was error and prejudicial. *Ib.;* 76 Ark. 69 (73); 104 Ark. 489 (498); 56 *Id.* 216 (221).

2. Since Longino's injuries resulted from a violation by him of a positive order, command and rule made for his protection, he cannot recover. The court sent the case to the jury upon the theory of comparative negligence, which has no place in this suit. 4 Thompson on Negl., § 4624. The violation of orders by the servant is the proximate cause of the injury as here. 180 S. W. 831 (834); 240 U. S. 444.

The correct rule is laid down in these cases. *Supra.* See also 124 Ark. 437 (448); 129 *Id.* 520; 18 R. C. L. 659, § 152; 155 N. W. 343-8; 103 N. E. 401 (403).

The court erred in giving and refusing instructions and on the evidence there could be no recovery. Cases *supra.*

Dr. Lutterloh's testimony was admissible. Kirby & Castle's Digest, § 3409. His testimony was competent and very important and its exclusion highly prejudicial.

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

1. Dr. Lutterloh's testimony was properly excluded as incompetent.

2. Longino did not assume the risk of the negligence of any other servant of defendant. 97 Ark. 486; 77 *Id.* 367. He did not violate any command of the master.

3. Instruction No. 7 was a correct statement of the law. The one in 205 S. W. 695 is not similar and No. 9 states the law correctly. Under the law the negligence of the fellow servant is that of the master. Acts 1907, p. 163; Acts 1913, p. 734; 116 Ark. 189; 108 *Id.* 578. The evidence fully sustains the verdict. See cases *supra.*

SMITH, J. An instruction numbered 1 given by the court below states the issues of fact out of which this litigation arises, and we copy it as constituting in part a statement of the facts:

"1. In this case the plaintiff, Tom Longino, as administrator of the estate of Don Longino, deceased, sues the defendant, Poinsett Lumber & Manufacturing Company, to recover damages, and alleges that in connection with the operation of defendant's business in the town of Trumann, it has a series of tanks so constructed as to hold boiling water, and that said tanks are enclosed by movable covers over the same, said covers being so constructed that they may be raised or lowered by means of weights; that said tanks are at all times kept closed by said covers except when the employees of the defendant company are engaged in placing timber in them to be steamed, or taking timbers from them before being manufactured. Plaintiff alleges that on the 14th day of December, 1916, his intestate, Don Longino, was in the employ of the defendant

company, and while in the discharge of his duty, and without fault upon his part, and under the direction of the person in authority and control, was required to go to a place at or near the end of said row of tanks and in undertaking to perform said duty fell into one of said tanks containing boiling water and as a result thereof was injured, from which injuries he died on the 4th day of March, 1917; that said injury was the result of the carelessness and negligence of the agents, servants and employees of said defendant in failing to keep the door of the tank into which deceased fell, closed, and in carelessly and negligently allowing the same to remain open; that the conditions of the door of said tank was unknown to said deceased and could not have been known to him in the exercise of ordinary care for his own safety."

We adopt the designations employed in the instruction set out and will refer to the injured servant as the deceased and to the corporation by which he was employed as the defendant. The injury of deceased, and his death as a result of his injuries, is admitted, but the defendant denies that it was guilty of any negligence, and alleged that the danger of falling into the tank was obvious and was a risk assumed by the deceased, and that deceased fell into the tank as a result of his own carelessness or of some accident for which it is not responsible. Complaint is made of certain instructions given by the court over defendant's objection. And it is also insisted that no case was made for submission to the jury. And, in addition to these defenses, it is insisted that the court erroneously excluded certain testimony relating to the mental capacity of deceased at the time he executed a release to the defendant, which was offered in evidence.

Deceased was a man of intelligence, thirty-two years old, and, according to the testimony offered on behalf of his administrator, had begun work on the day preceding his injury about noon and was injured about 6:40 a. m. the next day. There were twenty-six of these tanks, and in obedience to the order of his foreman deceased went

to the opposite end of the row of tanks to deliver an order and in returning fell into one of the tanks by reason of the door having been left open by some employee other than deceased. The steam arising from the tanks with the fog which it formed, combined with the lack of light at that hour of the day, rendered it impossible for him to see the open tank and thus avoid the injury. Deceased's screams attracted the attention of one Wood, his fellow servant, who pulled deceased from the tank of boiling water, and as he did so deceased asked who had left the door of the tank open. Deceased and Wood were designated as hookers, it being their business to fasten the hooks into the blocks, that were being manufactured, for the purpose of drawing them out of the tanks. On the part of the defendant the testimony was to the effect that it was the duty of deceased and Wood to open and close the doors of the tanks on which they were working, and that only one tank was supposed to be open at a time, and that if for any reason any other door was open it was their duty to close it. That the order to this effect was given, not only to keep the water boiling hot, but to prevent employees from falling into the tanks.

The court gave a very elaborate charge, and the instructions told the jury that no recovery could be had if it was the duty of deceased to close the door of the tank into which he fell, unless the door had been left open by some employee of defendant other than deceased and deceased did not know and in the exercise of ordinary care could not have known that the door had been left open. So that the case was submitted to the jury to determine whether or not deceased had left the door open and, if not, whether he was guilty of negligence in having failed to close it. And a recovery would also have been denied under the instructions given if deceased had been guilty of negligence in falling into the tank, although he did not leave it open and was not guilty of negligence in failing to see that it was closed. These were the questions of fact which have been resolved against defendant by the verdict of the jury.

The circumstances stated made a question for the jury whether deceased was guilty of contributory negligence; and likewise supported the finding, which the jury must have made, that the injury was not the result of one of the assumed risks of the service.

It is very earnestly insisted that no recovery should be had because the injury had resulted from the deceased's violation of a rule or order promulgated for his own protection and that of other employees, in that he did not see that the door of the tank not at the time in use was closed. But the jury was told that if it appeared from the evidence that it was the duty of the deceased to close the door of the tank into which he fell, and that he failed to do so, then there would be no liability on the part of the defendant for the injury sustained. The court properly refused to tell the jury that there could be no recovery if Wood, or some other employee, left the door open, because an instruction to that effect would have imposed upon deceased the assumption of the risk resulting from the negligence of a fellow-servant, and employees of corporations have been relieved by statute from the assumption of that risk. The instructions did tell the jury that no recovery could be had if deceased was guilty of negligence in being ignorant of the fact that the door was open, and the defendant was not entitled to a more favorable declaration of the law.

There was testimony to the effect that it was the duty of deceased and his fellow-servant Wood to remain at the mill until 6 p. m., when all other employees had quit work for the day, and before leaving the mill to see that the doors of all the tanks were closed, and instructions were asked, and refused, which declared the law to be that deceased could not recover "if he did not perform this duty and that one of the doors which he should have closed was left open and that on the following morning he fell through such door into the tank and was burned." But, as has been stated, two employees were charged with the duty of closing the doors and of seeing that they were closed. There were twenty-six of these tanks, and the

duty of closing their doors was not to be discharged by deceased alone, but by him and his fellow-servant, and inasmuch as the deceased was not charged with the assumption of the risk of his fellow-servant's negligence the jury had a right to pass upon the question whether deceased was negligent in assuming that his fellow-servant had discharged his duties in closing the doors which deceased himself had not closed. Deceased did not in fact assume the risk of injury from Wood's negligence in leaving the door open unless he knew or in the exercise of ordinary care should have known that Wood had been guilty of negligence in leaving the door open, and the law on this question was fully declared in the instructions given. Instructions given told the jury there could be no recovery if deceased had himself left the door open or was guilty of negligence in failing to see that it was closed, and defendant had no right to ask a more favorable declaration of the law.

After his injury deceased was sent to a hospital in Jonesboro, where he endured suffering beyond description; yet after about thirty days' treatment he had sufficiently improved to make it apparently safe to send him to the home of his father, where he greatly desired to go. Before leaving the hospital he executed a release, which was attacked at the trial upon the ground that deceased did not understand and appreciate the effect of his action in signing it; and testimony was offered to that effect which was legally sufficient to sustain the jury's finding that the deceased did not appreciate the effect of his action when he signed the release, as the instructions told the jury there could be no recovery if deceased did understand and appreciate the nature, quality and effect of his act in signing the release. The defendant first called the attending physician to prove by him that the deceased's mental condition was such that he appreciated the nature of his act in signing the release; but objection was made to this testimony on the ground that the answer to that question would be based upon information which the physician had acquired from the patient while

attending him in a professional capacity and which was necessary to enable him to prescribe as a physician. The physician testified that he was present at the time the release was signed, not for the purpose of then treating the patient, but for the purpose only of seeing that the patient was properly packed on the cot on which he was to be shipped to his father's home. The physician would have testified—had he been permitted so to do—that in his opinion the deceased knew and appreciated what he was doing when he signed the release. This testimony was properly excluded, as the witness had been the attending physician from the time he first saw deceased immediately after the injury until deceased left the hospital, and any information he had or any opinion he may have expressed would have been based upon information thus acquired. *Triangle Lumber Co.* v. *Acree,* 112 Ark. 534.

No error appearing, the judgment is affirmed.

DICKINSON v. CYPRESS CREEK DRAINAGE DISTRICT.

Opinion delivered May 26, 1919.

1. STATUTES—CONSTITUTIONALITY—TWO SUBJECTS IN ONE ACT.—Special and Private Acts 1911, p. 260, as amended by Acts 1915, p. 297, providing for organization of a drainage district and for the construction of certain levees, is not unconstitutional because it embraces two subjects, the Constitution containing no inhibition against an act embracing more than one subject, and the construction of the levees being a part of the drainage plan.
2. DRAINS—DE FACTO OFFICER—COLLATERAL ATTACK.—Where the act provided that directors of subdistricts should be elected from each subdistrict, a director so elected is a *de facto* officer at least, and, even though he be a nonresident of the subdistrict, his authority cannot be questioned in a collateral proceeding.
3. DRAINS—COLLECTION OF TAXES—WAIVER OF OBJECTION.—Where an owner of land in a drainage district organized under Acts 1915, p. 297, amending Special and Private Acts 1911, p. 260, failed to appear within 60 days and protest against assessments of his land, he cannot complain that excessive benefits were assessed against his land.

4. **DRAINS—FAILURE TO PAY TAXES.—The court has no right to refuse to impose a penalty of 25 per cent. upon the owner of land for failure to pay drainage taxes, because he is blind and ill; the statute making no exception in favor of the blind or sick.**

Appeal from Desha Chancery Court; *Zachariah T. Wood,* Chancellor; reversed with directions to impose penalty.

J. W. Dickinson, for appellants.

The acts are unconstitutional and void. The Board of Directors were illegally organized and the assessments are unjust, unequal and excessive. The lands were assessed as town lots when they should have been assessed as acreage lands as other lands were assessed.

Act 80, Acts 1915, leaves out many lands, aggregating 50,000 to 60,000 acres, subject to assessment. They are not assessed at all, and this enhances plaintiff's taxes and renders the act unconstitutional. The act was not followed in the election of the board. The act is a double-header and treats of two subjects, distinct and opposite.

F. M. Rogers, for appellees.

1. The acts of the board were valid, but if there were illegalities, the members of the board are *de facto* officers and their acts are binding. If appellants were dissatisfied they should have acted in time as prescribed by law.

2. The act is not unconstitutional. It treats only of one subject.

3. It is no objection that the act does not include some lands lying south of the Arkansas River and west of the Mississippi River. It was not intended to include the whole of the State of Arkansas. 109 Ark. 60. The exclusion of lands in no wise affects the act. 130 Ark. 70.

4. The assessments were made upon the lands as shown by the tax books.

5. There is no proof that the taxes paid to the original district have not been refunded them, but if they did pay them and have not recovered it, it was their own fault. Acts 1911, pp. 12-33. On the cross-appeal appellees are entitled to the penalties and attorney's fees.

SMITH, J. Appellant, who is the owner of a large amount of land situated in the Cypress Creek Drainage District, brought this suit to enjoin the officers of that district from enforcing the collection of the taxes claimed to be due on his lands for the years 1915 and 1916. The lands were delinquent for those years at the time of the institution of the suit. Appellant alleged that the acts of the Legislature under which the district was organized were unconstitutional. He also alleged that the Board of Directors was illegally organized, in that one of the directors was ineligible, and that the assessments against his lands were unjust, unequal and excessive. In an answer and cross-complaint the drainage district prayed the foreclosure of its lien for the taxes. It was admitted that certain lands owned by appellant were erroneously assessed as town lots when they should have been assessed as acreage property and given the assessment of corresponding property similarly situated, and the prayer of the complaint for this relief was granted. The court held against appellant on all other questions and directed that his lands be sold if the taxes were not paid within the time limited, but refused to impose the penalty of twenty-five per cent. as required by section 13 of the act (Acts 1915, p. 297), amending the act of March 18, 1911 (Special and Private Acts 1911, p. 260), organizing the district, and both parties have appealed.

It is first insisted that the act is unconstitutional because, as counsel says, "It is a double-header, treats of two subjects, distinct and opposite," his specific objection being that, whereas the title to the act is an act to organize certain territory into a drainage district for the purpose of draining the lands in said district, it also provides for the construction of certain levees.

Two answers may be made to this objection. The first is that the present Constitution, unlike that of 1868, contains no inhibition against an act of the Legislature embracing more than one subject. The second answer is that section 3 of the act declares, "The intent and purpose of this act being to protect the territory described in

section 1 hereof from floods from the gap in the Mississippi River levee between Jefferson lake and Cypress creek, and to provide a complete and thorough system of drainage for surface water, said board is hereby authorized, empowered and directed to adopt the maps, profiles and other information shown by the survey now on file in the office of the present Board of Directors of said district, which maps and profiles were made under the supervision of the Bureau of Drainage Investigation of the United States Department of Agriculture; * * *" The report of the Bureau of Drainage Investigation referred to in the act is found in the transcript, and an essential part of the plan there approved involved the construction of certain levees to prevent the overflow of the territory sought to be drained.

The act divided the territory of the district into five subdistricts and provided that one director should be elected from each subdistrict in which he resided; and it is contended that the director elected for subdistrict No. 1 was an actual resident of subdistrict No. 5. This director was at least a *de facto* officer and his title and right to act cannot be inquired into in this collateral proceeding.

The testimony in the case was chiefly directed to an attempt to show that excessive betterments were assessed against appellant's lands. But that question is not open to inquiry in the present suit. This district was created by the acts of the General Assembly above referred to, which amended Act No. 110 of the Acts of 1911 (Special and Private Acts 1911, p. 260), and at the time of the passage of Act No. 80, Acts 1915, litigation was pending which involved the assessment of benefits against the lands in the district, and section 5 of this act of 1915 undertook to validate these assessments and, after a legislative declaration that "all of the lands of the district will receive benefits to the extent of the assessment against them," directed that "all persons claiming that their lands will not be benefited by the making of the improvement contemplated by this act are hereby required

to apply to the proper court of chancery, within sixty days after the passage of this act, to enjoin the enforcement of said assessment; and any person failing so to apply to the court of chancery within said sixty days shall be forever barred from contesting the assessment of benefits aforesaid."

The appellant did not avail himself of the right given to appear within the sixty days and protest against his assessment, and he cannot complain, if, by a belated appeal to the court, he was denied the redress he might have obtained by a seasonable application to the court made within the time limited by law. *Board of Improvement* v. *Pollard,* 98 Ark. 543.

The court below properly rendered a decree against appellant's lands for the foreclosure of the lien fixed by law; but refused to impose the penalty of twenty-five per cent. which had accrued before this suit was filed, the action of the court being based upon the ground that appellant was blind and had been ill. But section 13 of the act requires the taxes to be paid between the first Monday in January and the 10th day of April and imposes a penalty of twenty-five per cent. against all lands on which the taxes are not paid. The law makes no exception in favor of the sick or the blind, and the courts are powerless to write that exception into the law. *Sims* v. *Cumby,* 53 Ark. 418; *Smith* v. *Macon,* 20 Ark. 17.

The decree must be reversed with directions to impose the penalty fixed by law. In all other respects it is affirmed.

HOLLENBERG MUSIC COMPANY *v.* WILLIAMS.

Opinion delivered May 26, 1919.

1. APPEAL AND ERROR—MANDATE—ALLOWANCE OF INTEREST.—In an action to foreclose a mortgage given to secure a note, where the Supreme Court, in reversing decree for defendants, remanded the case "with directions to enter a decree in favor of" plaintiff for a specified sum, "with foreclosure of deed of trust," plaintiff was not entitled to interest on such sum from date of the note, but merely from date of the decree.

2. SAME—CONCLUSIVENESS OF ADJUDICATION.—A decree of the Supreme Court on former appeal reversing a judgment for defendants and remanding the cause with directions to enter decree for plaintiff for a specified amount, is an adjudication of the sum due, which could not be changed or modified upon a second appeal.

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

C. P. Harnwell, for appellant.

Upon the remand of the cause as per the order of this court a decree of foreclosure should have been entered for the amount, with 8 per cent. interest, as Williams' tender was not sufficient. See opinion on former appeal to this court and the directions therein. Interest should have been allowed. The court below did not follow the directions in the order and judgment of this court. The judgment should be reversed with directions to enter a decree for the proper amount and interest, 8 per cent. from date of the note, December 19, 1911.

Clyde E. Pettit, for appellee.

The decree below is in accordance with the decision and order of this court on the former appeal and should be affirmed. 200 S. W. 896. There is no ambiguity in this court's directions. *Ib.*

HUMPHREYS, J. Appellant instituted suit against appellee, in the year 1912, in the Arkansas Chancery Court, to foreclose a mortgage given to secure a note for $2,976.70, of date December 9, 1911, bearing interest at the rate of 8 per cent. per annum from date until paid. Appellant was a wholesale and appellee a local dealer in musical instruments. They transacted a large volume of business with each other prior to the execution of the note and mortgage in question. The issues presented by the pleadings involved the statement of an account between the parties, which was made by a master appointed for that purpose by the chancery court. The master found that appellant was indebted to appellee in the sum of $226.58, and a judgment was rendered in ac-

cordance therewith, from which appellant prosecuted an appeal to this court. This court held on appeal that the account was improperly stated by the master and restated it on a different basis. The decree of the chancery court was thereupon reversed, annulled, set aside and remanded with directions to the chancery court to enter a decree in favor of appellant for the sum of $1,534.22 and to foreclose the deed of trust. A money judgment for that amount would have been rendered here in favor of appellant against appellee had the title to land not been involved. The aforesaid order and decree by this court was rendered on the 14th day of January, A. D. 1918. The mandate was filed in the chancery court on April 17, 1918, with the request by appellant to enter a decree of foreclosure for $2,608.55. This amount included interest from December 9, 1911, on the amount of $1,534.22, ascertained by this court on restatement of the account to be the balance due from appellee to appellant. The request was denied and appellant duly excepted to the ruling of the court. On the 4th day of June, 1918, appellee tendered into court, for the use and benefit of appellant, all costs and the sum of $1,534.22, with interest at the rate of 8 per cent. per annum from January 14, 1918, to the date of tender. The court ruled the tender sufficient and a full satisfaction, release and discharge of the indebtedness and mortgage. To the aforesaid ruling of the court, appellant duly excepted.

Appellant then accepted the amount tendered, under stipulation and agreement with appellee that the acceptance thereof should not waive or affect its right to prosecute an appeal to this court. The appeal was perfected and the cause is before us a second time.

It is contended that the chancery court, upon remand of the case, erred in not allowing interest on the sum of $1,534.22 at the rate of 8 per cent. per annum from the 9th day of December, 1911, the date of the note, to April

17, 1918, the date the mandate was filed. Learned counsel for appellant places that construction on the decree and mandate of this court. The wording of the decree was as follows:

"It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to enter a decree in favor of the appellant for the sum of $1,534.22, with foreclosure of the deed of trust."

We are unable to discover any ambiguity in the language used or direction given. The decree rendered by the chancery court was reversed and remanded with directions to enter the decree of foreclosure for $1,534.22 in favor of appellant. The exact amount was specified and necessarily related to the amount of the indebtedness due on the date of the decree, as no other date was mentioned. The specific amount determined and directed to be entered became a final adjudication of this court upon adjournment of the court and cannot be changed or modified upon a second appeal.

The decree, having been rendered in accordance with directions of this court, is affirmed.

GLASSCOCK v. MALLORY.

Opinion delivered June 2, 1919.

1. DEEDS—EXCEPTIONS—VALIDITY.—Where a deed described part of the premises as the southwest and the west half of the southeast quarter of a certain section, 240 acres, less 46 acres east of the railroad, when in fact there were 126 acres east of the railroad in the two tracts described, the exception was void.
2. VENDOR AND PURCHASER—RECORD—EFFECT.—Where both plaintiff and defendant claimed the same land under separate deeds, the plaintiff must prevail where his deed was first recorded.

3. REFORMATION OF INSTRUMENTS—BURDEN OF PROOF.—Where under the deeds the legal title passed to plaintiff, the burden of establishing grounds for reformation rested on defendant.

4. BOUNDARIES—RECOGNITION.—There is no reason for applying the doctrine of recognition of boundaries where the dispute was not as to the location of boundaries, but as to the substance of the conveyances under which the parties claim.

Appeal from Lee Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

J. W. Morrow, for appellant.

1. Before appellee can recover he must establish the fact that he owns land east of the railroad and he has failed to do so. He cannot rely on the weakness of appellant's title. His only claim is under Buford, and Buford had no title to any land east of the railroad. McCaleb, the common source of title, sold to Sellers, our grantor, the SW¼ and the W½ of SE¼ of section 28—less 194 acres west of the railroad. It is probable that he thought of the 240 acres, that 46 acres lay east of the railroad, but he sold all the SW¼ and W½ of the SE¼ except that part west of the railroad. But the deed to Sellers covered all land east of the railroad and Buford's covered all west of the railroad and took possession, and both held to their respective lands, recognizing the railroad as the boundary for five years or more. There was no mistake as to where the railroad ran. There is no allegation or testimony as to a mistake mutually. The boundary is certain and the acreage called for does not matter, as the boundary is certain, quantity must yield to monuments. 100 Ark. 105; 3 *Id.* 18. If the deeds were uncertain, the acts of the parties have made them certain.

2. Devlin on Deeds 7576-9. See also *Ib.* 1999-2000; 15 Mo. App. 590. Even if the description was void, the taking possession and the payment of the purchase price effectuated the sale. 51 Ark. 390.

The testimony shows that neither Buford nor any one claiming under him bought any of the land east of the railroad. After the sale and survey Sellers continued

to occupy all the land east of the railroad and both he and Buford recognized the railroad as the boundary line. The deed and Buford's conduct settle this controversy. He cannot accept the benefits under the deed and refuse the grantor the benefits which followed to him. Even if no deed had passed appellees are estopped, as where the line is in doubt the owners may fix a boundary line which if followed by possession is binding. 96 Ark. 168; 99 *Id.* 128; 105 *Id.* 598; 101 *Id.* 409; 104 *Id.* 99; 110 *Id.* 197; 23 *Id.* 704; 15 *Id.* 297; 23 *Id.* 704. The decree should be reversed as to all land east of the railroad in the SW¼ and W½ SE¼, section 28.

Daggett & Daggett, for appellee, C. T. Doan.

1. Both Doan and Mallory were innocent purchasers for value without notice. Neither knew that any of the lands claimed by Glasscock lay east of the railroad. The deeds from McCaleb were recorded on different dates and appellees' were recorded first and title vested first. 70 Ark. 256; 129 *Id.* 308; 196 S. W. 177; 46 Mo. 239; 58 Fed. 455.

2. Appellant has not had possession for the statutory period under color of title.

3. The cases cited by appellant do not apply because (a) there never has been any dispute as to the dividing line; (b) there never has been any agreement that the railroad was the boundary line, and (c) a tract of 87 acres is not a boundary strip, and (d) no controversy ever existed about this line until just before this suit, when Douglass made his survey.

4. Both Doan and Mallory are innocent purchasers for value without notice of appellant's claims. 2 Devlin on Deeds, § 747; 129 Ark 308; 196 S. W. 117; Kirby's Digest, § 763.

5. The language in a deed is construed most strongly against the grantor, and under McCaleb's deed to Buford all the SW¼ and all of the W½ of SE¼ was conveyed. 111 Ark. 220.

6. Where in a description there is an exception and it is indefinite or impossible to be located the exception

is void and the grantee takes the whole tract. 56 Ark. 41; 95 *Id.* 253; 85 *Id.* 1; 19 Ann. Cases 1207; 30 Ark. 640; 11 Am. St. 39; 97 Ala. 437; 11 So. Rep. 832; 135 Am. St. 342; 30 Ark. 657; 35 *Id.* 478; 48 *Id.* 419; 119 *Id.* 301; 106 *Id.* 83.

7. The statements of a grantor in a deed made after it is executed are inadmissible to impeach the deed, and the testimony of Johnston, Hope and Buford was properly excluded. 79 Ark. 426; 1 English 110; 9 Ark. 91; 43 *Id.* 320; 24 *Id.* 111; 90 *Id.* 149; 48 *Id.* 169; 101 *Id.* 409; 100 *Id.* 555; 103 *Id.* 193.

8. As the warrantor to the title to Mallory, Doan was a proper and necessary party to the suit.

9. The deed first recorded takes precedence. 70 Ark. 256, approved in 129 *Id.* 308; 196 S. W. 117. See also 46 Mo. 239; 58 Fed. 455.

10. As to adverse possession. This cuts no figure, as McCaleb was in possession of lands lying on both sides of the railroad and all of the property in litigation on January 2, 1912, and no bar had lapsed when suit was begun. The W½ of the SE¼ is clearly shown to be wild and unimproved and not in the occupation of any one. The cases cited by appellant are not in point.

11. The chancellor was correct in sustaining the motion to quash the portions of the testimony of Sellers, Hope and Johnston and also Buford. 40 Ark. 237; 90 *Id.* 149; 48 *Id.* 169; 101 *Id.* 409; 100 *Id.* 555. There was no competent testimony that the railroad was ever the boundary line.

Doan warranted the title to Mallory and was a proper party.

12. As to constructive notice the cases cited by appellant do not apply here. The shortage in acreage was not settled between Buford and Sellers.

13. On the cross appeal it is submitted that the deeds from McCaleb to the Bufords and Buford and Doan vested in C. T. Doan the whole SW¼ and W½ of SE¼ of section 28, and the deed from McCaleb to Sellers and subsequent conveyances conveyed no title whatever,

and under the deed from C. T. Doan to Mallory the title to all the lands except 46 acres on the east side of W½ SE¼ vested in Albert H. Mallory and the title to the 46 acres is now and always has been in appellee and cross appellant, C. T. Doan, and as to said 46 acres the decree should be reversed with directions to quiet the title in Doan.

McCULLOCH, C. J. The parties to this litigation make conflicting claims to certain lands in Lee County, formerly owned by Clarence McCaleb, who is the common source of the assertion of title. McCaleb owned a large body of land in that county containing about 1,300 acres, including 240 acres described as the SW¼ and the W½ of the SE¼ of section 28, township 3 north, range 3 east, and on January 2, 1912, he sold and conveyed something over 1,000 acres of it to R. W. Buford and his wife, Emma V. Buford, who subsequently conveyed to one Doan, who in turn conveyed to appellee Mallory. The description in the deed from McCaleb to the Bufords was, in part, as follows: "The southwest and the west half of the southeast quarter of section twenty-eight (28), 240 acres, less 46 acres east of the railroad." On the same day McCaleb executed a deed to F. T. Sellers conveying lands aggregating 312.31 acres, among which was a part of section 28, described as follows: "The southwest quarter (¼) and the west half of the southeast quarter (¼) of section twenty-eight (28), less 194 acres lying west of the railroad, all in township three (3) north of range three (3) east."

Sellers was acting as agent for the Bufords in the purchase from McCaleb of the lands embraced in the deed to the Bufords. The deed to the Bufords was filed for record on March 27, 1912, and the deed to Sellers was not filed for record until April 26, 1912. The line of railroad of the St. Louis, Iron Mountain & Southern Railway Company ran north and south through the southwest quarter of section 28, parallel with the east

boundary line of the quarter section, leaving 46 acres on the east side of the railroad in that quarter section. The railroad does not touch the west half of the southeast quarter of section 28, and all of the other land described in the deed to the Bufords lie west of section 28.

Appellant Glasscock asserts title under Sellers to the lands conveyed in the deed from McCaleb to Sellers, and he has been in occupancy of the lands in section 28 east of the railroad. This action was instituted by Mallory against Glasscock in the circuit court of Lee County for recovery of possession of all of the land except 46 acres lying on the east side of the west half of the southeast quarter (W¼ SE¼) of section 28. Appellant answered denying appellee's assertion of ownership of the land, and on his motion the cause was transferred to the chancery court, where it proceeded to a final hearing which resulted in a decree in favor of appellee quieting his title and awarding possession of all the lands in section 28, except 46 acres lying on the east side of the west half of the southeast quarter.

According to the facts, as disclosed by the testimony with respect to the location of the railroad, there are 126 acres east of the railroad in the two tracts described in the deeds as the southwest quarter and the west half of the southeast quarter of section 28. That being true, the exception in the deed of "46 acres east of the railroad" was void, and the effect of the deed was to convey the whole of the southwest quarter and the west half of the southeast quarter of section 28, 240 acres. *Mooney* v. *Cooledge,* 30 Ark. 640. Appellee had, therefore, a perfect record title to all of the lands in controversy, but he has conceded appellant's right to 46 acres on the east side of the west half of the southeast quarter of section 28, and the correctness of the court's decree in awarding it to appellant is not involved in this appeal. Appellee's deed was recorded first in point of time and his title under it must prevail as against any conflicting claim of appellant under the deed of McCaleb

to Sellers. *Penrose* v. *Doherty,* 70 Ark. 256. Appellant cannot claim as an innocent purchaser for the reason that the description in the deed to Buford was sufficient to put him upon notice of the extent of that grant, and also for the reason that the deed to Sellers, which was in the line of his own title, gave record notice that 194 acres of the southwest quarter and the west half of the southeast quarter of section 28 was excluded from the land, leaving only 46 acres of those two sub-divisions to be conveyed by that deed. The legal title having passed to appellee, the burden of establishing grounds for reformation rested on appellant, and we do not think the testimony adduced by him was sufficient to warrant a court of equity in granting that relief. It is clear from the deed that the intention of McCaleb was to convey to the Bufords 194 acres out of those two sub-divisions, and this is also apparent in the deed to Sellers.

There is testimony tending to show that Buford understood when he purchased the land that the railroad was to be his east boundary, but it also showed that he was ignorant of the true location of the railroad and supposed that he was to get the full acreage stipulated in his bargain. There are no equities in appellant's favor which call for a reformation of the deed so as to give him title to all of the land east of the railroad. The rule is well established by this court that the evidence which would justify the reformation of a deed must be clear and decisive, and the testimony in this case does not measure up to that standard. Nor is it sufficient to show that there was an agreement between the owners of the contiguous tracts as to the boundaries. The dispute arises in this case, not as to location of boundaries, but as to the substance of the respective conveyances under which the parties claim, and there is no reason for applying the doctrine of recognition of boundaries settled by agreement of the parties.

Our conclusion is that the decree of the chancellor is correct and the same is affirmed.

RINEHART & GORE v. ROWLAND.

Opinion delivered June 2, 1919.

1. TRIAL—TRANSFER FROM LAW TO EQUITY.—Where a transfer was made from the circuit to the chancery court, over objections of the appellants, before answer filed or testimony adduced, the court can look only to the allegations of the complaint to determine whether or not the cause was properly transferred to the equity court.
2. ACTION—LEGAL OR EQUITABLE.—A complaint for the recovery of money alleged to have been obtained through false representations *held* not to state a cause of equitable jurisdiction.
3. TRIAL—TRANSFER OF CAUSE—MOTION TO DISMISS.—Filing a motion to dismiss a complaint for uncertainty, in that it alleged a suit upon a contract, without stating whether it was oral or written, and if written without making it an exhibit, and failure to move specifically for transfer to the circuit court, did not amount to a waiver of the right to have the cause tried at law where appellants objected to the transfer to equity.
4. PLEADING—DESIGNATION.—The name by which a pleader designates his pleading is immaterial; the pleading should be considered according to its legal effect.
5. PLEADING—MOTION TO DISMISS COMPLAINT FOR UNCERTAINTY.—A motion to dismiss a complaint for uncertainty should be treated as a motion to make the complaint more definite and certain.
6. APPEAL AND ERROR — WRONG FORUM — INVITED ERROR.—Though a complaint fails to show a cause of action in equity, since the plaintiffs selected that forum, they cannot complain that the chancery court had no jurisdiction.
7. SAME—RIGHT TO TRANSFER.—In a cause improperly transferred to equity, where the chancellor's finding was not clearly against the preponderance of the evidence, the appellants, objecting to chancery jurisdiction, are not entitled to have the complaint dismissed, but to have the cause transferred to the law court and to have the issues of fact tried before a jury.
8. FRAUD—QUESTION FOR JURY.—In a conflict of evidence on the issue of fraud, the question was properly triable before a jury.

Appeal from Boone Chancery Court; *Ben F. McMahan,* Chancellor; reversed.

STATEMENT OF FACTS.

J. Sam Rowland et al., plaintiffs below, appellees here, instituted this action in the circuit court of Boone

County, Arkansas, against one C. E. Sarber, and Rinehart and Gore, defendants below. Rinehart and Gore are the appellants here.

The plaintiffs alleged in their amended complaint that about the 20th of November, 1916, defendants entered into a contract with plaintiffs whereby defendants agreed and undertook, for a consideration of $1,350 cash, to issue to each of said plaintiffs one sixty-fourth interest in certain oil and gas leases covering 2,500 acres of land situated in Boone County, Arkansas, and known as the C. E. Sarber leases, and as further consideration defendants agreed to drill a well then being put down on said land from a depth of 2,200 feet to a depth of 3,000 feet without unnecessary delay unless prevented by impossibility. They alleged that Harry Gore was present and was the active man in making said contract, and that he represented that his firm, Rinehart & Gore, were the ones who would do the drilling. He further represented that defendant C. E. Sarber was representing the firm of Rinehart & Gore, and that, while Rinehart & Gore were the owners of said leases, for convenience they had been taken in the name of defendant C. E. Sarber. They allege that for the purpose of wronging, cheating and defrauding plaintiffs Harry Gore, as a member of the firm of Rinehart & Gore, induced the plaintiffs to enter into the written contract with defendant, C. E. Sarber, well knowing at the time that the said Sarber could not and would not carry out the terms of said contract by drilling said well as they represented it would be drilled; that, for the purpose of wronging, cheating and defrauding plaintiffs, Rinehart & Gore, immediately on payment of the money which the plaintiffs had paid in, converted the same to their own use by placing same in the People's National Bank of Harrison, Arkansas, to the credit of Rinehart & Gore, well knowing that the money had been paid in by these plaintiffs for the purpose of having said well drilled deeper and well knowing at the time of the conversion of said money that Sarber would not be able to drill the well as defendants had induced plaintiffs to believe would be done.

Plaintiffs alleged that it was a fraudulent scheme on the part of Rinehart & Gore to induce plaintiffs to enter into the contract with Sarber, whom defendants represented as holding the property for them. They alleged that Sarber is insolvent, and that Rinehart & Gore knew such to be the fact when they induced plaintiffs to enter into the contract before mentioned.

They alleged that, by reason of the false and fraudulent acts and conduct of the defendants, they were defrauded of the sum of $1,350. For which sum with interest they prayed judgment and for all proper and equitable relief. They moved that the cause be transferred to the chancery court of Boone County, which was done, over the objection of defendants.

In the chancery court the defendants moved to dismiss for want of jurisdiction. Thereupon it was agreed in open court that the cause was transferred to the chancery court over the objection of the defendants. The court then overruled the motion to dismiss, to which the defendants duly excepted.

The defendants Rinehart & Gore then answered, admitting that they were partners but denying that they were partners or associated with C. E. Sarber with reference to the matters alleged in plaintiffs' amended complaint. They denied that they had a contract with plaintiffs, and alleged that the plaintiffs had a written contract with C. E. Sarber with reference to the drilling of the well referred to in the amended complaint, a copy of which they made an exhibit to their answer. They alleged that Sarber complied with the terms of that contract, and that plaintiffs breached the same by taking over the well and drilling same without the knowledge or consent of Sarber. They denied that Sarber represented the firm of Rinehart & Gore and denied specifically all the other allegations of the complaint.

The court heard the cause upon the testimony adduced on the issues thus raised, and made a general finding in favor of the plaintiffs, and rendered a judgment in their favor against the defendants Rinehart

& Gore for the sum of $1,350 with interest from the commencement of the suit, May 5, 1917, to the date of the decree, September 4, 1918, to-wit: in the sum of $104.65, making the total amount of the decree $1,464.55.

The court further found that the People's National Bank of Harrison, garnishee, had in its hands funds of Rinehart & Gore in an amount sufficient to pay the judgment, and also rendered a decree sustaining the writ of garnishment and directing the bank to pay the plaintiffs the amount of the judgment.

The defendants Rinehart & Gore duly prosecute this appeal. Further facts stated in the opinion.

E. G. Mitchell, for appellants.

1. The court erred in overruling defendants' motion to dismiss the complaint because it is vague and uncertain in that it alleges a suit upon a contract without stating whether it was oral or written, and if written it was not made an exhibit.

2. The complaint should also have been dismissed because there was a fatal misjoinder of parties plaintiff.

3. It was error to transfer the cause to chancery over defendants' objection. They were entitled to a trial by a jury at law, and the chancery court had no jurisdiction. No equitable grounds of jurisdiction were stated and appellants did not waive their rights as appellees' complaint stated no cause of action. Appellants were clearly entitled to a trial by jury at law and it was error to transfer to equity.

4. The findings are clearly contrary to the preponderance of the evidence. 46 Ark. 80; 47 *Id.* 485. The decree should be reversed for a trial at law.

George J. Crump, for appellees.

1. There is no question of novation in this case, nor is the statute of frauds available. It is not pleaded below. 105 Ark. 641; 71 *Id.* 302; 96 *Id.* 184; *Ib.* 505; 56 *Id.* 267.

2. There was no misjoinder or defect of parties. This question was not raised below and now it is too late. 33 Ark. 497; 93 *Id.* 351.

3. The court had jurisdiction. Grounds of equitable relief were stated in the complaint. No demurrer was ever filed to the original or amended complaint. Defendants submitted to a trial in chancery, and it is now too late to insist that the case ought to have been remanded to the law courts. 51 Ark. 238-259; 54 *Id.* 532; 123 *Id.* 178; 79 *Id.* 502; 134 *Id.* 254; 122 *Id.* 108; 87 *Id.* 211. The appeal should be dismissed or the decree affirmed on account of the imperfect abstract filed here, which does not comply with the rules of the court. But on the merits of the whole case the judgment should be affirmed, as the evidence sustains it.

WOOD, J., (after stating the facts). The record shows that the appellants filed in the court below the following motion: "That the defendants opposed the transfer of this cause from the law side of the docket and now and here object to the jurisdiction of the court to try said cause, wherefore defendants ask that the said action be dismissed."

The record further shows that, when this motion came on to be heard, the parties agreed in open court "that this cause was transferred to this court by order of the Boone Circuit Court over the objection of the defendants."

The record thus shows that the appellants duly objected to the jurisdiction of the chancery court, both when the transfer was made from the law court over their protest and again when they moved to dismiss after the cause had reached the chancery court, on the ground that the chancery court had no jurisdiction.

The court can only look to the allegations of the complaint to determine whether or not the cause was properly transferred to the equity court. For it appears that the transfer was made over the objection of the appellants before the answer had been filed or the testimony adduced.

The complaint does not state a single ground to give a court of equity jurisdiction. It states only a cause of action for the recovery of money which it is alleged had been obtained through the false representations of Harry Gore, for the firm of Rinehart & Gore, by which the appellees were induced to enter into a written contract with one C. E. Sarber, who was representing the firm of Rinehart & Gore, and by which false representations appellees were induced to pay over their money which the appellants converted to their own use; that same was a fraudulent scheme, etc., by which appellees were deprived of their money. In *Dillon* v. *McAllister et al.*, 40 Ark. 189-191, we said: "But, in the absence of other equitable elements for relief, courts of chancery do not entertain bills for compensation in money merely. Such relief, if it be all to which complainant is entitled, cannot be administered under a prayer for general relief."

Appellants filed a motion to dismiss the complaint on the ground that "the same is vague and uncertain in this, that it alleged a suit upon a contract without stating whether same was written or oral and if written not made an exhibit."

Appellees contend that appellants by filing this motion and by a failure to move the court specifically to transfer the cause to the circuit court waived the right to have the cause tried in that court.

The appellees would be correct in their contention perhaps if the above motion had been the only one filed by the appellants. But, as we have already stated, the record shows that the appellants at the inception also objected to the transfer of the cause to the chancery court. The name by which a pleader designates his pleading is immaterial. The pleading should be treated according to its legal effect.

The motion to dismiss on the ground that the complaint was vague and uncertain and that it did not set out the written contract should have been, and doubtless was, treated by the court as a motion to make the complaint more definite and certain.

Both motions of the appellants were filed on the same day, September 5, 1917, and were overruled on the same day, October 19, 1917. It, therefore, is conclusively established by the record that the appellants at the proper time challenged the jurisdiction of the court to hear this cause and that they have not waived their right to have the same reviewed here.

But, notwithstanding the allegations of the complaint fail to show a cause of action in equity, inasmuch as the appellees selected their forum and adduced their testimony and submitted their cause to a hearing before the chancery court, they are not in an attitude to complain.

Therefore, if the uncontroverted testimony or even a clear preponderance of the evidence proved that the appellees had no cause of action, the decree of the chancery court should be reversed and a decree should be entered here dismissing their complaint for want of equity.

The finding of the trial court was not clearly against the preponderance of the evidence. Therefore, appellants are not entitled to have a decree rendered here in their favor dismissing the complaint for want of equity. But appellants are entitled to have the cause transferred to the law court, and to have the issue of fact tried before a jury. It could serve no useful purpose to set out and comment in detail upon the evidence, and since the cause must be tried at law we refrain from so doing.

There was testimony which tended to prove that the leases, on lands for the purpose of drilling for oil, designated in the record as the Sarber leases, though taken in Sarber's name, were taken for the benefit of the appellants, and that in the making of the contracts for the drilling, as alleged in the complaint, Sarber acted for the appellants; that Gore, of the firm of Rinehart & Gore, was present and made the representations when the last drilling contract was entered into with Sarber and made the alleged false representations set up in the complaint by which it is alleged the appellees were induced to enter into the contract and pay over their money.

The principle applicable in the case of a vendor who by false representations induced one to enter into a purchase is, by analogy, applicable here. "It is well settled that one who has been induced to purchase property by the false representations of the vendor has the right to recover in the court of law any damages which he has sustained thereby." *Joyce* v. *McCord,* 123 Ark. 492.

In *Grayling Lumber Co.* v. *Ebbitt,* 134 Ark. 182, we said: "It is not necessary for the relationship of agency to exist between a vendor and the party inducing or procuring the sale of lands through fraud and deceit in order to warrant relief against the vendor. A vendor will be held liable if he participates in the fraud; or if he had knowledge of the fraud and adopts or takes advantage of it."

While there was a decided conflict in the evidence on the issue of fraud, that was an issue for the jury which should have been sent to them under proper instructions in such cases.

For the error in refusing to transfer the cause to the law court, the decree is reversed and the cause will be remanded with directions to transfer to the circuit court and for further proceedings according to law and not inconsistent with this opinion.

EDWARDS *v.* STATE.

Opinion delivered June 2, 1919.

1. INTOXICATING LIQUORS — TRANSPORTATION FOR ANOTHER.—Under Acts 1917, p. 41, § 8, making it unlawful "to convey or transport over or along any public street or highway any of said liquors, bitters or drinks for another," but not making it unlawful to transport for one's self, one who hires another to transport liquor for him is not guilty of aiding and assisting those unlawfully transporting it for him.
2. SAME—CRIMINAL STATUTE—STRICT CONSTRUCTION.—Acts 1917, p. 41, § 8, prohibiting the transportation of intoxicating liquor for

another, is a criminal statute, and must be strictly construed, and all persons must be excluded from its operation who are not expressly included within its provisions.

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

Arthur Cobb, for appellant.

The court erred in refusing to instruct the jury to find defendant Edwards not guilty; but also erred in its instructions to the jury, as no crime was proven under the law. 133 Ark. 1; 135 *Id.* 470.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

Confess error under the rulings of this court. 202 S. W. 39; 205 *Id.* 814; 206 *Id.* 51; 129 Ark. 106.

Perhaps defendant was guilty of selling liquor, but he was not on trial for that crime.

SMITH, J. Appellant was convicted of the offense of transporting intoxicating liquors, and has prosecuted this appeal. There was testimony to the effect that he had employed Bill Carmoody and H. Harper to transport and to deliver the liquors to him over the public highways of Garland County, and that pursuant to this employment Carmoody and Harper were transporting intoxicating liquors over the highways of that county for delivery to appellant when Carmoody and Harper were arrested by the sheriff of that county and the liquors intercepted and the delivery prevented.

Over appellant's objection the court gave the following instruction:

"2. In order that you may fully understand the principle involved, I will state to you that every person who aids and assists another in the commission of a misdemeanor, is deemed in law to be guilty of an offense himself, and while the law of this State permits a person to carry whiskey over the streets and highways for himself, it is unlawful for any person to carry it over the streets and highways for another, and if Carmoody

or Jerome or the negro, Harper, carried it for Edwards, and he employed them, or aided, abetted, assisted or advised them in the commission of that offense he would be guilty, the same as they would, and it would be no defense in this case that the whiskey belonged to Edwards, and that he did not himself transport it for another."

The court refused to give, at appellant's request, the following instruction:

"Before you would be justified in finding the defendant guilty you must believe from the evidence beyond a reasonable doubt that he transported whiskey over the public highways of Garland County or streets of the City of Hot Springs for another."

These instructions indicate the theory upon which the case was tried and the point to be decided. The conviction was had under section 8 of Act No. 13 of the Acts of 1917, page 41, commonly designated as the Bone Dry Law, the material portion of which reads as follows:

"That it shall be unlawful for any person, * * * to accept from another for shipment, transportation or delivery, or to ship, transport or deliver for another any of the liquors, bitters and drinks referred to in section 1 of this act, or any of them, when received at any point, place or locality in this State, to be shipped or transported to, or delivered to another person, * * * at any other point, place or locality in this State, or to convey or transport over or along any public street or highway any of said liquors, bitters or drinks *for another.*"

This court decided in the case of *Rivard* v. *State,* 133 Ark. 1, that it was not a violation of the provisions of the act cited above to transport intoxicating liquors into this State, provided the transportation was not made for another, even though it was brought into this State for the purpose of sale. And in the case of *Lacey* v. *State,* 135 Ark. 470, it was held that it was not a violation of the law to transport intoxicating liquors over the highways of this State if the transportation was not made for another, even though the liquor was intended

for illegal sale. In other words, the court has construed the act in question to mean that it is made unlawful for one to transport liquor for another but not when he does so for himself.

It is true, as stated in the instruction given by the court set out above, that every person who aids and assists another in the commission of a misdemeanor is deemed in law to be guilty of an offense himself. But as it was not unlawful for appellant to transport the liquor for himself he did not violate the law when he induced Carmoody and Harper to transport it for him. Carmoody and Harper violated the law; but appellant did not. This is true because the act made unlawful so far as it is applicable to the facts of this case is "to convey or transport over or along any public street or highway any of said liquors, bitters or drinks *for another.*"

We have held that the purchaser of liquor illegally sold is not an accomplice of the seller (*Springer* v. *State,* 129 Ark. 106), although when one buys, another sells, and there can be no seller without a purchaser. We so held because the act made unlawful was selling liquor and not buying it. So here the act made unlawful is transporting liquor *for another,* and as appellant did not cause liquor to be transported for another he is not guilty under the law. This being a criminal statute it must, of course, be strictly construed and all persons must be excluded from its operations who are not expressly included within its provisions.

The Attorney General has confessed error upon the ground stated, and the confession of error will be sustained and the judgment reversed and the cause dismissed.

FORT SMITH IRON & STEEL MILLS *v.* SOUTHERN ROUND BALE PRESS COMPANY.

Opinion delivered June 2, 1919.

1. CORPORATIONS—FOREIGN CORPORATION—VENUE OF ACTION.—A foreign corporation may be sued in a county in which it maintains a "branch office or other place of business," under Acts 1909, p. 293, section 1.
2. APPEAL AND ERROR—PRESUMPTION.—Where the court directed the jury to find in favor of one of the defendants and the verdict does not find against this defendant, but does recite the names of all the defendants against whom a finding of liability was made, it is apparent that the jury obeyed the court's direction.
3. TRIAL—REPETITION OF INSTRUCTIONS.—It is not error to refuse an instruction on a subject covered by another instruction given.
4. TROVER AND CONVERSION—PUNITIVE DAMAGES.—In an action for conversion of chattels, where the taking was wrongful, but not forcible, violent or malicious, punitive damages should not be assessed.

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

T. S. Osborn, for appellant.

1. The verdict for punitive damages is contrary to the law and the evidence. There was no evidence to justify such a judgment. 80 Ark. 260; 96 S. W. 1067.

2. A verdict of any kind against the Fort Smith Iron & Steel Mills is also contrary to both the law and the evidence.

3. Julia Arnold was not liable at all and was entitled to a verdict.

4. The court erred in not sustaining the demurrer, or special plea to the jurisdiction. Defendant was a foreign corporation and could not be sued in Arkansas. Kirby's Dig., § § 6072-3; 61 Ark. 504; 33 S. W. 482.

5. The service of summons was void. So was the service of notice to take depositions. *Supra.*

6. The court erred in its instructions. There was no proof to sustain a judgment for punitive damages. 80 Ark. 260; 96 S. W. 1067.

7. The court erred in refusing the request of defendants as asked. Nos. 2 and 3. Acts of 1907, Act 443; Act 260, Acts of 1909. The judgment should be reversed and case dismissed.

Jo Johnson and *J. B. Crownover,* for appellee.

1. A corporation has capacity to sue in other States than that of its charter. 24 L. R. A. 289; 101 U. S. 352. The bringing of a suit is not "doing business within the State under our laws. 216 Fed. 199; 55 Ark. 174; 89 Ala. 198; 8 So. Rep. 388; 2 Morowetz Corp., § 662; 94 Ark. 621. See also 90 Ark. 73; 76 *Id.* 10; *Ib.* 525.

2. The court had jurisdiction. The situs of the company was in Arkansas. 69 Fed. 753; 8 A. & E. Enc. Law 332.

3. Foreign corporations may be sued for torts. *Ib.,* p. 369-383.

SMITH, J. This suit was brought by appellee, a Delaware corporation, against appellant, a corporation under the laws of Oklahoma, for the conversion of one of its round bale presses at Spiro, Oklahoma. The press was not in operation at the time of the conversion but had been dismantled and was in storage. Appellant Joseph W. Arnold and Julia A. Arnold, his wife, who were president and secretary, respectively, of the defendant corporation, were sued individually, as was also one A. P. Walker, an employee of the defendant corporation, to which reference will hereafter be made as the defendant.

Paul Jones, the general manager of the plaintiff corporation, which will be referred to as the plaintiff, testified that on March 20, 1917, he received a letter signed by A. P. Walker reciting that the check for $25 which was enclosed was sent to pay for junk at Spiro, Oklahoma, per agreement. Jones immediately wrote Walker that he did not understand the letter, but to this letter he received no reply. Inquiry disclosed the fact that the press had been shipped to Fort Smith; but the testimony is conflicting as to whether Arnold and Walker

converted the press to their own use or to that of the defendant.

In justification of the conversion it was testified that a written offer for $25 had been communicated to and accepted by one Paul E. Jones for the plaintiff; but these letters were not produced at the trial and the plaintiff denied that such letters were in existence or had ever been written.

Appropriate pleadings raised the question of the sufficiency of the service against the defendant, it being shown that no agent had been appointed in this State upon whom service of process might be had. It was shown, however, that defendant's articles of incorporation recited that the places of business where its principal business was to be transacted are at Arkoma, Oklahoma, and Fort Smith, Arkansas, and that Arnold and his wife, as the principal officers of the corporation, resided in Fort Smith, where the larger part of the defendant's business was transacted.

The verdict of the jury was for the sum of $800 compensatory damages and for $200 punitive damages, and was rendered against both the defendant and Arnold and Walker individually, but did not mention the name of Mrs. Arnold, and it is now insisted that error was committed in that the jury did not obey the direction of the court to return a verdict in favor of Mrs. Arnold. No request that the verdict be amended was made at the trial.

Error is assigned in the refusal of the court to give an instruction numbered 6, which reads as follows:

"6. If you find from the evidence that the Fort Smith Iron & Steel Mills never had anything to do with said property and never had the same in its possession, you should return a verdict for it."

But the court did give an instruction as follows:

"2. On the other hand, if you find from the proof in this case by a preponderance thereof, that the Southern Round Bale Press Company did not sell or authorize the sale of this press, and further find that defendants,

A. P. Walker, Jos. W. Arnold and the Fort Smith Iron & Steel Mills took the same as charged in the complaint, or in any other manner, without the knowledge of plaintiff, then, in this event, it would be your duty to find a verdict against the defendants, or either of them, who took the property, for the fair market value of the property in question at the time and in the condition in which it was taken from Spiro, Oklahoma.

It is finally insisted that the verdict for punitive damages should not be permitted to stand.

We will dispose of these questions in the order stated.

The defendant was maintaining in the county in which it was sued a "branch office or other place of business," and it was, therefore, subject to suit in that county under the act of April 1, 1909 (Acts of 1909, p. 293), section 1, of which reads as follows:

"Section 1. That from and after the passage of this act any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporation so keeps or maintains such office or place of business, and that service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations."

See, also, *Lesser Cotton Co.* v. *Yates,* 69 Ark. 396; *Arkansas Construction Co.* v. *Mullins,* 69 Ark. 429, 431; *W. T. Adams Machine Co.* v. *Castleberry,* 84 Ark. 573, 574; *Vulcan Construction Co.* v. *Harrison,* 95 Ark. 588, 591; *Fort Smith Lumber Co.* v. *Shackleford,* 115 Ark. 272.

Mrs. Arnold has no just cause of complaint. Her name does not appear in either the verdict or the judgment, and as the verdict does recite the names of all the defendants against whom a finding of liability was made it is apparent that the jury obeyed the court's direction to find in her favor.

Instruction 6 is, of course, the law; but no error was committed in refusing to give it. Instruction No. 2 made it plain that the verdict should be returned against the defendants only who took or were concerned in the taking of the property.

We agree with counsel for defendant, however, that the imposition of punitive damages was not warranted by the testimony. The plaintiff had only the constructive possession of the property. There were no circumstances of force, oppression or intimidation connected with the taking. In *Kelly v. McDonald,* 39 Ark. 393, it was said:

"Exemplary damages ought not to be given, unless in case of intentional violation of another's right, or when a proper act is done with an excess of force or violence, or with malicious intent to injure another in his person or property."

The taking was wrongful but not malicious and punitive damages should not, therefore, have been assessed. See, also, 17 C. J. secs. 271, 273 and 276, of the article on Damages and cases there cited; *S. W. T. & T. Co.* v. *Memphis Telephone Co.,* 111 Ark. 474; *Greer* v. *White,* 90 Ark. 117; *Railway* v. *Hall,* 53 Ark. 7; *Barlow* v. *Lowder,* 35 Ark. 492; *O'Connell* v. *Rosso,* 56 Ark. 572; *Clark* v. *Bales,* 15 Ark. 452; *Brown* v. *Allen,* 67 Ark. 388; *Harrison Lbr. Co.* v. *Morris,* 80 Ark. 262; *Parks* v. *Thomas,* 138 Ark. 70, 210 S. W. 141.

The judgment for punitive damages will be reversed and the action therefor dismissed. The judgment for compensatory damages is affirmed.

SIMONSON v. PATTERSON.

Opinion delivered June 2, 1919.

COMPROMISE AND SETTLEMENT—EFFECT—RENTAL CONTRACTS.—Where a sublease provides that in event of a sale the sublease should terminate, and plaintiff lessee purchased the premises, *held* that where plaintiff insisted that the contract was terminated and defendant entered into a new contract with plaintiff at increased rental, such contract was a compromise and settlement, and binding, though defendant executed it under protest.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley,* Judge; reversed.

J. T. Coston, for appellant.

1. The provision in the old contract for a termination thereof in case of sale was valid and binding on Patterson, even though he did not know before signing it that Simonson was not the owner of the land.

2. The provision for terminating the old contract in case of a sale was binding, but if not it became binding when Patterson discovered that Simonson was not the owner and elected to go ahead and carry out the contract without complaint or taking any steps to cancel or rescind it.

3. The court erred in its instructions.

4. The evidence of Patterson was not competent, as it tended to vary the new contract.

5. Patterson in the new contract got 20 acres more land in section 31 than he got under the old contract, and was given his choice of moving or signing a new contract.

6. Patterson's attention was called to the provision for the termination of the old contract in case of a sale and was given his choice of moving or signing a new contract, and, after consulting an able attorney, he told Simonson there was some doubt about it but he was going to sign the new contract, and did. That was a compromise of their dispute and a sufficient consideration. 74 Ark. 270; 105 *Id.* 638.

7. The provision in the old contract for its termination in the case of sale was valid and binding. Tiffany on Landl. & Ten., p. 140.

8. Patterson is estopped by his acts. 93 U. S. 62.

9. Incompetent evidence of Patterson was admitted as to what he told Simonson, conflicting with and varying the terms of the written contract. 206 S. W. 895.

10. The compromise was a sufficient consideration. 43 Ark. 177. A protest was of no avail. 49 *Id.* 73-74; 85 S. W. 410. As to the compromise being a consideration, see 152 S. W. 299; 144 *Id.* 928; 138 *Id.* 983.

11. There was also a new consideration, the additional 20 acres of land given under the new contract. 1 Elliott on Contracts, § 209; 33 Ark. 101; 138 S. W. 457.

12. In conclusion the instructions do not touch the law applicable to this case. The case on the evidence should not have gone to the jury, but a verdict should have been instructed for appellant.

W. J. Driver, for appellee.

While the provision in the old contract for a termination of the lease in case of a sale may be valid and binding legally, yet the lessor has estopped himself by purchasing after inducing Patterson, the lessee, to enter into same in reliance upon his ownership. 16 Cyc. 719; 12 Ark. 42; 35 *Id.* 376.

Where an agent makes a contract without disclosing his principal he becomes liable personally himself. Mechem on Agency 695-6; 87 Ark. 434. The doctrine of equitable estoppel applies here. Pom. Eq. Jur., § 804. See also 99 Ark. 260; 64 *Id.* 627; 16 Cyc. 686-692; 55 Ark. 299.

Patterson could not dispute the title of Simonson. 22 Wall. 572; 6 Peters 382; 18 Howard 68; 70 Am. Dec. 115. See also 21 *Id.* 107; 100 *Id.* 538; 11 Howard 322; 20 *Id.* 760; 16 Cyc. 719; Bigelow on Estoppel (5 ed.) 450; 56 Mo. App. 183. When Simonson entered into this lease without disclosing the limit of his title he became responsible for the performance of the contract and

was required to exercise the same good faith in dealing with Patterson as if he was the owner. Patterson relied on his representations, expended money in draining and improving the lands, and was entitled to retain the property for the term contracted for without forfeiture. 93 U. S. 62.

The cases cited by appellant do not apply here. 112 Ark. 226. See also 34 *Id.* 44; 1 Brandt on Sur. & Guar., § 387; 1 Page on Contracts, § 312; 54 Ark 185; 55 *Id.* 374; 30 Ark. 50; 9 Cyc. 316-349; 127 Mo. 327; 117 Fed. 99. See also 102 Ark. 592; 39 Miss. 442; 31 Tex. 42; 41 Vt. 311; 234 Penn. 330; 94 Ark. 390; 72 *Id.* 539.

The statute of limitations was not pleaded. New issues cannot be raised here for the first time. 72 Ark. 539; 74 *Id.* 88; 71 *Id.* 242-552; 66 *Id.* 219; 64 *Id.* 305; 46 *Id.* 97; 80 *Id.* 391; 82 *Id.* 260; 101 *Id.* 95.

Appellant was estopped to declare a forfeiture because he failed to disclose to appellee the limitations upon his right to contract and received the execution of the contract of December 3, 1915, on the theory of ownership, and the second contract being without consideration there was no basis for the recovery of rents, and the case should be affirmed.

HUMPHREYS, J. This suit was instituted in the Oscelola District of the Mississippi Circuit Court by appellant against appellee, to recover a balance due for the year 1918 on a rental contract made between the parties on November 27, 1917, for a plantation of 400 acres in said county.

Appellee denied liability on the ground that the contract was void for want of consideration.

The cause was submitted to a jury on the pleadings, evidence and instructions of the court, upon which a verdict was returned and judgment entered in favor of appellee. From the judgment an appeal has been duly prosecuted to this court.

The parties first entered into a written contract of rental for the plantation on December 3, 1915, covering

the years 1916, for $5.50 per acre; 1917, for $6 per acre; and 1918, for $6 per acre if middling cotton was worth less than 10 cents per pound at Memphis on November 15, 1918, and $6.25 per acre if worth more than 10 cents per pound at said time and place. Appellant did not own the land at the time the contract was made. Appellant testified that he informed appellee, when the contract was made, that he held the lands under lease from non-resident owners. Appellee testified that he signed the contract believing that appellant was the owner of the plantation, and did not ascertain to the contrary until January, 1916, after he had taken possession and placed his tenants, teams and machinery on it. One provision of the contract was as follows:

"In event of sale of land herein described, this lease is to terminate and become null and void at the end of the year in which such sale shall have been made."

Appellant purchased the land on September 17, 1917, from the owners. On October 4th thereafter, he wrote appellee as follows:

"I beg to advise that I have finally and fully closed trade with the former owners of the property which you are now farming, and under the terms of your contract, same is void and terminates at the end of 1917. If I do not determine at an early date to farm the property myself personally, will be pleased to discuss with you a new contract for 1918. In line with my usual policy, I always try to trade first with parties on the property."

Appellee received the letter and consulted an attorney concerning his rights under the contract. Appellee testified that he then called upon appellant and insisted that he had a right to hold the plantation under the contract for the year 1918; that appellant said his purchase of the land terminated the lease on December 31, 1917, and that he must surrender the premises at that time or sign a new contract agreeing to pay $5,000 for the use of the plantation for the year 1918; that 75 acres of his cotton was still in the field, and, on that account, signed, under protest, the contract upon which this suit is

founded, asserting at the time that he intended to test his rights under the first contract. In keeping with appellee's position, he declined to pay the additional rent of $2,472 provided for in the second contract at the time it became due, paying only so much as he regarded due under the terms of the first contract.

Appellant asked for a peremptory instruction on the theory that the second contract was valid and a substitution for the first. The court refused to so instruct, and sent the case to the jury upon the theory that appellant's right to recover depended on whether or not appellee knew that Simonson did not own the land when he entered into the first contract. The instruction given by the court under the latter theory, over the specific objection of appellant, was as follows:

"There are two contracts in evidence here, one dated December 3, 1915, and one dated November 27, 1917. You are instructed that, if at the time plaintiff and defendant entered into contract dated December 3, 1915, plaintiff advised the defendant that he was acting for the owners of the land and not for himself, or if that fact was otherwise known to the defendant at the time, then you will find for the plaintiff on the issue of rent, for the amount here sued for, with interest thereon from November 15, 1918, to this time at the rate of 6 per cent.

"On the other hand, you are instructed that if you find, from a preponderance of the evidence, that at the time plaintiff and defendant entered into the contract dated December 3, 1915, plaintiff failed to disclose to the defendant the parties for whom he was acting, in so making said contract, and that defendant did not know that plaintiff was acting for others and believed that he was acting for himself in so making said contract, your verdict should be for the defendant on the issue of rent sued for."

The main insistence of appellee is that the contract of date November 27, 1917, required appellant to do that which he was bound to do under the contract of December 3, 1915, and therefore void for the want of consideration.

Appellant's insistence is that the contract of date November 27, 1917, was a settlement or compromise of a dispute concerning the effect, under the sales clause in the first contract, of the purchase of the lands by appellant from the owners, and that the settlement or compromise of the dispute was a sufficient consideration to support the latter contract.

Appellant's construction of the first contract was that the purchase of the lands terminated the lease on December 31, 1917, at which time he was entitled to the possession. They disputed concerning their respective rights. Appellant demanded a new contract specifying a rental of $5,000 for 1918, else the possession of his lands on December 31, 1917. Rather than move, or defend his possession under the terms of the first contract, he yielded to the demand of appellant by signing, under protest, the contract constituting the basis of this suit. The reasons assigned by appellee for signing the contract are that he had secured no other place and had not gathered his cotton, so it cannot be said he signed the new contract under duress, or that appellant's interpretation of his first contract was made in bad faith. Even if it be conceded that appellant's claim was without merit, the execution thereof was a settlement or compromise of a dispute between the parties, which compromise within itself was a sufficient consideration to support the rental contract or lease of date November 27, 1917. The contract of that date was substituted for the first and was a valid, binding obligation upon both appellee and appellant. It was said by Mr. Chief Justice HILL, in the case of *Satchfield* v. *Laconia Levee District*, 74 Ark. 270, that—

"The voluntary adjustment of a matter in dispute or litigation, even when protesting against it, effectually terminates the question of litigation."

This court is committed to the doctrine that a voluntary settlement or compromise of claims between partries, with or without merit, if asserted in good faith, is sufficient consideration to support a new agreement or

contract. *Gardner v. Ward,* 99 Ark. 588; *Cherokee Const. Co.* v. *Prairie Creek Coal Mining Co.,* 102 Ark. 428; *Kress* v. *Moscowitz,* 105 Ark. 638.

Other issues were presented by the pleadings and evidence and have been argued in the respective briefs of learned counsel, but, under our conclusion as to the vital issue in the case, it is unnecessary to incorporate in the opinion a statement of the pleadings or evidence upon which the collateral issues depended. Likewise, our determination of the vital issue renders a discussion of the collateral issues unnecessary.

In our view of the law, under appellee's own evidence and the undisputed fact that he owed $2,472 on November 15, 1917, the balance due on the last rental contract for 1918, the trial court should have instructed a verdict for appellant in that amount, with interest at the rate of 6 per cent. per annum from November 15, 1918, to the date of the rendition of the judgment.

For the error indicated, the judgment is therefore reversed and judgment is directed here for said sum, with interest at the rate of 6 per cent. per annum from said date until paid.

HART, J., (dissenting). After a careful consideration of the evidence we fail to find any consideration to support the contract. The rights and obligations of appellant were were not in any degree changed to his detriment. This is not a case of a compromise of claims; but is a case where a party by a new contract in which there is no change to his disadvantage, merely obligates himself to do that which he was already bound to do by the former contract.

The law is well settled that the mere agreement to perform an existing contract obligation by one party to a contract is not a valid consideration for a new promise for the other party. 9 Cyc. 349 and cases cited.

Judge WOOD concurs in this dissent.

BEAL-BURROW DRY GOODS COMPANY v. TALBURT.

Opinion delivered June 9, 1919.

1. BANKRUPTCY — PARTNERSHIP — WAIVER OF SECURITY. — Where a creditor of a firm delivered pledged notes to one of the partners for collection and renewal and he, in violation of the agreement, retained the proceeds, the creditor, by filing his claim and accepting a dividend as an unsecured creditor in bankruptcy proceedings against the firm, did not waive his claim against the partner for misappropriation of the proceeds of the note.
2. SAME—ACCEPTANCE OF DIVIDEND—WAIVER.—Where the creditor of a partnership delivered certain pledged notes to one of the partners for collection or renewal, and the partner, in violation of his agreement to pay the proceeds to the creditor, used such proceeds to pay off other indebtedness, the creditor, by accepting a dividend in the partnership's bankruptcy proceeding, did not waive the right of action against such partner for misappropriation of the proceeds, upon the theory that it shared in the distribution of the proceeds, since they did not constitute part of the partnership assets administered in bankruptcy.

Appeal from Marion Chancery Court; *Ben F. McMahan,* Chancellor; reversed.

Richard M. Mann, for appellant.

1. Appellee wilfully and maliciously injured the property of appellant and liability for the act was not released by his discharge in bankruptcy. Bankrupt Act of February 5, 1903, § 17; 242 U. S. 138; 37 Sup. Ct. 38; 61 L. Ed. 205; 112 N. Y. Supp. 987; 210 N. Y. 175; 104 N. E. 135; 195 U. S. 176; 49 L. Ed. 147; 193 U. S. 473-485; 748 L. Ed. 754, 759-760; 24 Sup. Ct. Rep. 505; 97 S. E. 78. Both the notes and money were fraudulently appropriated. 139 N. W. 883; 243 Fed. 770. The discharge in bankruptcy was not a release of the claim. Cases *supra.*

2. The debt involved was one created by fraud, embezzlement, misappropriation and defalcation by one acting in a fiduciary capacity, and was not released by his discharge in bankruptcy. 195 U. S. 176, 49 L. Ed. 147; 72 N. J. Eq. 473; 66 Ark. 420; 62 So. 765; 182 Ala. 413; 5 Denio (N. Y.) 269; 156 Fed. 541.

3. The notes were obtained by false pretense and fraud and are not barred by a discharge in bankruptcy. 228 U. S. 28, 57 L. Ed. 718.

Appellant did not waive its right by filing its claim in bankruptcy and accepting dividends declared. Nor is it estopped by so filing its claim. 123 Ark. 403; 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205; 228 U. S. 28, 57 L. Ed. 718. The decree should be reversed and judgment entered here for the debt and interest. Cases *supra.*

Williams & Seawell, for appellee.

The only question involved is the election of remedies. Appellant's claim was a secured one by pledge of notes. 1 Remington on Bankruptcy (2 ed.), § 748; *Ib.* 752; 123 Ark. 403.

By electing to prove its entire claim as an unsecured creditor it elected to waive its lien on the notes. 123 Ark. 403.

McCULLOCH, C. J. This is an action instituted by appellant against appellee in the chancery court of Marion County to recover the amount of funds alleged to have been collected by appellee as the agent and trustee of appellant and wrongfully appropriated to another use in violation of the trust. Appellee pleaded his discharge in bankruptcy, and also pleaded that appellant is estopped to pursue the remedy adopted in the present action by reason of its election to pursue another remedy in the bankruptcy court.

The facts of the case are undisputed. Appellee and one Fee composed a mercantile firm doing business in Marion County, Arkansas, and the firm became indebted to appellant in the sum of $2,631.36, and pledged to appellant certain promissory notes executed by customers of the copartnership. On January 10, 1916, appellant delivered said notes to appellee under a written contract whereby appellee undertook to collect the notes, or to secure renewals from the several obligors, and to return to appellant "the original notes or renewal notes or the cash received in payment of any one or all of these

notes." Appellee collected the amount of the notes and mingled the funds with funds in bank of the copartnership, and in that way used the funds in the general business of the firm in the purchase of merchandise and in the payment of accounts of other creditors. In April, 1916, the copartnership and appellee went into voluntary bankruptcy and were discharged after having been adjudged to be bankrupt. Appellant proved its claim against the copartnership and received a dividend of about $800, which was credited on the amount of the indebtedness.

While the discharge of appellee in the bankruptcy proceedings was pleaded in the answer, it is now conceded that the discharge itself did not operate as a bar to the present action, but it is insisted that appellant waived its right to pursue the remedy against appellee by proving up its claim in the bankruptcy proceedings against the copartnership as an unsecured creditor and accepting dividends based on the allowance of the full amount of the claim. The contention of appellee is based on the theory that appellant occupied the position of a secured creditor of the copartnership but elected to prove its claim as an unsecured creditor, and must, therefore, be held to have released its security and waived its right to proceed to the enforcement of the security. The fallacy of this argument is in assuming that appellant was, at the time it presented a claim in bankruptcy, a secured creditor within the meaning of the Federal statute. The facts do not afford basis for that contention. Appellant had, prior to the bankruptcy proceedings, held as security the notes which had been pledged by the copartnership, but that security had become dissipated by the wrongful act on the part of appellee in committing a breach of the trust in mingling the funds with those of the copartnership. The security was no longer in existence and appellant's only remedy, aside from the original obligation of the copartnership, was the right of action against appellee for his wrongful misappropriation of the funds. This, however, was purely collateral, and did not, as before

stated, put appellant in the attitude of being a secured creditor within the meaning of the bankruptcy statute. *Bank of Searcy* v. *Merchants Grocer Co.*, 123 Ark. 403.

Nor can it be said that appellant waived its right to pursue this remedy by participating in the distribution of the funds collected by appellee and mingled with the assets of the copartnership, for the proof does not show that the funds constituted a part of the assets of the copartnership at the time the assets were administered. Appellee in his answer alleged that he used the proceeds of the collection "in the payment of the indebtedness of the said J. H. Talburt & Company," and in his testimony in the case he stated that he "put the money into the bank account of the firm J. H. Talburt & Co., and paid it out to the creditors of the firm," and on cross-examination he stated that the money was used from the bank account "to buy merchandise for the store and my family and I lived off the merchandise out of the store." It does not appear, therefore, that the funds collected constituted a part of the assets distributed in kind or that appellant was put upon notice that such was the case, and the doctrine of election does not, on that account, apply.

The decree of the chancellor was erroneous, and the same will be reversed and judgment entered here in favor of appellant for the amount claimed, with interest. It is so ordered.

HORROCKS v. BASHAM.

Opinion delivered June 9, 1919.

1. WILLS—CONSTRUCTION.—Under a will directing that an estate left in trust to a son should be delivered to him when he accumulated certain estate, or in any event at a certain age, with provision for distribution of the estate in case he should die without heirs of his body surviving, and a codicil to the effect that should the son die leaving heirs of his body such heirs should inherit a fee simple, the son, upon accumulating the specified estate, took an estate in fee simple, and not merely a life estate.
2. WILLS—CONSTRUCTION.—The law favors the early vesting of estates in land.

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

W. H. Pemberton, for appellant, Parma Collette Basham.

1. The only question is the construction of the will of George L. Basham, deceased.

2. The issues here are similar to, if not identical with, the case in 115 Ark. 400, and control the case. See also 81 *Id.* 480; 104 *Id.* 445. The chancellor erred in his construction of the will, and this court should reverse and enter judgment for Parma Collette Basham.

Under the will Leftridge Basham only took a life estate in the real property and not the fee simple title. It is clear from the codicil that if Leftridge died leaving any bodily heirs such heirs would take an estate in fee simple. There is no repugnancy between the codicil and the will, but if there is a conflict the codicil will prevail. *Supra.* The codicil was added to make his intention clear.

Sherrill, Buchanan & Mallory, for Della B. Horrocks.

Leftridge only took a life estate under the will. This is settled by the case of 115 Ark. 400, and this leaves the second question to be settled whether the note to the Worthen bank should be canceled as a fraud on plaintiff Horrocks. Mr. Peay was acting as president of the bank in his official capacity and the bank is bound by his acts. The decree should be reversed and plaintiff Horrocks be given judgment against Leftridge Basham for $8,746.82, and interest, and the Worthen note canceled.

Rhoton & Helm, for appellees, Worthen & Co. and Leftridge Basham.

Construed as a whole the will, the intention was to leave a fee simple estate to Leftridge Basham. The intention should govern and every clause given effect if possible. 126 Ark. 58, and cases cited; 98 *Id.* 553; 112 *Id.* 527. The testimony shows that the intention was to

give Leftridge a fee simple estate when he accumulated $15,000 by his own exertions or died leaving bodily heirs. The decree is correct, and should be affirmed.

McCULLOCH, C. J. This litigation involves a construction of the last will and testament of the late George L. Basham for the purpose of determining whether under the terms of the will the testator's son, Leftridge Basham, took an estate in fee simple, as contended by appellee, or whether he took an estate tail, which under our statute is converted into a life estate, as contended on behalf of appellants. The instrument in question, omitting parts not material to this controversy, reads as follows:

"All the rest and residue of my estate, real and personal, I give and devise to W. B. Worthen Company, Robt. J. Lea, E. E. Moss; my brother, Hugh Basham, and my son, Leftridge Basham, to hold in trust for the purposes hereinafter set out. It is not my purpose to impose on my trustees, Lea, Moss and Hugh Basham, the burden of the management of my estate but simply to give them advisatory control.

"*First.* My said trustees shall pay all my just debts and funeral expenses and the legacy hereinbefore set out.

"*Second.* They shall pay to my son Leftridge the sum of one hundred and twenty-five dollars per month and a further sum each month which shall equal the amount of his earnings during that month in any vocation which he may follow. And the further sum of twenty-five dollars per month for each child born in lawful wedlock while living.

"Should the exigencies of his business in the judgment of my trustees justify it, they may advance to him a reasonable sum provided the same can be done out of the income of my estate. Should my son by his own efforts accumulate an estate of the value of fifteen thousand dollars clear and unencumbered, or in any event when he shall have reached the age of forty-five years, my trustees shall turn over to him my entire estate.

"Should my son die without bodily heirs him surviving, then I will and direct that my trustees shall pay to each of the children of my four brothers and my sister the sum of one thousand dollars. Should any of my nephews or nieces die, prior to my decease, leaving a child or children, said child or children shall receive the part that would have gone to the parent if living. I further direct that they shall pay to my sister-in-law, Laura Basham, fifteen hundred dollars. All the above sums to be paid out of the income of my estate as soon as may be, should my son Leftridge so depart this life without bodily heirs him surviving. And in that event after the payment of the above legacies I hereby direct that my said trustees shall annually pay one-half of the net income of my estate each to Methodist Orphans' Home and the Florence Crittenden Home of Little Rock. Should either of these cease to exist then the whole net income shall be paid to the other.

"I hereby direct that $1,000 of my stock in the Bankers Trust Company shall be set aside by my said trustees and that the income and profits of the same shall be used for the care and preservation of my lots in Mount Holly Cemetery, Little Rock, Arkansas, and the furnishing of fresh flowers for the graves of my wife, my children and myself on natal, Easter and Christmas days."

There is an undated codicil to the will, which reads as follows:

"I desire to make it clear that should my son Leftridge (die) leaving heirs of his body, such heirs or their descendants shall inherit my estate in fee simple."

The omission of the word "die" from the codicil is a patent one. It is clear from the language of the will that the trust should come to an end when Leftridge Basham should "by his own efforts accumulate an estate of the value of fifteen thousand dollars clear and unencumbered," and in any event, when he "shall have reached the age of forty-five years." According to the testimony in the case it has been determined by the trustees that said devisee has accumulated an estate of the

value specified in the will, and they have turned the devised estate over to him.

When the whole language of the will is considered together, it is manifest that the testator used the words "should my son die without bodily heirs him surviving" with reference to the period before the time of distribution when the devised estate should be reduced to possession by delivery to the beneficiary. This, under the doctrine announced by this court in *Harrington* v. *Cooper,* 126 Ark. 53. In that case we approved a long line of decisions of the Kentucky Court of Appeals, where similar language in wills was restricted to the death of the remainderman before the termination of that estate or before the distribution of the estate or its reduction to the possession of the person to whom it is first devised.

Now, when the language of the codicil is considered in the light of what appears to be the intention of the testator expressed in the original instrument, it can not reasonably be construed as changing in anywise that intention. In fact, the language used shows that the testator had in mind his intention as expressed in the original document, and did not change the devise, but merely made clearer his intention as originally expressed. The language is not susceptible of the construction that it was intended to devise the property to heirs of the body of the first taker in any event, but merely to declare that those heirs should take the estate in fee simple, if they took at all, on the happening of the contingency specified, *i. e.,* the death of the first taker before the distribution of the estate "leaving heirs of his body." This interpretation of the will, which is not inconsistent with the language used, is induced by the well-settled canon of construction that the law favors the early vesting of estates. And the fact that the trust is ended, according to the terms of the will, when the estate is delivered to the devisee on the happening of either one of the events specified, leads unerringly to this construction, for the provision of the will concerning the disposition of the property after the death of the first taker is made by the trus-

tees during the existence of the trust. So it is clear that no remainder over was intended, except upon the death of the first taker before he came into possession of the estate.

The decree of the chancery court was correct, and it is, therefore, affirmed.

SWINTON v. CUFFMAN.

Opinion delivered June 9, 1919.

1. EXECUTORS AND ADMINISTRATORS—PARTIES.—The administratrix of the estate of a deceased mortgagee is a proper party to bring foreclosure suit.
2. APPEAL AND ERROR—NECESSITY OF OBJECTION—DEFECT OF PARTIES.—In a suit to foreclose a mortgage, the objection that there was a defect of parties because the trustee in the mortgage was not made a party plaintiff is waived on appeal where it was not raised in the court below.
3. MORTGAGES—FORECLOSURE—PARTIES.—Where a trustee in a mortgage or deed of trust was not nominally a party plaintiff for the purpose of foreclosing the trust deed, but was in fact a party by his intervention, the court had all the parties in interest before it, and could protect their rights.
4. APEAL AND ERROR—UNNECESSARY QUESTIONS.—The contention that deceased's books of account were erroneously admitted in evidence to prove an indebtedness need not be disposed of where the undisputed evidence shows that defendants had a settlement therefor with the decedent.
5. WITNESSES—COMPETENCY—ATTORNEY AS WITNESS.—In an action by an administrator to foreclose a mortgage, an attorney who stated that he was not employed by deceased as attorney, and was merely a trustee, was a competent witness to prove conversations with decedent.

Appeal from Clark Chancery Court; *Jas. D. Shaver,* chancellor; reversed.

H. E. Rouse, for appellant.

1. The demurrer should have been sustained and it was error to overrule it because Haynie, the trustee, was

not retained as a party plaintiff. He was a real party in interest and could alone maintain the suit. Appellee was not a proper party and without legal capacity to sue. Kirby's Digest, § § 5999-6002.

2. Cuffman's books were inadmissible as evidence. No testimony was introduced that the books were regularly or fairly kept as books of original entry of either a deceased merchant or trader keeping accounts for goods or wares, etc., sold or labor done as required by Kirby's Digest, § 3071. But appellants introduced competent testimony to repel charges against Swinton for the sums specified in the books. No foundation was laid nor competent testimony introduced that Cuffman had the reputation of keeping correct books. Kirby's Digest, § 3072. It was not shown that they were books of original entry kept in his handwriting, or that he had the reputation of keeping correct books, or that the entries therein were contemporaneous with the facts recorded. The books should have been excluded as no proper foundation was laid. 60 Ark. 333; 65 *Id.* 320; 17 Cyc. 368, note 74, citing 65 Ark. 316. Kirby's Digest, § § 3071-2.

The testimony shows conclusively that the books were not correctly kept. Cuffman said the balance owing was only $50 and he should have known appellee is bound by his statement, as it was one against his interest. 123 Ark. 266. He up to the time of his death claimed that appellants owed him more than $50 and appellee can not treat the compromise as null and void and sue for the full amount, but her remedy was to sue on the compromise for the balance unperformed. 85 Ark. 439; 89 *Id.* 390.

As the court did not require the proper foundation to be laid to introduce the books, under no circumstances should this court affirm the judgment without allowing appellants to show by competent evidence that the proper credits had been given and the books incorrectly kept. Haynie's testimony was competent. He was a plaintiff and so continued until the date of the decree. Cuffman chose him as a trustee in the deed of trust. He was not

interested in the outcome of the suit and was not an opposite party to appellee, claimed no interest in the lands in the amended complaint foreclosed and was not pursuing nor being pursued by appellee and was not antagonistic to appellee and claimed no adverse rights against the estate. He was either a plaintiff or not a party to the suit and could be called as a witness as to all conversations and transactions with Doctor Cuffman. Kirby's Digest, § 3093; 106 Ark. 504-5; 43 *Id.* 307; 197 S. W. 1170; 203 *Id.* 1009; 46 Ark. 309-10; 79 *Id.* 414.

There is absolutely no proof that Haynie was Cuffman's attorney in this matter. He was simply acting as trustee for Cuffman and not as attorney. 40 Cyc. 2365, 2375-6. See also 112 Ark. 277. Haynie's testimony was competent. *Supra.* The decree is against the clear preponderance of the competent evidence, and if appellants owed anything it was not exceeding $50 and interest.

John H. Crawford and *Dwight H. Crawford*, for appellee.

1. The demurrer was properly overruled. It challenged the complaint because it did not state facts sufficient to constitute a cause of action and (2) that plaintiff was not a proper party plaintiff and was without legal capacity to sue. A good cause of action was stated. Kirby's Digest, § 6093, subd. (5).

2. Plaintiff was a proper party plaintiff and had legal capacity to sue. The demurrer did not specifically raise the question and was waived by pleading over. 33 Ark. 497; 93 *Id.* 215; Kirby's Dig., § 6094; 122 Ark. 566; 95 *Id.* 33; 43 *Id.* 230; 48 *Id.* 454; 45 *Id.* 392; 44 *Id.* 202; 49 *Id.* 277.

3. The account book of J. H. Cuffman, deceased, was admissible in evidence. Kirby's Digest, § 3071; 10 R. C. L. 1174, § 373; 101 Cal. 326; 35 Pac. 871; 2 Mass. 217; 3 Am. Dec. 45. See also 10 R. C. L., § 371, p. 1171.

4. The burden of proof to show payments and application thereof to the mortgage debt was upon appellants and that burden was not discharged by them. The

chancellor so found and his findings on the whole case should be sustained.

WOOD, J. This action was brought by the appellee as administratrix of the estate of J. H. Cuffman against the appellants. The action was based on a promissory note in the sum of $952.85, which the appellants had executed to J. H. Cuffman and to secure the payment of the note they had also executed a deed of trust on 180 acres of land in Clark County. W. E. Haynie was named as trustee.

Appellee alleged that Cuffman died March 17, 1917, and that she was duly appointed administratrix of his estate; that appellants executed the note March 23, 1913, which was due January 1, 1914; that the sum of $950 had been paid on the note, leaving a balance due of $240.79, for which she prayed judgment. She asked that same be declared a lien on the lands described in the deed of trust and if the judgment be not paid that the land be sold to satisfy her claim.

The appellants demurred to the complaint in the court below, one of the grounds being that appellee "was not a proper party and was without legal capacity to sue." The demurrer was overruled.

The appellants answered, denying that they were indebted to the estate of Cuffman. They alleged that the estate was indebted to them and asked for judgment against the estate.

W. E. Haynie intervened and asked to be made a party and set up that he had acquired title to the lands described in the deed of trust and denied that appellee had a right to foreclose the same and asked that the suit be dismissed.

After hearing the testimony the court rendered a decree in favor of the appellee against the appellants for the sum of $298 with interest and declared the same a lien on certain of the lands described in the decree.

Appellants by this appeal seek to reverse the decree.

The appellants contend, first, that the court erred in overruling their demurrer for the reason that W. E. Hay-

nie, the trustee in the deed of trust given to secure the note upon which the suit was based, was not named as a party plaintiff. In other words, the appellants say that the trustee was the real party in interest and that he alone could maintain the suit.

Appellants did not raise this objection in the court below. Their specific objection was that appellee was not a proper party and was without legal capacity to sue. There is no doubt that the administratrix of the estate of a creditor who desired to foreclose a mortgage taken in his name is a proper, even if not a necessary, party to a suit. The administratrix is the legal representative of the estate for the purpose of collecting all debts due the estate and before there could be a foreclosure of the mortgage it would have to be ascertained that there was an indebtedness which the mortgage was given to secure against the debtor and in favor of the estate. As the mortgage was taken for the benefit of the estate the administratrix was at least a proper party to bring suit and to establish the claim in favor of the estate. But appellants now contend here for the first time that there was a defect of parties because the trustee in the mortgage was not also made a party plaintiff. That particular objection not being raised in the court below was waived by the appellants and can not be taken advantage of here for the first time.

In *Murphy* v. *Myer,* 95 Ark. 33, we said: "It is provided in 6093, Kirby's Digest, that a demurrer may be interposed upon the ground that there is a defect of parties. This must specifically be made a ground of demurrer." By section 6094, Kirby's Digest, it is provided, "that the demurrer shall distinctly specify the ground of objection to the complaint; unless it does so it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action." See also *Love* v. *Cahn,* 93 Ark. 215.

Moreover, although the trustee was not nominally a party plaintiff for the purpose of foreclosing the deed of trust, he was in fact a party to the suit by his interven-

tion. The court, therefore, had all of the parties in interest before it and could make all the necessary orders protecting their rights.

Haynie, the trustee, is not complaining and has not appealed.

It is also contended by the appellants that the books of account of J. H. Cuffman were erroneously admitted and considered in evidence for the reason that no sufficient foundation was laid for their introduction.

The view we entertain upon another branch of the case makes it unnecessary to dispose of this contention. For it may be conceded for the purposes of this decision that the books of Cuffman were properly introduced and that these books tended to prove an indebtedness of the appellants to the estate of J. H. Cuffman in the amount claimed. Nevertheless appellants contended and the undisputed evidence shows that the appellants had a settlement with J. H. Cuffman before his death. Haynie testified on this point as follows:

"I was trustee in mortgage appellants gave Cuffman on their land; Cuffman told me amount they owed on the note and mortgage; he said that Swinton owed him eleven hundred and twenty some odd dollars; Cuffman asked me if I would help Swinton get a loan on the land; I told him I thought he could get $1,000 loan on place; Cuffman then stated that he had sold Swinton a mule for $125, and he would take the mule back, and the $1,000 cash and that would pay the note and settle the matter. They were unable to get loan on account of being negroes. I tried to get Cuffman to take deed to place and get loan and pay himself; said he didn't want to be bothered with it, and asked me to take a deed to place and get loan on it. I took deed to lands, borrowed $1,000 on the place, which cost a commission of $50, and $950 was paid to Doctor Cuffman on the mortgage. Cuffman released lands in his mortgage called the home place. * * * The mule was returned and $950 paid to Cuffman, which Cuffman said paid all but $50. Cuffman didn't have me employed as his attorney to attend to this matter; paid me no money

for my services in this matter; I have no interest in this matter one way or another, and will be affected by no judgment that may be rendered in this matter."

The record shows that the appellee amended her complaint so as not to include the lands that were claimed by intervener Haynie and the decree did not embrace those lands. Haynie, as the pleadings and his testimony show, had no interest in the final termination of the cause and was at most a mere nominal party to the suit. He was, therefore, a competent witness to prove any conversations and transactions between Cuffman and the appellants. *St. Louis, S. F. R. R. Co.* v. *Fithian,* 106 Ark. 504; *Walden* v. *Blassingame,* 130 Ark. 448 (197 S. W. 1170); *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009.

Appellee introduced no testimony to show that Haynie was acting in the capacity of an attorney and that the conversations of Cuffman with him were privileged communications. The testimony of Haynie, on the contrary, shows that he was acting only in the capacity of a trustee. His testimony shows conclusively that appellants and Cuffman compromised any differences and settled whatever indebtedness was due from appellants to the appellee by agreeing to pay to Cuffman the sum of $1,000 and returning the mule. Appellants accepted the terms of the settlement, paid to Cuffman the sum of $950 and returned the mule. Under the terms of the settlement this left the sum of $50 due the estate of Cuffman, for which the appellee should have a decree.

The facts bring this cause within the doctrine announced by this court in *Whipple* v. *Baker,* 85 Ark. 439; *Ingham* v. *Neal,* 89 Ark. 385. For here the facts show that the minds of the parties had fully met and a new agreement had been made, which was accepted in satisfaction of whatever indebtedness there was due from the appellants to Cuffman. The facts thus clearly distinguish this case from the recent case of *Ledwidge* v. *Ark. Nat. Bank,* 135 Ark. 420.

The decree is, therefore, reversed and the cause will be remanded with directions to the chancery court to enter a decree in favor of the appellee against the appellants in the sum of $50, the balance shown to be due on their compromise settlement, and for further proceedings according to law and not inconsistent with this opinion.

THOMPSON v. GUTHRIE MILL & ELEVATOR COMPANY.

Opinion delivered June 9, 1919.

EVIDENCE—AFFIDAVIT TO ACCOUNT.—It was not error in an action on account begun before a justice of the peace to permit the plaintiff to introduce a sworn itemized statement of the account; the rule that an *ex parte* affidavit cannot be used as independent evidence not applying.

Appeal from Yell Circuit Court, Dardanelle District; *A. B. Priddy,* Judge; affirmed.

R. F. Sandlin, for appellant.

1. The affidavit of appellee's sworn account was not admissible. The affidavit was not taken and certified according to law, *that such account was just and correct.* Kirby's Digest, § 3151.

An affidavit is not allowable on trial of an issue unless opportunity has been given the adverse party to cross-examine affiant. None was given here. 42 Ark. 355. Appellant having filed his affidavit denying the account, and his affidavit was properly filed, as he was not required to plead upon an appeal until his case was called. (Sec. 4673, Kirby's Digest.) He filed his affidavit before the case was called. An answer may be filed in circuit court after default in justice's court. 35 Ark. 445.

2. The verdict does not respond to the instruction of the court, as there was no evidence to support the verdict, but is clearly against the evidence. 70 Ark. 386.

Ratteree & Cochran, for appellee.

1. The sworn affidavit filed was sufficient and duly filed in time before trial.

2. No proper objections were made to the filing of the statement of account.

3. The verdict was sustained by the evidence. All questions of fact are settled by the verdict. 109 Ark. 35. The facts were all submitted to the jury under proper instructions and this court will not disturb the verdict. 49 Ark. 122; 25 *Id.* 11; 40 *Id.* 168. See also 89 *Id.* 321; 93 *Id.* 548; 113 *Id.* 400.

WOOD, J. This action was begun by the appellee against the appellant in the justice court. The appellee filed before the justice court its account against appellant in the sum of $72. Judgment was rendered against the appellant in the justice court, and he appealed to the circuit court.

The bill of exceptions contains the following recitals: "The defendant files an affidavit just as the parties announced ready for trial and then objects to the plaintiff introducing a sworn itemized statement of the account; which objection was overruled by the court and defendant saved exceptions."

The cause was sent to the jury under proper instructions and from a judgment in favor of the appellee is this appeal. There was testimony to sustain the verdict.

The appellant contends that the court erred in allowing the appellee to introduce the sworn itemized statement of the account. His contention being that the record shows that this was introduced as an independent *ex parte* affidavit. But the record, as set out above, does not sustain the appellant's contention. The appellant says that the affidavit was not "duly taken and certified according to law that such account is just and correct." Section 3151, Kirby's Digest. But the appellant did not in the court below raise the objection that the account "was not duly certified" as required by the above statute. He only objected to the plaintiff "introducing a sworn itemized statement of the account."

Section 4565 provides that in ordinary actions before the justice of the peace "the plaintiff shall file with the justice the account or the written contract or a short written statement of the facts on which the action is founded." It will be observed that the statute does not even require that the account shall be sworn to. There was no error, therefore, in the court permitting the appellee to introduce the sworn itemized statement of its account. This was the foundation of appellee's action; and as the law did not require that it be sworn to, the fact that it was sworn to did not render the same invalid. It was appellee's pleading, and was competent to be introduced as such.

Appellant relies upon the doctrine announced by this court in *Smith* v. *Smeltz,* 42 Ark. 355, and *Western Union Tel. Co.* v. *Gilles,* 89 Ark. 483-7, where we held that an *ex parte* affidavit could not be used as independent evidence. See also *Johnson* v. *Johnson,* 122 Ark. 276.

But the doctrine of the above cases has no application to the facts as shown in the record under review here.

There is no error, and the judgment is, therefore, affirmed.

WASHINGTON FIRE INSURANCE COMPANY v. HOGAN.

Opinion delivered June 9, 1919.

1. COURTS—DECISION AS RULE OF PRACTICE.—A rule of practice rendered in 1884, which has never been overruled and has become an established rule of practice, will not be overruled.
2. SAME—APPEAL FROM COUNTY COURT—JURISDICTION.—Upon appeal from the county court, the circuit court acquires only such jurisdiction as the county court had, and may render such judgment only as that court could have rendered.
3. JUDGES—DISQUALIFICATION—WAIVER.—The objection that a judge was disqualified by reason of having appeared for plaintiffs in a previous suit against defendants upon the same cause of action which had been dismissed for want of prosecution will be deemed waived where the cause was allowed to proceed to judgment without calling the judge's attention to his disqualification.

Appeal from Sebastian Circuit Court, Greenwood District; *G. L. Grant,* Special Judge; reversed.

STATEMENT OF FACTS.

This is an appeal from a judgment of the circuit court quashing an execution on the ground that the judgment upon which it was issued was void. The material facts are as follows:

On the 5th day of November, 1912, the Washington Fire Insurance Company brought suit in the Sebastian Circuit Court for the Greenwood District against Daniel Hogan and John W. Jasper upon an open account. On the 6th day of January, 1915, this suit was dismissed by the court for want of prosecution. On the 23d day of December, 1915, the same insurance company through another firm of attorneys instituted a suit in the same circuit court against Daniel Hogan and John W. Jasper on the same account.

The case was tried before a jury which returned a verdict in favor of the plaintiff and judgment was rendered on the verdict. The presiding judge of the circuit court at which the trial was had and the judgment rendered, was a member of the firm of attorneys which had brought the first suit which had been dismissed for want of prosecution. The attention of the presiding judge was not called to the fact that he had been of counsel in the first case which had been dismissed for want of prosecution on the 6th day of January, 1915.

There is nothing in the record to show the disqualification of the presiding judge, or that the case was tried before him by consent. The record does show, however, that the plaintiff appeared by its attorneys and that the defendants were present in person and by attorneys and that both parties announced ready for trial. The case was tried before a jury of the regular panel.

Rowell & Alexander and *Warner, Harden & Warner,* for appellant.

1. Article 7, section 20, Constitution, has no application to the facts disclosed by the record here, and if it did the disqualification of the judge was actually waived. The cause of action in the principal case was not the cause of action that would disqualify the judge from presiding as it was an entirely separate and distinct proceeding from the one instituted in 1912 by the firm of Rowe, Little & Rowe.

At common law substantial or direct interest in the litigation was the only cause of disqualification of a judge. Relationship was not a disqualification. 80 Ark. 57. It was equally true that having been of counsel did not necessarily disqualify the judge. Coke, Litt. 294; 7 H. of L. Cases (Eng.), 429; 26 Tex. 586. In the absence of express constitutional or statutory inhibition the disqualification now sought would not exist, and since this qualification created by the Constitution and statute is in derogation of the common law it will be strictly construed. 82 Ark. 247. Moreover, every presumption will be indulged in favor of the validity of the judgment now attacked. 101 Ark. 395.

The instant case is not one where the presiding judge tried the same case instituted by him as a lawyer and before his election as judge. But the suit filed by Rowe, Little & Rowe on November 5, 1912, was dismissed on January 6, 1916, by Judge Little. Thereafter a new suit was instituted by other lawyers, and in that proceeding it is not contended that Judge Little was acting or had previously acted as counsel. His relationship as counsel in the suit actually tried was never created, and if any relationship as counsel and client existed it was in another proceeding separate and apart from the one in which judgment was rendered, and in which all his relations had been severed prior to the institution of the proceeding. He as judge had dismissed the suit filed by Rowe, Little & Rowe. This exact question is presented in 62 Ga. 36. See also 5 Pac. 516; 69 *Id.* 282; 136 *Id.* 804; 22 Md. 447; 9 Fed. 863. The case in 62 Ga. is identical in facts to this case and should be conclusive.

2. But if in error as to our contention, the ruling of the trial court that the judgment rendered by Judge Little was void was fatal and reversible error. It is shown and stated in the judgment that Judge Little's attention was not called to the fact that he had formerly been of counsel in the cause, nor did plaintiffs object to him trying the cause, but plaintiffs acquiesced in the trial and was a waiver of any disqualification. 12 Ark. 210; 43 *Id.* 33; 80 *Id.* 60; 15 R. C. L. § 28, p. 540; 69 N. E. 587; 40 S. E. 284; 12 Ia. 85.

The cases in 12 Ark. 210 and 43 *Id.* 33 settle the question in this State. See also 19 Ark. 96.

A judgment by a disqualified judge is not void, and if parties sit by and do not object nor even call attention to the disqualification they waive all objections. 91 N. Y. 292; 24 Am. & Eng. Enc. L. (1 ed.), 995, and note. While the question is settled in this State it has been before many courts and all have declared that a judgment so rendered is not void. 67 Ala. 271; 17 So. 112; 77 Ga. 46; 106 *Id.* 226; 57 Iowa 160; 8 Lea (Tenn.), 754; 9 *Id.* 500; 64 N. H. 423; 69 Pac. 282. See also 43 S. E. 438; 66 N. E. 501; 51 N. H. 608; 41 S. E. (S. C.), 978; 20 S. E. 798; 49 Ark. 439; *Ib.* 442; 23 *Id.* 235.

Petitioners did not introduce in evidence the answer filed by Hogan and Jasper in the suit in which judgment was entered nor have they offered any other evidence to show a meritorious defense to the cause upon which judgment was entered. See 135 Ark. 559.

R. W. McFarlane, for appellee.

The judgment was absolutely void and the disqualification can not be waived by the parties. 1 Hopkins, Ch. R. 2; 3 N. Y. 547; 62 Ga. 38; 77 Ind. 141; 58 Tex. 141; 23 Cyc., p. 600, and cases cited. See also 12 A. & E. Eng. L., p. 50; 43 Ark. 43; 23 Cyc. 600; 48 Ark. 156; 142 N. Y. 130. Every phase of this case is covered by 58 Tex. 141, which see also. Freeman on Judg., § 146; Black on Judg., § 174; 23 Tex. 104; 2 Chip. (Vt.), 99; 5 Vt. 124; 8 Johns. (N. Y.) 409; 10 A. & E. Ann. Cas. 970, and note; 23 Ala. 5.

HART, J., (after stating the facts). It is the contention of counsel for appellant that the court erred in holding that the judgment was void on account of the presiding judge being disqualified because he had acted as counsel for the appellant in the first suit against appellees which was dismissed for want of prosecution.

On the other hand, it is the contention of counsel for appellees that the judgment was absolutely void and that no valid execution could issue upon it. The decision of the question involves the construction of article 7, section 20 of the Constitution of 1874, and our decisions relative to it. The section is as follows:

"No judge or justice shall preside in the trial of any cause in the event of which he may be interested or where either of the parties shall be connected with him by consanguinity or affinity, within such a degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court."

It is claimed by counsel for appellees that according to the current of authority where the Constitution or statute expressly provides that a judge shall not preside or shall not sit in a case by reason of personal disqualification because of relationship, interest or having been of counsel in the cause, his disqualification is absolute, and that any judgment rendered by him is void and, therefore, his disqualification cannot be waived by the parties. We will not consider or review these authorities for the reason that as early as 1884 this court held that the objection that the judge was disqualified because of relationship was waived by the failure to call the judge's attention to the fact of disqualification and permitting the case to proceed to judgment. *Pettigrew* v. *Washington County,* 43 Ark. 33. This decision has never been overruled; but, on the contrary, has become an established rule of practice in this State since its rendition. It was so understood by this court in the later case of *Morrow* v. *Watts,* 80 Ark. 57. Doubtless many judgments have been rendered in reliance upon it and many rights have been settled under it. No useful purpose could be

served by overruling it; and it might cause much litigation and controversy, or at least might create needless alarm in the minds of lawyers and litigants who, during all these years, have conformed to the decision in the conduct of their affairs.

Again it is insisted by counsel for appellees that this case is not in point; but we do not agree with counsel in this contention. It is true as claimed by him that the circuit court quashed the judgment of the county court against the son of the county judge and affirmed it as to the other defendants. This court said this was not an error of which the appellants could take advantage because they were severally as well as jointly liable. If the judgment of the county court, however, had been void because one of the defendants was the son of the county judge, as is the claim of counsel, in such cases, the circuit court could have acquired no jurisdiction of the case on appeal. Upon appeal from the county court the circuit court acquires only such jurisdiction as the county court had, and may render such judgment only as the county court should have rendered. *Pride* v. *State,* 52 Ark. 502, and *Price* v. *Madison County Bank,* 90 Ark. 195.

This brings us to a consideration of the question of whether or not, under the facts as disclosed by the record, the personal disqualification of the judge was waived in the case at bar. We answer the question in the affirmative. The record shows that appellees were present in court in person as well as by attorney at the time the judgment in question was rendered. They knew that the presiding judge had been one of the attorneys for appellant when the first suit had been brought and dismissed. The record also shows that they announced ready for trial and allowed the case to proceed to judgment without objection. Having taken their chances of a favorable judgment at the hands of a judge, who they knew was personally disqualified, they cannot, after adverse decision, avail themselves of facts which they knew before the judgment was rendered to get rid of it. In other words, litigants cannot take their chances of a favorable

decision with a judge, who they know is disqualified to sit in the case, reserving the right to set the judgment aside, if it appears to their advantage to do so.

It follows from the views we have expressed that the court erred in holding the judgment void and in quashing the execution issued upon it.

For that error, the judgment must be reversed and the cause remanded with directions to the circuit court to overrule appellee's motion to quash the execution and for further proceedings according to law.

THOMPSON v. ROAD IMPROVEMENT DISTRICT NO. 1 OF BOONE COUNTY.

Opinion delivered June 9, 1919.

1. STATUTES—CONSTRUCTION.—Statutes relating to the same subject are to be treated as having formed in the minds of the members of the Legislature parts of a connected whole, although considered by that body at different dates, and under distinct aspects of the common subject, and are to be read and construed as one statute and as governed by one spirit and policy.
2. HIGHWAYS — LIMITATION ON TAXING POWER — COST OF CONSTRUCTION.—Acts 1919, No. 221, passed to cure defects in organization of a road improvement district organized under Acts 1915, p. 1400, in providing in section 3 that "the cost of construction of said road shall not exceed the sum of $3,000 per mile," and in prohibiting the district from charging against the lands in the district any amount in excess of $3,000 per mile for expense of construction, does not limit the liability of owners, but limits merely the cost of construction; section 28 of the above act limiting the indebtedness of the district, exclusive of interest, to 30 per cent. of total assessed value.

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

This court has repeatedly held that in the construction of a statute effect should be given, if possible, to every clause. 2 Ark. 250; 11 *Id.* 44; 15 *Id.* 555; 17 *Id.*

651; 22 *Id.* 369; 28 *Id.* 203; 67 *Id.* 566; 76 *Id.* 309; 89 *Id.* 378; 99 *Id.* 149; 71 *Id.* 561; 109 *Id.* 60.

The court below erred in disregarding the language of section 3 of the Alexander act. There are two limitations in the act. One upon the cost of the work and the other upon the power of taxation. It seems to us that the limitation upon the taxing power is absolute and unqualified. The property owners cannot be required to pay a sum in excess of $3,000 per mile, and taxes to that extent will only pay the principal of the bonds and nothing for interest. This case is controlled by 55 Ark. 148.

E. G. Mitchell, John I. Worthington and *Troy Pace,* for appellee.

While it is true effect should be given if possible to every clause of the act, yet it is a fundamental rule that the act should be considered as a whole and read in the light of its other provisions. 115 Ark. 194-205. It is necessary therefore to read the entire section of the special act and construe the provisions of section 3. The commissioners are vested with all the powers, duties and responsibilities of the Alexander Law, Act 338, Acts 1915, and they are especially authorized to borrow money and to issue negotiable bonds for the necessary amount to complete the highway as provided by the Alexander law. Section 8 authorizes them to borrow money at a rate of interest not to exceed 6 per cent., and by the second paragraph of section 28, in making provision the limit of cost that cannot be exceeded, it is specifically provided that in determining whether any contract or liability is within said limit interest on bonds shall not be considered as part of the debt.

Even if specific reference was not made in this way by the special act to the general law, it still would be the duty of the court in construing the language of the special act to take into consideration the provisions of the general law, as all acts *in pari materia* are to be taken together as if but one law, but the intention of the Legislature is made much more plain by the specific author-

ity to borrow money and issue bonds as provided by the general law.

In interpreting the legislative will, it is also a rule that in interpreting the legislative will, it is by explaining its intentions at the time the law is enacted by signs that are most natural and probable, such as the words, the context, the subject-matter, the effects and consequences of the spirit and reason of the law, and the intention is to be taken or presumed according to that which is consonant to reason and good judgment. 48 Ark. 305; 32 *Id.* 462.

It is evident then that the provision as to cost of construction is intended as a limit upon the amount of liability to be incurred by the taxpayers and that alone, as by the exercise of the court's own good judgment and common experience it is readily seen that a macadamized surface highway as provided for could not possibly be constructed for $3,000 per mile. That amount will not pay for a graveled-surface dirt road.

The court also has the right to take judicial knowledge of the orders of the State Highway Commission, which allotted an additional sum of $30,000, making a total of $47,500 for the construction of the road improvement. This is further evidence of the fact that it is not contemplated that the entire road is to be limited to $3,000 per mile but that that limit is only upon the amount that shall be produced from the taxpayers. This is also evident by the concluding language of that section of the act, there shall not be charged or collected any amount in excess of $3,000 per mile, including the $17,500 State and Federal aid, as if the cost of construction was to be limited to $3,000 per mile, there would be no sense in making the further limitation of the same exact amount to be collected from the taxpayers. All these facts taken together make it plainly evident that the Legislature recognized that the road could not be constructed for $3,000 per mile; that it also knew, because of the importance of the road, the Highway Department would make further allotments to the road from time to time, and thus

insure its construction, and it was intended to make further provision for building the road with additional funds and to limit the cost only as to the amount to be raised by taxation. While read in its strictest sense, the language seems to indicate that it was not intended to expend more than $3,000 per mile, still a consideration of all the facts justifies the conclusion that the Legislature had in mind only the protection of the taxpayers within a certain limit and that their intention to permit further funds secured in other ways is made clear by the concluding language of that section.

As to the "interest" on the bonds, it is necessary to make a careful distinction between the "cost of the improvement" and "cost of construction." It is true, in 55 Ark. 148, it was held that interest was a part of the debt or *cost of the improvement,* but nowhere has it ever been held that interest on bonds would be included in cost of construction. The entire proviso with reference to cost is directed to the cost of actual construction and not to cost of improvement. "Construction" is adjusting and joining the materials or parts so as to form a permanent whole, while the *cost of improvement* would include every item of expense, including interest, of building the road, but the *cost of construction* is not nearly so comprehensive and is limited to the actual cost of the work of construction. See case in 95 Ark. 575 (579). See also 102 *Id.* 306. The finding of the chancellor is clearly correct and should be affirmed.

HART, J. This is an appeal from a decree of the chancery court holding that Act No. 221, approved March 10, 1919, was a limitation upon the actual cost of the construction of the road provided for in the act and not a limitation upon the liability of the property owners. The road district in question was organized under the general laws providing for the creation and establishment of road improvement districts for the purpose of constructing and maintaining highways in the State of Arkansas. Acts of 1915, p. 1400. Act No. 221, approved

March 10, 1919, was a special act relating to the same road, the object of which was to cure certain defects in the road as established under the general act. Therefore it will be seen that the two acts relate to a common subject and have a common purpose. The latter act supplements the prior one and was passed for the purpose of making certain changes in the plans and materials to be used in the construction of the road. It is a cardinal rule of construction that statutes relating to the same subject are to be treated as having formed in the minds of the members of Legislature parts of a connected whole although considered by that body at different dates and under distinct aspects of the common subject. Such statutes are to be read and construed as one statute and as governed by one spirit and policy. *Board of Directors of St. Francis Levee District* v. *Williford,* 120 Ark. 415, and *Smith, Treasurer* v. *Farmers Bank of Newport, Ark.,* 125 Ark. 459. Therefore, it becomes necessary to read the entire section of the special act in connection with the provision of the general act relating to the same subject in order to properly understand and construe it.

Section 3 of the special act is as follows:

"That said commissioners are hereby vested with all the powers, duties and responsibility mentioned and entrusted to them in the aforesaid Act No. 338 of the General Assembly of 1915, and it is made the duty of the commissioners to make and complete the improved highways contemplated by the formation of said improvement district; and that to that end said commissioners shall have the authority to borrow money and to issue negotiable bonds of the district for the requisite sum in manner and form as provided by said Act No. 338 of the General Assembly of 1915; provided, that said commissioners are hereby authorized and empowered to so change the plans for said proposed improved highways, so as to reduce the estimated cost thereof, by eliminating the base course called for in the plans and specifications along all parts of said highway where, owing to the nature of the ground and soil such base course can be

omitted without detriment or serious damage to said road, and by reducing the width of the macadamized surface from twelve feet to nine feet, and such other changes as in the judgment of the commissioners, by and with the approval of the engineer for the district, and the State Highway Engineer will tend to lessen the cost of construction and not materially decrease the usable value thereof; and further provided, that the cost of the construction of said road shall not exceed the sum of $3,000 per mile, including the sum of $17,500 already contributed and promised by way of Federal and State aid to the construction thereof, and in no event shall there be charged against or collected upon the real estate included in said district, for the purpose of such road construction, any amount in excess of said sum of $3,000 per mile, including the said amount of $17,500 to be received as Federal and State aid, for the expense of such construction."

Section 28 of the general act provides that the board of commissioners shall be authorized to issue bonds for the purpose of securing money with which to carry out and perfect the work of the improvement. It also provides as follows:

"No board of commissioners shall have authority to make and enter into a contract or create a liability in the discharge of which sum of money shall be necessary that will, exclusive of interest, exceed thirty per cent. of the total assessed value of the real property located within the limits of the district. This limit of thirty per cent. is absolute and shall not be exceeded, regardless of the number of roads, the buildings, construction and maintenance and repair of same, or the length of the time required to perfect the work, but in determining whether any contract or liability is within the said limits interest on said indebtedness, or bonds herein authorized shall not be taken as a part of the debt."

It will be observed that that part of the general act quoted above provides that no board of commissioners shall have authority to enter into a contract or create a

liability in the discharge of which a sum of money shall be necessary that will, exclusive of interest, exceed thirty per cent. of the total assessed value of the lands within the district. By using the words, "exclusive of interest," it is apparent that the framers of the act meant to empower the commissioners to make a contract that the original cost of the construction of the improvement should not exceed thirty per cent. of the assessed value of the land in the district. The avowed purpose of the special act was to lessen the cost of the improvement by providing for certain specified changes in the plans and materials used in making the road and by reducing the width of the macadamized surface. It, also, authorized the commissioners to make such other changes as, in their judgment, by and with the approval of the engineers, would tend to lessen the cost of construction. It is manifest that the words "cost of construction" as here used mean the original cost of building the road according to the altered plans and specifications provided for in the section. Continuing, the section further provides that the cost of construction of said road shall not exceed the sum of $3,000 per mile, including the sum of $17,500 contributed and promised by way of Federal and State aid to the construction thereof, and that in no event shall there be charged aginst the lands in the district for purpose of such road construction any amount in excess of said sum of $3,000 per mile, including the amount received as Federal and State aid, for the expense of such construction.

As we have already seen, the object and purpose of this statute as expressed by its terms was to change the plans and specifications of the road so as to lessen the cost of making it. According to the ordinary and natural meaning of the word "construction," a road is constructed when that is done which is required to put it in proper condition according to the plans and specifications, including overhead expenses, under which it is built and it is made ready for traffic. We think that the words "cost of the construction of said road" mean the

performance of all that is required in the section in regard to the actual building of the road, including grading, macadamizing and everything else necessary to make it a road. The words have nothing to do with interest on deferred payments for the cost of construction. They mean the original cost of making the road under the plans and specifications provided in the section in which they are used. This view is strengthened when we consider that the corresponding section of the general act, under which the improvement district was originally organized provides for a contract for the construction of the improvement for a certain specified cost and expressly states that it is exclusive of interest. This is in the application of the well established rule of construction laid down above.

It follows from the views we have expressed that the decision of the chancellor was correct and the decree will be affirmed.

WOOD, J., disqualified and not participating.

MISSOURI PACIFIC RAILROAD COMPANY v. MARTINDALE.

Opinion delivered June 9, 1919.

1. CARRIERS—LIVESTOCK—BURDEN OF PROOF OF NEGLIGENCE.—A shipper suing a carrier for damage to livestock in shipment is required merely to establish by a preponderance of the evidence an injury to the cattle and the amount thereof, and need not prove that the damage was caused by negligent delay in transportation.
2. CARRIERS—LIVESTOCK—LIABILITY OF CARRIER.—A carrier of livestock is an insurer against loss of every kind, except that occasioned by act of God, of the public enemy, of the public authority, of the shipper, or from the inherent nature of the cattle.
3. APPEAL AND ERROR—HARMLESS ERROR.—In a shipper's action for damage to livestock from negligent delay in transportation, the carrier cannot complain, on appeal, of an instruction basing the shipper's right of recovery upon unreasonable delay by the carrier; such instruction being favorable to the carrier.

4. Appeal and error—review—theory of case.—In a shipper's action for damages for livestock from negligent delay in transportation, the carrier cannot, on appeal, complain that the shipper was allowed to recover on the theory that the carrier was an insurer where the carrier's contractual and common-law liability was pleaded, and the shipper made all proof necessary to sustain that theory and the carrier was not prevented from introducing evidence to exempt itself from liability as insurer.

5. Carriers — unreasonable delay — sufficiency of evidence.—Evidence *held* to show unreasonable delay in transportation of livestock.

6. Carriers—interstate shipment—time for claim and suit.—Cummins' amendment to Interstate Commerce Act (U. S. Comp. Stat., § 8604a) prevents carriers of interstate shipments from contracting with shippers for notice of claims of less than 90 days or for filing claims for a shorter period than four months or for the institution of suits for a shorter period than 2 years.

7. Carriers—interstate shipment—notice of claim.—The Cummins amendment (U. S. Comp. Stat., § 8604a), prohibiting carriers from contracting for a notice of claim in a shorter period than 90 days, is applicable to a notice regarding loss or injury, since the claim must be founded upon loss or injury.

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

E. B. Kinsworthy and *R. E. Wiley,* for appellant.

1. There was error in plaintiff's first instruction, and the error was not cured in any other. It fails to require the jury to find a causal connection between the unreasonable delay, if any, and the killing and injuries to the cattle, and not only is there no testimony from which the jury could infer such causal connection, but the affirmative testimony shows there was no such causal connection for it is undisputed in the evidence that there was no delay in transportation from Prescott to Hoxie and that the train was handled in ordinary and usual time as per schedule with no stops except to feed and rest, that there was no delay, reasonable or unreasonable, up to the time the train reached Hoxie. The evidence shows also that the principal part of the damage was done when the train reached Hoxie. The burden of proof was on plaintiff to show negligent delay. Where the ac-

tion is grounded on delay in transportation, plaintiff must prove delay in transportation and that it was negligent. 174 S. W. 1165; 112 Ark. 110-114; 103 *Id.* 522; *Ib.* 522.

It was error to strike out of appellant's second request the language as to the burden of proof as to the delay and negligence. Cases *supra.*

2. The testimony is not sufficient to sustain the verdict, no unreasonable delay is shown and the case was submitted solely on the ground of unreasonable delay, and that leaves the verdict without evidence to support it.

3. Defendant's request No. 6 should have been granted. It told the jury that the provision in the written contract which required plaintiff's written notice regarding loss or injury in time to enable defendant's agent to examine the stock before it was removed from the unloading pen or mingled with other stock was reasonable and binding, and as plaintiff did not give such notice the verdict should be for defendant as to all loss or damages on account of injuries and shrinkage in weight. This provision is reasonable and binding and failure to comply with it is a valid defense. 63 Ark. 332; 101 *Id.* 436; 127 Id. 261; 241 U. S. 190. The burden of proof is upon plaintiff to show that this provision was complied with. 63 Ark. 332; 82 *Id.* 353. There is no proof that such notice was given. The claim itself shows as also other evidence that the cattle were sold and delivered to the buyers on November 24, three days prior to the filing of the claim. If the provision is binding, and it is, it was error to refuse this instruction. Section 20 of the Interstate Commerce Act, 38 Stat. at Large 1196, 4 Fed. Stat. Anno. (2 ed.), p. 507, does not apply or refer to contracts for notice of loss or injury. There is a distinction between the "notice of claim" mentioned in the statute and the "notice regarding loss on injury" provided in the contract. 101 Ark. 436.

3. Request No. 7 for defendant should have been given, and it was error to refuse it, as written notice was required to be given within 91 days after loss or injury.

This requirement is strictly within the latest legislation. See section 20, quoted *ante* Cummins Act, 38 U. S. Stat. at Large, 1196.

W. P. Murrah and *McRae & Tompkins,* for appellee.

1. The jury by their verdict found that there was unreasonable delay and that the cattle arrived in damaged condition and that the railroad had not explained the delay and had not shown that it was not negligent. Instruction No. 1 given for plaintiff was really too favorable to appellant. There was no error in giving it nor in refusing to amend it. The dead cattle proved that there was a failure to deliver safely. 100 Ark. 269-279; 1 Hutchinson on Carriers, 265, etc. After damages to the goods has been established the burden is on the carrier to show it was caused by one of the perils which exempted the carrier. 194 U. S. 427.

The case in 174 S. W. 1165 was decided before the passage of the Cummins amendment, March 4, 1915, and the case is not in point, because it holds that a negligent delay must be proved by the shipper to recover for shrinkage and condition of the stock *after arrival.* In this case the damages claimed were those claimed in transit, see 112 Ark. 110, where there is not one word to the effect that plaintiff must show that the delay was negligent. See also as to the burden, 103 Ark. 522.

As to notice, none was required. See Cummins Amendment, Barnes, Fed. Code, § 7936, 39 Stat. 441, Act August 9, 1916.

There are no errors in the instructions, and the evidence sustains the verdict and the judgment should be affirmed.

HUMPHREYS, J. Appellee instituted suit against appellant in the Nevada Circuit Court to recover damages to a car load of cattle shipped by him from Prescott, Arkansas, to his consignee, Woodson-Fennewald Commission Company, at National Stock Yards, Illinois, to be sold on the market. It was alleged in the complaint that the shipment was made under a contract binding

appellant to safely carry and deliver the cattle to the consignee, but, upon reaching their destination, it was discovered that fifteen head were dead, three crippled, and a number bruised, to the damage of appellee in the sum of $880; that, by the negligent delay of appellant in transportation, appellee was damaged in the sum of $131 on account of extra feeding and shrinkage in weight of cattle; that appellee gave due notice of his claim for damages to appellant.

Appellant filed answer, denying all material allegations in the complaint, and invoked, by way of further defense, failure of appellee to notify it, in writing, of the loss or injury in time to examine the cattle before being removed from the unloading pens or permitted to mingle with other cattle, or to give notice of an intention to file a claim for loss or damage within ninety-one days, or to file a verified, itemized claim within 125 days, according to the requirement of section 7 of the contract of shipment.

The cause was submitted to a jury, upon the pleadings, evidence and instructions of the court, and a verdict returned and judgment rendered for $750, from which judgment an appeal has been duly prosecuted to this court.

The undisputed evidence disclosed that forty-nine head of cattle were shipped at 12:30 P. M., on November 20, 1917, over appellant's railroad, by appellee, from Prescott to his consignee at National Stock Yards, Illinois, under contract with appellant to safely carry and deliver them; that they reached their destination at 1:10 P. M., on November 23, 1917, too late for the market, and consequently held over until the 24th of November for sale; that on the 24th, the market was lower than on either the 22d or 23d; that when they arrived at National Stock Yards, fifteen of them were dead, three crippled, six bruised, and the others depreciated in value by reason of shrinkage, etc.; that the following claim for damages was presented to the company on the 27th day of November, 1917, and bears the rubber stamp of the Missouri

Pacific freight claim department of date November 28, 1917, towit:

"National Stock Yards, Ill., Nov. 27, 1917.

"Mo. Pac. R. R. Co., Dr.

"To Woodson-Fennewald L. S. Com. Co., a/c A. Martindale, Prescott, Ark., to loss and damage on a car of cattle sold November 24.

To 12 average cattle 7,560 lbs. at av. pr. $6.80		$514.08
Less amount of deads sold for		46.15
		$467.93
To 3 dead yearlings, 900 lbs. av. pr. 6c	$ 54.00	
Less amount deads brought	7.00	$ 47.00
To one crip. ylg. 300 lbs. at 6c	18.00	
To 2 crip. steers, 1,260 lbs. at $6.80	85.68	
	$103.68	
Less amount crips. brought	21.00	82.68
To $1.00 a cwt. depreciation on 14,000 lbs. cattle		140.00
Total		$737.61"

That the natural shrinkage of cattle in transit was 4 per cent. of their weight the first day, 3 per cent. the second day and 2 per cent. each day thereafter; that the cattle were in good condition when loaded at Prescott, and that appellee accompanied them as far as North Little Rock, where they were unloaded and fed, at which time he returned to his home; that the cattle were properly loaded at North Little Rock and again unloaded and reloaded at Hoxie in order to get up about ten head that were then down and being trampled on by the other cattle in the car; that three bulls were contained in the shipment and that it was customary to tie them, which custom was complied with at Prescott, North Little Rock and Hoxie; that afterwards it was discovered that the bulls were untied and remained untied until the car reached its destination. The evidence on the part of appellee tended to show that the average schedule time

for the transportation of cattle from Prescott to the stock yards in question was about forty-two hours, and that there was an unreasonable delay in the transportation of this particular car. The evidence on the part of appellant tended to show that there was no delay in the transportation of said shipment.

Over the objection and exception of appellant, the court instructed the jury, in substance, that if they found that the transportation of the cattle was unreasonably delayed and that the cattle arrived at their destination in a damaged condition, they should find for the appellee, unless they found that the delay was not due to appellant's negligence. Appellant insists that the instruction was erroneous and prejudicial for two reasons; first, because it did not instruct that, before a recovery could be had, the jury must find from a preponderance of the evidence that the delay caused the damage to the cattle; second, because it failed to tell the jury that before a recovery could be had it must appear from the weight of the evidence that the damage resulted from a negligent delay in transportation on the part of appellant. It is insisted by appellant that, under the law, appellee must have shown a negligent delay by the weight of the evidence and that the burden was upon him to do so; else, no recovery could be had. Appellant is in error in this contention. To recover damage to cattle in transit, it is the shipper's only burden to establish by a preponderance of the evidence an injury to the cattle and the amount thereof. *St. L., I. M. & S. R. Co.* v. *Pape,* 100 Ark. 269; *K. C. Sou. Ry. Co.* v. *Morrison,* 103 Ark. 522; *K. C. Sou. Ry. Co.* v. *Mabry,* 112 Ark. 110. Appellant has cited the case of *St. L. S. W. Ry. Co.* v. *Burnett,* not reported in the Arkansas Reports, but reported in 174 S. W. 1165, in support of its contention that a shipper must prove damage to the cattle shipped, resulting from negligent delay by the carrier, before a recovery can be had. The rule announced in that case had application to damage resulting after delivery, and not in transit, and is therefore not an authority in the case at bar.

But, aside from the question of whether the instruction in question was erroneous, appellant carrier was responsible under the undisputed facts in the case by virtue of its contract to safely carry and deliver, and by virtue of its responsibility fixed by law as an insurer of the cattle against all loss of every kind, except that occasioned by "the act of God, of the public enemy, of public authority, of the shipper, or from the inherent nature of the" cattle. *St. L., I. M. & S. R. Co.* v. *Pape,* 100 Ark. 269. We think the instruction in question requested by appellee, basing his right to recover on unreasonable delay in the transportation by appellant, was more favorable to appellant than the facts warranted, and therefore not prejudicial to its rights.

Appellant suggests that appellee is not entitled to have the judgment affirmed on the ground that appellant was an insurer of the safe carriage and delivery of the cattle under the contract and the law, because, had appellee asked for a verdict on that theory of the case, it might have introduced evidence to bring it within one of the exceptions under the contract or law. The contractual and common-law liability of appellant was pleaded, and appellant made all the proof necessary to sustain his case on that theory and appellant was not prevented from introducing evidence to exempt itself from liability. It can not now be heard to complain when the undisputed facts in the record fix its liability under the contract and law.

Again, appellant insists that the verdict is unsupported by testimony in that the record fails to show that there was an unreasonable delay in the transportation of the cattle. It is suggested that, on account of the condition of the cattle, it was necessary for them to be unloaded at Hoxie, and, for that reason, it can not be said that the time consumed in transporting the cattle was unreasonable. The fact that the cattle were unloaded at Hoxie is perhaps a circumstance tending to show the necessity of some delay, but it does not conclusively show that there was no unreasonable delay in the transporta-

tion of the cattle. There is evidence tending to show that the cattle should have been transported in about forty-two hours, and that the shipment was in transit about seventy-two hours. Both Al Weaver and A. M. Denman, men experienced in shipping cattle, testified that, under ordinary circumstances, the cattle should have been transported in about forty-two hours. We think the evidence was sufficient to warrant the jury in finding that the time consumed in the transportation of the cattle was unreasonable.

Again, it is contended by appellant that the provision in its contract requiring appellee to give written notice of the loss or injury in time to have examined the cattle, before they were removed from the unloading pens, was binding upon appellee as to damages for injuries and shrinkage in weight, and that his failure to give such notice must work a reversal of the judgment. Appellant has cited Arkansas cases upholding such provisions in contracts as reasonable and that shippers of stock must comply with them as a prerequisite to recovering damages for loss occasioned by injuries and shrinkage in weight of the cattle while in transit. These cases were predicated upon the law as it stood prior to the Cummins amendment of August 9, 1916, to the Interstate Commerce Act, which is as follows:

"That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Our interpretation of this amendment is that it prevents the carriers on interstate shipments from contracting with shippers for notice of claims on account of loss,

damage or injury to the subject-matter of the shipment in a shorter time than ninety days, or for filing claims in a shorter period than four months, or for the institution of suits on claims for a shorter period than two years. The language is plain and unambiguous. The object and purpose of the act was to protect shippers against the short time for giving notices of claims on account of loss, damage or injury to the subject of shipment imposed by carriers on them in bills of lading or contracts of shipment. Appellant, however, seeks to uphold the contract clause in the instant case because it applies to a notice regarding loss or injury and not to a notice of claim. In other words, it is asserted that the Cummins amendment only prevents carriers from contracting for a notice of the claim in a shorter period than ninety days, and does not affect their right to contract for a notice regarding loss or injury. The claim must necessarily be founded upon the loss or injury and the word "claim" used in the amendment is broad enough to cover loss or injury. Any other construction would deprive the shipper of the protection intended by the act. We can see no good reason for preventing a carrier from contracting for a notice of claim in a shorter period than ninety days and permitting it to contract for notice of loss or injury when the shipment reaches its destination. We do not think the statute intended such a distinction.

Lastly, appellant contends that the contract provides that notice of the claim shall be filed in ninety-one days, and the judgment should be reversed because appellee did not give this notice. The undisputed evidence shows that the notice was given and received by the Missouri Pacific freight claim department on November 28, 1917, within four days after the cattle reached their destination.

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

CUMNOCK v. ALEXANDER.

Opinion delivered June 9, 1919.

1. CONSTITUTIONAL LAW—BENEFITS FROM IMPROVEMENTS—LEGISLATIVE QUESTION.—The question as to what lands will be benefited by a particular improvement is a matter for the Legislature; the courts being bound by recitals in statutes as to such benefits, except for arbitrary or obvious and demonstrable mistakes.
2. HIGHWAYS—BENEFITS TO CITY—DISCRIMINATION.—Acts 1919, No. 436, creating Pulaski County Road Improvement District No. 10, in providing that Little Rock shall be taxed for building roads on the opposite side of the Arkansas River, is not an arbitrary discrimination against the city, which has connection with roads on the other side of the river by means of a free bridge.
3. HIGHWAYS—VALIDITY OF STATUTE—INVASION OF COUNTY COURT'S JURISDICTION.—Acts 1919, No. 436, creating Pulaski County Road Improvement District No. 10, dividing certain territory into subdistricts and imposing on each district the duty of improving certain roads located therein, is not an invasion of the jurisdiction of the county courts, in view of provisions in the act making the plans for the improvement subject to the order and judgment of the county court.
4. HIGHWAYS—ROAD DISTRICT—BENEFITS.—Acts 1919, No. 436, is not unconstitutional in providing that a road district be divided into six subdistricts and that the general expenses inuring to the benefit of all the subdistricts shall be borne by the several sections in proportion that the cost of the work in each section bears to the total cost in all sections.
5. HIGHWAYS—VALIDITY OF STATUTE—AUTHORITY TO CONSTRUCT NEW ROADS.—Acts 1919, No. 436, creating Pulaski County Road Improvement District No. 10, is not objectionable in allowing the commissioners to improve new roads, since they cannot be constructed without the approval of the county court.
6. HIGHWAYS—ROAD DISTRICT—IMPROVEMENT OF CITY STREETS.—Such act is not invalid in providing for improvement of city streets as well as rural roads.
7. HIGHWAYS—ROAD DISTRICT—VALIDITY OF STATUTE.—Nor is such act invalid because certain lands in an adjoining county, not taxed, will be benefited.
8. HIGHWAYS—DISTRICT—VALIDITY OF STATUTE.—Such act is not invalid as having conferred corporate entity and authority on the district in violation of Constitution, article 12, section 2.
9. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—PRESUMPTION.—All doubts as to the constitutionality of a statute will be resolved in favor of the statute.

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

STATEMENT OF FACTS.

This suit questions the constitutionality of Act No. 436, passed at the 1919 session of the General Assembly. The act is entitled, "An Act Creating the Pulaski County Road Improvement District No. 10." Section 4 of this act divides the territory embraced in the entire district into six sub-districts designated as sections. The act describes the territory embraced in each sub-district and imposes upon each particular section the duty of improving certain roads located therein. Two of these sections are north and east of the Arkansas river and each includes the city of North Little Rock; while four of the sections lie south and west of the river. The city of Little Rock, which is on the south and west side of the Arkansas River, is included in all six of the sections, and it is asserted that this constitutes an arbitrary discrimination against the city of Little Rock.

A second objection is that the act is an invasion of the jurisdiction of the county court over the roads of the county, and a third objection is that certain costs and expenses are made a common charge against all the districts, whereas no authority exists under the law for imposing a tax against any particular tract of land except upon the theory that that land is to derive a benefit equal to or greater than the tax to be levied from the improvement proposed. A fourth objection is that the roads to be improved are not definitely determined by the act and that the commissioners may and probably will establish new roads. A fifth objection is that the act undertakes to improve certain streets in the city of Little Rock in connection with the roads leading into the outlying territory. A sixth objection is that sub-district No. 4 provides for the improvement of a road running near the Lonoke County line which will be beneficial to the lands of that county, but that no provision is made for requiring the lands thus benefited to bear their proportionate part of the cost of the improvement.

Amici Curiae assert the act is void as having conferred corporate entity and authority on the district in violation of section 2 of article 12 of the Constitution; and that the act is void in that provision is made for the appointment of a receiver to collect the taxes of any particular section if default shall be made in the payment of any bond or the interest thereon. And they further say that the act must fall because it contains certain exemptions from liability in favor of the commissioners against their negligence. And, finally, they assert that the act is void in that it contains a legislative finding that certain lands will be benefited by the proposed roads, whereas this is a judicial, and not a legislative, question.

These objections will be discussed in the order stated.

Frauenthal & Johnson, for appellant.

The act is unconstitutional and void because

1. It provides for one set of commissioners for six separate improvements.

2. It includes about two-thirds of Pulaski County in a road improvement district and divests the county court of its constitutional jurisdiction.

3. It calls for improving part of the streets of Little Rock, together with roads leading into both the city of Little Rock and North Little Rock so as to combine a road leading into the country surrounding these cities without giving the property owners of the city a voice in the improvement.

4. The roads leading into North Little Rock have included within the taxable area the city of North Little Rock as well as the city of Little Rock, while those leading into Little Rock include only the city of Little Rock and omit North Little Rock from its taxable area, thus making an arbitrary discrimination and distinction between the cities.

5. Section 1 of the act gives commissioners the right to build a loop without designating the route of the road which renders it void for uncertainty.

6. Section 2 includes Pulaski property for the purpose of paying for the improvement and does not include Lonoke County property when the road runs very near the Lonoke County line.

7. Section 2 begins at the southeast corner of section 31, township 2 north, range 11 west, which is outside the city limits of North Little Rock. See 116 Ark. 178; 118 *Id.* 119.

Grover T. Owens and *J. W. House, Jr.,* for appellees.

The act is not unconstitutional for any of the reasons stated by appellant. See 96 Ark. 418-419; 96 *Id.* 410-417, 120; *Id.* 282; 125 *Id.* 325; 133 *Id.* 380-390; 126 *Id.* 318-322; 125 *Id.* 325; 125 *Id.* 325-330; 130 *Id.* 507-517.

Allyn Smith, amicus curiae.

The act is unconstitutional for the reasons stated by attorneys for appellant and many others. 59 Ark. 513; art. 12, § 2, Constitution. See also 11 Kan. 23; 74 Wis. 620; 8 Kan. 321; 134 U. S. 557; 6 Howard, 550; 12 *Id.* 537; 24 *Id.* 553; *Ib.* 663; 7 Mass. 161; 179 S. W. 486; 2 Minn. 330; 6 Peters (U. S.), 709.

F. A. Henry and *J. H. Carmichael, amici curiae.*

The act is unconstitutional for the reasons stated, *supra,* and others. It infringes upon the jurisdiction of the county courts, is arbitrary and discriminatory. 89 Ark. 513. The description of the road is vague, indefinite and uncertain. 66 Ark. 292.

SMITH, J., (after stating the facts). It is always a question of fact, and, in a large measure, a matter of opinion, as to what lands will be benefited by a particular improvement. Reasonable minds may, and do, differ on this question, and that difference continues to exist when the question of the amount of benefits is reached. Some one must be authorized to decide these questions, for it is inconceivable that there should ever be, or could ever be, unanimity of opinion upon a subject affording so wide a scope for difference of opinion. The Legislature has control of this subject, and it may appoint such agencies

to make these findings as it sees proper to create, or it may make the findings on its own account, and when these findings have been made and have been properly declared in the recitals contained in legislative enactments the courts are bound thereby except for arbitrary or obvious and demonstrable mistakes. A number of cases have thus announced the law and what we have just said disposes of the last recited objection of the *amici curiae,* that the question of benefits is a judicial, and not a legislative question. Indeed, it is conceded that this court has frequently so decided, and we decline to overturn this line of cases.

Applying this test, we are unable to say that an obvious and arbitrary discrimination against Little Rock has been made. We can not say, in the face of the affirmative finding by the Legislature, that Little Rock will derive benefits from the construction of roads which are on the opposite side of the river, that no such benefits will be derived, for the city of Little Rock has direct connection with these roads over the free bridge across the river. It may be true that Little Rock will not derive as much benefit from the roads on the opposite side of the river as from those on its own side; but that is a question of fact about which we are not called upon to express an opinion. This question of benefits is one to be considered by the assessors, when the betterments are assessed, and does not arise on this appeal.

The contention that the act is an invasion of the jurisdiction of the county court is one which received deliberate consideration by the court in the recent case of *Sallee* v. *Dalton,* 138 Ark. 549, where a somewhat similar statute was under construction; and while the judges have differed, and do differ, upon this question, the majority are of the opinion that the act is not open to that objection.

Sections 6 and 7 of the act make the plans for the improvement subject to the order and judgment of the county court, and if that court should disapprove the plans of any or all of these sections that district or those

districts whose plans were disapproved could not be constructed. These sections are in fact separate districts, and it is made the duty of the county court to pass upon the plans of each of them. By section 5 it is provided that "if, for any reason, the improvement of one or more of the sections of said road as hereinbefore defined and numbered can not be carried out, it shall be the duty of the commissioners to improve the remaining sections in the manner herein set forth."

Indeed, the third objection to the act contained in the statement of facts is that separate districts are required to prorate certain expenses. The portion of the act upon which this objection is based reads as follows:

"The general expenses of the district inuring to the benefit of all sections shall be borne by the several sections in the proportion that the cost of the construction work in each section shall bear to the total cost of the construction work in all sections, and contributions from county, State and Federal aid shall be divided among the several sections according to its proportion insofar as this may not be altered by the law under which the contributions are made."

We think, however, that no legislative purpose is manifested to have one section bear any portion of the cost of any other section, for the expenses to be borne and prorated by all the sections are only "the general expenses of the district inuring to the benefit of all sections." These sections constitute separate improvements, yet they are so closely related that certain expenses will be common to them all and to effect a saving to each section it is provided that this common expense shall be apportioned according to the cost of the construction work. We see no constitutional objection to this arrangement.

The objection that some new road may be improved is not well taken because this can not be done without the approval of the county court. In those cases in which this court has held that new roads could not be constructed we have done so because the burden of main-

taining these roads after their completion could not be imposed upon the county over the objection of the county court. But if the county is willing to assume this burden and the court having jurisdiction over the subject-matter approves plans for the construction of some new road which will eventually become a part of the county's highways, we see no constitutional objection to changing the route of an old road or of opening up and improving a new one.

The objection that both streets of a city as well as rural roads may be improved is not a valid one, and is met by the opinions in the cases of *Nall* v. *Kelley,* 120 Ark. 282, and *Tarvin v. Road Imp. Dist.,* 137 Ark. 354, 209 S. W. 81, and *Bennett* v. *Johnson,* 130 Ark. 507.

The act can not be held invalid because certain Lonoke County lands which are not taxed may be benefited. Improved roads must have termini, and the districts which are to bear the cost of their construction must have boundaries, and we can not say that the Legislature has acted arbitrarily in failing to extend the boundaries of this district into a county into which the improved road does not penetrate.

The objection that the act offends against section 2 of article 12 of the Constitution must be considered as having been settled against the contention of the *amicus curiae* who makes that objection by the opinion of this court in the case of *Carson* v. *St. Francis Levee District,* 59 Ark. 513. Counsel ask us to reopen the question there decided; but inasmuch as that case was vigorously contested and was presented with great zeal and ability, and has since been regarded as one of the landmarks in our jurisprudence, and has been looked to as authority for the creation of numerous levee, drainage and road districts, we decline to reconsider the question here sought to be raised.

We need not consider here the validity of those sections of the act which provide for the appointment of a receiver and grant immunity to the commissioners except for wilful misconduct, for if those sections were stricken

from the act a valid working statute would remain, and by section 29 of the act it is provided that "if any provision of this act is held to be invalid it shall not affect the remainder of the act." * * * *Snetzer* v. *Gregg,* 129 Ark. 542; *Sallee* v. *Dalton,* 138 Ark. 549.

We are required to resolve all doubts in favor of the constitutionality of legislative enactments, and when we have done so we are constrained to hold that the act is not unconstitutional in any of the particulars mentioned, and the decree of the court below to that effect is, therefore, affirmed.

HART, J., (dissenting). I express my dissent in this case with very great respect for my brother judges and with a full realization and appreciation of the advantages of good roads to the citizens of the State; but as I have stated before, I consider the first duty of the court to preserve inviolate the provisions of our Constitution. In my judgment, the opinion of the majority emphasizes the necessity of the grounds of dissent of Mr. Justice WOOD and myself in the case of *Sallee* v. *Dalton,* 138 Ark. 549, to which reference is made. In my opinion there are two insurmountable reasons why the act in question should be held unconstitutional. In the first place, article 7, section 28, of the Constitution provides that the county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, etc. In the second place, it has been uniformly held that improvement districts are sustainable only upon the theory that the local assessments levied to pay for such improvements are imposed upon property specially and peculiarly benefited by the improvement to an amount equal to the assessment.

In the application of these principles to public roads, in *Road Improvement District No.* 1 v. *Glover,* 89 Ark. 513, it was held that local improvement districts may be formed to improve public roads on the ground that such improvements may be local in character and confer special benefits on the lands within the limits of the districts independent of and unconnected with the public benefits.

Since that decision many cases relative to road improvement districts in the respect above stated have come before this court for determination, and it seems to the writer that the court has, by insensible degrees and without perceiving the progression (or at least without recognizing it), been carried step by step from the principles of law announced in the Glover case until there has been a radical departure from the limitations placed upon the formation of such districts in both the above named respects, noticeably so in the recent decisions of *Sallee* v. *Dalton,* 138 Ark. 549, the instant case, and *Reitzammer* v. *Desha Road Improvement District No.* 2, 139 Ark. 168.

In order to properly show my grounds for dissent, it becomes necessary to consider certain sections of the act which the majority opinion has omitted.

Section 3 provides that the board of commissioners to construct the improvement shall consist of five named commissioners. It provides for their term of office and that at the expiration thereof the county judge shall appoint their successors for the term of five years. The same section further provides that in case of vacancy on the board, the county judge shall appoint a successor for the unexpired term.

It may be here stated that in the case of *Reitzammer* v. *Desha Road Improvement District No.* 2, *supra,* the act gave the commissioners the power to name their successors. This act was sustained. So it may be taken as a holding that the commissioners have the power to perpetuate themselves, and have charge of the roads after the road is constructed. In my opinion this is contrary to both the letter and spirit of our former decisions. Article 19, section 27, provides for the formation of local improvement districts in cities and towns upon the consent of the majority in value of the property owners owning property adjoining the locality to be affected.

In *Pulaski Gas Light Co.* v. *Remmel,* 98 Ark. 317, it was held that where an improvement district in a city was organized for the purpose of improving a street, the board of commissioners acquired no control of the street

except for the purpose of making the improvement, and when that object was accomplished, the street became subject to the exclusive control of the city.

In *Shibley* v. *Fort Smith & Van Buren District,* 96 Ark. 410, the court said:

"We perceive no sound reason why the Legislature may not, without trenching upon the jurisdiction of the county court, authorize the construction of new roads and bridges as local improvements. It does not impose upon the general public the burden of maintaining the improvement, nor does it fasten upon the county court the duty of supervising and maintaining the new road or bridges as a part of the internal affairs of the county. The statute now under consideration, by its express terms, is rescued from such an objection, for it provides that the county courts of said counties may take over and acquire the bridge after it had been constructed, and maintain it as a public highway, but that, in the event the county courts do not decide to take it over, then it shall be maintained by levying annual assessments on the property benefited. It is left optional with the county courts of the two counties whether or not the control of the bridge shall be taken over, and this provision leaves unimpaired the jurisdiction of the county court over the bridge when it sees fit to exercise that jurisdiction."

There is an apparent conflict in these two cases. As we have already seen, the Constitution provides for the organization of improvement districts in cities and towns and that improvement of streets fall within the grant of the Constitution. The court held, however, that after the improvement was constructed, under the statute, the control of the street went back to the city.

In the bridge case, the court held that the county court "may" take over and acquire the bridge after it has been constructed. Now I think in order to harmonize this with the case of *Pulaski Gas Light Co.* v. *Remmel, supra,* which was a later decision, that the words, "the county courts of said counties may take over and acquire the bridge after it has been constructed," mean must

take over, etc., in order to comply with the constitutional provision that the county courts shall have original jurisdiction over all matters relating to roads, bridges, etc. This is in application of the canon of construction that provisions of the Constitution should be construed as mandatory. At least they should be so considered if statutes relating to a similar subject are so considered. In any event, the decision should be so construed as to allow the county court to take over the roads after they are constructed. Now let us consider the powers of the county court as prescribed by the act. The act is very long, and it is impracticable to set it all out, or even the whole of the sections, which I think sustain my dissent. I think the substance of the sections, which I shall state (and which I think are the ones which have a direct bearing on the subject under consideration) will show clearly the error of the majority, or at least will show more clearly than does the opinion of the majority, the grounds of my dissent, *i. e.*, that the freedom of judgment of the county court is for all practical purposes taken away by the act.

The act names the commissioners and states their tenure of office. It provides that they shall continue in office until the roads are built and paid for. A subsequent section provides for the issue of long time bonds for the payment of the cost of construction. This negatives the idea that the roads are to be turned over to the county court after they are constructed.

It also provides that the commissioners shall receive $5 a day for each day they shall be actually engaged in the work of the district. The Desha County district has been upheld and the act creating it gives the board the power to appoint their own successors. All this manifests an intention upon the part of the legislators to place not only the construction, but the maintenance and repair of the roads in the hands of the commissioners.

Section 21 provides that as soon as the improvement has been finished, and annually thereafter until all indebtedness of the district has been paid, the commission-

ers shall make and file with the county court a statement of all moneys disbursed and containing a general report of the affairs of the district.

Section 123 of the act provides that the district is authorized to receive any part of the funds that may now or hereafter be set aside by the United States for the improvement of public roads, and any that may hereafter be set aside by the State for aid in the improvement of public roads.

Section 24 provides that no one of the commissioners shall be liable for mistake of judgment, or negligence, but only for wilful misconduct.

Section 5 provides that it shall be the duty of the commissioners to construct, repair, and improve the roads by grading, draining and surfacing them in such manner and with such materials as the commissioners deem best for the interest of the district with full power to construct bridges, culverts and all necessary appurtenances of said roads.

Section 4 of the act provides that the territory shall be divided into six sections, each of which is held in the majority opinion to be a separate and independent district but all of which have the same commissioners.

It is evident that the effect and purpose of this statute is to take all, or at least the principal roads leading into Little Rock out of the control of the county court and to place them in the hands of the commissioners named by the Legislature. But it is judicially declared in the majority opinion that this is all done subject to the approval of the county court and that, therefore, the provision of the Constitution which provides that the county courts shall have exclusive original jurisdiction in all matters relating to roads is preserved inviolate. Suppose the county court does not approve the action of the commissioners as outlined above, will it be said in future judicial decisions that he must not act arbitrarily in the matter, or will his refusal be treated as a final settlement of the matter. Suppose he does not exercise any judgment in the matter but blindly approves whatever plans

and specifications the commissioners may adopt and the road is constructed and bonds are issued for the payment thereof during his term of office. (It is a matter of common knowledge that road building in this State is in its infancy.) Suppose that on this account, or because of the ignorance or fault of the commissioners or the engineers selected by them, roads are constructed under the act which shall be found to be unsuitable or inadequate for the needs of the capital city of our great State, the roads as constructed must be paid for unless the obligation of a contract is impaired, and this is contrary both to the Constitution of the State and of the United States. Suppose the revenues for the public roads provided for by the Constitution should be augmented by some unforeseen circumstances, would the succeeding county judge be bound to continue the roads as laid out by the commissioners and bow to their will in the maintenance and repair of the same? If he must do so, where is his exclusive original jurisdiction given by the Constitution? If he could change the character of roads as, for instance, from a concrete surface to an asphalt one and could change the width of the roads, what goes with the provisions of the act which provides for the perpetual succession of the commissioners and for their payment for each day while they are engaged in the work of the district; and for their maintenance and repair of the roads? A careful reading of the act will show that the only duty the county court has to perform is to approve the action of the commissioners; and yet it is said that this does not destroy the freedom of judgment of the county court guaranteed by the Constitution. It is no answer to this to say that the best business men in the country have been selected as commissioners. What guarantee have the people that this will always be the case? The people have the right to the constitutional guarantee that the county court shall have exclusive original jurisdiction over all matters relating to roads.

Again section 28 provides that the commissioners of said district are authorized to widen any street which is

to be improved under this act, where they deem necessary to a width not exceeding eighty feet, and in case they deem any road to be improved under the provisions of this act should be widened, they shall make application to the county court for an order for the widening of the road. When the commissioners have passed the resolution widening any street, or when the county court shall have made an order widening any road, the commissioners shall call upon the assessors to assess the damages to the property taken or damaged.

It further provides that if the assessors make no assessment of damages, it shall be deemed a finding by them that no damage will accrue. It seems to me that this is clearly unconstitutional. Article 2, section 22, provides that 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 Legislature has no power to divest the citizen of his right to property without first providing some legal mode for ascertaining its value. *Cairo & Fulton R. R. Co.* v. *Turner*, 31 Ark. 494. Chancellor Kent said that this principle in American constitutional jurisprudence is founded on natural equity and is laid down by jurists as an acknowledged principle of universal law. 2 Kent. Com. (8 ed.), p. 399.

The framers of our Constitution in recognition of this great principle of natural justice, which should endure as long as the Constitution should stand, said: "The right of property is before and higher than any constitutional sanction." This sacred right of property can not be taken away by a legislative declaration that if the assessors of the district make no assessment of damages, it shall be deemed a finding by them that no damage will result. Under this section the assessors through neglect, ignorance or any other cause might fail or refuse to act, and their non-action would result in the taking of private property without compensation therefor. This would be a palpable violation of the provision of the Con-

stitution last quoted. A tribunal must be furnished and the property owner given an opportunity to be heard before his property can be taken for public use. This can not be done by mere nonaction on the part of those whose duty it is to act. *Cribbs* v. *Benedict,* 64 Ark. 555. The power of eminent domain is distinguished from the power of taxation. In 15 Cyc. 559, it is said:

"The power of taxation and eminent domain have always been clearly distinguished. Sales for taxes and taking private property for public use are both referable to the sovereign power, but one is for the recovery of a debt due the government, the consideration for which is the protection of person and property, and for the enforcement of a duty by the taxpayer, the performance of which is essential to the maintenance of government; while the other is the appropriation of private property for the public use, full compensation therefor being first made. The exercise of the right of eminent domain operates upon individuals and without regard to the amount or value exacted from any other individual or class of individuals and the taking of private property for public use must always be done under judicial or quasi-judicial proceedings, while sales for taxes may be made by the summary action of the collector." See also 10 R. C. L., par. 5, p. 8.

Section 10 provides that if the commissioners shall find any land in Pulaski County beyond the limits of the district will be benefited by the improvement of any section of the roads they shall notify ten assessors to assess the benefits against such lands. This is obviously unfair, and in my judgment extends the boundaries originally planned and makes a new district. It could not be told in advance how many additional tracts of land, the commissioners might find to be benefited, which were situated outside of the original district. These additional tracts, of course, were not considered in assessing the benefits in the district as originally established. I do not think there can be any legal and proper assessment of benefits in an improvement district until its boundaries are defi-

nitely established so that the assessors can intelligently act, and the property owners be advised. They can not do so if they have in mind that other lands might eventually be placed within the limits of the district.

It is true, as stated in the majority opinion, that the act provides that if any provision of the act is held to be invalid, it shall not affect the remainder of the act, and that under it if section 18 providing for the appointment of a receiver is invalid, this would not under the rest of the act be inoperative. I agree to this view, and at the same time express the opinion that section 18 is unconstitutional because our Constitution provides officers and methods for collecting taxes and because this jurisdiction did not belong to chancery courts as they existed when our Constitution was adopted.

It is worth nothing that the concluding part of the section provides that when the receiver is discharged, the affairs of the district shall again be conducted by the commissioners. This strengthens the view that I have expressed that the evident purpose of the act is to put the several roads designated therein into separate and distinct road improvement districts and place them under the management of one set of commissioners; and also to oust the county court of its jurisdiction, or at least its freedom of judgment in the exercise of its jurisdiction, which would practically amount to the same thing.

REITZAMMER v. DESHA ROAD IMPROVEMENT DISTRICT NO. 2.

Opinion delivered June 9, 1919.

1. STATUTES — AMENDMENT — CHANGING ORIGINAL PURPOSE.—Const. 1874, art. 5, § 20, prohibiting the amendment of a bill so as to change its original purpose, does not prohibit the House from amending a Senate bill by striking out of bill all after the enacting clause and substituting a new bill in lieu thereof if the amendment does not change the original purpose.
2. HIGHWAYS—EMBRACING LAND IN SEVERAL DISTRICTS.—There is no constitutional objection to embracing lands in more than one road district if they will be benefited by the roads constructed in each of the districts.

3. SAME—VALIDITY OF STATUTE—APPOINTMENT OF COMMISSIONERS.—Acts 1919, No. 202, creating Desha Road Improvement District No. 2, is not invalid because of the right given to the commissioners to select their successors.

4. SAME—VALIDITY OF STATUTE—COUNTY JUDGE AS COMMISSIONER.—Said act is not void by reason of making the county judge *ex-officio* a member of the board of commissioners, such fact not interfering with his freedom of action in approving or disapproving the plans.

5. SAME—VALIDITY OF STATUTE—DISSOLUTION OF EXISTING DISTRICT.—Acts 1919, No. 202, creating a road improvement district, is not invalid because providing in section 9 for the taking over of a district already created under the Alexander Road Law, unless the validity of some contract is impaired.

6. STATUTES—ENACTMENT—READING OF BILL.—An act passed without complying with the constitutional requirement that bills be read on three different days in each house was not invalid where the rules were suspended by a two-thirds vote to permit the bill to be passed without compliance therewith.

Appeal from Desha Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal questions the constitutionality of Act No. 202, passed by the 1919 session of the General Assembly, which is entitled "An Act Creating Desha Road Improvement District No. 2." The act is very similar to and in many respects is identical with the act attacked in the case of *Cumnock* v. *Alexander,* the opinion in which case is rendered simultaneously with this opinion. Indeed, *amici curiae* have filed briefs in both cases treating them as one, and we have considered these cases together as involving in many respects identical questions, so that in this opinion we will discuss only those questions not disposed of by the opinion in the *Cumnock* v. *Alexander* case.

It is first insisted that this act was passed in violation of section 21 of article 5 of the Constitution, which provides that "no law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose." The basis of this objection is that the act was introduced

in the Senate as Senate Bill No. 463, and that when the bill reached the House an amendment was adopted which struck out all of the bill after the enacting clause and substituted in lieu thereof the bill which was finally passed. Other facts in connection with this objection will be stated in the opinion.

A second objection is that the act provides for the creation of six separate districts which are designated as sections and that certain lands are included in more than one of these sections and will, therefore, be subject to taxation in each of them.

A third objection is that the board of commissioners is self-perpetuating, as they may elect their own successors, and that this constitutes an infringement of the county court's jurisdiction in that the right to fill these vacancies should be conferred upon, or, rather, should not be taken away from, the county court.

A fourth objection is that the county judge is made *ex-officio* a member of the board of commissioners when, as county judge, he will be called upon to approve matters previously considered by him as a commissioner.

A fifth objection is that no right of appeal is provided against excessive or improper assessments.

A sixth objection is that the act provides for taking over a road improvement district already created under the Alexander Road Law known as Desha Road Improvement District No. 1.

Amicus curiae makes the point that the requirements of the Constitution were not observed in the passage of the act, in that the bill was introduced in the Senate on February 24 and read the first time and the rules suspended and the bill read a second time, and the bill made a special order for February 25, on which day it was read a third time and passed, and on the same day it was transmitted to the House. That on February 25 the bill was read the first time in the House, and the rules suspended and the bill read a second time, and on the next day, February 26, it was read a third time and passed, the objection being that the bill was read in both houses on the same day.

Norman Moore and *A. A. Poff,* for appellant.

The bill is unconstitutional, because

1. It was not properly passed by the Legislature, as it violated article 5, section 21, of the Constitution.

2. The land included comprised two-thirds of the county for the expenses.

3. The act provides for the various sections of the road to be prorated.

4. The roads do not connect and do not form a single improvement.

5. There is no certainty in the boundaries of the district, and because of this uncertainty there could be no certainty as to the property benefited.

6. The county judge is named as one of the commissioners.

7. There is no certainty of making the assessment so as to apply the cost of each section to that section alone.

8. There is no court designated to which an appeal must be taken.

9. The act undertakes to create several districts under one board of commissioners.

10. The roads are not now public roads.

11. The act provides for taking over a road which has already been formed into Road District No. 1 of Desha County.

See article 5, Constitution 1874; 118 Ark. 294; 122 *Id.* 491; 120 *Id.* 230; 118 *Id.* 119; 89 *Id.* 513.

E. E. Hopson and *J. W. House, Jr.,* for appellees.

None of the objections as to the constitutionality of the act or its passage are tenable. *Sallee* v. *Dalton,* decided May 5, 1919; 96 Ark. 410; 104 *Id.* 425; 96 *Id.* 418; 120 *Id.* 277; 132 *Id.* 539. If section 9 of the act is unconstitutional it would not affect the other provisions. The lower court was correct and the decree should be affirmed.

J. O. A. Bush and *T. D. Crawford, amici curiae.*

These are fictitious suits and not *bona fide* adversary proceedings, and the questions raised have been passed

upon by many courts and this act is a legislative violation of the constitutional jurisdiction of the county courts. Art. 7, § 28. See also 53 N. E. 1102; 21 U. S. (L. ed.) 141; 131 U. S. Appendix C III; 79 S. E. 676; 118 Ark. 300; 95 *Id.* 618; 80 *Id.* 145; 109 *Id.* 250; 19 Wall. 655; 115 U. S. 550; 186 Fed. 451; 130 Ark. 70; 13 Otto 168; Cooley, Const. Lim., p. 115; 92 Ark. 93.

F. M. Rogers, amicus curiae.

This suit was brought to obtain a favorable judicial construction of Act 202, Acts 1919, in order to assure the successful floating of bonds. The act is constitutional and was properly passed. 8 L. R. A. (N. S.) 1107; Digest L. R. A. (old series), 1-70, title "holding office;" 26 Ark. 9; 132 *Id.* 539; 118 Ark. 119; 92 *Id.* 93; 89 *Id.* 513; 118 *Id.* 119; 134 *Id.* 328.

SMITH, J., (after stating the facts). The Constitution imposes no limitation upon the number of amendments which may be made to a bill as it passes through one or both branches of the Legislature. The only limitation in that respect is that "no bill shall be so altered or amended on its passage through either house as to change its original purpose." No attempt is made to show that the original purpose of the bill was altered by the House amendment. Indeed, it is shown that this was only a method of embracing a number of amendments in the form of one amendment and that many sections of the act remained unchanged and that the sections as amended are entirely germane to the original purpose of the bill.

There is no constitutional objection to embracing lands in more than one road district if the lands are benefited by the roads constructed in each of the districts. If the lands receive benefits from improvements being constructed in more than one district they become subject to the tax in each district. *Lee Wilson & Co.* v. *Compton Bond & Mortgage Co.*, 103 Ark. 452.

We think the provision of the act that the commissioners may select their own successors does not encroach

upon the jurisdiction of the county court. If there was any constitutional requirement that the commissioners be selected by the county court, it would have been improper for the Legislature to name the original commissioners—and that objection to the act is not made. Indeed, many acts of the Legislature have been approved by this court in which commissioners were therein named to supervise the construction of the improvement therein authorized. Whether the commissioners who act are the ones named by the Legislature or are the successors of such commissioners their plans are subject to the approval of the county court. These districts are organized for the purpose of aiding the county court in the construction of internal improvements, and the court may approve or reject the plans through which this aid is offered; but it does not invade the jurisdiction of the county court for the Legislature to appoint or to designate these agencies.

We think there is no constitutional objection to making the county judge ex-officio a member of the board of commissioners. His freedom of action in the approval or disapproval of the plans is untrammeled by the fact that he is a member of the board which made them. Whether the plans were made with or without his approval, and whether the judge's membership on the board gives him a more comprehensive view of the plans proposed or not, the fact remains that he has the same right of approval or disapproval that he would have if he were not a member.

Section 14 of the act provides that the commissioners shall designate a date for a hearing on assessments of benefits, and shall cause notice thereof to be given, the form of which is therein set out. Pursuant to this notice the commissioners are required to meet for the purpose of hearing any complaints against assessments, and when these complaints have been heard and the assessments equalized a copy of the assessment book is filed with the county clerk, and thereafter any aggrieved landowner has thirty days within which to bring "legal proceedings

to contest any of said assessments of benefits," after which time—in the absence of any such proceeding—the right to objection shall be deemed to have been waived.

It does appear from section 9 of the act that subdistrict No. 5 is created for the purpose of taking over the affairs of an existing road district created under the Alexander road law to improve the road lying in that subdistrict. The act provides that the district therein created "shall not begin any work of improvement thereon unless and until a majority of the commissioners of such other district shall file with them a writing stating that the project under their control has been abandoned, and they are hereby given power to abandon said project and terminate the existence of the district, and turn over their surveys to this district when paid therefor by it."

We know of no valid reason why a district organized under either a general or special act of the Legislature may not be dissolved, provided the validity of no contract outstanding at the time of the dissolution is impaired, and no such objection is made to the act under consideration. *Special School Dist. No.* 33 v. *Howard,* 124 Ark. 475.

The objection to the manner of the passage of the act is not well taken. The constitutional requirement that a bill shall be read on three different days in each house is subject to the qualification that by a two-thirds vote the rules may be suspended when the bill may be read the second time or the third time on the same day, and the rules were suspended for the second reading in each house. A bill cannot be read more than twice in either house in one day, but express authority is given for reading it in either house on the same day a first and second or a second and third time, provided the rules be suspended for that purpose by a two-thirds vote. The requirement of the Constitution having been met by a suspension of the rules, it cannot be said that the act was passed with a haste which makes it unconstitutional.

Upon the whole we find no valid objection to the constitutionality of the act, and the decree of the court below holding it constitutional is, therefore, affirmed.

HART, J., dissents.

DAVIS v. STATE.

Opinion delivered June 9, 1919.

1. MALICIOUS MISCHIEF—CUTTING DOWN TREES.—Kirby's Digest, section 1902, providing that it shall be a felony knowingly to enter upon the lands of any person and cut down or destroy any tree or trees standing or growing thereon of the value of more than ten dollars, it is a felony knowingly to enter upon another's land and cut down fruit trees which, while standing, were worth more than ten dollars, though worthless after being cut down.
2. SAME—INTENT.—Under Kirby's Digest, section 1902, the intent to convert trees cut down or destroyed to one's own use is not an element of the offense.
3. SAME—FAILURE TO FIND VALUE OF TREES DESTROYED.—Kirby's Digest, section 1906, providing that "in case the accused be found guilty, the value of the timber so cut down, destroyed sawed or carried away shall be stated in the finding or verdict," is directory merely, and the failure to insert in the verdict the real value of the trees in excess of ten dollars could not affect defendant's guilt or innocence.

Appeal from Benton Circuit Court; *W. A. Dickson*, Judge; affirmed.

Mauck & Seamster, for appellant.

The court erred in overruling the demurrer and in giving instruction No. 1. Kirby's Digest, § 1902. This statute does not include fruit trees. In construing a statute inapt words should be disregarded and the intent gathered from the whole act read in connection with its title and evident purpose. 86 Ark. 518. Penal statutes are construed strictly and the general words should be restrained for the benefit of him against whom the penalty is inflicted. An offender must fall both within the words and the mischief to be remedied. See 6 Ark. 131; 53 *Id.* 334; 40 *Id.* 97; 43 *Id.* 413.

The real intention when ascertained will always prevail over the literal. 28 Ark. 200; 37 *Id.* 491; *Ingle* v. *Batesville Gro. Co.,* 89 Ark. See also 46 Ark. 140. Fruit, ornamental or shade trees do not fall within the statute. See section 1901, Kirby's Digest.

Appellant could not possibly be guilty of anything but a misdemeanor under the law and evidence.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

Section 1902 of Kirby's Digest is the law of this case and not section 1901 as contended by appellant. The statute is plain and unambiguous and needs no construction, as the offense falls clearly within its terms. 93 Ark. 42; 11 *Id.* 44; 56 *Id.* 110. The Legislature must be understood to mean what it clearly expresses and this excludes construction. 65 Ark. 521. Statutes are construed according to their usual accepted meaning in common language. 97 Ark. 38; 28 *Id.* 200. Courts may not add to a statute words which substantially add to or take from it as framed. 104 Ark. 583. If the Legislature makes no exception in a statute, the courts can make none. 16 Ark. 671; 59 *Id.* 297; 6 *Id.* 14; 42 *Id.* 121; 62 *Id.* 585. See also 59 *Id.* 237. There is no other act repugnant to or which limits section 1.

There is no conflict between sections 1901 and 1902, and section 1902 does not repeal section 1901. 46 Ark. 140; 130 *Id.* 471.

Appellant says that the verdict failed to state the value of the trees destroyed as directed by section 1906, Kirby's Digest, but this is only mentioned in the motion for new trial, and the verdict was received by the court without any exceptions as to its form by appellant and he cannot complain now. 45 Ark. 524; 90 *Id.* 482. But section 1906 is directory merely, not mandatory. 98 Ark. 505; 34 *Id.* 491; 52 *Id.* 275; 21 *Id.* 329; 26 *Id.* 321-328.

On the whole case section 1902 clearly defines the crime and there are no errors of law and the verdict is sustained by the evidence.

HUMPHREYS, J. Appellant was indicted, tried and convicted of a felony, in the Benton Circuit Court, under section 1902 of Kirby's Digest, for unlawfully, maliciously and feloniously cutting down ten apple trees growing upon the land of Julius Giger and Henry Giger in said county and State, and one year's imprisonment was imposed upon him as a punishment therefor. From the judgment of conviction an appeal has been duly prosecuted to this court.

The evidence tended to show that, on or about the 10th day of October, 1918, appellant, who had had a dispute or quarrel with his employers, Julius Giger and Henry Giger, the owners of an apple orchard near Bentonville, Arkansas, consisting of about 65 acres of 17-year-old apple trees and some resets, entered the orchard in the night time and cut down 75 or 80 apple trees of the value of $1,000, and injured others by cutting the limbs off and hacking them; that the trees so cut down and injured were of the value of about $1,000 as fruit trees, but were of nominal value, only, as wood or timber trees, and had to be hauled to the brush heap and burned.

Over the objection and exception of appellant, the jury were instructed, in substance, that, if they found from the evidence beyond a reasonable doubt that appellant cut down and injured the trees at the time and in the manner alleged in the indictment, and that they were of the value of more than $10, they should find him guilty and assess his punishment at imprisonment not exceeding two years; but, if they found from the evidence beyond a reasonable doubt that appellant cut down and damaged the trees at the time and in the manner charged in the indictment, and that said trees were of the value of $10 or less, they should find the defendant guilty of malicious mischief and assess his fine at not less than $50. Appellant requested instructions to the effect that the value of the trees should be determined by the jury according to their market value as timber, and not their estimated value as fruit trees. The instructions requested by appellant upon the method of valuing the trees were

each refused and proper objections and exceptions were made and saved to the ruling of the court in refusing to give said instructions.

It is insisted by appellant that section 1902 of Kirby's Digest, under which appellant was indicted, which is section 1 of the act of March 17, 1883, does not include the destruction of, or injury to, fruit trees. Said section reads as follows:

"Any person who shall, without lawful authority, wilfully and knowingly enter upon any lands belonging to this State, or any lands belonging to any corporation or person, and shall cut down or destroy, or cause to be cut down or destroyed, any tree or trees standing or growing thereon, of the value of more than ten dollars, or any person who shall induce, assist, aid or abet any other person so to do, shall be deemed guilty of a felony, and shall upon conviction be punished by imprisonment, at hard labor, in the State penitentiary not more than two years."

It will be observed that there is no ambiguity in the language used in the section. In plain terms, it is made a felony by the section just quoted to wilfully and knowingly enter upon the lands of the State, any corporation or person and destroy or injure "any tree or trees" standing or growing on said land. Giving each word in the section its ordinary meaning, all kinds of trees, whether timber, fruit, ornamental or shade, are included under the rules for the construction of statutes laid down by this court in the cases of *McNair* v. *Williams,* 28 Ark. 200; *Geary* v. *Parker,* 65 Ark. 521; *Hancock* v. *State,* 97 Ark. 38. As suggested by the Attorney General, in order to place the interpretation contended for by appellant upon section 1902 of Kirby's Digest, it would be necessary to insert the word "timber" before the word "tree" or to add an exception to the section of "fruit trees." This addition or exception would conflict with the rule of this court laid down for the construction of statutes in the case of *Hodges* v. *Dawdy,* 104 Ark. 583. By reference to section 1906 of Kirby's Digest, which was section

5 of the act of March 17, 1883, being the same act in which section 1902 of Kirby's Digest appears as section 1, it is apparent that the Legislature did not intend to limit the kind of trees cut to *timber* trees. The following language appears in the latter part of section 1906 of Kirby's Digest, or section 5 of the act of March 17, 1883: "It shall not be necessary to allege in the indictment, or prove on the trial, the kind of trees, timber, lumber, staves or shingles cut, destroyed or carried away; * * * ."

It is urged by appellant that the crime charged against him is not included in section 1902 of Kirby's Digest because specifically defined in section 1901 of Kirby's Digest. Section 1901 not only defines malicious mischief as destroying or injuring "any kind of wood or timber, standing or growing upon the lands of any other person," but also characterizes the destruction or injury of "any fruit, ornamental or shade trees" a crime. The use of the words "wood or timber" in section 1901 might have reference to only trees growing which could be converted into "wood or timber" and, in order to include all kinds of trees, it was necessary to specifically designate the other kinds of trees as fruit, ornamental or shade trees. It was not necessary, however, to add "fruit, ornamental or shade trees" in section 1902, as the use of the words "any tree or trees" would include, necessarily, all kinds of trees. It will be observed that section 1902 of Kirby's Digest makes the same trespass a felony if the value of the tree or trees destroyed or injured exceed $10 in value. So, from that fact, it is quite clear that there is no conflict in the statutes. A party might be prosecuted under either. This court said in the case of *Meadows* v. *State,* 130 Ark. 471, in an indictment for a felony under section 1902 of Kirby's Digest, that the defendant could be convicted for a misdemeanor under section 1901 of Kirby's Digest, for the reason that section 1901 of Kirby's Digest was not repealed by section 1902 of Kirby's Digest, because there was no inconsistency between the two sections. This conclusion was necessarily reached because section 1901 made the trespass a

misdemeanor, and section 1902 made it a felony if the value of the trees exceed $10. It is true in the case of *State* v. *Malone*, 46 Ark. 140, that Mr. Justice SMITH, in holding that there was no inconsistency between the two statutes, said that "the earlier statute punishes the trespasser without regard to the intent of the trespasser; whereas the later requires the act to be done with intent to convert the property to the use of the taker or that of his employer or principal." In that case, the learned justice was not dealing with section 1902 but 1903 of Kirby's Digest. Section 1903 of Kirby's Digest is clearly a larceny statute involving the question of intent. Section 1902 of Kirby's Digest does not make the intent to convert the property to one's own use an element of the crime any more than does section 1901.

It is next insisted by appellant that reversible error was committed because the value of the timber was not ascertained by the jury and included in the verdict. It is provided in section 1906 of Kirby's Digest that "in case the accused be found guilty, the value of the timber so cut down, destroyed, sawed or carried away shall be stated in the finding or verdict." We think the only purpose and intent of said section 1906 was to form a basis for civil liability. It was necessary under the instructions of the court for the jury to find that the trees exceeded $10 in value before they could convict appellant. The failure to insert in the verdict the real value of the trees in excess of $10 could not affect appellant's guilt or innocence. The statute is directory and not mandatory.

Lastly, appellant insists that the judgment should be reversed because the court erred in refusing to instruct the jury that, in ascertaining the value of the trees destroyed or injured, they must determine it by their market value as timber, and not their estimated value as fruit trees. The rule for measuring the value of such trees, defined in the requested and refused instructions, does not conform to the rule announced by this court in the case of *Laser* v. *Jones*, 116 Ark. 206. The rule therein

announced is the criterion by which the value of fruit trees should be determined.

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

McCULLOCH, C. J., (dissenting). It is not the contention of appellant's counsel that there can be no conviction under this indictment for cutting down fruit trees, but their contention is that the statute under which the indictment was framed makes the market value of severed trees the test in fixing the value for the purpose of determining the degree of the offense. Cutting down fruit or ornamental trees is made an offense by this statute where they possess market value after being severed from the soil, but, according to the contention of counsel, the value of such trees as part of the soil is not to be considered. It is a felony under this statute to cut down a tree which possesses a market value of more than $10, even though it is a fruit tree or one used for ornamental purposes.

I think counsel are correct in their interpretation of the statute and that appellant should not have been convicted under this statute, but the penalty should have been imposed under section 1901 of Kirby's Digest, which makes it a misdemeanor, punishable by fine in any sum not less than $50, if a person "shall wilfully commit any trespass by cutting down or destroying any kind of wood or timber, standing or growing upon the lands of any other person, or carry away any kind of wood or timber that may have been cut down and that may be lying on such land, or shall maliciously cut down, lop, girdle or otherwise injure any fruit, ornamental or shade tree," etc.

There is no proof at all that the fruit trees severed from the soil had any value as fallen trees. Appellant's offense was merely an act of wilful trespass and deserved punishment which it was within the power of the court or jury to inflict under the statute just referred to. The statute quoted in the opinion of the majority is sec-

tion 1 of a statute approved March 17, 1883, entitled "An act to protect State lands, and for the regulation and protection of the timber and timber interests of this State." Section 2 of the statute makes it a felony for any person to carry away any trees, logs, timber, lumber, staves or shingles of the value of more than $10 cut from the lands of another with intent to convert the same to his own use. Section 4 of the statute, which is carried forward into Kirby's Digest as section 1905, reads as follows:

"If the trees so cut down or destroyed, or if the parts of trees, timber, lumber, staves or shingles made therefrom so taken and carried away, or so sawed at any sawmill, shall not exceed in value the sum of ten dollars, the person so offending shall be deemed guilty of petit larceny, and shall be punished accordingly."

At the time of the enactment of this statute, Kirby's Digest, section 1901 was then in force as part of the Revised Statutes, and this court, in the case of *State* v. *Malone,* 46 Ark. 140, construed the two statutes for the purpose of determining whether or not the act of 1883 repealed the former statute. In that case the defendant was indicted under the old statute for removing wood and timber of the value of $5 from the land of another, and the contention was that the old statute was repealed by the act of 1883. The circuit court so decided, but this court on appeal held that the old statute had not been repealed, and, in disposing of the matter, said:

"There is no inconsistency between the two statutes, for the earlier statute punishes the trespass without regard to the intent of the trespasser; whereas the later requires the act to be done with intent to convert the property to the use of the taker or that of his employer or principal. Again: The later act cannot be regarded as a revision of the whole law of trespass upon real estate and as intended to be a complete substitute for all previous legislation on that subject. Its title is, 'An act to protect State lands, and for the regulation and protection of the timber and timber interests of this State.' "

The question came before this court again in the case of *Meadors* v. *State,* 130 Ark. 471, where the defendant was indicted under the new statute for a felony in cutting timber of the value of $100, but was convicted of a misdemeanor under the old statute and fined $50. We followed the Malone case, *supra,* in holding that the old statute had not been repealed and that under it the defendant could be convicted of a misdemeanor. The Malone case was not merely an interpretation of one section of the act of 1883, but it constituted an interpretation of the whole statute and distinguished it from the purpose and operation of the old statute. In fact, Kirby's Digest, section 1905, which is section 4 of the act of 1883, does not say anything about the intention of the party in cutting down or removing trees, but this court in the Malone case characterized it as a larceny statute, guilt under it being dependent upon the intention of the party in cutting or removing the timber.

If the statute means what the majority in this case decides that it means, then the court was wrong in deciding in the Malone case that the old statute was not repealed, for under the view now expressed by the majority, all of the provisions of the old statute were swallowed up in the later statute. This is so under the rule of interpretation so often announced by this court concerning implied repeals, that a later statute repeals a former one without express words to that effect where it covers the entire subject-matter embraced in the old statute. If the statute be given the meaning which was attributed to it in the Malone case, then counsel for appellant are correct in their contention that the test of value in determining the degree of the offense is the market value of the severed trees, and there was no evidence to sustain a conviction in this case under the act of 1883, for the reason that no market value was proved, and the evidence showed that the cutting down of the trees was merely an act of vandalism without any intention to convert the timber to the use of the trespasser. In other words, it was merely a trespass upon the lands

which was punishable as a misdemeanor under section 1901.

The rule announced in *Laser* v. *Jones,* 116 Ark. 206, should not be applied, for that case dealt with the trespass statute (Kirby's Digest, section 7976), which authorizes recovery of treble damages, damages for cutting down, injuring, destroying and carrying away growing trees, whether used as shade trees, timber, or otherwise. That statute provides for the recovery of damages for the trespass, whilst under the act of 1883 prescribing the punishment for the cutting down or removal of timber, the value of the timber itself is made the test.

WOOD, J., concurs in this opinion.

HARRIS *v.* WALLACE.

Opinion delivered June 6, 1919.

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

Calvin Sellers, for appellant.

This case is controlled by 118 Ark. 119 and 133 *Id.* 491. The case in 130 Ark. 44 is conclusive.

John L. Hill, J. H. Bowen and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

The questions here are settled by 125 Ark. 329. See also 202 S. W. 831; 123 Ark. 205; 76 *Id.* 197; 85 *Id.* 171; 99 *Id.* 1; 112 *Id.* 342; 130 *Id.* 44. There was no abuse of discretion of the county court in laying out laterals. Here the laterals are moderate in amount. Two of the laterals only straighten out the road as sanctioned in 202 S. W. 831.

Per Curiam. Road Improvement District No. 1 of Perry County, one of the appellees, is a road improvement district formed by an order of the county court of Perry County pursuant to Act No. 338 of the General Assembly of 1915 (p. 1400), and the other appellees are commission-

ers of the district. Appellants own property in the district and instituted this action in the chancery court of Perry County for the purpose of obtaining a decree enjoining the commissioners from proceeding, under an order of the county court, to construct certain lateral roads and extensions not described in the original plans for the improvement.

It appears from the pleadings that after the organization of the district, the plans were altered so as to provide for additional lateral roads and extensions of the originally specified roads, and that those plans have been approved by an order of the county court, and that the commissioners are about to proceed with the construction of the roads and the additional laterals and extensions pursuant to the altered plans.

This litigation involves an attack on the validity of the proceedings on two grounds, one, that the statute does not, when properly interpreted, authorize the alteration of the original plans so as to provide for the construction of additional laterals or extensions not mentioned in the original plans which would constitute a substantial variance of those plans, and the other ground, that if the statute is an attempt to confer such authority, it is ineffectual because it contains no provision for assessing additional benefits arising from the added improvements. The chancery court upheld the validity of the proceedings and sustained the demurrer to the complaint.

Two of the justices of this court, Mr. Justice Hart and Mr. Justice Smith, are of the opinion that the first of the grounds of attack stated above should be sustained, that the proceedings looking to an alteration of the original plans are, for that reason, invalid, and that the decree of the chancery court should be reversed; two of the justices, Mr. Justice Wood and Mr. Justice Hart, are of the opinion that the second ground of attack stated above is well taken and that the proceedings are, for that reason, invalid, and that the decree should be reversed; Mr. Justice Wood does not agree with the other two justices

as to their conclusion on the first ground of attack, and Mr. Justice Smith does not agree with the other two justices as to the second ground of attack. The Chief Justice and Mr. Justice Humphreys are of the opinion that both grounds of attack are untenable, that the proceedings are valid, and that the decree should be affirmed. A majority of the justices entertain views on each of the points of attack which, if separately involved, would result in affirmance of the decree, but since the majority are, on different grounds, in favor of reversal, that must be the net result of their divergent views on the points involved.

It thus appears from the above recital that three of the justices are of the opinion that the decree should be reversed, but they do not agree on the ground of reversal.

The decree is, therefore, reversed and the cause remanded with directions to the chancery court to overrule the demurrer to the complaint, and for further proceedings.

HUMPHREYS, J., (dissenting). The original plans and specifications of District No. 1 of Perry County provide for the construction of the following roads: "Perry north, two miles to the county line; Perry east, four miles along the Rock Island railroad; Perry west, six and a half miles to Adona; Perry south, to Perryville and from there to Aplin." After the organization of the district, the commissioners proceeded, under section 16 of Act No. 338 of the General Assembly of 1915, the same act under which the district was organized, to lay out and include the following laterals in said district:

"From the point where the roads running from Perry to Adona would cross the track of the Rock Island & Pacific Railroad in section 29, township 5 north, range 17 west, the road is hereby changed so as to run parallel with said railroad track on the south side thereof to the point where the original recrosses said railroad track in section 31, township 5 north of range 17 west.

"From the town of Aplin along the existing highway in a southwesterly direction through section 25, township 4 north, range 19 west, to the western boundary of the district. A lateral beginning on the road from Perryville to Aplin on section line between sections 13 and 14, township 4 north, range 18 west, running southerly upon the said section line and upon the section line between sections 23 and 24, said township and range to the southeast corner of said section 24, thence southwesterly through section 26 upon the present highway, to the boundaries of the district.

"A lateral beginning at a point where the Perryville and Houston road intersects the Perry and Perryville road on the north line of section 10, township 4 north, range 17 west and running east along the existing highway on said north line of said section 10 and continuing along the existing highway in an easterly direction through sections 3, 2 and 1, township 4 north, of range 17 west, to the boundary of the district.

"Also a lateral beginning at the point where the roads now running from Perry to Adona in section 30, township 5 north, range 17 west, changes from a direction due south to a southwesterly direction and thence continuing due south across the track of the Chicago, Rock Island & Pacific Railroad to the line of the Perry-Adona highway as above laid out."

It is first contended by appellant that the commissioners, by and with the authority of the county court, had no right to lay off, establish and incorporate the said laterals as a part of the district, because the laterals did not appear upon the preliminary plans and, hence, were not petitioned for by the property owners of the district. As stated in the *per curiam* and this opinion, the property owners petitioned for the organization of the district under Act No. 338, Acts 1915, commonly known as the "Alexander Road Law." That act provides, in subdivision "F," section 1 thereof, for the filing of a plat with the petition showing the roads to be constructed as nearly as practicable. The plat was required so the

property owners might know what improvement was contemplated. *Lamberson* v. *Collins,* 123 Ark. 205. This requirement necessarily relates to the general or main plan of the improvement and does not exact the filing of a plat in the first instance of additional laterals or extensions authorized by the same act, if the commissioners deem them necessary and the county court finds, after hearing, that it is to the best interest of the district to have them. In fact, the language of section 16 aforesaid authorizes the construction of laterals and extensions "not provided for in the original plans." In petitioning for and organizing the district under the Alexander Road Law for the purpose of improving certain roads, the property owner necessarily petitioned for such laterals as the commissioners might deem necessary and the county court of benefit to the district, because one of the powers conferred by the act on the commissioners is to do that very thing, under the supervision and direction of the county court. It would not do to invoke the powers for organization under the act and discard the lawful powers for the construction of the improvement conferred by the act. The power to add laterals or make extensions was lawfully conferred. The Constitution does not inhibit it expressly or by implication. *McClure* v. *Topf & Wright,* 112 Ark. 342.

Again, appellant contends that section 16 of said act, authorizing the construction of laterals and extensions on certain conditions, should be construed as sanctioning only slight, or nominal, laterals or extensions. Such a limited construction is not only contrary to the language of the act, but would thwart the purpose and intent of the Legislature in its passage. A lateral road, or an extension of a road, necessarily means a road that will go somewhere. In the construction of the main improvement, it was quite likely that the main road or roads, would miss important villages, factories, quarries, etc. It is quite natural for the Legislature to have made some provision to connect the main improvement with places of importance that could not be reached with the main im-

provement. We think the specific language in this section, especially when read in connection with the whole act, shows that the authority thus conferred by the Legislature was conferred with this intent. Therefore, it would not be proper to so limit the laterals and extensions as to render them useless for the purposes intended by the Legislature. The proper construction to be placed upon the power conferred is that the commissioners, by and with the consent of the county court, may lay off, establish and construct such laterals or extensions as they may deem advantageous to the district, as feeders or auxiliaries to the main improvement. We think the laterals provided for in this district by the commissioners, and ordered to be constructed by the county court, are such laterals as were contemplated by section 16 of the act.

It is also contended that the statute made no provision for assessing additional benefits arising from the added improvements and that the statute is therefore ineffectual. Ample provision is made in sections 17 and 18 of said act to authorize the commissioners, as they did in this instance, to assess the benefits accruing to any property in the district by reason of the construction of said laterals. Section 17 of said act not only authorizes the commissioners, but any property owners, to petition the county court to increase or lower the assessment of benefits previously made, on account of the addition of lateral roads or extensions into adjoining territory. The fact that the commissioners are authorized to petition the county court for a reassessment, when changes are made in the plans or laterals added or extensions made into adjoining territory, clearly indicates that the benefits to all the property in the district may be reassessed. The mere fact that property owners are privileged to obtain a reassessment of benefits to their individual property does not preclude the idea that benefits may be assessed to all the property in the district. Section 18 of said act provides that the board of commissioners may, once a year, order a reassessment of the benefits.

The conclusions of the chancellor were correct and his decree should be affirmed.

I therefore dissent from the conclusions announced by the majority of the court, and am authorized to announce that the Chief Justice agrees with the views herein expressed.

SMITH, J. It is impossible to comprehend the extent to which the district petitioned for by the land owners has been enlarged and altered without tracing out these alterations and enlargements on a map of the district. We had a map of the district before us in the case of *Tarvin* v. *Road Improvement District No. 1 of Perry County,* 137 Ark. 354, 209 S. W. 81, a case involving the validity of the district now under review. The right to construct these lateral roads was raised in that case, but we refused to decide the question there for the reason there stated, that, "We are unable to ascertain from the record that this latter appeal was consolidated with the appeal taken from the organization of the district, so the contention of counsel that the order of the court establishing the laterals as a part of the district was without authority and contrary to law is not properly before this court for adjudication." However, on the question of the additional roads to be improved, we copy the following statements from appellants' brief:

"The commissioners of said district, however, have appealed to the county court to lay out the following additional laterals, which have been ordered by the county court of this county.

"From the point where the roads running from Perry to Adona would cross the track of the Rock Island & Pacific Railroad in section 29, township 5 north, range 17 west, the road is hereby changed so as to run parallel with said railroad track on the south side thereof to the point where the original road recrosses said railroad track in section 31, township 5 north of range 17 west.

"From the town of Aplin along the existing highway in a southwesterly direction through section 25,

township 4 north, range 19 west, to the western boundary of the district. A lateral beginning on the road from Perryville to Aplin on section line between sections 13 and 14, township 4 north, range 18 west, running southerly upon the said section line and upon the section line between sections 23 and 24, said township and range to the southeast corner of said section 24, thence southwesterly through section 26 upon the present highway, to the boundaries of the district.

"A lateral beginning at a point where the Perryville and Houston road intersects the Perry and Perryville road on the north line of section 10, township 4 north, range 17 west, and running east along the existing highway on said north line of said section 10 and continuing along the existing highway in an easterly direction through section 3, 2 and 1, township 4 north, of range 17 west, to the boundary of the district.

"Also a lateral beginning at the point where the roads now running from Perry to Adona in section 30, township 5 north, range 17 west, changes from a direction due south to a southwesterly direction and thence continuing due south across the track of the Chicago, Rock Island & Pacific Railroad to the line of the Perry-Adona highway as above laid out.

"The assessment of benefits has been made based upon the plans which involve the construction of said laterals, and the plaintiff says that said laterals were not petitioned for by the property owners of the district, did not appear upon the preliminary plans, which were filed before the petition was circulated, and that the defendant district has no power to construct said laterals, and the county court no authority to sanction their construction."

The net result of these enlargements and alterations is stated in appellants' brief as follows: "In this case the petitioners asked only for the construction of three roads, and now they find themselves saddled with laterals and extensions that almost double the cost of the work and the extent of highways to be built."

Counsel for appellee cite the opinion of this court in the case of *Conway* v. *Miller County Highway District,* 125 Ark. 329, as upholding the action of the court below in authorizing these additions and alterations. But it will be remembered that that was a case in which the commissioners were proceeding under a special act of the Legislature which gave them wide and discretionary powers in selecting the roads to be improved; while here we have a district organized under a general law to which we must look in ascertaining the powers of the commissioners.

The statute (Act 338, Acts 1915, page 1400) has been several times construed, and in each of these cases this court has said that the jurisdiction of the county court is dependent upon the filing of the petition. The machinery of the law is set in motion only by the filing of a petition of the property owners, so that the court possesses only such jurisdiction as is conferred by the filing of the petition, and can order the laying out and construction of only such roads as are sanctioned by the petitioners. The petition may describe the improvements contemplated in general terms and leave the plans for the future development of the board. *Ferguson* v. *McLain,* 113 Ark. 193; *Cox* v. *Road Imp. Dist. No.* 8, 118 Ark. 122. But the authority at last must come from the petition of the land owners.

The very recent case of *Rayder* v. *Warrick,* 133 Ark. 491, presented substantially the question we have for decision here. The changes in the plans there proposed are recited in the statement of facts as follows:

"*First.* That the road west from McGehee to the Drew County line should be located on the present roadbed, rather than on a straight line, because it would cost less, both in construction and right of way.

"*Second.* That the type of the road should be changed from a six-inch gravel one to a stone base with an asphalt surface.

"*Third.* The location of the road in the city of McGehee should be changed from a road on First avenue to run on Ash street to the intersection of Ash and Second

avenue, thence west on Second avenue. The total estimated cost of the road with the changes amounted to $119,300."

It thus appears that the changes in the road there sought to be improved are trifling as compared with the additions here proposed, although the cost in that case, as in this, was nearly doubled, but the increased cost in that case was due to a proposed change from a gravel road to one with a stone base and an asphalt surface.

It was contended in that case, as in this, that section 16 of the act gave the commissioners certain enlarged powers, once the district had been established by the county court, and that under this section, "if the commissioners find it necessary and to the best interest of the district at any time before the improvements are made to make any alteration or change in the plans and specifications," to make them and it was not doubted or denied in that case that if section 16 were read by itself it apparently gave the commissioners that power. So now it is contended that "if the commissioners find it necessary and to the best interest of the district at any time before the improvements are made * * * to construct any additional laterals or extensions within the boundaries of the district not provided for in the original plans * * * ," the commissioners may construct these laterals or extensions under the authority of section 16.

But the point decided in *Rayder* v. *Warrick, supra,* was that section 16 was not to be read by itself, and the reasoning of that case is so appropriate that I quote from it at length:

"If the broad construction sought to be placed upon section 16 by the commissioners in regard to the alteration of the plans and specifications and route of the road to be constructed should prevail, it is at once obvious that the section is in conflict with section 1 of the act or at least that the two sections would be inconsistent with each other.

"Subsection (A) of the first section provides for the circulation of the petition among the land owners and for the filing of a plat with the petition upon which the boundaries of the proposed district shall be plainly indicated showing the road which it is intended to construct and the improvement as nearly as practicable.

"(1) Subsection (B) of section 1 provides that the State Highway Engineer or his assistants shall prepare preliminary surveys, plans, specifications and estimates of the road which it is proposed to construct and improve in the district and file them in the county court for the purpose of determining the feasibility of any road improvement and the cost thereof before the petitions mentioned in subdivision (A) are circulated. This section came up for construction in the case of *Lamberson* v. *Collins,* 123 Ark. 205. With the view of arriving at the true meaning of each of these subdivisions and to harmonize them, with each other, to meet the intention of the Legislature, the court held that in the formation of a district under the act, it was necessary that the provisions of subdivision (B) of section 1 be followed as well as the provisions of subdivision (A) of the section. It was said that the lawmakers intended to provide for a source of information as to the magnitude and cost of the improvement before the property owners were called upon to exercise their choice, either favoring or opposing it. If the broad meaning now sought to be given to section 16 by the commissioners should be adopted, it will be readily seen that such construction would make it inconsistent with the construction we have already placed upon section 1 of the act and would be to hold that the Legislature did a vain and idle thing in declaring in section 1 that certain things must be done as a prerequisite for the valid organization of the district which could be undone by the commissioners under the power given them by section 16. In other words it will be inconsistent to hold that the provisions of section 1 in regard to the preliminary survey, plans, specifications and estimates of the proposed road must be made as a prerequisite to the

validity of the proposed district and then to hold that under section 16 the commissioners might alter the plans, specifications, estimates and survey, in such a manner as to construct an entirely different kind of road on a wholly different route. As we have just seen, one of the reasons for holding the requirements of subdivision (B) of section 1 mandatory was that this requirement was placed in the statute to enable the land owners, who are to be assessed for the cost of the improvement, to know in advance the nature and character thereof, and to enable them to act intelligently in determining whether or not they will encourage or oppose the improvement. The provisions of this section would not in any way safeguard the interests of the land owners if the commissioners could wholly change the plans and specifications so as to make an entirely different improvement and to construct it over an entirely different route. It has been many times said by this court that it is a primary rule in the interpretation and construction of the statutes that the intention of the Legislature is to be ascertained and given effect. In doing this, each section is to be read in the light of every other section, and also the object and purposes sought to be accomplished by the act are to be considered. Therefore courts should give effect to the intention of the Legislature as collected from the entire statute and that intention should prevail over inconsistencies between different sections or different parts of the same section when either a strict or liberal construction of the language of any particular section would lead to a contradiction between it and other sections."

In the *Rayder* v. *Warrick* case the petition contained the recital that, "Your petitioners agree to any change that may hereafter be made by the court or the commissioners of the district in the line of said route, provided the general purpose of securing the highway between the *termini* is retained." We disregarded this recital in the petition and in doing so said:

"It would in effect give them (petitioners) the power to legislate and to change the meaning of a provision of

a statute in accordance to their will and contrary to the will of those who did not sign the petition. Those who did not favor the improvement had the legal right to have the district organized and the improvement constructed in accordance with the provisions of the statute; and that right could not be taken away by any act of those signing the petition."

If under a petition for twenty miles of road, estimated to cost $60,000, roads forty miles in length and costing $120,000 can be authorized, as in the case here, why may not roads one hundred miles long be constructed under a petition for a road five miles in length? And what magic is there in designating the additional roads as laterals which authorizes the construction of a road so designated which could not be constructed, if it were otherwise designated? To so construe this statute would make the petition upon which the property owner thought he had a right to rely a mere pitfall.

The proper rule to apply in the construction of this statute is announced in the case of *Hout* v. *Harvey,* 135 Ark. 102, in which the doctrine of *Rayder* v. *Warrick, supra,* is reaffirmed, and that is, that these plans are not so fixed and immobile that no departure whatever from them can be made, but that the petition is jurisdictional, and the plans of the district petitioned for do form the basis of the improvement, and alterations of and additions to these plans which may be made must be such as are calculated to perfect or improve them, and not alterations or additions which substantially change the plans for which the property owners have petitioned.

I think the act confers authority to revise the assessments to conform to authorized changes in the plans; but there is no authority to make assessments for an improvement for which the property owners have not petitioned.

HART, J. I agree with Mr. Justice Smith that it would be contrary to the principles decided in *Rayder* v. *Warrick,* 133 Ark. 491, to hold that the commissioners have power, under section 16 of our general statute for

the creation and establishment of road improvement districts, to build laterals of such extended character.

Section 16 of the act provides that the commissioners may alter the plans, or to construct laterals within the boundaries of the district not provided for in the original plans, or even change the road so as to extend it to additional territory not included in the original district. Acts of 1915, p. 1400.

In *Rayder* v. *Warrick, supra,* we held that section 16 and section 1 should be read in the light of each other and construed together. The provisions of section 1 were held to be mandatory to enable the land owners to know in advance the nature and character of the improvements to be constructed so that they might act intelligently in deciding whether they would aid or oppose the improvement. So it was held that the provision of this section would not in any way safeguard the interests of the land owners if the commissioners could wholly change the plans so as to make an entirely different improvement and to construct it over a wholly different route.

In the application of this principle to the present case, it seems equally manifest to my mind, that the land owners could not derive any benefit from section 1 and that the making of the plans under it would be useless expense if the commissioners, at will, might change the character of the improvement by constructing laterals of such length and added cost as in the present case. Indeed, I think that that part of section 16 which provides for the construction of laterals creates a new improvement and is inconsistent with the other provisions of the act and is therefore void.

I, also, agree with Mr. Justice Wood in holding that that part of the section with reference to the extension of laterals is void because the act nowhere provides for an assessment of benefits after the commissioners had determined to change the district by extending the road within or without the boundaries of the district. Local assessments can only be constitutional when imposed to pay for local improvements conferring special benefits

on the lands assessed and then only to the extent of these benefits. When lateral roads are extended from the original road, either within the boundaries of the district as originally established or beyond the limits of the original districts and the boundaries of the original districts are also extended, in either event, it is manifest that the extension of the laterals might be a substantial part of the cost of the improvement and might effect the change in the benefits to each tract of land throughout the district. In other words, an assessment of benefits under the improvement as originally planned would not meet the requirement for the assessment of benefits under the altered plans. This is so because as we have just seen, local assessments can only be imposed to the extent of the benefits and it cannot be known whether the cost of the improvement will, or will not, exceed the value of the benefits until an assessment of all the lands within the district is made. This is a prerequisite to the construction of the improvement and the assessment of benefits must be made before it can be determined whether or not the improvement can be constructed.

It is true section 17 provides that whenever the commissioners or any owner of lands within the district finds that by the construction of any lateral roads or extension into an adjoining territory that the assessment of benefits previously made on any land has become inequitable by reason of the change, they may petition the county court to equalize the assessment. This is not sufficient. Under this section the commissioners or the land owner might or might not act. There is nothing requiring the commissioners to do so. As before stated, the commissioners must determine in advance that the cost of the improvement does not exceed the benefits conferred before they have the power to construct the improvement.

BURKE CONSTRUCTION COMPANY v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered June 16, 1919.

1. CARRIERS—INJURY TO SHIPMENT—INHERENT DEFECT—EVIDENCE.—Where undisputed evidence tended to show that a steam shovel during shipment received injuries which were due to inherent defects in the shovel which could not be discovered by ordinary inspection, a verdict in favor of the carrier will not be set aside as based only upon conjecture.
2. CARRIERS—LIABILITY—HIDDEN DEFECTS.—An instruction that the carrier did not insure the safe transportation and delivery of the steam shovel against damages resulting from the defective condition the same was in when it was delivered to the carrier for shipment, and the carrier was under no duty to search for concealed defects in the steam shovel, was not objectionable as assuming that the steam shovel was in a defective condition where no specific objection pointed out the language objected to, and where other instructions properly charged the jury to determine whether there were concealed or hidden defects in the shovel.

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

STATEMENT OF FACTS.

This is an action by the appellant against the appellee to recover damages for the alleged destruction of a certain steam shovel and steam shovel boom.

The appellant alleged that it delivered the shovel and boom to the appellee for carriage from Fort Smith to Riverton, according to the contract for shipment, and that they were worth the sum of $6,000, for which the appellant asked judgment.

The appellee admitted that it received the shovel and boom and admitted the contract for shipment and admitted that they were not delivered according to contract but denied any liability for failure to deliver, and also denied that the shovel and boom were worth the sum of $6,000.

Appellee alleged in its answer that the steam shovel was moved on its own wheels; that the outfit was placed in one of its trains and moved out of Fort Smith; that,

while being transported, the coupling device on said shovel became detached from the end sill on account of the worn and defective condition it was in and as a result the same was derailed; that the appellee was guilty of no negligence in handling or transporting the shovel outfit; that in delivering the shovel outfit to the appellee upon its own wheels the appellant warranted the same to be in good condition for transportation; that the appellee had no knowledge that the outfit was not in proper condition to be transported; and it denied liability for any loss or damage caused solely by the defective condition of the outfit.

The facts are substantially as follows: On the 3rd of July, 1917, the appellant delivered to the appellee at Fort Smith, Arkansas, one steam shovel moving on its own wheels, and the equipment for same which was loaded on an ordinary flat car. The shovel was inspected by appellee's car inspector and car foreman before it was accepted for shipment and certain defects that were discovered were repaired and the shovel then accepted for shipment. The shovel car was connected up with one of appellee's freight trains consisting of an engine, 26 cars and a caboose. The caboose was the last car in the train and the shovel car was the sixth car ahead of the caboose, the flat car carrying the equipment being immediately behind the shovel car. After the shovel car and its equipment were connected up with the train, it was again inspected by the conductor who discovered no defects.

The train was handled in the usual manner, nothing out of the ordinary happened until it reached the place where the wreck occurred. The train stopped at the regulation crossing of the Iron Mountain railroad and at Chester where a helper engine was put on to push it over the mountain to Winslow, where the helper engine was detached. The train left Winslow and stopped at Brentwood. It left Brentwood, and wreck occurred between West Fork and Wolsey while the train was running at the rate of about 25 miles per hour on a level track.

The only witnesses to the wreck were the conductor, brakeman and engineer. The conductor was in the cupola of the caboose. He was looking ahead and saw dust arising and knew something was wrong. He turned to pull the air to set the air brakes and the air was gone. He went forward immediately and found the car just behind the shovel car had shot over to the right of the track, its contents spilled around. The steam shovel car was across the track, another car was off the track and one set of wheels or trucks of another car were off the track. The track sloughed. The train proper stopped possibly ten car lengths ahead of these wrecked cars. This was because when the air separated it set the brakes and stopped the momentum of the train immediately and brought it to a standstill. He remained at the wreck only long enough to take in the situation and get an idea of the cause of the wreck so he could make an intelligent report. He went back in an hour or so and remained until the main line was clear. He then made an examination of the situation to determine what caused the wreck. He found that the draw bar casting off of the steam shovel car had come down between the rails and had derailed these cars. The casting was three or three and one-half feet long and 12 or 14 inches wide. The ordinary sill is seven feet long and 12 inches wide. The casting was a little wider. It went back under the car, some of it in the shape of an angle. It was attached to the steel end of the sill of the car. This casting was off and mixed up with the flat car immediately behind the wreck. It had mixed up with the brake shoe and the two wheels, having been caught by them and pulled along about ten car lengths in the middle of the track. There was evidence of it having been rolled along the middle of the track. The witness used the end of a table in the courtroom to describe how the drawbar casting had been attached to the end of the sill and what the end sill was. The flat car upon which the boom and shovel were loaded was off the track and the other car had wobbled around in a different position. Witness saw it and it "looked like a ship going over the waves."

The engineer testified that the first thing that called his attention to anything that caused the wreck was when the brakes appeared to go on emergency. I could not see myself, but my fireman looked back and said, "We are in the ditch." The train stopped and witness went back to see really what it was. He found two cars were derailed. The train had parted, and the air hose broken in two. Witness remained about two minutes. He made no examination as to the cause of the wreck. The speed he was making at the time the derailment occurred was between 22 and 25 miles an hour. It was over the best track they had, just a little bit down hill, all new steel and on good ballast. Witness was on the left side and could not see the trouble on account of the curve. The engine had gone around the curve two car lengths. After the emergency brakes went on the train ran about 400 feet.

The head brakeman testified that there was no unusual handling of the train on the trip and no switching. He was going over the train through Wolsey when the brakes went on emergency and looked back to see what was wrong with the rear end of the train and the steam shovel car was turned over. It was off to one side of the bank with one end lying across the track. He demonstrated its situation before the jury.

The assistant superintendent testified that it was his duty, representing the superintendent, to determine as near as he could what caused the wreck. He went to the scene about two and a half hours after it occurred. He found the end sill of the steam shovel had broken out in the center, which permitted the drawbar casting to drop in the center of the track, and that was what they determined caused the wreck. This casting was about 44 inches long, 12 inches wide, 1 inch thick. What the arm or knuckle fits into and the pin goes goes through, detached, would be probably two feet, or two feet and a half through. The witness saw evidences on the ties where the drawbar casting had caught and also where it had struck the trucks of the car. The witness was asked if he examined the cracks of the steam shovel car in front

where the end sill was broken and answered in the affirmative. He was then asked to describe same to the jury and he demonstrated from the end of the table in the courtroom as to the construction and he described it as follows: "The end sill is a piece of iron. It extends across the car about 7 feet. It is about 12 inches wide and three-quarters of an inch thick. The end sill is riveted on what we call a side sill or center sill. The side and center sills run back full length of the car. The end sill was riveted on to the side walls, and center walls, which are made of iron. The center sills are 44 inches from one to the other. They were riveted to the car. From where they were riveted to the inside was 38 inches. That is where it broke. That let the drawbar casting and the whole thing drop in to the center of the track. In addition to the broken end sill, there was what they call center parts, coming from the center sill back. I found an old break in the end of the sill; on one side it was about half way through, or six inches; the other side not so much—possibly one-fourth of the way through; the balance was a new break. When the bar casting was in place it would cover these old breaks. The old breaks were both from the bottom. I employed a photographer to take the photographs of the wreck of the steam shovel. I was present when he took them."

The photograph was exhibited. It showed the end of the car that broke; it was hoisted up five or six feet. On the photograph you can see the break in the end sill, and the rivets where it is riveted on to the center sills. You can see the side sills also.

The witness then proceeded to describe the appearance of the car in its wrecked condition as shown from the photograph. "It is my theory that when the drawbar casting dropped down, of course the trucks struck it. I did not see it drop down, but that is what we determined. I did not see the casting under the car. I was told about it. I first saw this casting on the side of the track, just a little back of where the steam shovel was lying. It indicated it had been knocked and churned around on the

track and chats. It was perfectly all right. It was bolted on to the end sill with four bolts. There were no bolts in it when I saw it. I did not see the bolts. They had been shirred. That is my theory. They probably may have been shirred off after they dropped on the track and these trucks ran over them and turned them over and over. I did not see that they had been turned over and over, but the indications were that they had been turned over and over. I saw that something had been rolling along the track, or had been moving on the chats on the roadbed. I do not know what did that but I have a pretty good idea. That is what we determined from the appearance of everything at the point of derailment. If the shovel car from the train proper was bouncing along the track, first on one side and then on the other, it could not have made these indentations, gashes and scars, with an ordinary outfit. It would not have made that kind. That is my theory or inference. The angle bar, I spoke of, which appears in the photograph, was about six inches wide and three-fourths of an inch thick, and about two and one-half feet on either side. It was bolted on each end on one of these I-beams and gradually came together, and was pitched right up against the end sill. I suppose it was to strengthen the car. Before the drawbar casting could fall out, the end sill would have to break and the angle bar would have to break, too, as it was bolted to the end sill. The air brakes would go on emergency and the momentum of the train might carry it 400 feet—according to the speed of the train and the condition of the brakes. I don't know how far from where it rested the steam shovel had left the track, but I noticed flange marks in the ties about 359 feet. There were two other cars behind the shovel car off the track, and one pair of trucks derailed. I cannot tell which car made the flange marks. The track was disturbed possibly 300 feet. Whatever distance the cars made was made by reason of momentum the train had before the break occurred. The old breaks in the end sill were so covered by the drawbar casting, I don't think an inspector could have seen it, with a reasonable inspection."

The roadmaster testified that he was repairing the track at the scene of wreck; that one rail was broken out of the track, badly bent up and warped to pieces. Practically torn loose from the ties, but fastened at one end. The disturbance was some three or four hundred feet. It was about the center of the disturbance. Forty-four ties were broken in the center. No curve in the track where the derailment occurred. "The vibration of the train could have caused it to break and by having so much space in there—44 inches of space—and the working and vibration on that end sill would, in my judgment, cause it to break on a pull. I never found that piece that came out of the end sill; I only found the casting and the space between. There were no bolts in the casting. I did not see the casting bolted on to the car at all."

James A. Burke, for the appellant, testified that the shovel was worth when shipped the sum of $4,000.

The verdict and judgment were for the appellee, and this appeal is duly prosecuted.

Other facts stated in the opinion.

Winchester & Martin, for appellant.

1. The court erred in giving instruction No. 2 for defendant. It assumes the fact that the shovel outfit was in a defective condition when delivered for transportation. It does more than "assume," as it states in so many words that it was in a *defective condition.* This was error, as announced by this court in many decisions.

2. It was also error to give instruction No. 3 for defendant. It was highly prejudicial and does not state the law correctly, (1) as it is not the law that in delivering the car to be transported on its own wheels, plaintiff warranted it to be in proper condition to be transported to destination on its own wheels. It was open for inspection and was inspected by two of defendant's employees regularly employed for the purpose. (2) It suggests that there were concealed or hidden defects by stating that defendant was under no duty to search for concealed defects. (3) The jury is not confined to the statements

in defendant's answer, "the coupling device on said shovel became detached from the end sill on account of the worn and defective condition it was in and as a result thereof said outfit was derailed * * * , and that the damage to the same resulting from said derailment was caused and brought about solely by inherent and latent defects existing in said equipment" (the coupling device), but the jury were told, "if you find there were concealed or hidden defects in any part of the steam shovel car described, and if you further find such defects were the sole and proximate cause of the derailment * * * the railway company would not be responsible therefor." The allegation is confined to the coupling device; the jury is turned into the field of inspection; * * * if you can find any hidden or concealed defects anywhere about the car, it may hinge a verdict on it.

3. It was error to give instruction No. 5 for defendant. There is not a word of testimony in the record to show on which end of the car that end sill that broke was located. It assumes facts not proved by any evidence whatever. The instruction also discusses the weight of the evidence and places undue emphasis on defendant's theory of the wreck, to which it calls attention of the jury. There is no evidence of any defect in the "iron end sill on the steam shovel" except as to two small cracks—one on the bottom. The jury were allowed to enter the field of speculation and conjecture. The instruction given on the court's own motion was also error. The plaintiff's instructions refused state the law correctly, and it was error to refuse them, and the verdict is contrary to and not supported by the evidence. 109 Ark. 206; 181 Fed. 91; C. C. A. 151. Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. See 76 Ark. 136; 98 Tex. 451; 139 N. C. 273; 56 Ill. App. 578; 190 Fed. 689; 45 U. S. (L. ed.) 361; 179 U. S. 658; 79 Ark. 437; 73 Tex. 304; 47 Minn. 384; 131 N. Y. 671.

W. F. Evans and *Warner, Hardin & Warner*, for appellee.

1. The verdict is supported by the evidence, and no errors were made by the court in giving and refusing instructions. On the whole case the verdict is right and the judgment should be affirmed. 130 Ark. 34; *Id.* 593; *Ib.*, 377. See also 134 Ark. 300. The testimony shows that defendant used due care and diligence in the inspection and transportation and defendant was not liable if the derailment and damage was caused by a defect in the end sill on the front end of the car which could not be discovered by an ordinary inspection. 118 Ark. 400; 117 *Id.* 45; *Id.* 269; *Ib.* 363; Hutch. on Carriers (3 ed.), § 334; 249 Fed. 308; 108 S. W. 150; 53 So. 832; Elliott on Railroads (2 ed.), § 1854.

There are exceptions to the rule as to the liability of railways as insurers of goods transported. 118 Ark. 400. See also 117 Ark. 451; 100 *Id.* 269; 99 *Id.* 363. The cases cited by appellant as to conjecture and speculation in the verdict of the jury are not in point. 107, 476; *Id.* 61.

2. The instructions given fairly presented the issues and correctly stated the law. 87 Ark. 281; 69 *Id.* 172; 87 *Id.* 531.

3. There was no error in refusing plaintiff's instructions. This court will not explore the record to find errors not stated nor pointed out in appellant's abstract and brief. Exceptions saved but not argued are treated as abandoned. 133 Ark. 250; *Id.* 372; 129 *Id.* 253.

4. No error in permitting the introduction of photographs in evidence. 85 Ark. 528; 111 *Id.* 83.

WOOD, J., (after stating the facts). One of the grounds of motion for new trial is that the verdict "is contrary to and not supported by the evidence."

Counsel for appellant, in both their brief and oral argument, strongly urge that the judgment be reversed, because there was no evidence to sustain the verdict, and because same was based only upon conjecture.

But, after a careful consideration of the facts which the testimony tended to prove, as above set forth, we have reached the conclusion that there was evidence to sustain the verdict. There was testimony that at the time the wreck occurred the train was making 20 to 25 miles an hour over the best track the company had, "just a little bit down grade, all new steel and on good ballast." The train was being operated in the ordinary manner. It was not proved by the appellant that there were any defects in the track or train. There was no evidence of negligence in the manner of the operation of the train. The appellee on the other hand proved by the undisputed evidence that there were two old breaks in the end sill, one from 4 to 6 inches long, and the other from 2 to 3 inches; that these cracks could not be discovered by the ordinary inspection which was made before the shovel car was received for shipment.

The appellee introduced evidence tending to prove that after the wreck occurred it was discovered that the end sill on the front end of the shovel car had pulled out; that a piece in the middle of the sill 38 inches long to which the coupler casting was attached had broken out on both sides and that the coupler casting had dropped down into the center of the track; that the two breaks in the sill, which caused the coupler casting to drop down, were on the line of the old cracks.

The conductor, who made an investigation of the cause of the wreck, said that he found that the drawbar casting of the steam shovel had come down between the rails and derailed the car. The assistant superintendent, who visited the scene of the wreck about two and a half hours after it occurred for the purpose of ascertaining its cause, says he "found the end sill of the steam shovel had broken out in the center, which permitted the drawbar casting to drop in the center of the track and that was what we determined caused the wreck."

Now these facts were sufficient to warrant the jury in finding that the cause of the wreck was old breaks in the end sill. The condition of the shovel car before and

just after the wreck was fully described by the witnesses and the condition of the track and the train are also fully described. Photographs were duly identified and exhibited showing the condition of the shovel car and witnesses demonstrated before the jury where the break was and without objection stated their conclusion as to how the wreck occurred.

Without discussing the evidence further, it suffices to say that the testimony was sufficient to justify the jury in finding that the proximate cause of the wreck was the undiscoverable defect in the shovel car. The proof being sufficient to warrant the jury in so finding, it cannot be said that its verdict was grounded merely upon conjecture.

Learned counsel for appellant cite among others the case of *Patten* v. *Texas Pacific R. R. Co.*, 179 U. S. 658. Syllabus 2 of the case is as follows: "Where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

We fully approve of that doctrine, but it is not applicable to the facts of this record. Here the appellee adduced evidence which, as we have seen, warranted the jury in concluding that the wreck was caused by the old breaks or defects in the end sill which could not be, and were not discoverable by the thorough inspection which was made by the appellee. If the appellant had shown that the appellee was negligent in the handling of the train or in failing to make a reasonable inspection or had shown that the track, rails, ties, or any of the train appliances were defective and as well calculated to have caused the injury, as the defective condition of the end sill, then there would be some reason for the application of the doctrine invoked by appellant's counsel. But in

none of the cases from our own court or other jurisdictions cited by appellant are the facts the same or similar to those we now have under review.

The court in substance instructed the jury that the appellee did not insure the safe transportation and delivery of the "steam shovel outfit" against damages resulting "from the defective condition the same was in when it was delivered to the appellee for shipment." That the appellee "was under no duty to search for concealed defects in the steam shovel."

It is contended that the instructions in this form assumed that the shovel car was in a defective condition. There was no specific objection raising the point here insisted upon by counsel for appellant, and, even if there had been, the instructions, when taken together, are not susceptible of that construction because in other instructions the court clearly left the issue for the jury to determine whether "there were concealed or hidden defects" in any part of the steam shovel car, described in this case, and, if so, whether or not such defects "were the sole and proximate cause of the derailment and damage resulting therefrom."

When the instructions to the jury are considered as a whole, we find no conflict or inconsistency in the charge. It was the duty of the appellant, if it conceived that this language of the charge was incorrect, to call the attention of the court specifically to the proposition which he now urges for reversal. Moreover, even if the instructions assumed that the steam shovel outfit was in a defective condition and that the defects were concealed, these facts were established by the uncontroverted evidence. The instruction, therefore, in the form given could not have been prejudicial to appellant, and the giving of it was not reversible error. *Pacific Mut. Ins. Co.* v. *Walker,* 67 Ark. 147-154; *St. L., I. M. & S. Ry. Co.* v. *Burrow,* 89 Ark. 178.

It is also manifest that the court, when the instructions are considered as a whole, did not intend to tell the jury that the damages to the steam shovel outfit resulted from the defective condition the same was in when it was

delivered to the appellee for shipment. An instruction in this form would have been on the weight of the evidence and inherently defective. The instructions, when read together, declared the law to be that the appellee would not be liable for damages resulting from the steam shovel outfit caused by its defective condition, and submitted to the jury to determine the issue as to whether or not the damages were caused by the defective condition or whether same resulted from some other cause. The court plainly told the jury in other instructions that the appellee would be liable unless the jury found that the damage was caused solely from a defective condition of the steam shovel outfit. The charge, as a whole, left the jury to determine whether or not there was a defective condition of the steam shovel outfit, and, if so, whether or not this condition was the sole cause of the damage.

Counsel criticise other instructions which we have considered and find that the charge as a whole furnished the jury a correct guide for their deliberations.

The record shows no reversible error, and the judgment is affirmed.

WINN v. EICKHOFF.

Opinion delivered June 16, 1919.

1. EJECTMENT—EXCEPTIONS TO DEED.—Under Kirby's Digest, section 2743, providing that exceptions to documentary evidence relied upon by either party shall be filed within three days after the opponent's pleading is filed, there is nothing which requires that the exceptions shall be passed upon before the trial.
2. SAME—EXCEPTION TO DEED.—Under the above section an exception properly speaking relates only to defects apparent on the face of the deed.
3. SAME—PRESUMPTION IN FAVOR OF LAND COMMISSIONER'S DEED.—The object of Kirby's Digest, section 4806, making the deeds of the State Land Commissioner *prima facie* evidence of title is to relieve the grantee and those holding under him from making proof until evidence is introduced tending to show that the deed conveyed no title.

4. EJECTMENT—SUFFICIENCY OF EXCEPTION.—Where the defendant in an ejectment suit bases his defense wholly upon the invalidity of the tax sale under which plaintiff claims, and alleges such invalidity in his answer, the answer will be held to be a substantial compliance with section 2743, Kirby's Digest, requiring exceptions to the documentary evidence of the plaintiff to be filed by the defendant.

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

STATEMENT OF FACTS.

This action was instituted by George Eickhoff against Oscar Winn to recover lots 5 and 6, block 1, in the city of Argenta.

Eickhoff alleged that he was the owner by virtue of a tax deed executed to him by the State of Arkansas on the 27th day of August, 1903; that the deed was based upon the forfeiture of the taxes for 1899. He also alleged that the lands were uninclosed and unimproved at and before the date of his deed and had been so unimproved until March 6, 1918, when Winn erected a wire fence around the lots. He alleged that he had paid the taxes on the lands continuously for all years since the date of his deed except the years of 1913 and 1914. These years the taxes were paid by Winn.

The deed of the State Land Commissioner of date 27th of August, 1903, attached to the complaint showed a conveyance from the State of the lots in controversy to Eickhoff, and recited that the lands were forfeited to the State for the non-payment of the taxes for the year 1899, and were sold to Eickhoff under the statute authorizing such sales.

Winn answered, admitting that he was in possession of the lots, and denied all the other material allegations of the complaint. He alleged that the tax sale under which Eickhoff claimed for the taxes of 1899 was void for the following reasons:

"*First.* Said lots were sold *en masse* and for a lump sum.

"*Second.* There was no warrant in the tax books for 1899 as delivered by the clerk of Pulaski County to the collector, authorizing said collector to collect taxes assessed and extended against said lands. Said lands were sold to the State of Arkansas for costs which were not properly chargeable and which were not authorized by law."

Winn also alleged that said lots for many years prior to the deed of the same from the State of Arkansas, have been cleared, enclosed and occupied by buildings; that for a number of years past they have been at different times enclosed, and have been in actual cultivation.

Winn prayed that the complaint of plaintiff be dismissed, and for all other and proper relief.

Eickhoff died on the 8th of July, 1918, and the cause was revived in the name of Carrie Eickhoff, executrix of his estate and in the name of his children. The deposition of Eickhoff was taken before his death and was introduced in evidence. He testified that he had paid the taxes for the years 1904-1912 inclusive, and the tax receipts were introduced to show such payment. His testimony also tended to prove that the lots in controversy were unenclosed and unimproved from 1892 until Winn built the fence enclosing the same.

There was other testimony corroborating the testimony of Eickhoff and tending to prove that the lots in controversy had not been enclosed or improved from the year 1892 until Winn built his fence enclosing the same in March, 1918.

Winn testified that he was the owner and in possession of the lots in constroversy; that he bought the lots from the original owner in 1913; that he paid the taxes on the lots for the years 1913, 1914, 1917, and had expended considerable money in improving the property.

Winn offered to introduce testimony to prove that Eickhiff's tax deed was void. He also offered to introduce certain records, stated that he wished to have the clerk to bring the record, saying: "I want to offer to introduce these."

The court replied: "Let the record show that he offered to introduce the records here attacking this tax title and the court denies the right to do it, and he saves his exceptions to the rulings of this court. The court is not saying that the tax title is valid, but so far as this case is concerned it is valid."

At the conclusion of the testimony the court instructed the jury as follows:

"Gentlemen of the jury: The rules of this court for expediting business require that all preliminary motions and pleadings be settled and the case ready for trial ten days before it is called. This, together with the fact that no exceptions were filed or called to the attention of the court, nor taken up and disposed of before the date of the trial, and the further fact that there is no testimony in this case to show that the land was improved or enclosed during the time that Eickhoff was paying taxes on it, but all the testimony is to the effect that it was uninclosed and unimproved during that period, therefore, as to possession you will find for the plaintiffs." Appellant duly excepted to the ruling of the court.

The verdict and judgment were in favor of the appellee, and from the judgment is this appeal.

Oscar H. Winn, for appellant.

Eickhoff's deed was regular on its face and *prima facie* title only, but was void because (1) the lots were sold for taxes *en masse* and for a lump sum and for costs not properly chargeable against them and not authorized by law. The court erred in excluding defendant's offered testimony of the county clerk and the records of the county clerk's office to prove that the deed was void. Kirby's Digest, § 2743; 81 Ark. 79; Kirby's Digest, § 4806. The irregularity in the tax sale did not appear on the face of plaintiff's deed, and defendant had the right to prove the irregularities in the tax sale and that it was void. The lots were not wild and unimproved, and Kirby's Digest, § 5057, does not apply. See 104 Ark. 626; 80 *Id.* 435; 81 *Id.* 258.

Will G. Akers and *J. C. Marshall,* for appellee.

All defects in a tax deed must be tried by the record and by the court. A tax deed is only *prima facie* evidence of title and is not required to contain recitals making the deed valid. 30 Ark. 732; 43 *Id.* 543; 1 Dana (Ky.) 6; 94 Ark. 460.

The court properly refused to admit evidence to sustain the exceptions to Eickhoff's deed. Kirby's Digest, § 1324; 3 Cyc. 335; 35 Pa. Sup. Ct. 467; 84 U. S. 672. See also 38 Cyc. 1332. Appellant's offers of proof were wholly insufficient. 18 Ark. 732; 80 *Id.* 435. The lots were wild and unimproved and appellant's title was never ripened or validated by possession or payment of taxes for the time required by law. Cases *supra* cited by appellant and appellee. 80 Ark. 435; 81 *Id.* 258; 104 *Id.* 624; 95 *Id.* 438; 30 *Id.* 732; 38 Cyc. 1332; 1 Dana (Ky.) 6; 94 Ark. 560; 7 *Id.* 424; 18 *Id.* 423; 13 *Id.* 242; 15 *Id.* 331; 21 *Id.* 370; 35 *Id.* 505, and many others. Upon the whole record the judgment is right. *Supra.*

WOOD, J., (after stating the facts). The first question presented is whether or not the court erred in refusing to allow the appellant to introduce records attacking the tax title and whether or not the court erred in instructing the jury as above set forth. Section 2743 of Kirby's Digest is as follows:

"The defendant in his answer shall set forth exceptions to any of said documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiff shall in like manner, within three days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the court, and shall be sustained or overruled, as the law may require; and if any exception is sustained to any such evidence the same shall not be used on the trial, unless the defect for which the exception is taken is covered by amendment."

The appellant complied with the above statute by setting forth his exceptions to the deed of the State Land Commissioner. There is nothing in the statute which requires that the exceptions to the documentary evidence shall be passed upon before the trial.

Section 4806 of Kirby's Digest provides that the deed of the State Land Commissioner shall be *prima facie* evidence of title to the purchaser. Section 4807 of Kirby's Digest provides that "such deeds shall be received as evidence in any court in the State."

Strictly speaking, an exception proper to a deed relates only to defects apparent on the face of the deed. See *Ward* v. *Sturdivant,* 81 Ark. 79.

The object of our law making the deeds of the State Land Commissioner *prima facie* evidence of title and requiring such deeds to be received as evidence in any court in the State is "to relieve the grantee and those holding under him from making proof until evidence is introduced showing or tending to show that the deed conveyed no title. *Scott* v. *Mills,* 49 Ark. 266-76.

Under the comparatively recent case of *Wolf and Bailey* v. *Phillips,* 107 Ark. 374, we held (quoting syllabus): "When plaintiff, in an ejectment suit, bases his right of recovery wholly upon the invalidity of the tax sale under which the defendant claims, and alleges such invalidity in his complaint, the allegations continue to be a part of the pleadings after the answer is filed, and the complaint will be held to be a substantial compliance with section 2743 of Kirby's Digest."

The same rule will apply to an answer of a defendant which alleges the invalidity of a deed upon which a plaintiff bases his source of title.

The pleadings in this form raise an issue which call for the introduction of evidence and the proper time and place to object to evidence offered, when such is the issue, is at the trial. The court, therefore, could not by any rule for the dispatch of its business deprive the appellant of the right to introduce the testimony at the trial to prove that the appellee's deed was void. The very

issue involved under the pleadings was whether or not the title was vested in appellees' decedent under the deed of the State Land Commissioner. This issue could not be disposed of as a preliminary one in advance of the trial.

It follows that the court erred in excluding the evidence offered by the appellant.

But the appellees contend that the undisputed evidence proves that the lots in controversy were unimproved and uninclosed and that Eickhoff acquired title thereto under the act of March 18, 1899 (section 5057 of Kirby's Digest), by the payment of the taxes for seven consecutive years under his deed which was color of title.

Whether or not city lots come within the purview of the above statute, we need not and do not here decide. For, if it be conceded that such lots were in contemplation of the Legislature when it passed the act, it was a question for the jury, as we view the evidence, whether or not the lots were unimproved and unenclosed. We refrain from setting out and discussing in detail the evidence on this issue and from expressing any opinion upon its weight, for the reason that the case must be remanded for a new trial.

Suffice it to say, the court was not warranted in assuming as a matter of law that the undisputed evidence proved that the lands at the time Eickhoff obtanied his deed were unimproved and remained so during the seven consecutive years that he paid the taxes.

For the errors in excluding the records offered by the appellant "attacking this tax title" and in instructing the jury to find for the plaintiffs, appellees, as to possession, the judgment is reversed and the cause will be remanded for a new trial.

MANWARING v. FARMERS' BANK OF COMMERCE.

Opinion delivered June 16, 1919.

1. VENDOR AND PURCHASER—EFFECT OF GIVING TITLE BOND.—Where the owner of land sells it to another and executes a bond for title, the effect of the contract is to create a mortgage upon the land in favor of the vendor to secure the purchase money notes; and when the vendor transfers the notes to another, the lien passes to the transferee.
2. SAME—TRANSFER OF PURCHASE NOTES—EFFECT OF RECONVEYANCE TO VENDOR.—Where a vendor transferred one of the purchase money notes to a third person and subsequently accepted a reconveyance from the vendee, and thereafter mortgaged the land to a fourth person, the vendee will be liable to the third person on the note held by him.

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

STATEMENT OF FACTS.

This is a bill in equity filed by the assignee of purchase money notes given to a vendor under an executory contract of sale to subject the estate to the payment of his debt. The facts are as follows:

On the 27th day of July, 1908, W. E. Ward and Lucy C. Ward, his wife, executed a bond for title to J. T. Manwaring to 160 acres of land in Craighead County, Arkansas. The purchase price was $4,000, evidenced by two promissory notes of even date with the bond for title, both due on or before the first day of December, 1919, one note being for $3,000 and the other for $1,000. W. E. Ward and wife, Lucy C. Ward, bound themselves to convey the premises with warranty of title to J. T. Manwaring upon the payment of the notes when they became due. On the 29th day of October, 1910, W. E. Ward became indebted to the Bank of Benton in the sum of $1,160 and executed to it his promissory note for that sum. At the same time he assigned and transferred as collateral security therefor to the bank the note of J. T. Manwaring for $1,000 given in part payment of the purchase price of the land as above set forth. Payments were made on the note of Ward to the bank until the 4th day of Febru-

ary, 1916, which reduced it to the sum of $297.40 and on the last named date Ward executed to the bank a new note for that sum in lieu of the old one. While said note of J. T. Manwaring to W. E. Ward for $1,000 was in possession of the bank as collateral security for the amount which Ward owed the bank, J. T. Manwaring executed a deed to said W. E. Ward reconveying said land to him. In a short time thereafter W. E. Ward and Lucy C. Ward, his wife, executed to the American Trust Company their mortgage on said land to secure the payment of $2,500 and this mortgage was duly filed for record. The American Trust Company transferred and assigned its mortgage to Gertrude M. Sowel.

On the 6th day of December, 1916, the said W. E. Ward and Lucy C. Ward conveyed the land to W. A. Cope by a warranty deed which is duly recorded. Cope is now in possession of said land, and claims to be the owner thereof. W. E. Ward, Lucy C. Ward, the American Trust Company, Gertrude M. Sowel, and W. A. Cope, were all made defendants to the suit by the bank to foreclose its vendor's lien on said land.

On the 17th day of December, 1911, W. E. Ward borrowed $1,700 from the Farmers Bank of Commerce and executed his note therefor to the bank. Ward transferred and assigned to the bank as collateral security for the amount he owed it, the note of J. T. Manwaring to himself for $3,000 given for the purchase price of the 160 acres of land which he had contracted to sell Manwaring. While this note was in the possession of the bank as collateral security for the amount Ward owed the bank, Manwaring executed a deed to Ward reconveying to him the lands in controversy. Ward also subsequently executed a mortgage to the American Trust Company to secure it in the sum of $2,500 which he owed it. The American Trust Company transferred and assigned the note and mortgage executed to it by W. E. Ward and Lucy C. Ward, his wife, to Gertrude M. Sowel. W. E. Ward and wife then conveyed the land by warranty deed to W. A. Cope. W. E. Ward and Lucy C. Ward, his wife, the

American Trust Company, Gertrude M. Sowel and W. A. Cope were all made defendants to the suit by the Farmers Bank of Commerce to foreclose its vendor's lien on said land.

The chancellor found that the assignment of the purchase money notes to the banks as collateral security for the amounts due respectively by Ward operated as a transfer of the vendor's lien; that the attempt to satisfy the vendor's lien by the reconveyance of Manwaring to Ward did not in any way impair the lien of the banks which held the purchase money notes as collateral security and that the lien of said banks was superior to the lien of the mortgage transferred by the American Trust Company to Gertrude M. Sowel and was, also, superior to any right of W. A. Cope and that J. T. Manwaring was liable to the banks for the respective amounts due them.

It was therefore decreed that the banks had a superior lien to any of the defendants on the land in question, and that J. T. Manwaring be held primarily liable for the amount of the indebtedness due the banks. The decree was entered of record October 16, 1918, and a sale of the property was held in abeyance until the first day of December, 1919, the date of the maturity of the notes of Manwaring to Ward given for the purchase price of the land.

The defendant, J. T. Manwaring, alone has appealed.

H. M. Mayes, for appellant.

A bond for title or agreement to sell land, is not a conveyance — is wholly executory — though it contains the words "grant, bargain and sell," and produces no effect upon the title or estate of the parties and creates no lien or charge on the land itself. 1 Bouvier Law Dict. (Rawles' 3rd Rev.), p. 1151; 32 Pa. 287; 37 *Id.* 201; 78 Am. Dec. 414; 35 W. Va. 463; 14 S. E. 249; 2 Blackst. Com., § 443. The title does not pass and it is not even color of title; it is only an executory contract to make

title in the future upon performance of certain conditions. 67 Ark. 184; 47 *Id.* 528; 18 Howard, 56; 50 Ark. 484. Our court clearly distinguishes as to the legal effect of notes hypothecated on a bond for title and a deed. 44 Ark. 192. See also 21 *Id.* 235; 23 *Id.* 639; 38 *Id.* 127. If the title fails or cannot be made, the consideration fails and non-fulfillment of the conditions of the bond is sufficient defense to a suit on the purchase money notes. 60 Ark. 43; 2 Warville on Vendors, etc., 922; 11 Ark. 58; 21 *Id.* 239; 51 *Id.* 333.

Appellant was never in default and no action would lie against him until he either defaulted the payment of interest or assessments or principal, which was not due until December 1, 1919, but here the vendor, the Wards, had accepted a reconveyance from Manwaring and had transferred their interest to a subsequent purchaser, and therefore the vendor would not be entitled to maintain an action against the original vendor, the obligation having been canceled and the bond for title being an executory contract and placed of record, the banks now seeking to enforce liens accepted these notes with notice. 39 Ark. 307; 7 *Id.* 208. The Bank of Benton is thus barred of any relief against Ward. The Farmers Bank was also affected with notice and cannot recover. The demurrers should have been sustained and the action dismissed. Cases *supra.*

Hawthorne & Hawthorne and *D. K. Hawthorne,* for appellees.

Where land is sold and notes for the purchase money and bond for title given, the vendor is a trustee holding the legal title for the vendee. 71 Ark. 164. See also 84 *Id.* 41; *Id.* 160-8; 49 *Id.* 468; 128 *Id.* 462; 60 *Id.* 90. The maker of a negotiable note takes the risk of payment of it to the payee and is not discharged from his obligations to the holder thereof after it is transferred. 115 Ark. 366. Where land is sold with a recital in the conveyance that notes were given for the purchase money, all subsequent purchasers take subject to the lien of any inno-

cent holder of the notes for value received, notwithstanding any attempted release of the lien before the assignment of the notes, and the land here could be sold, and the decree below is in all things correct and should be affirmed. Cases *supra.*

HART, J., (after stating the facts). The decision of the chancellor was correct. It is well settled in this State that where the owner sells land to another and executes a bond for title, the effect of the contract is to create a mortgage upon the land in favor of the vendor to secure the purchase money subject to all the incidents of a mortgage as effectually as if the vendor had conveyed the land by absolute deed to the vendee, and had taken a mortgage back to secure the purchase price. It is equally well settled that, upon the failure of the vendee to pay in accordance with the terms of the contract, the vendor may proceed by a bill in equity to foreclose the equity of redemption and sell the lands for the payment of the debt. *Higgs* v. *Smith,* 100 Ark. 543, and cases cited.

The lien of Ward upon the 160 acres of land in question to secure the purchase money notes executed to him by Manwaring, was in the nature of a mortgage, and when he transferred the notes to the Bank of Benton and the Farmers Bank of Commerce to secure the amounts which he had borrowed from them, the lien passed with them and the banks had the right, by subrogation, to foreclose the lien. *Martin* v. *O'Bannon,* 35 Ark. 62, and *Calhoun* v. *Ainsworth,* 118 Ark. 316. These principles are conceded; but counsel for Manwaring claims that the vendor's lien on the land in question was terminated because Ward had by a deed from Manwaring taken back the land. It is claimed that the effect of the reconveyance was to extinguish the vendor's lien on the land.

It is true the general rule is that where one having a vendor's lien on land becomes the owner of both the legal and equitable title by reconveyance, the lien is extinguished, still there are exceptions to the rule, and this is one of them. The purchase money notes given by Manwaring to Ward were transferred before their maturity

respectively to the Bank of Benton and the Farmers Bank of Commerce as collateral security for an amount of money which Ward had borrowed from each bank. While Ward was still indebted to each bank and the notes were in the possession of the banks as collateral security for his indebtedness, Manwaring reconveyed the land to Ward and attempted to cancel the notes which he had executed to Ward for the purchase price of the land. This he could not do. So far as the banks were concerned there could be no merger of the legal and equitable title in Ward by a reconveyance of the land to him by Manwaring. Manwaring knew that the notes given by him to Ward for the purchase price of the land were outstanding and not yet due at the time he reconveyed the land to Ward. Therefore, in order to protect himself, he should have required Ward to have surrendered the notes to him before or at the time he executed the deed to Ward. *Driver* v. *Lacer,* 124 Ark. 150. Manwaring alone has appealed, and it is unnecessary to consider the correctness of the decision of the chancellor as to the other defendants.

It follows that the decree must be affirmed.

BARKHEIMER v. LOCKHART.

Opinion delivered June 16, 1919.

1. INSANE PERSONS—CONCLUSIVENESS OF ADJUDICATION.—While an adjudication of insanity is not conclusive of insanity in other proceedings in which it may be an issue, it is *prima facie* determinative.
2. SAME—CONVEYANCE—WHO MAY SET ASIDE.—The deed of an insane person may be avoided at the suit of any person who was prejudiced by its execution.
3. FRAUDULENT CONVEYANCES — PERSONS ENTITLED TO ATTACK.—A person having a claim for damages is a "creditor" within the protection of the statute against fraudulent conveyances.
4. SAME—JURISDICTION OF CHANCERY.—Equity has jurisdiction to uncover fraudulent conveyances in order that a creditor's judgment may be enforced.

Appeal from Ouachita Chancery Court; *Thomas I. Thornton,* Special Chancellor; reversed.

R. K. Mason and *Powell & Smead,* for appellant.

The undisputed evidence shows that Lockhart was insane at the time of the execution of the deeds and they are void and the property subject to plaintiff's claim. 106 Ark. 230. Plaintiff was a creditor within the meaning of our statutes when the deeds were executed. It only remained for the jury to ascertain and find her damages. The deeds made Lockhart insolvent. The deeds were also void, being voluntary and in fraud of creditors. 56 Ark. 73; 50 *Id.* 46; 68 *Id.* 162; 86 *Id.* 225; 73 *Id.* 174; 91 *Id.* 399; 74 *Id.* 161; 105 *Id.* 90; 106 *Id.* 230; 108 *Id.* 164. The alleged consideration was neither a good nor a valuable one. See case of 108 Ark. 164; 38 Ill. App. 180. The decree should be reversed with directions to grant the relief prayed, with costs and attorney' fees.

Gaughan & Sifford, for appellees.

1. Appellant must prove that the conveyances were fraudulent and voluntary, and the creditors were hindered and delayed. She has not done so. The undertaking by Mrs. Lockhart was a valuable consideration. 4 Words and Phrases, 1132; 101 Ark. 28.

2. It was not proved that fraud was intended. 110 Ark. 335, 345; 99 *Id.* 45; 91 *Id.* 218; 39 *Id.* 571; 55 *Id.* 59. See also 22 *Id.* 184. Each case must rest upon its own circumstances and no general rule can be laid down.

Here the consideration was adequate, but mere inadequacy of price or consideration is not sufficient to show that a conveyance is fraudulent as to the grantee. 92 Ark. 248; 118 *Id.* 237.

3. As to defendant Meek, the lot was purchased long before the assault and was conveyed to Mrs. Lockhart with the view of completing the gift, as well as for other purposes, which made up the consideration for the conveyances. There is no proof of actual fraud and no attorneys' fees should be allowed. The decree should be affirmed, as there are no errors.

SMITH, J. On the 2nd day of August, 1915, J. D. Lockhart, a druggist of Camden, Arkansas, committed rape upon the person of Vera Barkheimer, a white girl nine years of age. On the same day Lockhart was arrested upon a warrant charging him with the commission of the crime and placed in the jail, where he remained until taken to the State Hospital for Nervous Diseases several days later.

On August 4, 1915, two days after his arrest and while still in jail and after he had been adjudged insane, Lockhart executed three deeds to his wife, thereby conveying to her two lots in the business section of the city of Camden, and his homestead in that city, which was all the real estate owned by him. Each of these deeds recited a consideration of five dollars and love and affection. It was admitted that the five dollars was not paid, but Mrs. Lockhart testified that the real consideration for the deeds was the agreement by her to pay the expense of her husband's defense and to assume the support of their three minor children. These children were 19, 17 and 14 years of age, respectively. Mrs. Lockhart testified that she had discharged the obligations thus assumed by paying attorney's fees in both the criminal prosecution and in the suit for damages amounting to something over a thousand dollars, and that she had expended twelve hundred dollars a year for the support of the children, and that sum would be required for their continued support during their minority, and that the value of the property conveyed to her by her husband would be thus more than consumed, and that her husband owed no debts at the time of his arrest. The testimony is conflicting as to the value of these lots, it being placed as high as five thousand dollars by some of the witnesses and as low as three thousand by others at the time the deeds were made. In addition to this property Lockhart had two hundred dollars in money and a stock of drugs worth fifteen hundred dollars. This stock was disposed of by sale at retail and finally closed out before the recovery of the judgment for damages.

A suit for damages was begun on January 10, 1916, which resulted in a judgment on October 26, 1917, for $750. On November 8, 1917, Mrs. Lockhart conveyed one of the lots to an attorney representing her husband, who made no claim of being an innocent purchaser. Execution was issued on the judgment, but was returned February 5, 1918, *nulla bona,* whereupon this suit was brought to uncover the property deeded by Lockhart to his wife.

There was testimony to the effect that explanation was made to Lockhart, which he appeared to understand, at the time of the execution of the deeds, that his wife, in consideration therefor, had agreed to assume the expense of his defense and the support of his children, and that he executed the deeds for these considerations, and that Mrs. Lockhart did not know when she assumed these obligations that any civil liability could be asserted against her husband because of this tort. There was other testimony, however, which we do not regard as essential to set out, that the deeds were prepared by a notary under the direction of Mrs. Lockhart's brother.

Lockhart had been adjudged insane at the time of the execution of the deeds, and while this adjudication is not conclusive of insanity in all other proceedings in which it may be an issue, it is *prima facie* determinative, and we think the testimony here does not overcome the presumption arising from that adjudication. *Eagle* v. *Peterson,* 136 Ark. 72.

The deed of Lockhart was not void, but was voidable at the suit of any creditor who was prejudiced by its execution. *Cox* v. *Gress,* 51 Ark. 224.

The plaintiff in this damage suit was a creditor (*Papan* v. *Nahay,* 106 Ark. 230), and when her demand had been reduced to judgment and became enforceable as such, no property could be found upon which the execution could be levied. It is true that at the time of the execution of the conveyances here sought to be set aside, Lockhart did own a drugstore of sufficient value to satisfy the judgment subsequently obtained. But, before the judgment was obtained, Mrs. Lockhart had caused

this stock of goods to be sold and had used the proceeds of the sale in the defense of the suits against her husband and in support of her children, these being the obligations assumed by her as a consideration for the deeds themselves.

It is decisive of this case to say that a judgment creditor's right to enforce the judgment will be defeated if these voidable deeds are permitted to stand, and it is, therefore, a proper subject of chancery jurisdiction that these voidable conveyances should be uncovered, to the end that the enforcement of this demand may not be defeated. *Peters* v. *Townsend,* 93 Ark. 103. The decree of the court below will, therefore, be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

PERRY *v.* STATE.

Opinion delivered June 16, 1919.

1. STATUTES—PRESUMPTION OF REGULARITY.—That an act of the Legislature was signed by the Governor and deposited with the Secretary of State raises the presumption that every requirement was complied with, unless the contrary appears from the record of the Legislature.
2. SAME—PRESUMPTION.—Where the Senate journal shows that a Senate bill was amended in the Senate, but the bill as approved by the Governor did not contain such amendment, it will be presumed, in the absence of any showing to the contrary in the Senate record, that the Senate receded from the amendment, and that the bill passed by the Senate and House was the bill approved by the Governor.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. E. L. Johnson,* Judge; affirmed.

W. J. Driver, for appellant.

The bill passed by both Houses is not the bill signed by the Governor. The records are conclusive of this. The courts are the judges and must determine whether the act ever became a law. 103 Ark. 48. See also 19 Ark. 256; 44 *Id.* 548; 90 *Id.* 176; 32 *Id.* 414; 34 *Id.* 263; 6 Wall.

499; 40 *Id.* 221; 32 *Id.* 496; 72 *Id.* 565; 41 *Id.* 475; 33 *Id.* 17; 40 *Id.* 200; 41 *Id.* 475; Cooley Const. Lim., 135; 49 *Id* 333. There is a variance between the bill passed and the one signed. Section 6 provides that the act shall not be effective until voted on at a special election had and a majority of votes cast for its adoption. In enrolling the act certain provisions were left out and it was so signed by the Governor. 7 Wyo. 166. See Const., art. 5, § 12; 51 Am. Dec. 611; 47 Am. St. 821; 72 *Id.* 928; 75 *Id.* 889; Const., art. 5, § 22; 110 Ark. 269; 90 *Id.* 174. See also 29 Ark. 266; 32 *Id.* 496; 33 *Id.* 17; 61 *Id.* 109. The act is unconstitutional and void. Cases *supra;* 49 Ark. 325; 71 *Id.* 527.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

The bill passed was the same bill signed by the Governor; the bill and its indorsements, as well as the records and journals of both Houses, show this. 40 Ark. 200; 131 *Id.* 295; 27 *Id.* 278. See also 131 *Id.* 294; 90 *Id.* 174; 110 *Id.* 269. The judgment below is correct and it should be affirmed.

C. M. Buck and *P. A. Lasley,* of counsel for appellee, join in the brief for appellee, contending that the judgment is right and should be affirmed. Citing cases *supra.*

HUMPHREYS, J. Appellant was indicted, tried and convicted, in the Chickasawba District of the Mississippi Circuit Court, for permitting a cow to run at large contrary to the provisions of Act No. 154, Acts of the General Assembly of the State of Arkansas of 1919, approved March 1, 1919.

Appellant defended on the ground that the act, as approved by the Governor, was not the same act passed by the two Houses of the Legislature.

The cause was submitted to the court, sitting as a jury, upon the following agreed statement of facts:

"That the defendant (appellant) John Perry did, on the first day of April, 1919, knowingly and intentionally turn out and permit to run at large in that part of the

Chickasawba District of Mississippi County, Arkansas, lying east of Little River, one cow, in violation of the terms of Act 154 of the General Assembly of Arkansas, approved March 1, 1919.

"It is further agreed that for the purpose of testing the validity of said act, this cause shall be submitted to the court, a jury trial being waived, that all records of both Houses of the General Assembly shall be considered as offered in evidence, and that the record of journal entries of the Senate, certified to by Ira C. Langley, secretary of said body, is a true and correct copy of the journal of said body; also the records certified to by H. G. Combs, chief clerk of the House of Representatives, is a true and correct copy of said journal record of said House; also that all of said records, including the original enrolled bill as now filed with the Secretary of State and the original bill as introduced, together with the indorsements thereon, are hereby made a part of the record of this case."

The original bill, the act as signed, the journals and indorsements on the orignal bill were introduced in evidence under the terms of the stipulation.

The court sustained the validity of the bill, found the defendant guilty, assessed his fine at $5 and rendered judgment in accordance with the findings, from which findings and judgment, an appeal has been duly prosecuted to this court.

It is insisted by appellant that the bill passed by the Legislature provided for an election and a majority vote of the electors in the district before the bill should become effective, and that the bill approved by the Governor and filed in the Secretary of State's office does not contain such provision; in other words, that the bill signed by the Governor and filed in the Secretary of State's office was not the bill passed by both Houses of the Legislature. Act No. 154, Acts 1919, is the same act as Senate Bill No. 64. The challenged act and Senate Bill No. 64 are exactly alike. It appears, however, from the entries in the Senate journal and indorsements on the original

bill that the following amendment was adopted and ordered engrossed on January 21, 1919, and reported as engrossed on January 23, 1919, to-wit:

"Amend section 6 of Senate Bill No. 64 by adding at the close of section 6, the following: Provided, this act shall not become effective until it is voted on at a special election to be called by the county judge of said county, and receives the votes of the majority of those voting at said special election. And said special election shall be called by the county judge at least thirty days prior to the first day of September, 1919, and notice of said special election shall be published in some newspaper in each district in said county for at least thirty days prior to the date fixed by said county judge for holding said election.

"And provided further, that the expense of holding said election shall be paid out of the general fund of said county, and the judges and clerks who shall hold said election shall be selected by the sheriff, circuit clerk and county judge of said county."

It also appears by an entry in the Senate journal and an indorsement on the original bill that the bill was read the third time and passed on January 24, 1919. It is argued from these entries on the journal and indorsements on the bill that the engrossed bill, incorporating the amendment aforesaid, was the bill that passed the Senate and House, and that the bill in its original form, as approved and signed by the Governor, was not the same bill passed by the two Houses of the Legislature. This conclusion would be true if the Constitution of the State required that every step in the course of the passage of bills or amendments thereto should be recorded in the journals or indorsed on the bills. The Constitution, however, makes no such exacting requirements. *Vinsant* v. *Knox,* 27 Ark. 266; *Chicot County* v. *Davies,* 40 Ark. 200; *Harrington* v. *White,* 131 Ark. 291. This court has adopted the following rule with reference to presumptions in favor of the validity of bills which have been signed by the Governor and deposited in the office of the Secrtary of State:

"An act of the Legislature signed by the Governor and deposited with the Secretary of the State raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the record of the General Assembly." *Harrington* v. *White,* 131 Ark. 291. In support of the rule thus announced, the court in that case cited *Chicot County* v. *Davies,* 40 Ark. 200; *State* v. *Corbett,* 61 Ark. 226; *State* v. *Bowman,* 90 Ark. 174; *Mechanics Bldg. & Loan Assn.* v. *Coffman,* 110 Ark. 269. It is true that the record in the instant case affirmatively shows that the amendment in question was offered, adopted and ordered engrossed on January 21, 1919, and that on January 23, 1919, the bill was reported "correctly engrossed." The next entry in the journal and indorsement on the bill is that it was read a third time and passed on January 24, 1919. It does not appear affirmatively that the bill, as engrossed, was read a third time and passed. The indorsement appears on the original bill and not on an engrossed bill. After being engrossed, it was within the province and power of the Senate to have ordered the bill placed back on its second reading for amendment and to have receded from the amendment engrossed into the bill, or to have stricken the amendment from the bill, and, should such course have been taken, it would not have been necessary to its validity to have entered these steps, concerning the amendment, on the journal. The silence of the record in this regard would not conflict with the presumption that such course was pursued by the Senate. The silence of a legislative journal on matters not required to be entered on the journal can not conflict with the presumption of the regularity of the passage of a bill. It is only in matters where the journal does speak, or where it is required to speak, that it could conflict with such presumption. In the case of *Harrington* v. *White,* 131 Ark. 291, this court indulged the presumption of the regularity of the passage of a bill where the House and Senate journals were in conflict as to the inclusion of four counties in an exemption clause contained therein. The House

journal recited that the four counties in question were included in the exemption by a Senate amendment. The Senate journal was silent on this point. There was no constitutional requirement that the amendment including the four counties should be entered on the journal, and the court said in this case: "The mere silence of the journal of the Senate as to the inclusion of certain counties in the amendment to the exemption clause is not sufficient to overcome the presumption of regularity;" * * * meaning, of course, the presumption of regularity in the passage of the bill growing out of the fact that it had been signed by the Governor and deposited with the Secretary of State. Likewise, this court presumed the regularity of the passage of a bill, on account of it being signed by the Governor and deposited with the Secretary of State, where the journal showed that an amendment had been adopted in the House, which conflicted with the enrolled bill approved by the Governor. The presumption of the regularity of the passage of the bill was indulged on the theory that, before the final passage of the bill, the House receded from its amendment shown by the journal to have been adopted. In so holding, the court called attention to the fact that the Constitution of 1868 did not require amendments to be entered on the journals, and took occasion to say, in reference to journals and journal entries, that: "While the journals furnish evidence of legislative proceedings, so far as they go, yet courts are not bound to hold that nothing was done except what appears therein. Their silence is conclusive only in those matters which the Constitution requires them affirmatively to show the action taken." The journals in the instant case only go so far as to show that the amendment was adopted and engrossed in the bill. It does not affirmatively appear that the engrossed bill passed, or that the Senate did not recede from the amendment. Under the rule announced in the cases referred to, the court must indulge the presumption that the Senate did recede from the amendment and, for that reason, the amendment

adopted in the Senate did not appear in the enrolled bill. As suggested by the Attorney General, the Senate may have discovered, after the amendment was adopted, that, if added to section 6, as provided in the amendment offered and adopted, the whole section would be rendered insensible in meaning. Had the amendment been added at the end of section 6, the first part of the section would then have provided for the bill to go into effect without an election, and the latter part of the section would have provided for it not to go into effect until a majority of the electors in the district had voted in favor of the passage of the bill.

No error appearing, the judgment is affirmed.

SMITH, J., (dissenting). In the brief filed on behalf of the State it is said that the case of *Chicot County* v. *Davies,* 40 Ark. 200, is identical with the instant case and that the act under which appellant was convicted was upheld by the court below, as having been properly passed, upon the authority of the first mentioned case. The majority opinion cites that case and quotes from the case of *Harrington* v. *White,* 131 Ark. 291, and it is evident that the majority has relied upon these two cases as being decisive of the particular point which, according to my opinion, makes the act invalid.

But there is a very important difference between the facts as recited in the case of *Chicot County* v. *Davies* and the instant case. It is true that the House journal in the *Chicot County* v. *Davies* case showed the adoption of the amendment; and it is also true that the bill as approved by the Governor did not include the amendment adopted by the House, and the court, therefore, indulged the presumption in that case that the House had receded from its amendment before passing the bill. That presumption was properly indulged in that case because there was no showing whatever that the bill had been engrossed so as to include the amendment before it was placed on its final passage. The bill there was a House bill and it was, therefore, subject to engrossment in the

House—it having originated there. Not having been engrossed, it was proper in that case to indulge the presumption that the House had receded from its amendment (otherwise it would have engrossed the bill), and that the bill transmitted to the Senate was the bill as passed by the House.

That presumption cannot be indulged here for the reason that every record offered in evidence, including the journal of the Senate, shows that the bill was engrossed. We judicially know what it means to engross a bill; we judicially know that in both the House and the Senate there is a standing and privileged committee whose duty it is to see that bills originating in the respective houses, and amended therein, are engrossed before being placed upon their final passage. It is the business of these committees to see that these amendments are properly fitted into the bills which they amend so that when placed upon third reading and final passage the bills may read as amended. It is the business of the committees, not only to discharge this duty, but to report to their respective houses when they have done so, to the end that it may be known that the bill is ready for its final reading. And the engrossing committees are privileged committees because it is provided by the rules that "they shall have leave to sit and report at any time."

That duty was discharged here and a formal report to that effect was made, and this report meant, and was intended to mean, and could only mean, that the bill was ready for its third and final reading and when so read would include the amendment which had been adopted. This report showing the engrossment of the bill was made on January 23, and on January 24 the bill was read the third time and passed.

Of course, it is, and must be, the law that all presumptions are to be indulged in favor of the validity of an enrolled bill which the Governor has signed; but these presumptions can not overcome affirmative, undisputed, uncontradicted official records which appear to have been properly made and kept and which show that the bill

approved by the Governor is not the bill passed by the Legislature.

In my opinion the case of *Harrington* v. *White, supra,* gives no support to the majority opinion, but, upon the contrary, supports the views here expressed. There a conflict between the journals of the two houses appeared; but the opinion in that case recites the facts to be that the amendments were engrossed into the bill in the House, that being the body in which the bill originated, and that the bill as enrolled and approved by the Governor was identical with the bill as engrossed by the House engrossing committee. In this case of *Harrington* v. *White, supra,* the bill had been engrossed by the House engrossing committee; while in the instant case the bill had been engrossed by the Senate committee, the bill being engrossed in each instance by the engrossing committee of the house in which it had originated. We, therefore, indulged the presumption in the case of *Harrington* v. *White,* that the House engrossing committee had properly discharged its duty in the engrossment of the bill; but in the instant case we do not have to presume that the engrossing committee did its duty. We have an affirmative, uncontradicted recital of the Senate journal to that effect, and if we are to give faith and credit to records, which note every step taken in the enactment of this bill into a law, it must appear that the bill approved by the Governor is not the one passed by the Legislature.

The *ad hominem* argument is made that the bill approved by the Governor is more sensible and less contradictory than the engrossed bill would have been. But no such test should be applied for the purpose of overcoming the recitals of unambiguous, uncontradicted official records. And in my opinion this is especially true when we take into account the notorious laxity of the Legislature in passing local bills, and we should not tear down the safeguards of the law thrown around legislation of that character.

I dissent, therefore, from the finding of the majority that the act under which appellant was convicted was properly passed.

SALMON v. BOYER.

Opinion delivered June 16, 1919.

1. TRIAL — INSTRUCTION — ASSUMPTION OF FACT.—An instruction which assumed the ownership of land to be undisputed when it was in dispute was erroneous.
2. SAME—INSTRUCTION—ASSUMPTION OF FACT.—An instruction was erroneous which assumed that the title to certain machinery permanently affixed to the soil was in the plaintiff or lessee of the soil under a contract which reserved the right to move such mechinery where there was evidence tending to prove that this right had been abandoned by such lessee.
3. EVIDENCE—CONCLUSIVENESS.—Facts claimed to be established by the testimony of an interested witness cannot be said to be established by undisputed testimony.
4. FIXTURES—INTENTION OF PARTIES.—Whether a chattel attached to realty becomes a fixture or retains its character of a chattel depends upon the intention of the parties; to establish which it is admissible to show its adaptation to the use or purpose of that part of the realty with which it is connected and the intention of the party making the annexation.

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

R. J. Williams, for appellant.

The verdict is contrary to the law and the evidence, and the court erred in its instructions to the jury. Taylor, Landl. & Ten. (9 ed.), § 551, 553; 98 Ark. 606; 93 *Id.* 78. The court also erred in refusing to give No. 1 asked by appellant and in allowing the pretended lease to be read in evidence, and the verdict is excessive.

C. W. Norton, for appellee.

The legal status of personal property attached to real estate to be used in connection therewith is determined by the purpose and intent of the parties at the time of putting the articles in position. Agreements that the lessee shall have the right of removal from the freehold have been taken as conclusive that the same are not intended as fixtures. 105 Ark. 638; 86 *Id.* 503. There is no error in the instructions, and the verdict is supported by the evidence. If there was any error in the

instructions it was waived by appellant's failure to make it part of the motion for a new trial. 117 Ark. 198; 174 S. W. 241-244; 87 *Id.* 640; 90 Ark. 484.

HUMPHREYS, J. Appellee instituted suit against appellant in the St. Francis Circuit Court to recover $4,174, alleging that appellant had unlawfully converted certain property of that value belonging to appellee.

Appellant filed answer, denying that the property described in the complaint belonged to appellee; that he wrongfully took possession thereof; or that it was of the value alleged.

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 appellant for $800. From the judgment an appeal has been duly prosecuted to this court.

The substance of the evidence is as follows: On the 24th day of January, 1910, the Heth Cooperage Company, a partnership consisting of J. W. Boyer, S. I. Thompson and M. E. Williams, leased a tract of land in Heth, Arkansas, from the Heth Improvement Company, for the purpose of establishing a cooperage and lumber factory. The lease was for 15 years, signed "Heth Improvement Company, by C. C. Bird, Secretary," on the one part, and "Heth Cooperage Company, by S. I. Thompson, J. W. Boyer and M. E. Williams," on the other part, and contained a provision that the Heth Cooperage Company might remove all buildings and machinery placed thereon at any time on or before the expiration thereof. Appellee testified that the Heth Improvement Company was Bird and Morrison; that they executed the lease to them, and, according to his understanding at the time, were the owners of the land. The lease was introduced in evidence over the objection and exception of appellant. In the year 1910, C. A. Shue constructed a heading plant on the land for the Heth Cooperage Company and placed therein an engine, boiler and all necessary machinery and connections, and a dry kiln

about 100 feet from the main shed. The engine was set on a concrete foundation about four feet in the earth, and was securely bolted thereto with bolts six feet long. The boiler was encased in a brick wall resting on a concrete foundation about 13 inches below the surface. The Heth Cooperage Company operated the heading plant until January 1, 1913. S. I. Thompson, in charge of operation, died, and the mill was not thereafter operated. It remained there intact until the spring of 1915, when it burned. During the period of operation, J. W. Boyer visited the plant about once a year. After it ceased operation, he visited the town of Heth in January, 1917, and inspected the property. He returned again in January, 1918, at which time he ascertained that the property had been sold, and appropriated by appellant. Appellee was the surviving partner and entitled to the assets of the Heth Cooperage Company. Appellant purchased the real estate in 1916, from Abston, Wynne and Jackson. Appellant testified that at the time of his purchase he inquired of his grantors concerning the engine, boiler and other heading machinery which had remained in place after the fire, and was told by them that it was a part of the real estate; that he bought the machinery along with the land without notice of appellee's claim to the machinery. The following stipulation appears in the record: "By agreement of counsel, it was admitted that the defendant, Salmon, purchased the land from Abston, Wynne and Jackson; and Abston, Wynne and Jackson purchased it from ..... Hairgrove, and ..... Hairgrove from the Heth Plantation Company, and that Salmon was the owner of the land." Appellant sold a part of the machinery, and converted the other part to his own use. Some of the witnesses valued it at more than the amount recovered, and others at less.

The cause was sent to the jury upon the assumption that the undisputed evidence showed that appellee was the owner of the engine, boiler and other machinery of the heading plant sold and converted by appellant. The court instructed the jury that the sole issue to be deter-

mined by them was the market value of the property at the time it was converted by appellant. This was error because, if it be conceded that the execution of the lease, which was not acknowledged and recorded, was proved and admissible as evidence, still the undisputed evidence does not show that the lessor, Heth Improvement Company, was the owner of the land at the time the lease was executed, or thereafter. Appellee testified that he understood the Heth Improvement Company was the owner. This, together with the construction of the plant and the occupancy under the lease for several years, was the only evidence tending to show ownership of the land in the Heth Improvement Company. It was agreed that the appellant was the owner of the land through *mesne* conveyances from the Heth Plantation Company, a corporation. This agreement tends to prove that the Heth Improvement Company was never the owner of the land. The ownership of the land on the date of the lease was a disputed question of fact for the determination of the jury, under the pleadings and evidence.

It was also error to instruct the jury that the undisputed evidence showed that appellee was the owner of the engine, boiler and other machinery, because, even if it be conceded that the Heth Improvement Company was the owner of the land at the time the lease was made, and that the appellee, as the surviving partner of Heth Cooperage Company, had the right, under the lease, to remove all machinery attached to the soil, on or before the expiration of the lease, there was evidence in the record tending to show the abandonment of the reserved right. A part of the consideration of the lease was the operation of the plant. Appellee ceased to operate the plant on the first day of January, 1913, after the death of his partner. The plant was destroyed by fire in the spring of 1915, and the engine, boiler and other machinery left in an exposed condition on the ground, without anyone in charge thereof. Appellee inspected the fixtures in January, 1917, to ascertain whether they were all there. In this state of case, it was a question

of disputed fact whether or not appellee had terminated the lease and his right to remove the fixtures, as surviving partner, by abandonment.

It is also exceedingly doubtful whether the execution of the lease was sufficiently proved to admit it as evidence. If the Heth Improvement Company was a partnership, the lease being signed by one member of the firm, even though signed as secretary, would be sufficient proof of the execution of the instrument to admit it as evidence. The signature on its face, however, would indicate that the Heth Improvement Company was a corporation. If so, it was necessary to show that Bird, as secretary, had authority from the corporation to execute the lease.

It is also insisted by appellant that the court erred in refusing to instruct the jury, in effect, that, if they found the engine and boiler were securely fastened into the soil and that appellant had purchased the land for a valuable consideration, without notice of appellee's claim under his lease, they should return a verdict for appellant. This instruction excludes the idea that it was the duty of appellant, in order to bring himself within the doctrine of innocent purchaser, to make inquiry concerning the ownership of fixtures of this character, even though substantially fastened into the soil. It is true appellant testified that he inquired from his vendor concerning the ownership of the fixtures and was informed that they were a part of the real estate. He was an interested party, and facts established by his testimony alone cannot be said to be established by the undisputed evidence. *Skillern* v. *Baker,* 82 Ark. 86; *Briggs* v. *Collins,* 113 Ark. 190.

The instruction also makes the sole test of whether fixtures of this character retain their nature as chattels or become irremovable fixtures depend on the manner in which they are affixed to the soil. This court has laid down other tests, to-wit: "Appropriation or adaptation to the use or purpose of that part of the realty with which it (the fixtures) is connected."

"The intention of the party making the annexation to make the article a permanent accession to the freehold." *Choate* v. *Kimball,* 56 Ark. 55; *Bemis* v. *First National Bank,* 63 Ark. 625; *Ozark* v. *Adams,* 73 Ark. 227.

According to Ewell on Fixtures, the tendency of the times is to attach the most importance to the test of intention, the first two tests being in the nature of evidence by which the intention may be ascertained. For the reasons suggested, the court properly excluded the requested instruction.

As the case must be reversed for the errors indicated, it is unnecessary to discuss the insistence of appellant that the verdict was not supported by any substantial evidence.

The judgment is reversed, and the cause remanded for a new trial.

HUIE v. STATE.

Opinion delivered June 23, 1919.

HOMICIDE—ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE. —A conviction of assault with intent to kill will not be set aside because the testimony showed that the pistol with which the assault was made was not cocked.

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

Edwin Hiner, for appellant.

The law of this case is well settled by this court. The verdict is not supported by the evidence, but is against it. The proof is insufficient to show the "present ability to do bodily harm," and there could not be a specific intent to kill at the time, as the pistol was not in shape to fire at the time the alleged assault was made, nor was a specific intent to kill shown by the testimony, but all the proof is against it.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The evidence sustains the verdict, as it shows the assault, the present ability and the intent to kill. 2 Bishop's New Cr. Law, § 23; 108 Ark. 312-314; 103 *Id.* 28.

2. The jury have settled the facts, and the verdict should stand. 82 Ark. 372; 104 *Id.* 162.

McCULLOCH, C. J. Appellant was convicted of the crime of assault with intent to kill, alleged to have been committed by assaulting Will Witcher, a police officer in the City of Fort Smith. The sole ground urged for reversal of the judgment is that the evidence is insufficient to sustain the judgment of conviction, in that it fails to show that appellant's attempt to do bodily harm to Witcher was coupled with present ability to do so, or that there was specific intent to kill.

The testimony adduced by the State tends to show that Witcher was on the lookout for appellant to arrest him on a charge of grand larceny and, meeting him on the street, attempted to arrest him, when appellant resisted and drew a pistol and extended it against Witcher's side or stomach. Witcher grabbed the pistol and disarmed appellant and fired at appellant as the latter ran away. Witcher testified that when he secured the pistol he found that the hammer was on "safety," or in other words, that the pistol was not cocked. It is contended that the fact that the pistol was not cocked makes the proof insufficient to establish the "present ability" to do bodily harm and that there could not have been a specific intent to kill in a legal sense when the pistol was not in shape to fire at the time the assault was made. Neither of these contentions is sound for the reason that the intent to kill may have existed in the mind of the accused, even though he was mistaken in assuming that the pistol was cocked or for the reason that he may have had the intention of cocking it before the felonious consummation was interrupted and there was a present ability to do bodily harm, though the pistol was not in shape to

be fired until it was cocked. The question as to what is essential, in order to constitute an assault under such circumstances as are involved in this case, was discussed in the recent cases of *Sullivan* v. *State,* 131 Ark. 107; *Johnson* v. *State,* 132 Ark. 128.

It is a mooted question whether or not the pointing of an unloaded pistol constitutes an assault. 2 Wharton's Criminal Law, section 800; 2 Bishop's Criminal Law, section 3132. But the mere fact that the pistol was not cocked does not deprive the act of the essential feature of present ability to do harm with the weapon, for no appreciable length of time is required to cock a pistol, and, therefore, the ability to inflict a bodily injury is immediately present. When a pistol is unloaded, it is not in condition to use as a weapon, but the act of raising the hammer or moving the safety plate is an act which may be done so quickly that it cannot be considered merely as an intervening act in preparation for an assault. It was, under the circumstances of the case, a question of fact for the jury to determine whether the specific intent to kill existed at the time of the assault, for the assault was interrupted, and the jury might have found that appellant intended to cock the pistol and fire, and that he had the intent to kill and would have cocked it as soon as he ascertained that it had not been cocked if he had not been interrupted in the consummation of the felonious act.

We are of the opinion, therefore, there the evidence was sufficient to sustain the verdict.

Judgment affirmed.

BERG v. JOHNSON.

Opinion delivered June 23, 1919.

1. TRIAL—TRANSFER OF CAUSE TO EQUITY.—**Transfer of an action of ejectment to equity cannot be defended upon the ground that there is a defect in a sheriff's deed relied upon by defendant in that it recites the sale to have been made by the officer after the return day of the writ and that reformation of the deed was nec-**

essary where the pleadings do not show such error nor contain a prayer for reformation.

2. SAME—TRANSFER OF CAUSE TO EQUITY.—A deed which transfers land to two parties by their surnames merely conveys the legal title to them, which entitles them to sue at law, and it was error to transfer an action of ejectment to equity because the deed did not give their Christian names.

3. SAME—TRANSFER OF CAUSE TO EQUITY.—It was not ground for transfer of an action of ejectment to equity that a tax deed under which defendant claimed erroneously named the grantee therein in the acknowledgment as the party acknowledging the deed, instead of the name of the grantor, where it was clear that the deed was duly executed and acknowledged by the grantor.

4. SAME—TRANSFER TO EQUITY.—An action of ejectment was improperly transferred to equity on defendant's motion where plaintiff based her right of action on a legal title to the land and sought only a legal remedy, and defendant offered no equitable defense except the plea of laches, which is not available if no equitable relief was sought in the complaint.

5. PLEADING—ADMISSION.—An allegation in a complaint in ejectment that defendant has been in unlawful possession of the land for two years past is not an admission that the possession was adverse or under claim of ownership under a tax deed, and therefore does not show affirmatively that plaintiff's right of action is barred.

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

F. G. Taylor, for appellant.

1. The court erred in transferring the cause to the chancery court, and

2. The court erred in its findings and decree. The exception to the muniments of title that the sale was made to a partnership and that the Christian names of each partner are not mentioned is fully and clearly settled in 65 Ark. 503. It is also settled in the agreed statement of facts, and the decree of the chancery court in February, 1880, term. The exception to the sheriff's deed is controlled by Kirby's Digest, § 3298.

3. The statute of limitations does not affect plaintiff's claim. 105 Ark. 309. Title by adverse possession cannot be built up against a married woman. Kirby's

Digest, § 5056; 73 Ark. 221; 64 *Id.* 412; 62 *Id.* 316; 42 *Id.* 305.

4. The doctrine of laches does not apply, as this was ejectment, and plaintiff was asking no equitable relief whatever. 70 Ark. 371; 94 *Id.* 122; 67 *Id.* 320; 108 *Id.* 248; 89 *Id.* 19; 133 *Id.* 441.

5. The tax sale under which defendant claimed was absolutely void, as the levy of taxes in the two districts of Clay County was not uniform throughout the county. 57 Ark. 554.

6. See also as the exceptions to title, 9 Am. & E. Enc. Law, 134, and note 1; 2 Black on Judgm., § 607; Freeman on Judg., § 416; 17 How. (U. S.) 577.

7. Proof of possession without showing how or by what act maintained is not evidence of adverse possession. 40 Ark. 366. The burden of proof is on the person who claims by adverse possession. 61 Ark. 464; 65 *Id.* 422; 76 *Id.* 109; 82 *Id.* 51; 110 *Id.* 571; 117 *Id.* 579; 130 *Id.* 445; 126 *Id.* 86.

G. B. Oliver, for appellee.

1. There was no error in transferring the cause to chancery. The sheriff's deed was to Hecht & Bro., which conveyed only an equitable title, and will not sustain ejectment. 36 Ark. 456; 68 *Id.* 150; 60 *Id.* 561; 92 *Id.* 63; 30 Cyc. 431 (5).

2. The decree is right, because (1) the complaint alleges that defendant is in possession *"and has been for two years past"* by reason of a sale of the land for taxes, and the deed is good on its face and therefore at least color of title. It was therefore unnecessary for defendant to offer any evidence on this point. If the suit had been tried at law the court must have instructed a verdict, as the action was barred by adverse possession for two years. The two years' statute was against married women. 53 Ark. 418; 71 *Id.* 117. In fact, in both law and equity a demurrer to the complaint on the ground that it showed on its face that the cause of action was barred by limitation would have been sus-

tained. 28 Ark. 27; 112 *Id.* 572; 31 *Id.* 684; 34 *Id.* 164; 49 *Id.* 253; 108 *Id.* 219; 116 *Id.* 219; 116 *Id.* 223; 92 *Id.* 522. (2) A trial in a court of law must have resulted in a verdict for defendant for another reason. Plaintiff claimed title by descent from her father, Samuel Hecht. The answer denies that, and her grantees are the heirs of Samuel Hecht. Before she can take by descent from him she must prove marriage of Samuel Hecht and her mother. Warvell on Ejectment 412, § 380; 14 Cyc. 16 (3); 15 *Id.* 16 (d); Kirby's Digest, § 2638.

3. Plaintiff is barred by laches. 120 Ark. 249; 85 *Id.* 372. She was in effect seeking a reformation of her deed so as to show the tax sale was on June 21st and not on the 24th. 108 Ark. 248.

McCULLOCH, C. J. Appellant instituted this action against appellee in the circuit court of Clay County to recover possession of a tract of land containing 80 acres in that county, alleged to be in the unlawful possession of appellee. The cause was transferred to the chancery court over the objection of appellant, and proceeded to a final decree in favor of appellee.

Appellant's chain of title runs as follows: The land was purchased from the State of Arkansas in July, 1872, by a copartnership composed of P. H. Young, James Surridge and Joseph T. Fisher, and was, in the year 1877, sold under execution against said purchasers, and at the execution sale was purchased by Hecht & Brother, a copartnership composed of Levi Hecht and Samuel Hecht. Upon the expiration of the statutory time for redemption the sheriff of Clay County executed a deed pursuant to the sale, which purported to convey the land to the copartnership by that name without specifying the individual names of either of the partners. Samuel Hecht died intestate, leaving appellant and other children as his heirs at law, and in a partition suit between said heirs and Levi Hecht the tract in controversy was allotted to the heirs of Samuel Hecht. The other heirs of Samuel Hecht conveyed their interests to appellant.

Appellee claims title under a tax sale in the year 1889, at which sale J. M. Stephens became the purchaser. Stephens conveyed the land in the year 1893 to H. H. Williams and Williams conveyed to appellee by deed dated November 28, 1913. This action was begun on December 15, 1915.

The first question presented is whether or not the circuit court erred in transferring the cause to the chancery court. The ruling of the court in transferring the cause is defended by learned counsel for appellee, first, on the ground that there is a defect in the sheriff's deed under the execution sale in that it recites the sale to have been made by the officer after the return day of the writ, and that a reformation of the deed so as to show the true date of the sale is essential to appellant's cause of action for the recovery of the land. The answer to this contention is that the pleadings do not show any defect in the sale with respect to the sale being made after the return day of the writ, and there is no prayer for equitable relief. There was an amendment to the complaint substituting a new copy of the sheriff's deed and alleging that the copy originally exhibited contained the wrong date, but it is not alleged that there was any error in the recitals of the deed concerning the date of sale, nor is there any prayer for reformation.

Next, it is urged that the sheriff's deed of conveyance to the copartnership under that name (Hecht & Brother) without specifying the individual names of either of the partners conveyed only the equitable title and that it was essential to appellant's cause of action for the case to be transferred to equity so that the deed could be reformed. Again, it may be said in answer to this contention that there was no prayer for a reformation, nor was that essential to appellant's right of action for the reason that the deed conveyed the legal title to the copartner whose surname was stated, and the subsequent partition suit settled the rights of all other parties who had an equitable interest. In *Percifull* v. *Platt*, 36 Ark. 456, it was decided that a deed to a partnership

under the firm name which expressed the surname and initials of one of the copartners operated as a conveyance of the legal title to the copartner so named, and in *Cole* v. *Mette,* 65 Ark. 503, it was held that a conveyance to a copartnership under the firm name which expressed the surnames, but not the Christian names nor initials of the copartners was sufficient to convey the legal title to both of the copartners. In disposing of that question in the case of *Cole* v. *Mette,* the court approved the case of *Fletcher* v. *Mansur,* 5 Ind. 267, where it was held that "a deed to one person, describing him by his surname only, is not for that reason void."

In the present case only the surname of one of the partners was stated in the conveyance, and under the doctrine of the cases just referred to that was sufficient to convey the legal title to him. It became just a question of identification, and the only difference between this case and the case of *Cole* v. *Mette* is a matter of degree of proof of identification, it being said in the opinion in that case that the fact that the surnames of both of the partners being mentioned afforded better means of identification than where the name of only one of them was mentioned. It is clear, therefore, that appellant showed in her pleadings a legal title to the land and the right to immediate possession, and was entitled to sue at law.

It is further contended that appellee set up sufficient grounds in his answer to justify the transfer of the cause to equity, in that the original tax deed under which he claimed was imperfect because the name of the clerk of the court was not specified in the certificate of acknowledgment. W. E. Spence was the county clerk who executed the deed and J. M. Stephens was, as before stated, the purchaser. The deed was in the form specified by statute and mentioned the name of the grantee and the name of the officer who made the conveyance. The certificate of acknowledgment followed the form specified in the statute, but erroneously mentioned the name of the clerk as "W. E. Stephens." It was certi-

fied, however, that the party who appeared and executed the conveyance was the clerk of the county court, who was personally known to the officer, and acknowledged that he executed the conveyance "as clerk of the county court of said county." The only error in the certificate of acknowledgment was in stating the name of the clerk, and this was an obvious clerical error, which did not defeat the conveyance, for it is clear from the deed and acknowledgment that the deed was executed by W. E. Spence as clerk of the county and was duly acknowledged by him before the officer.

There was no grounds for transferring the cause to the chancery court, as appellant had based her right of action on a legal title to the land and sought only a legal remedy, and appellee offered no equitable defense, except the plea of laches, but that plea was not available where no equitable relief was sought in the complaint. *Rowland* v. *McGuire,* 67 Ark. 320.

It is insisted that the complaint and one of the exhibits show affirmatively that appellant's right of action was barred by limitation, and that for that reason the error in transferring the cause to chancery was harmless. An examination of the record, however, does not sustain that contention. The complaint sets out appellant's chain of title and contains an allegation that appellee "is in the unlawful possession of said lands and has been for two years past." The complaint contains no allegation with respect to the character of appellee's possession except that it is unlawful. It is not alleged that the possession was adverse or that it was held under any claim of ownership under a tax deed, or otherwise. It is true there was an affidavit filed with the complaint which was made by appellant's attorney stating that "she is informed and believes" that appellee claims the land in controversy "by reason of a sale of said land for the taxes on the same" and that appellant had tendered to appellee "a sum of money equal to the amount of taxes and costs first paid for said land with interest thereon from the date of payment thereof and the amount of

taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of improvements made on such land." The affidavit does not recite the date of the tax sale or deed, nor does it contain any allegation that appellee was in possession under a tax deed. The affidavit does not constitute a part of the pleadings in the case, but, even if it were so treated, it is not sufficient to show on its face, either by itself or in connection with the allegations of the complaint, that appellee occupied the premises adversely for two years under a tax deed. For that reason it is not correct to say that the complaint shows affirmatively that appellant's right of action is barred. It is undisputed that appellee claims the land under a tax deed, but the testimony does not show beyond controversy that there was an adverse holding under that deed for two years before the commencement of this action. The allegation in the complaint with respect to the unlawful possession of appellee for two years before the commencement of the action was not necessary, so far as the length of time of said possession was concerned, to a statement of appellant's cause of action for the recovery of the land, and was included merely for the purpose of setting forth the facts upon which a recovery of the rents and profits could be based. On the trial of the action it would operate as an admission on the part of appellant as to the length of time appellee had been in possession, but she is not conclusively bound by the allegation so far as it relates to appellee's plea of the statute of limitaions. Appellant was entitled to a trial by jury in a court of law on the issue raised by appellee's plea of the statute of limitations, and this privilege was denied by the transfer to equity.

The decree is therefore reversed, and the cause is remanded with directions to remand the cause to the circuit court for further proceedings not inconsistent with this opinion.

PINE BLUFF COMPANY v. WEBB.

Opinion delivered June 23, 1919.

1. STREET RAILROAD—COLLISION—SUFFICIENCY OF EVIDENCE.—In an action against a street railroad company for negligence in a collision between defendant's street car and the wagon in which plaintiff's intestate was killed, evidence *held* sufficient to establish negligence on defendant's part.
2. SAME — DISCOVERED PERIL — NEGLIGENCE.—Where a motorman in charge of a street car discovered a traveler in a position of peril, it was his duty to exercise ordinary care to avoid injuring him.

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

Bridges, Wooldridge & Wooldridge, for appellant.

1. The court erred in giving instructions 1, 2, 3 and 4 for plaintiff and in refusing No. 6 for defendant, as requested, and in modifying it. 99 Ark. 384; 83 *Id.* 61; 122 *Id.* 272; 123 *Id.* 594. Deceased's own negligence directly contributed to the injury, and there could be no recovery. *Ib.*; 108 Ark. 95 (108); 36 Cyc. 1537; 72 Ark. 572; 27 A. & Eng. Enc. Law (2 ed.) 63-72; 24 Atl. 596; Booth, St. Ry. Law, § 303, and cases cited.

2. The verdict is not sustained by the evidence, and the law was not correctly stated in the court's charge. 116 Ark. 125 (139), and cases *supra.*

Rowell & Alexander, for appellee.

1. Reading the instructions together as a whole, they correctly state the law. 83 Ark. 61; 119 *Id.* 295.

2. The verdict is small, but it is right, and is sustained by the evidence, and there was no prejudicial error.

McCULLOCH, C. J. Appellant owns and operates the street railway system in the City of Pine Bluff, and appellee's intestate, R. J. Preston, died from personal injuries inflicted in a collision with one of appellant's street cars. This is an action instituted by appellee to recover damages for the benefit of the estate and the next of kin, and in the trial of the case before a jury

there was a verdict in appellee's favor for the recovery of a small sum on each branch of the case.

The collision occurred at the intersection of Sixth Avenue and Oak Street. The street cars run along Sixth Avenue, and Preston was, at the time of the collision, going east on Sixth Avenue. He was a truck farmer, and was peddling vegetables in Pine Bluff, and was driving a wagon loaded with produce. He was walking along the street near the curb on the south side with the lines in his hand driving the horse, and, as he approached Oak Street, he turned to the left, or towards the north, to cross the car track so as to go north on Oak Street. The street car was behind him, coming from the west, and struck his wagon and knocked him and the wagon from the track. He was seriously injured and died a few days later. The collision occurred about noon, and several passengers on the car, in addition to the motorman testified concerning the facts of the case. The testimony adduced by appellee tends to show that the street car was from 100 to 150 feet distant when Preston started driving across the track, and that the motorman could have stopped the car and avoided the collision by the exercise of ordinary care. The testimony adduced by appellant tends to show that Preston drove on the track when the car was from 15 to 25 feet distant, and that the motorman made every reasonable effort to stop the car by applying the brakes. There is a slight conflict in the testimony as to the speed the car was going, but it appears to be undisputed that the car had stopped for a passenger at the corner of the street next to Oak Street and was not going at full speed when the collision occurred.

If the jury found the facts to be in accordance with the testimony introduced by appellee with respect to the distance of the car when Preston drove on the track, then the conclusion was warranted that he was not guilty of contributory negligence in attempting to cross the track under those circumstances, and that on the other hand the motorman was guilty of negligence in failing to exer-

cise ordinary care to stop the car in time to prevent the collision. There is no dispute in the testimony as to the fact that the motorman saw Preston when he drove on the track, the only dispute being as to the distance the car was from the wagon and team at that time. So the real issue in the case was practically narrowed down to the question of the distance between the wagon and the car at the time Preston drove on the track. We cannot say that the finding of the jury was not supported by sufficient evidence.

It is earnestly insisted that the court erred in giving the following instruction at the request of appellee:

"If you should find from the evidence that the deceased started to drive across defendant's street car track when defendant's car, approaching, was at such a distance as to lead a reasonable person, under the circumstances at the time, to believe he had sufficient time to cross over and get off in safety before the arrival of the car at said place; that the position of deceased was so noticeable and apparent that a reasonable person in the position of the motorman on defendant's car approaching the deceased, and in the exercise of ordinary care in keeping a lookout for persons or property approaching or on the track, would have discovered the deceased, and that it would have been apparent to such person that the deceased was in a dangerous position; that said motorman, by the exercise of ordinary care, could have discovered the dangerous situation of deceased in time to have stopped his car and avoided injuring the deceased; and that defendant's motorman did not use ordinary care with the means at his command to stop the car and prevent the collision, and did not use ordinary and reasonable care in keeping a lookout whereby he failed to discover the dangerous situation of the deceased, and did strike deceased's wagon and injured deceased in consequence of his failure to use such care, then it is your duty to find for the plaintiff."

It is argued that this instruction ignored the duty of Preston to exercise ordinary care for his own safety,

but we think, that, instead of ignoring that question, it expressly submitted it in the first part of the instruction. The instruction presupposes that Preston saw the approaching street car, but leaves it to the jury to say whether or not it constituted negligence for him to start across the track under the circumstances as the jury might find to exist. The right to use the crossing was a reciprocal one; and if the jury found that the street car was distant to the extent stated by appellee's witnesses and in broad daylight the motorman could see the crossing, the inference would have been warranted that it was not imprudent for Preston to attempt to drive across under those circumstances. This instruction does not, as contended by learned counsel for appellant, impose on the motorman the sole duty to exercise care to avoid a collision, but merely defines the duty of the motorman in the event they found that Preston was in the exercise of ordinary care when he drove on the track. This instruction was in some respects too favorable to appellant, for, as before stated, it was undisputed that the motorman saw Preston when he drove on the track, and the only question left for the determination of the jury was whether or not he exercised ordinary care to avoid the collision after discovering the traveler's peril.

Other instructions on the subject of discovered peril were correct, and no error was committed by the court in that respect.

The court gave all the instructions requested by appellant, except No. 6, which was modified by adding the italicized words, so as to read as follows:

"Contributory negligence means negligence on the part of the deceased—that is, a failure on the part of the deceased to exercise reasonable care for his own safety. If you find from a preponderance of the evidence that the deceased was guilty of some negligence which contributed to produce the accident which resulted in his injury, then plaintiff cannot recover damages for such injury, even though it may further appear that the motorman in charge of the car was also negligent.

Unless you find that the motorman failed to exercise ordinary care after discovering the danger or peril of the deceased."

Error is assigned in the modification, but we are of the opinion that the modification was correct so as to incorporate the doctrine of liability for negligence after discovery of peril.

It is unnecessary to discuss the other instructions in detail, for they are not in conflict with the law on this subject discussed in previous cases. *Little Rock Railway & Electric Co.* v. *Sledge,* 108 Ark. 95; *Bain* v. *Fort Smith Light & Traction Co.,* 116 Ark. 125; *Pankey* v. *Little Rock Railway & Electric Co.,* 117 Ark. 337; *Karnopp* v. *Fort Smith Light & Traction Co.,* 119 Ark. 295; *Pine Bluff Co.* v. *Crunk,* 129 Ark. 39.

The recovery in this case was for a very moderate sum, and our conclusion is that the evidence was sufficient to sustain the verdict, both as to liability as well as to the extent of the compensation to be awarded, and that there was no error committed by the court in its charge to the jury. The judgment is therefore affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* WHITLEY.

Opinion delivered June 23, 1919.

1. RAILROAD—KILLING STOCK—EVIDENCE.—The rule that where the testimony of the engineer in charge of a locomotive engine was consistent, reasonable and uncontradicted, and showing that the killing of an animal was unavoidable, a judgment in plaintiff's favor will be reversed, is inapplicable where the jury might have concluded that the engineer's testimony was inconsistent with the physical facts as detailed by him and other witnesses.
2. SAME—INSTRUCTION—LOOKOUT STATUTE.—While it is the better practice for the court to interpret the meaning of the lookout statute in its instructions, rather than to read the same to the jury, as a declaration of law, it was not prejudicial to read the statute to the jury as an instruction where the facts rendered the statute applicable, and there was no issue as to what interpretation should be put upon it.

Appeal from Little River Circuit Court; *J. S. Steel,* Judge; affirmed.

June R. Morrell and *James B. McDonough,* for appellant.

1. The court should have directed a verdict for defendant. The engineer's evidence is reasonable, consistent and uncontradicted, and rebuts all presumption of negligence. 66 Ark. 439; 67 *Id.* 514; 89 *Id.* 120; 78 *Id.* 234. The killing was unavoidable. 53 *Id.* 96; 69 *Id.* 659.

2. It was error to read section 8131 of Kirby & Castle's Digest to the jury. 24 Ark. 499; 55 *Id.* 588; 63 *Id.* 477. The rule is not changed in 116 Ark. 514. See also 119 *Id.* 295; 127 *Id.* 323.

3. Even where stock are discovered on the track, he is not necessarily required by law to stop or slacken the speed of the train. 37 Ark. 593. Nor to slow down if cattle are seen on the right-of-way. 99 *Id.* 226.

Seth C. Reynolds, for appellee.

1. The killing is admitted. This makes a *prima facie* case of negligence, and the burden shifted to defendant to show that the killing was not done negligently. 88 Ark. 12; 83 *Id.* 217.

2. The evidence shows negligence, as do the physical facts, and there was no error in reading to the jury the law of this State. 74 Ark. 606; 70 *Id.* 385; 34 *Id.* 39; 62 *Id.* 187; 95 *Id.* 226. The cases cited by appellant do not apply here.

3. There was no error in the instructions, nor in reading our statute. 99 *Id.* 226; 119 *Id.* 295-301.

WOOD, J. This is an action by the appellee against the appellant to recover damages for the alleged negligent killing of a Jersey heifer belonging to the appellee. The appellee alleged that the heifer was killed about three-fourths of a mile north of Ashdown by the southbound passenger evening train of the appellant. The appellant denied that it had killed the heifer, and set up that if the appellee had been damaged the loss was

due to his own negligence and carelessness, and not to any negligence on the part of the appellant.

The appellee testified that about the 12th day of August his Jersey heifer was killed about three-fourths of a mile north of Ashdown. He knew that the evening passenger train killed her because he saw she was dragged in front of the train; found her on the right-of-way on the east side of the track right at the crossing; that on one side she had some skinned places and the left hind leg was broken. Witness had demanded of the agent of the appellant at Texarkana the sum of $75 as pay for the heifer, but the agent refused to pay. The heifer was worth $75.

Other witnesses corroborated the testimony of the appellee tending to prove that the heifer was killed by the said passenger train of appellant's as alleged in appellee's complaint, and that the market value of the animal was $75. The testimony tended to prove that the railroad track at the point where the animal was killed was straight for some distance; that one could see 150 yards north of that point.

The testimony of the engineer was substantially as follows: "He was an engineer and pulling the passenger train going south which killed the heifer in controversy. Witness could see the cows on the left-hand side of the track in plain view. There was a road crossing close to where they were, and the cow didn't show any indication of being close to the track, or anything. Witness whistled for the road crossing, and then whistled for the semaphore signals, and applied the brakes, got the semaphore answer and went on down, and just as he got in seventy-five or eighty feet of the cow she raised her head and went for the track, and just before she got across she momentarily stopped and the train hit her. Witness couldn't stop. She jumped on the track in front of witness, and with the train witness had it was impossible to prevent the same from killing her. If it had been witness' own wife and child, he couldn't have prevented the accident. The train had air-brakes in good order.

The cows were one-half mile away when witness first saw the cattle. They were 25 or 30 feet away from the track on right-of-way. They made no attempt whatever to approach the train until witness got within 75 feet. The heifer jumped right up with her head up, and came right upon the track. Witness had already applied the brakes. He applied them about 1,500 feet from where the cattle were. He had reduced his rate of speed coming into the city limits and approaching semaphore and had applied brakes in service application, not a stop application. The service application is to check the speed of the train, in order to have it under control, approaching the semaphore. Witness drew off probably three or four pounds of air in order to check the momentum. It wasn't to stop the appliance at all, but when he saw the cow going straight toward the track he went into emergency immediately. The cow started like she was coming across, and she got with her front feet upon the track and stopped. She was on the east side and was knocked off on that side.

The court gave the following instruction to the jury:

"It shall be the duty of all persons running trains in this State upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril; and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed."

The appellant objected specifically to the instruction on the ground that the evidence in the case did not warrant the court in giving the same and because the instruction, which is a copy of the act of May 25, 1911, commonly referred to as the "Lookout Statute," is misleading because the facts recited in the statute are not supported by the evidence in the case.

The court also instructed the jury as follows: "If you believe from the evidence in this case that if defendant's servants had been keeping a lookout and could have avoided the killing of plaintiff's cow by stopping its train, it was the duty of defendant's servants to stop its train to avoid the injury."

The appellant asked the court to instruct the jury to return a verdict in its favor, which request was refused. To which ruling the appellant duly excepted.

The court granted appellant's prayers for instructions Nos. 2 and 3 as follows:

"2. The court instructs the jury that the engineer operating the locomotive pulling the train has the right to operate the train upon the assumption that any animal on the track will get off before being struck by the train. In this case, if the animal was upon the right-of-way, or if it was near enough to the track to be struck by the engine, nevertheless the engineer had the right to assume that the animal would move out of the way before the train arrived at the point where the animal was. If the animal started across the track in front of the engine suddenly, and if the animal remained still until the engine was only a short distance away, and then started suddenly to cross the track in front of the engine, and if, after the engineer realized that the animal would cross in front of the engine, he was unable to slow the engine down or stop it, so as to avoid the killing, in that event you will find for the defendant."

"3. If the animal was in view, and was in a place of safety when first observed by the engineer, the said engineer in that event had a right to assume that the animal would not suddenly rush upon the track and had

the right to operate his train accordingly. If said animal did remain in a place of safety until the engine was so near that it could not be stopped, and then rushed suddenly in front of the engine and was injured, the jury will find for the defendant."

The jury returned a verdict in favor of the appellee in the sum of $60, and from the judgment rendered in his favor against the appellant for that sum is this appeal.

In *St. L. S. W. Ry. Co.* v. *O'Hara,* 89 Ark. 120, we held: "Where the testimony of the engineer in charge of a locomotive engine was consistent, reasonable and uncontradicted, and showed that the killing of the animal was unavoidable, a judgment in plaintiff's favor will be reversed." See also other cases cited in appellant's brief.

The appellant contends that the above doctrine is applicable to the facts of this record and calls for a reversal of the judgment.

The engineer testified that he could see one-half mile away as he was coming around the curve; that he checked his train 1,500 feet away because he was approaching the city limits and semaphore; that the cow was three-fourths of a mile from the depot, his train being still further away; that the cow was 25 or 30 feet from the railroad track and showed no inclination to approach the track until his train got within 75 or 80 feet of the cow, "when she just raised her head and went for the track and just before she got across she just momentarily stopped with her front feet upon the track and the train hit her."

The testimony of the appellee tended to prove that the heifer was knocked off on the east side of the track about six or seven feet from the railroad. She had skinned places on the left side and her left hind leg was broken. No injury was noticed about the head, except a little blood running out of her nose.

Now, taking into consideration the physical injuries to the cow as described by the witnesses and the position

she was in on the track at the time the train struck her, the direction in which she was moving and the rate of speed at which she must have been moved; the distance from the track when she began to move towards it and the respective distances of the cow and the train from the point where the collision occurred at the time the cow first began to move towards the train, and the relative speed made by each, we conclude that it was for the jury to say whether the testimony of the engineer was reasonable, consistent and uncontradicted.

The jury might have concluded that his testimony was not consistent with the physical facts as detailed by him and other witnesses. For instance, if the cow was on the east side of the track 25 or 30 feet away from the same and had run towards the west, stopping with her front feet on the track and was struck by train going south as the engineer testified, the jury might have concluded that this testimony was wholly in conflict with the physical facts as to the injury of the cow as described by other witnesses.

If the cow was crossing the track from the east to the west and stopped with her front feet on the track while the train was going south, this would have thrown her right side, and the front part of her body, her head, in a position to be first struck by the train. But the testimony of the witness was to the effect that her horns were not broken; that he did not notice any skinned or bruised places about her head, and that the skinned and bruised places on her body and the broken leg were all on the left side.

These facts were at least sufficient for the jury to say whether or not the engineer's testimony was reasonable, consistent and uncontradicted. Therefore, the doctrine announced in *St. L. S. W. Ry. Co.* v. *O'Hara, supra,* and other cases cited and relied upon by the appellant is not applicable to the facts of this record.

The testimony of the appellee tended to prove, and the appellant's engineer testified, that the heifer was killed by the running of the train. This under the

statute raised a *prima facie* presumption of negligence on the part of the appellant and cast upon the appellant the burden of overcoming the presumption. Kirby's Digest, section 6607; *St. L., I. M. & S. Ry. Co.* v. *Fambro,* 88 Ark. 12; *K. C. So. Ry Co.* v. *Davis,* 83 Ark. 221.

The appellant did not overcome this presumption by testimony which can be said as matter of law to be "consistent, reasonable and uncontradicted," and therefore the court did not err in refusing to instruct a verdict in its favor.

The credibility of appellant's engineer was for the jury. Although the engineer testified that he was keeping a constant lookout and observed the cow, nevertheless under the circumstances it was a question for the jury to determine whether or not he was keeping a lookout required by the statute, and whether or not he failed to do so, and, if he failed to do so, whether or not such failure resulted in the killing of the appellee's heifer of which he complains.

The appellant's seventh ground of motion for a new trial is that the court erred in giving, on the motion of plaintiff, instruction No. 3, which was the reading by the court to the jury section 8131, of Kirby's and Castle's Digest of the statutes.

The bill of exceptions recites the following: "The court on his own motion gives the following instruction to the jury, which is section 8131, Kirby's Digest, which said instruction is in words and figures as follows: (Then follows the instruction which is in the exact language of section 8131 of Kirby's and Castle's Digest). Then follows the exception to the ruling of the court.

It was proper, under the issue of negligence raised by the pleadings and the testimony, to declare the law defining the duty of the employees of railroads running trains in this State to keep a constant lookout as prescribed by the statute. There was no issue before the jury as to what was the proper interpretation to be put upon this statute, nor is it a case where the statute is susceptible of more than one interpretation.

The only question was and is, whether the statute is applicable. The issue raised made the statute applicable.

It is the better practice for the court to interpret for the jury the meaning of the statute in its instructions, rather than to read the same to the jury as a declaration of law. *St. L., I. M. & S. Ry. Co.* v. *Elrod,* 116 Ark. 514. But here, as we have seen, there was no issue as to what interpretation should be put upon the statute and the facts rendered the statute applicable. The mere reading of it could not have resulted in any prejudice to the jury.

The instructions as a whole correctly submitted the only issue, to-wit: "Whether or not the killing of appellee's heifer was the result of the negligence of appellant in running its train."

The judgment is correct, and it is affirmed.

SPECIAL SCHOOL DISTRICT NO. 5 *v.* STATE.

Opinion delivered June 23, 1919.

1. SCHOOL LANDS—PURPOSE OF GRANT OF CONGRESS.—Act of Congress of June 23, 1836, provided that section 16 in every township "shall be granted to the State for the use of the inhabitants of such townships for the use of schools." By ordinance of the Legislature approved October 16, 1836, the State accepted the above grant. By act of Congress of February 15, 1843, Congress conferred upon the State the power to invest the money arising from sales of such land in some productive fund to be applied to the use of schools within the several townships for which they were originally set apart. By act of the Legislature of 1885 it was provided that "the principal arising from the sale of the 16th section of land shall never be apportioned or used." *Held* that the two last-mentioned acts were declaratory of the meaning of the two earlier acts, and correctly construe the meaning of the original act of Congress.
2. SAME—VALIDITY OF ACT AUTHORIZING SALE.—Act 465 of 1919, providing that certain 16th section lands should be sold and the proceeds invested in a high-school building, is void as authorizing a breach of the trust assumed by the State in accepting the grant of Congress of June 23, 1836.

3. SAME—ACCEPTANCE OF GRANT—TRUST.—By accepting the grant of Congress of June 23, 1836, the State pledged her faith to hold the land or its proceeds for the benefit of all the inhabitants of the township, and an act which provides that the funds may be invested for the benefit of a portion of such inhabitants is void.

Appeal from Mississippi Chancery Court, Chickasawba District; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

Act 465 of the Acts of 1919, passed on the 28th of March, 1919, provided "that the school district of Special School District No. 5 of Mississippi County, Arkansas, be authorized to sell and convey by warranty deed a fee simple title to the SE¼ and E½ of the SW¼ of section 16, township 15 north, range 11 east, Mississippi County, Arkansas, and to reinvest the money obtained from such sale. Section 2 of the act provided: "That the lands may be disposed of by the directors after four weeks' advertisement in the paper or papers published in Blytheville, Arkansas, for a general circulation in Mississippi County, Arkansas; that the directors may dispose of the lands described in such small divisions and at public auction or private sale as they deem advisable in order to secure the best price." Section 3 provided: "That the funds derived from sale of the lands shall be reinvested in a building and equipment to be constructed in Blytheville, Mississippi County, Arkansas, and used for high school purposes." Section 4 provided: "That the building so constructed shall be for the benefit of children living in school districts numbers 33, 42, 49 and Special School District No. 5, who may attend the school without paying tuition."

Pursuant to the authority of the act, the directors caused to be published in the *Herald-News,* a newspaper published in the city of Blytheville having a general circulation in Mississippi County, Arkansas, a notice of sale of the lands above described.

This suit was instituted in the name of the State for the use and benefit of the common school fund and by school districts numbers 27 and 33 and by J. B. Fields,

a taxpayer of School District No. 27, and Herman Cross, a taxpayer of School District No. 5 of Mississippi County, in their individual capacities against Special School District No. 5 of Mississippi County, Arkansas, and the directors of such district.

The plaintiffs in their complaint set up the above act and alleged that it was void, among other things, for the reason that it violated the act of Congress granting the land in section 16 in each township of the State. They alleged that the act of Congress granting the 16th section of lands to the State created a trust, the revenue or proceeds only from which could be used for the support of schools; that the act was a discrimination against certain of the inhabitants of the township in which the lands are located; that the act does not provide any manner for obtaining the consent of the inhabitants of such township; that the act is an attempt to take the proceeds from the sale of school lands and invest in buildings for which no sites are provided, and for obtaining which no provision is made.

The answer denied all the material allegations of the complaint as to the invalidity of the act and alleged that the defendants did advertise and their purpose was to proceed to sell the land in pursuance of the terms of the act and to reinvest the proceeds in accordance with its terms.

The court found that Act 465 was unconstitutional and void "in that it is violative of the trust imposed by the Congress upon sixteenth section lands at the time said lands were granted to the State of Arkansas, for the use of the inhabitants of the several townships for the use of the schools, in that the investment of the proceeds of the land, as outlined in the act, would be a discrimination against the inhabitants of township 15 north, range 11 east, who do not live within the boundaries of School Districts Nos. 33, 42, 49 and Special School District No. 5 of Mississippi County."

The court thereupon entered a decree perpetually enjoining the defendants, as directors of Special School

District No. 5, from selling the lands and their attempting to carry out the purposes of the act. From that decree is this appeal.

Davis, Costen & Harrison, for appellant.

Act No. 465, Acts of 1919, is not unconstitutional and void, nor violative of the trust imposed upon the State in the act of Congress granting the sixteenth section lands to the State for school purposes, etc.

The act of Congress is not binding upon the State, and it is not necessary to obtain the consent of the inhabitants to such a sale as this. 19 Ark. 308; 11 *Id.* 332. One acting under authority granted by statute has, in addition to the authority expressly granted, that necessarily implied and essential to carry out the power granted. 36 Cyc. 1112; 111 Ark. 332 (335). An executory trust was created by the act of Congress, but the object and intent was to be carried into effect in a manner at the sound discretion of the trustee. 39 Cyc. 195. The State derived no more power from the act of Congress of February 15, 1843, than it already had to sell its lands. 15 U. S. (Lawy. ed.) 338-341. The State can sell the sixteenth section lands without permission of Congress. *Ib.* 558. Only on the theory that the trust is an executory one could the State have authorized the sale of these school lands as she has done. See 19 Ark. 308; 49 *Id.* 174; 50 *Id.* 346; 111 *Id.* 333.

The act is not a discrimination against the inhabitants of the township who do not live in School Districts 33, 42, 49 and Special District No. 5. The manner of carrying out the trust is left to the State, and it has determined that a high school building would be for the benefit of the inhabitants of the township under the terms and conditions of the act, and that is conclusive, conceding that the act was a discrimination, yet the unconstitutional parts of the act may be eliminated and the constitutional sections may stand. 37 Ark. 356; 46 *Id.* 312; 92 *Id.* 93.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. The lands were granted for the *use* of the townships for schools, and the "*use*" means that the trust shall be carried out by using the incomes for the maintenance of schools and cannot be determined and destroyed by the Legislature selling the lands at any time it sees fit. Funk & Wag. New St. Dict., 2626; 39 Cyc. 845. For definitions of "use" see, also, 152 Ind. 111; 52 N. E. 599; 6 Misc. (N. Y.) 524; 27 N. Y. Sup. 879; 62 Conn. 62; 16 L. R. A. 461; 34 Me. 394; 81 Conn. 372.

The act is clearly invalid. 120 Ark. 80; 96 N. W. 310.

The act is also discriminatory, and violates a doctrine of uniformity in the disbursements of the school funds. 120 Ark. 80, deprives those inhabitants.

2. See Pomeroy, Equity, § 982.

3. The fact that the trust is executory does not authorize the trustee to destroy it. 39 Cyc. 195.

4. The act, by its own terms, is nugatory, and no portion of it can stand. Const. 1874, Art. 14, § 2.

P. A. Lasley, R. A. Nelson and *C. A. Cunningham,* also of counsel, for appellee, join in appellee's brief.

WOOD, J., (after stating the facts). The lands in suit are part of section 16, township 15 north, range 11 east, immediately south of and adjacent to the town of Blytheville, which were granted to the State of Arkansas by the act of Congress, approved June 23, 1836, supplementary to the act for the admission of the State of Arkansas into the Union.

The act provided: "That the section numbering 16 in every township, and when such section has been sold or otherwise disposed of, other lands equivalent thereto, or as contiguous as may be, shall be granted to the State, for the use of the inhabitants of such townships for the use of schools."

By an ordinance of the Legislature approved October 18, 1836, the General Assembly of the State of Arkansas "freely accepted, ratified, and irrevocably con-

firmed as articles of compact and union between the State of Arkansas and the United States" the act of Congress containing the above grant of lands.

The language of the act of Congress, to-wit: "For the use of the inhabitants of such townships for the use of schools," shows clearly that the purpose of the grant was to convey to the State absolute title to the sixteenth section in every township to be held in trust for the benefit of the inhabitants of the townships in which such sections are situated for the use of the schools.

The act of Congress of February 15, 1843, conferred upon certain States, among them Arkansas, the right to provide for the sale of lands reserved and appropriated by Congress for the use of schools within those States "and to invest the money arising from sales thereof in some productive fund, the proceeds of which shall be forever applied under the direction of said Legislature to the use and support of schools within the several townships and districts of the county for which they were originally reserved and set apart, and for no other purpose whatever."

There is also other language in the act of 1843 showing that Congress interpreted the language of the original grant in the act of 1836 to mean that the money arising from the sale of the sixteenth section should be invested in some productive fund for the use and support of the schools within the townships where the sixteenth sections are situated.

While the act of Congress of 1843, *supra,* was declared by this court, in *Mayers* v. *Byrne,* 19 Ark. 308, not binding upon the State as to the disposition of the land, the act nevertheless is a construction by Congress of the meaning of the terms of the original grant as to how the money derived from the sale of the sixteenth sections should be used by the State to which such lands were granted.

The Legislature as early as 1853 provided that the accruing annual interest on the money arising from the sale of the sixteenth section of land in any township

shall be a perpetual fund to be appropriated to the support of a school or schools in the respective townships, but no part of the principal shall ever be expended for any purpose whatever and shall be loaned out at an interest of not less than 8 per cent. per annum." Act of January 11, 1853.

Section 2 of the act of 1885, section 7488 of Kirby's Digest, provides as follows: "The principal arising from the sale of the sixteenth section of land shall never be apportioned or used."

While the later interpretation by Congress and by the Legislature of the meaning of the terms of the act contained in the original grant are not binding on the court, they are persuasive, and indeed we are convinced that they correctly construe the meaning and purpose of the original act of Congress of 1836, and the ordinance of the State accepting the grant.

Now, the word "use" employed in the act of Congress has a well-defined legal meaning, and the State by its ordinance accepting the terms of the grant of the United States entered into the compact and accepted the trust imposed thereby which her sovereign power, the Legislature, must observe in executing the trust.

"As a general rule," says the Supreme Court of Indiana, "the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy or cultivation, etc., or the rent which can be obtained for its use. If it is money or its equivalent, generally speaking, it is the interest which it will earn." *Brunson* v. *Martin,* 152 Ind. 111-118; *Lin* v. *Howard,* 163 Mich. 556, 128 N. W. 793-5; *In re Moor's Estate,* 163 Mich. 353, 128 N. W. 198; *Candee* v. *Conn. Savings Bank,* 81 Conn. 372-74.

It will be observed that the act of Congress granted the sixteenth section to the State absolutely and unreservedly and without prescribing the manner in which the lands should be used if retained by the State, or, if

sold, how the proceeds should be invested or put to use. In these respects the power of the Legislature is plenary. It is wholly within the province of the Legislature to determine whether the lands shall be leased or whether they shall be sold or how and by whom they shall be managed and sold. *Widner* v. *State,* 49 Ark. 172; *School Dist. No. 36* v. *Gladish,* 111 Ark. 329.

As is said in *Mayer* v. *Byrne,* 19 Ark. 308-18: "The State, as a sovereign, not as an individual, took upon herself a trust, which she was to execute, and could only execute, by such municipal legislation as her General Assembly might deem necessary and expedient to carry into practical effect the objects of the grant. The land was to be appropriated to the support of schools for the benefit of the inhabitants of the township in which it was situated, but whether this was to be effected by leasing the land, or selling it, and putting the proceeds upon interest, was not prescribed by the act of Congress making the grant, and, of course, was left to the discretion and good faith of the State."

But there is a limitation upon the power of the Legislature to dispose of the *corpus* of the trust; that is, the land itself, or, if sold, the proceeds thereof, in a manner which would defeat the trust by appropriating the land or the proceeds thereof to a purpose contrary to that expressed in the compact. The State is under a sacred obligation to carry out the purpose of the grant as clearly expressed in the act of Congress.

We conclude, therefore, that the words "for the use of the inhabitants of such township for the use of schools" contained in the grant of Congress limit the State in her execution of the trust, through her sovereign agent, the Legislature, to the purposes indicated by the meaning of the word "use." This word has a potential significance and shows that the parties to the compact never intended that the sixteenth section, the land itself, or the proceeds thereof, if sold, should be turned over to the inhabitants of the township, the beneficiaries of the trust, but, on the contrary, that the lands or its

proceeds should be put to use for the maintenance and support of schools.

The act under review provides that the funds derived from the sale of the sixteenth section shall be reinvested in a building and equipment in Blytheville, to be used for high school purposes. By the act in question the property itself, or the *corpus* of the trust, is exhausted and used in a building for the benefit of students living in School Districts Nos. 33, 42, 49 and Special School District No. 5. The act thus violates the plain terms of the contract or compact between the United States Government and the State as evidenced by the act of Congress of 1836 containing the grant, and the ordinance of the State accepting the same, and is, therefore, void. Article 2, section 22, Constitution of 1874.

But, even if the compact contemplated that the *corpus* of the trust might be appropriated for high school buildings, etc., the act under consideration is further void because it is discriminatory against part of the inhabitants of the township in which the sixteenth section is situated, which violates the terms of the compact. The plain language of the act of Congress "for the use of the inhabitants of such township" refers to all the inhabitants of such township. The grant of land "for the use of the inhabitants of the township" created a vested right in the usufruct of the sixteenth section in all the inhabitants of the township in which that section is situated.

It is shown by a stipulation in the record that School Districts Nos. 4, 6, 22, 32 are partially within township 15, in which the sixteenth section is situated.

Section 4 of the act of the Legislature under consideration provides "that the building so constructed shall be for the benefit of students living in School Districts Nos. 33, 42, 49 and Special School District No. 5, who may attend the school without paying tuition.

All the inhabitants of township 15 have a usufructuary proprietorship of the sixteenth section. This is really the more important estate than the naked legal

title which the State has pledged her good faith to hold for the benefit of all the inhabitants of the township and to be administered uniformly and impartially to the benefit of all. Any act which could have the effect of depriving any of the inhabitants of the benefit of the use of the lands or the proceeds thereof for the use of schools would violate the provisions of the compact and would be a taking of their property without compensation.

In *Dickinson* v. *Edmonson,* 120 Ark. 80, speaking of the disbursement of the common school fund, we said: "The Legislature had no authority to select an arbitrary basis for the disbursement of the funds, but must do so upon some just basis relating either to the scholastic population or the general population of each locality or the amount of taxes paid, or some such equal and uniform basis of distribution. The Constitution expressly provides for uniformity of taxation, but there is no express provision with respect to the uniformity of disbursement. However, in the very nature of the subject, there must be uniformity, otherwise the use of the fund would not be for the common benefit of the people. * * * The common school funds cannot be distributed in a partial manner so as to discriminate between different localities." The above doctrine is applicable here.

The funds derived from the use of the sixteenth section or from the use of the proceeds of the sale of such section, were manifestly intended by the grant from the United States Government, to be used for the benefit of the inhabitants; that is, all the inhabitants, for the support and maintenance of schools without discrimination against any inhabitants of any class or locality. Therefore, the decree of the chancery court declaring the act under review void and perpetually enjoining the directors of Special School District No. 5 from selling the land is correct, and it is affirmed.

McCULLOCH, C. J., not participating.

DAVIS *v.* BISHOP.

Opinion delivered June 23, 1919.

SALE—GROWING CROP—DROUGHT.—Where the defendant agreed to sell to the plaintiffs at a price named 300 bales of cotton which were growing on defendant's farm, and by reason of drought the defendant raised only 219 bales, whereas he usually raised five hundred bales, plaintiff cannot recover damages for non-delivery of the remainder of the bales to be sold.

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

John N. Cook, for appellants; *Mahaffey, Keeny & Dalby* (of Texas), of counsel.

The court erred in giving instruction No. 1 directing a verdict. Even if the complaint alleged unequivocally and the proof showed that the cotton called for in the contract was to be raised by appellee and this crop fell short the 81 bales, this would not relieve him from damages in the event the market price of the cotton exceeded the price mentioned in the contract. 6 R. C. L. 1001, § 367; 15 L. R. A. (N. S.) 833; L. R. A. 1917 A. 648; *Ib.* 1916 F. 3; *Ib.* 1917 C. 437.

Appellee made no effort to show why he failed to raise the 300 bales, further than to say he only made 219. 13 C. J., § 873 *et seq.* and 958.

The issue should have been submitted to a jury. 4 Crawford's Digest, p. 4966.

Pratt P. Bacon, for appellee; *Wheeler & Robinson* (of Texas), of counsel.

The court properly instructed a verdict, the failure to deliver was caused by the act of God and without any fault on the part of the seller. 75 S. W. 341; 53 L. R. A. (old ser.) 681; 83 Ala. 440; 35 *Id.* 169; 31 Ark. 286; 16 Cyc. 847; 74 Ala. 311; 39 Ill. 372. Appellee tendered the proceeds of all the cotton he raised under the contract, and the verdict is right, and the judgment should be affirmed.

HART, J. Geo. W. Davis & Company sued G. W. Bishop to recover damages which they alleged they sustained by reason of the breach of a contract by Bishop to sell and deliver to them a certain number of bales of cotton.

At the conclusion of the evidence, the court directed the jury to return a verdict in favor of the defendant, and from the judgment rendered the plaintiffs have duly prosecuted an appeal to this court.

The only issue raised by the appeal is whether or not the trial court erred in directing a verdict for the defendant under the evidence adduced by the plaintiffs. Hence it will only be necessary to abstract the testimony of the plaintiffs.

C. G. Davis & Company is a firm of cotton buyers at Texarkana, Texas, and have been engaged in that business for several years. C. W. Bishop owned a large cotton plantation in Miller County, Arkansas, and usually planted about one thousand acres in cotton. About the 1st of August, 1917, C. G. Davis, the senior member of the firm, and G. W. Bishop had a conversation about the advisability of the latter selling at that time a part of the cotton which was being grown on his plantation during that year. They agreed that it would be a good thing for Bishop to do this. Bishop told Davis that he had one thousand acres in cotton and usually made five or six hundred bales. On the 1st day of August, 1917, they entered into a contract for the sale by Bishop to C. G. Davis & Company of three hundred bales of the cotton at 24½ cents a pound. The cotton was already growing on Bishop's farm in Miller County, Arkansas, and was to be delivered at Texarkana, Texas, during the months of October, November and December of that year.

In contracts of that kind it was the custom for the planter to deliver the number of bales sold out of the first cotton picked by him. During the fall, Bishop picked two hundred and nineteen bales of cotton on his farm and delivered the same to C. G. Davis & Company, who paid him the contract price therefor. Bishop failed to de-

liver to Davis & Company any more cotton, and they brought this suit in order to recover damages which they allege they sustained on account of his failure to deliver to them any more cotton. It was shown by Bishop that he delivered to them all the cotton that he grew on his farm in Miller County, Arkansas, during that year.

The court did not err in directing a verdict for the defendant. It is true, as contended by counsel for the plaintiffs, that the general rule is that when the contract is to do a thing which in itself is possible, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it. The reason is that it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. There are, however, well-known exceptions to this general rule, and one of them is that where from the contract it is apparent that the parties contracted on the basis of the continued existence of a given thing, a condition is implied that, if the performance became impossible from the perishing of the thing, that shall excuse the performance.

In the instant case, according to the evidence adduced by the plaintiffs, the defendant agreed to sell to the plaintiffs three hundred bales of cotton which were growing on his farm in Miller County, Arkansas. The contract was executed on the 1st day of August. The defendant had planted one thousand acres in cotton, and that number of acres usually made five or six hundred bales of cotton. The contract related to the crop to be grown by the defendant on the latter's farm in Miller County. Under these circumstances, the performance of it, in the contemplation of both parties, depended upon the future growth and continued existence of the cotton.

The defendant delivered to the plaintiffs all the cotton that grew on the farm, and he was therefore excused from a further performance of the contract.

According to the plaintiff's own testimony, it was the intention of the defendant to sell him a part of the crop which was growing on his plantation in Miller County, and under the circumstances the designation of three hundred bales was a mere statement of opinion as to the quantity and cannot be regarded as a warranty that the defendant would raise that number of bales. Of course, if the defendant, by the terms of the contract, had warranted that he would raise three hundred bales of cotton, he would be bound by the terms of his warranty, notwithstanding, on account of weather conditions or other matters over which he had no control, he failed to raise the designated number of bales. Here we have already seen, it appears from the plaintiffs' testimony that it was the intention of the parties that the cotton should be grown on the defendant's own farm, and it is plain that the number of bales was specified in the contract for the purpose of limiting the quantity sold to that amount. *Switzer* v. *Pin Conning Mfg. Co.,* 59 Mich. 488; *Rice & Co.* v. *Weber,* 48 Ill. App. 573, and *Ontario Deciduous Fruit Growers' Association* v. *Cutting Fruit Packing Co.* (Cal.), 53 L. R. A. 681.

In the last-mentioned case the court held that, under a contract for the sale of the crop of a certain orchard, stating the minimum quantity of the fruit to be delivered, the seller cannot be held liable in damages for failure to deliver the specified quantity because of the failure of the crop due to unusual climatic conditions; nor can he be compelled to substitute other fruit for that contemplated in the contract.

In a case note to L. R. A. 1916F, at p. 63, in discussing the question of intervening impossibility of performance of a contract as a defense to an action for the breach thereof, it is said:

"Whether or not a contract for the sale of produce to be delivered at a certain future date contemplates that it shall be grown on a particular tract of land, so that a failure of the crop on that land will excuse non-delivery, is often a close question of construction of the particular

contract. The rule appears to be that if the parties contemplate a sale of the crop, or of a certain part of the crop, of a particular tract of land, and, by reason of a drought, or other fortuitous event, without the fault of the promisor, the crop on that land fails or is destroyed, non-performance is to that extent excused; the contract, in the absence of an express provision controlling the matter, being subject to an implied condition in this regard; but that, if the contract does not specify or contemplate the crop of any particular tract of land, non-performance will not be excused merely because it happens that, on account of a drought or other fortuitous event, without his fault, the promisor is unable to perform the contract, the cases following in this respect the general rule previously indicated that the mere inability of the obligor to perform will not generally excuse non-performance.''

It follows that the judgment must be affirmed.

SUMMERS v. CONWAY & DAMASCUS ROAD IMPROVEMENT DISTRICT OF FAULKNER COUNTY.

Opinion delivered June 23, 1919.

1. CONSTITUTIONAL LAW—SUFFICIENCY OF ALLEGATIONS OF PLEADING.—The courts will not review legislative assessments for local improvements on merely general allegations that the assessments are arbitrary, excessive and confiscatory; facts must be pleaded which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the facts, so as to amount to an arbitrary abuse of power.
2. HIGHWAYS—PETITION OF PROPERTY OWNERS.—Art. 19, section 7, Constitution, requiring a petition of a majority of the property owners for the creation of an improvement district within a city or town, has no application to a highway district a part of which only is within a city.
3. SAME — ASSESSMENT — EFFECT OF FAILURE TO APPEAL.—Where a property owner within a highway district neglects to appeal from an assessment of his property, he cannot ask relief from equity upon the ground that the assessment is excessive and confiscatory.

Appeal from Faulkner Chancery Court; *Jordan Sellers,* Chancellor; affirmed.

STATEMENT OF FACTS.

By Act No. 148, approved March 1, 1919, the Legislature passed an act creating an improvement district for the purpose of improving and constructing a hard-surfaced road from a point in the city of Conway to Damascus, a distance of twenty-two miles, all in Faulkner County, Arkansas. Road Acts of 1919, vol. 1, p. 374.

J. I. Summers, a taxpayer and property owner in the proposed district, filed a complaint in the chancery court to enjoin the commissioners of the district from issuing bonds under the provisions of the act and from entering into any contract for the construction of the road. The complaint sets up various grounds which, it alleges, render the act unconstitutional and void.

The court sustained a demurrer to the complaint. The plaintiff elected to stand on his complaint and refused to plead further. The court, therefore, dismissed his complaint for want of equity. The plaintiff has appealed.

The appellant *pro se* and *J. H. Dunn,* for appellant.

The act is unconstitutional and void because:

(1) Plaintiff's land will receive practically no benefit from the road, and certainly not in the sum assessed, it will be more than a mile from the road.

(2) Other lands in the district assessed are in the same situation as to inaccessibility, and the assessments are void and tend to increase the burden of taxation on the remainder of the lands in the district.

(3) The jurisdiction of public highways and roads is vested in the county court and said act violates our Constitution.

(4) By said act the city of Conway is included in the district, and a portion of the road constitutes a street of said city, while under the laws of Arkansas the sole control of streets in a city is vested in the city council, and no tax can be levied on property of the city without

the consent of a majority in value of the owners in said city, which has never been obtained.

(5) No notice of the filing of the plat and assessment is required under said act.

For these reasons the assessment is void, and is a cloud upon plaintiff's title, and the collection of said tax would deprive plaintiff of his property without due process of law, and the court erred in sustaining the demurrer. Act 7, § 28, Constitution, and *Ib.* Art. 18, Amendment No. 5; 125 Ark. 325; *Swepston* v. *Avery,* 118 Ark. 294; 201 S. W. Rep. 797; 86 Ark. 231; 82 S. W. 371.

R. W. Robins, for appellee.

The contentions of appellant have all been decided against him by this court, see 72 Ark. 119; 98 *Id.* 113; 125 *Id.* 325; 92 *Id.* 93-98; 118 *Id.* 119; 112 *Id.* 277; 130 *Id.* 507; 53 *Id.* 529; 49 *Id.* 518; 52 *Id.* 529; 19 *Id.* 602; Welty on Assessments, par. 20, note 3; 170 U. S. 304, 311; 164 *Id.* 176; 21 Ark. 40; 59 *Id.* 528; 170 U. S. 55; 125 *Id.* 345; Cooley on Taxation 53; 6 Enc. Pl. & Pr. 338; 81 Ark. 562; 98 *Id.* 113; 83 *Id.* 344; 133 *Id.* 188; 134 *Id.* 30. See, also, McGee on Due Process of Law 248; 239 U. S. 207, Law. ed. 230; 49 Ark. 518; 90 *Id.* 413; 21 Enc. Pl. & Pr. 437; 149 C. C. A. 31; 139 U. S. 591; 229 U. S. 481; 117 Fed. 925; 160 C. C. A. 473; 112 Fed. 582; 168 U. S. 224; 157 C. C. A. 241; 146 *Id.* 537; 19 Ark. 416.

HART, J., (after stating the facts). The plaintiff alleges the act to be unconstitutional and void on various grounds, all of which have been decided against him by the recent decisions of this court. Therefore we will proceed to state his grounds of complaint and cite without additional discussion the cases, or some of them, which have put at rest the contentions now made by the plaintiff.

1. It is contended that the land of the plaintiff will receive practically no benefit from the proposed improvement because his land lies one and one-fourth miles from the road.

Section 4 of the act specifically declares that all lands located within the district will be benefited by the construction of the road and proceeds to state definitely the amount of benefits that each tract of land will receive. The various tracts of lands are divided into different zones for the express purpose of the Legislature fixing the benefits that each tract will receive. The Legislature provided that the lands in the different zones are benefited a certain per cent. of the assessed value of the lands as shown by the last assessment thereof for State and county purposes. A different per cent. is fixed for each separate zone.

The act further provides for the filing of a plat of the district by the county surveyor showing the zone of each subdivision of land as defined in the act and directs the county clerk to extend an assessment in a book provided for that purpose against each tract of land in the district, according to the percentage fixed by the act and the zone as shown on the map filed by the county surveyor. This is a legislative assessment of benefits.

In the case of *Moore* v. *Bd. Dir. of Long Prairie Levee Dist.*, 98 Ark. 113, the court said: "Nor can the courts review merely on general allegations that the assessments are arbitrary or excessive and confiscatory. Facts must be pleaded, which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts." See, also, *Alcorn* v. *Bliss-Cook Oak. Co.*, 133 Ark. 118.

The same view has been expressed in several other cases, notably in the recent cases of *Cumnock* v. *Alexander*, 139 Ark. 153, and *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168. In these last two cases the legislative assessment of benefits were sustained where the lands were situated farther away from the proposed road than the land in question.

2. It is insisted that the act is void because other lands in the district which have been assessed for the

construction of the road are in the same situation as to inaccessibility to the road as are the lands of the plaintiff. It is conceded by the plaintiff that, if his contention in this respect as to his own lands is not sustained, the ruling would apply with equal force to other lands similarly situated. It is perfectly manifest that the same ruling should obtain in both cases.

3. It is contended that the act is contrary to article 7, section 28, of the Constitution, which vests in the county court exclusive original jurisdiction in all matters relating to roads. This question under a similar statute was recently thoroughly considered by the court and decided adversely to the contention of the plaintiff by a divided court. The reasons for the holding were given in an opinion by the chief justice and the dissenting opinion prepared by the writer and concurred in by Mr. Justice WOOD, gives the reasons for the contrary view. Therefore it would be useless to again open and discuss this question. *Sallee* v. *Dalton,* 138 Ark. 549.

4. It is next insisted that the act is unconstitutional because a certain part of the road which is proposed for improvements constitutes a street in the city of Conway. It is claimed that this violates article 19, section 27, of the Constitution relative to the formation of improvement districts in cities and towns. This court has expressly held several times that the Legislature may create a road district and authorize the commissioners to improve the road through an incorporated town or city. *Cox* v. *Road Imp. Dist. No. 8 of Lonoke County,* 118 Ark. 119; *Bennett* v. *Johnson,* 130 Ark. 507; and *Cumnock* v. *Alexander,* 139 Ark. 153, and *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168.

5. It is next urged that the assessment of benefits upon the land of the plaintiff was unreasonably high and amounted to confiscation of his property. The act provides that the map and plat showing the different zones in which the property was situated should be filed within 30 days after the passage of the act, and that any landowner who thinks himself aggrieved by any incorrect

showing of his land thereon may file a petition in the county court within 10 days after the filing of said map asking for a correction thereof. The act further provides that the landowner may appeal from the judgment of the county court if he feels aggrieved by its action in the matter. It is also provided that within 10 days after the filing of the assessment book any landowner deeming himself aggrieved by the assessment may file a petition in the chancery court for a correction thereof. These provisions afforded the landowners a day in court for the hearing of any complaint against the assessments.

In the case of *Coffman* v. *Road Imp. Dist No. 6 of Lawrence County,* 134 Ark. 411, the court held that, under the act in question in that case, property owners might appeal from an order of the county court approving the assessment of benefits by following the only requirement of the statute, namely by filing an affidavit for appeal within 10 days. This period of time was recognized by the court in that case as not unreasonable. Several other cases have sustained statutes in cases of this kind, allowing a short period of time for the landowner to act in the premises.

The writer dissented in some of these cases on the ground that the time was unreasonably short, but our previous decisions have closed the door to further inquiry on this question.

The plaintiff failed to avail himself of the remedy provided by the statute within the ten days allowed him, and cannot now question the validity of the assessment on the ground that it is excessive.

It follows that the decree will be affirmed.

COMMONWEALTH PUBLIC SERVICE COMPANY *v.* LINDSAY.

Opinion delivered June 23, 1919.

1. ELECTRICITY—INJURY FROM WIRE—PRESUMPTION.—The fact that a person using the street is injured by contact with a live wire hanging or fallen to the ground, without explanation, is sufficient *prima facie* evidence on the part of the company owning the wire to entitle the plaintiff to go to the jury in an action for damages for the injury.
2. SAME—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—Where plaintiff, in an action for injury from a live wire, testified that he did not know that the electricity was turned on the wire and there was nothing to indicate that such was the case, and he further testified that the wire was lying beside the sidewalk and that he picked it up for the purpose of throwing it out of the way, it was a question for the jury whether he was guilty of contributory negligence, as it cannot be said as matter of law that he was acting officiously in attempting to remove the wire.
3. SAME—INSTRUCTION.—An instruction that "companies supplying electric current are bound to use reasonable care in the construction and maintenance of their lines" was not objectionable as being abstract where there was evidence tending to prove that the defendant had not allowed sufficient clearance between its wires and the limbs of a tree.
4. TRIAL—INSTRUCTIONS.—It is not a sound objection to an instruction that it does not submit all the issues to the jury where other instructions cover the different phases of the case.
5. ELECTRICITY—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.—An instruction that "the plaintiff cannot be charged with contributory negligence unless he voluntarily exposed himself to a known danger" was not objectionable as excluding constructive knowledge where it is apparent from the context that the court did not mean to confine liability to actual knowledge.
6. SAME—LIVE WIRE—INSTRUCTIONS.—Instructions that plaintiff had no right to touch a live wire lying beside the sidewalk, and that he could not recover if he voluntarily touched the wire, were properly refused.

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

STATEMENT OF FACTS.

Emmett Lindsay by Mary Burk, his mother and next friend, brought this action against the Commonwealth Public Service Company to recover damages for an in-

jury sustained by him in coming in contact with a live electric wire which he alleges the defendant negligently allowed to fall down on the sidewalk in the city of Mena. The defendant company denied negligence on its part and pleaded contributory negligence on the part of Emmet Lindsay.

The material facts as shown by the plaintiff are as follows: The defendant operated an electric light plant in the city of Mena, Arkansas, by means of which it furnished electricity to public and private consumers. As a part of its equipment, it maintained a row of poles on Port Arthur Avenue upon which a wire was strung carrying an electric current of 2,300 volts. The poles on Port Arthur Avenue were set between the concrete part of the sidewalk and the curb. There was a large shade tree between the concrete walk and the curb through which the electric wire was strung. The electric wire was not attached to the tree, but was attached to poles set on each side of the tree for that purpose. The branches of the tree were cut away so that they did not come in contact with the wire at the time it was strung. During a night in August, 1918, there was a hard rainfall accompanied by wind. The storm does not appear to have been so unusual in severity as might not reasonably have been expected to occur. On the night in question the wire was burned off at some point where it passed through the branches of the tree and the loose ends dropped down right on the edge of the concrete part of the sidewalk which was used by pedestrians. Emmett Lindsay was a boy 17 years of age and lived at the home of a Mr. Stratton further up in the city. On the morning after the rain or storm, he got up about 5:30 o'clock and attempted to turn on an electric light. The current was off and the light would not turn on. The plaintiff did not pay any further attention to the matter, but went on with his usual work about the house until about seven o'clock in the morning, when he started down town for the purpose of getting a gallon of gasoline. On his return home he noticed

a wire down right at the edge of the sidewalk. He had the gallon of gasoline in his right hand and reached with his left hand to throw the wire back out of the way. It was a live wire and knocked him unconscious. The wire was the one which had fallen down to the edge of the sidewalk from the tree described above, and carried 2,300 volts of electricity. The plaintiff did not know it was a live wire when he picked it up. He did not see any fire up in the tree and did not know that a limb of the tree was on fire. The accident occurred about three blocks from the power house of the defendant and on the main thoroughfare of the city of Mena. The plaintiff's hand was burned so badly that the thumb and index finger on his left hand had to be amputated. His middle finger on that hand is still crooked. The plaintiff suffered severe pain on account of his injuries. He was asked on cross-examination if he had not climbed the tree and touched the wire up there and had been thus knocked from the tree by coming in contact with the live wire. He answered that he did not, and again stated that he had started to pick up the wire right at the edge of the sidewalk for the purpose of throwing it out of the way when he was injured. He stated that the wire was not on the concrete part of the sidewalk where the people usually walked, but that it was right at the edge of it—between that and the curbing.

On the part of the defendant it was shown that the wire in question had been strung through the tree four or five weeks and was an up-to-date standard gauge wire. One of the employees of the company stated that it had no means between five o'clock in the morning and the time of the accident of ascertaining that the limb of the tree had fallen across the wire; that it had rained most of the night before and that the rain was accompanied by wind; that before the rain there was a clearage of six inches between the limbs of the tree and the wire; that the limb was not liable to come down and touch the wire with that clearance; that a small limb had broken down and fallen on the wire the night before the

accident occurred; that this limb bore the wire down and pressed it against another limb of the tree, and that on account of the rain this caused the electricity to burn both the limb and the wire so that the wire burned in two and fell down on the ground; that the company had before the accident asked permission of the owner of the property to trim off more of the limbs of the tree, but had been denied permission to do so.

It was shown by the defendant that it was safer for the wire to run between the branches of the tree without being fastened to the tree. There was also testimony on the part of the defendant tending to show that the plaintiff had climbed the tree and touched the live wire while up in the tree; that his coming in contact with the live wire caused him to fall out of the tree down on the sidewalk. As above stated the plaintiff denied climbing the tree, and in this statement he is corroborated by a witness who first came to him and said that he found him lying unconscious with one hand closed about the live wire and the other holding the gallon jug of gasoline.

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

James B. McDonough, for appellant.

1. A directed verdict should have been given for defendant. The evidence does not warrant the application of the doctrine set forth in 89 Ark. 581. The breaking of the wire was due entirely to an accident that reasonable care could not prevent and there was no liability. 1 Thompson on Neg., § 802, and cases cited.

2. The burden of proof was on plaintiff to prove negligence. 122 Ark. 445. He failed to make out a case of liability. As a matter of law there was no liability. 31 L. R. A. 566; 43 W. Va. 661; 39 L. R. A. 499; 9 C. S. 490; Thompson on Neg., § 892.

3. The court erred in giving the instruction on the burden of proof. 89 Ark. 581, and cases *supra.* See also 54 Ark. 209; 57 *Id.* 418; *Ib.* 429; 61 *Id.* 381; 78 *Id.* 426; 57 L. R. A. 624; 31 *Id.* 566; 82 Mich. 293. This case

falls within the rule announced in Thompson on Neg., § 802, and 57 Ark. 429.

4. It was error to give instruction No. 1. It is abstract and misleading and was specifically objected to. There was no evidence of negligence in constructing and maintaining wires. See cases *supra.*

5. It was error to give instruction No. 3. Defendant endeavored to cure its defects by modification of it but the court declined to do so. Regardless, however of the modifications, it does properly submit to the jury the law as to contributory negligence.

6. It was error to give instruction No. 7 (2a). Defendant was not an insurer of safety under the proof. Defendant was only required to use ordinary care. Jaggard on Torts, 863. It also conflicts with Nos. 4 and 5 given for defendant and places on defendant an absolute duty different from that required by law. Kinkead on Torts, § 261; see also cases *supra.*

7. The court erred in refusing defendant's request No. 2. Cases *supra.*

Norwood & Alley, for appellee.

1. The doctrine of *"res ipsa loquitur"* applies here. 9 R. C. L. 31; "Electricity" and cases cited; 59 Ark. 215; 89 *Id.* 581. See also 54 Ark. 209; 57 *Id.* 418-429; 61 *Id.* 381. See also 78 *Id.* 426; 94 *Id.* 254; 86 *Id.* 549; 103 *Id.* 64; 31 L. R. A. 566-572; 57 *Id.* 619.

2. The court properly instructed the jury. 78 Ark. 430; 54 *Id.* 212; 54 *Id.* 131; 9 R. C. L., § 14; 61 Ark. 386; 104 *Id.* 227; 81 *Id.* 187; 87 *Id.* 396; 104 *Id.* 196; 66 *Id.* 264; 65 *Id.* 265; 71 *Id.* 398; 72 *Id.* 145; 73 *Id.* 183.

All the instructions should be read together and as a whole there are no errors. 133 *Id.* 206. The judgment is right on the whole case and should be affirmed. Cases *supra.*

HART, J., (after stating the facts). 1. It is earnestly insisted by counsel for the defendant that the court erred in not directing a verdict for the defendant because it was not shown that the defendant was guilty

of negligence and because the undisputed facts show that the plaintiff was guilty of contributory negligence. The circumstances surrounding the injury were proved by the plaintiff. It was shown by the plaintiff that his injury resulted from contact with a live electric wire of the defendant which had fallen down at the edge of the sidewalk of one of the principal streets of the city of Mena over which the plaintiff at the time was walking. This made a *prima facie* case of negligence against the defendant which was not overcome by the evidence adduced in its behalf. *Southwestern Tel. & Tel Co.* v. *Bruce,* 89 Ark. 581; *Jacks* v. *Reeves,* 78 Ark. 426, and *Texarkana Gas & Electric Light Co.* v. *Orr,* 59 Ark. 215. The dangerous character of live electric wires and the consequent peril to which their suspension over public streets expose those who travel the streets or sidewalks, show the justness of the rule, which holds that the injury of a person using the street by contact with a live wire hanging or fallen to the ground, unexplained, affords sufficient *prima facie* evidence of negligence on the part of the company owning the wire to entitle the plaintiff to go to the jury in an action for damages for the injury.

So, too, whether a person coming in contact with a live wire in a highway is himself guilty of negligence is ordinarily a question for the jury to be determined by it under the circumstances of each particular case. It is true the record shows that the plaintiff lived with a family which used electricity and that on the morning in question when he first arose he endeavored to turn on the electric lights and found that the current was off in the house. It was also shown that the boy climbed the tree and came in contact with the live wire while up in the tree; that the end of the wire in the tree was blazing or one of the limbs of the tree was afire from contact with the wire. The plaintiff denied that he had climbed the tree or that there was any fire in the tree at the time he took hold of the live wire to throw it out of the way. He said that he did not know that the elec-

tricity was turned on the wire, and there was nothing to indicate that such was the case. While the wire was not lying on the part of the sidewalk usually traveled, it was lying near the edge of the concrete part of it and the plaintiff said that he reached down and picked it up for the purpose of throwing it out of the way. He was only seventeen years old at the time and there is nothing to show that he ever worked about electricity. Electric light wires are a stealthy and silent danger of great force and capable of instantly killing or severely injuring persons coming in contact with them. Therefore, under the circumstances of this case the court was right in not telling the jury as a matter of law that the plaintiff was guilty of contributory negligence.

2. It is also insisted that the court erred in giving instruction No. 1 to the jury. The instruction is as follows: "You are instructed that companies supplying electric current are bound to use reasonable care in the construction and maintenance of their lines. This care varies with the dangers that will result from negligence on the part of the company. Reasonable care is such care as a reasonable man would use under ordinary circumstances, and, in determining whether such care has been exercised, the jury will take into consideration the location of the lines, whether in thickly or sparsely settled communities, the harmless or dangerous character of the current carried by such lines, and their remoteness or proximity to people who may pass by, and all other circumstances in evidence."

Counsel for the defendant insists that the instruction is extremely abstract and misleading because it contains a general declaration that electric companies are bound to use reasonable care in the construction and maintenance of its lines. He insists that this declaration does not have a specific application to the facts in the case at bar; that there is no negligence unless it be based upon the contention that the defendant had improperly strung its wires through the tree, and that the undisputed evidence on that point showed that there was

sufficient clearance between the limbs and the wire. We can not agree with counsel in this contention. The negligence charged against the company consisted in its failure properly to construct its line and its omission to take the necessary precautions to prevent the wires from falling to the ground and causing injury to persons using the street or sidewalk in case they did fall. It is true according to one of the employees of the defendant there was a clearance of six inches between the wire and the limbs of the tree in dry weather, but this was not sufficient to absolve the company from its duty to properly maintain its wires. It knew that ordinary rain storms would frequently occur and that the rain falling on the trees might cause the limbs to fall down over the wire and thereby cause both the wires and the limb of the tree to burn in two. The necessary result of this would be to allow the wire carrying 2,300 volts of electricity to fall down on the sidewalk where persons traveling over it would likely come in contact with it. Therefore we do not think the court erred in giving the instruction.

3. It is next claimed that the court erred in giving instruction No. 2, which is as follows: "If you find that the wire in question was under the control and management of the defendant and that the accident would not have happened in the ordinary course of events and if defendant had used due care, then, since the defendant owed a duty to the plaintiff to use care in the management of its lines to avoid injuring him, the burden of proof is on the defendant to prove that the alleged injury was not caused by defendant's negligence."

There was no error in giving this instruction. The undisputed evidence showed that the injury was caused by the plaintiff coming in contact with the live wire of the defendant which had fallen down on the ground at the edge of the sidewalk. This made a *prima facie* case for the plaintiff and placed the burden of proof on the defendant to justify or excuse its negligence. See authorities *supra*.

4. It is claimed by counsel for the defendant that the court erred in giving instruction No. 3. The instruction reads as follows: "You are instructed that the defense of contributory negligence is contingent upon the object of the plaintiff in handling said wire and also upon his knowledge or ignorance of all the elements of danger connected therewith. The plaintiff can not be charged with contributory negligence unless he voluntarily exposed himself to a known danger. If you find from the testimony that a live wire belonging to the defendant company and controlled by the defendant was lying near the walk, as alleged, and that said wire showed no signs of being charged with electricity, and that plaintiff was ignorant of the character of said wire, and that he took hold of said wire merely for the purpose of casting it aside, and was injured thereby, then your verdict will be for the plaintiff upon this issue."

Counsel for the defendant make both general and specific objections to this instruction. He urges that the instruction is faulty because it does not submit to the jury the issue as to whether or not the plaintiff was making an effort prior to the accident to do something with the wire, the wire at the time being in the tree. It is well settled that the court can not submit all the issues to the jury in one instruction. It was the theory of the defendant that the plaintiff saw a flame up in the tree and out of idle curiosity climbed up there for the purpose of investigating the trouble to the wire and while doing so came in contact with the live wire which caused his injury. The court submitted this phase of the case to the jury in an instruction asked by the defendant.

It is also insisted that the instruction is faulty because the wire was not on the sidewalk in a place where the plaintiff or other passersby would reasonably be injured thereby, and that the plaintiff acted unnecessarily or officiously in endeavoring to remove the wire. He claims that under the circumstances the defendant owed the plaintiff no duty. Such a modification to the

instruction would have amounted to a peremptory instruction in favor of the defendant and was not proper. It is true the wire was not actually lying on the concrete part of the sidewalk which is usually used by pedestrians, but it was lying near the edge of it, and the plaintiff could not be said to be as a matter of law acting officiously in attempting to remove the wire.

It is, also, claimed that the instruction is erroneous because it told the jury that the plaintiff can not be charged with contributory negligence unless he voluntarily exposed himself to a known danger. The vice of this part of the instruction is said to be that it absolves the plaintiff from contributory negligence unless the danger was actually known to him, when the instruction should have contained the modification, that the plaintiff could not be charged with contributory negligence unless he exposed himself to a danger known to him or which ought under the circumstances to have been known to him. We do not think this objection is well taken. The word "known" as used in that part of the instruction evidently referred to the fact of both actual and constructive knowledge of danger on the part of the plaintiff. This is shown by the context. It will be observed that before the plaintiff could recover, under the concluding part of the instruction the jury must find that the plaintiff was ignorant of the character of said wire. This refers to actual knowledge of the danger on his part. Just before that we find the following: "That said wire showed no sign of being charged with electricity." This refers to constructive knowledge on the part of the plaintiff. Before he could recover the plaintiff was required to show, not only that he did not know of the danger, but that he had no reason to believe the wire to be charged with electricity. If the court intended to use the word "known" to mean actual knowledge, as contended by counsel for the defendant, there would have been no use in telling the jury that it must also find that said wire showed no signs of being charged with electricity before he could recover. If he had to have

actual knowledge it would not be any defense that the facts were such that he had reason to believe that the wire was charged with electricity and consequently in the exercise of ordinary care ought to have known that it was so charged and was therefore dangerous to touch. Hence a majority of the court does not think that the court meant to restrict the meaning of the word "known" to actual knowledge, and we do not think there was any error in giving the instruction.

5. It is next insisted that the court erred in refusing to instruct the jury that plaintiff had no right to touch the wire unless it interfered with his passage along the street. The court did not err in refusing to so instruct the jury. This would have been equivalent to the trial court ruling, as a matter of law, upon a question of fact. So, too, in regard to the request of the defendant to instruct the jury that if plaintiff voluntarily touched the live wire then there could be no recovery. Such an instruction would have been an attempt to limit the traveler along the street to an extent not warranted by the decisions.

6. Counsel for the defendant filed a reply brief in which he assigned as error the action of the court in several respects not argued in his original brief. This is contrary to the rules of the court and for that reason these assignments of error can not be considered by us. The rule has been uniformly enforced and no excuse has been given by counsel for not enforcing it in the present case. If counsel should omit to argue any assignment of error in his original brief, such assignment must be treated as waived or abandoned by him unless permission to amend his brief is asked and granted by the court for good cause before the case is submitted. We find no prejudicial error in the record and the judgment must be affirmed.

McCULLOCH, C. J., and SMITH, J., dissent.

J. R. WATKINS MEDICAL COMPANY v. MOSLEY.

Opinion delivered June 23, 1919.

FOREIGN CORPORATION—RIGHT TO SUE.—Where a foreign corporation, before bringing suit on a contract previously entered into within the State, duly qualified to do business in the State, as required by Acts 1907, No. 313, it was entitled to sue on such contract, notwithstanding the act provides that "the complying with the provisions of this act after suit is instituted shall in no way validate said contract."

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman,* Judge; reversed and judgment here for appellant.

W. E. Beloate, for appellant.

Appellant was entitled to recover after it later complied with the laws of Arkansas requiring foreign corporations to qualify. The contract here is very similar if not identical with that of *Watkins Medical Co.* v. *Hogue,* decided by this court March 24, 1919. The contract created the relation of vendor and vendee and not principal and agent. 126 Ark. 597; 131 *Id.* 15. Defendant guaranteed the payment of the debt and was liable on the third and last contract. 70 Minn. 84; 72 N. W. 829; 68 Am. St. 512. Mosley acknowledged the debt by letter and his admission binds his sureties. 25 N. D. 268; 141 N. W. 479; 2 Brandt on Sur. & Guar. (3 ed.), § 795.

It was prejudicial error to refuse to sustain the demurrer to par. 2 of the answer and in giving instructions 2, 3 and 4 on the theory that a contract entered into by a foreign corporation which had not complied with Act No. 313, Acts 1907, p. 744. 77 Ark. 203; 91 S. W. 306; 113 Am. St. Rep. 139; 77 Ark. 203; 91 S. W. 306; 113 Am. St. 139, following its previous decision in 61 Ark. 1; 54 Am. St. 191; 31 S. W. 157; 29 L. R. A. 712, and afterwards followed in 122 Ark. 451; 132 *Id.* 108; 200 S. W. 283. See also *Hogan* v. *Intertype Corporation,* 136 Ark. 52. The contract was not void and the sale was not unlawful. 132 Ark. 108. Only the right to sue or

recover is prohibited until the foreign corporation qualifies under our act of 1907, *supra;* 236 U. S. 165.

Towney, Smith & Towney (of Minnesota), of counsel for appellants, join in the above brief.

George A. Burr, for appellees.

1. This case is not controlled by 122 Ark. 651, as it differs in material facts as do the other cases cited by appellant. The law of 1899 as amended by act of 1907, provides that any foreign corporation which fails or refuses to comply with the law can not make any contract which can be enforced in this State either in law or equity, and a subsequent compliance with the act after suit shall not validate the contract, etc. The words of this amended act should be given full force and effect as it was evidently the intention to change the former law. Every act thus penalized or prohibited is void, and hence the contract here. 47 Ark. 378; 9 Cyc. 479; 54 Ala. 150; 81 Ark. 41; 85 *Id.* 106; 103 *Id.* 288.

2. The verdict establishes the fact that appellant was doing business in this State through its agent Mosley, during the period covered by the contract; that it is a foreign corporation and had not complied with our laws. It is prohibited by law and the contract is null and void. 29 Ark. 386; 32 *Id.* 619; 47 *Id.* 378; 77 *Id.* 580; 2 Mechem on Sales, 1044; 1 Page on Cont., § 327. See also, 6 Humph. (Tenn.) 36; 91 Ark. 69, and cases cited *supra.*

A penalty implies a prohibition and the Wingo Act is a prohibition unless the act is complied with. 103 Ark. 288; 124 *Id.* 539; 115 *Id.* 166.

3. The amendment of the Wingo Act, act No. 687, invalidates the contract here sued on and renders it unenforceable and the judgment is right and should be affirmed.

4. The basis of the objections to the introduction of documentary evidence is not clearly defined, but the

court was right in admitting it. 115 Ark. 166; 124 *Id.* 539.

HUMPHREYS, J. On the 27th day of April, 1917, appellant, a foreign corporation, instituted suit against appellees in the Circuit Court of the Eastern District of Lawrence County, for $548.14, alleging that said sum was a balance due under the terms of a contract entered into by and between appellant, on the one part, and appellee, J. M. Mosley, together with his sureties, on the other part. The contract in all material parts was identical with the contract made in the case of *J. R. Watkins Medical Co.* v. *Hogue,* 138 Ark. 105, 210 S. W. 628.

Appellee defended upon the ground that the contract sued upon was entered into by appellant, a foreign corporation, for the sale of its medicines, extracts and other articles in the State of Arkansas, through its agent, J. M. Mosley, one of the appellees herein, before qualifying to do business in the State in accordance with Act No. 313, Acts 1907, of the General Assembly of the State of Arkansas.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court. By the verdict and judgment, appellees were exempted from liability, and an appeal has been duly prosecuted to this court.

The undisputed evidence disclosed that, on December 1, 1913, appellee, J. M. Mosley, was indebted to appellant in the sum of $588.97 for goods furnished by appellant and sold by appellee; that, on that date, the contract in question was entered into by and between appellant and appellee with his sureties, in which said amount was expressed as due for goods received and sold under a former contract; that appellee agreed to pay, and said sureties guaranteed the payment of said sum, together with all amounts that might accrue on account of shipments of medicines, extracts and articles furnished during the life of the contract; that all goods subsequently furnished by appellant and sold by appel-

lee were paid for, and that $40 was paid on the old indebtedness, leaving a balance due of $548.14; that all goods received and sold under the contract in question were received and sold prior to November 30, 1915; that, on said date, and not before, the appellant qualified as a foreign corporation to do business in the State of Arkansas, under act No. 313, Acts of 1907 of the General Assembly of the State of Arkansas. Over the objection of appellant, much evidence was introduced tending to show that, prior to the contract of date December 1, 1913, appellee, J. M. Mosley, sold the goods and products of appellant in the State of Arkansas for a number of years, as its agent. Under our view of the law, as applied to the undisputed facts above recorded, it is unnecessary to set out that evidence.

The cause was sent to the jury upon the theory that appellant, being a foreign corporation and not having qualified to do business in the State of Arkansas, could not recover for the medicines, extracts and other articles shipped to appellee if they were furnished to him and sold by him as the agent of appellant.

Appellant insists that it was entitled to recover for goods furnished and sold by appellee, even though received and sold by him as its agent.

In construing the statute law prescribing conditions upon which foreign corporations might do business in Arkansas, as it stood before the passage of the act in question, this court held in many cases that the contracts of foreign corporations, made before complying with the conditions imposed by the statute, were not void, but unenforceable until the requirements in the statute were complied with, and that a foreign corporation might comply with the terms of the act after bringing suit to enforce its contracts. *State Mutual Fire Ins. Assn.* v. *Brinkley Stave & Heading Co.*, 61 Ark. 1; *Buffalo Zinc & Copper Co.* v. *Crump*, 70 Ark. 525; *Sutherland-Innes Co., Ltd.* v. *Chaney*, 72 Ark. 327; *Woolfort* v. *Dixie Cotton Oil Co.*, 77 Ark. 203. Contracts made by foreign corporations for the transaction of business in

the State of Arkansas, after the passage of act No. 313, Acts 1907, commonly known as the "Wingo Act," were not rendered nugatory for failure to comply with the requirements of the act, but were rendered unenforceable unless the corporation complied with the provisions of the act before instituting suit on its contract. The act in question was before this court for interpretation in the case of *Waxahachie Medicine Co.* v. *Daly,* 122 Ark. 451. In construing the act, the court said, through Mr. Justice KIRBY, that: "The present statute (Act No. 313, Acts 1907, of the General Assembly of the State of Arkansas), after prescribing a penalty of a fine of not less than $1,000 for failure to comply with its provisions, provides: 'As an additional penalty any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid can not make any contract in this State which can be enforced by it either in law or in equity and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.'

"This provision does not expressly declare the contract void, although it does say it shall be unenforceable either in law or in equity by the delinquent corporation, and that a compliance with it after suit is instituted shall in no way validate the contract. The use of this language as to the validation of the contract was made doubtless because of the court's decision holding in the construction of the other statute that a compliance with the terms of the law by the foreign corporation after suit brought would enable it to prosecute the suit; but if the Legislature had intended that compliance with the terms of this act by a delinquent foreign corporation, after the entry into a contract and before suit brought, on its part, would not enable it to enforce such contract, then there was no use to add anything after the words 'which can be enforced by it either in law or equity.'

"Since the statute does not expressly declare the contracts void, we do not think, in view of the language used, that the lawmakers intended to fix such additional

penalty for the failure to comply with the terms of the statute."

Under this construction of the statute, in force at the time the contract was made and the goods were shipped and sold, it is immaterial whether the contract was one of principal and agency or sale and purchase. The amount due, under the terms of the contract, was undisputed. The trial court should have instructed the verdict for the appellant in the sum of $548.14, with interest at the rate of six per cent. from the 30th day of November, 1915, and it was error not to do so when requested.

The judgment is therefore reversed and judgment will be entered here in favor of appellant against appellees for said sum. It is so ordered.

IRBY *v.* DOWDY.

Opinion delivered June 23, 1919.

PLEADING—AMENDMENT—SUBSTITUTION OF PARTIES.—Where a parent brought suit in his own name to recover a horse alleged to belong to his infant son, it was not error to refuse to permit him to amend the complaint to allege a cause of action in favor of the son by plaintiff as his natural guardian, as the proposed amendment would have the effect of bringing a new cause of action.

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

C. E. Elmore, for appellant.

Joseph Irby was the father and natural guardian of his son, and he should have been allowed to prosecute the suit in his own name and for his own use and benefit. It was error to refuse to substitute. Kirby's Digest, § 3756-7; 32 Ark. 92-96; 95 *Id.* 355-8.

All male persons are minors until they are twenty-one years of age. 79 Ark. 194; 101 *Id.* 510-12; 107 *Id.* 561.

If the minor had no father nor mother then this cause should have been prosecuted as laid down. Section 6021, Kirby's Digest; 82 Ark. 514; 93 *Id.* 353. Joseph Irby had the right to file his application as a sub-

stituted complaint to become natural guardian and next friend for his minor son. Kirby's Digest, § 4671. Appeals from justices court are tried "anew on the merits" in the circuit court. 55 Ark. 281-3. No new suit was instituted as it is the infant who is the real party. 119 Ark. 231-3; 71 *Id.* 258; 66 *Id.* 247-253. The circuit court on appeals may permit amendments to be made to the complaint or statement of claim. Showing a substituted natural guardian and next friend for the infant does not constitute a new cause of action. 71 Ark. 258; 119 *Id.* 231-244; 98 *Id.* 480. New parties may be made in the circuit court on appeals from justices of the peace. Kirby's Digest, § 6011; 31 Ark. 210; 74 *Id.* 54; Kirby's Digest, § 6006; 49 Ark. 100; 86 *Id.* 304-6; 74 *Id.* 54; 95 *Id.* 97.

HUMPHREYS, J. Appellant, in his individual capacity, brought suit before a justice of the peace in Fulton County against Andrew Dowdy, to recover a certain gray horse of the value of $100. The affidavit filed by appellant to obtain delivery of the personal property stated that appellant was the owner of, and entitled to the immediate possession of, the horse. An appeal was prosecuted to the circuit court of Fulton County from the judgment rendered in the magistrate's court. On the call of the case in the circuit court, appellant filed a motion to substitute himself, as natural guardian and next friend of his son, Herbert Irby, a minor, seventeen years old, as plaintiff in his place and stead. The motion was overruled, over the objection and exception of appellant. The cause then proceeded to a hearing before a jury.

Appellant testified, in substance, that his oldest son bought the horse in question, through his direction, for his son, Herbert Irby, who was at the time residing with, and assisting, his oldest son in making a crop; that the horse was paid for out of that portion of the proceeds of the crop belonging to Herbert; that Herbert kept the horse on the farm during the crop season, and that he

traded him to appellee for a crippled horse; that appellant never had any control over, or the possession of, the horse, nor did he ratify or confirm the trade made by his son with Robert Dowdy.

At the close of appellant's testimony, the court instructed a verdict for appellee and rendered judgment dismissing the action. From the verdict and judgment an appeal has been duly prosecuted to this court.

The verdict was instructed and the action dismissed for the reason that the undisputed evidence disclosed that appellant had no interest in the horse.

Appellant insists that the court erred in refusing to permit him to substitute, in his place, as plaintiff, himself as guardian and next friend of his son, Herbert Irby, who was the real owner of the horse in question. Had the suit been instituted in the first place by any one as the next friend of Herbert Irby, it would have been within the discretion of the court to have substituted his natural guardian, or any other person as his next friend, for the next friend who had first brought the suit. *Wood* v. *Claiborne,* 82 Ark. 514; *Nashville Lumber Co.* v. *Barefield,* 93 Ark. 353. In the suit supposed, the infant would have been the real party in interest, and not the party who represented him, and the substitution of the natural guardian or another person as next friend would not have the effect of bringing a new cause of action. *Freeman* v. *Lazarus,* 61 Ark. 247; *St. Louis, I. M. & S. R. Co.* v. *Haist,* 71 Ark. 258; *Haydon* v. *Haydon,* 98 Ark. 480; *Buckley* v. *Collins,* 119 Ark. 231. While it is true that section 3757 of Kirby's Digest provides the natural guardian shall have the custody and care of minor children and their estates, it does not follow that they can maintain suits in their individual names for their children's property, for it is provided by section 6021 of Kirby's Digest that "The action of an infant must be brought by his guardian or his next friend." Unless the minor was included as a party plaintiff when the action was brought, his inclusion thereafter would amount to the institution of a new suit. This court said,

in the case of *State* v. *Rottaken,* 34 Ark. 144, quoting the fourth syllabus: "Where a plaintiff shows in his complaint that he has no cause of action, the court can not amend it by making others plaintiffs who have." This rule of pleading was reaffirmed in the case of *Schiele* v. *Dillard,* 94 Ark. 277. In approving the rule, the court said, "The appellants sought by amendment to their complaint to substitute new parties defendant. This could not be done. While the court may in its discretion allow additional parties plaintiff or defendant to be added or struck out, it can not make an entire change of parties plaintiff or defendant. That would be tantamount to a new suit between entirely different parties."

It is suggested by appellant that the ruling of the court prohibiting him from prosecuting the suit in his individual name caused his son, Herbert Irby, to suffer the loss of a horse valued at $100. We do not understand that the dismissal of appellant's complaint in any way prejudiced the rights of his son, Herbert Irby. Herbert Irby was in no sense a party to the suit, and his title to the horse was not adjudicated. Notwithstanding the dismissal of appellant's suit, he was at liberty to institute another as the guardian and next friend of his minor son for the recovery of the horse in question.

No error appearing, the judgment is affirmed.

BATTE BROTHERS *v.* BATTLE.

Opinion delivered June 23, 1919.

1. SALE—EVIDENCE.—Where there was a controversy as to whether the buyer or the seller of lumber failed to perform the contract, it was not error to refuse to permit the buyer to show that certain offers to him had been made to buy the timber in question, where the court permitted the witness to testify what the market value of the timber was.

2. EVIDENCE—MARKET VALUE—OPINION.—It was not error to permit a witness to testify as to the market value of the lumber in question where he based his opinion on an examination of a hundred or more logs and other witnesses testified that these logs were about an average.

3. EVIDENCE—MARKET VALUE—HOW ESTABLISHED.—Where there was no market value at the place of delivery, it was competent to show what the lumber was worth by deducting the freight from its value at the nearest established markets.

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

J. D. Cook, for appellants.

1. The court erred in the exclusion of the testimony of Batte and Hicks as to the market value of merchantable cypress lumber and in the admission of appellee's evidence as to that issue. Appellants did not purchase mill run lumber but *merchantable* mill run lumber under the contract. Appellants were entitled to prove the market value by sales of the different grades which made up merchantable mill run purchased by appellants. The evidence was competent and material, and its exclusion prejudicial, as the verdict shows. 137 Ark. 592; 66 Ark. 175.

2. It was also error to exclude the evidence of R. S. Bailey as to the market value of lumber covered by the contract upon an examination the day before of one hundred or more logs on the yards of the mill. 82 Ark. 358.

Graves & McFadden, for appellee.

The assignments of error by appellants were not assigned in the motion for new trial and this court will not consider them as they are raised here for the first time and Nos. 4, 5 and 6 are not specific, but too general and sweeping. 75 Ark. 111; 103 N. E. 27; 38 Ark. 528. But if sufficiently definite there was no error by the court. *Supra.*

2. There was no error in the exclusion of the evidence of Batte and Hicks as to particular offers, sales market value and grades. It was not competent to prove offers for the property to prove the market value of property. 117 Ark. 317; 14 Ark. L. R. 230; 30 N. E. 985; 10 R. C. L. 956-7.

The exceptions to testimony were not properly saved in the record. But if the testimony was competent, and it was improperly introduced in the light of the verdict of the jury, it was not reversible error as the jury found for the defendant and no complaint is made of error in the instructions.

SMITH, J. This suit was instituted by Batte Brothers, a copartnership composed of A. W. and C. W. Batte, to recover of J. J. Battle damages on account of an alleged breach of a contract. The jury found for the defendant, and plaintiffs have appealed, and in referring to the parties we shall employ the designations used in the briefs and will refer to appellants as plaintiffs and to appellee as the defendant.

The material portions of the contract are as follows:

"That, for the consideration hereinafter mentioned, said party of the first part hereby sells to the parties of the second part all of the cypress lumber cut from all the merchantable cypress timber on the White, Van Etten and Read tracts of land, estimated at one million feet mill run, more or less, said lumber to be cut from straight logs twelve inches and over in diameter, and of standard length. The party of the first part agrees to guarantee the logs to run as good grade as the trees inspected by the party of the second part on the mill yard.

"It is further agreed that said party of the first part will cut and deliver f. o. b. Fulton, Arkansas, at least one hundred thousand feet per month, unless hindered or prevented by some unavoidable casualty or weather.

"It is further agreed that said party of the first part will cut said lumber in accordance with specifications to to be furnished by the parties of the second part.

"The parties of the second part agree to pay the party of the first part the sum of twenty dollars per thousand feet, cash on ten days' sight draft, mill run, for said lumber when delivered in accordance with specifications f. o. b. and loaded on cars at Fulton, Arkansas."

It was alleged in the complaint that defendant failed and refused to cut and deliver the lumber, and plaintiffs offered testimony in support of that allegation. The case was tried upon the theory that this failure was due to an advance in the price of the lumber over that named in the contract, and much conflicting testimony was offered in regard to the market value of this lumber. On the other hand, the defendant alleged that plaintiffs were to furnish specifications for cutting the lumber but failed to furnish any specifications therefor, and that plaintiffs failed to pay for and receive the lumber which was sawed under the contract or to make the advances thereon which the contract called for.

The real and controlling question in the case was, who breached the contract? Which of the parties failed to perform? And that question of fact was resolved against plaintiffs by the verdict of the jury in favor of defendant.

As tending to support their contention that defendant had refused to manufacture the lumber, plaintiffs offered testimony to the effect that lumber had advanced in price, and that defendant failed to perform the contract on that account. It is also said that the enhancement of the market price of the lumber over its contract price furnished the measure of damages for the alleged breach, and that error was committed at the trial in the admission and exclusion of testimony bearing on that fact. Upon the issue thus joined the court instructed the jury as follows:

"If you find from the preponderance of the evidence in this case that the defendant failed or refused to furnish the lumber to the plaintiffs as set out in the contract, and that the plaintiffs have suffered any damage on account of such alleged breach of contract, you will find for the plaintiffs. Under the terms of the contract sued on, it was the duty of the plaintiffs to furnish the defendant with specifications of the lumber that was to be cut by the defendant furnished to the plaintiffs. If you find that the plaintiffs failed or refused to furnish

the specifications for the lumber to be cut by the defendant, then the plaintiffs can not recover, or, if you find that the plaintiffs themselves abandoned the contract sued on, and that, on account of such abandonment of the contract, the contract was not fulfilled by the defendant, then you can not find for the plaintiffs."

Other instructions elaborated the idea that the right to recover existed if the jury found the fact to be that plaintiffs performed or offered to perform their part of the contract, while the defendant failed or refused to perform. And other instructions told the jury what the measure of damages would be in the event a right of recovery was found to exist.

No objection is urged to any of the instructions given, and it would, therefore, be academic to determine whether error was committed in the admission or exclusion of testimony which went only to the question of the amount of damages to be recovered when the jury had found against plaintiffs' right to recover at all but for plaintiffs' contention that the jury might have found otherwise on the main question of fact but for the alleged errors in the admission and exclusion of testimony tending to show there had been an enhancement in the value of the lumber. In other words, that, if plaintiffs had been properly permitted to show the increased market value of the lumber over the contract price, it would have appeared to the jury that it would have been profitable to the plaintiffs to have the contract performed and correspondingly unprofitable to the defendant to perform it, and the jury would, therefore, have the more readily believed their testimony that they furnished specifications for sawing the lumber and otherwise offered to perform the contract, and would more readily have disbelieved defendant's testimony that this was not done. Assignments of error which raised this question will, therefore, be considered.

The first of these assignments of error is that the court refused to permit plaintiff C. W. Batte and one K. P. Hicks to testify as to certain offers which had been

made to them to buy portions of the lumber in question. If the competency of this testimony were conceded as an abstract proposition, it does not follow that error was committed here by its exclusion, for this would have been only one circumstance to show the market value, and the court did not refuse to permit the witnesses who would have given this testimony to state what the market value was. Moreover, this offered testimony related only to the higher grades of the lumber which would have been cut under the contract, and did not include the "mill run" of lumber for which the contract called.

A witness named Bailey was permitted to testify as to the market value of the lumber in question, and he based his opinion on an examination of a hundred or more logs which he found on the yard the day before he gave his testimony, the objection being that the witness did not know and did not undertake to state that these logs were about an average. But other instructions supplied that testimony. Substantially the same objection was made to the testimony of witness Beloe. But what we have said about the testimony of Bailey is equally applicable to that of Beloe.

A witness named Hicks was permitted to testify as to the market value at the contract place of delivery (the mill) by figuring the freight from the mill to the nearest established markets. Other witnesses had testified that there was no market for this lumber at the mill, and it was, therefore, competent to show what the cost of transportation of the lumber would have been by deducting this cost from the price obtainable at the established market to arrive at the market value at the point of shipment. *Arkansas Short Leaf Lbr. Co.* v. *McInturf*, 134 Ark. 284.

Exceptions were saved to certain testimony in regard to the quantity of timber. But this can not be of importance if there was no right to recover damages, a fact which the jury evidently must have found.

No prejudicial error appearing, the judgment is affirmed.

CLARK v. LEWIS.

Opinion delivered June 30, 1919.

1. LANDLORD AND TENANT—CONTRACT TO FURNISH SEED—DAMAGES.—Where a share-cropper's written contract did not specify the variety of cotton to be planted, but expressly left that open to mutual agreement, and there was an agreement as to the kind of cotton seed to be used, and the landlord fraudulently violated the agreement by substituting another variety, he will be responsible to the share-cropper for the damages sustained.
2. CONTRACT—BREACH—MEASURE OF DAMAGES.—Where a landlord agreed to furnish a prolific short-staple variety of cotton seed to plant, and to pay the share-cropper for his share on the basis of the market price for short-staple cotton, but, instead of doing so, furnished a less prolific variety of long-staple cotton seed, the landlord will be liable to the share-cropper for the difference between the market prices of the long and the short staple cotton.

Appeal from Crittenden Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

H. R. Boyd, for appellant.

The chancellor erred in his findings and decrees for the following reasons:

(1) The contracts were valid and there is no evidence of fraud perpetrated in regard thereto in the record.

(2) Being valid contracts and a full disclosure of all facts by the answers, no decree should have been rendered except a dismissal of the suits or decree entered in accordance with the amount tendered in the answers or found due upon the basis of said contracts.

(3) There is no evidence of any fraud whatever in the record.

(4) Plaintiffs, after discovery that Foster cotton seed had been planted, proceeded to carry out said contracts without objection, and thereby ratified them if there was any invalidity in them.

(5) Said contracts were perfectly valid and legal.

There is no invalidity in the contracts. 30 Ark. 56; 23 L. R. A. 449, and notes; 1 Benjamin, Sales, pp. 329-30,

§ 318-19; 35 Ark. 190; 102 *Id.* 349; 156 Fed. 753; 19 L. R. A. (N. S.) 197, and note, p. 201; 20 Cyc. 251.

Evidence of fraud must be decided and reliable and calculated to mislead. 27 Ark. 250; 82 Pa. St. 198. Fraud is never presumed but must be proven. 99 Ark. 45; 33 L. R. A. (N. S.) 836, and note; 40 Ark. 417; 82 *Id.* 20.

Clark was Towne's manager, and there is no evidence that the agent ever had any authority to represent that Wannamaker seed would be planted. After the tenants discovered that they had raised Foster cotton, they took no action to avoid the contract but proceeded to pick and deliver the cotton, and thereby condoned any imperfection or fraud in the contract. 196 Fed. 627; 2 Pomeroy, Eq. Jur. (2 ed.), § 917.

A. B. Shafer and *L. C. Going,* for appellees.

It is clearly manifest that in the preparation of the contract the landlord was looking after his interest, and by it the same is thoroughly protected. We do not contend that the written contract was fraudulently procured or that appellees were imposed on in the making of it, the only objection we have made is as to the conduct of the parties under it and the construction which appellant and his intestate placed upon the rights of the parties under it. When appellees went on the place and before the contract was signed, it was represented to them that Wanamaker cotton was to be grown; at the time they signed they thought that such cotton was to be grown. Both Townes and his manager represented to them that the entire place was to be planted in Wannamaker cotton.

The proof is conclusive that Wannamaker cotton was a short staple and grows many more pounds per acre than Foster cotton. If appellant at the time the contracts were made intended to have appellees plant Foster cotton, and for the purpose of taking advantage of appellees, induced them to believe that they were going to raise Wannamaker cotton, and under that induce-

ment fixed the price, then his conduct was a deliberate and unmitigated effort to steal, which courts of equity are always ready and willing to prevent. A very material alteration was made in the contract by appellant in substituting Foster cotton. This was a fraud which equity will not countenance. It was a fraud, and the court below so held, and the decree should be affirmed.

McCULLOCH, C. J. Appellant's intestate, C. L. Townes, owned a plantation in Crittenden County, and leased separate portions of it for the year 1917 to appellees, Milton Lewis, Ned Hall and Henry Croft. There was a printed form of lease used which described the quantity and location of the particular portion of the land to be rented to each tenant and specified, in substance, that the tenant should pay one-third of the crop to the landlord as rent, and should sell and deliver the crop, when harvested, to the landlord, and that the landlord should pay the tenants for cotton so delivered a price "within two cents of Memphis upland quotations, according to grade." The contract contained another stipulation that the tenant should "prepare for, plant, cultivate and gather such crops of cotton and corn as may be mutually agreed upon, under the direction and supervision of the landlord or its agents." Appellees each planted and gathered a crop of cotton for the year specified and delivered the same to the landlord, and this controversy arises concerning the price of the cotton to be credited to the accounts of the tenants.

Townes sold the cotton on the Memphis market, and credited the tenants with the cotton at the price specified in the contract, that is to say two cents per pound less than the price of middling cotton on the Memphis market. It is agreed that that is what the language of the contract meant. The cotton was, however, of the long staple variety, and Townes sold the cotton on the Memphis market at a price largely in excess of the price at which he credited it to the tenants; the testimony establishing the fact that the cotton in fact brought more than forty cents per pound.

Appellees instituted separate actions against Townes in the chancery court of Crittenden County for an accounting of the proceeds of the cotton sold from time to time, and for recovery of the amount according to the price actually realized on the sales. The cases were consolidated, and Townes died during the pendency of the action and the cause was revived in the name of the administrator. There was a decree below in favor of each of the appellees for the amount of the proceeds of the cotton according to the price actually received by Townes, after deducting the accounts for supplies furnished, and an appeal has been prosecuted to this court.

The basis of the suit of appellees, in the face of the letter of the contract, which fixed the price of the cotton to be within two cents of the price of middling cotton on the Memphis market, is the following state of facts which the testimony adduced fully establishes, or at least a finding to that effect is not against the clear preponderance of the testimony.

In the negotiations between the tenants and the landlord before the signing of the contract it was represented to the tenants by the landlord that the kind of seed known as Wannamaker seed would be furnished to the tenants for planting purposes, and each of the tenants agreed to the use of that kind of seed, and, after the contract was entered into and planting time came and the seed was furnished, the landlord still represented to the tenants that the seed furnished was of the Wannamaker variety, but those representations were false, and the seed actually furnished and planted by the tenants was a kind known as Foster seed. Wannamaker cotton is a medium staple variety and very prolific, the average yield from that variety being greatly in excess of the Foster variety, which is shown to be very long staple and not so prolific. The tenants preferred the Wannamaker seed because it was more prolific, and the testimony shows that that was the variety agreed upon between the parties.

Now, it is contended that the letter of the contract should control, as under established rules of evidence all antecedent statements and agreements during negotiations are merged in the written contract and can not be proved by parol testimony which varies the writing itself. The answer to that contention is that the contract does not specify the variety of cotton to be planted. In fact, one of the clauses of the contract leaves that open to mutual agreement, and the testimony shows that there was in fact an agreement as to the kind of cotton to be used and that Townes fraudulently and surreptitiously violated the agreement by substituting Foster seed instead of Wannamaker seed. Even if the clause of the contract referred to did not apply to the selection of the seed, then it would follow that the contract leaves that question open, and the tenant would have the right to make his own selection as to the variety of the seed, and if by deception and fraud he was induced by the landlord into planting the kind of seed which was contrary to the tenants' selection, then the landlord should bear the loss and not the tenant. The tenants preferred the prolific variety of cotton rather than the long staple, and had the right to make the selection, and it was a fraud on their rights for the landlord to furnish another variety of seed without their consent. The substitution was prejudicial to the interests of the tenants and very much to the benefit of the landlord, for under its operation the tenants raised long staple cotton with the disadvantage of a short yield, and received only short staple prices, whilst the landlord sold the cotton at long staple prices and accounted to the tenants only for the much smaller short staple prices. The testimony shows that Townes received nearly double the price for the cotton at which he accounted to the tenants, and this resulted from the wrongful substitution of the variety of seed agreed upon.

The evidence shows that the tenants did not ascertain that a different variety of seed had been furnished until they were about ready to gather the crop, but they

did discover it then, and it is further contended that the fact that the tenants, with knowledge of the change in kind of seed furnished, gathered and delivered the crop constitutes a ratification of the act of the landlord in furnishing a different variety of seed than that agreed on and that the tenants are on that account estopped to claim a price in excess of that specified in the contract. The rule of law is invoked that where parties are induced by fraud to enter into an executory contract they waive the fraud by proceeding with performance after discovery of the fraud. An exception, however, to that rule is that where the contract is executed in whole or in part before the fraud is discovered, performance does not constitute a waiver. *McDonough* v. *Williams,* 77 Ark. 261; *Thompson* v. *Libby,* 36 Minn. 287. The tenants had expended their time and labor in planting and cultivating the crop, believing that the seed of their own selection had been furnished, and it would be an unjust rule to impose upon them, as a condition upon their right to complain, that they first abandon the contract and give up their crops. The tenants gathered and delivered the crops because the contract required it, but they are entitled to recover the price of the cotton received on the Memphis market because of the fact that the landlord by his wrongful act prevented them from getting advantage of the production of the prolific variety of cotton which they had selected.

Decree affirmed.

EMBRY v. NEIGHBORS.

Opinion delivered June 30, 1919.

1. LANDLORD AND TENANT—LIEN FOR RENT AND ADVANCES—PRIORITY. Where a tenant to whom the landlord had made advances went to war and his father took over his crop and cultivated and gathered it, the landlord's lien for rent and advances was superior to the rights of the father.

2. SAME—ENFORCEMENT OF LIEN—PARTIES.—Where a landlord obtains possession of the proceeds of a crop grown by the father of his tenant, and applies same to the discharge of his lien, the father can not object that the son was not made a party to the suit.

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

Jas. H. Johnson, for appellant.

1. The proceeds of the crop belonged to appellant as he had not promised in writing to pay the debt of his son, Sadie, and he was not liable for his son's debts. Kirby's Digest, § 3654; 105 Ark. 697; 150 S. W. 146.

2. There is not one word of proof that appellant agreed in writing to settle the supply bill of his son and was not bound to do so under the law. *Supra.* It was error in allowing testimony as to the account of the son, as Sadie, the son, was not a party, and it was error to take this case from the jury without giving appellant the opportunity to present his instructions as to the law applicable to this case. The court also erred in taking the case from the jury, for it was a matter of fact for the jury, whether or not appellee had any sum of money belonging to appellant and had converted it to his own use.

Appellee had no lien for the year's (1918) supply bill, for Sadie made no crop that year, and if he had a lien the son should have been made a party to the suit.

Hays & Ward, for appellee.

1. Appellee had a lien on the crop for necessary supplies furnished the son, Sadie, his tenant, to enable him to make the crop.

2. Appellant finished making the crop started by his son, Sadie, with full knowledge of appellee's lien for supplies and without paying anything therefor.

3. Appellee did not waive his lien and appellant made no contract with appellee divesting him of his vested right in said crop.

4. Appellee having a lien on the crop was entitled to have the amount of the lien paid by the bank from

the proceeds of the sale of said crop, having come with the agent of appellant to sell said crop.

5. Appellee having received the amount of his account for supplies and rent, he was not obliged to refund said amount.

6. These being the facts from the undisputed testimony, the court properly directed a verdict for appellee. These propositions are supported by the facts and the law. Kirby's Digest, § 5033; 35 Ark. 231; 95 *Id.* 32; 16 R. C. L., § 504; 67 Ark. 364; 25 *Id.* 418.

The statute of frauds does not apply to this case.

Sadie Embry was not a necessary party. 95 Ark. 38.

The owner of personal property has the right to take peaceable possession of it wherever found. 110 Ark. 454-5. Substantial justice has been done and the judgment should be affirmed.

WOOD, J. The facts are correctly stated by counsel for appellee as follows:

"The appellee, Neighbors, in the spring of 1918, rented to one Sadie Embry 15 acres of land in Pope County, Arkansas, Embry agreeing to pay one-half of the crop for the rent of the land, team and tools. A little later appellee rented to Al Embry, the appellant here, another 15 acres of land adjoining the land rented to Sadie Embry upon the same terms. Al Embry, the appellant, is the father of Sadie Embry; their lands were adjoining, they lived near each other and knew the terms upon which each was cultivating his crop.

Appellee, Neighbors, to enable his tenants, Sadie Embry and Al Embry, the appellant, to make their crops, furnished each certain goods and supplies, and Al Embry knew that Neighbors, appellee, was furnishing goods and supplies to his son, Sadie Embry.

In the spring of 1918, and about crop planting time, Sadie Embry went to war, and his father, Al Embry, appellant, took over the crop that had been started by his son, and, using the same tools and teams, he went ahead cultivating the land during the crop season, and at gath-

ering time he proceeded to gather and market the crop grown on the land rented from Neighbors. Out of the first three bales of cotton gathered, which he claimed was grown on the land he had rented from Neighbors, he paid Neighbors his rent and also for goods and supplies furnished by Neighbors to him (Al Embry). Later Al Embry gathered three more bales of cotton from the land that was originally rented to Sadie Embry, and this cotton was taken to Atkins by appellee, Neighbors, and one Cusie Embry, a son of Al Embry, and those two parties sold the three bales of cotton and received a check in the name of Al Embry, which check they together took to the Bank of Atkins to be cashed. The clerk in the bank, at the direction of appellee, Neighbors, credited his (Neighbors) bank account, not only with one-half of the proceeds of the cotton for rent, but $146.03, the account of the supply bill that Neighbors had furnished to Sadie Embry to enable him to make the crop of cotton; Cusie Embry, who had been acting as the agent of his father, Al Embry, refused to take any of the money from the bank, but left his father's share there, which was later collected from the bank by Al Embry. The next day after the sale of the cotton, appellant, Al Embry, made demand on the appellee, Neighbors, for $147.03, which was refused, whereupon Embry filed this suit in the circuit court. The court on the trial of this cause before a jury, after hearing the evidence, directed the jury to return a verdict in favor of the appellee, hence this appeal.

The appellant among other things testified that he did not agree to pay appellee the amount of the account of his son, Sadie Embry; that the latter traded with Neighbors before appellant moved on the place. He also testified that his son, Sadie Embry, was a grown man with a wife and two children.

It is conceded that appellee's account against Sadie Embry was correct.

There is no reversible error in the ruling of the court. The undisputed evidence shows that appellee

had rented to Sadie Embry, the son of the appellant, for the year 1918 the land upon which the cotton was grown, out of the proceeds of which the appellee received the amount of the account of Sadie Embry for the rent and for supplies furnished Sadie Embry by the appellee during that year. The undisputed proof, therefore, shows that Sadie Embry was the tenant of the appellee for the 15 acres of land upon which the cotton was grown.

The appellant contends that the proceeds of the crop belong to him and that, inasmuch as he had not promised in writing to pay the debt of his son, Sadie Embry, he was not liable therefor, under the statute, section 3654, Kirby's Digest.

But the above statute has no application to the facts of this record. The undisputed testimony, as we have already stated, shows that the land upon which the cotton was grown was rented by the appellee to Sadie Embry, and not to Al Embry. There is no testimony abstracted by the appellant to show that after Sadie Embry went to the war the appellant rented the same land from the appellee under an independent contract.

The appellant in his abstract states that "before any crop was planted Sadie Embry was drafted into the service of the United States, the appellee then rented to the appellant the 15 acres of land that was to have been cultivated by appellant's son on the same terms of one-half of the crop." The appellant does not set forth in his abstract any testimony tending to prove the above facts.

The appellee in his abstract states that the appellee rented to Sadie Embry 15 acres of land; that in the spring 1918, and about crop planting time, Sadie Embry went to war and his father, Al Embry, appellant, took over the crop that had been started by his son, and, using the same tools and teams, he went ahead cultivating the land during the crop season, and at gathering time he proceeded to gather and market the crop grown on the land rented from Neighbors.

Appellant contends that his son first rented the 15 acres from the appellee, but that after his son left the

appellant entered into an independent contract for the rental of this land. The latter statement, however, he does not prove by any testimony set forth in the record.

The burden is upon the appellant to show error in the ruling of the trial court and we must presume in favor of the judgment that the statement set forth in the appellee's abstract or statement of facts in regard to the contract is correct, since appellant brings forward no testimony to controvert the same.

If the appellant was simply occupying the premises for his son, Sadie Embry, then the latter, and not the appellant, must be regarded as the tenant of the appellee. Under section 5033, Kirby's Digest, the appellee had a lien upon the crop grown on the land in controversy, which was superior. The appellee having obtained possession of the proceeds of the crop had a right to hold the same to satisfy the debt of Sadie Embry for the rent and for the supplies. The appellant when he took over the land and crop had notice of the relation of landlord and tenant that existed between the appellee and Sadie Embry. The appellee's vested right under the statute was superior to any interest or claim that the appellant may have had therein. See *Lemay* v. *Johnson*, 35 Ark. 231: *Hunter* v. *Mathews*, 67 Ark. 364; *Murphy* v. *Myer*, 95 Ark. 32.

Since the debt of Sadie Embry to the appellee for rent and supplies is not denied, and since the appellant has no interest in the proceeds of the crop held by the appellee for the payment of this debt, superior to the lien of the appellee, it does not lie in appellant's mouth to complain that Sadie Embry was not made a party to the suit.

The judgment is correct, and it is therefore affirmed.

POOL v. MITCHELL.

Opinion delivered June 30, 1919.

1. STATUTES—CONSTRUCTION—SUPERFLUOUS LANGUAGE.—Act No. 281 of 1919, providing for the construction of a certain highway, enacts as follows (§ 11): "The assessment of benefits shall be paid in successive installments, *so that no local assessment of benefits shall be paid in successive installments,* so that no local assessment shall in any one year exceed ten per centum of the assessed benefits accruing to said real property." *Held* that the words italicized should be treated as surplusage.
2. SAME—CONSTRUCTION—SUPERFLUOUS LANGUAGE.—Act No. 281, of 1919, providing for the construction of a certain highway, uses the following language: "The commissioners may require the assessors to review their assessment not oftener than once per annum, increasing or diminishing the assessment against particular pieces of property as justice requires, provided that the total amount of benefits shall not be diminished *if the district revised assessment shall be given as in cases of the original assessment, and it shall be equalized in like manner.*" *Held,* that the language italicized is meaningless and should be treated as surplusage.

Appeal from Yell Chancery Court, Danville District; *Jordan Sellers,* Chancellor; affirmed.

Wilson & Chambers, for appellant.

The act relied on is clearly void for the reason that section 11 is uncertain and indefinite. See 72 Ark. 586; 45 *Id.* 158; 105 *Id.* 380. Courts can not substitute words by writing in the words omitted in a statute. 104 Ark. 597; 106 *Id.* 522. The entire statute is invalid. 34 Ark. 224; 66 *Id.* 36; 75 *Id.* 546.

Sam J. Mitchell, for appellees.

The omitted words in section 11 do not render the act invalid. The meaning of the whole act, read together, makes the intention clear, and there is no uncertainty nor is the act void therefor. 64 Ark. 556; 80 *Id.* 150; 63 *Id.* 612; 119 *Id.* 314; 120 *Id.* 406; 108 *Id.* 562; 92 *Id.* 93; 125 *Id.* 350; 111 *Id.* 108.

HART, J. C. W. Pool, a citizen and property owner of a proposed road district, brought this suit in equity

against the commissioners of the district to enjoin them from proceeding to construct the road under the act on the ground that the act was void for uncertainty. The commissioners filed a demurrer to the complaint which was sustained by the court. The plaintiff elected to stand upon his complaint, and it was dismissed for want of equity. The case is here on appeal.

The district in question was created by Special Act No. 281, approved March 17, 1919, for the purpose of constructing a road from a point in the town of Danville to a point in the town of Walnut Tree in Yell County, Arkansas.

The plaintiff alleges in his complaint that the act is unconstitutional and void for the reason that its provisions are too uncertain to be capable of enforcement. It is claimed that the uncertainty is that section 11 of the act undertakes to provide for a revision of the assessment in language which is so uncertain that the intention of the Legislature can not be carried out. Section 11 reads as follows: "It shall be provided by a resolution of the board of commissioners that the assessment of benefits shall be paid in successive installments, so that no local assessment of benefits shall be paid in successive installments, so that no local assessment shall in any one year exceed ten per centum of the assessed benefits accruing to said real property.

"The commissioners may require the assessors to revise their assessment not oftener than once per annum, increasing or diminishing the assessment against particular pieces of property as justice requires, provided that the total amount of benefits shall not be diminished if the district revised assessment shall be given as in cases of the original assessment, and it shall be equalized in like manner."

The first paragraph of the section repeats certain words, but it is not claimed that the repetition of these words renders the act void for uncertainty. It is manifest from reading the paragraph that the repetition of the words does not obscure its meaning. Any one read-

ing the act would treat them as surplusage and could readily ascertain the legislative intent from the language used.

It is claimed by counsel for the plaintiffs that the uncertainty arises from the language used in the last paragraph of the section. The first part of this paragraph reads as follows: "The commissioners may require the assessors to revise their assessment not oftener than once per annum, increasing or diminishing the assessment against particular pieces of property as justice requires, provided that the total amount of benefits shall not be diminished."

It is manifest that this much of the concluding part of the section is definite and certain. There can be no mistake in the meaning intended by the Legislature. Section 17 of the Declaration of Rights in our Constitution provides that no law impairing the obligation of contracts shall ever be passed. The manifest intention of the Legislature in putting in the proviso "that the total amount of benefits shall not be diminished" was for the purpose of not conflicting with the clause of the Constitution just referred to. Of course, the property can only be assessed to pay for the whole cost of the improvement, but, the assessment having once been made and a contract for the construction of the improvement having been made on the faith of it, the commissioners could never reduce the total amount of benefits assessed so as to impair the obligation of the contract. This is perfectly manifest from reading the whole act. It contains twenty-five sections, and no useful purpose could be served by setting them out in connection with what we have already said. All the concluding part of the section after the words "shall not be diminished" have no meaning at all. The fact, however, that they are words jumbled together without any certain meaning does not in any wise impair the meaning of the words that go before them. There are evidently words left out of the concluding part of the section, but it is not within the province of the court to insert these words. The words in the concluding part of

the section which as joined together have no definite meaning must be treated as surplusage.

It follows that the act is not void for uncertainty, and the decree will be affirmed.

ROGERS v. ARKANSAS-LOUISIANA HIGHWAY IMPROVEMENT DISTRICT.

Opinion delivered June 30, 1919.

1. HIGHWAYS—ASSESSMENTS—INEQUALITY.—On appeal from assessments in a highway improvement district where the assessments have been made by zones, a gross inequality is not shown by the fact that lands nearer the improvement are assessed less than those farther away where it appears that a large lake lies between such improvement and the lands assessed at the lower rate.
2. HIGHWAYS—ASSESSMENTS.—Upon review of highway assessments, the fact that a drainage ditch 36 feet wide separates the assessed lands from the highway does not establish that the improvement will not benefit the lands.
3. HIGHWAYS—REVIEW OF ASSESSMENTS.—A great amount of deference is due to the judgment of the assessors in estimating the benefits from a highway improvement, and reviewing courts will not substitute their judgment for that of the assessors unless the evidence clearly shows that the assessments are erroneous.
4. HIGHWAYS—ASSESSMENTS—REVIEW.—In reviewing assessments made by the board of assessors of a highway improvement district, the question is not what the usable value of the road is to a particular tract of land, but to what extent has the improvement enhanced the value of the land.

Appeal from Desha Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

F. M. Rogers, for appellants.

1. The assessments of benefits are unequal, not uniform and excessive.

2. Many lands are not benefited at all.

3. The assessments are out of proportion to and in excess of benefits. Hence the assessment is illegal and void. 98 Ark. 113; 103 *Id.* 127; 108 *Id.* 419; 113 *Id.* 493. See also 14 Ark. 286; 31 *Id.* 557; 35 *Id.* 169; 60 *Id.* 409.

E. E. Hopson and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

The assessments were valid and made according to law. The presumption is that they are valid, and there is no showing to the contrary. 99 Ark. 508; 84 *Id.* 257; 94 *Id.* 563; 197 U. S. 430-433. The amount of betterments to each tract is a mere matter of forecast and estimate. *Ib.;* 21 Ark. 60; 50 *Id.* 513; 64 *Id.* 258, 265-6. The gist of the whole matter is clearly stated in 100 Ark. 366, 369.

We must depend upon the opinions of men of sound judgment and reasonable information to determine what future benefits will be. 113 Ark. 493-6. When the Legislature has fixed the amount of assessment for benefits, its finding is conclusive unless there is arbitrary and manifest abuse of power which must be shown. 100 Ark. 366; 140 S. W. 585; 108 Ark. 419; 201 S. W. 798; 98 Ark. 544. See also 2 Cooley on Taxation (3 ed.), 1226, and cases cited.

SMITH, J. Appellants are owners of lands lying in the Arkansas-Louisiana Highway Improvement District, and pursuant to section 13 of the act creating that district filed suits in the chancery court of the county in which their lands are located to have their assessments revised. The interests of these complaining land owners are not identical, and they have attacked their assessment on different grounds. Indeed, to grant relief to some of them on the grounds assigned would result in denying relief to others. For instance, certain of these landowners say that the assessment of benefits should be levied on the lands throughout the district as a whole, and each tract should bear an equal and uniform burden of the cost; while one of the land owners whose lands received the lowest assessment insists that his lands should not have been assessed at all.

The relief prayed was denied by the chancery court, and this appeal has been prosecuted to review that action.

It is insisted that a gross inequality exists between certain lands in Chicot County in township 15 south, range 2 west, and township 16 south, range 1 west, and other lands in the district, because the lands in Chicot County are nearer the road to be improved, yet bear a less amount than other lands farther away. But these lands in favor of which it is said a discrimination has been made are situated on the east bank of Lake Chicot—a body of water as wide and and as deep as the Mississippi River and eighteen miles long—which lies between the road and the lands which are said to have a grossly inadequate assessment against them. We think there is less merit in this contention than there is in that of the owners of the lands lying east of the Lake that their lands should not be assessed at all. Those owners base their contention upon the grounds that the lake is unbridged, and that the owners of lands east of the lake would make but little use of the highway if it were improved. However, it is shown that a ferry is operated across the lake and that once the property owner is across the lake he has connection with the largest system of improved roads ever undertaken as a single enterprise in this State. This assessment was made by "zones," the eighth zone being charged with the lowest assessment, and it is shown that these lands east of the lake were reduced from the second to the eighth zone by the commissioners when the assessment of benefits was made, upon the complaint of the property owners.

Other property owners complain of their assessments because a drainage ditch thirty-six feet wide lies between their lands and the improved road, and the argument is made that they should not, therefore, be assessed at all. But we think the argument is without merit. These ditches can be bridged.

Other owners complain that they will not use the improved road after it is constructed but that it will be more convenient for them to continue to use the unimproved roads which they are now using, and this contention is presented with great earnestness, and it is insisted

that for the reasons stated these owners, who will not use the improved road, should pay but little, if any, of the cost of the improvement.

We announced the rule to be followed by this court in the decision of questions of this character in the case of *Mo. Pac. Ry. Co.* v. *Monroe County Road Improvement Dist.,* 137 Ark. 568, 209 S. W. 728, where it was said: "An estimate of benefits resulting from a local improvement to a given piece of property is largely a matter of opinion, and generally there is a wide difference of opinion on such questions. Under those circumstances a great amount of deference is due to the judgment of the board of assessors who are constituted as a special tribunal for the purpose of determining that question, and courts reviewing the proceedings of the assessors should not substitute the judgment of the judges for that of the assessors, unless the evidence clearly shows that the assessments are erroneous."

When that test is applied we do not feel warranted in disturbing the assessments made by the commissioners. The question is not what the usable value of a road is to a particular tract of land, but to what extent has the improvement enhanced the value of the land. It is against this enhanced value or betterment that the tax is levied to pay for the construction of the improvement which is to bring about the enhanced value. One owner of land might use a road which neither his predecessor nor succcessor in title would use. But it appears fair and reasonable to say that land must necessarily be benefited or enhanced in value by having an improved road constructed in such proximity that the land owner may use the road if he desires to do so.

The assessments on the lands of the complaining owners run from two to six dollars per acre, the payment of which is extended over a period of twenty years, and in return for this they are given access to highly improved roads of a total length of one hundred and fifty-five miles through a territory where, according to the agreed statement of facts, the existing roads are impassable at certain seasons of the year.

It may be true that inequalities exist in the assessments; but, as the question of values and benefits is largely one of opinion, we are constrained to approve the assessments as made by the commissioners as revised by the court below (that revision consisting in striking from the assessment rolls the lands lying outside of the Mississippi River levee which had inadvertently been assessed), because we can not say that the evidence clearly shows that the assessments are erroneous. The decree is, therefore, affirmed.

McCASTLAIN v. WYLIE.

Opinion delivered June 30, 1919.

TAXATION—RIGHT TO PAY.—One who has, under color of title, paid the taxes on wild and unimproved lands for six years consecutively has no right, as against the owner of the land, to enjoin the latter from paying the taxes for the seventh year, in order that the former might acquire a title by seven years' payment of taxes, under Kirby's Dig., § 5057.

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

C. F. Greenlee, for appellant.

1. It is conceded by appellee's demurrer that (1) McCastlain is the owner of the land and (2) that he paid the taxes for every year from 1902 to 1913, and (3) that the land was assessed to appellant every year from the time he obtained his tax deed until the institution of this suit; (4) that appellee's tax deed is void because it is based on a void tax sale; that the land was sold without authority of law and for excessive taxes; that it was advertised for sale as prescribed by law; that the clerk of the county court did not issue his warrant for the collection of taxes at the time and in the manner prescribed by law; (5) that appellee did not offer to pay the taxes on January 6 or 7, 1919, nor did he furnish funds for the payment of said taxes, and that if a tender of taxes was made for appellee it was done by another and without

appellee's authority. Under these admissions it was the duty of appellant to pay the taxes on the land which is admitted to be his land and he did pay the taxes for the year 1918; at the time of the institution of this suit on January 9, 1919, the taxes had been paid by appellant and he had the collector's receipt. The assessment had been made on the land and the books were in the hands of the collector. Kirby & Castle's Digest, § 8676. Appellant paid his taxes on the land January 1, 1919, instead of the 1st Monday in January, and the complaint of appellant is that the collector violated section 8719 of Kirby & Castle's Digest. The complaint is peculiar; the collector had the money on January 9th for appellant's taxes and had given his receipt therefor and the payment was sufficient, and a stranger had no right to complain. Appellee bases his contention upon 36 Ark. 508, par. 1 of syllabus and 23 *Id.* 374, but they have no application. See also 23 Ark. 376; 70 *Id.* 500.

2. An answer is not demurrable if the facts with every reasonable inference to be drawn constitute a good defense. 96 Ark. 163; 33 *Id.* 169; 3 *Id.* 207; 187 *Id.* 427.

3. It is settled that when a court of chancery assumes jurisdiction for one purpose it will retain it for all purposes to do justice. 83 Ark. 554; 84 *Id.* 140; 92 *Id.* 15; 105 *Id.* 558; 112 *Id.* 572.

It cannot be questioned that it is the right of the landowner to pay the taxes on his land, and appellant was anxious that the ownership of the land should be determined in this case, but since appellee was aware that his title was absolutely void he preferred to *chouse* appellant out of his land by another route than in a chancery proceeding, and the decree should be reversed and cause remanded with directions to overrule the demurrer and require proof as to the ownership of the land.

Lee & Moore, for appellee.

Appellee had color of title, the lands were wild and unimproved, and he had paid taxes for six consecutive

years and he had the right to pay for the seventh year and perfect his title. Act 415, Acts 1911, p. 361. Taxes are payable from the first Monday of January; not before that date, and payment of taxes before that date is of no validity. 36 Ark. 510; 23 *Id.* 374; 37 Cyc. 1158. The collector did not appeal from the judgment canceling his receipt and ordering him to issue receipt for taxes of 1918 to appellee. The decree is right, and should be affirmed.

SMITH, J. Appellee brought suit in the Monroe Chancery Court against appellant and the sheriff and collector of that county, and for cause of action alleged the following facts: That he was the owner of a certain forty-acre tract of land situated in that county, having obtained a deed therefor on February 27, 1890, from the State Land Commissioner, and that under this deed he had paid the taxes on said land for the years 1912, 1913, 1914, 1915, 1916 and 1917. That on January 6, 1919, the same being the first Monday in January, he applied to the collector to pay the State and county taxes then due, but the tax books were not at the time in the office of said collector, and that on Tuesday, January 7, 1919, he tendered to the collector the full amount of all taxes due on said land, but the tender was refused because the taxes upon said land had been paid by the appellant on the first day of January, 1919, and the taxes assessed against said lands were marked paid on the tax books. That said payment was in fraud of appellee's right to pay taxes upon said land, and was done for the purpose of defeating appellee's title to said land, and was made prior to the date fixed by law for the payment of taxes, and was a fraud upon the rights of appellee.

An answer was filed by appellant, in which he alleged his ownership of the land under a deed to him from the county clerk of that county based upon a sale for the taxes due thereon for the year 1901. It was further alleged in the answer that the deed to appellee from the

Land Commissioner was void because it was based upon a sale for taxes which was void for a number of reasons there stated, and that appellee was seeking to perfect a void tax title by making seven consecutive payments of taxes.

A demurrer to this answer was sustained, whereupon, appellant declining to plead further, a decree was entered canceling the tax receipt issued on January 1, 1919, to appellant and directing the collector to accept the tender of the taxes made by appellee and to issue a receipt therefor, and from that decree this appeal has been prosecuted.

In support of the decree of the court below, appellee relies upon Act No. 415 of the Acts of 1911, page 361, which provides that "All taxes levied on real estate and personal property by the several county courts of the State, when assembled for the purpose of levying taxes, shall be deemed to be due and payable at any time from the first Monday in January to and including the 10th day of April in each year. * * *" And it is argued that inasmuch as appellant paid these taxes before they were legally due and payable the payment should be treated as a nullity.

But appellee is in no position to raise this question. Under the allegations of the answer, the truth of which is confessed by the demurrer, appellant is the owner of the land, and, as such, the only person who had the legal right to pay the taxes upon issue joined on that question. While appellee is not a mere volunteer, he has no such interest in or title to the land as gives him a preferential right over the true owner to pay the taxes. This seventh payment which he seeks to make may have perfected his title, and his desire to pay was evidently prompted by a consideration of that fact. But this seventh payment had not been made, and the benefit of section 5057 of Kirby's Digest did not inure because of the six payments which had been made, as that statute inures to the benefit of him only who has paid taxes for seven consecutive years under color of title. The tax

books had been marked paid, and no taxes for 1918 were charged against the land when the suit was brought. Under these circumstances it was not proper to adjudge that appellee had the right, as against appellant, to pay the taxes, and the court should not have lent its aid to appellee to make a payment of taxes which would have given him the benefit of the provisions of section 5057, which he would not otherwise have had.

The decree of the court below is therefore reversed, and the cause remanded, with directions to dismiss the complaint.

BUSH v. WOFFORD.

Opinion delivered June 30, 1919.

1. RAILROADS—APPARENT AUTHORITY OF ROADMASTER.—A roadmaster having general authority to employ men to do work in grading the roadbed was a general agent, and a contract of employment of a teamster for sixty days was within the apparent scope of his authority.
2. PRINCIPAL AND AGENT—GENERAL AGENT—LIMITATION OF AUTHORITY.—It was not error to refuse to instruct the jury upon the theory that one who contracts with a general agent is bound to inquire as to the limitations of his authority.

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

Thos. B. Pryor and *W. P. Strait*, for appellant.

1. Under the undisputed facts appellee failed to make out a case for damages, and a verdict should have been directed for defendant. Where the obligation of the contracting parties are mutual, and a duty is imposed upon each party to perform certain things, as here, the party who first commits a breach thereof relieves the other party of any responsibility of performance or liability for a failure to do so. 98 Ark. 760; 78 *Id.* 336; 97 *Id.* 522; 105 *Id.* 233; 79 *Id.* 524; 96 *Id.* 647.

2. One who deals with an agent is bound to ascertain the nature and extent of his authority, that he is

put upon notice of the limitations of the agent's authority. If he fails to do so, he deals with the agent at his own risk. 92 Ark. 315; 105 *Id.* 111; 117 *Id.* 174; 62 *Id.* 33; 116 *Id.* 6.

2. If for any reason the case should have gone to a jury, then the court committed reversible error in refusing instructions Nos. 4, 6 and 7 asked for defendant and in modifying No. 3. These instructions are elemental principles of law applicable to the facts here. Cases *supra.*

Heartsill Ragon, for appellee.

There is no error in the instructions given, modified or refused, and the testimony supports the verdict, which was not excessive, and the judgment should be affirmed. 49 Ark. 320; 48 *Id.* 138; 96 *Id.* 456; 100 *Id.* 325.

McCULLOCH, C. J. Appellee, W. P. Wofford, instituted this action at law against appellant Bush as receiver of the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for an alleged breach of contract whereby appellant's agents employed appellee to do grading work with four teams for a period of sixty days. Appellant denied that he executed the contract in question, and also denied that, if there was such a contract, it was broken by appellant. There was a trial of the issues before a jury which resulted in a verdict in favor of appellee, and an appeal has been duly prosecuted.

The first contention is that the testimony is not sufficient to sustain the verdict in that there was no contract covering a definite period of time. Appellee testified that he was employed by the section foreman to work with four teams for sixty days. He testified that when the foreman first approached him with the proposition to do the work he declined to do so on the ground that he then had a good job hauling coal and was afraid that if he went to work in the railway service they might stop him from working before he could work long enough to make the job a remunerative one. His testimony was,

in substance, that the foreman then proposed to hire him for the period of sixty days, and that he aggreed to go to work under those terms, and that the price was also agreed on. This testimony made an issue for the determination of the jury as to whether or not the contract was in fact entered into as claimed by appellee.

Again, it is urged that the testimony is insufficient because there was no authority on the part of the section foreman to enter into a special contract fixing a definite period of service for an employee. Appellant adduced testimony establishing the fact that there was a rule of the company not to employ men in service of this kind for a definite time, but to employ by the hour or by the day, and it is contended that the section foreman was without actual authority. Conceding that the undisputed evidence establishes lack of actual authority, it cannot be said that the evidence was insufficient to warrant a finding that the action of the foreman was within the apparent scope of his authority or at least within the apparent scope of the authority of Mr. Blake, the roadmaster, who gave express authority to the section foreman to enter into the contract. The testimony shows that Mr. Blake authorized the section foreman to make the contract with appellee for performance of services during the period of sixty days. Blake was a general agent, and appellee was not put upon inquiry as to restrictions upon his authority. *Three States Lumber Co.* v. *Moore,* 132 Ark. 371. Blake was authorized to employ men to perform services of this kind, and the fixing of the terms of the employment was within the apparent scope of his authority. Appellee had worked for appellant before that time in similar service, and it was a question for the jury to determine whether or not he was apprised of the actual authority of the roadmaster.

Again, it is said that the undisputed evidence shows that appellee first broke the contract by withdrawing two of his teams from this work, and that he could have earned as much by hauling coal from a mine after he

was discharged from appellant's service. The evidence is not undisputed on those questions, and we are of the opinion that there was enough to justify a submission of the issue to the jury.

Error is assigned in the ruling of the court in refusing to give an instruction (No. 4) which would have told the jury that if "it was the custom or rule of the company to employ labor of the character in question by the day only, and that this custom was known to the plaintiff, or by the exercise of ordinary diligence or inquiry could have been known to him, then he is charged with a notice and knowledge of this fact, and if, with such knowledge and notice, he entered into a contract with the agent of the company of a character not authorized by the defendant, then he cannot recover in this cause."

This instruction is, for the reasons already stated, incorrect in telling the jury that the duty rested on appellee to inquire concerning the authority of the agent. *Three States Lumber Co.* v. *Moore, supra.*

The court submitted to the jury in an appropriate instruction the issue as to the charge that appellee abandoned the contract, and there was no error in refusing the instruction on that subject requested by appellant.

We find no error in the proceedings, and the judgment is therefore affirmed.

CHICAGO LAND AND TIMBER COMPANY *v.* DORRIS.

Opinion delivered June 30, 1919.

1. TAXATION—TITLE UNDER OVERDUE-TAX ACT.—Where land was sold to the State in 1883 under the overdue-tax act of March 12, 1881, and was not redeemed within the time allowed, plaintiff as remote grantee of the tax purchaser acquired a valid title.
2. QUIETING TITLE—DAMAGES ALLOWED.—A decree in a suit to quiet title by one holding a valid tax title properly adjudged that she recover damages for defendant's unlawful acts in claiming the growing timber and posting it, thereby preventing plaintiff from selling it.

3. LOGS AND LOGGING—TIMBER AS PART OF REALTY.—Growing trees constitute a part of the realty, and their conveyance is a conveyance of an interest in the land itself.

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

STATEMENT OF FACTS.

Sarah E. Dorris brought this suit in equity against the Chicago Land and Timber Company to quiet her title to a certain forty-acre tract of land in Cleveland County, Arkansas, and to recover damages for the value of certain timber cut and removed therefrom by the defendant.

The material facts are as follows: The land in controversy was sold by virtue of a decree of the chancery court in the exercise of the jurisdiction conferred upon it by the Overdue Tax Law. The sale was made in 1883, and, no one appearing and bidding thereat, the land was stricken off to the State and duly certified to it. There was no redemption within the time allowed by law, and on the 14th day of March, 1907, the State of Arkansas conveyed the land by deed to William Kilpatrick. On the 17th day of October, 1911, William Kilpatrick by a deed conveyed the land to G. W. Stover. On the 10th day of October, 1913, G. W. Stover and wife conveyed the land to the plaintiff, Sarah E. Dorris. All of these deeds were duly filed for record in the proper office. On the 26th day of May, 1884, under an order of the probate court, the forty-acre tract of land in controversy was declared vested in Emma J. Bearden as the widow of J. T. Bearden, deceased. She conveyed the land by warranty deed to Robert F. Bearden, and on October 26, 1900, Robert F. Bearden conveyed the land to J. W. Bearden. On January 25, 1907, J. W. Bearden conveyed the timber on the land to the Grant Lumber Company and gave it ten years within which to cut and remove the timber. On December 2, 1911, J. W. Bearden conveyed the land to G. W. Stover. No mention was made in the deed that the timber had been sold. The Chicago Land and Timber Company claimed title to the timber by *mesne* conveyance from the Grant Lumber Company.

A. G. Jones paid the taxes on the land for 1881. J. W. Bearden paid the taxes from 1885 to 1901, inclusive. The land appears on the tax books from 1902 to 1905, inclusive, in the name of the State, and no taxes were assessed or paid. J. W. Bearden paid the taxes for 1906 and 1907. William Kilpatrick paid the taxes for 1908, 1909 and 1910, and G. W. Stover paid the taxes for 1911 and 1912. For the year 1908, and all subsequent years, the timber on the land was assessed and the taxes thereon paid by the Chicago Land and Timber Company and its grantors. It appears from the record that the tax records of the county were burned except the tax books of 1881, and from 1885 to 1889, both inclusive.

Evidence was adduced by the plaintiff tending to show the amount and value of the timber cut from the land by the defendant.

The chancellor found for the plaintiff and a decree was entered accordingly. The defendant has appealed.

W. D. Brouse, for appellant.

1. From the depositions and agreed statement of facts it appears and is shown that J. W. Bearden held possession of the land under *mesne* conveyances from May 26, 1884, to the time of the conveyance of the timber to the Grant Lumber Company on January 25, 1907, a period of 23 years, and all the deeds were of record at the time he sold to G. W. Stover on December 2, 1911, and that during all that time Bearden lived on the land and cultivated it, claiming it under said deeds and holding open actual adverse possession, and that the taxes were paid by Bearden and his grantees for more than 20 years, except for the years 1902 to 1905, when the land was marked "State," and no taxes were paid. The "State" was estopped by putting the land back on the tax books and accepting the taxes. It will be presumed that the land has been redeemed under the Overdue Tax Act, Acts 1881, 69-70.

2. In ejectment plaintiff must recover on the strength of his own title. Where the State has levied

and collected taxes for 34 years after forfeiture for overdue taxes the presumption of redemption is of a higher nature than that arising from a deed issued by the State Land Commissioner under Kirby's Digest, § § 4802-3. The presumption is that public officers do their duty as the law requires. In an action of ejectment where plaintiff and defendant both base their claims upon presumptions of equal dignity the defendant must prevail, the burden being on plaintiff to show title and better right to possession. 205 S. W. 699.

3. The deeds of appellant and her grantors were all of record and notice to Stover at the time of his purchase. 86 Ark. 202; 69 *Id.* 442. Appellant owned the timber, and 205 S. W. 699 is conclusive. However, if the timber belonged to appellee there is no slander of title shown, for appellant's claim, and statements were not shown to be false and malicious or willful. 25 Cyc. 248; 90 Cal. 532; 13 L. R. A., and cases cited in foot notes.

Woodson Moseley and *S. J. Hunt,* for appellee.

1. The overdue tax deed to Kilpatrick is *prima facie* title. 76 Ark. 450.

2. The officers who placed the land on the tax books while State land had no authority to do so, and the State is not estopped to assert title. 93 Ark. 490. The case in 135 Ark. 353 is quite different from this, and the proof offered here. No presumption of a grant or redeption arises from possession and continuous payment of taxes for a period less than 20 years. 86 Ark. 202 and 69 *Id.* 442 do not apply here, as in those cases the parties deraigned title from a common source. Appellee who purchased from Stover is not estopped by the deed from Bearden to Stover December 2, 1911, because Stover had already acquired paramount title, having purchased from Kilpatrick. 16 Ann. Cases 648-654. One of two grantees of a common grantor may assert against the other a title different from or paramount to that derived from the common grantor. 16 Ann. Cases 648-652.

The proof of special damage and the amount is positive, and appellee is entitled to the amount claimed. 56 Wash. 162; 21 Ann. Cases 220. Besides appellant actually sold and removed the timber after the commencement of this action.

HART, J., (after stating the facts). The plaintiff's title was derived from the sale of the lands for taxes by virtue of a decree of the chancery court under the overdue tax law. The land was sold to the State in 1883, and no redemption was had within the time prescribed by the statute. The commissioner executed a deed to William Kilpatrick to the land on the 14th day of March, 1907. Kilpatrick conveyed the land to G. W. Stover on October 17, 1911, and Stover in turn conveyed it to the plaintiff. Under these conveyances the plaintiff acquired a valid title to the land. *McCarter* v. *Neil,* 50 Ark. 188; *Fiddyment* v. *Bateman,* 97 Ark. 76, and *Wagner* v. *Arnold,* 91 Ark. 95.

Counsel for the defendant recognized the force and effect of these and other decisions of the court, holding that where the proceedings were regularly had under the overdue tax act of March 12, 1881, resulting in a sale of the land for taxes under the orders of the court, which was confirmed, all persons interested in such land are thereafter precluded from attacking such sale on account of defenses which could have been set up in such proceedings. But they claim that the facts in the present case make an exception to the general rule and bring it within the principles decided in *Wallace* v. *Hill,* 135 Ark. 353. We do not agree with counsel in this contention. The facts here are essentially different from those presented by the record in that case. There, the owner of the lands occupied them at the date of the overdue tax sale. The owner presented the tax receipt of the proper officer showing that he had paid the taxes on the land for the year mentioned in the decree under the overdue tax law, and the court held that the owner was precluded in this respect by the decree in the overdue tax pro-

ceedings. The landowner further showed, however, that the taxes were placed on the tax books for the next year and each succeeding year thereafter, and that the taxes were regularly assessed in his name. He exhibited tax receipts showing that he had paid the taxes for all these years. There was a finding of the chancellor in his favor, and the court held that under the circumstances the chancellor was warranted in finding that the owner had redeemed the land from the overdue tax sale, as he had a right to do under the statute. Here the lands were sold to the State in an overdue tax proceeding in 1883. The record does not show that any of the grantors of the defendant owned the land at this time. Nor does it show that either of them owned the land or paid the taxes thereon in 1884. It does show that one of the plaintiff's grantors paid the taxes on the land for the year 1885. This, however, does not establish the fact that such person owned the lands in 1883, at the time they were sold and, consequently, had a right to redeem from the overdue tax sale.

It is true the record does show that the tax books for the years 1882, 1883 and 1884 were burned, but this fact did not prevent the defendant from showing that its grantors owned the land at the date of the sale under the overdue tax proceedings, and therefore had a right to redeem the land from such sale.

In the present case the claim of the plaintiff is made under a paramount title derived by *mesne* conveyances directly from the State, and the court was right in holding that he had a valid title to the land and the timber thereon. In the decree not only was the title of the plaintiff quieted, but it was adjudged that she have and recover from the defendant the sum of one hundred dollars damages. It is, also, claimed that the decree should be reversed because the court awarded damages to the plaintiff. We do not think this position is sound. Plaintiff alleged that a few weeks before the filing of the complaint she was negotiating with E. R. Buster and Clarence E. Griffin for the sale of timber on said land

and that defendant through its agents forbade her from selling or cutting the timber and prevented her from selling said timber. That, by reason of the unlawful acts of defendant in claiming said timber and posting the same, she has been damaged in the sum of one hundred dollars. The proof shows that she and her husband lived on the land; that part of it had valuable growing timber on it.

The plaintiff, through her husband as her agent, sold a part of the timber to a corporation, of which E. R. Buster and Clarence E. Griffin were the principal stockholders, and controlled the corporation. Subsequently her husband for her made a sale to Griffin of the rest of the timber on the land, and he agreed to advance $135 for the purpose of paying a mortgage for the purchase money. The defendant then tacked upon the trees on the land large posters, some twelve by fourteen inches in size, as follows: "Posted property, owned by Chicago Land and Timber Co., Clio. Any person trespassing will be prosecuted." After seeing this notice, Griffin refused to take the timber as he had agreed to do.

According to the testimony of C. E. Griffin, he offered to purchase the timber on the land for $5 per thousand delivered at his mill or pay $2 per thousand and haul it himself. He agreed to pay the amount of the mortgage indebtedness on the land, which amounted to $123.70. He thought the timber would pay $100, and agreed that the husband of plaintiff might work out the balance. After he saw the notices posted on the land, by the defendant, he refused to consummate the sale of the timber because he was afraid of getting into a lawsuit with the defendant. The contract had not yet been reduced to writing. The highest obtainable price for the land thereafter was $100, less than its market value. This testimony was not attempted to be contradicted. We think the allegations and proof sustained the finding of the chancellor as to the damages. The growing trees constituted a part of the realty, and their conveyance by the plaintiff to Griffin was a conveyance of an interest

in the land itself. *Graysonia-Nashville Lbr. Co.* v. *Saline Development Co.*, 118 Ark. 192, and cases cited.

It is true that the contract to sell the timber was a verbal one, but it was intended that it should be reduced to writing, and Griffin says that he would have carried out the contract if the defendant had not claimed the timber and have forbidden anyone from cutting and removing it. The notice went further and threatened the prosecution of anyone cutting the timber. The loss of the sale of the timber is alleged and relied upon as special damages. The complaint alleges a loss of a sale to E. R. Buster and Clarence E. Griffin. The proof shows that they were the principal stockholders of a corporation which had agreed to purchase the timber for $100, the amount of damages awarded by the chancellor. The complaint set out the name of the persons to whom the timber was sold, and the damage suffered from a loss of the sale. The defendant was put upon notice of what it was to meet. The special damages alleged was the natural and proximate cause of the posted notice set out above. The complaint alleged precisely in what way special damages would result from the posted notice. In the notice the defendant not only claimed the title but threatened to prosecute anyone interfering with it. The plaintiff was in the possession of the land and as shown in the opinion, according to the current of authority for many years, the defendant had no title to the land. The decisions on the conclusiveness of overdue tax sales have already been cited. The controlling principles of law above announced are supported by the following cases: *Stevenson* v. *Love*, 106 Fed. 466; *Wilson* v. *Dubois* (Minn.), 59 Am. Rep. 335; *Harris* v. *Sneeden* (N. C.), 7 S. E. 801; *Hopkins* v. *Drowne* (R. I.), 41 Atl. 567; *Eberle* v. *Fields* (Ala.), 62 So. 73; *Hubbard* v. *Scott* (Ore.), 166 Pac. 33, and *McGuinness* v. *Hargiss* (Wash.), 21 Ann. Cases 220.

From the views we have expressed, it follows that the decree must be affirmed.

McCLELLAND v. PITTMAN.

HAMBY v. PITTMAN.

Opinion delivered June 30, 1919.

1. HIGHWAYS—IMPROVEMENT DISTRICT—SUFFICIENCY OF COMPLAINT.—Complaint alleging that local Act No. 130 of 1919 creating Road Improvement District No. 2 in Nevada County, was unconstitutional in including plaintiffs' land more than six miles from the road; that plaintiffs would be required to cross two public roads to reach this road, which is inaccessible to them; that absolutely no benefit would accrue to plaintiffs' land from the building of the road, *held* insufficient to show that the act is confiscatory.
2. HIGHWAYS—SPECIAL ACT—DEPRIVING COUNTY COURT OF CONTROL OF FUNDS.—Acts 1919, No. 130, *held* not unconstitutional as depriving the county court of its control over the fund derived from the three-mill tax collected under Const. Amend. 5, and over the general funds of the county which the county court is authorized to contribute to the road improvement.
3. HIGHWAYS—ROAD DISTRICT—BOUNDARIES.—Acts 1919, No. 130, creating Road Improvement District No. 2 in Nevada County, is not arbitrary and confiscatory for not including in the district lands in the southern part of the county where the roads provided for do not extend into the southern part of the county not taxed.
4. HIGHWAYS—CONSTITUTIONAL LAW—DUE PROCESS.—Act No. 130 of 1919, creating Road Improvement District No. 2 in Nevada County, does not violate Const. U. S. Amend. 14, relating to due process of law, because in providing in section 22 for the dissolution of an existing road district, it provided for payment of the expenses and indebtedness of such district and placed the burden thereof on the lands in the new district.
5. HIGHWAYS—ROAD DISTRICTS.—Acts 1919, No. 130, creating Road Improvement District No. 2 in Nevada County, is not objectionable for placing property in Prescott in each of five separate road districts created by the act.
6. STATUTES—PARTIAL INVALIDITY.—The provisions of Acts 1919, No. 130, creating Road Improvement District No. 2 in Nevada County, and providing for appointment of receiver and for certain exemption from liability in favor of the commissioners and for the payment of such reasonable expenses as may be incurred in preparing the act, if invalid, are clearly separable, and do not render the remainder of the act void.

Appeal from Nevada Chancery Court; *Jas. D. Shaver,* Chancellor; affirmed.

Hamby & Hamby, for appellant.

The court erred in sustaining the demurrer to the complaint. The complaint alleges that plaintiff's property outside of Prescott will not, and can not possibly be benefited by any of the five roads embraced in the special act. The demurrer admits this, and the property should have been his property from the effect of the act. By the terms of this act the county court is deprived of its constitutional jurisdiction. 89 Ark. 513; 92 *Id.* 93; 104 Ark. 425; 125 *Id.* 525. It permits the district to issue interest-bearing bonds, or indebtedness, contrary to our Constitution. Const. 1874. The act deprives owners of real property in the district of the right or opportunity of an impartial investigation before an impartial tribunal and the right of appeal. Const. Ark. 1874, and Const. U. S. No notice was given as required by law of the special act, and it is void. 86 Ark. 231. There is no limit to the amount of cost. It is so alleged and is admitted by the demurrer. Const. 1874.

McRae & Tompkins and *H. B. McKenzie,* for appellees.

1. The Legislature has declared the lands benefited, and that settles it. The Legislature can delegate its power to other agencies as arms of the State to carry out its powers and intention. Their acts cannot be attacked except for fraud or prejudice or demonstrable mistake, and none is shown. 98 Ark. 543; 103 *Id.* 452; 113 *Id.* 493; 98 *Id.* 113; 103 *Id.* 127; 98 *Id.* 113.

2. The courts take judicial knowledge of public surveys and maps, sections, townships, ranges and base lines, etc. 28 Ark. 378; 34 *Id.* 224; 113 *Id.* 316; 108 *Id.* 53; 103 *Id.* 452.

3. The jurisdiction of the county court is not trenched upon nor affected. 96 Ark. 410. The jurisdiction of the county court is not invaded. 92 Ark. 93; 102 *Id.* 560; 104 *Id.* 560; *Sallee* v. *Imp. Dist.,* 138 Ark. 549. Under 96 Ark. 410 and 104 *Id.* 424 it would be unlawful to lay off a whole county into a road district, but

here only portions of a county are affected, and the taxes levied are according to the benefits received by the various tracts. Cases *supra.*

4. Art. 16, § 1, of the Constitution does not apply to interest-bearing indebtedness of local improvement districts. 115 Ark. 195; 69 *Id.* 284; 55 *Id.* 148; 103 *Id.* 127; 59 *Id.* 513.

There is a difference in restrictions as to local improvements in cities and towns and the country. 84 Ark. 390; 99 *Id.* 100.

5. The expression of the legislative will is due process of law. 64 Ark. 555; 87 *Id.* 8. See also 42 Ark. 152; 167 U. S. 548; 149 *Id.* 30. See Cooley's Constitutional Lim. 168.

The Legislature can dispense with limitations as to cost, etc. 134 Ark. 30. The Legislature has determined and settled the question that the lands will be benefited. *Supra.* 118 Ark. 119; 120 *Id.* 277; 123 *Id.* 327; 81 *Id.* 562; 172 U. S. 267; 52 Ark. 107. See also 98 Ark. 116; 167 U. S. 548; 125 *Id.* 345; 147 *Id.* 282-6, 302.

The question of depriving the county court of its jurisdiction is settled by *Sallee* v. *Dalton,* 138 Ark. 549.

The Legislature has spoken, and its action settles the questions raised by appellants. 102 U. S. 691, 703-4; 96 *Id.* 97; 11 *Id.* 701; 125 *Id.* 345-6, 356; 128 U. S. 582; 140 *Id.* 316-328; 147 *Id.* 190, 198-9; 149 *Id.* 30; 130 Ark. 70. The act does not provide that the taxes levied shall be used for any other purpose than that intended by the act, and the presumption is in favor of its constitutionality. 59 Ark. 513; 72 *Id.* 513.

J. O. A. Bush and *T. D. Crawford,* for appellants.

1. The act is void. Act 5, § 26, Const. 1874. This was a special act or local bill, and no notice was given as required by law.

2. One of the roads laid out is more than six miles from plaintiff's lands and across two public roads and inaccessible, and the act is confiscation.

3. It deprives the county court of its constitutional jurisdiction.

4. It practically creates a perpetual commission to improve roads and build bridges, etc. Art. 7, § 28, Const.

5. The district is so extended as to include territory in no wise affected by all the improvements, and is therefore void, and it discriminates in favor of lands in the southern part of the county, and it provides that if any bond or coupon is not promptly paid the holder may apply for a receiver.

6. It is also void because it provides that the existence of prior road districts should be terminated and sections 1 and 3 of the road district shall assume all the expenses of the prior district.

7. It provides that the commissioners shall organize by electing one of their number president, and shall appoint a secretary and treasurer. See on these points 172 U. S. 269; 81 Ark. 562; 89 *Id.* 513; 98 *Id.* 543; 122 *Id.* 294; 129 *Id.* 546; 131 *Id.* 64.

The act is arbitrary and discriminatory. 48 Ark. 370; 130 *Id.* 70.

It is invalid for the provision for appointment of a receiver, and is violative of the "*due process of law,*" act of Congress and United States Constitution. 3 Mackey 142; 74 N. Y. 183; Gray, Lim. Tax. Power 570; Judson, Taxation 343; 134 Ark. 328.

SMITH, J. This appeal questions the constitutionality of act No. 130, passed by the 1919 session of the General Assembly, entitled "An act creating Road Improvement District No. 2 in Nevada County." The act is very similar to, and in many respects is identical with, the acts construed by this court in the recent cases of *Cumnock* v. *Alexander,* 139 Ark. 153, and *Reitzammer* v. *Desha Road Improvement Dist.,* 139 Ark. 168. Indeed, the counsel for some of those who attack the Nevada County act filed a brief as *amici curiae* in the former cases and they now refer to that brief on their own appeal, the court below having sustained a demurrer to the

complaints in which the validity of the act was attacked. So that it now appears that most of the questions raised by appellants here have been decided adversely to their contention, and we shall here discuss only those questions not already disposed of.

For the purpose of improving certain roads there mentioned the lands to be benefited thereby are divided into five sections or districts. Certain of the plaintiffs who attack the act allege that "the road for which their lands are to be taxed is more than six miles from these lands; that they would be required to cross two public roads to reach this road, which is inaccessible to them; that absolutely no benefit is to accrue to said lands from the building of said roads, and yet these lands are to be charged with the burden of taxation for their construction."

We have here, however, road districts of legislative creation in which there is the direction that certain roads shall be constructed and a legislative determination that certain lands will be benefited thereby, and as was said in the case of *Moore* v. *Board of Directors of Long Prairie Levee District,* 98 Ark. 113, "Nor can the courts review (a legislative determination) merely on general allegations that the assessments are 'arbitrary, excessive and confiscatory.' Facts must be pleaded which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the range of facts, so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts."

We do not think that the allegations of the complaint set out above are sufficient for us to say, as a matter of law, that it would be arbitrary and confiscatory to assess lands six miles distant from the road to be improved. The benefit to be derived might be very slight, but that is a fact yet to be determined and one not now before us. Neither would the fact that there are intervening roads make it arbitrary and confiscatory to assess for the improvement of a road farther removed from the

land. We do not know the route, length or *termini* of these intervening roads; they may be unimproved roads which are passable only at certain seasons of the year.

These are questions of fact which make it impossible for us to say that the Legislature has made a demonstrable mistake. It might be said that it is pointed out in the brief filed on behalf of the commissioners that, when we have taken judicial knowledge of the public surveys, it will affirmatively appear that the lands in question are not six miles from the road to be improved, but a distance of less than three. However, we prefer to place our decision upon the first ground stated.

It is said the act must fall because it deprives the county court of its constitutional jurisdiction over the roads of the county, in that the act gives the court no right to remove commissioners and that the county court is given no control over the expenditure of the road tax collected in any of the townships in which any of the lands of the district shall lie, the tax here referred to being the three-mill tax collected under the authority of the Fifth Amendment to the Constitution. In answer to this objection, it may be said that the plans of the commissioners must first be approved by the county court, as well as any changes therein which may later be proposed. And, while the act does not provide that the county court shall direct the disbursement of the portion of the annual three-mill road tax which may be given to a particular district, it only authorizes the court to turn this money over to a particular district. The same section of the act authorizes the county court "to contribute such funds in money or scrip to the expense of the improvement from the general revenue of their respective counties as it may deem appropriate." And it is fair to presume that, in making this disbursement, the court will ascertain the needs of the particular district which requires assistance from either the three-mill road tax fund, or from the county general revenue, and will act for the best interests of all parties in the disbursement of these funds. The act does not undertake to deprive

the county court of its control of these funds—it only authorizes a particular use which the court may or may not make of those funds, that is a donation to the road districts.

The act is also attacked upon the ground that it is arbitrary and confiscatory, in that the lands in the southern part of the county are not included in the district and will not be taxed for the improvement. We think this objection is sufficiently answered by the statement that the roads do not extend beyond the boundary of the districts, into the portions of the county not taxed. There must be some limit alike to the boundaries of the district and the length of the roads, and it does not appear that any arbitrary action has been taken here in defining the boundaries of the districts or the *termini* of the road.

The complaint alleges that the act provides that if sections 1 and 3 of the road scheme shall be constructed the existence of a prior road district shall be terminated and sections 1 and 3 should assume all the expenses of the prior district and that all expenses already incurred by said road district shall be a charge on the lands of these sections 1 and 3, and that this action places a burden on the lands of these taxpayers in violation of the due process clause of the Fourteenth Amendment.

This objection to the act is based upon the provisions of sections 22 thereof, which reads as follows:

"Section 22. If the commissioners and the county court find that it is feasible, practicable and desirable to construct sections one and three of the roads, as provided for in this act, and shall file the plans therefor with the county clerk, as provided in this act, or shall make the assessment of benefits in said sections one and three, and said assessment of benefits in each of these sections shall be sufficient to complete the improvement in each, and this act and the said assessment of benefits shall not be held invalid, and the commissioners are ready to let the contract for the construction of the improvement in each of sections one and three, they shall file a statement to this

effect with the county court, and the county court is thereupon authorized to enter an order terminating the existence of Road Improvement District No. 1 of Nevada County. Appeals from such order shall be taken within thirty days after its entry, and not thereafter. If the county court does not enter an order terminating the existence of said Road Improvement District No. 1, as herein provided, then its existence and the proceedings of its commissioners and assessors shall not be affected by this act, but they may proceed to make the improvements in their district, under the provisions of the law under which said Road Improvement District Number One was created.

"It is found and hereby declared that the surveys, plans, and other expenses incurred by said Road Improvement District Number One produced results that will inure to the benefit of sections one and three of the respective roads and the respective territory set forth in this act, and in the event the existence of Road Improvement District Number One shall be terminated, as herein provided, the said sections one and three, created under this act, shall assume and pay each one-half of such expenses and other indebtedness."

We see no constitutional objection to this section. The Legislature has made provision for the possible dissolution of a certain district numbered 1, and has provided the manner in which it may be dissolved, if it is decided to take that action. In the recent case of *Reitzammer* v. *Desha Road Imp.*, 139 Ark. 168, we decided that as the Legislature might create, so it might abolish, road districts, taking care, however, to see that no outstanding obligations or contracts were impaired. Having made provision for the dissolution of an existing road district, it was proper to make provision for the payment of the expenses and other indebtedness of the district dissolved, and this the act has done, and no attempt is made to show that the apportionment of this indebtedness was made arbitrarily.

Complaint is also made that property in the city of Prescott has been placed in each of the five districts created by the act. But in the recent case of *Cumnock* v. *Alexander et al.*, we reaffirmed the doctrine of earlier cases which had held that lands might be placed in more than one district, if they would in fact receive a separate and distinct benefit by each of the proposed improvements.

The validity of the district is also questioned because of the presence in the act of a provision for the appointment of a receiver; and another for certain exemptions from liability in favor of the commissioners; and still another for the payment of such reasonable expenses as may have been incurred in preparing the act. We think, however, that if anyone or all of those provisions were held invalid, the act would not fall on that account. We think they are clearly separable, and that the Legislature did not intend to make the validity of the act dependent on mere matters of detail, and that the act would have been passed with these provisions stricken from the bill. *Oliver* v. *Southern Trust Co.*, 138 Ark. 381, and cases there cited.

Other questions are discussed in the briefs filed by appellants; but we regard them as settled adversely to the contentions made by appellants in the cases cited in appellee's brief.

The decree of the chancellor sustaining the demurrer to the complaints attacking the district is therefore affirmed.

WOOD and HART, JJ., dissent.

LOUISIANA & ARKANSAS RAILWAY COMPANY *v.* ANDERSON.

Opinion delivered June 30, 1919.

1. RAILROADS—NEGLIGENCE—APPROACHES TO STATION PLATFORM.—It is the duty of a railroad company to keep in safe condition an approach to its station platform, to which the public would naturally resort.

2. SAME—NEGLIGENCE—QUESTION FOR JURY.—The approach to a depot platform which has a fall of 3 feet in a distance of 10 or 15 feet, and which is crossed by a gulley 8 inches deep by 24 inches wide hidden by grass, is not as matter of law so dangerous that an ordinarily prudent man would not attempt to drive over it.

3. SAME—NEGLIGENCE—INSTRUCTIONS.—Instructions as to a railroad's duty to keep its station approaches in reasonably safe condition, and as to plaintiff's contributory negligence in driving down a steep slope having patent obstructions, *held* not objectionable for authorizing recovery, though plaintiff drove over an unsafe place when a safe place had been prepared for him.

4. TRIAL—PERSONAL INJURY—INSTRUCTION.—In an action against a railroad company for injuries received by plaintiff driving down an approach to defendant's depot platform, objection that instruction assumed that such slope was one of the approaches of the platform was *held* not well taken, where the instructions as a whole clearly left the question to the jury.

5. TRIAL—INSTRUCTIONS IGNORING ISSUE.—An instruction that one using a driveway at a station is only required to notice such defects as are patent, and that he can not recover if injured on account of defects of which he knew or ought to have known by the exercise of ordinary care, *held* not objectionable as excluding the idea that it was his duty to take note of patent defects.

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

Moore, Burford & Moore, for appellant.

1. It was error to refuse to sustain the demurrer to the complaint and in refusing to give instruction "A" for defendant for a directed verdict. The uncontradicted testimony shows that defendant had erected a safe approach to and from its baggage room running north and south along the west side of the depot at Hope, and it was not appellant's duty to keep the west slope in repair, because it was not built or intended for use as an approach to the platform or as a means of debarkation therefrom. The accident happened on May 2nd, more than two months prior to the date of the examination by plaintiff's witnesses. Common knowledge of the season in Arkansas shows that the weeds and grass could not have hidden the rut on the date of the accident, and besides it did not happen or occur on the driveway

intended for the use of the public as a driveway. Plaintiff was guilty of contributory negligence, and could not recover. Any defect was patent, and readily discoverable, and anyone who used it assumed the risk. 85 Ark. 463; 92 *Id.* 208; 94 *Id.* 252; 205 S. W. 886.

2. The court erred in giving request No. 1 for plaintiff; also in giving instructions Nos. 3 and 4. 94 Ark. 252. They invaded the province of the jury and there was no evidence upon which to base them and assume certain facts to be true, nor do these instructions correctly state the law. *Ib.*

McMillan & McMillan and *Searcy & Parks,* for appellee.

1. The danger was not patent and open, but the evidence shows that the ditch was hidden by grass and weeds which defendant had carelessly permitted to grow. No witness stated that the west side of the dump was not intended for public use.

2. The instructions, as a whole, correctly state the law. 83 Ark. 318. The verdict is small under the circumstances and proof.

HUMPHREYS, J. Appellee instituted a suit against appellant in the Hempstead Circuit Court to recover damages in the sum of $15,000 for an injury received on May 2, 1917, in falling from a wagon being driven down the west slope of the gravel platform to appellant's depot in Hope. It was alleged that the west slope was rendered unsafe for wagons being driven down the slope from appellant's baggage room, through appellant's negligence in permitting the ground to be cut with washes and hidden from view by growing grass and weeds.

Appellant denied the allegation of negligence, and pleaded contributory negligence on the part of appellee in driving down the west slope, instead of following the roadway down the north slope, prepared by it for the use of persons going to and from the depot.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, upon which a verdict was returned and judgment rendered against appellant for $1,000. From the verdict and judgment, an appeal has been duly prosecuted to this court.

Appellee moved from Louisiana to Springhill, Arkansas. His household goods were shipped and trunks checked to Hope, Arkansas. In company with his brother, J. F. Anderson, he went from Springhill to Hope for his goods and trunks, which came over appellant's railway and were deposited in appellant's freight depot and baggage room. Appellant had constructed a gravel platform, or dump, about three feet high, extending north and south along the passenger depot and baggage room. The north and south slopes from the platform to the street were from twenty to thirty feet long, and the west slope about half that length, extending from the top of the platform to a level with the street below. The north and south slopes were generally used in approaching and departing from the depot. The general travel was on a well defined or beaten roadway over the dump or platform from either the north or south. There was some travel, however, up and down the west slope by persons going in wagons to and from the depot. Sin Mauldin, who ran a service car and met all passenger trains, saw people frequently turn down the west slope, and was in the habit of driving his own car down it "every day or two." There was evidence tending to show that a gulley about two feet wide and eight inches deep had been cut by water in the west slope, opposite the baggage room; that it was hidden from view by grass and weeds that had grown in it and on a part of the slope. After loading a stove and box of goods at the freight depot, south of the passenger depot, appellee and his brother drove up the south approach on the gravel platform and stopped opposite the baggage room door. The back end of the wagon was near the door and the team and wagon turned in a northwesterly direction. They then loaded the trunks, putting one near the front

to sit upon. The most direct route toward their home was to go in the direction in which the team stood, down the west slope and, it appearing to the driver, as well as appellee, that it was all right to drive down that slope, they did so, turning toward the left. They testified that the right wheel dropped into a ditch or gulley, causing the left wheel to cut into the wagon bed and tilt it so as to throw appellee from the wagon and on to the ground and break his kneecap and otherwise injure him; that they did not see the ditch, or gulley, into which the right wheel fell, because it was obscured by grass and weeds growing in and near it. Appellee had observed and knew that the most usual way to drive off the platform to the street was either by the north or south route.

Appellant insists, first, that no duty rested upon it to keep the west slope in repair, because it was not built, or intended, for use as an approach to the platform, or a means of debarkation therefrom; and, second, that the precipitous grade, as well as the ditch, were patent and the drive over it so obviously dangerous that appellee was guilty of contributory negligence in attempting to drive down said slope, especially in view of the fact that a better way had been prepared, either to the north or south. In other words, appellant contends that, under the law as applied to the undisputed facts, the court erred in refusing to instruct a verdict for it.

(1) It can not be said, as a matter of law, that no duty rested upon appellant to keep the slope in reasonably good repair, for the evidence shows that it was in close proximity to the depot, a part of the construction of the platform, and frequently used as an approach to it. This court has announced and reiterated the general rule that, "Railroad companies are bound to keep in a safe condition all portion of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platform where passengers or those who have purchased tickets with a view of taking passage on the cars, or to debark from them, would naturally or ordi-

narily be likely to go." *Texas & St. Louis Ry.* v. *Orr,* 46 Ark. 182; *St. L., I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255; *St. L., I. M. & S. R. Co.* v. *Dooley,* 77 Ark. 561; *St. L. & S. F. Rd. Co.* v. *Caldwell,* 93 Ark. 286; *Arkansas Midland Ry. Co.* v. *Robinson,* 96 Ark. 32; *St. L. & S. F. R. Co.* v. *Grider,* 110 Ark. 436.

(2) The grade of the west slope to the platform was not so precipitous that it can be said, as a matter of law, that it was obviously dangerous to drive upon it. There was a fall of three feet in a distance of ten or fifteen feet. Parties frequently turned down it, and some of them testified that it looked all right for that purpose. Neither can it be said as a matter of law that the gulley eight inches deep by about two feet wide, running diagonally across a part of the slope, in and about which grass was growing, was such a patent defect, or so obviously dangerous, that an ordinarily prudent man would or should not attempt to cross it. Some of the witnesses testified that the gulley was hidden by the grass growing in and near it, and that the slope appeared to be smooth.

The undisputed facts did not warrant a verdict for appellant, so appellant's request for an instructed verdict was not well grounded.

Under our construction of the instructions, when read together, the case was submitted to the jury on the theory that it was the duty of appellant to exercise ordinary care to keep the approaches to its depot platforms in reasonably safe condition for use by its patrons, and that, before appellee could recover, it must appear from a preponderance of the evidence that he was injured by reason of a hidden gulley in an approach to the platform, of which appellant, or its agents, knew, or could have known in the exercise of ordinary care, and of which appellee did not know and could not have known in the exercise of ordinary care. The jury were plainly told that, "if appellee drove down a steep incline that had obstructions that were patent and readily seen, he is deemed to have assumed the risk," and, having thus negligently contributed to the injury, could not recover.

In the light of this specific direction, it can not be said, as contended by appellant, that the first instruction given by the court authorized a recovery whether or no appellee selected and drove over an unsafe place when a safe way had been prepared for him.

Appellant's next insistence, that instruction No. 3, given by the court, assumes that the west slope was one of the approaches to the platform, is not well taken. The language complained of, in the context used, and, when considered in connection with the other instructions given by the court, told the jury, in effect, that, in order to fix liability on appellant, it was necessary for them to first find that the slope was so constructed that reasonably prudent persons going to and from the baggage room would regard and use it as a safe place to drive. We think the issue as to whether the west slope was an approach to the platform was left to the jury, and not assumed by the court.

Specific objection was made to instruction No. 4, given by the court, for the reason, it is said, that it excluded the idea that it was appellee's duty to take note of all patent or obvious defects on the driveway. The following sentence appears in the middle of said instruction: "The plaintiff (appellee) is only required to take notice of such defects or hazards in the driveway as are patent and obvious to the senses." Again, in the latter part of the instruction, the jury were told that appellee could not recover if injured on account of defects of which he knew, or ought to have known, in the exercise of ordinary care. It appears to us that the rule, which it is contended is excluded by the instruction, is clearly announced in it.

While there are some inaccuracies in the instructions, upon the whole they embody the law applicable to the facts in the case.

No prejudicial error appearing in the case, the judgment is affirmed.

SMITH v. STATE.

Opinion delivered June 9, 1919.

1. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.—Where the State's theory was that, after a previous quarrel, defendant armed himself and hunted up deceased for the purpose of killing him and was the aggressor, and defendant's theory was that deceased was the aggressor, an instruction upon self-defense was *held* not objectionable as not telling the jury that defendant was not bound to retreat if he was first assaulted by deceased with a murderous intent.
2. HOMICIDE—INSTRUCTION.—An instruction that, the killing being proved, the burden of proving circumstances that would justify or excuse the homicide shall devolve on the accused, unless the State's proof sufficiently manifests that the defense only amounted to manslaughter or that the accused was justified or excused in committing the homicide, was correct.
3. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—A proper request for instruction was properly refused where it was covered by other instructions given.

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

STATEMENT OF FACTS.

Bob Smith was indicted for murder in the first degree charged to have been committed by killing John Blunt.

According to the testimony of W. H. Scott, Bob Smith and John Blunt got into a quarrel in a pool room owned by a brother of Smith in Bradley, Lafayette County, Arkansas, one night in October, 1917. Several parties had been playing pool and Scott made a bet with Smith that Blunt would win the next game. Blunt wanted to quit playing and started to put up his cue. Smith told him that he could not quit and began cursing him about it. Smith then started towards Blunt with his cue in his hand. Blunt pulled his pistol, cocked it, and told Smith not to come any further. One of Smith's brothers and others took him out of the front door of the pool hall, and Scott and another person took Blunt out the backway. Blunt and his companions first went to a drug store and then to a restaurant for the purpose

of getting something to eat. Smith and his companions came into the restaurant while Blunt and his companions were there. Smith told Blunt that he was going to kill him the next morning, or as soon as he could get something to kill him with. Smith and his companions left the restaurant first. Subsequently Scott and Blunt left the restaurant to go to a hotel where they intended to occupy the same room. They stopped on the way by a fire which had been built by a negro who was running a merry-go-round. While standing by the fire Smith and his companions passed them. While they were passing Blunt changed his pistol from his left hip pocket to his right one and kept his hand on it. Smith's brother was with him at this time. Smith and his companions after going by Blunt and Scott stopped and talked awhile. Smith then came back towards the fire where Scott and Blunt were standing. As Smith approached close to Blunt, without saying anything, he drew his pistol and fired it rapidly at Blunt six times. As soon as he fired the first shot, Blunt fired back at him with his pistol, shooting three times. Several of the shots fired by Smith at Blunt took effect in his body. Blunt walked about 57 steps before he fell and died.

Another witness for the State corroborated in the main the testimony of Scott. He also stated that Smith fired at Blunt six times, and that Blunt fired at Smith three times; that he thinks Smith fired the first shot, but that they both fired right close together.

Bob Smith was a witness for himself. According to his testimony, he was not advancing on Blunt in the pool room for the purpose of fighting him when the latter drew his pistol and stopped him advancing toward him. The pool room was owned and operated by a brother of Smith. After the difficulty in the pool room his brother closed it for the night. The defendant, Smith, took his pistol which he had laid away for safe keeping earlier in the evening and placed it in his pocket. He then went on down the street and happened to go into the restaurant where Blunt and his companions

were eating. Smith told Blunt that if he had had his pistol at the time of the difficulty in the pool room that he would have shot Blunt. Smith and his companions then went on down to where the merry-go-round was being operated, and Smith did some repair work on it. He then started back to town to find a vehicle of some kind in which to go home. He lived several miles out in the country. In passing by the fire where Blunt and his companions were standing, Smith saw Blunt draw his pistol and fire it at him. Smith at once drew his own pistol and shot at Blunt six times in rapid succession.

Blunt died of the wounds received at the hands of Smith. Several other witnesses corroborated in the main the testimony of Smith. Some of the witnesses testified that both Smith and Blunt had taken several drinks of whiskey that night, and some of them said that the shots were fired so close together that they could not tell which one shot first.

The jury returned a verdict of manslaughter, and fixed the punishment of the defendant at four years in the penitentiary.

From the judgment of conviction Smith has duly prosecuted an appeal to this court.

R. L. Montgomery, T. D. Crawford and *D. K. Hawthorne,* for appellant.

The court erred in giving instructions for the State and in refusing those asked by the defense. 64 Ark. 144; 99 S. W. 383; 73 *Id.* 399; 133 Ark. 321-326. The giving of instructions 10 and 11 for the State and the refusal of Nos. 4 and 6 for defense were prejudicial. Cases *supra.*

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

Under the evidence appellant was unquestionably guilty of manslaughter. 108 Ark. 125.

There are no errors in the instructions given and refused. 114 *Id.* 398; 73 *Id.* 399; 93 *Id.* 409-414; 62 *Id.*

307; 99 *Id.* 580; 23 *Id.* 730; 114 *Id.* 398; 120 *Id.* 193; 76 *Id.* 515; 103 *Id.* 352; 125 *Id.* 177; 128 *Id.* 35.

HART, J., (after stating the facts). It is first insisted that the court erred in giving instruction No. 10 to the jury upon the motion of the State. The instruction is as follows:

"In ordinary cases of one person killing another in self-defense it must appear to the defendant, acting without fault or carelessness on his part, that the danger was so urgent and pressing that in order to save his own life, or prevent his receiving great bodily harm or injury, the killing was necessary, and it must appear also that the person killed was the assailant or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

It is claimed that neither this nor any other instruction given in the case told the jury that the defendant was not compelled to retreat if he was first assaulted by the deceased with a murderous intent. We can not agree with counsel in this contention. The theory of the State was that the parties were separated when they had their difficulty in the pool room, but that the defendant became very angry and approached the deceased in a restaurant on the same night telling him that he would kill him the next morning or as soon as he got anything to kill him with; that it was not the purpose of the deceased to again attack the defendant unless in his own necessary self-defense; that the defendant subsequently armed himself and passed by the deceased while he was standing by the fire at the merry-go-round; that the deceased shifted his pistol from his left to his right hand side and put his hand on it in order to be ready in case the defendant attacked him; that the defendant walked on by without attacking him, and that the deceased made no motion to shoot the defendant; that the defendant again approached the place where the deceased was standing and without warning suddenly pulled his pistol and fired six

times in succession at him; that the deceased did not shoot until after the defendant had fired one time. In short, it was the theory of the State that after the first difficulty the defendant armed himself and hunted up the deceased for the purpose of killing him, and was the aggressor throughout the difficulty.

On the other hand, it was the theory of the defendant that the deceased was the aggressor when the fatal rencounter occurred. According to the defendant's own testimony he had put his pistol in his pocket at the time his brother closed up the pool room and was going to take it to his home in the country. Before starting home he had done some repair work on the machinery of the merry-go-round and had no thought of shooting the deceased, but only intended to pass by the place where he was standing in order to find a vehicle in which to go home. As he approached the deceased the latter pulled his pistol and shot at him and he in turn then began firing at the deceased. The defendant's theory that the deceased was the aggressor was submitted to the jury in this, as well as the other instructions given by the court. This theory is contained in the clause in which the jury are told "and it must appear also that the person killed was the assailant." The theory of the defense as well as that of the prosecution was fully and fairly submitted to the jury in this as well as the other instructions given by the court. Moreover the instruction is substantially in the language of an instruction numbered 7, which was approved in the case of *Plumley* v. *State,* 116 Ark. 17.

It is next insisted that the court erred in giving instruction No. 9. The instruction is as follows:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the defense only amounted to manslaughter or that the accused was justified or excused in committing the homicide."

There was no error in giving this instruction. This instruction is a copy of section 1765 of Kirby's Digest. *Cogburn* v. *State,* 76 Ark. 110, and *Turner* v. *State,* 128 Ark. 565.

In the first mentioned case the court said that the section of the statute just referred to is a rule of law to be applied when the killing has been proved and there is nothing shown to justify or excuse the act. The court said further that in such a case it may well be presumed that there was no justification, or the defendant would have shown it. In the present case it was shown that the defendant did the killing. In fact, he admitted having done so. Other instructions were given by the court which fully covered the subject of reasonable doubt.

It is next insisted that the court erred in refusing to give instruction No. 6 asked by the defendant. The instruction is as follows:

"You are instructed that under the law a person does not have to wait until the party attacking has actually done him violence before he has a right to strike in his own self-defense, but if the defendant as a reasonably prudent person acting upon the facts and circumstances as they appeared to him, and from his standpoint, actually believed that the deceased was attempting to kill him or do him great bodily injury, then the defendant had the right to defend himself, so if you believe from the evidence in this case that the defendant acting as a reasonably prudent person at the time he killed the deceased, and upon the facts and circumstances as they appeared to him and from his standpoint; believed that the deceased was attempting to kill the defendant or do him great bodily injury, then the defendant had the right to stand his ground and defend himself and shoot the deceased at the time."

The court did give at the request of defendant instructions numbered 5, 7 and 9. Instruction No. 5 is as follows:

"You are instructed that if the defendant believed that it was the intention of the deceased to kill him or

do him great bodily injury, and that the defendant without fault or carelessness on his part, shot the deceased, he was justified is so doing; that it was sufficient if the defendant, acting without fault or carelessness on his part, honestly believed that the killing was necessary, if he acted under such circumstances as made it reasonable to entertain that belief."

Instruction No. 7 reads as follows:

"You are instructed that to justify a killing in self-defense, it is not essential that it should appear to the jury to have been necessary; but it is sufficient, if the defendant honestly believed, acting upon the facts and circumstances from his standpoint, and without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life or to prevent him from receiving great bodily injury."

Instruction No. 9 reads as follows:

"The jury are instructed that, in passing on the question as to whether the defendant was acting in his necessary self-defense, you are to consider his conditions and surroundings at the time, and determine whether the circumstances and surroundings were such as to induce in his mind an honest belief that he was in danger of losing his own life or of receiving great bodily injury at the hands of the deceased, and if you believe from the evidence that such was the case, and that the defendant at the time fired the fatal shot, while acting under such belief, and that he acted with due caution and circumspection and without negligence then it will be your duty to acquit the defendant."

A comparison of these instructions which were given by the court at the request of the defendant with instruction No. 6 which was refused will show that the matters embraced in the refused instruction were fully covered in those given by the court at the request of the defendant. His theory of self-defense was fully covered in these and other instructions given by the court.

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

HUDGINS PRODUCE COMPANY v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered July 14, 1919.

1. CONTRACTS BY CORRESPONDENCE — SHIPMENT OF FREIGHT — DESIGNATION OF ROUTE BY BUYER—VARIANCE BY SHIPPER FROM INSTRUCTIONS.—H. entered into a contract with V. for the purchase of potatoes, the negotiations being by telegram. H. directed that the potatoes in being shipped to it be routed a certain way. V. accepted H.'s stipulation, but routed the potatoes another way. There was a delay in the delivery of the potatoes due to the negligence of the carriers. H. was obliged to accept the same upon arrival due to the order of the U. S. Food Administrator. *Held* V. violated the stipulations in the contract with reference to the route, which constituted a breach of the contract in that respect and rendered V. responsible for damages caused by the negligence of the carriers.
2. CONTRACTS—PURCHASE OF POTATOES—BREACH—DAMAGES.—H. ordered potatoes from V. to be shipped by a certain route. V. shipped the potatoes by another route, thereby committing a breach of the contract, and rendering itself liable for damages resulting from the negligence of the carriers. *Held,* the finding of the jury fixing the amount of the damages was sustained by the evidence.
3. EVIDENCE—MOVEMENT OF CARS—RECEIPT OF CARS FROM CONNECTING CARRIER—RECORDS.—In an action against the delivering carrier for damages growing out of delay in the delivery of a freight shipment, the car accountant of the carrier can not offer in evidence the record made under his supervision showing the daily movement of cars over the rails of the defendant carrier; such record is incompetent, being merely a narrative of past events.

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

Webber & Webber and *W. H. Arnold,* for appellant.

1. The delay was unreasonable and resulted in the loss of the car of potatoes. Both defendants were liable. The railway companies were of course liable, but they were the agents of Varley & Co. and they were liable also. The contract was to deliver the car to plaintiff at Texarkana, Ark., and Hudgins Co. are not required to look to the railway companies alone for reimburse-

ment. 118 Ark. 20, and notes to 5 Am. & Eng. Ann Cases 263, and 2 L. R. A. (N. S.) 79. The rule is recognized in 77 Ark. 482; 88 Ark. 270; 89 *Id.* 342; 92 *Id.* 287. Varley & Co. selected a different route and another line of railway and are primarily liable for the damages caused by the delay. The car was forced on the plaintiff, Hudgins Produce Co., and they had no option but to receive it and they were entitled to damages to the amount of the difference between the contract price and what was received for the car, it being conclusively shown that plaintiff used all diligence to minimize the loss by selling the car to the best advantage. Defendants are therefore liable to plaintiff for the difference. 209 S. W. 65; 81 Ark. 549.

2. The railroad company was clearly liable. The evidence offered by it was secondary, and the copies of the record offered were inadmissible and properly excluded. 118 Ark. 398; 86 *Id.* 484; 73 *Id.* 112. The judgment should be reversed and judgment entered here for $1,023.23 upon the verdict.

James D. Head, for appellee Varley & Co.

1. Appellee was not responsible for the delay. The plaintiff as consignee had the burden of locating the shipment when it arrived in the yard under Food Administration Rules. It was the duty of the railroad company to have notified the Hudgins Produce Co. of the arrival of the car when it came because it was perishable stuff, as the way bill showed. It is admitted that the bill of lading showed that the produce company was to be notified of the arrival of the car and that it received proper advice as to the car number and initials. It was the intention of the produce company to accept the car, and they led Varley & Co. to believe it would be accepted if it arrived the week of March 5th. All of these conditions were met, and plaintiff ought not to be heard to contend now that, although the car did arrive within the week, yet that because of the negligence of the railroad in failing to notify it of the arrival of the

car it could refuse to take the car. Such a position is in direct conflict with the rules and regulations of the Food Administration under which the produce company seek the benefit under another feature of this case.

Assuming that the position of counsel as to the potatoes being the property of Varley & Co. until they arrived is correct as a general proposition of law, yet the telegram referred to takes this case out of the rule, and the intention of the parties as to whose property the car should be must govern. 209 S. W. 65; 111 Ark. 521. The case in 118 Ark. 17, relied on by appellant, can not govern here, because under the terms of the contract there the purchase made "draft with bill of lading payable upon arrival and examination of the goods." And the case went off on the provisions of the contract itself that the buyer had the right to rescind the contract of sale and the remedy of the seller should have been against the railroad for its failure to deliver within a reasonable time.

This court has ruled as to who has the right to sue the railroad company for damages due to negligence or negligent delay in the carriage of goods. 112 Ark. 110; 106 *Id.* 477; 146 S. W. 537; 79 Ark. 353; 88 *Id.* 343. Under the Carmack Amendment when the produce company took up the draft and procured the bill of lading it alone had recourse against the railroad for delay in transportation. Were this matter not governed by said amendment, still the consignee having taken the goods was entitled to sue the carrier for damages for delay. 10 C. J. 297, 354; Hutchinson on Carriers, § 1318; 10 C. J. 2750; 161 S. W. 1144. Varley & Co. have no right of recovery for delay against the railway company. 30 L. R. A. 1071; 153 S. W. 201. See also 57 U. S. (L. Ed.) 314.

There was error in plaintiffs' instructions and in refusing those asked by defendant, Varley & Co.

2. The verdict is not justified nor sustained by the law or evidence as to Varley & Co. There is no competent proof to show that the produce company lost a

cent by reason of taking over the car of potatoes. The testimony as to disposition of the car of potatoes by statements from the books was not competent, as it was not shown who kept the books or that they were correctly kept and the bookkeeper was not called.

Morover the jury were entitled to take with them into the box matters of common knowledge of human affairs, etc. And again, the jury may have arrived at the conclusion that a portion of the damage to the produce company was caused by the failure of Varley & Co. to load in time and that the remainder was due to the negligence of the railroad company in failing to transport the same. The jury were warranted in finding such to be the case if they were allowed to consider the complaint of plaintiff.

The instructions as to the measure of damages were correct. 110 Ark. 112. Upon the record the only errors were against Varley & Co., and they are not complaining.

E. B. Kinsworthy and *R. E. Wiley,* for Missouri Pacific Railway Company.

1. The court erred in excluding the testimony of E. G. Trobaugh, the car accountant, at the head of the department, 103 Ark. 153, and the scale book record, 123 *Id.* 235, and the train sheets. 158 Mass. 450; 122 Ky. 269; 3 L. R. A. (N. S.) 1194; 207 S. W. 226. The way bill also was competent testimony.

2. There is no evidence to sustain the verdict against the carrier in favor of plaintiff or Varley & Co. There was no competent testimony to show any damage under the proper rule. The only measure of damages against the carrier possible would be the difference in the market value at destination at the time the potatoes should have arrived and the market value at the time they did arrive. 73 Ark. 112; 74 *Id.* 358. The damages claimed is special and consequential, and there is no testimony whatever that the carrier was advised of the facts which might render consequential damages likely or possible

if the shipment was delayed. 74 Ark. 358; 118 *Id.* 406; 90 *Id.* 452.

2. Plaintiff can not sustain separate judgments for the same delay and damages against both principal and agent. 63 Ark. 30. The carrier was Varley & Company's agent and had no priority of contract with plaintiff. *Ib.* It was error to refuse the instructions asked by the railway company, as they state the law. *Supra.*

McCULLOCH, C. J. Plaintiff Hudgins Produce Company is a domestic corporation engaged in the wholesale mercantile business in the City of Texarkana, and instituted this action against the defendant Missouri Pacific Railroad Company and Varley & Company, a foreign corporation, to recover damages on account of delay in the delivery of a carload of seed potatoes purchased by plaintiff from defendant Varley & Company. Varley & Company were doing business in Minneapolis, and the contract with plaintiff for the sale of the potatoes was negotiated through L. F. Eck, a broker in Texarkana. The contract and the subsequent communications between the parties were conducted by telegraphic messages, except the last communication, which was a postal card from Varley & Company to the plaintiff, and those communications explain the whole transaction. The messages read as follows:

"2/13, 1918.

Varley & Company, Minneapolis, Minnesota.

Ship quick Hudgins Produce Company via C. G. Wabash and Iron Mountain car Triumphs 390 delivered.

(Signed) L. F. Eck."

"Minneapolis, Minn., February, 13th. L. F. Eck, Texarkana. Would book Hudgins three ninety this low price. Varley & Company."

"Mackay Telegraph-Cable Company," "February 14, 1918, Minneapolis, Minn. L. F. Eck, Texarkana, Ark. Booking Hudgins Produce Company immediate shipment weather permitting car Triumphs. Varley & Company."

"February 16, 1918, Varley & Company, Minneapolis, Minn. Rush Hudgins Triumphs; wire car number, initials; quote more. L. F. Eck."

"Minneapolis, Minn., February 16, 1918. L. F. Eck, Texarkana, Texas. Hudgins car not loaded except equipment Monday unable to quote more until present orders filled. Varley & Company."

The postal card reads as follows:

"Minneapolis, Minn., 2/20; Gentlemen: We are today shipping Hudgins Produce Company at Texarkana, Arkansas, car 14636, routed Soo. E. JN. & E.-C. E. I. St. L. & I. M. from station 2/22 containing 240 sacks, 36,000 pounds Triumph. Thanking you for the order, we are yours very truly, Varley & Company."

The car of potatoes was loaded and shipped by Varley & Company on February 22, 1918, from Webster, Wisconsin. The routing directions contained in the messages evidencing the contract were not followed by Varley & Company, and the shipment was over a different route entirely, except the last carrier, the defendant Missouri Pacific Railroad Company, being successor to the St. Louis, Iron Mountain & Southern Railway Company. It was the custom of Varley & Company to make their shipments from the potato producing region to Peoria, Illinois, and then divert the shipments to place of destination under the contracts of sale, and that course was pursued in this instance. The potatoes reached Texarkana over the line of the Missouri Pacific Railroad Company on Saturday afternoon, March 9, 1918, but was not delivered to the plaintiff, nor notice of arrival given, until Monday morning, March 11th. The season for selling seed potatoes had then ended according to the proof, and it was too late to sell them for seed purposes, and the only available market was to sell them for eating potatoes. Under a ruling of the National Food Administrator the consignee of damaged or perishable produce was not permitted to reject a shipment and was required under the said ruling to accept it, and plaintiff was compelled under directions of the local repre-

sentative of the National Food Administrator to accept this shipment. The price of the car of potatoes under the contract between plaintiff and Varley & Company was $1,209.74, and the draft drawn by Varley & Company on the plaintiff was attached to the bill of lading, the consignment being to shipper's orders, and plaintiff paid this draft in order to obtain the possession of the bill of lading, and also paid the freight bill of $194.26, making an aggregate of $1,404. Plaintiff sold the potatoes for $380.67, and claims damage in the sum of $1,-023.33.

The suit is, as before stated, against Varley & Company and the railroad company. The court in its instructions told the jury, in substance, that under the contract whereby Varley & Company undertook to sell the potatoes to plaintiff and to ship to Texarkana to its own order for delivery to plaintiff, Varley & Company was liable for any damages caused by its own negligence in failing to deliver the potatoes to the carrier with reasonable diligence or for unusual delay caused by the carrier in transporting and delivering the potatoes. The court also gave the following instructions, among others, at the request of Varley & Company:

"If you find from the evidence that the plaintiff ordered through L. F. Eck, from Varley & Company, the potatoes in question, that the plaintiff was advised later that the shipment had not been made, and it was likely car for same could not be had till Monday, February 19th, and if you further find that, considering weather conditions, said car was loaded as soon after it was placed at the point of shipment as was reasonably practical and that Hudgins Produce Company did not then cancel order on receipt of such advice aforesaid, then you are advised that Hudgins Produce Company can not now complain of any such delay in loading said car of potatoes and can recover nothing on account thereof."

"If you find there was unusual delay in this shipment after its delivery to the initial carrier and that the same has been unexplained in any way by defendant

railroad, and if you further find that this delay caused damage, and that Varley & Company is liable to Hudgins Produce Company in any amount, then your verdict should be for the said Varley & Company against defendant railroad company, for such amount as you may find Hudgins Produce Company was damaged, if any, by reason of such unusual delay."

The court also as a part of its oral instructions told the jury that if they should "find for plaintiff against Varley & Company then it will become the duty of the jury to determine whether or not there should be a verdict in favor of Varley & Company against the railroad company."

The jury after deliberation returned into court and reported a verdict in the following form: "We the jury find for the plaintiff in the sum of $500 damages against Varley & Company and the Missouri Pacific Railway Company jointly." Thereupon the attorney for Varley & Company objected to the verdict on the ground that it failed to state what part of the judgment should be against each defendant and because the jury had failed to make a finding on the question of liability as between the two defendants. After a short colloquy between the court and counsel representing the various parties, the court directed the jury to return and make a finding as to the rights of the two defendants whether or not Varley & Company was entitled to a verdict against the railroad company. Objection to this was interposed by plaintiff and the defendant railroad company. The jury then retired and later brought in a verdict in the following form: "We, the jury, find for the plaintiff and assess the damages at $250 against Varley & Company and $250 against the Missouri Pacific Railway Company, each with interest at six per cent. per annum from March 13, 1918." The court rendered judgment on the verdict in favor of the plaintiff for the sum of $250 and interest against each of the defendants. The plaintiff and the defendant railroad company have appealed.

(1) It is contended by counsel for plaintiff that the defendant Varley & Company is liable for all of the damages found by the verdict of the jury and that the court should have rendered a judgment for that amount notwithstanding the form of the last verdict. Our conclusion is that this contention is correct and that the plaintiff is entitled to a judgment against Varley & Company for the sum of $500, with interest, as found by the jury. This is based on the undisputed evidence in the case that Varley & Company did not obey the instructions of the plaintiff in selecting the route of shipment, but adopted a route of its own selection. Counsel debate the question whether or not the contract constituted an agreement on the part of Varley & Company to assume responsibility for an expeditious delivery of the potatoes at Texarkana so as to make them responsible for any delay caused by the negligence of the carrier, and also whether or not the railroad company is liable to the plaintiff for damages to the potatoes consigned by Varley & Company to its own order at Texarkana. We do not, however, deem it necessary to go into a discussion of those questions, for if it be conceded that they should be decided against the contention of the plaintiff, the undisputed fact remains that Varley & Company violated the stipulations of the contract with respect to the selection of the route, which constituted a breach of the contract in that respect and rendered Varley & Company responsible for damages caused by the negligence of the carriers. And, if defendant railroad company is responsible to the shipper for any part of the damage, the judgment is correct, for the finding of the jury is conclusive on the question of liability of the railroad company for that much of the damages, and no prejudice results for the reason that Varley & Company is entitled to a judgment over against the railroad company for the amount so found by the jury.

In the telegram proposing the purchase of the potatoes and specifying the terms, the plaintiff also specified the route of shipment and Varley & Company accepted

the proposal and undertook to comply with the contract according to stipulation. This constituted a contract to ship over the route indicated and a failure to do so was a breach of the contract. Plaintiff was compelled to accept the consignment when it arrived at Texarkana under penalty of having its license to do business revoked by the National Food Administrator. This imposed on the plaintiff the acceptance of the shipment, not according to the terms of the contract, but in violation of its terms, and the shipper is, therefore, responsible for the injury which resulted to the plaintiff, since it is settled by the jury upon sufficient evidence that the delay was unusual and must have resulted from the negligence of the carriers.

(2) It is also insisted that according to the undisputed evidence plaintiff is entitled to recover a sum largely in excess of the amount found by the jury, but upon consideration of all the testimony in the case we are of the opinion that there was sufficient evidence to sustain the finding of the jury in that regard. The testimony adduced by plaintiff tends to show that the damage amounted to the difference between the cost of the potatoes, with freight charges added, and the amount which plaintiff received on resale of the potatoes, but we think that the jury might have drawn the legitimate inference that all of the damage resulted from the negligent delay after delivery to the initial carrier for shipment. Plaintiff acquiesced in the shipment on February 23, 1918, and was therefore not entitled to any damages accruing up to that time. The evidence shows the time required for the consignment from Minneapolis to reach Texarkana and the jury doubtless reached the conclusion that the delay caused by the negligence of the carrier did not justify the assumption that all of the damages resulted from it. The market for seed potatoes did not end on any particular day. In fact, plaintiff's telegram to Varley & Company shows that it was willing to accept the potatoes without claim of damages if the potatoes reached Texarkana during the week ending March 5,

1918. There was only a week's delay after that time and the market for seed potatoes was drawing to a close. The jury had a right to take those facts into consideration in determining whether or not the whole of plaintiff's loss was attributable to the delay in transportation. There was also a slight conflict in the testimony as to the market value of eating potatoes at the time plaintiff sold this car for that purpose.

(3) The railroad company asks for reversal principally on the ground that the court rejected testimony tending to show the time when it received the car of potatoes from a connecting carrier. Mr. Trobaugh, who held the position of car accountant with defendant Missouri Pacific Railroad Company, in his testimony offered to produce the record made under his supervision showing the daily movement of cars over the rails of defendant company, but the court held that the records were not competent without direct proof of correctness. It appears from the testimony of Mr. Trobaugh that these records were made up of reports of car checkers over the system so as to keep track of the movements and location of cars. It is contended that this record was competent evidence, the same as train sheets compiled by the train dispatcher showing movements of trains. We have decided that such train sheets are competent evidence either for or against the public carrier under whose supervision the records are made. *Bush, Receiver,* v. *Taylor,* 136 Ark. 554, 207 S. W. 226. There is no analogy between the two systems whereby these records are kept. The train sheet is a record made at the time the transactions occur, that is the time that the movement of trains are ordered and reported, and this constitutes a sufficient guaranty of the authenticity of the records to justify the admission of them as testimony; but, as we understand the testimony of Mr. Trobaugh, the records made under his supervision constitute merely a narrative of past events as reported by the car checkers, and for that reason the record is not competent. The question, we think, is ruled by the case of *St. Louis,*

Iron Mountain & Southern Ry. Co. v. *Gibson,* 113 Ark. 417, where it was held that in a suit to recover damages for personal injuries caused by the operation of a train, it was not competent to prove the time the train left a certain station by the testimony of the operator at another station to whom the information was telegraphed by the operator at the station in question. It is argued that a certain other record made by the train conductor, and called "wheel report," which showed the progress of the car in question, was offered in evidence by the railroad company and improperly excluded by the court, that it was competent under the rule announced above and ought to have been admitted, but we can not discover definitely that such report was offered and what its contents were. We, therefore, do not pass on the competency of that report as evidence in the case. It is conceded that without the excluded testimony, there was nothing in the record to show when the carload of potatoes was delivered to defendant carrier, and the presumption arises that the delay occurred on its line as the delivering carrier. *St. Louis, Iron Mountain & Southern Railway Co.* v. *Coolidge,* 73 Ark. 112.

The judgment of the circuit court, will, therefore, be reversed, and judgment will be entered here in favor of plaintiff against Varley & Company for the sum of $500, with interest from March 18, 1918, as found by the jury, and the judgment in favor of plaintiff against defendant railroad company for $250, with interest aforesaid, is affirmed, but that amount is a part of the sum recovered against Varley & Company, the plaintiff being entitled under the verdict to the sum of $500, with interest aforesaid. The plaintiff will be entitled to judgment for the cost of appeal against both defendants. It is so ordered.

LOVE v. GRAND INTERNATIONAL DIVISION OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

Opinion delivered July 7, 1919.

1. LABOR UNIONS—EXPULSION OF MEMBERS.—*Held,* that the Grand International Division of the Brotherhood of Locomotive Engineers possess constitutional authority to expel members of subordinate divisions of the brotherhood, and to order the division, of which the expelled brother was a member, to enforce the order of expulsion.
2. LABOR UNIONS—CONTROL OF ACTS OF MEMBERS—ISSUING CIRCULARS AND PETITIONS—EXPULSION OF MEMBER.—The Brotherhood of Locomotive Engineers, *held,* under its constitution and by-laws, to have authority to expel from membership a member of a subordinate division for issuing or signing circulars or any form of petition in relation to the business of the brotherhood, among the members, or others.
3. LABOR UNIONS—EXPULSION OF MEMBER—GROUNDS.—The expulsion of a member of a subordinate division of the Brotherhood of Locomotive Engineers by order of the Grand International Division of said brotherhood, *held* properly brought about under the constitution and by-laws of the order.
4. LABOR UNIONS — EXPULSION OF MEMBER — PROCEDURE.—*Held,* the Grand International Division of the Brotherhood of Locomotive Engineers, assembled in triennial convention and possessing the authority to expel a member of a subordinate division of the order for a violation of its by-laws, may delegate the investigation of charges against such member to a committee.

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

J. C. Marshall, for appellant.

1. The Constitution of the G. I. D. did not invest it with jurisdiction to expel members of subordinate divisions, but with appellate jurisdiction only. The power of disfranchisement must be conferred by statute or charter and is not sustained otherwise as an incidental power except where the member has been convicted of infamous crime by a competent court, or some act against the society tending to its destruction or injury. Thompson on Corp., § 4688; 20 Wis. 63; 4 Am. Dec. (2

Binn.) 453; 31 Mich 458; 1 Bacon on Ben. Soc., § 88-97; 92 Atl. 41; 8 Hun. 216.

The law does not favor forfeitures and the facts must be clearly established by satisfactory proof. 2 How. Pr. 228. The burden is on defendant to show forfeiture of rights under the charter and by-laws. 90 Dec. 89; 176 S. W. 516; 108 Ill. App. 47; 70 *Id.* 95; 78 N. E. 469; 80 Ark. 190; 19 Pa. Sup. Ct. 272.

Where the corporation or society owns property, a member can not be expelled unless this power is contained in the charter. 63 Am. Dec. 772, note; 7 C. J., § § 24, 28, 32, 38; 1 Bacon on Ben. Soc., § § 83, 88, 98-9. To prove expulsion of a member, expulsion in compliance with the laws of the order must be shown. 67 Ill. App. 576.

There are no presumptions in case of forfeiture of property or other important rights for the law is opposed to summary proceedings involving forfeitures. 1 Bacon, Ben. Soc., § 110. Whoever charges another with culpable omission of duty or breach thereof must prove it. 13 Am. Dec. 304; 25 *Id.* 108; 16 Cyc. 927-8.

A member of an incorporated benevolent society can not be expelled for a private quarrel under a by-law, for expulsion for vilifying another member and generally the use of contemptious, insulting or disrespectful language by one member to another, or even an officer, is not sufficient ground of expulsion. Thompson on Corp., § 4674.

Mere defamation of a member is no cause of discipline even. 28 N. W. 802; 35 N. Y. S. 214; 4 Am. Dec. 453; 42 Atl. 118.

2. The expulsion is void, as there was no by-law authorizing it. Cases *supra;* 7 C. J. 1101; Thompson on Corp., § 4671; 1 Serg. & R. 254. See also, 15 Pa. St. 251; 89 N. Y. S. 921; 7 C. J. 1011-17.

Notice must be given. The power of expulsion belongs to the society alone unless by fundamental article or by-law it is transferred to a select number. 14 Phila.

233; 22 Md. 156; 40 Hun. 546; Thompson on Corp., § 4691.

No copy of the charges was ever served upon accused, and they certainly were entitled to notice and a hearing. 1 El. & El. 545; Thompson on Corp., § 4692; 35 N. Y. Sup. 214; 31 N. E. 776; 10 Daly (N. Y.) 262. The charges must be definite and specific or the expulsion is void. 28 N. W. 802; 56 N. Y. S. 1052; 46 Hun. 273; see also, 7 C. J. 1116-8; 105 Atl. 717; 52 L. R. A. (N. S.) 817, and note.

House, Rector & House, for appellee.

1. The section of the constitution and by-laws under which the G. I. D. proceeded is not invalid, and the division had ample power of expulsion as punishment for the offense charged. The authorities cited for appellant establish the proposition that a benefit society has the right to expel a member for any offense against the members duty to the organization. The pamphlet which appellants admit they prepared and circulated was such an offense. This court can not review the evidence or pass on the merits. Bacon on Ben. Soc., § § 48 and 613. Here the lodge had jurisdiction and proceeded regularly and the by-law was valid. 48 S. E., p. 580.

The failure of appellants to exhaust their remedies afforded them closes the door of the courts. 102 Tex. 89; 19 A. & E. Ann. Cases, 1250. To the same effect are 156 N. W. 658; 137 Mass. 368; 86 Mich. 626; 65 Kans. 452; 144 Mass. 175; 157 Ill. 108; 26 L. R. A. 98; Bacon on Ben. Soc., § 625; 86 Me. 434.

The order had jurisdiction, the by-law is valid and there were no irregularities in the trial, or if there were they were waived. 70 L. R. A. 188; 91 S. W. 834; 108 *Id.* 454; Niblack on Ben. Soc., § 35 to 39; 107 Cal. 74; 70 Pac. 352.

2. Section 3 of the Constitution and 92 of the statutes and the fraternal obligation of appellants are abundant law for the institution of the charges under which appellants were tried. 98 S. E. 580; 31 N. E. 776; 137

Mass. 329; 113 S. W. 144. The finding of the highest court of the brotherhood is conclusive and binding here. 24 Oh. L. J. 314; 116 Pa. 391; 84 Ky. 490; 52 Pa. 125; 30 N. Y. Sup. 885; 53 N. J. L. 536; 61 Ill. App. 597; 49 L. R. A. 353.

3. The expulsion is not invalid because the G. I. D. violated its own rules or because of insufficiency of charge and notice. 76 Kans. 516; 4 Cyc. 303. An appearance and defense waives notice and insufficiency of charge. 103 N. Y. Sup. 1003; 118 N. Y. 101; 24 N. Y. Sup. 114; 28 Mich. 261; 110 Cal. 308; 112 Tenn. 664; 70 Pac. 352.

As to the power of the courts to review the proceedings, see Niblack on Ben. Soc., § 55; 65 Atl. 829; 121 N. Y. 284; 155 *Id.* 83.

Formalities in charge or notice are waived by appearance. 24 R. I. 550. All presumptions favor the validity and legality of the proceedings in the administration of the society's disciplinary laws. Speer, Equity, 87; 64 How. Pr. 442.

4. It was competent to delegate to a special committee the duty of trying the charges. 157 Mass. 128; 31 N. E. 776. See also, 28 Mich. 261; 116 Pa. 391; 76 Tex. 552; 110 Cal. 297; 129 Ill. 298; 52 N. J. L. 455; 54 Mo. App. 468.

5. Both the committee and the main body acted in good faith and gave appellants a fair and impartial trial and the chancellor so found and the finding should not be disturbed. 86 Ark. 622; 129 *Id.* 297-301; *Ib.* 583; 130 *Id.* 178 135 *Id.* 607.

HUMPHREYS, J. Appellants instituted suit against appellees in the Pulaski Chancery Court to prevent them from interfering with their membership in the Brotherhood of Locomotive Engineers and their property rights, consisting of insurance, traveling cards, etc., incident to their membership. In substance, they alleged that the Grand International Division of said Brotherhood, commonly known as the "G. I. D.," was a duly

organized Ohio corporation, located at Cleveland, Ohio, with power to do business in Arkansas, and possessing supreme authority in matters of said brotherhood; that, without authority, and contrary to the laws of the Brotherhood and the land, said G. I. D., while sitting in triennial session in Cleveland, on May 18, 1918, expelled appellants from the Brotherhood, thereby injuring them in their property rights; that said G. I. D. ordered local division No. 554, in which they held their membership, to put the order of expulsion into effect. Based upon these allegations, appellants prayed for cancellation of the order of expulsion, the non-enforcement thereof, and reinstatement as members.

Appellees admitted the expulsion and order for the enforcement of same but denied that it was without authority under the constitution and by-laws of the Brotherhood to expel them and direct the enforcement of the order.

(1) The cause was heard upon the pleadings, depositions and exhibits thereto, from which the chancellor found that the Grand International Division of the Brotherhood of Locomotive Engineers possessed constitutional authority to expel members of subordinate divisions of the Brotherhood and to order the division of which the expelled brother was a member, to enforce the order of expulsion; that appellants were charged, fairly tried and expelled for violating a by-law of the order. In keeping with the findings, the court dismissed the petition of appellants for want of equity. From the findings and decree of the chancellor, an appeal has been prosecuted to this court, and it is before us for trial *de novo*.

Several years before the institution of this suit, F. C. Stelter sued the Rock Island Railroad on account of injuries received while operating one of its engines. The railroad company compromised the suit with Stelter, but refused to re-employ him, contrary, Stelter claimed, to its contract with the order. He attempted to present these claims, first, to his local division, next to the Grand

Chief Engineer, and then to the Grand International Division, but failed to get relief. In preparing and presenting the claims, he was assisted by J. C. Love, one of the appellants in this cause. In an attempt to get the claims of appellant Stelter considered, appellants attended the convention of the G. I. D. in 1918. While there, the following written charges were preferred against them by E. S. Pritchard, a delegate to the G. I. D.:

"To Officers and Members of the Grand International Division:

"Sirs: I herewith prefer charges against member J. C. Love and member F. C. Stelter of Division No. 554, for violation of obligation, and submit the attacking pamphlet hereto as evidence."

The attacking pamphlet attached as evidence consisted in a bill of particulars and a complete statement of Stelter's case and his fruitless attempts to obtain redress from the local division, the officials and the G. I. D. at its first convention. In substance, it charged that certain officers of the G. I. D., including the Chief Executive of the Order, prevented him from obtaining redress through deceit, falsehood, tyrannical influences, etc.

The charges were referred to a committee of five for trial and report. Appellants appeared before the committee and admitted that the attacking pamphlet was signed by J. C. Love of Division No. 554, and prepared and circulated by him with the consent and approval of appellant F. C. Stelter.

The following report was filed by the committee:

"Sirs and Brothers: We, your committee appointed in the case of J. C. Love and F. C. Stelter of Division No. 554, for violation of obligation, beg to report that after due consideration of all the evidence and examination of all the witnesses, we find that they are guilty as charged, and recommend their expulsion."

After refusing to allow appellants to appear before the body, the G. I. D. voted to expel them. The motion was then adopted conferring power on the Grand Chief

Engineer and the Advisory Board to hear and reinstate parties who had been suspended.

The evidence on the part of appellants tended to show that the sitting of the committee was an informal affair; that when they appeared before such of them as were present, they did not intend to appear for trial, but thought they were appearing for the purpose of presenting Stelter's claims set forth in the attacking pamphlet, and had no idea that they were being tried on the charges preferred against them; that they did not understand that the questions propounded to them as to authorship and circulation of the pamphlet were propounded in the course of a trial; that they left the committee, or such members as were present, believing that, in case they were to be tried, they would receive a copy of the written charges and notice of the time and place of trial.

The evidence on the part of the committee tended to show that appellants were present and understood the nature of the charge against them; that they were being tried on it; and that on the trial they admitted authorship and responsibility for the circulation of the pamphlet.

Appellants first insist that the constitution of the Grand International Brotherhood of Engineers did not invest the G. I. D. with original jurisdiction to expel the members of the subordinate divisions thereof, but in that respect, with appellate jurisdiction only. It is provided in the third section of the constitution of the Order that: "The G. I. D. shall have exclusive jurisdiction over all subjects pertaining to the Brotherhood, and its enactments and decisions upon all questions are the supreme law of the Brotherhood, and all divisions and members of the Order shall render true obedience thereto.

* * * * * *

"It shall also have full power to order the expulsion of a member of any division, and in the event of such division failing to comply with such order, the Grand Chief shall recall their charter and shall hold the same

until the order is complied with or decision is reversed by the G. I. D.; and such expelled member shall not be reinstated except by action of the G. I. D."

It would indeed be a restricted construction to hold that only appellate jurisdiction was conferred upon the G. I. D. by this section of the constitution. It is hard to conceive what broader or more specific language could be invoked in an attempt to confer *all* power upon a body than was utilized in this section. The first clause confers jurisdiction on the G. I. D. over *all subjects* pertaining to the Brotherhood; the next makes the enactments and *decisions* the *supreme law* of the Brotherhood, and the next exacts complete obedience of every member of the Order to the laws enacted, or *decisions* made by the G. I. D., touching any subject concerning the Brotherhood. If this is not an investment of *all power* in a body by plain, unambiguous language, we are unable to detect the restriction or limitation. Touching upon the unlimited power vested in the G. I. D. by the first paragraph of this section of the constitution of the Order, it was said by the court in the case of *Simpson and Smith* v. *Grand International Brotherhood of Locomotive Engineers,* 98 S. E. 580, that: "The powers thus vested in it expressly exclude any presumption of intent to adopt the limitations and rules of the civil laws, respecting either procedure or substantive rights in the Order."

Again, in the latter clause of the same section, full power is vested in the G. I. D. to order the expulsion of a member of any division. Ample authority is granted the subordinate divisions of the order by other sections of the constitution to expel their members without an order from the G. I. D. In case of an affirmance of an expulsion on appeal to the G. I. D., an order to the division to expel the member would therefore be an unnecessary or superfluous order. In case of reversal of an expulsion on appeal to the G. I. D., certainly no such order would, or could, be issued. Consequently, it is plain that the authority conferred on the G. I. D. to order a division to expel a member grows out of an exercise of

its original jurisdiction. Had the power thus conferred related to other than an exercise of original jurisdiction, the authority would not have been to order expulsion but to order the trial and expulsion of a member, if found guilty. The order for the imposition of the penalty presupposes a trial and conviction.

(2) Again, it is insisted by appellants that there was no by-law establishing the offense charged and fixing expulsion as the penalty. Section 92 of the constitution of the Order provides that: "All divisions, or members of divisions, are prohibited from issuing circulars or signing any form of petition relative to Brotherhood business among members of the Brotherhood or others. If issued by a division its charter shall be suspended, and the length of such suspension shall be at the discretion of the Grand Chief Engineer. If issued or signed by a member, he shall be suspended or expelled; provided that the foregoing shall not prevent or hinder in any manner any official or division of the Brotherhood in properly conducting the business of the organization as to sending out notices, reports, etc., for the purpose of securing or giving information."

This by-law prevents lay members of the Order from *issuing* or *signing circulars,* or any form of *petition* in relation to the business of the *Brotherhood* among the members or others. The attacking pamphlet was a circular or petition relating to Brotherhood business, and, therefore, clearly inhibited by the law of the Order.

(3) Appellants also insist that the charge was not sufficiently definite to bring it under section 92 of statutes, or any other by-law of the Order. The charge, in substance, is the violation of obligation, evidenced by the attached attacking pamphlet. Owing to the length of the pamphlet, it is impracticable to incorporate it in this opinion. Suffice it to say that it is a circular or petition relative to the conduct of Division No. 554, the Grand Chief Engineer and the first triennial convention of the G. I. D. in relation to the claim of appellant F. C. Stelter, concerning an alleged violation of a contract be-

tween the Rock Island Railroad and the Order, in reference to the railroad's refusal to re-employ him, after his suit against it was compromised. The subject matter contained in the pamphlet related to the business of the Brotherhood among the members as well as others. The charge was sufficiently definite and specific.

It is also insisted by appellants that the mode of procedure adopted by the G. I. D. in the trial was contrary to the by-laws of the Order. We have examined the statutes of the Order and find that the mode of procedure provided in them for trial of members relates to trial by subordinate divisions. No method of procedure is specified in the laws of the Order for trials of members by the G. I. D. Under these circumstances, it was within the power of the G. I. D. to adopt a fair method of procedure, even though it did not conform to the method governing trials of the members before subordinate divisions. *Gray* v. *Christian Society,* 137 Mass. 329; *Spillman* v. *Supreme Council of Home Circle,* 157 Mass. 128, 31 N. E. 776.

(4) It is also contended by appellants that the G. I. D. had no right to delegate the investigation of the charges to a committee. It is asserted that the G. I. D. itself should have investigated the charges. In conventions of this character, composed of delegates from subordinate divisions, sitting triennially, it is hardly practicable to conduct investigations otherwise than through committees. This method was approved in the case of *Spillman* v. *Supreme Council of Home Circle, supra,* which was an organization quite like the Brotherhood of Locomotive Engineers. In commenting on this method of procedure in that case, Justice Allen took occasion to say: "It (referring to the Supreme Council) was, in short, a body of the highest, and apparently unrestricted, authority. The trial of members or officers of grand or subordinate councils might be had before a special committee of one or more members of the Order named by the supreme leader. This committee need not consist of members of the Supreme Council. The Supreme

Council is a body whose will is a law unto itself. It was to have original jurisdiction in all cases of its own officers and members, but no mode of procedure was provided for their trial. It would seem, therefore, that it might adopt such mode of trial as it pleased, subject only to the implied limitation that it must be fair."

Lastly, appellants insist that they did not obtain a fair and impartial trial. On sharply conflicting evidence, the chancellor made a special finding to the contrary, which finding seems to be supported by the evidence.

No error appearing, the decree is affirmed.

MALONE v. STATE.

Opinion delivered July 7, 1919.

1. CRIMINAL LAW—RIGHT OF PARTIES TO SPECIFIC INSTRUCTIONS COVERING HIS THEORY OF THE CASE.—A party to a suit has the right to a statement to the jury both of the principles of law controlling his case and of the specific application of those principles to the facts in evidence, that is to say, either party has a right to insist upon a concrete application of the legal principle involved, to the facts in evidence, and a declaration from the court that these facts, if believed by the jury to be true, call for the application of the principle.
2. LIQUOR—ILLEGAL SALE—THEORY OF DEFENSE—DUTY OF COURT TO PRESENT.—In a criminal prosecution for the illegal sale of liquor, the defendant is entitled to have his theory of defense, that the prosecuting witness was an accomplice in the illegal sale, presented to the jury in a proper instruction, there being evidence to warrant such a submission; and it is reversible error to refuse to submit that issue.

Appeal from Crittenden Circuit Court; *R. E. L. Johnson,* Judge; reversed.

Hugh Haden and *Berry & Wheeler,* for appellant.

It was error to refuse the instructions asked by defendant and especially No. 5. He was convicted solely upon the testimony of Chris Parker, unsupported and uncorroborated in any way. Higgins does not corroborate Parker on any fact connected with the sale. There was

really no sale to Parker, but he was the agent of Malone. Defendant's theory of the case was not given to the jury by any instruction. 50 Ark. 545. The only witness was an accomplice of defendant. 95 Ark. 233; 43 *Id.* 367; 51 *Id.* 115; *Ib.* 189. Defendant's theory was not given to the jury at all. 50 *Id.* 545; 52 *Id.* 345. The court should not indicate an opinion on the facts, but in giving the law only determine whether there is any *evidence at all* justifying a particular instruction. 74 Ark. 460; 92 *Id.* 499. Instruction No. 3 as asked was sustained by the evidence. It is a copy of section 2384, Kirby's Digest, except the misdemeanor part is omitted. The failure to give those requests of defendant and the giving of the instructions for the State was prejudicial error. 111 Ark. 299; 93 *Id.* 600-3.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

There was no error in refusing instruction No. 5 for defendant. There was no evidence upon which to predicate it. Defendant was tried for a sale to Chris Parker and not for directly or indirectly being interested in sales by Parker to other persons. There was in fact a sale to Parker and evidence that Parker was not acting as agent of defendant. A sale is defined in 1 Mechem on Sales, p. 3. The testimony is undisputed and therefore the question of whether or not the transaction was a sale or an agency was one of law for the court to decide, and therefore was no error in refusing No. 5 as asked. Mechem on Sales, par. 50. It was clearly a sale and Chris Parker was not an accomplice. 129 Ark. 106. On the whole case the evidence shows a sale and there was no error in the trial.

STATEMENT OF FACTS.

Henry Malone prosecutes this appeal to reverse a judgment of conviction against him for the illegal sale of intoxicating liquors.

Chris Parker, a witness for the State, testified that he had known the defendant about a year and had

bought from him a case of whiskey in Crittenden County, Arkansas, for which he agreed to pay him the sum of $70. He said that he did not himself pay the defendant the money but his wife paid him later; that the purchase of the case of liquor occurred sometime between the 14th and 18th of December, 1918; that he and Sandy Higgins at another time bought some liquor at defendant's place of business from a colored man.

On cross-examination the witness stated that he bought the whiskey from the defendant for the purpose of selling it again and that he was to retain all that he sold it for over $70. We quote from his testimony on cross-examination as follows:

Q. How much did you sell this liquor for?
A. $1.75 a half pint.
Q. How much did you have?
A. A case.
Q. 48 half pints?
A. Yes, sir.
Q. You were to sell that for one dollar and seventy-five cents a half pint. You were Mr. Malone's agent then?
A. Yes, sir. It was his stuff.
Q. How much was you to get?
A. The balance over seventy dollars.
Q. And you did not sell enough to make $70?
A. No, sir.
Q. Sold only about half of it?
A. Yes, sir.

Sandy Higgins testified that he and Chris Parker bought a pint of whiskey about the 18th of January, 1919, from a negro at the defendant's place of business and paid $3 for it; that they did not see the defendant at the time and did not see the negro who sold them the liquor sell anything else in the house; that the defendant was running a restaurant and lunch counter.

The jury returned a verdict of guilty and fixed the punishment of the defendant at one year in the State penitentiary.

From the judgment of conviction, the defendant has duly prosecuted an appeal to this court.

HART, J., (after stating the facts). It is contended by counsel for the defendant that the court erred in refusing to give instruction No. 5 asked for by him. The instruction reads as follows:

"If you find from the evidence that the witness Parker, did not purchase the liquor from Malone, but was acting as his agent and that he was an accomplice in the sale alleged to have been made by the witness, Parker, to other persons, then unless you find from the evidence in the case that the said witness, Parker, has been corroborated on some material fact in this transaction, you will find the defendant not guilty."

The Attorney General first contends that there is no evidence upon which to predicate this instruction. He contends that the testimony of Chris Parker only warranted the jury in finding that he had purchased the liquor from the defendant. In *Springer* v. *State,* 129 Ark. 106, the court held that in a prosecution for the illegal sale of liquor, the purchaser is not an accomplice of the seller, and the statute requiring corroboration of the testimony of an accomplice to sustain a conviction does not apply in such a case. Hence he contends that the court did not err in refusing the instruction.

The weakness of the argument lies in the fact that the jury need not necessarily have found that Parker purchased the liquor from the defendant although it might have done so. Parker testified on cross-examination in response to questions asked him that the liquor belonged to Malone and that he acted as Malone's agent in selling it. Although he had stated on his direct examination that he himself had purchased the liquor from Malone, when his whole testimony is read together, the jury would have been warranted in finding that he acted as agent for the defendant in selling the liquor. In this view of the case the instruction asked for by the defendant and refused by the court was not abstract, but was

a correct instruction submitting to the jury the defendant's theory of the case, that the prosecuting witness was the agent of the defendant in selling the liquor and was not a purchaser of the liquor from the defendant.

The defendant's theory of the case was not presented to the jury in any other instruction given by the court. It is true the court did instruct the jury in substance that in order to find the defendant guilty it must find that Chris Parker purchased from him a case of intoxicating liquor, or some other amount of intoxicating liquor for the sum of $70, or for any other price; but the instruction as given only submitted to the jury the State's theory of the case and did not submit to it the theory of the defendant.

It has been uniformly held by this court that a party has the right to a statement to the jury both of the principles of law controlling his case, and of the specific application of the principles to the facts in evidence. In other words, the defendant has a right to insist upon a concrete application of the legal principle involved to the facts in evidence, and a declaration from the court that these facts, if believed by the jury to be true, call for the application of the principle.

The court submitted to the jury the State's theory of the case and refused to submit that of the defendant. Such action tended to confuse and mislead the jury and constituted prejudicial error calling for a reversal of the judgment.

For the error in refusing to give instruction No. 5 asked for by the defendant, the judgment will be reversed and the cause remanded for a new trial.

HUMPHREYS, J., (dissenting). This case turns upon whether Chris Parker, the prosecuting witness, was the agent of appellant in the sale of a certain case of whiskey. If so, Chris Parker was appellant's accomplice, and appellant should not have been convicted on the uncorroborated testimony of his accomplice. If,

however, Chris Parker purchased the case of liquor for cash or on credit, even with the privilege of returning all or any part of it, then Chris Parker was a purchaser, and in no sense an accomplice of appellant; and, in that event, corroboration of the testimony of the prosecuting witness was not necessary to convict. The direct testimony of the prosecuting witness was to the effect that he purchased the whiskey outright from appellant. It is true he testified on cross-examination that he was appellant's agent, but the facts detailed by him concerning the transaction establish a sale either on credit or with privilege to return all or a part of it. No limitation was placed upon the prosecuting witness by the appellant in the disposal of the liquor. He could sell the liquor upon his own terms, where, when and to whom he pleased. He was to pay a fixed or definite price, to-wit: $70 for the entire case of whiskey. I think the undisputed facts establish a sale, as defined by Mechem on Sales, in vol. 1, paragraphs 34 and 49. Under this view as to the effect of the testimony of the prosecuting witness, I can not agree with the conclusions of the majority. In my opinion, the court properly refused to give instruction No. 5, requested by appellant, submitting the question of whether the transaction constituted a sale or agency. Under the undisputed facts in the case, it was the duty of the court, and not the jury, to determine this question.

VANHOOZER v. GATTIS.

Opinion delivered July 7, 1919.

1. FIXTURES—BUILDING UPON LAND—RIGHT TO REMOVE—AGREEMENT OF THE PARTIES.—A building erected upon leased premises may be treated as either real estate or personal property, according to the agreement and understanding of the parties.
2. FIXTURES—RIGHT OF TENANT TO REMOVE BUILDING.—Tenants must remove buildings placed by them upon leased premises within the time specified in their leases, otherwise the buildings immediately become a part of the real estate to which attached.

3. FIXTURES—AGREEMENT GIVING RIGHT TO REMOVE—WRITTEN AGREEMENT—ORAL TESTIMONY TO CONTRADICT.—A lessee erected a building upon the leased premises under an oral agreement with the lessor that the lessee might remove the same. Some time later the parties entered into a written unambiguous agreement, limiting the time for removal of the building. In a later dispute over the lessee's right to remove the building, *held,* that the first agreement was merged in the written contract, and that oral evidence to contradict the written contract was inadmissible.

4. FIXTURES—REMOVAL OF BUILDING—WAIVER OF TIME—STATUTE OF FRAUDS.—A. leased land to B. and agreed in writing that B. might remove a certain barn that B. had erected on the leased premises during a certain time. *Held* an oral extension by A. to B. of the time within which he might remove the barn was not within the statute of frauds, nor was the extension agreement made without consideration.

5. WAIVERS—BURDEN OF PROOF.—The party asserting a waiver must establish it by the weight of the evidence.

6. FIXTURES—RIGHT TO REMOVE—DAMAGES FOR DETENTION AND USE OF.—A. leased premises to B., agreeing that B. might remove a barn therefrom, which he had built. In an action by B. to recover the barn and for damages, *held,* B. could not recover any damages for the loss of the use of the barn, but that his damages would consist of its depreciation in value from the time he attempted to move it, until recovery, with interest on the whole amount at the rate of six per cent. per annum from the date he demanded it.

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

T. A. Pettigrew, for appellant.

1. The contract founded on the compromise of the lawsuit was valid and binding. 43 Ark. 377; 101 *Id.* 142; 88 *Id.* 363; 69 *Id.* 82. It was conclusive in the absence of fraud. 74 Ark. 270.

2. The court erred in permitting the appellee and Honea Crossno to testify about transactions and agreements between appellant and appellee and Honea Crossno and Crossno and Vanhoozer with regard to the barn that occurred five years before the written contract was made. No oral testimony should have been permitted except that the contract was made in compromise

of a law suit pending in chancery. 102 Ark. 575; 83 *Id.* 163; 79 *Id.* 256.

If the barn had any usable value at all it would be its rental value and if as situated it had no rental value the measure of damages for detention would be the interest on its value at the legal rate stated to be $350. 36 Ark. 260; 34 *Id.* 184; 39 *Id.* 387; 199 S. W. 103.

His first contention is untenable. 8 Words & Phrases (1st Series), p. 7042; 4 L. R. A. 284; 19 *Id.* 611; 6 *Id.* 249; 3 *Id.* 33.

He is mistaken in his second contention. 78 Ark. 202; 206 S. W. 663; 22 Cyc., p. 10, par. 4.

The third is also untenable. Appellee was entitled to recover the fair usable value of the property and interest was not the criterion. 24 Ark. 264; 34 *Id.* 184; 36 *Id.* 260. See also 98 Ark. 328.

3. The burden of proof was on appellee and it was error to refuse to so instruct the jury. 991 S. W. 915. It was error also to give No. 2. This case is widely different from 206 S. W. 661 and 90 Ark. 351 and 52 *Id.* 251. The dissenting opinion in 206 S. W. 661 is applicable here.

Sid White, for appellee.

Counsel for appellant relies for a reversal on three grounds: (1) The court erred in allowing appellee to introduce testimony of the exact circumstances under which the barn was erected, together with the intentions of the parties with reference to ownership and control.

(2) That the court erred in charging the jury as a matter of law that if appellee built the barn with an express understanding that it should remain his personal property subject to removal at all times, then it remained. personal property and did not become a part of the realty and he could remove it, answering in damages, if any, by reason of the delay in removal.

3. That the award of damages is excessive.

HUMPHREYS, J. Appellee instituted suit in replevin in the Logan Circuit Court, Northern District,

against appellant, for the possession of a barn, placed upon appellant's land while he occupied the premises under lease, which expired in the year 1915. Appellee alleged that the barn was built under permission to remove same after the expiration of the lease; that his right to remove the barn had not expired; that he was entitled to the immediate possession of the property, but appellant was wrongfully detaining same; that the barn was of the value of $350, and that by reason of the wrongful detention of same, he was damaged in the sum of $100.

Appellant answered, denying the material allegations of the complaint and affidavit in replevin, and pleaded, by way of further defense, a written contract between them, of date December 22, 1915, under the terms of which, it was alleged, appellee's right of removal of said barn expired before the institution of this suit.

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 the barn, or its value, $350, and damages in the sum of $150. A judgment was rendered in accordance with the verdict, from which, under proper proceedings, an appeal has been prosecuted to this court.

In the year 1910, or 1911, appellee verbally leased a farm from appellant's agent, Honea Crossno, which lease expired in the year 1915. Crossno became interested as a partner in the lease the following fall. During the term of the lease, appellee and his partner built a barn upon the land. Appellee afterwards purchased his partner's interest in the lease and barn. In the fall of 1915, a dispute arose between appellee and appellant which resulted in the institution of a suit by appellee against appellant. The suit was compromised by the execution of a written rental contract, of date December 22, 1915, for the rental of the farm for the year 1916. Appellee bound himself by one of the provisions in the contract to pay appellant $775 for the use of the land for the year 1916, and the right to remove the barn from the premises

within twelve months after the expiration of the lease, or by January 1, 1918. Over the objection of appellant, appellee was permitted to testify that the barn was built under contract that it should remain the personal property of himself and partner, with the right to remove it from the premises just as other personal property. An exception to the admissibility of this evidence was properly preserved. The evidence on the part of appellee also tended to show that in December, 1917, some five days before the time expired under the contract for moving the barn, appellant extended the time indefinitely to appellee for moving same. The evidence on the part of appellant tended to show that the barn was built upon the land without any understanding that it should remain the personal property of appellee and his partner, with the right to remove it from the premises at any time; also to show that appellant never extended the time to appellee for removal beyond January 1, 1917, the time specified in the contract. Under the view of this court as to the disposition of the case, we deem it unnecessary to set out the substance of the evidence responsive to the issues collateral to the main question involved on this appeal.

(1-3) The cause was sent to the jury on the theory that if the barn was ever personal property, it was always personal property, and that appellee had a right to remove it even though he did not remove it by the time agreed upon in the written lease for the year 1916. This was error, because the character of such an improvement, or fixture, may be determined by contract either express or implied. The rule is well settled in this State that such structures may be treated either as real estate or personal property, dependent upon the intention as to how they shall be regarded and treated by the parties interested. *Markle* v. *Stackhouse*, 65 Ark. 23; *Bemis* v. *First National Bank*, 63 Ark. 625; *Field* v. *Morris*, 95 Ark. 268; *Bache, Receiver*, v. *Central Coal & Coke Co.*, 127 Ark. 397. Appellee suggests that the rule laid down is in conflict with the doctrine announced in the cases of

Buffalo Zinc & Copper Co. v. *Hale,* 136 Ark. 10, 206 S. W. 661; *Beauchamp* v. *Bertig,* 90 Ark. 351, and *Harmon* v. *Kline,* 52 Ark. 251. We see nothing in them contravening this rule. On the contrary, each of the cases recognizes the doctrine that tenants must remove buildings placed by them upon leased premises within the time specified in their leases, else they immediately become a part of the real estate to which attached. The written contract between the parties in the instant case provided that the barn should remain the property of appellee until January 1, 1918, if removed from the premises by that time; which was, in effect, an expressed intention between them that it should become a part of the real estate if it remained on the premises thereafter. The theory upon which the case was submitted to the jury was contrary to the plain terms of the written contract. The character of the structure or fixture having been determined by an unambiguous written contract between the parties on December 22, 1915, it was error on the part of the court to admit oral evidence tending to establish the character or nature thereof at a prior date. The antecedent oral lease under which the barn was built on the premises by appellee and his partner, and the dispute between the parties, growing out of said contract, were merged into the compromise contract of date December 22, 1915; so, it was improper to admit oral evidence confirming or contradicting the unambiguous written contract. *Tillar* v. *Wilson,* 79 Ark. 256; *Soudan Planting Co.* v. *Stevenson,* 83 Ark. 163; *Zearing* v. *Crawford, McGregor & Camby Co.,* 102 Ark. 575.

(4) Appellant also insists that the alleged waiver on her part of the time specified in the contract, in which to remove the barn, was void, first, because not in writing; and, second, without consideration.

As to coming within the statute of frauds and therefore void, appellant cites section 3656 of Kirby's Digest, which is as follows: "No contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upward, shall be binding on the parties unless, first, there

be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof."

The oral extension of time, if granted, in which to move the barn was in no sense a "sale of goods, wares and merchandise," and, therefore, not included in or controlled by the terms of the statute cited.

Neither was the extension of time, if granted, in which to move the barn, void for the want of consideration. The detriment that would have resulted to appellee in the loss of his right to remove the barn, by reason of the extension of time, if not enforced, was sufficient to support the new agreement for further time in which to move it. This identical question was involved in the case of *Nothwang* v. *Harrison,* 126 Ark. 548. In upholding a contract for an extension of time to cut and remove timber from lands held under a timber lease, the court said: "An agreement as to the time or manner of the exercise of some legal right when so acted upon that the right has become valueless unless it may be enjoyed pursuant to the agreement, is a sufficient consideration to support a contract to that effect."

(5) It is also insisted by appellant that the court erred in refusing to instruct that the burden was upon appellee to prove that appellant had waived her right to the barn. Waiver is the gist of this action. In fact, it is the only ground upon which appellee can sustain his action at all. The burden rests upon him to prove his case by a preponderance of the evidence. The party asserting a waiver must establish it by the weight of the evidence. *Beene* v. *Green,* 127 Ark. 119.

(6) Lastly, there appears to be a difference between learned counsel as to the measure of the damages applicable, in case appellee should prevail. Appellee is not in a position to make use of the barn while on appellant's land, nor to move it in its present form to other lands and use it. In order for appellee to use it as a

barn, it must be torn down and rebuilt on his own premises. In other words, appellee can only make use of it when reduced to its original state of lumber. Lumber would have no rental value. It follows that appellee could not recover damages for the use of non-usable property. Appellee could not, therefore, recover damages for the loss of its use. His damages would consist of its depreciation in value from the time he attempted to move it until recovery, with interest on the whole amount at the rate of six per cent. per annum from the date he demanded it. Cobbey on Replevin (2 ed.), p. 492, section 914.

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

CROSSETT LUMBER COMPANY *v.* STATE.

Opinion delivered July 7, 1919.

1. TAXATION—ASSESSMENT OF VALUE OF CAPITAL STOCK—CORPORATION—LANDS LYING IN ANOTHER STATE.—In assessing the value of the capital stock of a corporation, it is proper to include lands belonging to the corporation, situated in another State.
2. TAXATION—SAME.—The ruling in the case of *State ex rel. Attorney General* v. *Bodcaw Lumber Co.*, 128 Ark. 505, is not overruled by Act No. 262, page 1355, Acts of 1917.

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

George Norman and *Gaughan & Sifford*, for appellant.

We call attention to the provisions of our Constitution and statutes and the decisions of our own court and that of the United States, which are needed to correctly decide the issues here. Const. 1874, Ark., art. 16, § § 5-6; Kirby & Castle's Digest, § § 8462, 8516, 8524, 8549. Section 8549 was in effect when the Bodcaw Lumber Company case was decided, also when *Harris Lumber Co.* v. *Grandstaff* was decided. 128 Ark. 505. After the decision in the Bodcaw case the Legislature passed Act 262,

Acts 1917, materially changing section 8549. This act undertook to make the shares of stock of a corporation property for the purpose of taxation. We find no warrant in our laws or Constitution for requiring the ordinary industrial corporation to assess for itself or its shareholders its shares of stock owned by its stockholders. 73 Ark. 516; 78 *Id.* 188; 87 *Id.* 484; 92 *Id.* 338-9; 97 *Id.* 254; 131 *Id.* 40; 47 U. S. (Law ed.) 669; 58 *Id.* 477. See also *Bank etc.* v. *Richardson,* 8 Advance Sheets Lawy. Co-Op. Pub. Co., p. 212, January 27, 1919.

The Legislature, by Act 252, undertook to relieve industrial corporations from the decision in the Bodcaw case and from the hardships imposed under that decision. The statute is unambiguous and should be taken to mean what it says, and authorizes credit on the assessment for the value of its Louisiana lands, and it is not unconstitutional. The decision in the Bodcaw case appears to ignore the distinction between *capital, capital stock* and *shares of stock.* See p. 513 in 128 Ark.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

This case presents nothing new. The identical question was settled in 128 Ark. 505. Act No. 262 was introduced six weeks before the Bodcaw case was decided and was passed two weeks before the decision in that case. But to give the act the construction contended for by appellant, it would be unconstitutional. Art. 16, § 6; 128 Ark. 515.

SMITH, J. Appellant is a domestic corporation and has a considerable portion of its assets invested in lands in the State of Louisiana upon which it pays taxes according to the laws of that State, and it is out of that fact that this litigation arises. In the assessment of the value of its capital stock the assessor refused to take that fact into account in determining the intangible value of this capital stock. In other words in determining the intangible value of the capital stock the assessor refused to deduct the value of the Louisiana lands in which a por-

tion of the company's assets had been invested. Complaint against this action was made in the county court where the relief prayed was denied, and relief was again denied on appeal to the circuit court and this appeal has been prosecuted from that judgment.

(1) The question presented is not a new one. On the contrary, the identical question received the most careful consideration by us in the case of *State ex rel. Atty. General* v. *Bodcaw Lumber Co.,* 128 Ark. 505, and in the decision of that question it was there said: "The valuation of the property outside of the State must be omitted when the property of the corporation itself is sought to be taxed, but when the effort is to assess the values of the shares of stock it should not be deducted, for those shares of stock have a separate valuation existing here within the jurisdiction of the State and upon which the State has a right to take its toll of taxation."

(2) It is asserted, however, that this case has been overturned by the enactment of Act No. 262 of the Acts of 1917, page 1355, entitled "An act to provide for the assessment for the taxation of companies, associations and corporations engaged in all kinds of insurance, security, guaranty and indemnity business, and assessing for taxation the intangible property of all corporations."

The argument to that effect is based upon the fact that industrial corporations like appellant are required by paragraph 6 of section 2 of this act to make return of "the assessed value of all real estate owned by the corporation," it being asserted that the purpose of this requirement was to ascertain the value of the intangible property of the corporation and to allow the corporation credit for its lands which were separately assessed.

In answer to this argument it is pointed out that the opinion in the Bodcaw case was handed down by the court on March 12, 1917, and Act No. 262 was approved by the Governor five days later. But the act had been passed by the House on February 5th and by the Senate on February 28th and was delivered to the Governor for

his approval two weeks prior to the rendition of the opinion in that case.

But a second answer to this argument is made, which we regard as more conclusive, and that is that the section of Kirby's Digest (section 6936) under which the property of the Bodcaw Lumber Company had been assessed required that corporation to make a return of "the true value of all tangible property belonging to such company or corporation." The term "tangible property," found in the old statute, is certainly as comprehensive as the term "all real estate," found in Act No. 262, and substantially the same argument was made there as the one made now; so that we conclude there is nothing in this Act No. 262 to impair the authority of the Bodcaw Lumber Company case as a guide to the correct method of assessing the capital stock of domestic corporations, even though portions of it may be invested in lands lying in another State which are there assessed and paid on as such. In other words, if a corporation cannot be allowed to deduct from its assessment its tangible property in another State it cannot be allowed to deduct the value of its real estate situated in another State. *State ex rel. Atty. Gen.* v. *Ft. Smith Lumber Co.*, 131 Ark. 40.

The court below, therefore, properly refused to allow the appellant to deduct from its assessment the value of its lands in Louisiana and that judgment is, therefore, affirmed.

HILGER *v.* J. R. WATKINS MEDICAL COMPANY.

Opinion delivered July 7, 1919.

1. JUDGMENTS—AUTHORITY OF COURT TO RENDER IN VACATION.—A circuit judge is without authority to render a judgment in ordinary proceedings in vacation.

2. CERTIORARI—DATE OF RENDITION OF JUDGMENT.—On *certiorari*, where the face of the record shows that the judgment was rendered in vacation, this court will look only to the face of the record, and will not hear a contention that the judgment was actually rendered at a regular term.

3. CERTIORARI—REMEDY OF—JUDGMENT RENDERED IN VACATION.—This court, in its superintending control over inferior courts, will issue writs of certiorari to quash judgments rendered by circuit judges or chancellors without authority in vacation.

Certiorari to Cleburne Circuit Court; *J. M. Shinn,* Judge; judgment quashed.

W. R. Casey, M. E. Vinson and *Troy Pace,* for petitioner.

The judgment was void because it was rendered in vacation. Art. 7, § 12, Const.; 71 Ark. 226; 75 *Id.* 415-20; 89 *Id.* 85; 202 S. W. 33; 208 *Id.* 428-30; 103 *Id.* 571; 116 Ark. 310-14.

HUMPHREYS, J. A. N. Hilger filed a petition for writ of *certiorari* in this court to bring up the proceedings of the Cleburne Circuit Court in the case of *The J. R. Watkins Medical Company, Plaintiff* v. *E. L. Gentry, J. E. Dugger and A. N. Hilger, Defendants,* alleging that a judgment was entered against him in said cause in the sum of $909.63, in vacation, without authority of law; that, at the time said judgment was entered, he was absent from the United States, in the United States' military service, and that he had a meritorious defense to the action, in that the obligation, upon which judgment was rendered, was changed in a material part after the execution thereof, without his consent.

A writ was ordered directing the circuit clerk of Cleburne County to certify to this court a transcript of the proceedings of the circuit court in said cause.

The substance of the proceedings certified by the clerk, in response to the writ, consists:

First. Of an order made by the circuit court on March 7, 1919, which was a day of its regular spring, 1919, term, taking the above entitled cause under advisement and giving petitioner, A. N. Hilger, sixty days within which to take and present depositions and a brief to the judge of said court in vacation.

Second. The adjournment of the court on March 7, 1919, until court in course; and,

Third. An entry on May 16, 1919, in vacation, of a judgment in favor of the J. R. Watkins Medical Company against A. N. Hilger, for $909.63, with six per cent. interest thereon from March 1, 1917, until payment of the judgment, with direction by the judge that the judgment be entered as of date March 7, 1919. The judgment recited that the cause was submitted upon the pleadings and depositions of the plaintiff with permission to A. N. Hilger to take and present depositions and brief in vacation to the judge within sixty days, who should then render judgment as of date March 7, 1919; and that the said A. N. Hilger failed to present the depositions and brief within the allotted time.

(1) The petitioner insists that the judgment is a nullity, because rendered in vacation. A circuit judge is without authority to render a judgment in ordinary proceedings in vacation. *Biffle* v. *Jackson,* 71 Ark. 226; *Boynton* v. *Ashabranner,* 75 Ark. 415; *Poole* v. *Oliver,* 89 Ark. 85; *Mell* v. *State,* 133 Ark. 197; *State ex rel. Hall et al.* v. *Canal Construction Co.,* 134 Ark. 447; *Diffie* v. *Anderson,* 137 Ark. 151.

(2) The respondent, The J. R. Watkins Medical Company, insists, however, that the judgment was actually rendered on the 7th day of March, 1919, at the regular spring term of the Cleburne Circuit Court. This contention cannot avail in a proceeding on *certiorari* to this court. It could only avail respondent in a proceeding to correct the judgment by *nunc pro tunc* order in the circuit court at regular term time, which remedy is not affected or precluded by this proceeding. On *certiorari,* this court can only look to the face of the record. The record shows that the judgment was rendered in vacation.

(3) It is also insisted by respondent that *certiorari* is not the proper remedy in this case. It is true that the writ of *certiorari* cannot be used as a substitute for an appeal, nor to correct mere errors in the exercise of the jurisdiction of inferior courts; and also true that it is a discretionary writ, but the Supreme Court, in its super-

intending control over inferior courts, will issue writs of *certiorari* to quash judgments rendered by circuit judges or chancellors without authority, in vacation. *Ex parte Helmert,* 103 Ark. 571; *Bowden* v. *Webb,* 116 Ark. 310.

It appearing from the face of the judgment herein that it was rendered in vacation and therefore void, it will be quashed.

STEWART v. STATE.

Opinion delivered July 14, 1919.

1. MORTGAGES—DISPOSING OF MORTGAGED PROPERTY—CHATTELS.—In a criminal action under an indictment charging the sale by the mortgagor of mortgaged chattels, *held,* the evidence was sufficient to sustain the verdict.
2. APPEAL AND ERROR—FAILURE TO OBJECT—INSTRUCTION.—Where no exception was saved at the trial to the giving of an instruction, the same will not be reviewed on appeal.
3. MORTGAGES—SALE OF MORTGAGED CHATTELS—PREREQUISITES FOR CRIMINAL PROSECUTION.—Where defendant, in a criminal prosecution, is charged with disposing of mortgaged chattels, it is not necessary, under Kirby's Digest, § § 2011 and 2013, as a condition for conviction, that a demand must be made on the mortgagor for the debt or the mortgaged property, nor that defendant refuse, upon demand, to pay the debt.

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

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. Appellant has filed no brief. None of the seven assignments in the motion for new trial can be sustained. The evidence is ample to sustain the verdict. The instructions state the law correctly, but, if any are bad, no exceptions were saved. 91 Ark. 43; 89 *Id.* 24; 88 *Id.* 505.

2. While there must be proof of a debt before defendant can be convicted, yet this was met by the evidence of S. H. Briant. 68 Ark. 490. After the offense of removing mortgaged property has been committed it can-

not be condoned by satisfying the creditor with other property. 37 Ark. 412.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Hempstead Circuit Court at the April, 1919, term thereof, for exchanging or disposing of mortgaged property, in violation of sections 2011 and 2013 of Kirby's Digest of the statutes of Arkansas, and his punishment fixed at six months in the penitentiary. From the judgment of conviction, an appeal has been regularly prosecuted to this court.

Attorneys for appellant have not favored us with a brief; so we are dependent upon appellant's motion for a new trial for suggestions of error. The first three grounds of the motion are general, and embody the suggestion that the verdict is contrary to the law and evidence. The other grounds are as follows:

"4. That the court erred in its instruction to the jury, on its own motion, in behalf of the State.

"5. That the court erred in refusing to give instruction No. 1, asked by the defendant.

"6. That the court erred in refusing to give instruction No. 2, as asked by the defendant.

"7. That the court erred in amending instruction No. 2 as it had been prepared and requested by the defendant."

The evidence on the part of the State showed that appellant executed a mortgage on December 18, 1917, to the Briant Store Company, a partnership in the general mercantile business at Hope, Arkansas, on two horses, one black and the other roan, and his future crop of 1918, to secure a loan of $50 and advances for supplies; that the mortgage was filed for record in the manner provided by law; that thereafter, supplies were furnished until the indebtedness amounted to $216; that, although demand was made for payment of the indebtedness, appellant failed to pay it, and, when questioned concerning the whereabouts of the roan horse, answered that he was in the range; that the roan horse was of the value of $100.

Anthony Stewart, a brother of appellant, testified that he saw appellant trade off the roan horse. John and Dave Stewart, also brothers of appellant, testified that appellant told each he had traded off the roan horse.

(1) It is apparent from the summary of the State's evidence that every material allegation of the indictment was sustained by sufficient legal, substantial evidence; therefore, the verdict was not contrary to the evidence.

(2) No exception was saved to the instruction given by the court on its own motion, so the assignment of error set up in the fourth ground of the motion for a new trial cannot be considered by this court.

(3) The fifth assignment of error consists in the refusal of the court to give the following instruction requested by appellant, towit: "You are instructed that, before you can convict the defendant, you must find from the evidence, beyond a reasonable doubt, that he was indebted to the Briant Store Company, that demand was made on him and payment refused, and that he disposed of the property with the intent to defeat the debt." This instruction is erroneous in two particulars: First, it stated that a demand for the debt or horse was necessary before appellant could have been convicted; second, that the mortgagor, appellant, must have refused to pay the indebtedness before he could have been convicted. The statute under which appellant was indicted and convicted does not require, as a condition to conviction for disposing of mortgaged property, that a demand must be made on the mortgagor for the debt or mortgaged property; nor a refusal of payment of the indebtedness on his part.

The sixth and seventh assignments of error are that the court erred in refusing to give instruction No. 2, as requested by appellant, and in amending it. The record before us does not support these assignments of error. The record fails to show any amendment or modification of the instruction by the court before it was given. It appears that the instruction was given in the form asked.

No error appearing, the judgment is affirmed.

FOURCHE RIVER VALLEY & INDIAN TERRITORY RAILWAY COMPANY v. CAMP.

Opinion delivered July 14, 1919.

RAILROADS—INJURY TO PASSENGER—GENERAL DUTY OF CARE—INSTRUCTION.—In an action against a railroad company for damages for personal injuries caused by negligence, where it was alleged that the injury was caused by defendant's permitting the roadbed and tracks to get out of repair, an instruction is proper which told the jury that it was the defendant's duty to exercise the highest degree of care which a prudent and cautious person would exercise, consistent with the mode of conveyance and practical operation of the road, to prevent an injury.

Appeal from Perry Circuit Court; *G. W. Hendricks*, Judge; affirmed.

J. H. Bowen and *Sellers & Sellers*, for appellant.

The court erred in giving instruction No. 1 for plaintiff. Defendant was required to exercise only the highest degree of care consistent with the operation of a mixed log and passenger train. 105 Ark. 276.

G. B. Colvin and *Mehaffy, Reid, Donham & Mehaffy*, for appellee.

1. The instruction complained of has often been approved by our courts. 99 Ark. 366; 119 *Id.* 392, and many others too numerous to cite.

2. None of the instructions have been abstracted by appellant's counsel and the judgment should be affirmed. 206 S. W. 69.

McCULLOCH, J. Appellee instituted this action against appellant railway company to recover compensation for personal injuries received while he was a passenger on one of appellant's trains en route from Thornburg to Bigelow. It was a mixed train, hauling logs and other freight, and carrying a coach for the accommodation of passengers. The passenger coach was derailed and appellee sustained serious personal injuries.

The charge of negligence in the complaint is that appellant "permitted the roadbed, track, rails and ties to

deteriorate, to become defective and the rails spread, rendering the same unsafe for the proper and careful operation of the train, by reason whereof the said coach was thrown from the track and caused to turn over as above alleged."

The answer contained a denial of the charge of negligence and the trial of the issues before a jury resulted in a verdict in appellee's favor awarding damages in a substantial sum.

It is conceded that the evidence is sufficient to sustain the verdict, both as to negligence of appellant company and also in the amount of the award of damages. The only ground urged for reversal of the judgment is that the court erred in giving instruction No. 1, which reads as follows:

"You are instructed that when the plaintiff became a passenger on the defendant's railroad at Thornburg for the purpose of being transported to Bigelow, it became and was the duty of defendant to use the highest degree of care for his protection from injury which a prudent and cautious man would have exercised, consistent with the mode of conveyance and practical operation of the railroad, and if you find from a fair preponderance of the evidence that the railroad company failed to exercise this degree of care, and that by reason of such failure plaintiff was injured, then your verdict will be for the plaintiff."

There was specific objection to the instruction on the ground that the language should be changed so as to make it apply only to the exercise of care in the operation of this particular train, and not to the general operation of the railroad. The objection is untenable for the reason that there is no issue in the case as to negligence in the operation of this particular train, and the charge of negligence relates solely to the failure to exercise proper care with respect to the condition of the railroad track. The company owed its passengers the same degree of care in that regard.

"Railroad companies are bound to the most exact care and diligence," said Judge BATTLE, speaking for the court in *Arkansas Midland Ry.* v. *Canman,* 52 Ark. 517, "not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers."

An instruction limiting the degree of care to the operation of this particular train would, therefore, have been inapplicable to the issues involved in the present case. The substance of the instruction, if not the exact form, has been repeatedly approved by this court. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Purifoy,* 99 Ark. 366; *Dillahunty* v. *Chicago, Rock Island & Pacific Ry. Co.,* 119 Ark. 392.

Judgment is affirmed.

BAXLEY v. WATSON.

Opinion delivered July 14, 1919.

1. JUDGMENTS—EXPIRATION OF TERM—CONTROL OVER, BY COURT.—A judgment of the circuit court becomes final upon the adjournment for the term, and the court has no further jurisdiction over it except by *nunc pro tunc* proceedings to make the record speak the truth, or to modify or vacate the judgment or grant a new trial upon statutory grounds.
2. JUDGMENTS—RE-ENTRY OF JUDGMENT—ABSENCE OF BILL OF EXCEPTIONS.—This court will not, on appeal, review the action of the trial court in setting aside a judgment, and entering it again, after lapse of the term, in the absence of a bill of exceptions.
3. APPEAL AND ERROR—RE-ENTRY OF JUDGMENT AFTER TERM—BURDEN OF PROOF.—Where the trial court, after lapse of the term, set aside a judgment and re-entered the same, the burden is upon the appellant to show that the court erred in re-entering the judgment.
4. APPEAL AND ERROR—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION.—On appeal, in the absence of a bill of exceptions identifying and bringing into the record the evidence upon which the court based its findings, this court will presume that every fact necessary to sustain the finding and judgment of the court was established by the evidence.

5. APPEAL AND ERROR—NECESSITY FOR BILL OF EXCEPTIONS.—Although the record shows the filing and overruling of a motion for a new trial, in all cases, except where the face of the record shows error, a bill of exceptions, as well as a motion for a new trial, is necessary.

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

STATEMENT OF FACTS.

This action was begun July 3, 1917, by the appellee against the appellant to recover the possession of a tract of land in Saline County, Arkansas. The appellee deraigned title from the State through a forfeiture and sale of the land for overdue taxes and exhibited the deed of the Commissioner of State Lands executed the 28th day of December, 1916, under the authority of an act approved December 13, 1875, sections 4802 and 4803, Kirby's Digest.

Appellant filed a general demurrer to the complaint, and also answered not waiving his demurrer. In his answer appellant alleged that the taxes had been paid for the year in which the forfeiture was claimed and every year since, and that the State was thereby estopped; that appellant had paid the taxes for the year 1881 and all the years including the year 1916, and had made improvements of the value of more than $300 for which no tender had been made to appellant; that at the time of the sale of the lands, the approval of the sale and the confirmation thereof the law under which the overdue tax proceedings was instituted had been repealed. Appellant also pleaded the action had not been brought within seven years after it accrued.

The appellee filed a general demurrer to the answer. The answer and demurrer were filed September 3, 1917. On June 3, 1918, the same being an adjourned day of the March, 1918, term of the Saline Circuit Court, the cause was submitted to the court for trial and was heard upon the pleadings and the exhibits which were introduced as evidence and the record of the tax receipts and the record of the overdue tax proceedings under which

appellee claimed. The court rendered judgment in favor of the appellee. No exceptions were taken to the ruling of the court. No motion for new trial was filed. The record immediately following the judgment entry, recites:

"Whereupon the defendant asked and was granted an appeal to the Supreme Court of the State of Arkansas, and was given ninety days from and after this date to prepare and file his bill of exceptions herein."

On Friday, October 8, 1918, an adjourned day of the October term of the Saline Circuit Court as the record recites, "the court set aside the order and judgment entered in this cause on June 3, 1918, for the purpose of re-entering said order on this date." Then follows the order setting aside the "judgment entered in this cause June 3, 1918," and this further recital, "Friday, October 8, 1918, an adjourned day of the regular October term of the Saline Circuit Court, among other things, the following proceedings were had, towit: Here the record sets out what purports to be "motion for new trial" in the case of *J. A. Watson* v. *J. A. Baxley,* containing various grounds. The record does not show when the purported motion for new trial was filed, if filed at all, nor does the record disclose that the trial court ruled upon the motion. There is no recital in the entry setting aside the judgment of June 3, 1918, showing that the appellee had notice of the proceedings to set aside, and there is no showing *aliunde* to that effect.

The next recital of the record is the judgment of the trial court re-entering the judgment in favor of the appellee from which is this appeal.

D. M. Cloud, for appellant.

1. Defendant's tax receipts show conclusively that all taxes have been paid by Jonathan and W. A. Adams, defendant's predecessor in title, and by defendant for each and every year from 1881 to 1917, inclusive, except for 1909 and 1910.

The petition and decree introduced in evidence by defendant nowhere shows for what year or years defendant's land was charged with taxes, nor the amount thereof. Before defendant's land can be legally sold for non-payment of taxes, the record under which the sale was made must show for what year or years defendant's land was charged with delinquent taxes and the amount thereof for each year, including penalty, if any. Black on Tax Titles, p. 60, § 60.

Where land was forfeited to the State for taxes and the clerk and assessor later caused it to be placed on the tax books and taxes were levied and collected every year for 36 years, it will be presumed that the land had been redeemed under the overdue tax act, Acts 1881, pp. 69, 70, par. 11, 13.

2. In ejectment plaintiff must recover upon the strength of his own title. Where the State levied and collected taxes for 36 years after land had been forfeited for overdue taxes, the presumption of redemption under the overdue tax act, 1881, par. 11-12, is of a higher nature than the conflicting presumption arising from a deed by a State Land Commissioner under Kirby's Digest, § § 4802-3.

The presumption is that public officials do as law and their duty require them.

In ejectment where plaintiff (appellee) and defendant both base their claim upon presumptions of equal dignity the defendant must prevail, the burden being on plaintiff to show real title and a better right to possession. 135 Ark. 353. Appellant's deed was of record and was notice to appellee at the time of his purchase from the State Land Commissioner. 86 Ark. 86; 69 *Id.* 442.

135 Ark. 353 is decisive of this case.

The burden was on plaintiff (appellee) to show real title in himself, and as his State land deed is only *prima facie* evidence of title and defendant's deed, coupled with possession and payment of taxes for 36 years by himself and grantors, is of greater weight as evidence of title, and plaintiff's case should be held for naught.

J. S. Utley, for appellee.

1. No exceptions were saved by appellant to the action of the trial court in awarding judgment in favor of appellee on June 3, 1918.

2. No motion for new trial was ever made following the judgment of June 3, 1918, in favor of appellee.

3. No bill of exceptions was ever filed relative to the judgment for appellee, June 3, 1918.

4. The court was without jurisdiction to set aside the judgment of June 3, 1918, because the March term had expired, and the court had lost jurisdiction to set aside the judgment and re-enter same.

5. No exceptions were saved by appellant to the action of the court in rendering the judgment appealed from; no ruling was ever made on his motion for a new trial and no bill of exceptions was ever filed herein.

6. The appeal was taken after the time allowed by law.

7. The objections raised by appellant and the arguments made in his brief have all been adjudicated by this court against his contentions.

8. Some of the questions relied on by appellant were not only not raised by the evidence in the trial court but were not raised by the pleadings.

(1) See 203 S. W. 590. (2) 6 Ark. 141; 7 *Id.* 524; 25 *Id.* 562; 22 *Id.* 546, 517; 13 *Id.* 344; 53 *Id.* 204; 46 *Id.* 17; 95 *Id.* 565; 129 *Id.* 86; 122 *Id.* 148; 125 S. W. 423. (3) A bill of exceptions showing that it contained all the evidence is necessary. 133 Ark. 105; 96 *Id.* 379; 109 *Id.* 543; 59 *Id.* 178; 122 *Id.* 148. (4) The court had no jurisdiction, as the March term had expired. Kirby's Digest, § 1302. Unless by *nunc pro tunc* to make the record speak the truth, or for fraud. Kirby's Digest, § § 4431, 6620. For the authority of courts over judgments after the expiration of the term at which rendered. See 133 Ark. 97 for fraud practiced; 135 *Id.* 445 for casualty or misfortune; 93 *Id.* 103 against persons of unsound mind; also 14 Ark. 203; 25 *Id.* 212; 33 *Id.* 105; 46 *Id.* 552; 53 *Id.* 454; 48 *Id.* 331; 36 *Id.* 513; 52 *Id.* 316; 58 *Id.* 484;

89 *Id.* 160; 97 *Id.* 314; 113 *Id.* 237; 53 *Id.* 21; 86 *Id.* 504, etc. Here none of the reasons set out in our statute warranted the court in exercising authority over the judgment; even if any of the grounds had existed, the procedure prescribed by section 4626 *et seq.* was not followed.

If the trial court had no authority over his judgment rendered at a previous term, his act was void in setting aside the June judgment "for the purpose of re-entering said order on this date," October 8, 1918, and this appeal is too late, not having been filed within six months after June 3, 1918. It was also void because it was done without notice to appellee. Kirby's Digest, § 4424.

9. If any motion for new trial was ever filed, it was after the court had set aside the judgment of June 3, 1918, and before re-entry on October 8, 1918. If filed after re-entry of judgment, it did not embody any exceptions to the judgment or any other action of the court, because none were saved. The bringing of exceptions for the first time by way of motion for a new trial does not entitle one to consideration and he will not get it. 135 Ark. 499; 131 *Id.* 121; 132 *Id.* 97.

10. There was no ruling of the court on any motion for a new trial, and such a ruling must be excepted to. 18 Ark. 355; 19 *Id.* 683; 24 *Id.* 628.

11. Appellant in his brief raises only three questions: (1) That the record of proceedings in the overdue tax sale fails to show for what years taxes were due; (2) that the record fails to show the amount of taxes for which the lands were sold, and (3) that the payment of taxes raises the presumption that the lands had been redeemed.

12. But this court has often decided in overdue tax suits that all questions as to the regularity of the assessment, the amount of taxes assessed and the payment of same are concluded by the decree and is not open to collateral attack. Appellant failed to introduce in evidence the final decree and failed to show anything to overcome the presumption of the validity of the sale which is raised

by the deed of appellee. In order to overcome the presumption it is incumbent on him to show that the sale was never confirmed, which was not done. 63 Ark. 1; 49 *Id.* 336. See also 87 Ark. 184; 92 *Id.* 87, as to regularity of assessment and payment of taxes.

For effect of appellee's deed as making out a *prima facie* case of title. 87 Ark. 184; 92 *Id.* 87.

The statute of limitations does not run against the State. 95 Ark. 70.

Questions not raised below will not be reviewed on appeal. 77 Ark. 27; 74 *Id.* 557; *Ib.* 407; 72 *Id.* 539; 94 *Id.* 390; 91 *Id.* 443, and many others to the same effect.

Furthermore the fact that the deed was issued by the State Land Commissioner shows that the taxes, penalty and costs for which these lands were sold at the over-due tax sale remained on the books at the State Land Office as unpaid.

The State is not estopped from claiming title to its own property by the unauthorized acts of its officers. If these lands were put back on the tax books by the officers of Saline County immediately after the overdue tax sale, their action was unauthorized. 39 Ark. 580; 93 *Id.* 495.

In the absence of the testimony which appellant says he showed from the tax books and competent evidence of tax payments, this court is not in position to say that the trial court did not act upon sufficient evidence. Even if the tax receipts had been properly authenticated, they are not competent as testimony so long as it is not in evidence that the record of tax receipts provided for by Kirby's Digest, § 7068, is unavailable. 12 Enc. of Evidence, 363-4. Nor is it in proof that these lands were assessed for taxation during the years appellant says he paid on them. If he paid voluntarily on unassessed lands, it is his own loss, and he will not be heard to say that the State is estopped from claiming her own lands. 12 Enc. Ev. 363-4.

This case, having been tried before a court sitting as a jury, should be determined by the same rules as if ren-

dered in circuit court by a jury. Kirby's Digest, § § 6214 and 6218; 135 Ark. 445. A finding on conflicting evidence will not be disturbed on appeal. 129 Ark. 218; 130 *Id.* 551; 133 *Id.* 523; 134 *Id.* 307. Where there is legally sufficient evidence to sustain the court's finding, it will not be disturbed even though the finding appears to be contrary to the preponderance of the evidence, if there is any substantial evidence to support it. 134 Ark. 231; 130 *Id.* 59; 129 *Id.* 520; 134 *Id.* 292.

WOOD, J., (after stating the facts). (1-2) There is no error in the ruling of the court. The judgment of June 3, 1918, became final upon the adjournment for that term, and the court had no further control or jurisdiction over it except by *nunc pro tunc* proceedings to make the record speak the truth, or to modify or vacate the judgment or grant a new trial upon statutory grounds. Sections 4431 and 6220, Kirby's Digest. The court exercising its jurisdiction to modify and vacate judgments erroneously set aside the judgment of June 3, 1918. But the court re-entered this judgment, and from this judgment of re-entry is this appeal. There is no bill of exceptions, and therefore no showing by the appellant that the court erred in re-entering the judgment of June 3, 1918, which it had previously set aside.

(3) The burden was upon appellant to show that the court erred in re-entering the judgment of June 3, 1918. See *Incorporated Town of Corning* v. *Thompson,* 113 Ark. 237, and other cases cited in appellee's brief.

(4) Moreover, even if this could be treated as an appeal from a trial had and judgment entered on the issues joined for the first time October 8, 1918, still that judgment could not be reversed for several reasons. No errors appears on the face of the judgment. In the absence of a bill of exceptions identifying and bringing into this record the evidence upon which the court based its findings, we must presume that every fact necessary to sustain the finding and judgment of the court was

established by the evidence. *Knights of Pythias* v. *Bond,* 109 Ark. 543.

(5) Even if the record showed that the motion for new trial was filed, passed upon, and overruled (which it does not) still, in all cases except where the face of the record shows error a bill of exceptions as well as a motion for new trial is necessary. The latter does not take the place of the former. *DeQueen & Eastern Rd. Co.* v. *Pigue,* 135 Ark. 499, and cases cited.

The judgment is, therefore, affirmed.

AHRENT v. SPRAGUE.

Opinion delivered July 14, 1919.

1. TELEGRAPHS AND TELEPHONES—RIGHT TO CONSTRUCT LINES.—Under Kirby's Digest, § 2934, any person, or corporation organized for the purpose of transmitting intelligence by telephone, may construct, operate and maintain its lines along and over the public highways and the streets of the cities and towns of the State, provided the ordinary use of such highways and streets be not obstructed by reason of their occupation by said telephone company.
2. TELEGRAPH AND TELEPHONE COMPANIES—HEIGHT OF WIRES FROM GROUND—OBSTRUCTION OF TRAFFIC.—Appellee operated a telephone company, maintaining wires along the public highways. Appellants operated a threshing machine, which broke appellee's wires in going from the road into a field. Appellee brought a suit in equity to enjoin appellant from breaking its wires. Appellant, in a cross-bill, sought to enjoin appellee from maintaining its wires at too low a height from the ground. Under the evidence it appeared that appellee's wires were maintained at a height of over ten feet from the ground. *Held,* appellant was not entitled to injunctive relief under his cross-bill.
3. EQUITY JURISDICTION—IRREPARABLE INJURY—INADEQUATE LEGAL REMEDY.—Equity will interfere to prevent an irreparable injury, or in a case where the plaintiff has no adequate remedy at law.
4. APPEAL AND ERROR—INJUNCTIVE RELIEF—BURDEN OF PROOF.—The burden is upon the plaintiff to establish grounds for injunctive relief sought.
5. TELEGRAPHS AND TELEPHONES—DESTRUCTION OF WIRES—RIGHT TO INJUNCTIVE RELIEF.—Appellee operated a telephone company and maintained wires along the public highway. Appellants in op-

erating a threshing machine broke appellee's wires in going from the road into a field and returning to the road. Appellee maintained its wires at a height of over ten feet from the ground. *Held,* a finding by the chancellor that the injury suffered by appellee was immediate, destructive and irreparable was not against the preponderance of the evidence, and that an injunction issued against the appellants would not be disturbed on appeal.

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

STATEMENT OF FACTS.

Appellee is the owner of the Corning Telephone system. His lines are constructed along the highways from Corning to several nearby towns. Appellants owned and operated a steam threshing machine which was carried from place to place during the threshing season along the highways where the appellee's telephone wires are strung and into the wheat fields adjacent thereto. Appellee claims that appellants wilfully and repeatedly broke down his telephone wires with their thresher and brought this suit in equity to enjoin appellants from tearing down and otherwise interfering with his telephone wires, poles, etc.

Appellants filed an answer and cross-complaint. They denied the allegations of the complaint and allege that appellee maintained his telephone line so close to the ground along the highways where they were strung that they were a nuisance and interfered with the transportation of their threshing machine.

The chancellor found the issues in favor of appellee and the decree concludes as follows: "It is therefore considered, ordered and decreed by the court that the defendants, W. M. Ahrent, Chris Bauschilicher, Loui Allmandinger, John Borchers and Mike Hemmerlein, and each of them, their agents, servants and employees, be and the same are hereby enjoined and restrained from in any way interfering with or damaging the wires, poles or other property of plaintiff; provided, this order shall not be construed to prohibit the defendants from moving their traction engine, separator and other appliances

along the public highways, nor shall it apply to prevent the defendants from moving or cutting the wires of the plaintiff to such an extent as may be absolutely necessary to move their said traction engine, separator, etc., along said public highways; provided, further, that it does not apply (except as to wilful destruction), where plaintiff's lines are not placed as required by section 2934 of Kirby's Digest, and with the construction of said section that it includes travel by threshing machines and appliances."

Appellants have prosecuted an appeal and appellee a cross-appeal.

The appellants pro se.

1. The findings and decree are erroneous, (1) because no injunction should have been granted and the complaint should have been dismissed; (2) a restraining order should have been granted on defendants' cross-complaint, and (3) costs should have been adjudged against plaintiff.

Except for the permission given by Acts 1885, found in Kirby's Digest, § § 2934-5-6, appellee had no right to erect or maintain his lines on or along the public highways, and if he claims the benefits he must accept the burdens imposed by them. *Ib.* 2934. Appellee's lines were not constructed in conformity with section 3924 *Ib.*, and did obstruct travel and were a nuisance. 37 Cyc. 247; 18 Ark. 252. In abating a public nuisance one may even use force if necessary. 29 Cyc. 1217. Appellants had the right to break or tear down the lines where they were so low was to catch on their machine, and injunction will not lie.

2. If any remedy it was at law. 22 Cyc. 759; *Ib.* 758 and note. The proof does not show that the acts were "wilful and wanton," but, if so, that would only be a misdemeanor under Kirby's Digest, sections 1899, 7945, and it will not be presumed in the absence of intention that any violation of criminal law was contemplated. Taylor on Ev. (10 ed.), § 112.

3. Appellee, by his failure to keep his lines up and comply with section 3934, Kirby's Digest, was the first to commit a fault and in injunction suits must come into court with clean hands. 22 Cyc. 788, note 53, 776 G.

4. Appellants owed no duty to protect appellee's wires when they interfered with the movement of their threshing machine along the public roads, it being his duty to keep them out of the way, and had the right to remove them. 80 Ark. 499; 97 S. W. 660.

5. An injunction should have been granted on the cross-complaint. Kirby's Digest, § 2934; 37 Cyc. 252-3, 765, 760; 142 Ill. 104.

6. The costs should have been adjudged against appellee. *Supra.*

G. B. Oliver, for appellee.

1. Appellants' brief does not comply with Rule 9 and the appeal should be dismissed or the decree affirmed.

2. The evidence shows no obstruction of a public road, and the lines were constructed according to law and sufficiently high to allow passage of travel and are in no sense either a public or private nuisance.

3. The fact that appellants have, each threshing season, given the same unwarranted trouble is sufficient warrant for injunction.

4. On the cross-appeal no case is made, as there is no showing that appellee has not and will not maintain his wires as provided by Kirby's Digest, section 2934.

HART, J., (after stating the facts). (1) Appellee has conducted and is conducting a telephone business in the town of Corning and other towns in the western district of Clay County, and in the country between said towns. Pursuant to the provisions of section 2934 of Kirby's Digest, appellee has erected his poles and wires and has constructed his telephone lines along and over the highways between said towns. Under the provisions of this section of the digest, any person, or corporation organized for the purpose of transmitting intelligence by

telephone may construct, operate and maintain its lines along and over the public highways and the streets of the cities and towns of the State, provided the ordinary use of such highways and streets be not obstructed by reason of their occupation by said telephone companies.

According to the testimony of appellee his telephone poles are from 16 to 18 feet high and the wires are stretched and are not allowed to sag. At various places where the lines cross the highways the wires are fastened to trees and are over 20 feet from the ground. The lines are properly inspected and when a wire falls to the ground or begins to sag or a pole becomes rotten, repairs are made at once. Nothing has been introduced in evidence to show that the telephone lines as constructed and maintained by appellee interfere with the public travel over the highways. Appellants did show that in two or three instances the wires had fallen down, but the testimony shows that they were immediately repaired by appellee. Appellant's testimony tended to show that the wires sagged to such an extent that on four different occasions when they turned from the highway to go into wheat fields and then back to the highway again, the elevator which was attached to the separator caught in the wire and tore the line down. The separator and the engine were on the same truck, the engine being about 15 or 18 feet in front of the separator.

(2) According to the appellants' own testimony the engine was 10 feet high and the elevator 12 feet 1 inch high and in each instance the separator caught the wire. This shows that the wires were over 10 feet high at the places where the thresher left the highway to enter the wheat fields and where the wires were torn down. This was sufficiently high that the ordinary use of the highway would not be obstructed. Hence it may be said that it is clearly established that the telephone lines of appellee as constructed and maintained are legal structures. It follows that appellee did not so construct and maintain his telephone lines as to constitute a nuisance and the

chancellor correctly held that appellants are barred of injunctive relief under their cross-complaint.

It also follows that appellee has constructed and maintained his lines as directed by the statute and has the right to so maintain them along the public highways. This brings us to a consideration of the question of what circumstances, if any, would entitle appellee to injunctive relief against anyone wilfully tearing down his telephone lines or threatening to do so.

(3) It is well settled that equity will interfere to prevent irreparable injury, or in cases where the plaintiff has not an adequate remedy at law. An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages, or where there exists no certain pecuniary standard for the measurement of the damage. This inadequacy of damages as a compensation may be due to the nature of the injury itself, or to the nature of the right or property injured. 22 Cyc. 763-4.

In discussing the inadequacy of the legal remedy Prof. Pomeroy says that irreparable injury means a destructive act to property of such peculiar character or use that its loss would not be adequately recompensed by the damages the jury's verdict would give. Pomeroy's Equity Jurisprudence, vol. 6, sec. 544. See also 14 R. C. L., p. 346, sec. 48.

(4) The chancellor found that the facts brings the case for appellee within the principles of law just announced. Is the finding of the chancellor against the clear preponderance of the evidence? The burden was upon appellee to establish his ground for injunctive relief.

(5) According to the testimony of F. B. Sprague, he had trouble each season with the appellants about tearing down his telephone wires. Three other persons owned threshers operated in the same territory and they never tore down his wires at all.

Sprague talked with a relative of one of the appellants who ran the engine and he admitted that they had torn down his wires several times and said that he did not care a damn; that it did not cost him anything. Sprague met some of the appellants on the street one day and told them that if his lines were in their way not to tear them down, but to call him and he would have them fixed. They told Sprague that he did not have any right to have his lines along the public highway; that they had been to see an attorney about it and that he had so advised them. After that they tore the lines down and never said anything to Sprague about it.

One of the appellants and two boys, each a relative of other appellants were witnesses for appellants. Each testified that he was with the thresher when the wires were broken down by coming in contact with the elevator and that the breaking each time was accidental.

Their testimony, however, is contradicted by the attendant circumstances. The proof shows that the wires were broken down three times before the temporary injunction in this case was granted and once afterwards. The time the wire was torn down after the temporary injunction was granted, appellants repaired it at once and it only took them about ten minutes to do so. This tended to show that they would know when the elevator came in contact with the telephone wire. On one other occasion the wire and poles for a half mile were torn down and on another occasion the wire and poles were torn down for the distance of a quarter of a mile. This tended to show that the conduct of appellants in tearing down the wires was wilful, else they would have stopped as soon as the elevator caught on the wire, and would not have continued to move their threshing machine along until they had torn down the wire and poles for such a great distance. Each time the wire was torn down as the threshing machine was being driven into a wheat field from the highway or out of a wheat field back to the highway. In such case the telephone wire and posts would be in plain view. It would not be like the case where the

machine was being driven along the public road where the wires only crossed the road at intervals. Appellants admit that they knew the wire was strung along the highway and when they turned out of the highway to go into a wheat field they knew they would either pass under the telephone wire or that their machine would come in contact with it. The fact that the engine did not come in contact with the wire shows that it was strung over 10 feet high from the ground where the thresher entered the wheat field. The testimony shows that this was enough for all ordinary use. The engine was 10 feet high and the elevator was 12 feet 1 inch. The wire was strung higher than the engine, so that appellants would have only had to have lifted it two feet when they entered a wheat field. Appellants, however, claim that only two men rode on the truck which carried the engine and separator and that one of them guided the machine and that most of the time of the other was taken up with the engine. It was not to be expected that they should keep a continual watch along the highway so as to keep from tearing the line down where it crossed over the highway while the thresher was being moved along the highway; but as we have just seen, they knew when they turned out of the highway into a wheat field they would likely come in contact with the wire and one of them might have climbed up on the elevator and lifted the wire clear of it instead of driving along and tearing down a quarter or a half mile of wire and poles.

The testimony shows that there were extra men on hand to help thresh the wheat and that in the case of the other threshers one of these men looked out to see that the thresher did not tear down the telephone lines. When the line was torn down the business of the telephone company must necessarily be discontinued until the line was repaired. This showed that the injury was immediate and destructive and thus irreparable.

Therefore, under all the circumstances, we are of the opinion that the finding of the chancellor was not against

the preponderance of the evidence and under the settled rules of this court cannot be disturbed on appeal.

What we have said on this branch of the case disposes of the appellee's cross-appeal adversely to him.

It follows that the decree will be affirmed.

Kansas City Southern Railway Company *v.* Road Improvement District No. 6, Little River County.

Opinion delivered July 14, 1919.

1. Road districts—objection to assessments—appeal—validity of the organization.—Where a road improvement district is organized under Act 338, Acts of 1915, on an appeal by a property owner from the assessment of benefits the property owner may not attack the validity of the organization of the district, and on such appeal the inquiry is confined to the ascertainment of the correctness of the assessment of benefits.
2. Appeal and error—sufficiency of the evidence—appeal—assessment of benefits in road district.—On appeal from the circuit court, where the issue involved is the correctness of the assessment of benefits, the judgment of the circuit court will not be disturbed if the evidence is legally sufficient to sustain the findings.
3. Improvement districts—assessment of benefits in excess of cost of the improvement.—The assessment of benefits in an improvement district will not be invalidated because the same exceed the cost of the improvement; this court will not say as a matter of law that benefits from the construction of a given improvement will not accrue to real property in excess of the cost of such improvement.
4. Improvement districts—cost—assessment of benefits—amount to be collected.—The law does not limit the assessment of benefits, but there can not be a collection of funds in excess of the total cost of the improvement, including the interest on money borrowed and all other expenses of the proceedings.

Appeal from Little River Circuit Court; *James S. Steel,* Judge; affirmed.

James B. McDonough, for appellant.

1. The original petition did not contain a majority either in land value, acreage or number of land owners

in the district. Acts 1915, 403; 128 Ark. 298; 124 *Id.* 234; 118 *Id.* 119; 126 *Id.* 318.

2. The roads to be constructed and improved were not public roads. Act No. 338, Acts 1915; 89 Ark. 53; 118 *Id.* 119-125.

3. The change in boundaries made the district invalid. 104 Ark. 298; 116 *Id.* 167.

4. The boundaries as described in the petition are different from those in the notice required by law. 113 Ark. 566; 115 *Id.* 163.

5. Publication of the notice was not given as required by law. 113 Ark. 566; 130 *Id.* 75.

6. The undisputed evidence shows that the district is organized for the purpose of enabling the county to build a road. 118 Ark. 119; 89 *Id.* 513. The jurisdiction of the county court cannot be taken away and the county cannot build roads under the name of improvement districts. 118 Ark. 294; 125 *Id.* 325; 92 *Id.* 93.

7. No proper map was attached to the original petition. Acts 1915, § 1, p. 1403.

8. The assessments are excessive and hence illegal and void. There is assessed against appellants for each mile $6,170. 127 Ark. 310.

9. The only benefit, if any, to appellants is such benefit as would accrue to the value of the land used as a right-of-way. 64 Ark. 555; 118 *Id.* 303; 129 *Id.* 542.

10. The railroad property of appellants under the evidence will not be enhanced in value and hence not especially benefited. 107 Ark. 285; 89 *Id.* 513; 125 *Id.* 422; 127 *Id.* 310.

11. The assessment of benefits is unreasonable, arbitrary, unjust and unlawful; contrary to section 1 of the 14th Amendment of the United States Constitution and contrary to our Constitution of this State, art. 16, § 5; 48 Ark. 370; 239 U. S. 478; *Ib.* 215; *Ib.* 254; 240 *Id.* 55; 245 Fed. 377; 164 U. S. 112. See also 109 Ark. 90; 255 Ill. 398; 105 N. E. 699; 175 Pac. 37; 248 *Id.* 377.

A. D. Dulaney and *John J. Dulaney,* for appellee.

1. The notice was legally published and none of the appellants appeared to object to the formation of the district. They were silent when it was their duty to speak and they had their opportunity. Act 338, § § 3-13.

2. The district was validly organized. Act 338, Acts 1915.

3. The court correctly sustained the demurrer. 106 Ark. 328; 235 U. S. 350; 102 Ark. 558; 83 *Id.* 236. All facts essential to the jurisdiction of the county court existed and every necessary step in the establishment of the district was taken. The validity of the district could not be raised in the hearing on the assessment of benefits. 134 Ark. 292; 209 S. W. 725, 728. The case of 127 Ark. 310 does not control this case. See 124 Ark. 263; 92 *Id.* 141.

4. Appellants' remedy was by certiorari instead of appeal. 124 Ark. 237.

5. The record shows all proceedings necessary to create a valid district were taken. 72 Ark. 101. The roads are public roads and proper legal notice was given. Acts 1917, No. 105. The record affirmatively shows that our laws were strictly complied with and that the county court exercised its constitutional and statutory jurisdiction. Act No. 338, § 20. The proper map was filed. *Ib.,* § 1 (a).

6. The assessments are not excessive but reasonable and valid. 134 Ark. 34; 125 *Id.* 422. A question not raised below will not be considered on appeal. 75 *Id.* 312. The judgment of the lower court is presumed correct until the contrary is shown. 75 *Id.* 427; 80 *Id.* 249; 125 *Id.* 428; 126 *Id.* 590.

7. The benefits assessed are not arbitrary and inequitable, as shown by the record. The railroad property was assessed on a mileage basis as directed by the act. 134 Ark. 299; 209 S. W. 726.

8. Appellants' property is subject to assessment for the highway improvement and would be benefited by

the reason of the construction of said improvement. 209 S. W. 730; 131 Ark. 497; 134 *Id.* 299; 113 *Id.* 196.

9. As to "due process of law," see 119 Ark. 26; 114 U. S. 606; 111 *Id.* 701.

McCULLOCH, C. J. Pursuant to the terms of Act No. 338 of the legislative session of 1915, the county court of Little River County, by order entered on May 14, 1918, on petition of property owners, created an improvement district in that county designated as "Road Improvement District No. 6 of Little River County," for the purpose of constructing a road running northward from Ashdown, the county site, about eleven or twelve miles. There was no appeal from said order of the county court creating the district. The road to be improved runs parallel with the line of railroad of the Kansas City Southern Railway Company and 9.7 miles of the railroad right-of-way is included in the district, as well as station property, and after the assessment of benefits was made by the board of assessors and a certificate thereof filed with the clerk of the county court pursuant to section 13 of the aforesaid statute, the date for hearing on the assessments before the county court was set for August 23, 1918, and appellant appeared in the county court for the first time and made objections to the assessment against the railroad property. The county court overruled the objections to the assessment and appellant prosecuted an appeal to the circuit court. In addition to the objections to the fairness and correctness of the assessment, appellant filed a written plea attacking the validity of the organization of the district on various grounds, viz., that the original petition for the improvement filed in the county court did not contain the signatures of a majority of the property owners; that the petition specified certain tracts of land to be embraced in the district which were omitted by the order of the county court; that the road to be improved was not a public road; that the description of the boundaries of the district set forth in the original petition were

vague and uncertain, and that the notice of the hearing on the petition was not published as provided by law. There were several other objections to the validity of the order, which it is unnecessary to set forth. The plea also attacked the fairness and uniformity of the assessments.

The circuit court sustained a demurrer to those paragraphs of appellant's plea attacking the validity of the statute and the proceedings creating the district and confined the hearing entirely to the question of the correctness of the assessments. Testimony was introduced by both parties on that issue, and judgment was entered by the circuit court approving the assessments as made by the board of assessors and approved by the county court.

The first contention is that the court erred in sustaining the demurrer to appellant's plea attacking the validity of the district. Counsel for appellant relies on the decision of the court in the case of *Lee Wilson Company* v. *Road Improvement District No.* 1, 127 Ark. 310, where, on appeal from the assessment of benefits in a road improvement district formed under this same statute, we said: "Appellants made no attack upon the organization of the appellee district in the court below. But as the organization of the district was essential to any valid local assessments and levies, the question as to whether there was such organization was one of jurisdiction which appellants have the right to raise at any time."

Counsel for appellee rely on the decision of this court in *Missouri Pacific Railroad Company* v. *Conway County Bridge District,* 134 Ark. 292, where, under a special statute creating an improvement district and authorizing an appeal by property owners from the assessment of benefits, the court held that on such an appeal a property owner could not attack the validity of the statute creating the district, and that the inquiry on such appeal was confined to the ascertainment of the correctness of assessment of benefits, the property owners being left to other remedies in attacking the validity of the organi-

zation of the district. The latter case was followed and the same rule applied in the case of *Chicago, Rock Island & Pacific Railway Co.* v. *Road Improvement District No. 1 of Prairie County, Arkansas,* 137 Ark. 587, 209 S. W. 725. In that case the improvement district was created under a special statute (Acts 1913, p. 864) authorizing the creation of road improvement districts in Lonoke and Prairie Counties. That statute was similar to Act No. 338 of the session of 1915 except that it applied only to the two counties mentioned.

It is contended by counsel for appellant that those cases are reconcilable with each other and that appellant's right to attack the validity of the order creating the district is sustained under the decision in *Lee Wilson & Co.* v. *Road Improvement District No.* 1, *supra,* without conflicting with the decisions in the later cases which arose under special statutes. It is true, as before stated, that the two last mentioned cases arose under special statutes and that in the first of those cases the statute itself created the improvement district, but in the last case the district was created by an order of the county court and in that respect is almost, if not entirely, identical with the facts in the case of *Lee Wilson & Co.* v. *Road Improvement District No.* 1, *supra.*

We are of the opinion that the cases are apparently in conflict and that, while the questions arose under different statutes, the principles which control are the same. In the last two cases we proceeded upon the theory that after the creation of the district there was conferred merely the privilege to appear before the board of assessors and the county court for the sole purpose of testing the correctness of the assessment of benefits and that the circuit court on appeal derived only such powers as the board of assessors and the county court has. Section 3 of Act No. 338, *supra,* provides that an 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 sub-

ject to collateral attack, but only to direct attack on appeal," and that 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 said appeal is taken." And in section 13 of the same statute, providing for notice of the filing of assessments and the appearance of property owners to contest the same, the proceedings are expressly limited to "the purpose of having any errors adjusted, or any wrongful or grievous assessment corrected." Section 14 provides for an appeal by a property owner from an order of the county court approving or readjusting the assessments.

(1) These features of the statute place it in the same category with a special statute creating an improvement district and makes the same principle applicable as is announced by the last two cited cases of this court. These features of the statute were not called to our attention in the case of *Lee Wilson & Company* v. *Road Improvement District No.* 1, *supra,* and were not discussed in the opinion. The brief statement of the law in that case declared a correct principle that in all legal proceedings the question of jurisdiction may be raised at any stage, even on appeal to this court, but we failed to take cognizance of the principle that the right to raise the question of jurisdiction at any stage is limited to the same proceeding, and not to a separate proceeding. Under the statute now under consideration the organization of the district and the proceedings for the assessment of benefits and adjustment of the same are entirely different proceedings. While the abstract principle of law was correctly announced in the case of *Lee Wilson Co.* v. *Road Improvement District No.* 1, *supra,* it was not applicable in that case, and after declaring it we determined that there was nothing in the record, as disclosed on appeal, to show the want of jurisdiction and we declined to disturb the proceedings on that ground. The case was reversed on the sole ground of the obvious unfairness of the assessments. After further consideration of the whole matter we reach the con-

clusion now that the principle announced in the two last cases (*Missouri Pacific Railroad Co.* v. *Conway County Bridge District, supra; Chicago, Rock Island & Pacific Railway Co.* v. *Road Improvement District No.* 1 *of Prairie County,* 137 Ark. 587, 209 S. W. 725, *supra*) is the correct one and is applicable to the present case, and so much of the language of the opinion in *Lee Wilson Co.* v. *Road Improvement District No.* 1, *supra,* as is in conflict with this view is disapproved.

(2) This leaves only for consideration the question of correctness and fairness of assessments. In cases of this character, where the appeal is from a judgment of the circuit court, we apply the rule that the judgment will not be disturbed if the evidence is legally sufficient to sustain the findings. *St. Louis & San Francisco Rd. Co.* v. *Fort Smith & Van Buren Bridge District,* 113 Ark. 493; *Missouri Pacific Rd. Co.* v. *Conway County Bridge District, supra; Chicago, Rock Island & Pacific Ry. Co.* v. *Road Improvement District No.* 1 *of Prairie County, supra.*

This case was heard on oral evidence adduced by both parties to the controversy and the testimony is conflicting. That adduced by appellee tends to show that the assessments were fair and uniform. It would serve no useful purpose to discuss the testimony in detail, for we find it to be legally sufficient to sustain the judgment of the circuit court.

(3-4) One of the principal points of attack is that the assessment of benefits exceeds the cost of the improvement and that the assessment is erroneous on that account. We cannot say as a matter of law that benefits from the construction of a given improvement will not accrue to real property in excess of the cost of such improvement. The law does not thus limit the assessment of benefits, but there cannot be a collection of funds in excess of the total cost of the improvement, including, of course, the interest on money borrowed, and all other expenses of the proceedings. Property owners cannot be compelled to contribute funds for any other purposes

than those contemplated by the organization of the district and funds in excess of the amount necessary for those purposes cannot be collected, but the question of estimate of benefits in the beginning is a different one, and they are not necessarily limited to the actual amount of money to be raised. Benefits are first appraised and then taxes levied based upon those benefits to raise funds to carry out the purposes of the organization.

It is contended that the evidence shows that the benefits were not assessed uniformly, in that private property was not assessed in the same proportion as railroad property. The testimony of the assessors shows that they considered all of the elements which entered into the question of benefits or enhancement of values, and we cannot say that appellant has been discriminated against in the assessment of its property, or that the fairness of the assessments, as a whole, is not sustained by legally sufficient testimony.

The judgment is, therefore, affirmed.

HART, J., (dissenting). The proposed district contains 23,585 acres of land not including the right-of-way of the railroad company. The proposed highway is for the most part close to the right-of-way of the railroad and parallel to it. The highway is about eleven miles long and 9.7 miles of the right-of-way of the railroad is included in the district. The cost of the road is estimated at $112,077.74. The benefits assessed against the property of the railway company are $7,000 per mile, making a total assessment of benefits against the property of the railroad company of $67,900. It is not shown that the proposed road will be of any advantage in draining the roadbed of the railroad company.

Judge Wood and the writer are of the opinion that the assessment of benefits against the railroad company is greater than the actual benefits to the property of the company. The statute provides that the county court shall hear and determine the justness of any assessments

of benefits and that it is authorized to equalize, lower, or raise any assessment upon a proper showing to the court.

Therefore, Judge WOOD and the writer are of the opinion that the assessments of benefits against the property of the railroad company are greater than the actual benefits and should have been lowered and that the judgment of the circuit court was erroneous in not doing this.

WOOD, J., concurs.

DEAN v. STATE.

Opinion delivered July 14, 1919.

1. CRIMINAL LAW—HOMICIDE—AGGRESSOR.—In a prosecution for homicide, where the killing occurred in a fight, it is a question for the jury, under the evidence, to determine who was the aggressor.
2. TRIAL—NUMBER OF INSTRUCTIONS ASKED—PRACTICE.—In requesting instructions counsel should succinctly present, in as few prayers as possible, the declarations of law applicable to the facts which the evidence tends to prove and which he considers essential to maintain his contentions. The practice of presenting numerous instructions repeating the same idea is not to be approved, but rather to be discouraged.
3. HOMICIDE—SELF-DEFENSE — CONDUCT OF DEFENDANT — INSTRUCTIONS.—In a homicide case, an instruction justifying the defendant's act on the ground that he might rightfully fear that he was in danger of his life or of great bodily harm, on account of the words and acts of the deceased, should also include the essential that defendant, in acting upon appearances of danger, must have done so without carelessness or fault upon his part.
4. EVIDENCE—HOMICIDE—TWO DEFENDANTS TRIED TOGETHER—RIGHT OF WIFE OF ONE TO TESTIFY.—A. and B. were separately indicted for the murder of C. Upon their motion the cases were consolidated and A. and B. were tried together. *Held,* the testimony of A.'s wife was incompetent and inadmissible.
5. WITNESSES—IMPEACHMENT—PROPER FOUNDATION FOR.—A witness may not be impeached unless the proper foundation for such impeachment is laid; so where T. was asked, on cross-examination, only the words of his conversation with one S., it is improper to permit S. to testify that the words spoken to him by T. were other than those testified to by T.

6. HOMICIDE—USE OF KNUCKS BY DECEASED—TESTIMONY OF EXAMINING PHYSICIAN AS TO NATURE OF WOUNDS RECEIVED BY DEFENDANT.—In a prosecution for homicide, defendant pleaded self-defense. Knucks were found on the body of deceased. *Held,* a physician was competent to testify as to whether injuries inflicted on defendant's head by deceased, were inflicted by knucks, where the physician examined defendant shortly after the killing, although the physician had only upon one former occasion examined wounds made by the use of knucks.

7. EVIDENCE—HOMICIDE—THREATS MADE TO DEFENDANT'S WIFE.—While a wife is not a competent witness in behalf of her husband, in a homicide case, when defendant has plead self-defense, he may testify to the effect that his wife had informed him of threats that were made upon his life, by deceased and his associates.

8. HOMICIDE — SELF-DEFENSE — THREATS BY DECEASED.—Where self-defense is pleaded in a homicide case, testimony of threats by deceased against the defendant and communicated to him, as well as testimony of the general reputation of deceased for turbulence and violence, is always admissible.

Appeal from Pike Circuit Court; *James S. Steel,* Judge; reversed.

Pinnix & Pinnix and *McMillan & McMillan,* for appellants.

1. The testimony shows a clear case of self-defense and in defense of each other.

2. The court erred in excluding the testimony of Dr. McClure. His testimony was competent. 55 Ark. 593-8-9; 94 *Id.* 538-544; 1 Greenleaf on Ev., § 441 B; 5 Enc. Ed. 534; 74 Ark. 554-6; 34 *Id.* 520. Dr. McClure's testimony tended to show that the deceased used brass knucks, a deadly weapon, in the fight and tended to strengthen the testimony of Pone Dean in all respects, etc.

3. It was error to allow Curtis Robertson to state what he told Pone Dean that Curtis' wife told him about what happened about the kiss. It was hearsay and also incompetent.

4. The court erred in holding incompetent the admission of Curtis Robertson that he had had trouble with the Harpers about his wife.

5. It was error to hold incompetent the fact that Curtis Robertson run one of the Harpers out of the country on account of a grievance about his (Curtis') wife. This affected the credibility of Curtis Robertson. 53 Ark. 390.

6. The court erred in refusing to exclude the testimony of Mrs. Curtis Robertson as to what he did with his brother's pistol and about the kiss. 76 Ark. 489; 120 *Id.* 492; 69 *Id.* 653.

7. It was error to refuse to allow defendant to impeach witness Robert Toland. 52 Ark. 303; 109 *Id.* 206; 52 *Id.* 273; 80 *Id.* 587.

8. Evidence as to threats by the Robertsons against defendants was improperly excluded; the threats were communicated and believed; deceased's reputation as a dangerous man was well known. 97 Ind. 322; 130 *Id.* 227; 28 N. E. 1115; 63 Kan. 602; 124 Am. St. 1030; Elliott on Ev., § 3041; 1 Wigmore on Ev., p. 242, § 198; 38 Ark. 498; 85 S. W. 191. See also on self-defense and *res gestae,* 12 Ark. 782; 43 *Id.* 99.

9. Mrs. Pone Dean was a competent witness at least for M. H. Dean. 116 Ark. 334.

10. There are many errors in giving and refusing instructions. The jury was not properly instructed on the law of self-defense. 164 U. S. 546; 64 Ark. 144; *Jackson* v. *State,* 133 Ark. —; Kirby's Digest, § 1765; 76 Ark. 110; 120 *Id.* 201.

John D. Arbuckle, Attorney General, and *Robert C. Knox,* Assistant, for appellee.

1. No error in refusing to allow defendant to testify what his wife told him. His wife was not a competent witness and besides it was only "hearsay."

2. No error in refusing to allow Mrs. Pone Dean to testify. On motion the cases of Pone and M. H. Dean were consolidated and tried together. 42 Ark. 204; 37 *Id.* 67-85; 20 *Id.* 36.

3. There were no errors in giving or refusing instructions. 93 Ark. 409.

WOOD, J. Pone Dean and his father, M. H. Dean, were indicted under separate indictments for the crime of murder in the second degree in the killing of Ford Robertson. The defendants moved to have the causes consolidated and tried at the same time. The motion set up "That both of said causes are of a like nature and relative to the same question and arose out of the same transaction and depend upon the same or substantially the same evidence." The motion was confessed by the State's attorney and was granted by the court and the causes were consolidated. The trial resulted in the conviction of Pone Dean of the crime of murder in the second degree and in the conviction of M. H. Dean of the crime of manslaughter. From the convictions are these appeals.

On the 26th day of January, 1919, there was a fight between Pone Dean and M. H. Dean, on one side, and Curtis Robertson and Ford Robertson, on the other, which resulted in the death of Ford Robertson. M. H. Dean was seventy-four years of age, and Pone Dean was thirty-six years of age. Curtis Robertson was about twenty years of age and Ford and Robert Robertson were young men but elder brothers of Curtis. The Deans and the Robertsons were farmers and lived in the same neighborhood. Pone Dean married a sister of the Robertson boys. Prior to his marriage Curtis Robertson had lived with Pone Dean and his wife and he also lived with them for a short while after his marriage but had moved to his own home a few months before the encounter. The Deans and the Robertsons were on intimate and friendly terms until a month or more prior to the killing, when an incident occurred that engendered the enmity between the Deans and the Robertsons which finally culminated in the killing. Pone Dean relates the incident as follows: "Curtis borrowed my shaving mug and brush, and one Sunday I went by the house and asked his wife for the shaving mug and brush, and asked her to kiss me, and she did, and I went home. As I started off I told her for her and Curtis to come over that evening and we would go to the schoolhouse. I went on home and was shaving,

and Curtis came along and stopped and talked awhile, and then went on towards home. In an hour or two he came back and came on the gallery with a pistol in his hand and stepped in and got his lantern and as he turned to go out he told me he wanted to talk to me. He walked about sixty yards from the house and he said, 'My woman said you asked her to kiss you.' I said, 'Yes, what are you going to do about it?' He said, 'He wasn't going to do anything and would let it drop where it was.' I told him that satisfied me if it satisfied him. There wasn't anything more said, and I went back to the house."

Mrs. Curtis Robertson, who was sixteen years of age, gives her version of the incident as follows: "Some month or more prior to the killing, Pone Dean came to our home, when my husband was gone. He came to the door and pushed the door open and said to me, 'Reckon anybody will catch us?' I says 'I don't know,' and he grabbed at me and asked me to kiss him. I told him, 'No, sir, I wouldn't do it.' He told me if I told it he would kill Curtis. Up to that time Pone Dean and his wife were very close friends of myself and husband. The day Pone Dean came up there and asked me to kiss him was Sunday. He came for his shaving mug and brush. I told my husband about it that evening. My husband told it to his brothers, Ford and Robert."

It appears from the testimony in the record that neither Pone Dean nor his father, M. H. Dean, considered that Pone Dean, in the kissing of Mrs. Robertson, had been guilty of any act reasonably calculated to arouse the intense enmity of the Robertson brothers toward him; while, on the other hand, the testimony tends to show that the Robertsons were mortally offended. Ineffectual efforts were made to reconcile the families, and the above is the condition of mind that existed between them when they attended preaching services at a schoolhouse in the neighborhood on the morning of the day of the fatal encounter, which was Sunday.

There was testimony introduced by the State tending to prove that the defendants provoked and were the ag-

gressors in the fight; while the testimony introduced for the defendants tended to prove the contrary. The testimony introduced by the State proved that Pone Dean killed Ford Robertson with a pocket-knife of a large size called a "granddaddy" barlow; that he drew this knife and rushed toward Curtis Robertson, who fled around the house with Dean pursuing him for a short distance, when he immediately returned; the testimony further tending to prove that in the meantime old man Dean was hitting Ford Robertson with a club; that he hit Ford Robertson three or four times, when Ford Robertson knocked him down with his fist, and by that time Pone Dean ran up and stabbed Ford Robertson in the back. On the other hand, the testimony introduced by the defendants tended to prove that Curtis Robertson was armed with a pistol and that Ford Robertson was armed with knucks and also had a pocket-knife; that words passed between Ford and Curtis Robertson and Pone Dean; that Curtis and Ford Robertson were approaching Pone Dean; that Curtis said, "If you want to fight, you son-of-a-bitch, get on me;" that Pone Dean saw Curtis' gun and started toward him, his purpose being to get close enough to keep Curtis from shooting him; that as he started for Curtis his father hit Ford and checked him; that after running Curtis around the house Pone Dean turned back, saw Ford knock his father down twice, whereupon he (Pone Dean) started on to Ford but before he got to him Ford turned, came about six feet toward him (Pone); that Ford had knucks and a knife in one hand and a club in the other and hit Pone Dean one lick with his knife and the next lick hit him on the head with the knucks and knocked him down, during which time Ford received at the hands of Pone Dean the fatal stabs with the knife.

(1) The testimony is voluminous and without setting out and commenting upon it in detail it suffices to say that it was a question for the jury, under the evidence, to determine whether or not Pone Dean and his father were the aggressors in the fight or whether or not Curtis and Ford Robertson were the aggressors.

It is the contention of the appellants that under the testimony adduced by them they acted in self-defense and in the defense of each other. It is the contention of the State, on the other hand, that the appellants brought on the fight and were the aggressors and that the killing of Ford Robertson by appellant Pone Dean was the result of malice on his part, but without the deliberation and premeditation necessary to constitute murder in the first degree. In other words, that the appellants, under the evidence, were guilty of murder in the second degree.

The principles of law governing the right of self-defense and the right of near relatives, such as father and son, to defend each other from assaults made with a deadly weapon with the intent to kill or inflict great bodily injury, are familiar and have been so often announced by this court that it could serve no useful purpose to reiterate them here. We find in the bill of exceptions the following:

"After the court had examined and given or refused all the instructions which were marked either given or refused on the margin thereof by the court, and the instructions had been read to the jury, counsel for defendants tendered to the court the instructions in the record which are neither marked given or refused. Thereupon, the court made the following statement: 'Gentlemen, you have three attorneys in this case for the defendants. When I asked that your instructions be submitted so I could examine them, you tendered me a set of instructions, and I examined them in connection with the set of instructions requested by the State and passed upon all your instructions and have given the instructions to the jury. Now you have tendered two other sets of instructions, which I cannot pass upon. You gentlemen should agree upon your instructions and submit them to the court and not submit three different sets of instructions."

(2-3) It appears that appellant's prayers for instructions contained sixty-nine separate statements of the law. While all the law applicable to a cause of this

kind cannot be covered in one independent declaration, yet a careful scrutiny of the independent and separate prayers for instructions presented in the three sets presented by appellants' counsel shows that in many of them the same idea is repeated many times. This manner of presenting prayers for instructions is not to be encouraged. Numerous instructions, many of them repeating the same idea, are well calculated, by their very multiplicity and repetition of thought, to confuse and mislead, rather than to enlighten, the jury. Counsel should succinctly present in as few prayers as possible the declarations of law applicable to the facts which the evidence tends to prove and which they consider essential to maintain their contentions. We have taken the pains, however, on account of the great importance of the issues involved, to carefully scrutinize the charge of the court, and we find that, when taken as a whole, it correctly declared the law as heretofore announced in numerous decisions of this court, and gave the jury a correct guide for their deliberations in determining the guilt or innocence of the appellants. Some of the instructions contain verbal inaccuracies and on that account are open to criticism. For instance, the seventh and eighth prayers for instructions, given at the instance of appellants, declared the law to be that the defendants had the right to act upon the circumstances as they appeared to the defendants and that if the language and conduct of the deceased were such as to induce in the mind of a reasonable man the belief, under all the circumstances existing, that they were in danger of death or great bodily harm at the instance of the deceased they would be justified in slaying him. These instructions omitted the essential that the defendants, in acting upon appearances of danger, must have done so without fault or carelessness on their part. But this idea was embraced in other instructions, and it was an omission, too, favorable to the appellants and of which they could not complain. It would be better form, however, for each instruction along this line to carry that qualification.

When the charge is taken as a whole, we do not regard it as calculated to mislead the jury and prejudice the rights of the appellants. In view of a new trial, however, which must be had on account of the error of the court in excluding certain evidence from the jury, the trial court will be under the necessity of again instructing the jury, when it will doubtless make corrections in the mere verbiage of some of the present prayers for instructions, if again offered, and will reduce their number so as to make a more concise and connected charge.

Those of appellants' prayers for instructions which announce correct principles of law and which were refused by the court we find were covered by other prayers which the court gave, either at the instance of the appellants or at the instance of the State.

A few of the cases in this court announcing the principles of law applicable to the facts of this record, to which the charge of the trial court as a whole conformed, are as follows: *Smith* v. *State,* 59 Ark. 132; *Carpenter* v. *State,* 62 Ark. 286; *Elder* v. *State,* 69 Ark. 648; *Lee* v. *State,* 72 Ark. 426, 436; *Pratt* v. *State,* 75 Ark. 350; *Mabry* v. *State,* 80 Ark. 345; *Wheatley* v. *State,* 93 Ark. 409; *McDonald* v. *State,* 104 Ark. 317.

(4) There was no error in refusing to allow the wife of Pone Dean to testify, although Pone Dean and his father, M. H. Dean, were indicted for the same offense under separate indictments. Their motion to consolidate sets up "that both of the causes were of like nature and relative to the same question and arose out of the same transaction, and depended upon the same or substantially the same evidence." The motion was tantamount to a request on the part of the appellants for a joint trial and an admission on their part that the offense, if committed at all, was jointly committed. Under such circumstances the wife of Pone Dean, who was incompetent to testify as a witness in his behalf on his trial, could not well give testimony in the cause in favor of M. H. Dean that would not also inure to the benefit of her husband. The appellant M. H. Dean, therefore,

waived any right he may have had, if any, under the circumstances to the testimony of Mrs. Pone Dean. See *Carr* v. *State,* 42 Ark. 204; *Carey* v. *State,* 37 Ark. 67; *Collier* v. *State,* 20 Ark. 36.

Robert Toland, a witness for the State, on his direct examination, testified that Pone Dean ran up and stabbed Ford Robertson in the back. On cross-examination he was asked the following questions: "Q. Did you undertake to tell him, F. W. Short, and Mr. Coleman there at the time (at the Short house the night after the fatal encounter) about how this fight went off?" The witness answered, "Yes, I told them just how it occurred." "Q. You told them just like it occurred here?" "A. Yes, sir."

Later the witness Short was called and was asked these questions concerning the conversation between him and witness Robert Toland: "Q. Did he, in making his statement to you that night, say that Pone Dean stabbed Ford Robertson in the back?" The witness answered, "No, sir; he didn't say that. He said, 'Went to fighting with their knives.' "

(5) The court excluded the testimony of the witness Short, and there was no error in the ruling. The witness Toland, whose testimony the appellants were seeking to impeach by the witness Short, was not given an opportunity on his cross-examination to hear what the witness Short had said were his statements. He was merely asked if he had not discussed the case with Short and Coleman and if he had not told them how the fight went off and if he had not told them that it went off just like it occurred here. No proper foundation was laid for the impeachment of the witness. *Jones* v. *State,* 101 Ark. 439.

(6) Doctor McClure, who was called as a witness for the State, testified that he was a graduate of medicine and surgery, having taken his degree from Tulane University. He testified that he examined the body of Ford Robertson on the day he was killed, and testified as to the nature of the wounds. He also, on the same

day, examined the wounds on Pone Dean. He found two wounds, each probably about half an inch long about an inch apart, one on the fore part of his forehead at the edge of the hair, and the other one on the left side, and another cut wound on his elbow, almost right in the elbow about a quarter of an inch long. He stated that they took a pair of brass knucks and a knife off the body of Ford Robertson and he described each of these weapons. In the course of his examination he stated, in answer to questions, that he did not think he had ever examined any knuck wounds more than one time. He was asked, "Could you tell from the examination the cause of the wounds on his head," and answered, "I think not." He stated that he did not think the wounds on Pone Dean's head were made by naked knuckles. He was asked, "As a physician can you tell whether or not that wound was made with a metal instrument?" and answered, "Sometimes you can and sometimes you can't." He stated that the wound went to the bone. Further along he was asked the question, "After you had seen the knucks taken from Ford and comparing that with the print of the wound on the forehead of Pone Dean, did that knucks about fit that wound?" And the further question, "Did you, in your mind, compare the knucks and size of the knucks with the wound and size of the wound? Did you make any comparison in your mind as to them? You saw both?" And the further question, "In your opinion, Doctor, was the wound on the forehead of Pone Dean caused by those knucks or similar to those?"

The court refused to allow the witness to answer these questions on the ground that the witness had not qualified himself as an expert about knuck wounds. The court also refused to allow this witness to testify to the effect that in his opinion the wounds on Pone Dean's head were made by the metal knucks. Now, the testimony of the witnesses for the State who were eye-witnesses to the fight tended to prove that Ford Robertson was not using metal knucks in the fight. Curtis Robertson stated that he met his brother coming around the

corner of the house after the fight holding his side, walking along by the side of the house, and "He did not have any weapons, such as a knife or knucks at the time." Robert Robertson testified: "I did not at any time during the difficulty see Ford with a knife or pair of knucks. * * * Ford struck the old man and knocked him down; he hit him with his fist was all I saw. I did not notice any knife, weapon or knucks about Ford at that time." Robert Toland testified: "He (old man Dean) hit him (Ford) some three or four times, and then Ford Robertson knocked the old man down with his fist. I couldn't tell whether Ford had anything in his hand."

The witness, Vettetow, the preacher, testified that he did not see any part of the fight; after he got out of the house he saw the Deans and Curtis and Ford Robertson. Pone was standing at one corner of the house with his knife in his hand, a "granddaddy" barlow, and the old man, who was close to his son, had a stick in his hand. Curtis and Ford Robertson were fifteen or twenty feet from the Deans. He did not see anything in their hands. Another witness, who said he saw Pone Dean draw his hand with a knife and make a stroke and start at, or toward Ford Robertson, also testified that he "did not see either one of the Robertsons with a knife or pistol that day." M. H. Dean testified: "I saw Ford Robertson with knucks in the house. He had them after he went to the door. Ford Robertson hit me with knucks, one lick was on the side of the head at the edge of the ear, and the other lick was on the cheek. The wound was swollen ten days. Pone was injured on the side of the head with cuts and his wounds made him mighty weak, and he fainted there on the ground." Pone Dean testified: "I came back to protect my father, and before I got there Ford came toward me with his knife and knucks and a club. * * * He had his knucks in one hand and a knife in the same hand and a club in the other hand, and he hit me one lick with his knife, and I dodged the next lick, and the next lick he hit me on the head with his knucks, and that was the winding up of the fight."

The undisputed evidence proved that metal knucks were found on the dead body of Ford Robertson. But it was exceedingly important to the rights of the appellants to prove, if it could be done, that Ford Robertson had metal knucks just before and while he was engaged in the fight and that he was using the knucks in the fight. Now the testimony of Doctor McClure, if admitted, would have tended to prove that Ford Robertson used metal knucks during the fight, and in this way would have tended to corroborate the testimony of the Deans, and to discredit the testimony of the witnesses for the State that tended to prove that he did not use knucks. If it were a fact that Ford Robertson had metal knucks and was using them, this might justify or excuse the Deans in the use of force which otherwise they would not have been justified or excused in using. So the issue as to whether or not Ford Robertson was using metal knucks at the time he received the fatal wounds would be absolutely essential to the rights of the appellants, not only on the question of justification, but also on the question of the degree of guilt and the measure of punishment. The exclusion of the testimony, therefore, if competent, was highly prejudicial. Was it competent?

The witness qualified as an expert physician and surgeon. He had personal observation, not only of the wounds on Pone Dean, but also of the knucks that were found upon Ford Robertson's dead body. While he did not make a comparison by fitting the knucks over the wounds, yet, from his knowledge of the looks of each, he was able to make the comparison in his mind, and was of the opinion, from the character of the weapon found and the nature of the wounds produced, that the latter were caused by the former. In *Brown* v. *State,* 55 Ark. 593, 598, speaking of the testimony of an expert physician and surgeon, we said: "He may also give his opinion as to the nature of the instrument which produced a particular wound, the force required to produce it, and whether a given injury could have been inflicted by a weapon of a particular description." While the witness

had only observed a metal knuck wound one time this was sufficient to show that he had some experience with such wounds, and the results from wounds and the treatment of same were in the line of his profession and qualified him to give his opinion, both as to the nature and result of the wounds as well as the kind of weapon that produced them. See also *Miller* v. *State*, 94 Ark. 538.

(7-8) The court erred in refusing to permit Pone Dean to testify that he received information from his wife that the Robertsons had made threats that they were going to run him out of the country or kill him. While a wife under our statute is not a competent witness in behalf of her husband, that rule does not exclude the testimony of a defendant to the effect that his wife had informed him of threats that were made upon his life. The defendant is a competent witness in his own behalf and he may give testimony like any other witness concerning any fact that is relevant to the issue. Whether or not threats have been communicated to a defendant in a case like this is a substantive and affirmative fact pertinent to the issue, and no one could be more competent to establish the fact than defendant himself. The appellants had adduced testimony tending to prove that a pistol was seen on Curtis Robertson while in the church, and that Ford Robertson also while in the house was seen with metal knucks; that their attitude there was most unfriendly, and after they passed out of the church that they became the assailants. There was a decided conflict in the evidence as to all these matters. The issue was sharply drawn as to whether appellants acted strictly in self-defense and in defense of each other, and were, therefore, justified in the killing, or, if not, of what degree of punishable homicide under the circumstances were they guilty. Where such are the issues, testimony of threats by the deceased against the defendant and communicated to him, as well as testimony of the general reputation of the deceased for turbulence and violence, is always admissible. As is said in *Palmore* v. *The State*, 29 Ark. 248: "Threats, as well as the character of the

deceased, are admissible when they tend to explain or palliate the conduct of the accused. They are circumstantial facts which are a part of the *res gestae* whenever they are sufficiently connected with the acts and conduct of the parties as to cast light on that darkest of all subjects, the motives of the human heart." See also *Bell* v. *State,* 69 Ark. 148; *Smith* v. *United States,* Book 40, U. S. Supt. Ct. Reports (L. E.), p. 627.

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

SANDERS v. BERRY.

Opinion delivered July 14, 1919.

1. FRAUD AND DECEIT—SALE OF LAND—COMMISSION OF AGENT.—L. owned a zinc mine, and B. negotiated a lease thereof to H. and G., the lease containing an option to purchase for $20,000, with a provision for the payment of a substantial commission to B. H. and G. assigned the lease to a corporation of which one A. was the principal stockholder. Thereafter L. sold the mine to S., a sister of A., for $8,000 cash. *Held,* the chancellor was warranted in finding that the sale to S. was colorable merely, and that the real sale was to her brother, A., the title being put in her name for the purpose of defrauding B. out of his commission in making the sale.
2. FRAUD AND DECEIT—ACTS AND DECLARATIONS OF CONSPIRATORS.—When the connection of individuals to accomplish a fraud is shown, every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is original evidence against each of them.
3. FRAUD AND DECEIT—DECLARATIONS OF ONE CONSPIRATOR MADE IN THE OTHER'S ABSENCE.—Where a conspiracy between three parties to defraud a fourth out of commissions due under a contract is established, evidence of the declarations of two of the conspirators made in the absence of the third, is admissible in a suit against them all.

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

STATEMENT OF FACTS.

J. C. Berry brought this suit in equity against Mabel A. Sanders, Jas. C. Ley, J. M. Goldman, A. B. Hamilton, P. R. Papin, A. W. Sanders, F. J. Gilbrault, F. E. Newbery, W. S. Dennison and N. I. Reiter, to recover a commission alleged to be due him under a contract with Jas. C. Ley for the sale of certain mining lands and mining improvements in Marion County, Arkansas, by Ley to Mabel A. Sanders, and to have a lien declared on the lands to the extent of his commission.

A demurrer was sustained to the original complaint and the plaintiff filed an amended complaint. A demurrer was again interposed by Mabel A. Sanders to the amended complaint and the court dismissed the case as to all of the defendants except Jas. C. Ley and Mabel A. Sanders.

In July, 1915, Jas. C. Ley resided in Marion County, Arkansas, and owned 200 acres of land in said county and operated a zinc mine thereon. He owned valuable machinery and buildings, etc., used in connection with the operation of the mine which were affixed to the soil. On the 3d day of July, 1915, Ley, by a contract in writing, leased the lands and mine to A. B. Hamilton and J. M. Goldman. The lease contained an option clause under which the lessees had the right to purchase the land at any time within one year for the sum of $20,000, and it was agreed that should the sale be consummated under the option, all moneys payable on the royalties under the provisions of the lease and on the purchase price of the lands should be paid to the credit of Jas. C. Ley in the Bank of Yellville, Ark. It was further provided that the lease should remain in force for one year from the date thereof.

Jas. C. Berry was the agent of Ley in making the contract and procured Hamilton and Goldman to execute it. In order to pay him for his services, Ley executed in his favor the following instrument:

"Yellville, Ark., July 3, 1915.

"Bank of Yellville:

"You are hereby authorized, in case I, James C. Ley, effect a sale of the northeast quarter of the northeast quarter, section 6, township 19 north, range 17 west, the north half of the northwest quarter of section 5, township 19 and south half southwest quarter, section 32, township 20 north, range 17 west, under a lease and option this day executed to A. B. Hamilton and J. M. Goldman or their successor and assigns, to pay out of any money, paid into the bank on purchase of said lands, to J. C. Berry, the sum of $2,000 (two thousand dollars) as commission for services rendered in connection with the making of such sale.

"In event of failure of sale of the property, I agree to pay and authorize the bank to pay J. C. Berry one per cent. on all royalties paid on ores mined and sold from said property under such lease."

The lease and the contract to pay Berry, together with other papers pertaining to the transaction were put in a wrapper and placed in the Bank of Yellville. The following endorsement was written on the wrapper: "These title papers (deeds, patents and abstracts) are the property of James C. Ley of Dodd City, Arkansas, and by directions of both parties to a mining lease and option executed on the 3d day of July, 1915, by James C. Ley to J. M. Goldman and A. B. Hamilton are deposited in escrow in the Bank of Yellville to remain pending negotiations for purchase under said option; if lands are purchased under option, deeds and abstracts to be delivered to Goldman and Hamilton by their successors, otherwise to be returned to Ley, July 5, 1915."

The lease and option were duly assigned by A. B. Hamilton and J. M. Goldman to the St. Louis Zinc & Lead Company on the 2d day of August, 1915. This corporation was organized for that purpose and immediately went into possession of the property and spent about $5,000 in making additional improvements thereon. A. W. Sanders, a brother of the defendant, Mabel A. San-

ders, was the largest stockholder in the St. Louis Zinc & Lead Company.

J. C. Berry was the principal witness for himself. He testified substantially as follows: I am acquainted with only a part of the defendants, namely, Jas. C. Ley, A. B. Hamilton, J. M. Goldman, A. W. Sanders, N. I. Reiter and P. R. Papin. I do not know Mabel A. Sanders. I took A. B. Hamilton and J. M. Goldman to the Nakomis mine, the property in controversy, and together with Jas. C. Ley we went over all the property, examined the mill and all the machinery in the mill. We went to the shafts and different prospects that had been shown upon the property. We went to the store building and looked over the mine supplies. Hamilton and Goldman, after thoroughly examining the property, entered into the lease and option contract which is the basis of this lawsuit. Some time during the fall Ley came to me and wanted me to see some parties interested in the lease and see if we could not arrange a loan on the property. All of the parties interested except Ley and myself were nonresidents of the State. N. I. Reiter became the manager of the mine for the lessee. I told Ley I did not think the parties would lend him any money and he never had any conversation with me in regard to the sale until December 10, 1915, at which time N. I. Reiter, A. W. Sanders and J. C. Ley registered at my hotel and stopped there for a day or two. The next morning Ley said that Reiter and Sanders were down there to look over the papers in the bank and verify the papers in escrow there. He further stated to me that he was going to make a sale of the property and that I would get the amount of my commission as agreed upon. I told him that would be all right. Mr. Reiter and Mr. Sanders never said anything to me at that time as to what their business was in Yellville. I have never seen Mr. Ley since that day. During the latter part of December, 1915, Reiter brought a deed down from Ley to Mabel A. Sanders to the property in question and left it for record. I learned from Reiter then that Ley had conveyed the property to Mabel

A. Sanders by a quitclaim deed. Reiter also stated that he was the agent of Mabel A. Sanders and had negotiated the title for her and that A. W. Sanders did not know anything about the deal. He also stated that I was taken care of in the deal and that my commissions would be paid. He told me that Mr. R. A. Grund of St. Louis was Mabel A. Sanders' attorney and that he had drawn up the papers for her. Reiter continued to manage the mine after Ley conveyed the property to Mabel A. Sanders, but thereafter he acted for her instead of for the lessee. The lessee abandoned its lease after the conveyance by Ley to Mabel A. Sanders.

P. T. Glass was cashier of the Bank of Yellville at the time the lease and other papers were put in the bank and the instructions to the bank were filed with the papers. He testified that on or about December 10, 1915, Mr. Ley, Mr. Reiter, and Mr. Sanders all three came to the bank for the purpose of examining these papers and spent the greater part of an afternoon and some of the following forenoon in making the examination; that he was in St. Louis from the 11th to the 17th day of December, 1915, and in two or three days after he got there J. M. Goldman came to the hotel where he was stopping and told him to tell J. C. Berry that there was a scheme to beat him out of his commission on the sale of the Nakomis mine; that he told Berry about this.

W. E. Layton was the president of the Bank of Yellville and a brother-in-law of J. C. Berry. According to his testimony, Mr. Ley, Mr. Reiter and Mr. A. W. Sanders called at the bank for the purpose of examining the papers relating to the lease and option for the sale of the mine and the papers were turned over to them for their inspection. They came back the second time and examined the papers. Mr. Ley told me in the presence of Mr. Reiter and Mr. Sanders that Mr. Berry would be cared for according to the contract they had made with him. They said they were here for the purpose of closing a deal for the sale of the property. Mr. Ley went far enough to say that unless Mr. Berry was taken care of in the matter he would not sell it.

Mabel A. Sanders was a witness for herself. Her deposition was taken on interrogatories and cross-interrogatories at Los Angeles, California, where she resides. Her testimony is substantially as follows: I am a sister of A. W. Sanders, and my residence is Los Angeles, California. I was in the city of St. Louis, Missouri, in December, 1915, visiting my brother, A. W. Sanders. During the first part of December, 1915, J. C. Ley came to my brother's house in St. Louis and my brother introduced him to me. Ley wanted to borrow some money on a zinc and lead mine which he owned in Arkansas, but my brother would not let him have it. Ley then went to Chicago for the purpose of borrowing money on the mine, but was unable to do so. When he returned to St. Louis he tried to sell me the property. My brother told me that he was a stockholder in a corporation which was operating the mine under a lease for one year and that it had an option to purchase the property during the year. Ley offered me the property for $8,000. My brother told me all about the option contract his company had and advised me to buy the mine, saying that it was worth what his company had agreed to pay for it. Ley also advised me to buy the mine and said that it would be a splendid investment. On the 8th day of December, 1915, I got a ten-days' option in writing from Ley for the purchase of the mine. My attorney sent my brother to Yellville to compare the copies of the abstract and lease and option held by the Bank of Yellville. Upon his return I consummated the sale with Mr. Ley and paid him $8,000 in cash for the property. I had no agent. I made the deal myself direct with Mr. Ley in my attorney's office in the city of St. Louis. My attorney was not the attorney for the lessee of the mine, but was an attorney who sometimes transacted private business for my brother. I purchased the property for myself with my own money. I bought the property because I thought it was a fine investment and the chance of a lifetime to make some quick money. I purchased the property from Mr. Ley because I believed him and believed that it was

a good buy, and especially so on account of the lease and option to the St. Louis Zinc & Lead Company. My brother also believed it would be a fine buy for me. Both my brother and Mr. Reiter told me it was fine property. Before I purchased the property Mr. Reiter was managing it for the lessee. My brother was the chief stockholder in the corporation operating the mine under the lease. After I acquired the property, Mr. Reiter remained in possession for the St. Louis Zinc & Lead Company until it failed to go on with the work. He did do some business for me in relation to the property, such as paying the taxes, etc. Soon after I purchased the property the lessee surrendered the possession of it to me and Reiter became my manager in operating the mine. During the time the lessee was operating the mine I was informed that its engineer was wasting a large amount of money on the mine. My lawyer requested my brother to compare copies of the title papers and escrow agreement with the originals in the Bank of Yellville. Mr. Reiter and Mr. Ley were going back to the mine and went with my brother to Yellville. My brother reported that the papers were true copies. Ley executed a quitclaim deed to me to the property in controversy. He also executed a bill of sale to the machinery and other property.

It was shown in evidence by the plaintiff that he was informed that there was a fraudulent scheme on foot to cheat him out of his commission and that his attorney wrote to Ley and to the other parties interested with regard to the matter. Reiter had informed Ley that R. A. Grund of St. Louis, Missouri, was the attorney for Mabel A. Sanders and a letter was then written to him. He answered, pleading the press of other business engagements, and put Berry off until he could examine the matter and let him know the facts thoroughly. In the meantime, after receiving the money, Ley left the country and has not been back since.

Other facts will be stated and referred to in the opinion.

The chancellor found that the conveyance by Ley to Mabel A. Sanders was a simulated one and that it was made to her for the benefit of her brother, who was the real party in the transaction, in order to defraud Berry out of his commission under the lease and option contract. The defendant, Mabel A. Sanders, has appealed.

Williams & Seawel, for appellant.

1. The lower court erred:

(1) With reference to its action on the pleadings, and (2) with reference to its findings of facts and application of law thereto.

Appellant demurred to both the original and amended complaint and to the cause of action after plaintiff (appellee) had elected to treat her as trustee. She did not waive her demurrer by pleading over, because the plaintiff wholly failed to state a cause of action against her and she expressly reserved her exceptions to the ruling of the court on demurrer. 8 Ark. 74; 18 *Id.* 304; 107 *Id.* 285.

According to the allegations of the complaint as *controlled by the exhibits* thereto appellant bases his right of recovery upon the *sale* of this property for an agreed sum. There is no allegation that a sale was either made or prevented. The only allegation is that under such contract an *option to purchase* was duly executed by the principal of appellee. The exhibits control the averments of the complaint. 104 Ark. 459; 33 *Id.* 722; 94 *Id.* 372.

It is well settled that the commission claimed by a real estate broker is not due until performance by him of the contract of employment. In this case no performance is alleged. The allegations do not charge a liability either against Ley, the principal, or against appellant. 9 Corp. Jur. 604; 204 U. S. 228; 44 S. W. 819; Walker, Law of Real Est. Ag., § 85; Gross on Real Est. Brokers, p. 158, § 149; 111 S. W. 779; 106 *Id.* 1152.

Neither appellant nor her land were liable for a commission never earned. 104 Ark. 459-464; 204 U. S. 228; 104 Ga. 157; 70 *Id.* 56; 54 N. E. 418.

Her purchase was subject to the lease and option. This the vendor had a right to make and the vendee and appellant to purchase. 116 S. W. 494; 39 Cyc. 1233; Walker, Law of Real Est. Agency, § 91; 56 Atl. 455. There is nothing in the acts charged that would create or establish either a personal liability or fix a charge of trust on her land. 103 S. W. 417; 128 *Id.* 944; 136 *Id.* 1118; 81 Ark. 96. To impress a trust upon property and hold the possessor of the legal title as a trustee, it is necessary to allege and show an equitable right to the title or property. 126 Ark. 61, 65.

Because a party is dissuaded from accepting an offer through the interference of a third person affords no basis for recovery in law or equity, no matter whether the motives be good or bad. Until there is an acceptance of an offer there is no contract and no cause of action exists. 103 S. W. 417; 128 S. W. 944; 136 *Id.* 1118.

2. There is absolutely no evidence that sustains the findings of fact nor is the decree supported by any principle of law or equity.

J. C. Floyd, for appellee.

1. Appellant can not now for the first time complain of the action of the court on the pleadings, as she did not except at the time nor have her exceptions noted of record. She has waived all her rights to complain. 127 S. W. 708; 3 Ark. 207; 19 *Id.* 194; 1 Ark. 38. See also 85 Ark. 246; 107 S. W. 1177. The rule governing pleadings has no application here. 74 Ark. 572, 86 S. W. 1008; 22 Ark. 524.

2. The liability of defendant, James C. Ley, rests upon a special contract for services rendered in behalf of his principal in securing an executed contract of lease with option to purchase which is binding on the lessor during the full term thereof. 87 Ark. 506, 113 S. W. 35; 39 Cyc. 1247 L; 89 Ark. 289, 116 S. W. 662; 9 Cyc. 287 (b).

3. Ley became liable to appellee for his commission stipulated and the price he paid for the property is immaterial. 44 L. R. A. 349 (b), and note; 104 Iowa, 487; 92 Cal. 33-37

4. The sale by Ley to Mabel A. Sanders was by the consent and connivance of the St. Louis Zinc & Lead Company and for its benefit or the benefit of its stockholders and with the fraudulent purpose of defrauding him of his commission. If a principal, in order to defraud the broker of his commission, conveys to a third person for the customer found by the broker the broker may sue for the commission and is not compelled to sue for or bring an action of fraud. 9 C. J. 633, par. 106; 19 *Id.* 272, par. 2; 95 N. Y. App. Div. 154, 88 N. Y. Supp. 472.

The liability of Mabel A. Sanders to appellee rests wholly upon principles of equity which make her a trustee for the payment of the commission $2,000 for services rendered, and he is entitled to a lien. 3 Pom. Eq. (4 ed.), § 1044; 32 L. R. A. 298; Bispham, Eq. (4 ed.), § § 91-3, 218; 130 U. S. 122, 128; 151 U. S. 1, 25-27; 181 *Id.* 77, 89; 11 Enc. U. S. Rep. (Michie), 692; 39 Cyc. 172, subd. 6.

As to officers buying corporate property, see 21 Wall. (U. S.), 616; 10 Enc. Dig. Ark. Rep. (Michie), 323; 73 Ark. 310; 83 S. W. 910; 105 *Id.* 74; 121 *Id.* 1059; 11 *Id.* 479; 84 *Id.* 505.

5. A broker who is the "procuring cause" of a sale is entitled to his commission, although the actual sale is another cut wound on his elbow, almost right in the elbow made by his principal. 45 S. W. 418; 73 Ga. 295-301; 78 Tex. 92; 44 L. R. A. 350, note 5; 29 S. W. 46.

HART, J., (after stating the facts). It is first insisted by counsel for the defendants that the court erred in certain respects in its ruling on the pleadings. But little need be said in regard to this phase of the case. Chancery cases are tried *de novo* on appeal. The amended complaint is too long to set out at length in this opinion. We have carefully considered its provisions, however, and have reached the conclusion that the allegations are broad enough to warrant the relief granted by the chancellor provided they are established by a preponderance of the evidence.

(1) The principal issue in the case is whether or not the proof shows that the real transaction was between Ley and A. W. Sanders and that the conveyance of the property to Mabel Sanders was colorable merely for the purpose of defrauding the plaintiff, Berry, out of his commissions in the sale of the property. The law requires good faith in every business transaction and does not allow one party to intentionally deceive another by making false representations or by concealments. Fraudulent schemes are usually planned in secret and executed in the dark. For this reason it is oftentimes a matter of great difficulty to determine what one's motive may have been for this or that particular action. What you do and not what you say is often the key to open the door of your mind. Therefore, upon the issue of fraud, such as here raised, the plaintiffs should be permitted to thoroughly sift the transaction and to explore the entire field and to show any conduct and circumstances from which an inference of fraud may be legally inferred. It has been said that falsehoods are the ghosts of truth; the masks of faces. Another philosopher has said that a lie always needs a truth for a handle to it. The truth of these maxims is well illustrated in the case at bar. It is not to be doubted that Mabel A. Sanders had the right to purchase the property in question for her own use and benefit, and that if she did so, the property should not be burdened with a lien for Berry's commission. The bald testimony of Mabel A. Sanders tends to show that she purchased the property in good faith for an investment; but when her testimony is read and considered from its four corners, the court thinks it is contradictory and inconsistent with itself, and when viewed in the light of the attendant circumstances warranted the chancellor in finding that the sale to her was colorable merely and that the real sale was to her brother, A. W. Sanders, the title being put in her name for the purpose of defrauding Berry out of his commission in making the sale.

Mabel A. Sanders lived in Los Angeles, California, and was on a visit to her brother in St. Louis, Missouri,

when her connection with the transaction commenced. She had never heard of the Nakomis mine and did not know any of the parties connected therewith except her brother. She first said that her brother told her about a company in which he was the principal stockholder, leasing the land for one year and taking an option for the sale of it for the same time for the sum of $20,000. She stated that he told her that it would be a good way for her to make money quickly because his company would likely exercise its option during the year and that in that event she would receive $20,000 for the property less $2,000 commission, which would go to Berry. It is perfectly evident from her acts and conduct that she did not expect the lessee to exercise its option during the year. The lessee surrendered possession of the property to her soon after she purchased it and the same manager continued to operate the mine. The taxes were due just after she purchased the mine and the same manager attended to the payment of them for her. She made no effort to get the lessee to exercise its option to purchase at $20,000 or even for a reduced price. She acquiesced in it giving up its lease when by its terms it ran for a year. The lease was a profitable one to her and she could have compelled the lessee to have carried out the lease and operated it for the balance of its term. She knew her brother was the principal stockholder in the lessee corporation and was managing it and yet permitted it to surrender possession without an effort to induce it to exercise its option to purchase the property. If she had been induced by her brother to purchase the land upon the faith that his corporation would exercise its option to purchase during the term of its lease, it is perfectly natural that she would have made some effort to induce him to carry out his promise.

It is equally unreasonable to say that she bought it for an investment. She said that both her brother and Ley told her that it was a fine investment and that she thought there would be a good profit in the investment. At the same time she admits that she had been informed

that the engineer on the property was wasting a large amount of money on it. She said that she acted independently in purchasing the property and made the deal directly with Mr. Ley at her attorney's office. Her attorney was a stranger to her and was an attorney who some times transacted private business for her brother. She did not visit the mine either before or after its possession was surrendered to her by the lessee. She knew that a good deal of money had been wasted in operating it, and yet continued its operation under the same management. She returned to her home in California without ever going to see the mine. She says that she paid Ley the purchase price in cash. He was a stranger to her and this was a suspicious circumstance in itself. Ley immediately went to a distant part of the country and has not since returned to Arkansas. Berry was informed that there was a scheme on foot to cheat him out of his commission and immediately wrote to that effect to all the interested parties. Such a letter was written to the attorney of Mabel Sanders on the 29th day of December, 1915, and was duly received by him. He did not answer the letter until January 12, 1916, and asked for a delay until he could investigate the matter thoroughly. This was inconsistent with the statement of Mabel A. Sanders that she made the purchase direct from Mr. Ley without the help of her brother. If such had been the case it would have been easy for her attorney to have so replied at once. There would have been nothing to investigate. Mabel A. Sanders admits that her attorney sent her brother down to Yellville to examine the lease and option contract and papers deposited therewith for the purpose of seeing that the copies of them were true ones. As we have just seen, the circumstances all point to the fact that the lessee corporation did not intend to exercise this option and on that account it could make no difference to her about what the terms of that instrument might be. If the transaction with Ley was in good faith, she would acquire the title to the property. It is evident that an examination of these papers was made for the purpose of

knowing exactly what the obligation of the parties to Berry might be. If Mabel A. Sanders was to receive in good faith the title of Ley to the property, it could make no difference to her what the papers placed in escrow in the Bank of Yellville contained, for even if the lessee corporation exercised its option to purchase she would only have to pay $2,000 commission to Berry and she knew that everything in excess of the price she was to pay for the property and the amount of Berry's commission would be profit to her. It would make a difference to her brother, however, to know the exact terms of the option so that he would know definitely whether he could purchase the property in his own name and escape the payment of commissions to Berry. A. W. Sanders could not have purchased the property in his own name without violating the conditions upon which the lessee corporation was organized. Ley, Sanders and Reiter all went down to examine the papers together. While there, Ley told the president of the bank, who was the brother-in-law of Berry, that the property was about to be sold and that Berry would get his commission right away. At the time Reiter came down to record the deed from Ley to Mabel A. Sanders, he told Berry that the deal was made with Mabel Sanders for the purpose of protecting her brother, A. W. Sanders, in the money that he had expended on the mine under the management of Hamilton and Goldman. He said that A. W. Sanders had been out something like $5,000 in this way. The deed to Mabel Sanders was executed on December 8, 1915, and this case was tried in the spring of 1919. During all this time, so far as the record discloses, Mabel Sanders did not visit the mine, or try to sell it, although she says she bought it for resale for a quick return on her money. She made no complaint to her brother that the option of his company to purchase was not exercised. Reiter was the trusted agent of her brother. Neither of them testified in the case. It is true the burden of proof was upon Berry to show concerted action and collusion on the part of the defendants; but the court is of the opinion that this

has been done, and that the record, when read and considered from its four corners and viewed in the light of the attendant circumstances, shows that Mabel Sanders was a mere figurehead, and that the real transaction was with A. W. Sanders, the principal stockholder of the lessee corporation and the manager and director of its affairs and policies.

(2-3) But it is claimed that the statements of Ley to Layton in the presence of Reiter and Sanders and the statement of Reiter to Berry when he came down to file the deed from Ley to Mabel Sanders for record are not admissible. Of course, concert and collusion on the part of A. W. Sanders, Mabel Sanders and Reiter to cheat Berry out of his commission must be established before their declarations made in the absence of Mabel Sanders would be binding upon her. When the connection of individuals to accomplish a fraud is shown, every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them. Care must be taken that the acts and declarations thus admitted, be only those which were made and done during the pendency of the fraudulent enterprise, and in furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are to be rejected. *Clinton* v. *Estes,* 20 Ark. 216, and Jones' Commentaries on Evidence, vol. 2, sec. 254 (255).

We think the charge of collusion between these parties to cheat Berry out of his commission is established by the facts and circumstances introduced in evidence, when considered in connection with their acts and conduct. The transaction was not regarded ended until Reiter had filed the deed for record. He and A. W. Sanders were active participants during the whole course of the transaction. Reiter was manager of the mine and the confidential agent of A. W. Sanders while his company was operating the mine. He went with A. W. Sanders to

examine the escrow papers in the Bank of Yellville. He advised with the parties about the condition of the mine. He carried the deed from Ley to Mabel Sanders and filed it for record. He at once commenced to pay the taxes for her. The associates of A. W. Sanders became angry and charged him with bad faith when they found out about the conveyance to Mabel Sanders. This indicates a belief on their part that A. W. Sanders, the principal stockholder of the lessee corporation, was on a deal for the property under cover, and in violation of their rights, and did not intend that the lessee corporation should exercise its option to purchase the mine. Reiter continued right along in charge of the mine. Hence the court thinks that the declarations were made in the prosecution of the common object and before the termination of the unlawful enterprise. Therefore, so far as concerns the transaction for which the combination was formed, the parties were identified in interest and motive and what one said in the conduct of the matter may be used as evidence against the others.

It follows that the decree will be affirmed.

HUMPHREYS, J., not participating.

ALFREY HEADING COMPANY v. NICHOLS.

Opinion delivered July 14, 1919.

NEGLIGENCE—INJURY TO PERSON COMING ON PREMISES.—The owner or occupant of land is liable in damages to those coming on to it, they using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given no notice of.

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

STATEMENT OF FACTS.

C. C. Nichols sued the Alfrey Heading Company to recover damages for personal injuries sustained by stepping into a hole of hot water on the premises of the defendant caused by its alleged negligence.

The plaintiff was a witness for himself. According to his testimony, he had been working for the defendant at intervals for fifteen years and on the 1st day of November, 1917, he was pinning heading in the turning room for it. His brother, J. W. Nichols, was regularly employed by the defendant as assistant foreman and on the 1st day of November, 1917, was acting foreman. L. L. Priest was a stockholder in the defendant company and had charge of selling its wood. On the afternoon of November 1, 1917, the plaintiff went to his brother and told him that he wanted to lay off and haul some wood home. His brother told the plaintiff that he could not spare him and asked him to see Mr. Priest about getting the wood at night. He told the plaintiff that he would make arrangements with the night watchman to let him get the wood at night. The plaintiff went to see Priest, who had had charge of selling the wood for ten or twelve years and made arrangements with him to buy the wood and haul it after dark. The plaintiff quit work at six o'clock and about 7:30 o'clock, p. m., went on the premises with a wagon for the purpose of loading it with wood. He intended to load wood on the wagon that night for his father to haul for him the next morning. The plaintiff had to back the wagon around to get it in position for loading it with the wood. He did know there was any hole there and it was so dark he could not see the hole. In backing the wagon into position he stepped into a hole of hot water and burned his foot very badly. His father was with him and pulled his shoe off and in doing so brought the hide and flesh with it. The plaintiff's foot was so badly burned that he could not work for about one month and a half. He then returned to work but his foot hurt so badly that he had to quit and did not work any more until the following June. His foot pained him con-

siderably during all this time. The trial was had on the 14th day of March, 1919, and the plaintiff's foot hadn't gotten entirely well at that time.

On cross-examination the plaintiff admitted that steam arose from the hole, forming a vapor, but said it was so dark that he could not see it at the time of the accident, and only found it out after he was hurt. The hole had been there for a week or ten days, but the plaintiff had not noticed it during that time. There was a pile of clippings which obstructed his view from the place where he worked in the turning room. The hole was caused by a pipe bursting which passed from the boiler room under the ground to the kiln about twenty feet from the wall of the turning room. The wall of the turning room was solid except an open space the length of the wall about six or eight feet wide where the clippings are thrown out. The plaintiff did not know that the hole was there and did not notice the steam escaping there. It was the custom of the employees of the company to go on the premises at night and haul wood away which they had purchased from the company. The plaintiff paid Priest a dollar for the load of wood. The father of the plaintiff corroborated his testimony as to the manner in which the accident occurred and, also, in regard to the custom of the employees in hauling wood from the premises of the company after working hours. He testified that such had been the custom for several years.

L. L. Priest was a witness for the company. According to his testimony he had exclusive charge of selling the wood of the company and had been so employed for several years. He had exclusive charge of selling the wood and was paid a commission for his services. He admitted that he gave the plaintiff permission to go on the premises after working hours on the day in question for the purpose of hauling the wood. But he said that he had no authority to give him permission to do so after working hours. Six o'clock was the time when the mill was shut down. The night watchman testified that he talked with the plaintiff after the accident and the plaintiff admitted to him that he knew the hole was there.

Another witness for the defendant testified that a hole came in the steam pipe, which ran from the boiler room to the kiln, from rust; that the hole was 15 inches deep where Nichols stepped into it; that steam is conveyed from the boiler to the kiln to dry the heading; that when a hole comes in the steam pipe under the ground it is just like a kettle boiling constantly and causes steam and fog to come up all the time in cold weather; that it was a cold night in November when Nichols was hurt; that there was nothing to obstruct the vision or keep anyone from seeing the hole from the turning room; that it had been there a week or ten days.

The business manager of the company also testified that the plaintiff told him after the accident occurred that he knew the hole was there. The plaintiff denied telling the business manager and the night watchman that he knew the hole was there, and said that he did not know it was there; that it was too dark to see it when he was hurt and that he had not noticed it before that time and, also, denied knowing that Priest did not have authority to let him get the wood after working hours and again stated that it had been the custom of the employees to haul wood from the premises after working hours for several years.

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

E. L. Westbrooke, for appellant.

1. Appellee was an invitee and due care having been used there was no liability. 104 Ark. 243; 89 *Id.* 128; 119 *Id.* 251; 2 Words and Phrases (2 ed.) 1192. The purpose of one entering or using premises determines whether he is there by invitation. 20 R. C. L. 69; 29 *Id.* 454. Under the rule in 89 Ark. 128 there was no invitation from appellant to Nichols. His brother, although a foreman, under the facts creates the relation of invitor and invitee.

2. If not an invitee he was a mere licensee. 22 L. R. A. (N. S.) 1047; 77 Ark. 561-6; 90 *Id.* 278-285; 8 Am. St. 611; 103 Ark. 226; 114 *Id.* 218.

3. Nichols was himself negligent. 114 Ark. 218; 103 *Id.* 226; 29 Cyc. 514; 24 L. R. A. (N. S.) 497; 10 Allen 368; 121 Ark. 556-564.

Emerson, Donham & Shepherd, for appellee.

It is undisputed that a dangerous and unsafe hole was negligently created and permitted to remain on appellant's premises. The hole was unprotected and was a dangerous place, and all of appellant's officers knew of its existence. This clearly shows negligence. The verdict settles the liability, as it is not claimed to be excessive and there is no error in the instructions. 29 Cyc. 453, 471; 77 Ark. 561; 89 *Id.* 122; 104 *Id.* 236.

HART, J., (after stating the facts). The principal question presented for our consideration is whether the trial court erred in refusing to direct a verdict for the defendant. It is contended that plaintiff was at most a licensee to whom the defendant owed no duty except to refrain from wilfully or wantonly injuring him while on the premises. We cannot agree with this contention. We think the undisputed evidence shows that the plaintiff was on the premises for the mutual advantage of himself and of the defendant and for that reason was there under an implied invitation of the defendant.

L. L. Priest was a witness for the defendant. According to his testimony he had exclusive charge of selling its wood at the time the accident occurred and had been so employed for several years past. His own testimony makes him an employee of the company and not an independent contractor. He sold the wood for the defendant and received a commission therefor. He did not buy the wood and sell it again on his own account. His testimony is corroborated by that of the other witnesses and made him an employee of the company.

Mr. Thompson in discussing the liability of the owner for injuries from dangerous places on his grounds to persons coming there for the common interest or mutual advantage of both parties, quoted with approval the following clear enunciation of the rule by Judge Gray of

the Supreme Court of Massachusetts: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of." Thompson's Commentaries on the Law of Negligence (2 ed.), vol. 1, sec. 985.

This court has approved the rule as above stated. *Hobart-Lee Tie Co.* v. *Keck,* 89 Ark. 128; *St. L., I. M. & S. R. Co.* v. *Wirbel,* 104 Ark. 243; *St. L., I. M. & S. R. Co.* v. *Dooley,* 77 Ark. 561, and *St. L., I. M. & S. R. Co.* v. *Duckworth,* 119 Ark. 246.

The testimony shows that the hole in the ground was caused by the pipe rusting and making a hole in it so that the steam escaped from the pipe and formed a hole of boiling water. This condition had existed for a week or ten days and its existence was known to the defendant. As we have just seen, the plaintiff went upon the premises for the purpose of loading some wood which the defendant had sold him and stepped in the hole while backing his wagon into position preparatory to loading it. He had been directed to go there by the servant of the company who had exclusive charge of selling the wood. It is true this servant testified that he did not have authority to direct the plaintiff to go there for wood after working hours, but he had been exercising such authority for years and the plaintiff did not know of any limitation upon his authority in this respect. Under these circumstances the negligence of the defendant was a question for the jury.

It is also insisted that the plaintiff was guilty of contributory negligence as a matter of law and for that reason was not entitled to recover. We do not agree with counsel in this contention. As we have seen, the plaintiff was on the premises at the implied invitation of the defendant and it was dark when he got to the place where

the accident occurred. It is true, according to the testimony of a witness for the defendant, steam was escaping from the pipe in the ground which caused a vapor to arise from the ground. The plaintiff, however, testified that he could not see the vapor on account of the darkness and did not know that the hole was there. The hole had been there for a week or ten days and was in plain view from where the plaintiff worked in the turning room. According to witnesses for the defendant, the escaping steam or vapor could be easily discernible by any one working in the turning room. The plaintiff, however, said that his view in that direction was obscured by clippings which were thrown from the turning room through the opening and lay piled upon the ground. He stated positively that he had not noticed the escaping steam and did not know that the hole was there. He had no occasion to make an investigation of the matter and it is entirely within the range of probability that he was so engrossed in his work that he did not observe the steam escaping or the vapor rising from the ground at the place in question. Under the circumstances, the contributory negligence of the plaintiff was, also, a jury question.

It is next insisted that the court erred in refusing instruction No. 2. The instruction is as follows: "You are instructed that if the plaintiff was on the yard for his own convenience at the time he was injured, he was not an employee but was a licensee; and the company owed him no duty to exercise even ordinary care in maintaining safe premises for him to go upon."

There was no testimony upon which to predicate the instruction and the court did not err in refusing it. As we have already seen, the undisputed evidence shows that at the time the accident occurred the plaintiff was there for the purpose of hauling away some wood which he had purchased from the defendant. He was given permission to go there at that hour, and, being upon the premises in the common interest of himself and of the defendant, he was there at the implied invitation of the defendant. There was no testimony upon which to predicate an

instruction that he was on the premises as a mere licensee.

The case was submitted to the jury upon proper instructions, framed in accordance with the principles of law above announced, and, finding no prejudicial error in the record, the judgment will be affirmed.

MURPHY v. BOOKER.

Opinion delivered July 14, 1919.

1. MORTGAGES—DEED AS MORTGAGE.—Where it appears that a deed, absolute in form, was intended as a mortgage, equity will carry out the real intention of the parties.
2. MORTGAGES—DEED AS MORTGAGE—EFFECT OF NEW CONTRACT.—Although the intention of the parties at the time of execution was that a deed, absolute in form, was in fact a mortgage, they are bound by the terms of a contract, subsequently entered into, wherever it is in conflict with the original agreement, when the new contract is founded upon an adequate consideration, and is fair and reasonable in its terms, and free from fraud.
3. EQUITY OF REDEMPTION—WAIVER.—The equity of redemption may be waived by a written agreement.
4. MORTGAGES—DEED AS MORTGAGE—AGREEMENT THAT THE DEED STAND.—Although a deed absolute in form is made a mortgage by a collateral agreement, the contracting parties may then, for a valuable consideration, agree that the deed stand.
5. DOWER — SEIZIN IN HUSBAND — EQUITABLE ESTATE.—Under the statute giving the right of dower, there may be dower in an equitable estate, but there must be such a right of immediate possession on the part of the husband as to constitute seizin in law.
6. DOWER—EQUITABLE ESTATE—FORECLOSURE.—A. owned lands and lost title by the foreclosure of a mortgage thereon. B. purchased at foreclosure sale, and later sold to C. The time for redemption expired, but A. and C. entered into an agreement whereby A.'s right of redemption was recognized by C. Thereafter A. and C. entered into a second agreement cutting off A.'s right. *Held,* A.'s title was extinguished by the foreclosure sale to B. and that A. did not reacquire title, either legal or equitable, so as to constitute an estate of inheritance with seizin in fact or in law under his first agreement with C.; at most he acquired only an equitable right to hold C. as a trustee and he still had the

power to contract away the rights thus acquired, which he did, and therefore *held,* that A.'s wife was without right to redeem the lands from C., according to the terms of the first agreement.

Appeal from Lafayette Chancery Court; *James M. Barker,* Chancellor; reversed.

Searcy & Parks, for appellant.

1. The transaction was a deed. Plaintiff had no title to the land, either legal or equitable, which must exist to constitute a mortgage. 86 Ala. 289; 5 So. 722; 55 Ala. 607; 96 Ill. 456; 16 Fla. 466; 13 Ill. 186; 60 *Id.* 516; 20 Am. Dec. 145; 77 Pa. 134; 73 Ill. 156; 172 *Id.* 82; L. R. A. 1916 B, p. 154, § 98.

2. The evidence fails to show that the deed was a mortgage. 153 S. W. 797. To show that a deed, absolute on its face, is a mortgage to secure a debt, the evidence must be clear, unequivocal and convincing. 88 Ark. 299; 75 *Id.* 551; 165 S. W. 273; 113 N. Y. 991; 92 N. E. 1077; 53 So. 814; 113 Pac. 34; 61 So. 881; 46 *Id.* 851. It must have been the intention of both parties, when the deed was executed, to execute a mortgage. 45 So. 168; 22 Kan. 661; 55 *Id.* 82; 39 Pac. 1024; 79 *Id.* 929; 19 R. C. L., § 35, title, Mortgages; 114 Ark. 121; 200 S. W. 1023.

All the circumstances tend to show that the transaction was not a mortgage. Plaintiff, under the agreement, had no right to tender the amount and demand a deed. The tender was not in good faith and plaintiff is estopped to claim the deed was a mortgage. 89 Va. 628; 16 S. E. 749; 206 S. W. 749; 96 U. S. 544.

3. The exceptions to the master's report should have been sustained.

J. M. Carter, for appellees.

1. The instrument was a mortgage and under the facts Murphy did not establish his debt and was not entitled to foreclose against Booker and the lands.

2. Booker had equities in the land—the right to redeem from the two sales to Paschal. Kirby & Cas. Digest, sections 5814 and 8748; 54 Ark. 457; 38 Ark. 364, 270; 13 *Id.* 112. In doubtful cases the court should

construe the contract to be a mortgage rather than an absolute sale. 27 Cyc. 1799, 1801; 165 S. W. 278; 106 *Id.* 489; 134 Ark. 196; 71 N. Y. 176.

3. Mrs. Booker had the right to redeem. The great preponderance of the evidence shows that the land was worth more than $50,000. 6 Ark. 274; 52 N. Y. 551; 42 Cal. 169; 8 Kan. 380; 21 N. Y. Eq. 414; 4 W. Va. 4; 65 N. C. 520.

The evidence shows that the contract was intended to be a mortgage, and the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees and the instrument remains a mortgage until the equity of redemption is foreclosed and the mortgagee can not have ejectment until after foreclosure. 1 Rice on Ev. 269; 31 N. Y. 399; 19 N. J. Eq. 166; 25 Ia. 19.

4. The rents charged were supported by the weight of the testimony. The mortgage to the American Investment Company was assumed by Murphy in the deed from Paschal and had never been foreclosed and Mrs. Booker had the right to redeem. Kirby & Castle's Digest, § § 2901, 4311, 7437, 4750, 7443; 57 Ark. 248; 94 *Id.* 107; 55 *Id.* 235; 85 U. S. 141. She was not barred by the foreclosure, as her right to dower was not directly in issue. 86 Ark. 540; 67 *Id.* 15; 61 *Id.* 547; 27 Cyc. 1807; 3 L. R. A. (N. S.) 1068; 53 N. Y. 298; 13 Am. Rep. 523; 2 Jones on Mortg. (6 ed.), § 1067; Thomas on Mortg. (2 ed.), § 622; 73 Va. 413.

McCULLOCH, C. J. This is an action instituted by appellees in the chancery court of Lafayette County against appellant in which the court was asked to declare a certain deed of conveyance in absolute form to be a mortgage and to allow redemption therefrom.

The lands in controversy aggregate 1,242 acres, of which a large portion is in cultivation and they were originally owned and occupied by appellee, Paul M. Booker. His wife, Martha E. Booker, joined with him in this suit. On December 11, 1913, appellees conveyed the lands to appellant by deed absolute in form reciting a considera-

tion of "the sum of one dollar and other valuable considerations." It is alleged that this deed, though absolute in form, was intended by the parties as a mortgage. Appellees had previously mortgaged the land to the American Investment Company to secure indebtedness to that concern, and also to the Windsor Trust Company to secure a large debt. The first mentioned mortgage had been foreclosed by decree of the chancery court and the statutory period of redemption had expired and a deed had been executed by the court's commissioner to W. B. Paschal, the purchaser, about two months before the execution of the deed by appellees to appellant. Paschal held title under his deed at the time of the conveyance to appellant and had also purchased the land under a foreclosure decree rendered by the chancery court of Lafayette County to enforce levee taxes due the improvement district known as the Long Prairie Levee District. The time for redemption under that sale had, too, expired and Paschal had received his deed from the court's commissioner. Appellant, after receiving the deed from appellees, also secured a conveyance from Paschal, the same being executed for the consideration of $37,400, which included the assumption by appellant of the payment of the unforeclosed mortgage to the Windsor Trust Company.

Appellees alleged in their complaint that, at the time of the execution of their deed to appellant, Paul M. Booker was still the owner of the land and had the right of redemption from the judicial sales to Paschal, but that he was financially embarrassed and unable to redeem from the sales of the land and pay off the other indebtedness, and that appellant at that time entered into an oral agreement with him to the effect that appellant should redeem the land from Paschal and allow him (Booker) to redeem by repayment of the sums paid out by appellant with eight per cent. interest, and that it was also agreed that Booker should remain in possession of said lands and cultivate the same from year to year and that if the lands could be sold, the profits over and above the ex-

penses of redemption would be divided between the parties. Appellant denied in his answer that appellee Booker owned the lands or had the right of redemption from the sales to Paschal or that there was any agreement, oral or otherwise, entered into by him with Booker whereby the latter was to be permitted to redeem the lands. He alleged in his answer that the only agreement entered into at that time was to the effect that, if Booker could find a purchaser for the lands at a price acceptable to appellant, Booker should receive a certain portion of the sale price over and above the sums paid by appellant for the purchase of the lands. Appellant also alleged in his answer that there subsequently arose a controversy between him and appellee Booker as to the terms of their agreement and that on January 6, 1915, they entered into a written contract which settled the rights of the parties. The contract is exhibited with appellant's answer. It recites the controversy between the parties and that the contract was to be in "compromise and settlement of their differences," and, after reciting a statement of the amount necessary to reimburse appellant for the sums so paid in the purchase of said lands, provides in substance that if Booker should find a purchaser for the lands at any time within three years from that date at a price not less than $50 per acre, and the sale be consummated, out of the proceeds of sale appellant should be reimbursed in the sum of of $40,480.10 theretofore expended by him in the purchase and all sums expended by him between that date and the date of sale for improvements, including clearing and repairs, with interest at eight per cent. and that the excess price obtained for the land over and above the total of the above mentioned sums should be equally divided between the parties. The contract concludes with the following paragraph:

"In the event that a purchaser who is ready, able and willing, as above defined, to purchase said lands at the price herein set out, to-wit: Not less than $50 an acre, is not produced by party of the second part within three years from this date, then in that event any and all in-

terest or claims of party of the second part in and to any profits arising from the sale of said lands, and any and all claims or interest in or upon said lands by virtue of the contract mentioned as a part of the consideration in his deed to the party of the first part dated December 11, 1913, shall terminate and be forever barred, and all indebtedness herein mentioned as being due from party of the second part to party of the first part shall by said event stand satisfied and canceled."

The cause was heard by the chancellor on conflicting testimony as to the substance of the oral agreement between the parties at the time of the execution of the deed by appellees to appellant. The chancellor found in favor of appellees and declared the deed to be a mortgage, and after reference to a master ascertained the balance due, and allowed a redemption.

We deem it unnecessary to discuss the testimony in detail or to determine whether or not it was sufficient to justify the finding that the deed was intended as a mortgage. We will rest our decision on another phase of the case. Suffice it to say that there was a conflict in the testimony and that at the time of the execution of the contract of January 6, 1915, a controversy had been pending between the parties as to the substance of their oral agreement. Nor do we deem it necessary to determine whether or not appellees had such an interest in the lands at the time they conveyed to appellant as to legally justify the claim that the deed should be treated as a mortgage. The time for redemption from the sales of the lands to Paschal had in fact expired, and the title of Booker had been extinguished, but he testified that Paschal, or the mortgage company, had verbally agreed to extend the time for redemption, and according to Booker's testimony the parties to the transaction now under consideration proceeded upon the assumption that he (Booker) had an interest in the lands and that the purchase by appellant from Paschal was to be treated merely as a redemption. Assuming, therefore, without deciding, that under the circumstances described there was an

agreement between Booker and appellant, which the latter should in equity have been bound to observe, with respect to treating the conveyance as a mortgage, we proceed to a determination of the question urged by counsel for appellant that in any event, appellees are bound by the contract of January 6, 1915.

(1) We are of the opinion that the contention is sound. Conceding that the original conveyance in absolute form was intended by the parties as a mortgage, yet there subsequently arose a *bona fide* controversy between the parties concerning that fact, and they adjusted the matter by a new contract, which speaks for itself. The equitable doctrine regarding declaring a deed in absolute form to be a mortgage so as to conform to the real intention of the parties has often been announced by this court, and in whatever form the contract may be expressed in writing, a court of equity will carry out the real intention of the parties by declaring the written deed or contract to be a mortgage when it is shown by evidence "clear, unequivocal and convincing" that such was the intention of the parties. *Wimberly* v. *Scoggin, Receiver,* 128 Ark. 67.

(2) But it is equally clear that when the parties to a dispute see fit to adjust their differences by a new contract covering the subject-matter they are bound by it, whatever may have been the original effect of the transaction. The doctrine is stated as follows in a text book on the subject:

"By an independent parol agreement the mortgagor may waive his right under a deed which originally, in effect, was a mortgage, and if this agreement is supported by a consideration, or is partially acted on by the parties, or fully performed, the mortgagor is estopped to deny the grantee's absolute title. The grantee has the legal title already, and the grantor may cut off all right to redeem by a receipt of an adequate consideration thereof, and an informal release of all his interests in the property. But the new agreement must not only be founded on adequate consideration but must be fair and

reasonable in its terms and free from fraud or undue influence." 1 Jones on Mortgages, § 338. The text is supported by the following authorities: *Perkins* v. *Drye,* 3 Dan. 170; *School* v. *Hopper,* 134 Ky. 83; *Scanlan* v. *Scanlan,* 134 Ill. 630; *Cramer* v. *Wilson,* 202 Ill. 83; *Hutchinson* v. *Page,* 246 Ill. 71; *Jordan* v. *Katz,* 89 Va. 628; *McMillan* v. *Jewett,* 85 Ala. 476; *Haggarty* v. *Brown,* 105 Iowa 395; *Sears* v. *Gilman,* 199 Mass. 384.

(3-4) The Kentucky Court of Appeals in the case of *School* v. *Hopper, supra,* concluding the discussion on this subject said: "Inasmuch as the deed was absolute in form, and was made a mortgage by the collateral agreement, it was within the power of the contracting parties for a valuable consideration to agree that the deed should stand as made." For a much stronger reason, the equity of redemption may be waived by a written agreement. The settlement of the dispute and the mutuality of the terms of the new contract furnish the consideration for its execution. This view of the matter is sustained by the decision of this court in the case of *Bazemore* v. *Mullins,* 52 Ark. 207, where the court held that under a conveyance of land in absolute form, but intended as security for debt, the mortgagor could estop himself by his conduct from asserting title to the land. Of course, if it were shown that the new contract, notwithstanding it was in the form of an agreement concerning the sale of the property, was really intended as a continuation of the mortgage, then a court of equity would enforce it as such, but there is no testimony in this case which would warrant any such conclusion. When this contract was entered into the parties had, as before stated, been in controversy for some time as to the terms of the original agreement. They were both represented by counsel in their several meetings for the purpose of discussing a settlement and this contract was submitted to and approved by appellees' counsel before it was signed. There was no advantage taken of Booker in the negotiations, and the proof is clear that he understood fully the effect of the contract he signed. It is true that

he claims that he objected to the terms of the contract at the time he signed it and gave notice to appellant that he would insist on his right to redeem from the mortgage, but he could not thus accept the terms of the contract by signing it and repudiate it by giving notice that he would not live up to it. The intention to continue the existence of the mortgage must have been a concurring one in order to justify a court of equity in preserving the right to redeem. *Rodgers* v. *Burt,* 157 Ala. 91. The preponderance of the testimony is to the effect that Booker did not object to the contract on the ground that it excluded his right to redeem, but his objection was concerning another feature of the contract. But, whatever may have been his expressed objection to the contract, he bound himself to compliance with its terms by signing it, and he can not, after the parties have acted upon it until the expiration of the time allowed before making the sale, recur to the original agreement which was settled by the contract. Not only did Booker wait until the time had nearly expired before he made any further objection to the contract or offered to redeem, but the proof shows that appellant took possession of the lands and made valuable and expensive improvements.

(5-6) It is contended, however, by counsel for appellees that, even if Paul Booker was estopped by the contract to assert the right of redemption, his wife, Martha E. Booker, was not a party to the contract and had the right to redeem according to the original agreement. This contention is based upon the assertion that a part of the lands constituted the homestead of appellees and that she also had an inchoate dower right.

The lands did not constitute the homestead. For two years before the purchase of the lands by appellant from Paschal they had been in the hands of a receiver appointed in the foreclosure suit and appellee Booker had occupied them merely as a tenant of the receiver. Paschal acquired the title from the foreclosure sales and conveyed it to appellant. It is true that Booker occupied the lands during the year 1914, but he did so under

the agreement with appellant to pay rent. He moved off the premises about the time the contract of January 6, 1915, was executed.

There was no inchoate dower right for the reason that the husband, Paul M. Booker, was not seized of an estate of inheritance after his title was extinguished under the foreclosure sales to Paschal. Under our statute giving the right of dower, there may be dower in an equitable estate, but there must be such a right of immediate possession on the part of the husband as to constitute seizin in law. In *Tate* v. *Jay,* 31 Ark. 576, the court said: "Seizin is either in deed, or in law; seizin in deed, is actual possession; seizin in law, the right to immediate possession. Unless such seizin existed during coverture there can be no dower, because it is an indispensable requisite to her right to dower, so declared by statute." Since Booker's title had been extinguished by the foreclosure sales to Paschal, he did not re-acquire title, either legal or equitable, so as to constitute an estate of inheritance with seizin in fact or in law under his original agreement with appellant. He, at most, acquired only an equitable right to hold appellant as a trustee and he still had the power to contract away the rights thus acquired. He could do so either by his contract in writing or by acts constituting estoppel as was held in *Bazemore* v. *Mullins, supra.*

We are of the opinion, therefore, that the chancellor erred in failing to give effect to the last contract between the parties and in rendering a decree in favor of appellees. The decree is, therefore, reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

HOLYFIELD, RECEIVER, v. DAVIS.

Opinion delivered July 14, 1919.

1. BANKS AND BANKING—INSOLVENT BANK—WITHDRAWAL OF STOCK AND NOTES GIVEN FOR STOCK—LIABILITY OF STOCKHOLDERS.—Stockholders of an insolvent bank who wrongfully withdrew funds paid for their stock or who were indebted for stock subscribed, and withdrew their notes, are liable *pro tanto* to the creditors of the insolvent bank.
2. BANKS AND BANKING—WITHDRAWAL OF STOCK—INSOLVENCY—LIABILITY OF STOCKHOLDERS TO CREDITORS.—The stockholders of the C. bank withdrew their stock, and others who had given notes for stock withdrew the said notes. This action rendered the bank insolvent, as the bank at the time was indebted to the J. bank on a note and an overdraft. One H., president of the C. bank, then delivered his note to the J. bank in a sum covering both note and overdraft, and the J. bank endorsed the note of the C. bank to him *without recourse* and assigned the overdraft to him for collection. H. brought suit and had a receiver appointed for the C. bank. *Held,* the stockholders of the C. bank who had wrongfully withdrawn paid for their stock, or who were indebted for stock subscribed, were liable *pro tanto* to the creditors of the insolvent C. bank; and that the debt from the C. bank to the J. bank on its note and overdraft were not canceled by the execution of the new note by H. and the assignment of the original note to H. without recourse.

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

STATEMENT OF FACTS.

This action was instituted on January 25, 1915, by W. B. Holyfield, as receiver of the Bank of Cave Springs, against W. C. Davis and others.

It is alleged in the complaint that the Bank of Cave Springs was an Arkansas banking corporation and that on the 11th day of May, 1911, the same was insolvent; that W. C. Davis and others, naming them, were stockholders. After naming the various parties and the number of shares held by each, and the par value thereof, it is further alleged that, on the 10th day of May, 1911, the Bank of Cave Springs was indebted to the Judsonia State Bank in the sum of $2,500, evidenced by its prom-

issory note, executed in June, 1910, bearing interest at the rate of ten per cent. per annum; that, on that date, the stockholders named in the complaint passed a resolution canceling the certificates of stock and directing that the stockholders be repaid in cash the amount of stock subscribed and paid for by them; and that the notes be returned to those who had executed notes for their stock; that, pursuant to this resolution, each of the stockholders named received, through the cashier of the Bank of Cave Springs, assets belonging to the bank equivalent to the amount of stock subscribed for by him; that, by this act of the stockholders the Bank of Cave Springs was rendered insolvent; that E. R. Hughes, who was president of the Bank of Cave Springs, individually endorsed the note that was executed by the Bank of Cave Springs to the Judsonia State Bank, and that, on the 9th day of October, 1911, Hughes, for the purpose of taking up the $2,500 note and the overdraft due from the Bank of Cave Springs to the Judsonia State Bank, executed his promissory note in the sum of $3,561.67, due on the 9th of April, 1912, bearing interest at the rate of ten per cent. per annum; that this note was executed under a contract with the Judsonia State Bank whereby it agreed to assign to Hughes the original bank note, which had been individually endorsed by him, and also the overdraft which he had assumed for the purpose of enabling him to collect the same; that, subsequent to October 9, 1911, the Judsonia State Bank, in due course of business, sold the note of $3,561.67, executed by Hughes, and also its note and overdraft for like amount against the Bank of Cave Springs, to the Pangburn State Bank; that the Pangburn State Bank thereafter recovered judgment against Hughes on said note in the sum of $3,831.50; that Hughes brought suit in the chancery court and had a receiver appointed for the Bank of Cave Springs, and as a result of that suit, Holyfield was appointed receiver, and, as such, brings this suit; that Hughes executed all of the notes mentioned for the benefit of the insolvent Bank of Cave Springs and its stockholders; and that the

Pangburn State Bank, which had obtained the judgment in the chancery court against Hughes, should be subrogated to the rights of Hughes; and that the defendants, the stockholders named, should be required to pay the amount of their judgment to the receiver for the use and benefit of the Pangburn State Bank and other claimants against the Bank of Cave Springs. The prayer was for a judgment against each of the defendants in the sum of the par value of their several certificates of stock, which sums are designated.

The answer denied all the material allegations of the complaint, and, among other things, alleged that "if E. R. Hughes executed any note to the Judsonia State Bank, it was executed by Hughes voluntarily and that neither the Bank of Cave Springs nor any of the defendants were liable for the note."

E. R. Hughes was one of the original defendants to this action. He died and the cause has not been revived as to him.

Witness J. N. Rachels testified in part: "I know personally that the assignment made by the Judsonia State Bank to E. R. Hughes of the $2,500 note and the overdraft of $893 was made solely for the purpose of concentrating the indebtedness of the Bank of Cave Springs as near as possible to enable Mr. Hughes, who was on the ground, to proceed with the litigation for the benefit of the Judsonia State Bank and its assignee, and I further know it was never intended that Mr. Hughes should have any right, title or interest in or to the $2,500 note or the overdraft account. In fact, Mr. Hughes was a joint maker on the $2,500 note with the Bank of Cave Springs, and, as president of the bank, was liable for the overdraft, and his note for $3,561.67, and that the vendor note on the Texas lands was given as additional security for the Bank of Cave Springs' indebtedness and to stay suit, or rather to delay the bringing of suit, for a period of twelve months." He further testified:

"In October, 1911, I came to Cave Springs to see E. R. Hughes, as president of the Bank of Cave Springs,

and J. G. McDaniel, as its cashier, with complaints in hand to file against them in favor of the Judsonia State Bank. After some discussion, Hughes reached the conclusion that he was liable for the whole of the indebtedness of the Bank of Cave Springs to the Judsonia State Bank, which was $3,561.67, and he offered to execute his personal note for that amount, on condition that we delay the bringing of the suit for six months and transfer to him the original note of the Bank of Cave Springs for $2,500 and the overdraft account of $893. This deal, however, was not closed up at that time, but conditionally agreed upon with the understanding that I would submit the proposition to the Judsonia State Bank and Mr. Hughes wrote a letter to the Judsonia State Bank, outlining the proposition and urging the bank to accept the settlement, and, after some delay, the Judsonia State Bank did accept the matter of settlement and transfer by endorsement without recourse of both the $2,500 note and the overdraft account. It was distinctly understood, however, that no amount of said indebtedness should be assigned to E. R. Hughes as his property, but assigned to him as our trustee, or agent, for collection, and he immediately after he had executed the note for $3,561.67 went with me to the office of L. H. McGill, representing the matter. In the interim, some time between that visit and another visit in April, the Judsonia State Bank sold and assigned the E. R. Hughes note for $3,561.67 and the Cave Springs Bank note for $2,500 and interest, and the Cave Springs Bank overdraft for $893, to the Pangburn State Bank for a consideration of $3,600 at the time paid.

Witness Rachels further testified that Hughes recognized the Pangburn State Bank as the legal holder of his personal paper, and also the legal holder of the $2,500 note and overdraft of the Bank of Cave Springs and that Hughes wrote Harry Churchill, who was president of the Pangburn State Bank, to that effect. He further testified:

"At the time of purchase of the Hughes note by the Pangburn State Bank and Judsonia State Bank, the

Pangburn State Bank was not personally acquainted with said E. R. Hughes, and it knew at said time that the Bank of Cave Springs was defunct." Witness was asked why the Pangburn State Bank would purchase the note under such circumstances, and answered: "The Pangburn State Bank knew under the law that the stockholders would be liable for the payment of the same."

Witness Ergenbright, who was the president of the Judsonia State Bank, testified that he had been in the banking business for ten years, at Judsonia. He corroborated substantially the testimony of witness Rachels. He stated that the Judsonia State Bank delivered to Hughes the $2,500 note and overdraft account at the time he executed his individual note to the Judsonia State Bank to enable him, Hughes, to hold the notes and overdraft and sue the stockholders of the Bank of Cave Springs and collect for the account of the Judsonia State Bank. Hughes promised to have the affairs of the Bank of Cave Springs placed in the hands of a receiver, and to make the collections in that way. He brought suit and had the receiver appointed. He also testified that the note of the Bank of Cave Springs to the Judsonia State Bank, for $2,500, and the overdraft account of $893 were assigned to Hughes without recourse, on or about the 23d day of October, 1911, and that the note given to the Judsonia State Bank by Hughes for $3,561.67 was also assigned to the Pangburn State Bank without recourse. The $2,500 note and the overdraft were in the hands of Hughes to be collected for the account of the Judsonia State Bank at the time same were sold to the Pangburn State Bank.

Harry Churchill testified that he was president and business manager of the Pangburn State Bank in October, 1911, and April, 1912; that he was authorized to buy and sell notes; that he purchased for his bank, through Ergenbright, from the Judsonia State Bank, the note given by E. R. Hughes for $3,561.67, including the note of $2,500, executed by the Bank of Cave Springs and endorsed by E. R. Hughes, and the overdraft account

against said bank of $893; that he purchased the same in the ordinary course of business; that at the time he purchased the note, the Judsonia State Bank and the Pangburn State Bank had no connection whatever. The Pangburn State Bank paid face value for the Hughes and Cave Springs indebtedness. The Hughes note and the Cave Springs note and overdraft were purchased as the same indebtedness at the same time. Pangburn State Bank brought suit against Hughes on his personal note and included the note of the Bank of Cave Springs and the overdraft, for the reason that Hughes was preparing to make the collections out of the stockholders, through the receiver. The Pangburn State Bank paid the costs and lawyers' fees to have the Bank of Cave Springs, through Hughes, placed in the hands of a receiver. He further testified he never saw Mr. Hughes and had never had a letter direct from him with reference to the matter.

There was introduced as evidence the proceedings in the chancery court, wherein the Pangburn State Bank was the plaintiff, and E. R. Hughes and others, among them the receivers of the Bank of Cave Springs, were defendants. The receivers of the Bank of Cave Springs were also cross-complainants. There was a decree rendered in that case in favor of the Pangburn State Bank against Hughes, in the sum of $3,831, which decree was to bear interest at the rate of ten per cent. No decree was rendered in favor of the plaintiff against the Bank of Cave Springs for the amount of the $2,500 note and overdraft of $893, and the cross-complaint of the receivers of the Bank of Cave Springs was dismissed for want of equity. There was considerable testimony as to the stock subscriptions and the amount of stock owned, which we will not set forth for reasons stated in this opinion. The testimony was exceedingly voluminous, and we will not set it out further in detail. The court found that there was no equity in the plaintiff's complaint and entered decree dismissing same, from which is this appeal. Other facts stated in the opinion.

C. M. Rice, J. N. Rachels, for appellant.

1. The receiver of an insolvent bank stands in the place of the bank with all its powers and duties and represents both bank and creditors. 5 Cyc. 860; 98 Ark. 200. The judgment in the case of *State Bank* v. *Hughes et al.* and in which the receivers of the Bank of Cave Springs were parties establishes three things, viz., (1) the indebtedness, the amount and owner and the probate thereof with the receivers. All defenses are precluded which might have been made. 135 Ark. 43. The finding that the bank was *insolvent* and the appointment of the receiver is sufficient without allowances. 84 Fed. 392; 10 Cyc. 451.

2. A stockholder is entitled to have the liability of stockholders enforced and directors have no right to cancel the notes for stock subscription. 110 Ark. 39. See also 75 Ark. 148; 119 *Id.* 550; Kirby's Digest, § § 861, 6348.

3. Apply the law of these cases, *supra,* to the facts admitted and proved and this case should be reversed and judgment entered here. 5 Cyc. 446; 66 Ark. 234.

4. The real question here on the record is, who were stockholders and the extent of their liability? The list of stockholders certified by the president and secretary on file in the clerk's office is *prima facie* evidence of who are stockholders. 114 Ark. 344; 45 *Id.* 117.

5. The assets of a corporation being a trust fund for its creditors and unpaid subscriptions being a part of this trust fund, neither the directors nor the aggregate body of stockholders can give it away by releasing the unpaid subscriptions to the stock. 10 Cyc. 451. Where the capital of an insolvent bank is withdrawn by refunding to stockholders, having unpaid creditors, the right to recover from the stockholders passes to the receiver. 34 Cyc. 401.

Appellees, pro se.

1. The receiver had no right to maintain this suit because there had been no indebtedness established against the Bank of Cave Springs or these defendants.

2. The stockholders are not liable for the indebtedness of the Bank of Cave Springs to the Judsonia State Bank, because the latter accepted Hughes' personal note with collateral security for the indebtedness and transferred without recourse.

There was no legal assignment to the Pangburn Bank, and it has no right to maintain this suit. 5 C. J. 898-900. There is no evidence that this bank was insolvent.

WOOD, J., (after stating the facts). It was proved that the Bank of Cave Springs was duly incorporated and the appellees, among others, are put down as the stockholders, together with the number of shares owned by each, as appears from the certificate required to be filed by the president and directors of the corporation, and which was filed for record on the 10th day of September, 1909, with the county clerk. Section 845 of Kirby's Digest.

The testimony, as set forth in the above statement, tends to prove that the Bank of Cave Springs became indebted to the Judsonia State Bank, as evidenced by a note, which was executed by the Bank of Cave Springs for $2,500, and, also, its overdraft for $893; that E. R. Hughes, the president of the Bank of Cave Springs, afterwards executed his individual note to cover the sum total of this indebtedness, at which time the Judsonia State Bank delivered to him the $2,500 note and overdraft account, and endorsed the $2,500 note without recourse and that afterwards the Judsonia State Bank transferred the individual note of E. R. Hughes, and also the note of the Bank of Cave Springs and its overdraft, to the Pangburn State Bank for the sum of $3,600.

Counsel for the appellees contend that the stockholders are not liable for the indebtedness of the Bank of Cave Springs to the Judsonia State Bank, because the latter bank accepted Hughes' personal note with collateral security for the amount of the indebtedness represented by the note and overdraft, and transferred said

note to Hughes without recourse, and also its overdraft account. Professor Tiedeman in his work on Commercial Paper, at section 260, says:

"When an endorsement is made 'without recourse' the endorser relieves himself of all liability for the dishonor of the paper. But, whatever popular impression it may produce, such an endorsement is not recognized in law as having cast any suspicion upon the character of the paper, or the financial responsibility of the parties to it."

While the words "without recourse" tend to show that the Judsonia State Bank, the payee of the note, had accepted the individual note of Hughes in payment of the note of the Bank of Cave Springs and had transferred its title in such note to Hughes, yet the testimony set forth in the statement shows that such was not the purpose of the endorsement, but, on the contrary, the preponderance of the evidence shows that the purpose of the delivery of the note and overdraft account to Hughes was to enable him to make collection of the same from the Bank of Cave Springs and its stockholders, and that the individual note executed by him was given, not for the purpose of paying off an indebtedness of the Bank of Cave Springs to the Judsonia State Bank, but for the purpose of becoming a joint maker and jointly liable for such indebtedness.

We are convinced that the title to the note executed by the Bank of Cave Springs to the Judsonia State Bank, and also the overdraft account, was not transferred by the above transaction to Hughes. But, if we were mistaken in this, the appellant could still maintain this suit, for there is no testimony whatever in the record to show that either Hughes or the Bank of Cave Springs has paid the note and overdraft account. Even if it were proved that Hughes had paid the note, he was but a joint maker and the Bank of Cave Springs would still be liable to his estate because the debt, as represented by the note and overdraft, was primarily its obligation. It must be remembered that this is a suit by the receiver of the in-

solvent Bank of Cave Springs to recover the assets of such bank, alleged to have been illegally withdrawn by its stockholders.

Where stockholders of a banking corporation, knowing that the bank is insolvent, sell their stock to the cashier and are paid out of the bank's assets, the effect of the transaction is a withdrawal of their stock from the bank on account of its insolvency in fraud of creditors, and such payments may be recovered by the receiver of the bank for the benefit of its creditors. *Corn* v. *Skillern,* 75 Ark. 148. See 34 Cyc. 401, and cases there cited. The receiver of an insolvent bank stands in the place of and represents such bank. He must collect and administer its assets for the benefit of creditors, stockholders and all who are interested in the financial affairs of the corporation. *Jordan* v. *Harris,* 98 Ark. 200. Even if the testimony had shown that Hughes had paid the debt of the Bank of Cave Springs to the Judsonia State Bank, the other stockholders would be liable to him for their *pro rata* part of such indebtedness, and a stockholder is entitled to have the liability of other stockholders enforced, and the directors have no right to cancel the note. It would be the duty of the receiver of the bank to require the stockholder who had not paid for his stock to pay for the same and to require those who had illegally withdrawn funds to refund the same. *Bank of Des Arc* v. *Moody,* 110 Ark. 39; 34 Cyc., *supra.*

Now, the undisputed testimony shows that at the time of the institution of this suit, the Bank of Cave Springs was insolvent, and that there was an outstanding indebtedness against it. This being true, such of the appellees, who were stockholders, who had wrongfully withdrawn the funds paid for their stock, or who were indebted for stock subscribed, were liable *pro tanto* to the creditors of the insolvent bank.

It follows that the court erred in dismissing the appellant's complaint for want of equity.

There was testimony tending to prove that certain stockholders turned their stock certificates back to the

cashier and that he returned notes, that had been given for stock, to the parties who gave them, and also refunded money that had been paid by certain stockholders for stock.

There appears to be some uncertainty and confusion in the record as to the precise action taken by the stockholders and as to who were the stockholders, and the number of shares of stock held by those who were stockholders and as to the notes that were returned and the amount of money that was refunded, and to whom.

Inasmuch as the cause must be reversed, we will leave this matter open for further proof and a determination of the trial court.

The decree is reversed and the cause will be remanded with permission to the parties, if they so elect, to take further testimony, and for such other proceedings as may be necessary according to law and not inconsistent with this opinion.

CHILES v. FORT SMITH COMMISSION COMPANY.

Opinion delivered July 14, 1919.

1. NEGLIGENCE—RES IPSA LOQUITUR—ALLEGATIONS OF THE COMPLAINT—UNEXPLAINED EXPLOSION.—Plaintiffs, the widow and children of one C., deceased, brought suit against defendant to compensate the loss sustained by them in the death of their intestate. The complaint alleged that a four-story building, in which C. was employed, was blown up and C. was killed; that the building contained various gas and ammonia fixtures which were in the exclusive control of the defendants; that C. was rightfully in the building at the time of the explosion but had no duty to perform in connection with the instrumentalities which occasioned the injury; and that the cause of the explosion was unknown to the plaintiffs. *Held,* a demurrer to this complaint was improperly sustained and that the concurrence of the conditions alleged made applicable the doctrine of *res ipsa loquitur.*

2. NEGLIGENCE—DOCTRINE OF RES IPSA LOQUITUR—SCOPE OF THE DOCTRINE.—The doctrine of *res ipsa loquitur* is not limited in its application to cases in which public carriers are involved, nor to

cases in which a contractual relation exists between the defendant and the party injured; but the doctrine has application in any case, the circumstances of which are so unusual and of such a nature that the injury could not well have happened without negligence on the part of the defendant, or when the injury is caused by something connected with machinery or equipment over which the defendant has entire control.

3. NEGLIGENCE—RES IPSA LOQUITUR—PROOF—QUESTION FOR JURY.—*Held*, the facts stated in the complaint as set out in paragraph No. 1, *supra*, state a cause of action, and if at the trial testimony is offered which supports the allegations, a case will be made entitling plaintiff to go to the jury, to have decided whether such testimony considered together with any other testimony which may be offered, discharges the burden of proof resting upon the plaintiff.

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

T. J. Wear, for appellants.

1. The complaint alleges a good cause of action by alleging negligence in general terms and that with the known facts as set out in the complaint, they could have introduced expert evidence sufficient for a recovery without alleging and proving the specific acts of negligence. 29 Cyc. 628; 19 *Id.* 15, § 4; 107 Cal. 549; 40 Pac. 1020; 48 Am. St. Rep. 146; 29 L. R. A. 718.

2. *Res ipsa loquitur* rule does not apply here. 29 Cyc. 591-2. The relation of master and servant does not exist here. The deceased owed appellee no contractual duty. Defendants owed deceased a duty not to injure him, as he was in their building under a special contractual relation as set forth in the complaint. 29 Cyc. 594; see also 11 Fed. 438; 107 Cal. 549; 20 L. R. A. 718; 40 Pac. 1020; 86 Ark. 76; 57 *Id.* 429.

Hill, Fitzhugh & Brizzolara and *Daily & Woods*, for appellees.

1. No negligence is charged in the complaint and no attempt to state any facts charging negligence to defendants. Only certain conclusions of law are stated in general terms. It was insufficient. 35 Ark. 104; 60 *Id.*

606; 43 *Id.* 296; 95 *Id.* 6; 17 *Id.* 445; 97 *Id.* 97; 34 *Id.* 111; 94 *Id.* 524; 110 *Id.* 416; 83 *Id.* 78; 44 N. Y. S. 284; 15 App. Div. 74; 102 Ill. App. 461; 99 N. Y. S. 890; 114 App. Div. 290; 170 Pa. St. 25; 32 Atl. 607; 71 Iowa 658; 180 Pa. 409; 44 L. R. A. 92. Thornton on Oil & Gas (3 ed.), § 743; 174 S. W. 730; 59 So. 959; 64 S. E. 721; 65 W. Va. 552.

2. *Res ipsa loquitur* does not apply. 166 Fed. 651; 42 Atl. 708; 113 N. Y. Sup. 343; Thornton on Oil & Gas (2 ed.), § 610-11; 61 Pac. 50; 158 Ky. 848; 51 W. Va. 96; 46 Oh. St. 386; 71 W. Va. 335; 67 S. W. 610; 122 N. Y. 118; 128 N. Y. 103; note to L. R. A. 1917 E, 189; 127 Ark. 98. See also 8 Gray 123; 129 Mass. 318; 12 Phila. 173; 22 Wash. L. Rep. 656; 65 W. Va. 552; 150 Ill. App. 126; 87 Ark. 190; 96 *Id.* 500; 44 *Id.* 529; 77 *Id.* 74; 79 *Id.* 617.

SMITH, J. Appellants are the widow and children of J. C. Chiles, and brought this suit as such to compensate the loss sustained by them in the death of their intestate. For their cause of action the following facts are alleged: That the defendants were conducting a mercantile business at No. 119 Rogers avenue in the city of Fort Smith in a four-story brick building, of which they had joint control and management. Other allegations of the complaint are as follows:

"That said defendants were in joint control of all of the pipes, pumps, tanks, machinery and all other appliances that were used by defendants in their business in furnishing the gas and ammonia that was used for the various purposes of the defendants in said building.

"That there was large amounts of ammonia used by said defendants in said building and by reason thereof they had large amounts or quantities of ammonia stored in pipes, tanks and vats in the basement of said building and they also had large amounts and quantities of natural gas circulating through and into said building by means of large pipes.

"That on or about 1:50 P. M. on the 22d day of October, 1918, through the negligence of the defendants,

their agents, servants and employees, in some manner unknown and unexplained to plaintiffs, the gas and ammonia that was being used by said defendants in said building was exploded and was set on fire and said building was wrecked and burned up and demolished and the said J. C. Chiles, deceased, who was in said building at the time of said explosion and when said gas and ammonia was set on fire, was killed by reason of said explosion and fire by the gas, ammonia, and by fire which suddenly filled said building, before he was able to make his escape from the fourth floor of said building where he was at work as an employee of the W. J. Echols Company, wholesale grocers.

"That at the time of the said explosion and fire, the said J. C. Chiles, deceased, was in the employ of the W. J. Echols Company, wholesale grocers, and when the explosion and fire occurred, he was in a room or on the fourth floor of the said building of the defendants aforesaid, which room or floor the said W. J. Echols Company, wholesale grocers, had rented or reserved from the defendants and into which the said W. J. Echols Company, wholesale grocers, had the right under its contract with the defendants to enter with its employees to transact its business on said fourth floor of said building and it also had the right of ingress and egress to said building and the said defendants by reason of their said contract with the said W. J. Echols Company, wholesale grocers, owed it and its employees a contractual duty and ordinary care not to injure or kill them by reason of an explosion of the said gas and ammonia or the burning of the gas and ammonia in said building which was used in their building, by their negligence or by the negligence of either of them.

"That at the time that said J. C. Chiles, deceased, was killed by said explosion and by the burning of said gas and ammonia in said building, he was at work for the said W. J. Echols Company, wholesale grocers, and was in the due scope or course of his employment and was using due and proper care and caution for his own safety

and protection at the time he was killed, and that it was through no fault of his that said explosion occurred or that said gas and ammonia was set on fire or that he was killed.

"That the defendants owed the said J. C. Chiles, deceased, a contractual duty as aforesaid not to injure or kill him by their negligence in the manner as aforesaid.

"That plaintiffs do not know the exact act or acts of negligence of the defendants that caused said explosion and caused said gas and ammonia to be set on fire and they were unobtainable by these plaintiffs as said building, pipes, pumps, tanks, vats, machinery and appliances in and being used in said building were in the sole and exclusive control and management of the defendants, their agents, servants, and employees as was also the gas and ammonia that was in said building and that was being used by said defendants in their business in said building at the time.

"That it was through the negligence of the defendants that said explosion occurred and said gas and ammonia was set on fire and that said building was wrecked and burned up and demolished and that said J. C. Chiles, deceased, was killed.

"That said explosion would not have occurred and said gas and ammonia been set on fire and said building would not have been wrecked and burned up and demolished and the said J. C. Chiles, deceased, been killed if the defendants had used due and proper care in the management and control of the pipes, pumps, tanks, vats, machinery and appliances that were used by said defendants in their business in furnishing the gas and ammonia that was used for the various purposes of the defendants in said building and if they had used due and proper care in the storing and handling of the said gas and ammonia that was used by said defendants in said building.

"That the act or acts of negligence upon the part of the defendants that caused said explosion and caused said gas and ammonia to be set on fire and said building to be wrecked, burned up and demolished and caused the

said J. C. Chiles, deceased, to be killed, were and are known to the defendants."

A demurrer was filed on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants, or either of them. The demurrer was sustained and the complaint dismissed, and this appeal has been prosecuted to review that action.

Appellants first insist that negligence on the part of the defendants is sufficiently charged to constitute a cause of action; and the second contention is made that, if this be not true, sufficient facts are alleged to make applicable the maxim *res ipsa loquitur*.

(1) We do not agree with the first contention. The allegations in regard to negligence are in effect conclusions of law; and if the maxim *res ipsa loquitur* is not applicable the complaint is demurrable. *Ballard* v. *Kansas City & Memphis Farm Co.*, 131 Ark. 83; *Hollis* v. *Hogan*, 126 Ark. 207; *Phillips* v. *Southwestern Tel. & Tel. Co.*, 72 Ark. 478; *Northern Construction Co.* v. *Johnson*, 132 Ark. 528; *Keller* v. *Vowell*, 17 Ark. 445; *C., R. I. & P. R. Co.* v. *Smith*, 94 Ark. 524; *Wood* v. *Drainage Dist. No. 2*, 110 Ark. 416; *Southern Orchard Planting Co.* v. *Gore*, 83 Ark. 78.

So far from alleging the cause of the explosion or the particular act or acts of negligence which occasioned it, the complaint contains the affirmative recital that the plaintiffs do not know the cause of the injury, consequently there could be no specific allegations concerning it. When analyzed, the complaint is found to contain substantially the following allegations: That a four-story business house was blown up and plaintiff's intestate killed; that the building and all gas and ammonia fixtures and appliances therein were in the exclusive control of the defendants; that the intestate was rightfully in the building at the time of the explosion but had no duty to perform in connection with the instrumentalities which occasioned the injury; and that the cause of the explosion was unknown to plaintiffs. The concurrence of these conditions makes applicable the doctrine of *res ipsa loquitur*.

This doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact; but relates only to the mode of proving it. *Stewart* v. *Vandeventer Carpet Co.,* 138 N. C. 60, 50 S. E. 562.

(2) As applied to railroads the rule is stated in 4th Elliott on Railroads, section 1644, as follows: "The true rule would seem to be that when the injury and circumstances attending it are so unusual, and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury."

We quoted and approved this statement of the law in the case of *Biddle et al., Recvrs.,* v. *Riley,* 118 Ark. 218; *Choctaw, O. & G. Rd. Co.* v. *Doughty,* 77 Ark. 9; *Price* v. *St. L., I. M. & S. R. Co.,* 75 Ark. 491; and *St. L., I. M. & S. R. Co.* v. *Armbrust,* 121 Ark. 351.

In the Riley and Price cases the persons injured were passengers upon trains; and in the Doughty case a fireman on a freight train, while in the Armbrust case the party injured was a traveler at a railroad crossing who was hit by a piece of coal falling from the train. But there is nothing in the opinion in any one of the cases which makes the doctrine applicable only to railroads. There are cases which apparently treat the doctrine as applicable only against carriers, and it is no doubt true that the doctrine has been more frequently applied in cases against carriers of passengers than in any other class of cases. But there appears to be no valid reason for thus limiting the doctrine. A leading case on the subject and one well considered is that of *Judson* v. *Giant Powder Co.,* 29 L. R. A. 718. That was a case where property was destroyed by an explosion of nitro-glycerine in process of manufacture into dynamite, and Mr.

Justice Garoutte, speaking for the Supreme Court of California, said: "All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a *prima facie* case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passenger. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebutable; but such is not the fact, for it is only *prima facie* and always disputable. As was well said by the court in *Rose* v. *Stephens & C. Transfer Co.,* 11 Fed. Rep. 438: "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or in reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties.' The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care towards this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises

from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in Shearman and Redfield on Negligence (section 59): 'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule, as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking on this question, it is said in Cooley on Torts (p. 799): 'The rule applied to carriers of passengers is not a special rule, to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care.' The author then cites the case of the householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: 'True, the act of God, or some excusable accident may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection.' ''

In support of the statement of the law thus quoted a large number of cases are there cited and reviewed. There is also an extended case note.

In the article on Negligence in 20 R. C. L., section 156, it is said: "More precisely the doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. * * * The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine *res ipsa loquitur* has no application."

And in section 157 of the same article it is said: "* * * It has been held in some cases that the maxim applies only where the relation of carrier and passenger exists, or where there is a contractual relation between the parties to the transaction producing the injury; but the prevailing view is that a presumption of negligence may be indulged in many other cases, and independently of any contractual relation between the person injured and him who is charged with responsibility for the injury. * * * ."

At section 158 of the same article it is said that this doctrine has found frequent application in cases of injuries from falling objects and substances, and that the rule has been applied in many instances to injuries produced by the fall of awnings, signs, walls, buildings, parts of buildings, building materials, tools, electric wires, and many other objects. Annotated cases are cited in the notes to the text, which collect a very large number of cases. Among the annotated cases there cited are our own cases of *St. L., I. M. & S. R. Co.* v. *Hopkins,* 54 Ark.

209, annotated in 12 L. R. A. 189, and the case of *Hall* v. *Gage,* 116 Ark. 50, annotated in L. R. A. 1915 C. 704.

The litigation in the case of *Hall* v. *Gage, supra,* arose from the falling of a wall which had been left standing after a fire, and in holding that the trial court had erred in refusing to charge the jury that the falling wall was *prima facie* evidence of negligence which imposed upon the owner the burden of showing that the accident happened without his negligence, we said: "In the case of *Earl* v. *Reid,* 18 Am. & Eng. Ann. Cases, p. 1, 21 Ontario Law Reports, 545, Teetzel, J., said: 'I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully on adjoining lands. In other words, every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbor's land and injure persons lawfully there.

" 'While the owner cannot be charged for injuries caused by inevitable accident, the result of *vis major* or of the wilful act or negligence of some one for whom he is not responsible, he is liable for injuries caused by the failure on his part to exercise reasonable care.'

"The fact that the wall fell is *prima facie* evidence of negligence in conformity with the maxim, *res ipsa loquitur.* Thompson's Commentaries on the Law of Negligence, volume 1, par. 1213. See, also, paragraph 1060 of the same volume. To the same effect see *Earl* v. *Reid, supra.*"

In the case of *Gurdon & Ft. Smith Ry. Co.* v. *Calhoun,* 86 Ark. 76, an employee working on the railroad track was injured by the falling of a tie-jack weighing three hundred pounds from a work car, and it was there contended by the railroad company that the injury complained of was not caused by the running of a train in the sense of the Constitution and statute making railroads liable for damage done by the running of trains; but the court expressly pretermitted the decision of that

question for the reason there stated that the uncontradicted facts raised the presumption of negligence and in so holding the court said: "Appellee was in a place where he had a right to be. It was a safe place until made dangerous by the presence and operation of the train over which appellant railway company had the exclusive management and control. The falling of a 'tie-jack,' weighing three hundred pounds, from the car could not well have happened in the usual course unless there had been some negligence in loading it on the car in the first place, or in the manner in which the train was operated and the car was moved, in the second place. Such an implement, if handled with ordinary care, could not fall from the car in the usual and ordinary method of its use as shown by the proof. The fact, then, that it did fall raises the presumption of negligence."

In the case of *Southwestern Telegraph & Telephone Co.* v. *Bruce,* 89 Ark. 581, the telephone company strung a wire across a vacant lot, which broke and left the end on the foundation of a house where the plaintiff was working. Plaintiff picked up the wire to throw it aside, and was shocked, and burned. The court applied the doctrine of *res ipsa loquitur* in fact but not *eo nomine* and in doing so said: "And where the defendant owes a duty to plaintiff to use care, and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur if those who have control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the accident occurred from the lack of that proper care. In such case the happening of the accident from which the injury results is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part."

Another case which applied the doctrine in fact but not *eo nomine* is that of *Jacks* v. *Reeves,* 78 Ark. 426.

The complaint there alleged that as plaintiff was driving along the road the top of her carriage was caught by defendant's telephone wire and torn off, causing the horse to become frightened and run away and injure the plaintiff. The court charged the jury "That the plaintiff, in order to entitle her to recover damages under this action, is required to prove that the accident occurred through the negligence of W. D. Reeves." Discussing that instruction the court said it was abstractly correct; that no liability rested upon the defendant except through negligence, but that the instruction was misleading under the facts of that case in not being qualified or coupled with another one explaining that the evidence of the accident and injury following therefrom, when the occurrence was (not) out of the usual course, was *prima facie* evidence of neglect and shifted the burden onto the defendant to prove that it was not caused by any want of care on his part.

See, also, *Arkansas Telephone Co.* v. *Ratterree,* 57 Ark. 429; *St. L., I. M. & S. R. Co.* v. *Steele,* 129 Ark. 532; Thompson on Negligence, vol. 1, sec. 1213.

In the case of *Barnowski* v. *Hilson,* 15 L. R. A. 33, the facts were that the roof of a house slipped and tipped to one side and fell while being raised by jackscrews. There was no showing that the house had been sufficiently braced nor other explanatory proof offered, and the Supreme Court of Michigan held there was a presumption of negligence which entitled the plaintiff to go to the jury. Appended to this case is an extended note in which a large number of cases are collected.

(3). We conclude, therefore, that a cause of action was stated in the complaint, and if testimony is offered which supports these allegations a case will be made entitling plaintiffs to go to the jury to have decided whether such testimony, considered together with any other testimony which may be offered, discharges the burden of proof resting upon the plaintiff.

The judgment of the court below sustaining the demurrer is, therefore, reversed and the cause will be remanded with directions to overrule the same.

NEVADA COUNTY v. NEWS PRINTING COMPANY.

Opinion delivered December 2, 1918.

1. COUNTIES — PRINTING CLAIMS — PUBLICITY ACT — DUTY OF LEVYING COURT.—Under the statute providing for making levies and appropriations for county expenses, Kirby's Digest, section 1494, sufficient funds should be levied and appropriated by the levying court, under Kirby's Digest, section 1499, subdivision 7, to pay printing claims allowed against the county, as required by act of 1915, p. 1511.
2. COUNTIES—PUBLICITY ACT—DUTY OF COUNTY CLERK.—Under the publicity act, the county clerk has authority to contract for the publication of claims allowed against the county.
3. COUNTIES — PRINTING OF CLAIMS ALLOWED AGAINST — APPROPRIATION.—It is necessary that the levying court make a proper appropriation before the county court may allow a claim for printing required by the publicity act.
4. COUNTIES — PUBLICITY ACT — COUNTY CLERK MAY CONTRACT FOR PUBLICATION, WHEN.—The county clerk may contract for the publication of claims against the county, before an appropriation to pay for the printing is allowed.
5. COUNTIES—EXPENSES—CONTRACT FOR PRINTING CLAIMS ALLOWED. —Kirby's Digest, section 1502, prohibiting making contracts until all appropriation is made, has no application to the publication required to be made under the publicity act.

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

STATEMENT OF FACTS.

This is an appeal from the judgment of the circuit court allowing the claim of the News Printing Company of Prescott against Nevada County, for printing done under what is known as the publicity act which was initiated by the people and declared adopted by the Governor on October 13, 1914. See Acts of 1915, p. 1511. Pursuant to the provisions of that act, the county clerk of Nevada County made a contract with the News Printing Company, a newspaper published in Nevada County, to print the claims allowed by the county court for the quarter beginning with its October, 1916, term and including the April, 1917, term. The record does not disclose that any appropriation was made for the payment of such

claim. The services were duly performed by the News Printing Company and it filed its claim, duly verified as required by law, for the sum of $84 in payment of its services under the contract. The county court disallowed the claim on the ground that no appropriation to pay such claim had been made by the quorum court. The News Printing Company appealed to the circuit court. In that court it was agreed that at the time the printing was done by the News Printing Company that the quorum court of Nevada County had not made an appropriation for the printing. and that no appropriation was available at that time or since for printing anything under the publicity act.

The circuit court rendered a judgment in favor of the News Printing Company and Nevada County has appealed.

Tillman B. Parks, for appellant.

No appropriation had been made by the quorum court to pay this claim. The allowance was without authority and void. Const., art. 16, § 12; Kirby's Digest, § 1502; 54 Ark. 645; 61 *Id.* 74; 85 *Id.* 609; 1 Dillon, Corp., § 463.

H. B. McKenzie, for appellee.

No special appropriation was necessary. The publication was authorized by law and the county made liable. The publicity act, § § 4, 7, 13; Kirby's Digest, sec. 1499; 68 Ark. 340; 63 *Id.* 397.

HART, J., (after stating the facts). Section 1494 of Kirby's Digest provides that the county judge with a majority of the justices of the peace shall constitute a court for levying and making appropriations for the expenses of the county. Such court is usually called the quorum or levying court. Section 1499 of Kirby's Digest, after providing that the court shall proceed to the making of appropriations for the expenses of the county for the current year, provides that said appropriations shall be made in the following order:

"1. To defray the lawful expenses of the several courts of record of the county or district and the lawful expenses of criminal proceedings in magistrate's courts, stating the expenses of each of said courts separately.

"2. To defray the expenses of keeping persons accused or convicted of crime in the county jail.

"3. To defray the expenses of making assessment and tax books and collecting taxes on real and personal property.

"4. To defray the lawful expense of public records of the county or district.

"5. To defray the expense of keeping paupers of the county or district.

"6. To defray the expense of building and repairing public roads and bridges and repairing and taking care of public property.

"7. To defray such other expenses of county government as are allowed by the laws of this State.

"8. After the appropriations shall have been made, the court shall then levy the county, municipal and school taxes for the current year."

The publicity act might have directed the quorum court to make a specific appropriation to be used in carrying out the provisions of the act, but it did not do so. It then becomes necessary to examine the paragraphs of section 1499 of Kirby's Digest above quoted to ascertain if the contract in question falls within any of those provisions. The purpose for which the appropriation is to be used is plainly designated in the first six paragraphs and it is evident that the contract in question is not covered by an appropriation for any of these purposes. The seventh section provides for an appropriation to defray such other expenses of county government as are allowed by the laws of this State. The language of paragraph seven is very broad and comprehensive, and includes any expense of county government at any time while the act is in force. This would include expenses of the county government made by acts subsequently passed as well as those which were so classed at the time of the passage of

the act. The Legislature made it mandatory upon the county clerk to publish in a newspaper a list of all claims allowed against the county, etc. This necessarily gave the county clerk the power to make a contract for such publication. The amount so expended by him became an expense of the county government, and an appropriation made under paragraph seven of section 1499 was available to pay such claim. The record in the present case does not show that any appropriation was made by the quorum court under paragraph seven of section 1499; but, on the contrary, the agreed statement of facts shows that no such appropriation was made.

Section 12, article 16, of our Constitution provides that no money shall be paid out of the treasury until the same shall have been appropriated by law and then only in accordance with said appropriation.

In *Dickinson* v. *Clibourn,* 125 Ark. 101, the court said that an appropriation denotes the setting apart or assigning to a particular use a certain sum of money for a specific purpose in such manner that public officials are authorized to draw and use the sum so set apart and no more, for the purpose specified and no other. Under the principles of law announced in that case an appropriation was necessary before the court could allow the claim and issue a warrant therefor.

It is insisted by counsel for Nevada County that an appropriation was necessary before the county clerk could make the contract in question. We do not agree with counsel in this contention. The section of the Constitution in question places no limitation upon the power of the county court or the agents of the county in regard to making contracts. The object of this provision of the Constitution was to prevent the payment of any funds until an appropriation was made therefor. It places a limitation upon the authority of public officials in paying out public funds; but it did not undertake to place a limitation upon the power of the Legislature to declare what might be proper subjects of expenses of government. Hence the Legislature had the authority to declare that

a contract like the one in question should be an expense of the county government.

Again, it is insisted by counsel for Nevada County that the allowance for the payment of the claim in question is void under section 1502 of Kirby's Digest. The section reads as follows: "No county court or agent of the county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended."

We do not think that section has any application to this case. The section is a part of an act approved March 18, 1879, providing for the organization of a levying court and defining its power with regard to making appropriations for the expenses of the county government.

In the case of *Fones Hardware Co.* v. *Erb,* 54 Ark. 645, it was held that a contract for building a county bridge made without a previous appropriation therefor by the levying court was void. The reason given was that, by the express terms of the act, the concurring judgment of the levying court and of the county judge that a bridge should be built was necessary before a contract for building it could be made. As we have already seen, the levying court was created by the Legislature and the power given it was expressly conferred by the Legislature. Hence the Legislature has all the power it could give to the levying court. In the present case the Legislature itself, by an act passed for that purpose, commanded the county clerk, without the concurrence of the levying court, to make the contract in question. This made it an expense of county government, and all that remained for the levying court to do was to make an appropriation for the payment of it. The Legislature acted directly in the matter and thus exempted the publicity act from the provisions of section 1502 of Kirby's Digest. This follows from the principles of law laid down in *Durrett* v. *Buxton,* 63 Ark. 397, and *Hilliard* v. *Bunker,* 68 Ark. 340, where the court held that the special act authorizing the county court to make an order for the building of a court-

house or jail whenever it shall think it expedient to do so was not repealed by what is now section 1502 of Kirby's Digest, which requires an appropriation before a contract can be made by the county court or other agent of the county. It was there said that it was hardly reasonable to suppose that the Legislature would require the permission of the levying court to make a contract which it had already made the duty of the county court to enter into and perform. So in the present case it is not reasonable to think that the Legislature intended to require the concurrence of the levying court in making a contract which it made it the duty of the county clerk to enter into and perform under a heavy penalty.

It follows from the views we have expressed that the contract was a valid one but it was not subject to allowance by the county court because, so far as the record discloses, no appropriation had been made for its payment.

It follows that the judment must be reversed, and the cause will be remanded for a new trial.

JOHNSON v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered June 2, 1919.

1. EVIDENCE—WRITTEN INSTRUMENT—PAROL TESTIMONY TO EXPLAIN LATENT AMBIGUITY.—When a written instrument, applied to its subject-matter, shows a latent ambiguity, parol testimony of the facts and circumstances surrounding its execution may be given to clear away its uncertainty.
2. SAME—SAME—SAME.—The rule just stated does not contemplate that a written contract can be added to or subtracted from by evidence of surrounding circumstances; but the rule is invoked and employed only in cases, where, upon the face of the contract itself, there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said.
3. ATTORNEY AND CLIENT—CONTRACT FOR FEES—AMBIGUITY.—A contract between an attorney and his client contained this provision: "My part to be not less than $10,000 and I have privilege of ac-

cepting the railroad company offer of compromise up to $25,000, if they make an offer after giving them four or five days' notice and no fee goes to you." *Held*, it is uncertain whether the words, "my part to be not less than $10,000," refer exclusively to the compromise to be attempted and effected before suit was to be instituted, or whether the parties meant that no fee was to be received by the attorney unless a recovery in excess of $10,000 was had against the railroad company.

4. SAME—PAROL TESTIMONY TO EXPLAIN.—The contract between attorney and client as set out in 3 *supra*, *held* ambiguous, and *held* also that the trial court erred in holding it unambiguous, and in not admitting parol testimony of conversations and negotiations between the parties at the time of the execution of the writing, which would serve to construe the latent ambiguity in the contract.

5. ATTORNEY AND CLIENT—AGREEMENT NOT TO MAKE SETTLEMENT.—A contract between an attorney and client, *held* not to contain a provision preventing the client himself from settling the litigation.

6. ATTORNEY AND CLIENT—CONTRACT FOR FEE—ADVANCE OF COSTS BY ATTORNEY—ONE-HALF PROCEEDS.—A contract between an attorney and client provided that the attorney advance the costs of the suit, and, in the event of recovery, such costs to be deducted from the amount recovered, and the attorney to get one-half of the remainder as his fee, and, in the event of failure to recover anything in the action, the attorney agreed to lose the money he had advanced for expenses of litigation and to charge no fee. *Held*, under the act of 1909, page 892, and upon the adjudicated authorities, that the contract is valid and binding, there being no evidence in the contract itself and no extrinsic facts on the record showing a lack of good faith or tending to impeach the contract.

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

STATEMENT OF FACTS.

This is an appeal from a judgment of the circuit court dismissing an attorney's claim for compensation in an action for damages for injuries resulting in death to a locomotive engineer alleged to have been caused by the negligence of the railroad company, in whose service he was at the time engaged.

The material facts are as follows: On February 13, 1918, John H. Fulson, while running a passenger train of the Missouri Pacific Railroad Company in the State of

Arkansas, was killed by his train striking a boulder on the left hand side of the track and thereby violently throwing the engine from the track. There was a sharp curve on the left hand side of the track as it entered a deep, narrow cut, and the railroad company had negligently allowed a large boulder to fall down on the left hand side of the track, lodging there and breaking a rail. Fulson, being on the right hand side of the engine at his post as engineer, was unable to see the boulder as the engine rounded the curve and entered the cut. Fulson was 44 years old at the time of the accident and an intelligent, strong and healthy man. His wife and several minor children survived him. The administrator of his estate, for the purpose of prosecuting a suit for damages against the railroad company entered into a contract with an attorney at law as follows:

"1. Whereas, the undersigned has a cause of action against the Missouri Pacific Railroad Company for personal injuries resulting in death to John H. Fulson and needs legal advice and other assistance, and wishes to employ Jo Johnson, lawyer, of Fort Smith, Arkansas (phone 110), and is dependent on said cause of action as an asset and security upon which, if possible, to employ counsel and secure expense moneys, and,

"2. Whereas, the said Jo Johnson has consented to accept such employment, and to arrange for all moneys as may become necessary for such expenses, on the terms as proposed by the undersigned, and only on condition that all of said terms and conditions shall be faithfully and fully carried out and performed.

"3. Now, therefore, I, the undersigned, of the address stated with my signature, have made, constituted and appointed, and by these presents do make, constitute and appoint, the said Jo Johnson my true and lawful attorney and agent, both in law and in fact, for me and in my name, place and stead,

"4. To conduct and manage to full and final settlement, and to fully settle, by suit or otherwise, my said cause of action, and he to employ any assistant counsel

or expert witnesses, or other help of any character, by him deemed probably beneficial to the interests of my cause of action; my said attorney to advance moneys to pay expenses in all courts, change of venue, appellate or otherwise, and all things to be done according to his best judgment and discretion.

"5. My said attorney has agreed to lose all of his said expense moneys and charge me no fee in event of failure, and in event of success we have agreed that he shall first deduct from the proceeds all expenses or charges outside of his fee, and then shall retain half the remainder as his fee for his services, and shall deliver the remaining half to me; provided, if he shall have loaned me any separate money for my personal use, he shall deduct that from my share and shall have ten per cent. per annum interest on his cash advancements.

"6. In consideration of the chances my said attorney has agreed to take, and the burdens he has agreed to carry, as stated, I have specially agreed not to in any way interrupt his management of my cause of action.

"7. My part to be not less than $10,000 and I have privilege of accepting the railroad company offer of compromise up to $25,000, if they make me an offer after giving them four or five days' notice and no fee goes to you.

"8. I have read this contract and fully understand it.

"Witness my hand this 4th April, 1918.

"G. W. Wall, Administrator."

"Accepted: Jo Johnson."

The contract was written on a printed form and one clause was marked out, which will be more particularly referred to in the opinion. The original contract is in the record and the paragraphs are not numbered. We have numbered them for the sake of brevity and convenience in writing the opinion.

The attorney filed a suit for damages for the administrator in the Baxter Circuit Court against the railroad company on June 6, 1918. Subsequently the administrator was removed and an administrator in succession ap-

pointed. During the latter part of August, 1918, he discharged Johnson and dismissed the suit against the railroad company. In September, 1918, for the purpose of carrying into effect a compromise with the railroad company, he instituted a friendly suit against it in the Pulaski Circuit Court for $10,000, and by consent obtained judgment for that sum. Johnson claimed that he was entitled, under his contract, to a fee of one-half the amount recovered; but his claim was denied by the railroad company. Johnson then filed his petition in the Baxter Circuit Court under an act providing that the compensation of an attorney shall be governed by agreement and also, the manner in which the court may determine and enforce a lien for the attorney's services created by the act. Acts of 1909, p. 892. The matter was submitted to the court under the provisions of the act. Johnson claimed that the language of the contract rendered it ambiguous. He claimed that under its terms he was to get half of the amount recovered after deducting the costs of the litigation. That the whole of paragraph seven related to a compromise on the part of the administrator before a suit against the railroad company was to be filed. That the words, "My part to be not less than ten thousand dollars," in the first part of paragraph seven, referred solely to the right of the administrator to compromise within four or five days after notice given to the railroad company before suit should be brought, and that it had no reference to the amount to be recovered after the management of the suit was turned over to him. The court first permitted Johnson to testify, reserving its decision as to its admissibility. The testimony of Johnson is long and involved; but we think it is legitimately susceptible to the construction placed upon it in his brief. The court below seemed, also, to have been of that opinion and after due consideration refused to receive the testimony on the ground that the contract was not ambiguous and that under its terms, Johnson was not allowed to recover anything as compensation unless the administrator by suit or compromise recovered more than that amount against the railroad company.

The trial court adjudged that Johnson's petition for attorney's fees under the statute should be denied, and Johnson has appealed.

Jo Johnson, for appellants.

1. Under the contract appellants were entitled to recover as a fee one-half of the amount recovered by the administrator after deducting the costs and expenses. 120 Ark. 289. The contract is to be construed most strongly against the party drafting it. 73 *Id.* 338; 74 *Id.* 41; 135 S. W. 343; 84 Ark. 431.

As a general rule third parties are not bound by the contract. 208 S. W. 786, but in 237 U. S. 285, 35 Sup. Ct. Rep. 543, it is held that the contract between the attorney and client is to be resorted to as a basis for calculating the compensation of the attorney irrespective of the rights of third parties. *Ib. loc. cit,* p. 549, 2nd col. See also 35 Sup. Ct. Rep., p. 549.

2. The interveners were clearly entitled to $5,000 under the contract. 128 Ark. 471; 237 U. S. 285; 55 Miss. 626.

3. Under section 1, Act 293, Acts 1909, appellants are entitled to recover. Kirby & Castle's Digest, p. 1916, § 463. They had a lien on the judgment and it cannot be affected by any compromise or settlement of the parties. 47 N. Y. Sup. Ct. (17 Jones) 89; 54 N. Y. Sup. Ct. (22 Jones) 8. See also 12 N. Y. Supp. 111; 35 Sup. Ct. Rep. 543 (549).

Allyn Smith, for Jo Johnson, makes the same points and cites the same authorities, *supra.* The judgment should be reversed, with instructions to enter judgment for $5,150.50 for attorney's fee and costs and expenses, etc.

Troy Pace, for appellee.

1. The contract was invalid, for the reason that G. W. Wall, who executed the contract, was never the legal administrator of Fulson, deceased. He was a non-resident of Arkansas and his letters and contracts were null and void. Kirby & Castle's Digest, § 14.

2. The right to remove to the Federal Court was not waived, nor its right to object to the competency of the administrator by filing notice, petition and bond for removal. 161 U. S. 271, 41 Lawy. ed. 431.

Appellee is not estopped to raise this question being a jurisdictional one. *Ib.*

3. The contract was void for champerty and against public policy. 66 Ark. 190; 206 S. W. 38.

4. The contract provided for no fee unless recovery in excess of $10,000 was had. An attorney is bound by his contract with his client. 120 Ark. 394. See also 120 *Id.* 289; 128 *Id.* 471; 205 S. W. 118.

HART, J., (after stating the facts). It appears from the record that the administrator of the estate of John Fulson, deceased, brought suit against the railroad company for negligently causing the death of said John H. Fulson, while in its employ as a locomotive engineer. Jo Johnson was his attorney under a contract executed by himself and the administrator. The administrator in succession discharged Johnson and dismissed the action brought by him. The administrator then instituted a friendly suit against the railroad company for the purpose of effecting a compromise with it and, pursuant to their agreement, a judgment was rendered against the railroad company for $10,000. Johnson claims that, the suit having been settled without his consent, he is, under our statute, entitled to recover his compensation as an attorney from the railroad company as declared in *St. L., I. M. & S. R. Co.* v. *Hays & Ward,* 128 Ark. 471.

The contract under which he seeks to recover is set out in our statement of facts and need not be repeated here.

(1) The circuit court was of the opinion that the contract sued on was not ambiguous and should be construed by the court. It was held that the contract on its face showed that the administrator was entitled to recover $10,000 before the attorney was entitled to recover anything; and that, the administrator, having compro-

mised with the railroad company for $10,000 by recovering an agreed judgment rendered against it for that amount, as he had a right to do, Johnson was not entitled to recover anything against the railroad company. This holding was in the application of the well known rule that parol testimony is not admissible to contradict, vary, add to, or take from the terms of a written contract. This brings us to a consideration of the question of whether or not the language of the contract rendered it ambiguous or uncertain in its terms; for it is well settled that when the written instrument when applied to its subject-matter shows a latent ambiguity parol testimony of the facts and circumstances surrounding its execution may be given to clear away its uncertainty.

(2) This doctrine has been repeatedly announced by this court and several of our earlier decisions on the subject are cited in the late case of *Brown & Hackney, Incorporated* v. *Daubs,* 139 Ark. 53. Indeed the rule is well settled in the text books and in the adjudicated cases elsewhere. The only difficulty is in its application to the facts of a given case. It is not contemplated by this rule that a written contract can be added to or subtracted from by evidence of surrounding circumstances. But as said in *United Iron Works* v. *Outer Harbor Dock & Wharf Company,* 168 Cal. 81, this rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they mean by what they said.

(3) In the application of this rule to the case at bar, the majority of the court is of the opinion that when the contract, which is the basis of this lawsuit, is read and considered from its four corners, it is uncertain whether the words, "My part to be not less than $10,000" in the first part of paragraph seven refer exclusively to the compromise to be attempted and effected before suit was to be instituted as contended by counsel for Johnson, or whether they mean that no fee was to be received

by Johnson unless a recovery in excess of $10,000 was had against the railroad company. It will be observed that under paragraph five of the contract, it is provided that the attorney is to have as his compensation one-half of the amount recovered, in the event of a recovery. When the provisions of this and other paragraphs are read in the light of each other and paragraph seven, it is uncertain whether the words "My part to be not less than $10,000" in the beginning of paragraph seven refer to the compromise provided for in that paragraph, or mean that in no event, regardless of whether a compromise was effected, should the attorney be allowed any compensation unless the amount recovered be more than $10,000. It is conceded by counsel for both parties that the latter part of paragraph seven was inserted in the contract for the purpose of giving the administrator four or five days within which he might effect a compromise with the railroad company before suit was instituted under the contract. The words, "My part to be not less than $10,000," are in the beginning of this paragraph and they may or may not refer exclusively to the compromise provided for in this section.

(4) It appears from the records that these words are in the handwriting of the attorney and that the succeeding words of the paragraph are in the handwriting of the administrator, while the remainder of the contract is on a printed form. Hence it is insisted that in case of conflict, the written part of the contract should control that part which is in print. This does not solve the doubt. The uncertainty is whether the words in question refer exclusively to the compromise provided for in the paragraph in which they are written, or are to be considered a limitation of the right of the attorney to compensation under paragraph five. Therefore, a majority of the court is of the opinion that the trial court erred in holding that the contract was not ambiguous or uncertain, and in not admitting parol testimony of conversations and negotiations had between the parties at the time of the execution of the writing which served to con-

strue the latent ambiguity in the contract in the respects pointed out above.

In *Davis* v. *Webber,* 66 Ark. 190, the court held that a stipulation in a contract for an attorney's fee for prosecuting a suit that the client shall not settle the suit without the attorney's consent is void as against public policy; and that if such stipulation is not severable from the rest of the contract, but is an inducement for entering into it, the entire contract is void. Counsel for the railroad company invoke this rule to defeat the attorney in his right to recover in this case. We do not think that rule has any application to the contract sued on.

(5) The particular parts of the contract relied upon to support counsel's contention are paragraphs four and six. In the former, the attorney is given the power to conduct, manage and settle the case by suit or otherwise, with the right to employ assistant counsel and expert witnesses. In the latter paragraph, it is reiterated that the client is not in any way to interrupt the attorney's management of the case. The clauses in question are not fairly susceptible to the construction that they prohibit the administrator from making a settlement without the consent of Johnson. Indeed, it appears from the whole contract that such was not the case. The contract is in the record. It shows on its face that there was a printed clause which had for its object the prohibition of the administrator from making a settlement without the attorney's consent, and this clause was marked by the parties before the contract was signed.

(6) It is next insisted that the contract is champertous and void because it contains a provision binding the attorney to pay the costs of the litigation. On this point it may be said that under the terms of the contract the attorney was bound to advance the costs of the suit, and in the event of recovery, such costs were to be deducted from the amount recovered, and the attorney was to get one-half of the remainder as his fee; and in the event of a failure to recover in this action, the attorney agreed to lose the money he had advanced for expenses of litigation and to charge no fee.

Authorities which adhere rigidly to the common law with respect to the doctrine of champerty and maintenance are cited by counsel in support of their contention. We do not deem it necessary to cite or review these cases; for this court has held that the common law in regard to the offense of champerty has never prevailed in this State. In the early case of *Lytle* v. *State,* 17 Ark. 608, in a syllabus prepared by Judge Scott, who also delivered the opinion, it is said that an attorney at law may purchase his client's interest in the subject-matter of the suit, in consideration of services rendered and to be rendered in the prosecution of the suit, and become bound for the costs in the prosecution of his own and client's rights, without the violation of any law of champerty in this State. In the opinion, the learned Justice referred to the fact that under the English law there was a total incapacity in counsel to make any contract whatever with his client for his professional services, while in this State the right of making contracts is a high personal privilege of the citizen, which could be claimed by lawyers as well as by any other classes of citizens.

In the later case of *Davis* v. *Webber,* 66 Ark. 190, the court again held that a contract between an attorney and client, allowing the former a contingent interest in the subject-matter of litigation as compensation for his professional services, is not void for champerty, though the courts will scrutinize such a contract closely to see that the attorney has taken no unjust or unfair advantage of his client. In *Davis* v. *Webber, supra,* the court referred to the fact that in *Lytle* v. *State, supra,* the court had traced the origin and reviewed the history, of the law of maintenance and champerty as enacted into statutes and declared by the courts of England. Continuing, the court said: "The conclusion reached was that such laws were not applicable to contracts between attorney and client providing remuneration to the attorney for services rendered his client in conducting litigation. The English rule avoiding such contracts upon the ground of maintenance and champerty was repudiated, as repug-

nant to our Constitution and statutes, and the court showed and might have added, that such a rule was contrary to the genius of our institutions."

In discussing the question in 11 C. J., pp. 242 and 243, it is said that in the States in which the common law doctrine of champerty and maintenance has not been adopted, it is nothing contrary to law, morals or public policy in a contract by an attorney to recover land or other property for an interest in it, even though he also agrees to pay the costs and expenses; and *Lytle* v. *State,* 17 Ark. 608, is the first case cited in support of the text.

There was an early statute passed in the State of Michigan directed against champerty and maintenance. The statute was in reality but an affirmance of the common law. Subsequently a statute was passed providing that the compensation of attorneys might be fixed by agreement between them and their clients and further providing that all laws in conflict with it should be repealed. It was held that this statute repealed the earlier one prohibiting champerty and maintenance, and that under it, a contract between an attorney and his client that the attorney should pay all costs incurred on account of bringing an action, in case he failed to recover anything, was valid. *Wildey* v. *Crane,* 63 Mich. 720, 30 N. W. 327, and *Lehman* v. *Detroit etc. R. Co.* (Mich.), 147 N. W. 628.

In *Brown* v. *Bigne* (Ore.), 27 Pac. 11, 28 A. S. R. 752, 14 L. R. A. 745, it was held that the doctrine of champerty is directed against speculation in lawsuits and to repress the gambling propensity by buying up doubtful claims; that it is not and never was intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it. It has been said that such statutes have been passed so that the doors of justice shall not be shut to the poor, who may be oppressed, or to those who have no other means of prosecuting their suits except the subject-matter of them.

Our Legislature has passed an act providing that the compensation of an attorney is governed by agreement and also providing for an attorney's lien and its enforcement. Acts 1909, p. 892. Under this statute and applying the principles of law above announced, a majority of the court is of the opinion that contracts like the one under consideration are valid and binding obligations where they are entered into in good faith. In the case at bar, there is nothing in the contract itself and no extrinsic facts in the record tending to impeach the integrity of the contract.

From the views expressed, it follows that the court erred in not receiving parol evidence as to the meaning of the contract as indicated in the opinion; and in not submitting this question to the jury.

If the jury should find that Johnson is entitled to recover, he will be only entitled to recover one-half of the amount recovered by the administrator, after deducting the expenses and costs as provided in paragraph five of the contract. See *St. L., I. M. & S. R. Co.* v. *Kirtley & Gulley,* 120 Ark. 389.

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

McCULLOCH, C. J., (dissenting). I fail to discover any ambiguity in the words, "my part to be not less than ten thousand dollars," or in the relation of that language to the other parts of the contract. If it means anything at all, it constitutes a modification of the terms specified in the printed portion of the contract and means that in the event of recovery the plaintiff's part of that recovery is to be as much as $10,000, and that the fee, if any, must come out of a recovery in excess of that amount. The words cannot, it seems clear to me, have any reference at all to the compromise clause, as that part of the contract which relates to the compromise, is complete without the words quoted above, for it is distinctly provided therein that the plaintiff should have the privilege of making a compromise settlement up to $25,000, and

that in that event the attorney should receive no fee. The contract having unequivocally given the plaintiff the right to compromise up to $25,000 without fee to the attorney, it was entirely superfluous to add the words specifying that the plaintiff was to receive $10,000 for his part, if they were intended to apply to the compromise before suit. The fact that there is ambiguity in that part of the paragraph which refers to the "four or five days notice" does not afford grounds for the admission of testimony with respect to the unambiguous portion of the sentence. *Brown & Hackney* v. *Daubs,* 139 Ark. 53.

But if it be conceded that there is ambiguity sufficient to let in proof of the intention of the parties, Mr. Johnson himself testified that the words "my part to be not less than ten thousand dollars" had no reference to the compromise, but that it applied to the contract after the effort to compromise had been exhausted, and his own testimony defeats his right to recover a fee in the case. Here is his testimony, literally, on that subject:

"Q. That had no reference to his settlement of the case, the part Mr. Wall wrote in the contract, and if he could get a settlement up to $25,000, he was to have it all and you was to get nothing?

"A. Yes, if he found he was in error in his then conviction that he could not get them above $5,000, but, if he could get them above that figure, even up to $25,000, and an offer that the family would accept, and he settled it and turned me loose, I was not to get any fee at all.

"Q. If he made settlement for any sum up to $25,000, he was to get the money, and if he failed and you took it up, he was to have $10,000 before you got any fee?

"A. That special $10,000 provision was not a provision or a part of the contract at all, except on the condition that when he exhausted his efforts of settlement then he would not disturb my management of the case."

Now, if the contract means what it seems to me that it means, and what Mr. Johnson himself says it was intended to mean, *i. e.,* that the attorney was not to get a fee in any event except out of a recovery in excess of

$10,000, then it follows that there can be no recovery in this case, for the reason that the plaintiff had the right, independently of any contract to control his own litigation and to compromise for any sum he saw fit to accept (*St. Louis, Iron Mountain & Southern Railway Company* v. *Blaylock,* 117 Ark. 504), and as the attorney agreed in the contract that he should not receive a fee except in the event of a recovery of more than $10,000, he is bound by that contract and cannot assert a lien against the railway company which is in conflict with the terms of his own contract with his client.

If the language quoted above be construed to have reference to a compromise and to operate as a limitation as to the amount for which the client could settle his own case, then that interpretation of the contract defeats its validity under the law announced by this court in the case of *Davis* v. *Webber,* 66 Ark. 190.

HART, J., (on rehearing). The majority opinion is based on a holding by the circuit court that the contract was not ambiguous and that it showed on its face that the administrator was entitled to recover $10,000 before the attorney could recover anything.

This court held, that upon the face of the contract itself, there was a doubt as to its meaning in the manner pointed out in the opinion that parol evidence might be used to dispel that doubt. In other words, the court held that it was uncertain whether the words, "My part to be not less than $10,000," in the first part of paragraph seven refers exclusively to the compromise to be attempted and effected by the administrator in three or four days before the suit was to be brought, or whether they mean that no fee was to be received by the attorney unless a recovery in excess of $10,000 was had against the railroad company, and that, therefore, the trial court erred in holding to the contrary.

It is now contended by counsel for the appellee that the trial court heard oral testimony and that its finding was based thereon. While the trial court did hear

the testimony, it reserved a ruling on its competency and at the conclusion of the hearing based its finding for appellee on the language of the contract itself, holding that it was not ambiguous.

Counsel insist that the statement made by the court and the judgment rendered show the correctness of his present contention. The concluding part of the statement sums up the conclusion of the trial court as follows:

"The only question, as I see it, for me to determine is whether or not the attorneys are entitled to recover on the contract entered into. If I can place any construction on or understand the English language, it means that there must be a recovery of more than $10,000 before the attorneys would be entitled to anything. The condition in there that 'I, the administrator, must receive not less than $10,000,' Mr. Johnson says that means the administrator must receive $10,000. * * * There is no question but what, if they had compromised for any amount of money over and above $10,000, the attorneys would be entitled under the terms of the contract to recover in accordance with the surplus."

The judgment of the court is as follows: "And thereupon, the cause coming to be heard on the petition of the interveners and the response thereto, and the interveners introduced their testimony and rested, the defendants introduced their testimony and rested, and thereupon the court, having heard the argument of counsel and being fully advised in the premises, doth find that the contract for attorney's fee as pleaded and introduced herein is for a fee of fifty per cent. of any amount received or paid in excess of the sum of $10,000, and that, the settlement being for the sum of $10,000 only, that under that contract the petitioners are not entitled to recover thereon."

We think that a careful reading of the statement of the court shows that it based its finding on the contract itself, and that it so states in plain terms. This view is strengthened by the language used in the judgment.

After reciting that testimony was introduced, the language is that the court doth find, "that the contract for attorney's fee as pleaded and introduced herein is a fee of 50 per cent. of any amount received in excess of $10,000." The words, "contract as pleaded and introduced herein," show that the court based its findings upon the language of the contract itself and did not consider the oral testimony introduced.

Counsel for appellee in his motion on rehearing also contends that the judgment should be affirmed because the evidence of Johnson himself shows that he is not entitled to recover. He has set out certain excerpts from Johnson's testimony which are susceptible of that construction; but we do not think his testimony considered as a whole is only susceptible of the construction placed upon it by counsel for appellee.

Mr. Johnson was examined and cross-examined at great length, and, as is frequently the case where lawyers are personally interested, his testimony is a jumble of facts and argument and for that reason and on account of its length it is impractical to set it out in full. The majority of the court think, however, that when all of it is read and considered together it might be legitimately inferred from it that the words in the beginning of paragraph seven quoted above, had no application except in case of a compromise before suit was brought and that, after suit was commenced, paragraph seven became a nullity and paragraph five only was operative in regard to attorney's fees. It is evident that the trial court so understood Johnson's testimony; for, if the presiding judge had understood it only to mean what counsel for appellee now contends it to mean, he would have held that Johnson could not recover under his own testimony considered in its most favorable light to himself.

Moreover, even if his testimony as disclosed by the record is only susceptible of the construction placed upon it by counsel for appellee, it does not follow that the judgment must be affirmed, if we are correct in holding

that the judgment of the court below was based solely upon the language of the contract itself.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Coleman,* 97 Ark. 438, the judgment was reversed because the court was of the opinion that the circuit court erred in holding that the deceased was guilty of contributory negligence as a matter of law and the direction was that the cause should be dismissed. On rehearing the judgment was modified so as to remand the case for a new trial because counsel for plaintiff made a showing that they had reason to believe that they could adduce testimony on a new trial which would carry the case to the jury on the question of contributory negligence.

Johnson, in his original brief, made the same contention he now makes as to the effect of his testimony, and counsel for appellee did not challenge the correctness of his contention in his original brief. Hence this state of the record may be taken as a showing by Johnson in good faith that he can make the proof indicated on a new trial of the case.

It follows that the motion for rehearing will be overruled.

VAN DYKE v. MACK.

Opinion delivered June 30, 1919.

1. HIGHWAYS—THE MISSOURI AND ARKANSAS HIGHWAY DISTRICTS—PURPOSE OF THE ACT.—Section 1 of Act No. 82, Acts of 1919, intended to create in a single statute four separate road improvement districts in different counties with no relation to each other except an effort to attain uniformity in the route of the combined roads to be constructed under the provisions of the statute.

2. SAME—A DISTRICT INCLUDES LANDS ONLY WITHIN THE COUNTY WITHIN WHICH THAT DISTRICT IS.—A single district created under the above statute includes lands only within the county in which that district is, notwithstanding the fact that the road may run within five miles of the county line.

3. SAME—BOUNDARIES—LANDS IN ANOTHER COUNTY—BENEFITS—LEGISLATIVE DETERMINATION.—The boundary of a road district was fixed by Act 82, Acts 1919, at five miles on each side of the said roadway, where the road ran within five miles of the boundary between the county in which the district was situated and an adjoining county, a legislative determination that the lands in the first named county only were benefited by the improvement will not render the statute invalid.

4. SAME—VALIDITY OF STATUTE CREATING CHANGE IN PORTION OF STATUTE—CONTINUOUS HIGHWAY.—Act 82, Acts 1919, created four road districts forming a continuous highway through four counties, but the act provided that the district could be created in White, one of the four counties, only upon petition of a majority of land owners. This part of Act 82 was thereafter repealed and Act 128, Acts 1919, enacted, taking White County out of the operation of Act 82. *Held* these facts did not affect the validity of Act 82 with reference to the other three counties.

5. SAME—ANNUAL ASSESSMENTS—VALIDITY OF STATUTE.—Section 22 of Act 82, Acts 1919, as amended March 13, 1919, fixing the maximum of annual assessments in the Missouri and Arkansas Road District, upon rural and different grades of urban property, *held* valid; and the statute also upheld, although no maximums were named therein for Jackson County.

6. SAME—UNIFORMITY OF ASSESSMENTS—MISSOURI AND ARKANSAS HIGHWAY.—Each of the districts created by Act 82, Acts 1919, are as separate and distinct as if created by different statutes, and it is within the power of the Legislature to prescribe the method of collecting assessments, even though different methods are prescribed in the different districts.

7. SAME—SELECTION OF ROUTE—ROUTE PREVIOUSLY SELECTED BY ANOTHER DISTRICT.—The organization of a road district in Jackson County under Act 82, Acts 1919, is not rendered invalid because the commissioners, in selecting the route, selected as a portion thereof the route already selected by another district organized under the general road statutes.

8. SAME—BRIDGE ACROSS WHITE RIVER IN JACKSON COUNTY.—Act 82, Acts 1919, creating the Missouri and Arkansas Road District, and which authorizes the commissioners of the several districts to construct bridges, etc., and all necessary appurtenances of said roads, does not authorize the commissioners to construct a bridge across White River in Jackson County, as a part of the road to be improved.

Appeal from Jackson Chancery Court; *Lyman F. Reeder,* Chancellor; reversed.

George A. Hillhouse and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

1. The act (No. 82, Acts 1919) is not void and invalid, because (1) it includes lands in Independence County, and no provision is made for the taxation thereof. It was not the intention of the Legislature to embrace any lands outside of Jackson County and the five-mile limit should be construed as meaning all the lands in Jackson County within that distance. The court should be guided by the principles decided in 133 Ark. 64.

2. If, however, lands in Independence County are included, the act is valid and provides adequate machinery for its enforcement. The proceedings are not judicial but ministerial merely or administrative and the tax can be levied by any persons or tribunal selected by the Legislature. 111 Ark. 150; 96 *Id.* 410; 104 *Id.* 425. It is plain that the county court of Jackson County can be invested with the power to levy taxes throughout the whole district. It is not necessary to provide the details for certifying the levy to the clerk of Independence County and other matters of mere machinery to effect the purpose. Ordinary intelligence is presumed and assumed on the part of administrative officers where such is manifestly the purpose of the Legislature. 86 Ark. 231. The tax is to be levied in Jackson County upon all lands of the district and there is no defect in the act. Section 8 provides that the tax is to be levied by the county court of the proper county where the lands are situate.

3. There is no interference with other districts. The demurrer admits the allegations of the answer which disclaims any interference or intention to interfere.

4. The limitation on the assessment does not render the act void as held by the court below. 21 Ark. 40. If the Legislature can provide a *minimum* for the assessment it can provide a maximum if necessary. Section 25 is valid. It is the duty of the commissioners of the Jackson County district to proceed with the improvement whether the White County district makes its improvement or not. 120 Ark. 277; 133 *Id.* 380.

Independence County acted without authority, and said act is void and unconstitutional in so far as it applies to any land in Independence County. 133 Ark. 66.

Gustave Jones, amicus curiae.

The act is unconstitutional and void for many reasons. 114 Ark. 324. A bridge would have to be built across White River—a tremendous expense. As the taxes levied in one county cannot be expended in another, the enormous burden of the bridge would be borne by Jackson County lands alone. 52 Ark. 107; 125 *Id.* 325; 133 *Id.* 380. Jackson County is not protected by the act from unjust, unequal and unconstitutional exactions in the act. See also Act No. 128, Acts 1919.

C. M. Erwin, for appellee.

Section 1, Act No. 82, Acts 1919, organized and established a separate district for each of the four counties and intended to embrace lands only in each county within five miles of the road. See Act No. 266, Acts 1919, section 22. If the proposed highway will be of benefit to lands on either side of the road from the city of Little Rock to the Jackson County line, an imaginary line dividing the counties of Jackson and Independence would not keep the lands from receiving a benefit and exempt therein from paying their just proportion for the improvement.

S. M. Bone and *John B. & J. J. McCaleb, amici curiae.*

The act is not void for the reasons stated by the court below nor by appellants' counsel. Independence County is not mentioned in the act, and method of assessing lands in that county is set out, and no commissioners named therefor, and it clearly was not the intention of the Legislature to embrace lands in that county.

McCULLOCH, C. J. This case involves an attack on the validity of act No. 82 of the General Assembly of 1919, which was approved February 14, 1919. Section 1 of the statute, which declares its pupose, reads as follows:

"The purpose of this act is to secure the construction of a highway running from the city of North Little Rock, Arkansas, through the counties of Pulaski, Lonoke, White, Jackson, and connection with the Alicia and Walnut Ridge Highway on the Lawrence County line at or near Alicia, thereby giving a through route to the Missouri line, over the Alicia and Walnut Ridge Highway to Walnut Ridge, thence over highway of Road Improvement District Number Two of Lawrence County to Randolph County line, thence over highway of Road Improvement District Number Three of Randolph County to Pocahontas, thence over highway of Pocahontas and Donathan to Missouri. To that end, there are hereby organized four improvement districts: One for Pulaski County, one for Lonoke County, one for White County and one for Jackson County. Said districts shall be entitled respectively, the Arkansas and Missouri Highway District in Pulaski County, the Arkansas and Missouri Highway District in Lonoke County, the Arkansas and Missouri Highway District in White County and the Arkansas and Missouri Highway District in Jackson County. Each of said districts shall be corporate bodies, with the right to sue and be sued, to have a corporate seal and to perform all the functions granted to them by this act. The limits of each district shall embrace all quarter sections of land, any portion of which is within five miles of the route as selected by the commissioners, whether the same be laid off in town or city lots or not."

Other sections name the commissioners for each of the districts and provide for the construction of the improvement, the issuance of bonds and the assessment of benefits. The other provisions of the statute involved in the attack made in this case on its validity will be referred to later in the discussion.

It appears from the section copied above that the lawmakers intended in this single statute to create four separate road improvement districts in different counties with no relation to each other except an effort to attain uniformity in the route of the combined roads to be con-

structed under the provisions of the statute. Section 4 authorizes the commissioners of the respective districts, in connection with the State Highway Department to "proceed to select a highway across their respective counties and joining with the highway selected by the commissioners of the adjacent counties," but that if "the commissioners of any two districts are unable to agree upon a meeting point of the respective highways, the State Highway Engineer shall fix the meeting point." That section further provides that when the route may be selected the county court shall proceed to lay out the public roads pursuant to the general statutes on that subject.

Appellee owns lands in Jackson County within the limits of the district as laid out, and he instituted this action in the chancery court of Jackson County to restrain the commissioners of the Jackson County district from proceeding under the terms of the act to assess benefits and levy taxes thereon. Some of the attacks relate to the validity of the whole statute, and others are directed to the question of the validity of only that part of the statute which creates the Jackson County District.

(1) The first point involved relates to the question of inclusion or exclusion of lands in Independence County. The Jackson County route as selected by the commissioners runs for a considerable distance within five miles of the Independence County line, and it is insisted that the statute is invalid because it either includes Independence County lands lying within the five-mile limit without providing for a method of assessment, or excludes those lands, notwithstanding the fact that the statute itself constitutes a legislative determination that all lands within the five-mile limit will be benefited by the improvement.

(2) We interpret the language of the statute to mean that only Jackson County lands within the five-mile limit are embraced within the boundaries of the district. There is some ambiguity in the language of the several provisions of section 1 when read separately, but, when

read together and in connection with the statute as a whole, it is apparent that the lawmakers intended to create four separate districts, the boundaries of which were to be within the four separate counties mentioned, and that the concluding words of the section specifying the limits of the districts relate only to lands in the county, notwithstanding the fact that the route may run near enough to the boundary of an adjoining county to include lands of that county within the five-mile limit. The name by which the separate districts are indicated in the statute shows clearly the intention of the lawmakers. The districts are designated respectively, the "Arkansas and Missouri Highway District in Pulaski County, the Arkansas and Missouri Highway District in Lonoke County, the Arkansas and Missouri Highway District in White County and the Arkansas and Missouri Highway District in Jackson County." The fact, too, that the various sections relating to the organization of the district, the supervision of the respective county courts and the appointment of assessors all indicate that the districts are created by counties, and are confined to the limits of the counties mentioned.

(3) The other point of attack that the statute is void because it excludes the Independence County lands is answered by saying that the statute only constitutes a legislative determination of benefits to the lands embraced in the districts and not all land within five miles of the route. It may have been determined by the lawmakers that lands in adjoining counties where perhaps the trend of travel is in a different direction may not receive benefits, even though within five miles of the road, or that the benefits received may be relatively so slight as not to justify inclusion within the boundaries of the district. We cannot say, in other words, that the legislative determination that the lands in Independence County will not be benefited is on its face arbitrary and without foundation. On this point the case is ruled by the decision of this court in *Conway* v. *Miller County Highway & Bridge District,* 125 Ark. 325, which involved the validity of a

statute authorizing the construction of a bridge across a navigable stream which formed the boundary between two counties, and it was held that the failure to include lands in one of the counties would not render the statute invalid. The same conclusion was reached in other cases. *Mullins* v. *Little Rock,* 131 Ark. 59; *Fenolio* v. *Sebastian Bridge District,* 133 Ark. 380.

(4) The chancery court decided that the statute was void for the reason that the construction of the road in White County through the agency of a district in that county was dependent upon the petition of a majority of the property owners in that county and might not be constructed at all, thus thwarting the purpose of the lawmakers in providing for the creation of four districts for the construction of continuous roads. Section 27 of the statute provides, in substance, that, after the adoption of plans for the construction of the improvement in White County, further progress shall be suspended until a majority of the owners of property within the district in that county shall petition the county court for the ratification or adoption of the statute, and when a majority so petitions the county court an order shall be entered directing the commissioners to proceed with the construction of the road. The General Assembly of 1919 subsequently passed Act No. 128, which was approved February 26, 1919, taking the White County district out of the operation of Act No. 82, or rather abolishing the district created by Act No. 82 in White County and authorizing the construction of the highway in that county pursuant to the terms of Act No. 213 of the session of 1917. The validity of the last mentioned statute is not involved in the present litigation further than it may be found to affect the validity of Act No. 82 relating to the creation of the districts in the other counties mentioned.

We are of the opinon, however, that neither section 27 of Act No. 82, or Act No. 128 abolishing White County District created by Act No. 82, renders the former statute invalid so far as it creates the districts for the improvement of the roads in the other three counties. The

effect of act No. 82 as originally enacted was, as before stated, to provide for the construction of a road along a continuous route, but the lawmakers saw fit to express in section 27 the condition that the construction of the road in only one of the counties should be dependent upon the will of a majority of the land owners. An intention is clear that the force and validity of the statute with respect to the construction of the roads in the other counties should not depend upon the construction of the road in White County. There is a clearly expressed legislative purpose to build each of the roads, and a condition is attached to the construction of only one of them, which does not affect either one way or the other the force of the other parts of the statute creating the districts in Jackson, Lonoke and Pulaski counties. The new statute (act No. 128) does not affect the validity or force of any part of the old statute, except that part which relates to White County. It leaves the remainder of the statute in force.

The chancellor also decided that the statute was void because the limitation upon the assessment of benefits contained in section 22 "is unjust and inequitable, and not equal and uniform, as required by the Constitution of the State." Section 22, as amended by the subsequently enacted statute approved March 13, 1919, reads as follows:

"The total assessed benefits shall not be collected in less than twenty years and one-twentieth of said assessed benefits shall not exceed an average of ten cents per acre per annum on the rural property nor an average of thirty cents per annum per lot of the dimensions of 50x140 feet on the property in cities of the first class and proportionately for larger or smaller lots or tracts of land, and an average of one-half that amount on lots or tracts of land in incorporated towns or cities of the second class. Provided this section shall not apply to any lands or cities located in the district known as 'Arkansas-Missouri Highway District in Jackson County.' "

(5-6) It will be observed that this section, by its express terms, is made inapplicable to the district in Jackson County. We fail to discover in this part of the statute any grounds for declaring act No. 82 invalid, even as applied to Jackson County or any of the other counties. The section quoted merely fixes the maximum of annual assessments and constitutes a legislative determination of the uniformity of this maximum in fixing the annual assessments on rural land at ten cents per acre and the assessments on city property at thirty cents on each lot of certain dimensions and half that amount on other urban property. This classification does not appear to be obviously erroneous, and the will of the lawmakers ought not to be disturbed. Nor does the method of collecting assessments lack uniformity because there is no maximum prescribed as to property in Jackson County. Of course, under the law the assessments must be limited to the benefits derived from the improvement and must be uniform, but the limitation prescribed in this section of the statute relates only to the maximum annual levy of taxation, and it did not violate any rule of uniformity by failing to apply to one of the counties embraced in the statute. Each of the districts created are just as separate and distinct as if they were created by different statutes, and it was within the power of the Legislature to prescribe the method of collecting assessments, even though different methods are prescribed in the different districts.

(7) The next point urged against the validity of the statute is in respect to its operation in connection with another road district in Jackson County which has adopted the same route. The statute itself makes no reference to the other road district, but it is alleged in the compláint that a road improvement district has been organized under general statutes for the purpose of building a road from Newport to Tuckerman, that the district has sold its bonds and is actively engaged in the construction of the road, which is laid out along the route adopted by the commissioners of the Arkansas and

Missouri Highway District in Jackson County, and that this fact constitutes a frustration of the design of the Legislature in creating the last mentioned district. In the answer of the commissioners they admit that Road Improvement District No. 2 of Jackson County organized under general statute is constructing a road from Newport to Tuckerman along the route selected by the commissioners, but that the plans formed by these commissioners do not provide for the construction of a road along that route and that their plans do not interfere with the construction of that part of the road by Road Improvement District No. 2 of Jackson County. It will be seen from inspection of any map of the State that the road between Newport and Tuckerman constitutes a section of the route in Jackson County which ends at Alicia on the Lawrence County line. The exclusion of that section from the operation of the present statute will constitute a gap in the road to be constructed through the agency created in Act No. 82.

We do not stop to consider what effect, if any, the enactment of this statute has upon the creation under the general statutes of Road Improvement District No. 2 of Jackson County, but we are called upon merely to consider the effect of the action of the commissioners of the Arkansas and Missouri Highway District in Jackson County in selecting a route through that county along which a road is being constructed by another public agency. It will be observed that section 1 of act No. 82 authorizes the commissioners of the district in each county to select the route, and that it declares that all lands situated within five miles of the route as selected shall be embraced within the district. Note in this connection that the boundaries run from the route selected, not necessarily the road actually constructed. The commissioners have selected the route along which the road from Newport to Tuckerman is proposed to be constructed through another agency, but the route remains as selected, and the boundaries embrace all lands within five miles of the route selected. The fact that the plans

adopted by the commissioners do not contemplate a construction of the road along part of the route does not affect the boundaries of the district. It may affect very materially the question of the assessment of benefits, but that is a matter with which we are not concerned in determining the validity of the statute.

We do not know judicially the extent to which the lands within the five-mile limit along the route between Newport and Tuckerman may be affected beneficially by the construction of the other portions of the road in addition to that portion of it which is to be constructed through another agency. Nor do we know judicially the boundaries of Road Improvement District No. 2. There may be such a thing legally as the overlapping of the boundaries of separate improvement districts if substantial benefits are derived from each district. *Cumnock* v. *Alexander, ante* p. 153. Those matters are taken into consideration merely in ascertaining benefits, and, as before stated, do not affect the validity of the creation of the district unless the fixing of boundaries of different districts is shown to be arbitrary and demonstrably erroneous.

(8) The last point of attack made in this case is that section 4 of the statute authorizes the commissioners of the several districts "to construct bridges, subways, culverts and all necessary appurtenances of said roads," and that the construction of a bridge across White River in Jackson County would operate as an unjust and unequal burden on tax payers on lands in that county. The answer to that contention is, we think, that the language of the statutes does not authorize the commissioners to construct a bridge across White River as a part of the road to be improved. That would constitute a separate and distinct improvement which is not embraced within the terms of the statute. The language quoted above was manifestly intended to refer to such bridges, subways, and culverts as would constitute necessary appurtenances to the road to be constructed, and not bridges of such size and magnitude as would constitute separate improve-

ments. Section 5, which is the one that relates to the method of assessing benefits, refers only to the assessment of benefits "which will accrue by reason of the construction of the highway in their respective counties," and makes no mention of the construction of bridges, which shows that the Legislature did not intend to authorize the construction of bridges which would constitute separate improvements, but merely bridges and culverts which would be essential portions of the road and constitute a part of the particular improvement and not a separate one.

These are the only points of attack made in the pleadings and briefs of counsel, and we do not enter upon consideration of any other phases of the statute. The conclusion reached is that the attack is not well founded, and that the chancery court was in error in declaring the statute to be void.

The decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

HART and SMITH, JJ., dissent.

BROWN COAL COMPANY v. WRIGHT.

Opinion delivered June 30, 1919.

SALES—CAR OF COAL—FAILURE TO NOTIFY BUYER—LIABILITY FOR DEMURRAGE.—A. ordered coal from B. to be shipped by rail to A. The coal was shipped, but B. did not notify A. of that fact, nor did the railroad notify A. of its arrival until after a large amount for demurrage had accrued. A. notified B. of the facts and declined to take the coal; B. wired A. to pay the demurrage and unload the coal quickly. This A. did. *Held,* B. was entitled to recover from A. the purchase price agreed on, less the amount of demurrage paid out by A.

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

STATEMENT OF FACTS.

The appellee, Mrs. F. A. Wright, through her agent ordered three cars of coal from the appellant. It is a written order dated April 3, 1918, directed to the Brown Coal Company, Memphis, Tennessee, instructing them to ship to Mrs. F. A. Wright at Thomwall, Arkansas, three cars of coal. The first car was to be shipped April 20, the others as ordered. The order was signed by Mrs. Wright's agent and was accepted by the appellant by letter of date April 11, 1918. On the 14th of April the appellant shipped the car of coal, the price of which was to be $299.39, to Mrs. Wright consigned to her at Thomwall in due time to reach her on the 20th of April, 1918. The car was shipped over the L. & N. Ry. Co.

May 13, 1918, the appellee telegraphed the appellant as follows: "Car No. 34082 shipped me at Thomwall, Arkansas, your letter dated April 14th; Memphis postmark May 4th. No notice from railroad company; demurrage $160. What shall I do? Wire instructions without delay, care R. D. Rasco, DeWitt, Arkansas. Mrs. F A. Wright."

To the above the appellant replied by telegram dated May 14, 1918, as follows:

"Suggest you unload car of coal promptly and release car now at DeWitt; see your agent. Signed, Brown Coal Company."

The same day the appellee wrote the appellant as follows:

"You will find enclosed my personal check for the sum of $299.39 less $175.10 demurrage. Your notice did not reach me until the 7th day of May, although our statement was made out April 14; the postmark in Memphis was May 4. You will, therefore, find enclosed check for $124.29 in payment of account."

On May 23, 1918, the appellant wrote the appellee returning the check for $124.29 and gave as its reasons for doing so that the appellee had deducted demurrage that had accrued on the car while standing at Thomwall await-

ing disposition. The appellant insisted in the letter for the payment of the purchase price of the car, which the appellee refused, and the appellant instituted this action to recover the full purchase price of the car of coal.

The appellee testified that the first information she received from the appellant that the coal was shipped was in a letter postmarked May 4, at Memphis. She exhibited the envelope and identified the envelope showing the above postmark. She testified that her agent, in order to ascertain whether the coal had been shipped, and if so where, watched the station and the switch every day, and that she watched the mail box every day, she received no notice from the railroad company that the car had arrived; the first notice she had that the coal had been shipped and when it arrived at DeWitt was from the agent at Stuttgart; she never received any notice or bill of lading from the company and did not know anything about what number of car to look for; she refused to unload the car after she learned it had arrived at Thomwall because the demurrage had accrued without any notice to her from the Brown Coal Company or the railroad company. She had a receipt from the railroad company for the amount of the demurrage.

R. D. Rasco testified that the appellee advised with him as an attorney as to what would be the best to do about the demurrage which had accumulated on the car to amount of $175.10; that the appellee said the coal was not worth the amount she paid for it and the demurrage, and did not desire to pay it; that he advised her that it would be best to take the matter up with the Brown Coal Company and not to unload it until she heard from it. He further testified that the appellee sent the telegram notifying the appellant of the demurrage and asked it to wire instructions; that the appellant called witness over the telephone, and after he stated to them that the appellee had absolutely refused to unload the coal he was directed by appellant, as Mrs. Wright's attorney, to have the car load of coal, that at that time and for some time past had been at the station at DeWitt, unloaded and to

pay the demurrage. It was the distinct understanding, said the witness, "that the demurrage was to be paid by the Brown Coal Company. I told them in my conversation that she would not receive it if she was required to pay the demurrage."

Witness exhibited with his deposition a letter from the appellant to the appellee dated August 14, 1918, confirming the telegram to Mrs. Wright and also long distance conversation with Mr. Rasco. In this letter, signed by appellant's sales manager, it is stated: "I suggested to him that he unload the car of coal promptly and release the car, so that it would not accrue any more demurrage, and that the car was now at DeWitt, and that after he had paid the agent at DeWitt that they shall haul the car back to Thomwall. I find that we have mailed you a post card as well as invoice, and none of this mail has been returned to us."

The court sitting as a jury rendered a judgment in favor of the appellant for sum of $102.65, which represents the amount of appellant's claim less the sum of $196.74, the amount of the demurrage paid by the appellee, and adjudged the costs against the plaintiff.

The appellant duly prosecutes this appeal.

J. E. Ray, for appellant.

1. The delivery of the car of coal to the railway company was a delivery to the consignee, even if she never received it at all, and the contract so reads, and that is the law. The car was properly consigned to appellee. 43 Ark. 358; 44 *Id.* 559; 50 *Id.* 20; 78 *Id.* 123; 79 *Id.* 456; 91 *Id.* 318; 92 *Id.* 287; 98 *Id.* 495; *Ib.* 482.

2. The court erred in refusing to reduce its findings of fact and law to writing, as asked and required by Kirby & Castle's Digest, section 7652.

R. D. Rasco, for appellee.

1. The liability of appellant for demurrage charges does not depend altogether upon the question as to when the title to the coal passed. It was the duty of appellant to notify appellee when the car was shipped. The con-

tract does not in express language require notice of the time of shipment, but both parties understood that notice should be given, as shown by their conduct, in executing its terms. Notice was proper and necessary. 115 Ark. 166; 114 *Id.* 415; 46 *Id.* 129. This is no violation of the parol evidence rule. 94 Ark. 575; 125 *Id.* 492; Jones on Evidence, § 440; 66 Minn. 156; 6 N. W. 854; 93 Ark. 439.

2. The testimony shows that appellant agreed to pay the demurrage charges. Finding of facts by the trial judge sitting as a jury are conclusive if based on evidence. 68 Ark. 83; 66 *Id.* 53; 80 *Id.* 249; 96 *Id.* 606; 126 *Id.* 318; 114 *Id.* 170; 171 S. W. 924. There is some evidence here to support the findings of the court. 111 Ark. 190; 107 *Id.* 281.

3. The refusal of the court to reduce its findings to writing was harmless, as it was not carried into the motion for new trial. Since appellant recovered all that it was entitled to receive, appellant cannot complain of harmless errors. 85 Ark. 115; 111 *Id.* 272; 112 *Id.* 507; 112 *Id.* 269. This court only reverses for prejudicial errors. 120 *Id.* 236; 128 *Id.* 594. Nor for mere irregularities where the judgment is right on the whole case. 24 *Id.* 586. The cases in 43 Ark. 358 and 44 *Id.* 559, cited by appellant, are the law as to when the title passes. 98 *Id.* 482. But that is not the question here, as appellant failed to give notice and enable appellee to keep down demurrage charges. The notice if sent by mail was not in time. Moore on Carriers, 399; 2 Daly (N. Y.) 104. Carriers must give notice. Kirby & Castle's Digest, § § 8177, 8184. If goods are shipped, but because of some failure of the seller to comply with the terms of the contract or offer or duties imposed by law the property does not pass. Williston on Sales, 402. The mail was the agent of the consignor. 36 N. Y. 307; 29 Vt. 127; 15 R. I. 66. If the offer is by mail and the acceptance by telegraph the offerer must receive the notice of acceptance before a binding contract is made. 130 Mass. 173. See also Page on Contracts, 52.

WOOD, J., (after stating the facts). Under the contract, evidenced by the order and accepted by the appellant, the delivery of the car by the appellant to the railroad company at Memphis was a delivery to the consignee. The title to the coal under the contract passed to the consignee, the appellee. The appellant had the right under the contract to demand of appellee payment for the car of coal, and if not paid on the 10th day of the month succeeding shipment, the right to draw on the appellee for the amount, and appellee became liable to the appellant for the purchase money.

But that is not the question involved here, for the appellee admits that she is liable to the appellant for the purchase price of the coal, but she claims that through the fault of the appellant in not giving her notice of the time when the car was shipped a demurrage amounting to $196.74 accrued which she paid under the directions of appellants, and which she would not have paid but for such instructions.

The testimony tended to prove that it was contemplated at the time the contract was entered into that the appellant should notify the appellee of the time when the car was shipped. The testimony tended to prove that the appellee received no such notice; that she was present through her agent at Thomwall looking for the car and ready to receive the same when it should arrive; that she received no notice from the railroad company at the time of its arrival at Thomwall until the demurrage in controversy had accrued; that she received no notice from the appellant by letter or otherwise that the shipment had been made and that after she ascertained that the car had finally arrived at Thomwall and demand for the amount of demurrage was made upon her she immediately communicated with the appellant by wire asking for instructions and received the answer set forth in the statement suggesting that she unload the car of coal promptly and release the car.

The testimony further tended to prove that the appellant was informed by appellee's agent and attorney,

after the demurrage had accrued and before she paid the same, that she would not accept and unload the car and pay the demurrage, and "that it was the distinct understanding between the appellant and the appellee, acting through her attorney, that the appellant should pay this demurrage; that, after this agreement was arrived at between the appellant and the appellee, the appellee paid the railroad company the demurrage and took the railroad company's receipt therefor, whereupon the car was released and accepted by the appellee.

The testimony thus adduced was amply sufficient to sustain the finding of the court that the appellant was liable to the appellee for the amount of the demurrage charges under its express agreement to pay the same, and the court did not err in so holding.

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

BRADWAY v. THOMPSON.

Opinion delivered June 30, 1919.

1. LOST WILL—ESTABLISHMENT OF—CHANCERY JURISDICTION.—It is proper to bring an action to establish a lost will, in the chancery court.
2. LOST WILL—PROOF OF CONTENTS.—Under Kirby's Digest, section 8065, "no will of any testator shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions be clearly and distinctly proved by at least two witnesses, a correct copy or draft being deemed equivalent to one witness."
3. LOST WILL—PROOF OF EXECUTION.—The evidence *held* to show that deceased had executed a will, in accordance with the formalities required by law, and that a carbon copy of a will introduced and offered for probate was a true copy of the will which had been executed by the testator.
4. EVIDENCE—ATTORNEY AND CLIENT—PRIVILEGE—DRAWING WILL—PROOF OF LOST WILL.—An attorney prepared a will for deceased, which it was proved was properly executed and witnessed. After

deceased's death the will could not be found. In an action in equity to establish the contents of the lost will, the attorney who drew deceased's will explained its contents to him, and was present at its execution, is competent to testify as to all these facts.

5. LOST WILL—POSSESSION OF TESTATOR—PRESUMPTION OF DESTRUCTION.—Where a testator, after executing a will, kept the same in his possession, but after his death the will could not be found, the presumption exists that deceased had destroyed the will, but this presumption is rebuttable by testimony that the testator had not revoked his will.

6. LOST WILL—PRESUMPTIONS—LAST POSSESSION—DECLARATIONS OF DECEASED.—Where the execution of a will is properly shown and its provisions established, and the will was last seen in the testator's possession, his declarations tending to show that he has or has not destroyed it, or which show that it was not in existence at his death, are admissible to strengthen or to rebut the presumption of revocation which arises from its disappearance.

7. LOST WILL—PROOF OF DESTRUCTION BY MEMBER OF HOUSEHOLD—OPPORTUNITY.—Deceased made a will which, could not be found after his death shortly thereafter. Deceased told friends the exact place where he kept the will, and these friends told a relative of deceased, who was in and out of his house at all times. *Held,* opportunity to destroy a will is not sufficient testimony to establish that fact, but it is a circumstance to be considered in determining whether the will was in existence at the time of the death of the testator, or had been destroyed during his lifetime.

8. LOST WILL—ESTABLISHMENT—DUTY OF CHANCELLOR.—In an action in equity to establish a lost will, when the chancellor is satisfied that the original will was lost, and that a copy should be admitted to probate, it is not indispensable that he should determine what became of the missing document; it is enough that he find that it was not canceled or revoked by the testator.

9. LOST WILL—ESTABLISHMENT—FINDINGS OF CHANCELLOR.—In an action to establish a lost will, *held,* a finding by the chancellor that the original of the will was not revoked, but lost, and the admission of a copy to probate, was not against a preponderance of the testimony.

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

STATEMENT OF FACTS.

This is a suit in chancery to establish a lost will by parol testimony of its execution and contents to the end that it may be duly admitted to probate.

On the 16th day of May, 1918, Joseph Kendrick executed his will in the city of Little Rock, Arkansas, and retained it in his possession. He died on July 26, 1918, in the city of Little Rock where he had resided for many years and where all his property was situated. After his death his will could not be found, and this suit was brought by the appellees, who are the trustees named in the will, against the appellants, who are the administratrix and sole heirs at law of said Joseph Kendrick, deceased.

Miss Fannie Mitchell testified substantially as follows:

I have known Mr. Joseph Kendrick since I was a child and he was always fond of children. Mr. Kendrick came to my mother's home in Little Rock and consulted with me about making his will. He said that he wanted to leave his property to charity; that he was getting old and his health was failing. After studying about the matter a few days I suggested to him to leave his property to a children's hospital. Mr. Kendrick approved of the plan and wanted me to write his will. He gave me a memorandum of the terms of his proposed will. He wanted Henry Condell, a nephew of his wife, to have a certain lot in the city of Little Rock. He wished to leave to Mrs. Anna Bradway, a niece, the interest on $2,000 so long as she should live and after her death the $2,000 was to be added to the hospital fund. The rest of the property was to be left for the erection of a hospital for children. After studying over the matter I told Mr. Kendrick that I could not write a will and persuaded him to go to my brother-in-law, Ashley Cockrill, to have him write the will. Mr. Kendrick was very secretive about the matter and only consented to do so after some persuasion on my part and the promise that Mr. Cockrill would keep the matter secret. Mr. Kendrick always expressed great love and admiration for Henry Condell. I made an appointment with Mr. Cockrill for him and went with Mr. Kendrick to his office. The will was drawn and read over to him by Mr. Cockrill and Mr. Kendrick

expressed great satisfaction about the matter. Mr. Cockrill handed the will to Mr. Kendrick and told him to put it in a safe place. Mr. Kendrick offered to pay Mr. Cockrill for writing the will, but I told him no, that Mr. Cockrill did not want any pay for it under the circumstances. After we left Mr. Cockrill's office Mr. Kendrick again expressed great satisfaction about the matter. I went to my place out in the country and did not hear anything more about Mr. Kendrick until a few days before his death when I learned that he was seriously ill at a local hospital. I went there to see him and Mr. Kendrick looked like he wanted to say something to me privately. The nurse was present in the room. Finally I leaned over him and said, "Mr. Kendrick, have you done anything that you wish me to undo?" I was referring to his execution of the will and think he so understood me. Mr. Kendrick replied, "No, Miss Fannie, not that; I am perfectly satisfied with that." Just at this time his physician came into the room and I did not get to talk with him further. He died in a few days thereafter.

Effie Jordan testified as follows: I am an expert stenographer and Mr. Ashley Cockrill dictated to me the will of Joseph Kendrick which I took down in shorthand and afterwards transcribed, making one carbon copy. I delivered both the original and the carbon copy to Mr. Cockrill. On the morning of May 16, 1918, Mr. Joseph Kendrick came to the office. In a short time Miss Fannie Mitchell came in and went into Mr. Cockrill's office where the three remained for a half hour or more. Then Mr. Cockrill came out of his private room looking for witnesses to the will. He first spoke of using me as one of the witnesses but got Mr. Sid Redding and Mr. Will Akers as witnesses to the will. I attach to my statement the carbon copy of the will executed by Mr. Kendrick on that morning. The interlineations and changes are in the handwriting of Mr. Cockrill. At his request some time afterwards I rewrote the will from my stenographic notes without using the carbon copy and attached this also to my statement. Mr. Cockrill gave Mr. Ken-

drick the original will inclosed in a long envelope with "Cockrill & Armistead" on the left hand corner. He put the carbon copy which I have exhibited with my statement in an iron safe in his office where it has since been kept.

Ashley Cockrill testified: I dictated the will of Mr. Joseph Kendrick to Miss Effie Jordan, my stenographer, and she wrote it on the typewriter making an original and a carbon copy. She brought them both into my private room and put them on my desk the day the will was executed. Mr. Joseph Kendrick signed the will by mark. His signature was written by W. G. Akers who attested it as a witness. The will was signed by W. G. Akers and Sid B. Redding as witnesses. The will as signed is exactly as shown by the carbon copy attached to the statement of Miss Jordan with these exceptions. On the first page of the will I filled in blanks with a pen the word "executrix" in two places. On the second page, in the three blanks intended for the names of the trustees I wrote with a pen E. G. Thompson, W. W. Wilson and C. H. Rosseau. On the third page near the middle, the word "whether" was stricken out with a pen and the word "and" was stricken out and the word "or" written above it. On this page I also wrote in a blank intended for the name of the executor or executrix, Fannie Mitchell and "rix" on the end of the typewritten "execut." I made an effort to keep an exact copy by filling in with a pencil in the copy the same words that were put in the original with the pen, but I neglected to write the name of Fannie Mitchell executrix as was done in the original. I know the carbon copy with the exception of leaving out the name of Fannie Mitchell is an exact copy of the will as executed. I explained the will fully to Mr. Kendrick and he read it line by line before he executed it. Mr. Kendrick fully understood the terms of the will before he executed it. After the will had been executed I folded it up and put it in an envelope with the name "Cockrill & Armistead, Little Rock, Arkansas," on the left hand corner. Mr. Kendrick left the office with the will in his possession and I never saw him again.

Sid B. Redding and W. G. Akers both testified that they signed the will as witnesses thereto at the request of Joseph Kendrick. Mr. Akers said he wrote the name of Joseph Kendrick and at the time Mr. Kendrick stood right behind him and placed his hand on the pen when the cross to his signature was made. They said that Mr. Cockrill took up the will and stated the various provisions in it before it was signed. They recollected that there was a devise of a house and lot in the city of Little Rock to a nephew of Mr. Kendrick's deceased wife and the interest on a certain sum of money was to be paid Mrs. Anna Bradway; that Joseph Kendrick said that he had done for his relatives all that he felt that he should do and that he left the balance of his estate to be used in erecting a charity hospital for needy children. Miss Fannie Mitchell was appointed executrix of the will and E. G. Thompson, C. H. Rosseau and W. W. Wilson were to act as trustees in administering the trust.

Henry Condell testified: I was a nephew of Joseph Kendrick's wife and at the time of the trial a sergeant in the United States army. Prior to his death I knew Joseph Kendrick as long as I could remember any one. I am past twenty-eight years old. I saw Mr. Kendrick about five days before his death at his home in the city of Little Rock. At that time I was on a week-end pass from Camp Beauregard and could only stay with Mr. Kendrick one day and one night. At that time Mr. Kendrick was not confined to his bed but was confined to the house. He told me that he had done what he had wanted to do for a long time—that he had made his will, but he did not tell me the provisions of his will. Before this time Mr. Kendrick had told me that he wished he had made his will. He had, also, offered to deed me a house and I said, "Uncle Joe, I do not think that is the right thing for you to do in your old age. When you are done with your property, it is your privilege to do what you please with it."

C. H. Rosseau testified: I have lived in Little Rock about thirty-seven years and knew Mr. Kendrick about

thirty-five years before he died. I always thought that Mr. Kendrick regarded me as one of his best friends. Mr. Kendrick was sick from the first day of June until the 26th day of July, 1918, and I saw him every day but one during that time. He was not confined to his bed or even to his house during all of this time. Mr. Kendrick first told me in the presence of my wife that he had made a will and would show me where he he kept it when I came over to his house. He told me that Mr. Cockrill had made his will for him, and he wanted me to know where he kept it in order that if anything happened to him I might take care of the will for him. In a few days after the first of June I went over to Mr. Kendrick's house and he showed me where he kept his will in a drawer to a spool case in a little room next to his bath room. The drawer containing the will was locked and he showed me where he kept the key hanging behind a little frame near the spool case. He showed me the envelope and the envelope had Mr. Cockrill's name on the corner of it. Mr. Kendrick told me that he expected some of his relatives would be much disappointed when they saw his will, but that he had a right to make it to suit himself. He spoke of the will as being in existence and being in the envelope which he showed me. Mr. Kendrick spoke to me about the matter again about a week before he went to the hospital. He again spoke of the disappointment of his relatives at its terms, but felt that he had a perfect right to make it just as he wanted. Mr. Kendrick was taken to the hospital on Monday and died early on the following Friday morning. On Tuesday Mr. Robinson, another old friend, and myself went to the hospital to see Mr. Kendrick. Mr. Robinson asked me if I could do anything for him and he replied: "Not a thing that I know of; everything is all right as far as I know." These are his words as nearly as I can repeat them. Mr. Kendrick was buried on Saturday. On Sunday I told Mrs. Bradway that I would come over on Monday, and we would get Mr. Kendrick's will. I told her the will was in the drawer of the spool case when I last

saw it. On Monday morning we looked through the spool case and could not find the will. I heard my wife talking to Mrs. Bradway about the will over the telephone before Mr. Kendrick died. After a little hesitation in the conversation, she told Mrs. Bradway where the will was. We were not able to find the will after Mr. Kendrick's death.

Mrs. C. H. Rosseau testified: I heard Mr. Kendrick talking to my husband about having made a will and the place where he kept it. When Mr. Kendrick decided to go to the hospital I spoke to Mrs. Bradway about it and asked her if she thought it would be safe to leave it there. Mrs. Bradway said she would not disturb it or do anything with it until the proper time came. At that time Mrs. Bradway knew where the will was kept. Previously I had told Mrs. Bradway that Mr. Kendrick had made a will.

It was also shown that Joseph Kendrick was a man of positive character and very slow to change his mind. He was very secretive and at his death had real estate valued at between forty and fifty thousand dollars. During his lifetime he gave Mrs. Bradway a house and lot in the city of Little Rock and had also given her daughter money to obtain a business education.

The different relatives of Joseph Kendrick were placed on the stand and all testified that they did not know anything about him making a will and that they did not destroy his will.

Mrs. Anna Bradway testified: I lived close to Joseph Kendrick for five years before he died. I was in and out of his house every day. I cleaned up the house and cooked his meals. When he was not able to come to my house for them I took them to him. He never mentioned to me the making of a will, but frequently told me that he would remember me in his will. This I took for a joke. I never had anything to do with tearing up the will. Mrs. Rosseau did not tell me where the will was except that she said it was in the house.

Other facts will be referred to and stated in the opinion.

The chancellor found the issues in favor of the appellees and decreed that the paper presented to the court should be established and proved as the last will and testament of Joseph Kendrick, deceased.

R. M. Mann, Murphy & McHaney, L. C. Maloney and *Carmichael & Brooks,* for appellant.

1. Two witnesses are necessary to establish contents of lost will. Kirby's Digest, § 8065; Revised Stat. § § 48-51; Gould's Digest, § 51, under Wills & Testaments (ed. of 1858) and § 5816 (ed. of 1874); Mansfield's (1884 ed.), § 6547; S. & H. Dig. (1894), § 7445; So., § 8065. Kirby's Digest must be an error in saying one witness. Our statute is taken from the New York statute. See Rev. St. of N. Y. (5 ed.), p. 144; 91 Am. Dec. 89; 76 N. E. 767.

The testimony of Miss Jordan, Mr. Cockrill, Mr. Akers and Mr. Redding goes only to the correctness of the copy and that no witness testified as to the provision of the will independently nor without the aid of the copy. None of their testimony fulfills the rule as laid down in the law. 76 N. E. 767. An attorney who drafted the will is not a competent witness. *Ib.;* 6 Am. St. Rep.; 5 Redf. Sur. (N. Y.) 372; 63 Atl. 247; 23 A. & Eng. Enc. Law (2 ed.) 114; 63 Atl. 250.

2. The leading case in this country on the admissibility of the declarations of the testator to prove a lost will, made either before or after the making of a will as to whether the will was genuine, or to take the place of two witnesses, to show the intention of the testator, is 180 U. S. (45 Lawy. ed.), 663, where it was held they were not, unless part of the *res gestae.* 60 Ark. 301 is cited; 74 *Id.* 216. Declarations of the testator are mere hearsay evidence and not competent. Borland on Wills, 92.

Appellee's case here is almost entirely of declarations of intention, clearly not competent. *Supra;* 38 L. R. A. 453; 76 N. E. 767; 122 Ark. 407; 107 Am. St. 439-

445; 68 N. Y. 46; 110 Am. St. 457; 13 Col. 546; 22 Pac. 898.

3. The presumption is that the will was destroyed by the testator with the intention of revoking it and must be overcome by evidence, strong, positive and free from doubt. 104 N. W. 403; 128 Ark. 273; 1 Alexander on Wills, 747, § 550; Schouler on Wills (5 ed.), § 402; Borland on Wills, p. 96, § 28; 113 Ga. 795; 39 S. E. 500; 84 Am. St. Rep. 263; 46 Atl. Rep. 521.

It was shown that the testator had at all times access to his will and it was clearly proved that none of those interested destroyed it. The presumption that the testator destroyed it is clear. See 110 N. Y. 481; 6 Am. St. Rep. 405. The Collier case, *supra,* is very similar to this. See also 50 Neb. 290; 38 L. R. A. 433 and note; 73 Ark. 20; 119 *Id.* 128. The declarations of the testator were not competent and it was error to admit them. *Supra.* In all other respects the evidence fails to meet the requirements of the law as stated above. As to the effect of mere opportunity to destroy a will as evidence of fraudulent destruction, see note to 110 Am. St. Rep. 453; 22 S. C. 187; 107 Am. St. 439-442.

The burden was on proponent to establish the will and overcome the presumption of law that the testator destroyed it to revoke it. 38 L. R. A. 484, note and cases *supra.*

Rose, Hemingway, Cantrell & Loughborough and *Cockrill & Armistead,* for appellees.

1. The finding of the chancellor that the will was in existence at the death of the testator and lost by accident or fraudulently destroyed by someone else is amply supported by the testimony. 185 S. W. 258. The presumption in favor of the chancellor's findings outweighs the presumption that the testator destroyed the will. 33 A. & E. Enc., p. 148.

The question at issue is not whether Mrs. Bradway destroyed the will, but really whether the testator changed his mind and destroyed it. It is immaterial whether

someone else fraudulently destroyed it and who that person was, or whether the will was still in existence at his death and lost. The alternative allegations in the complaint were permissible because under either of them the opposite party would be equally liable. 103 N. Y. S. 829; 16 Cyc. 239; 31 *Id.* 74.

If the facts justify a finding either that the will was destroyed by some one other than the testator, or was simply lost, then the decree should be affirmed. The chancellor found merely that the testator did not destroy it but died intending and believing it to be in existence. He did not expressly find whether it was destroyed by some one or was simply lost. If the facts justify either conclusion, then the decree is right. The chancellor's reasons are only persuasive but they should be very helpful to this court. The evidence justifies his conclusions and they should be upheld. 46 Atl. 519 is not this case but the reverse. The other cases cited by appellant are entirely different from this and do not apply. See 11 Biss. (U. S.) 256, a leading case; 5 B. Mon. (Ky.) 58, also a leading case; 96 N. W. 395; Schouler on Wills (2 ed.), § 402; 22 S. C. 187; 110 N. Y. 481; 18 N. E. 110. The evidence is ample to support the finding that the will was lost by accident. Whether so lost or destroyed by others designedly is equally fatal to contestant. The declarations of the testator were admissible as to the existence or not of the will and are abundantly sustained by competent testimony and adjudications. 11 Biss. (Ky.) 256-260; Fed. Cases No. 13, 194; 95 Wis. 121; 70 N. W. 61; 67 *Id.* 12, and cases cited; 70 *Id.* 61; 25 Atl. 558; 3 Grant's Cases, 140. The contention of the plaintiff that the concealment or destruction of the will was done or procured by the fraud of some third person is not proven. It must be affirmatively shown, as it is never presumed. 163 Pa. St. 201; 29 Atl. 919. Every criterion points to the conclusion that the testator did not destroy his will and the chancellor so found and his finding should not be disturbed.

2. On appeals in chancery cases questions as to competency of witnesses will not be considered, as it is presumed that only competent testimony was considered. 76 Ark. 153; 76 *Id.* 252. The declarations of the testator were competent. Cases *supra.* See also 40 Cyc. 1317 and note 461; 30 Cyc. 1316; 23 A. & E. Enc. 149-150, and cases cited, New York alone being cited as *contra;* 134 Mass. 252; 142 Ind. 55; 47 Ohio St. 325; 67 N. W. 12; 18 *Id.* 734; Cassaday on Wills, § § 384-390; *Ib.,* § 311-313; *Ib.* § § 314-320, 356-7.

3. The contents of the lost will are sufficiently proved. 63 Atl. 247 cited by appellant is not in point. The requirements of the statute is answered if there were two witnesses to the will; here there were *three.* 13 Col. 546. See also 23 A. & E. Enc. Law 144; 177 Mass. 238; 155 Col. 626. Here the entire contents of the will were clearly and distinctly proved and the case should be affirmed.

HART, J., (after stating the facts). (1) Chancery was the proper forum in which to bring the suit. Section 8062 of Kirby's Digest provides that whenever any will shall be lost or destroyed by accident or design, a court of chancery shall have the same power to take proof of the execution of such will, and to establish the same, as in the case of lost deeds. The power of a court of chancery to establish lost instruments is one long recognized and the practice under it requires that all those interested in the deed or will should be made parties and have notice of the proceeding. *Waggener et al.* v. *Lyles et al.,* 29 Ark. 47, and *Dudgeon* v. *Dudgeon,* 119 Ark. 128.

(2) Sections 48-51 of the Revised statutes, now section 8065 of Kirby's Digest, reads as follows:

"No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions be clearly and distinctly proved by at least two witnesses,

a correct copy or draft being deemed equivalent to one witness."

(3) The first question for our consideration is whether or not the execution and contents of the will are established according to the provisions of this statute. We think the proof clearly shows that this question should be answered in the affirmative. Mr. Cockrill dictated the will to his stenographer. She took it down in shorthand and transcribed her notes on the typewriter, making the original draft of the will and a carbon copy of it at the same time. She exhibited the carbon copy with her deposition and testified that it was the copy she made when she transcribed her stenographic notes as dictated to her by Mr. Cockrill. Mr. Cockrill identified the copy as being an exact copy of the original with the exception of filling certain blank spaces with the name of the executrix and the names of the trustees. He stated that he filled in the blanks with these names in the original with a pen and in the copy with a pencil.

Thus it appears from his testimony that the copy exhibited with the deposition of the stenographer was an exact copy in all respects of the original will. It appears from the testimony of the stenographer that the copy was an exact one in all respects except that in transcribing the will she left a blank space for the name of the executrix to be inserted and also for the names of the trustees. It appears from the testimony of both these witnesses that as far as the devises and bequests are concerned the carbon copy exhibited is an exact copy of the will executed by Joseph Kendrick.

In addition to this Miss Fannie Mitchell testified that Joseph Kendrick stated to her in detail how he wanted his property disposed of and that she at the time made a written memorandum from his dictation. She refreshed her memory from this memorandum and testified in detail about how Joseph Kendrick had directed his property to be disposed of in his will. Her testimony in this regard was in all essential respects similar to the disposition of his property as shown by the carbon copy

of the will. She testified that the memorandum she had written down at the time from his dictation showed that he wanted to give a house and lot in the city of Little Rock to Henry Condell. She gave the number of the lot. She testified further that Mrs. Bradway was to have the interest on $2,000 in money and that the principal at her death was to go to the establishment of an orphan's hospital; that all the balance of his property which was estimated at about $40,000 was to be used in erecting a hospital for orphan children. She stated further that the will was prepared by Mr. Cockrill from the memorandom which she had furnished him. The witnesses to the will, also, remembered that he had devised a house and lot to Henry Condell and the interest on a certain sum of money to Mrs. Bradway. They did not remember the amount. They stated that the residue of the estate was to be given to C. H. Rosseau, E. G. Thompson and W. W. Wilson in trust to erect a hospital for orphan children. All the above named witnesses except the stenographer, who was not present at the time, testified that the will was read over line by line to Joseph Kendrick and carefully explained to him before he signed it. He expressed himself as greatly pleased and left the office with the will in his hand. There is no testimony tending to show that he ever executed but one will.

It is shown by the testimony of disinterested witnesses that he executed this will in the office of Ashley Cockrill. These witnesses also clearly established the provisions of the will. Therefore we are of the opinion that the execution of the will and its contents have been clearly and distinctly proved with the formality and solemnity prescribed by the statute.

(4) Ashley Cockrill, the attorney who prepared the will under the instructions given him by the testator, was one of the witnesses to prove the execution of the will and its provisions. It is true subdivision 5 of section 3095 of Kirby's Digest provides that an attorney shall be incompetent to testify concerning any communication made to him by his client in that relation or his

advice thereon, without the client's consent. But the privilege in the statute is simply declaratory of that existing at common law. It is strictly personal and may be waived by the client. The waiver may be express or implied. The attorney was employed to draft the will in statutory form and the object of it was to enable the testator to dispose of his property according to his own wishes. While the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself, but after his death, and when the will is presented for probate the reason for the rule ceases and public policy requires that the attorney should be allowed to testify in order that the will of the testator may be carried out according to his intentions. A different result would be inconsistent with the objects of the will and in direct conflict with the reasons upon which the privilege is founded. *Glover* v. *Patten,* 165 U. S. 394; *In re Young's Estate* (Utah), 14 Ann. Cas. 596 and case note; *Doherty* v. *O'Callaghan,* 157 Mass. 90, 31 N. E. 726, and *In re Layman's Will* (Minn.), 42 N. W. 286.

In discussing the question of privileges as applicable to an attorney in case of will contests, Professor Wigmore said: "But for wills a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication. It must be assumed that during a part of that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much less the tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain." 4 Wigmore on Evidence, section 2314.

At the conclusion of the section the learned author said: "As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts

which the testator expected and intended to be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will."

(5) Joseph Kendrick kept the will in his possession and after his death a diligent search was made for it and it could not be found. The presumption is that he destroyed it with the intention to revoke it, but the presumption may be rebutted. 40 Cyc., p. 1281; Schouler on Wills, Executors and Administrators (5 ed.), vol. 1, sec. 402; and Underhill on Wills, vol. 1, sec. 272.

(6) According to the uniform current of decisions the fact that a will which is proved to have been properly executed by the testator, and which was last seen in his custody cannot be found at his death, raises a presumption that it was destroyed by him with the intention of revoking it. It is equally well settled that the presumption may be rebutted by evidence that the testator has not revoked his will. This brings us to the question of whether or not the declarations of the testator may be received for that purpose. Although there is some conflict among the authorities upon this question, the great weight of authority is that, if the execution of a will is properly shown, and its provisions established, and the will appears to have been last seen in the possession of the testator, his declarations tending to show that he has or has not destroyed it, or which show that it was not in existence at his death, are received to strengthen or to rebut the presumption of revocation which arises from its disappearance. Underhill on Wills, vol. 1, sec. 277; Schouler on Wills, Executors and Administrators (5 ed.), vol. 1, sec. 403; 40 Cyc., p. 1317; Jones Commentaries on Evidence, vol. 3, par. 484; *Weeks* v. *McBeth,* 14 Ala. 474;

Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; *Patterson* v. *Hickey,* 32 Ga. 156; *McDonald* v. *McDonald,* 142 Ind. 55, 41 N. E. 336; *Steel* v. *Price* (Ky.), 5 B. Mon. 58; *Collaghan* v. *Burns,* 57 Me. 447; *Boyle* v. *Boyle,* 158 Ill. 228; *Pickens* v. *Davis,* 134 Mass. 252, 45 Am. Rep. 322; *Ewing* v. *McIntyre,* 141 Mich. 506; *Tucker* v. *Whitehead,* 59 Miss. 594; *Williams* v. *Miles,* 68 Neb. 463; *Hildreth* v. *Schillenzer,* 10 N. J. Eq. 196; *Behrens* v. *Behrens,* 47 Ohio St. 323, 21 Am. St. Rep. 820; *Gardner* v. *Gardner,* 177 Pa. St. 218, 35 Atl. 558; *Banskett* v. *Keitt,* 22 S. C. 187; *Allen* v. *Jeter* (Tenn.), 6 Lea, 682; *Tynan* v. *Paschal,* 27 Tex. 286, 84 Am. Dec. 619; *Yerby* v. *Yerby* (Va.), 3 Call. 334, and *In re Valentine,* 93 Wis. 45.

In *Reel* v. *Reel,* 8 N. C. 248, at p. 268, Judge Henderson sums up the conclusion of the court in the following strong language: "To our minds, to reject the declarations of the only persons having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided to the contrary, we say it) they are received, not upon the ground of their being a part of the *res gestae,* for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their competency; those circumstances only go to their weight or credit with the tribunal which is to try the fact, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace."

Joseph Kendrick executed the will on the 16th day of May, 1918, and died July 26, 1918, in the city of Little Rock where he had lived for many years. He carried the will home with him and placed it in a drawer for safe keeping. He expressed great satisfaction that he had executed the will both at the office where it was executed and just after he left there. In a short time thereafter he told C. H. Rosseau, a friend of 35 years standing,

about the execution of the will and the likelihood of its displeasing his relatives. He stated to his friend that he thought he had a right to dispose of his property as he wished, notwithstanding his action would be disapproved by his relatives. He told Mr. Rosseau in the presence of his wife where he kept his will and that the first time Rosseau was at his house he would show him the place where he kept it, so if anything happened to him, Rosseau would know where to find the will. Kendrick was old and was fast losing his health at this time.

Mrs. Rosseau corroborated the testimony of her husband as to the satisfaction Mr. Kendrick expressed at having made a will. At first she also corroborated her husband to the effect that she told Mrs. Bradway where Mr. Kendrick said he kept the will. After Mrs. Bradway had denied that she had any knowledge where Mr. Kendrick kept the will and denied that Mrs. Rosseau had told her where he said he kept it, Mrs. Rosseau testified that she could not remember whether or not she had told Mrs. Bradway where Mr. Kendrick said he kept the will, but she did tell Mrs. Bradway that he had executed a will. Mr. Rosseau said that his wife did tell Mrs. Bradway over the telephone where the will was kept and that he told her after the death of Mr. Kendrick where he had kept it. So it may be taken as established by disinterested witnesses that Mrs. Bradway knew before Mr. Kendrick died that he had made a will and by one of them that he told her where it was kept after Mr. Kendrick's death. Mrs. Bradway was in and out of the house every day and had the opportunity to have searched for and found it before Mr. Kendrick's death even if Mrs. Rosseau did not tell her where it was kept.

(7) Of course opportunity to destroy the will is not sufficient testimony to establish that fact, but it is a circumstance to be considered in determining whether the will was in existence at the time of the death of the testator or had been destroyed during his lifetime. Mr. Kendrick only lived four days after he was carried to the hospital. Mr. Rosseau and another old friend named Rob-

inson visited him while there. Mr. Rosseau asked Mr. Kendrick if he had left anything undone which a friend could do for him and he remarked that he had left everything all right.

Miss Fannie Mitchell, who was consulted by Mr. Kendrick about making the will, visited him while he was in the hospital. Mr. Kendrick realized that he was a very sick man and seemed as if he wanted to talk to her about something but refrained because his nurse was present. Miss Fannie finally leaned over him and said: "Mr. Kendrick have you done something that you wish me to undo?" She was referring to the part she had taken in the preparation and execution of his will. Mr. Kendrick replied: "No, Miss Fannie, not that; I am perfectly satisfied with that." About that time his physician came in and no further conversation was had between the parties.

It is contended by counsel for appellants that he was referring to the fact that he had destroyed the will with the intention of revoking it. We think this is a strained construction to put on his language, because Miss Mitchell had not seen him since the execution of the will and he must have known that she referred to the part she had taken in that. This was the only transaction she had ever had with Mr. Kendrick. She was not interested in the provisions of the will in any way and evidently intended to help him undo what she had helped him to do if he had so wished it. He told her that he was perfectly satisfied with his action, evidently referring to the only transaction they had ever had—her assistance in the preparation of his will.

Henry Condell also testified that Mr. Kendrick, after he became sick and within five days of his death, told him about the execution of the will and expressed himself as satisfied at having executed it. There was no contradiction of any of these witnesses. None of them except Henry Condell had any interest whatever in the result of the suit. There is no circumstance tending to affect the veracity of any of them. There is no evidence

tending to show dissatisfaction on the part of Mr. Kendrick that he had executed the will or any wish or attempt to change it. On the contrary he made declarations of satisfaction at having executed it in the hospital when he knew he was facing death. The will was made within two months of the testator's death and after deliberation on his part. It was proved by several disinterested witnesses, who had known Joseph Kendrick well for many years, that he was a man of great force of character; that he was slow to make up his mind; but that, once having determined upon a course of action, he never changed his mind. After its execution he made repeated declarations of his satisfaction at its execution and the provisions of it up to within a few days of his death. Thus he recognized its continued existence. There was no excuse whatever for him to have spoken falsely in this respect. The witness who could have benefited directly by him making a will was his wife's nephew who was absent in the army. None of the other persons who assisted him in the preparation and execution of the will had any interest in the matter except to carry out his wishes.

(8) The chancellor after weighing the evidence was of the opinion that the facts justified him in establishing the instrument as a lost will to the end that it might be admitted to probate as provided by the statute. It was not indispensable that he should determine what became of the will. It was enough that he should find that it was not revoked or canceled by the testator.

(9) It is our duty to uphold the findings made by the chancellor unless the court is of the opinion that they are not sustained by a preponderance of the evidence. This we cannot do. It is not a question of whether the testator should have recognized that his blood relatives were objects of his bounty and should have given his property to them. It is not claimed that he was not competent to make a will and he had the right to dispose of his property as he wished. It does not make any difference that we might think that the testator should have

disposed of his property to his relatives as being in accord with the principles of natural justice and affection. No court has a right to dispose of a man's property contrary to his intentions or to change or revoke a will which he has deliberately made. After reading and considering all of the evidence, we are of the opinion that it cannot be said that the findings of the chancellor are against the preponderance of the evidence, and the decree must be affirmed.

WILLIAMS v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered July 7, 1919.

RAILROADS—INJURY TO TRESPASSER ON FREIGHT TRAIN—DUTY OF EMPLOYEES.—Defendant railway issued orders refusing permission to any one to ride on its through freight trains. Defendant's brakeman, on a through freight, permitted appellant and appellant's intestate and others to ride in a box car, exacting a small sum from each for the permission. Appellant was injured and his intestate killed, when they were sitting in the box car, their legs hanging out of the door, and the train passing through a very narrow bridge. *Held,* as defendant's employees were violating the rules of the company, that they owed the injured parties no duty to warn them of the danger, that the latter assumed all risks, and that defendant railway company was not liable for the injuries.

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

Phil M. Canale (of Memphis, Tenn.), and *Mehaffy, Reid & Mehaffy* and *T. D. Crawford,* for appellant.

The testimony shows two brakemen came into the furniture car and saw the three boys sitting in a position of extreme danger and unaware of their peril. Defendant's employees are charged with the duty of exercising ordinary care to avoid injuring persons in a place of danger. The testimony made out a *prima facie* case of negligence on their part. One who withholds testimony within his power is subject to the presumption that if in-

troduced it would be unfavorable to him. Note to Ann. Cases 1914 A., p. 917. The exact question has not been decided by this court, but has in a number of other States. 47 N. Y. App. Div. 479; 120 Minn. 31. The failure of a party to produce or account for an important witness whom he could secure may be properly considered by the jury in determining the merits of the case. 39 Ind. App. 333; 32 *Id.* 687; 75 Ga. 282; 200 Fed. 840. Failure of defendant to call as witnesses employees who, as shown by other evidence, may probably have committed an act of negligence resulting in the injury complained of raises a presumption that their testimony if produced would be unfavorable. 81 Fed. 578. See also 4 Rich. Law. 329, 55 Am. Dec. 678; 47 La. An. 1218, 49 Am. St. 400; 163 Mo. App. 304; 28 N. Y. S. 683. In this case defendant failed to produce either one of the three brakemen on the train on which the accident occurred. It is admitted that these brakemen were all present when the case was tried and that their presence was unknown to plaintiffs and the presumption is that their testimony would be unfavorable to defendant. The fact that defendant withheld their testimony would justify the jury in inferring that if present they would have testified that they saw the young men in a position of great peril and failed to warn them of their danger. The court erred in directing a verdict for defendant.

Thomas S. Buzbee and *George B. Pugh* for appellee.

1. The plaintiff, Williams, and the intestate of Thweatt, administrator, were wrongfully on the train and in the car and were merely trespassers. 58 Ark. 318; 57 L. R. A. 700; 15 Am. Rep. 513; 24 N. E. 753; 30 Am. Rep. 98; 76 Ark. 106; 18 L. R. A. (N. S.) 763; 37 *Id.* 418 and note.

2. It was not shown that any of the trainmen who knew that these boys were sitting in the door of the car; knew that these boys were sitting in the door of the car, which caused the injury, nor that either of the brakemen had ever been over the road before; on the contrary,

it was shown that brakemen who had experience on other portions of the road or on other railroads were sometimes sent over this division as brakemen on through trains when they had never been over that portion of the road before. Under these circumstances a peremptory instruction for defendant was proper. 129 Ark. 77; 113 *Id.* 353; 18 L. R. A. (N. S.) 763.

3. Previous to our new lookout law there was no obligation on the part of enginemen to discover the peril of a trespasser and the burden was on the plaintiff to show that the peril was actually discovered in time to have prevented the injury. 49 Ark. 257; 101 *Id.* 532; 76 *Id.* 10; 77 *Id.* 401; 83 *Id.* 300; 94 *Id.* 524.

In order to make out a *prima facie* case it was certainly necessary for plaintiffs to show that these two brakemen or at least one of them, knew that there was a bridge just ahead which the feet of these men, sitting as they were, would not clear and we do not believe even that would be sufficient, taken in connection with the other facts proven to make out a *prima facie* case in view of the fact that neither of these brakemen was directing the force or driving the vehicle or by his own act could have stopped the movement which brought the feet of these men into contact with the superstructure of the bridge. If they had been in the car with these men at the very time of the accident and had seen the bridge ahead and had known that the feet of the men would strike the superstructure of the bridge and failed to warn them, they would have been guilty of moral obliquity, but their conduct would have created no liability of the railway company for the resulting injury. The reverse of the rule contended for by appellant is the law of this State. 112 Ark. 446; 102 *Id.* 631.

McCULLOCH, C. J. This appeal is from a judgment of the circuit court of Pulaski County in two consolidated actions instituted against appellee for damages resulting from injuries received by the appellant in one of the cases, and by appellant's intestate in the other

case, while riding on one of appellee's freight trains. Williams, the appellant in one of the cases, was seriously injured, and Graham, appellant's intestate in the other case, received injuries which resulted in his death. The trial court gave a peremptory instruction in favor of appellee, and the only question before us for consideration is whether the testimony was sufficient, viewing it in the light most favorable to the rights of appellants, to warrant a verdict in their favor.

Williams and Graham were young men residing in the State of Tennessee and started on a trip to Oklahoma for the purpose of working in the harvest fields in that State. They attempted to make the trip on the railroad without paying fare, that is to say they undertook to "beat their way" to the journey's end. They, together with others who were bent on the same mission, rode on a freight train from Memphis to Argenta and then walked to Hot Springs junction, which is just outside of the southern limits of the city of Little Rock, where they boarded a through freight train. The rules of the company did not permit passengers on through freight trains, but in violation of the rules, two of the brakemen allowed these young men and quite a number of others to board the train. The testimony shows that the brakemen found these young men on the train and consented for them to remain there after paying a trifling sum for permission to ride, and that they let others board the train along the route. They directed the young men to get into furniture car, which the proof shows was about eighteen inches wider than an ordinary car. Whenever a new man would board the car, one of the brakemen would come in and require him to pay fifty cents to ride. The car was crowded and it was a warm day in June and and the brakemen informed the men in the car that they might leave the side doors open except while they were passing through a town. About a mile east of Magazine, Arkansas, there is a bridge about seventy-five feet long with an iron railing or side structure about three feet high. The extra width of the furniture car in which the

young men were riding, of course, narrowed the space between the side of the car and the structure of the bridge. Williams and Graham and another one of the young men were sitting in the door with their legs hanging down the side when the train went over the bridge at a speed of about thirty miles per hour, and their feet and legs struck against the bridge structure and the injuries heretofore mentioned were inflicted. Graham was jerked from the car and instantly killed. Williams' leg was broken and he was otherwise injured.

The testimony shows that one of the brakemen was in the car where the boys were sitting in the door about fifteen minutes before the train reached the bridge. The act of negligence set forth in each of the complaints consists of the failure of the brakemen to warn the men of the danger of sitting with their legs hanging out of the door. According to the undisputed evidence in the case, it is a violation of the rules of the company for the trainmen to accept passengers on a through freight train, and that the men who rode on the train, including the injured parties mentioned, were aware of this fact. In other words, they knew that they had no right to ride on the train. The fact that only a trifling sum was exacted of them makes it plain that they knew that the trainmen were not acting in good faith or with authority to allow passengers to ride on the train. That being true, they were no more than trespassers, and the servants of the defendant company owed them no duty except to refrain from injuring them by any act of negligence committed after discovery of their perilous position. The servants of the company were under no legal duty to warn these trespassers of the hazards of that mode of travel, but, on the contrary, the trespassers assumed the risk of all the dangers incident to the situation.

As stated by Judge RIDDICK in a similar case (*St. Louis, Iron Mountain & Southern Ry. Co.* v. *Read,* 76 Ark. 106), the liability of the company, if it exists at all, must rest upon the wanton and wilful act of employees

after discovering the peril of the trespasser. In that case, as in this, the injured party was wrongfully riding on a through freight train, and the injuries resulted from a collision caused by the negligence of the servants of the company, but this court held that there was no liability on the part of the company for the injuries so inflicted. So, in the present case, if it be conceded that there was negligence on the part of the company in failing to provide additional space between the sides of the passing cars and the bridge structure, that was not such negligence as would render the company liable to a trespasser on the train to whom it owed no duty except, as before stated, to refrain from acts of wilful negligence after discovering that the trespasser was in danger. Under no view of the law can it be held that the company's servant's, under the circumstances described, owed the trespassers on the train the duty of instruction or of warning them of the dangers of the journey.

The judgment of the circuit court was, therefore, correct, and the same is affirmed.

VIETZ v. HAZEN, LAGRUE AND SLOVAK ROAD IMPROVEMENT DISTRICT.

Opinion delivered July 7, 1919.

1. IMPROVEMENT DISTRICTS—ORGANIZATION—VALIDITY OF STATUTE—FEES FOR PREPARING THE ACT.—Act 107, Acts 1919, is not rendered invalid because of a provision therein for the payment of the expense of the preparation of the act.
2. SAME—TIME FOR APPEAL.—Act 107, Acts 1919, is not void because it limits the time of appeal from the county court to twenty days.
3. SAME—TIME FOR BRINGING SUIT—ROAD DISTRICT.—An act creating a road improvement district is not invalid because it limits the time within which suit may be brought relating to the improvement district.
4. SAME—ROAD DISTRICT—DELINQUENT TAXES—SALE OF LANDS.—Act 107, Acts 1919, is not invalid because it authorizes the commissioners to advertise and sell lands of the district when assessments have been made and not paid, without bringing a proceeding against the owner.

5. SAME—SAME—PERSONAL LIABILITY OF COMMISSIONERS FOR NEGLIGENCE.—It is proper in an act organizing a road improvement district, to provide that the commissioners shall not be personally liable for negligence.

6. SAME—SAME—SALE OF LANDS BY COMMISSIONERS—FIXING PRICE.—Under Act 107, Acts 1919, the commissioners of an improvement district may sell lands belonging to the district, fixing the price for the same.

7. SAME—SAME—SPECIAL ACT—MOTIVES OF EXECUTIVE IN APPROVING A BILL.—This court will not inquire into the motives of the executive in approving a legislative enactment.

8. SAME—SAME—LAND OWNERS AS COMMISSIONERS.—A statute creating a road district is not avoided because members of the board of commissioners are owners of land in the district, nor are the commissioners thereby rendered incompetent to act.

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

W. H. Gregory, for appellant.

1. The act is invalid for many reasons. The defendant's demurrer was to an entire paragraph in which both the question of due process and the land owner acting as assessor are raised; if either one was well taken then the demurrer should not have been sustained. 32 Ark. 131; 37 *Id.* 34.

2. The act is unconstitutional because (1) it authorizes the commissioners to pay the expenses of preparing the act itself and attorney's fees, which is against public policy. 6 Corpus Juris 737; (2) the bill for the act was not approved by the Governor and the method of obtaining his signature was a fraud, against which chancery will relieve. 83 Ark. 463. (3) The assessment of benefits is provided for but no appeal is provided for from the hearing before the commissioners and it limits the time for appeal. The assessments are unequal and unfair in their methods. 86 Ark. 1; 48 *Id.* 382; 28 Cyc. 1162-3. The railroad property was assessed too low. thereby discriminating against other land owners. The act is wholly void, but if not, then the assessment is on the wrong basis.

J. F. Holtzendorff and *Charles B. Thweatt*, for appellees.

The act is constitutional and valid, as the fact that it is within the legislative power to form an improvement district and assess benefits and levy taxes to pay for betterments is well settled by this court and many others. Citations are unnecessary. The act is not in violation of the "due process" of the Constitution, nor are the assessments excessive or unfair or unjust. The "due process" and "just compensation" clauses have been fully met in this act; a hearing is provided for and the right of appeal given to the courts. 181 U. S. 371; 21 C. 616.

The evidence does not show that the assessments are in excess of benefits. Every presumption is in favor of the act and it not shown to be invalid. It is not void nor is the assessment because land owners acted as commissioners. 103 Ark. 141; 191 U. S. 310; 133 Ark. 133.

None of eight grounds alleged in the complaint as to the invalidity of the act are tenable. 59 Ark. 528; 99 *Id.* 103; 112 *Id.* 346; 72 *Id.* 126; 64 *Id.* 563; 211 S. W. 168; 74 *Id.* 180; 239 U. S. 254; 119 Ark. 188; 94 Ark. 380; 71 *Id.* 215; 72 *Id.* 201; 18 Atl. 328.

The demurrer was properly sustained to the paragraph containing the eight grounds of invalidity.

The assessment of benefits and the apportionment of same were not erroneous but according to law and justice. Page & Jones on Taxation, etc., p. 1103; 114 N. Y. 441; 21 N. E. 1004; 164 U. S. 112; 108 Ark. 421; 209 S. W. 728; 97 Ark. 343; 201 S. W. 709; 209 *Id.* 728; 201 *Id.* 808; 64 Ark. 265.

There was no error in the railway assessment nor in its reduction. It was not arbitrary nor unequal nor unjust. 209 S. W. 728.

The findings of the chancellor that the assessments are fair, equal and just are correct and should be sustained.

Cooper Thweatt and *Emerson, Donham & Shepherd, amici curiae.*

The suit was not filed in good faith, with a desire or view to ascertain the legality of the proceedings and should be passed until the Creger case is reached and the two cases should be heard together. We call attention to some cases where other courts have handled similar situations. 44 N. E. 413; 53 *Id.* 1102; 21 U. S. (Lawy. ed.) 141; 79 S. E. 676.

We think this suit is collusive and not in good faith and should be postponed.

McCULLOCH, C. J. This is an action instituted in the chancery court of Prairie County attacking the validity of a special statute enacted by the General Assembly of 1919 creating a road improvement district in Prairie County. Act No. 107, session of 1919.

Appellant owns property in the district, and, in addition to the attack on the validity of the statute, he challenges the legality and fairness of the assessment of benefits made by the commissioners. The cause was heard upon oral testimony and there was a decree entered by the chancery court dismissing the cause for want of equity. Another property owner in the district brought a similar suit attacking the validity of the statute on precisely the same grounds as involved in the present action, but that cause has not been decided below. Counsel for plaintiff in that suit have appeared here, however, and asked leave to file a brief, and permission was given for them to do so, but instead of filing brief on the merits of the case they merely filed an abstract of the record in their case for the purpose of showing identity of the issues involved, and they ask for the postponement of the hearing of the present case until their case can be brought here on appeal. We see no reason for postponing the hearing of this case, but, of course, the conclusion we reach in the present case will not affect the rights of the litigants in another cause on a different state of facts, if it is developed that the facts are different.

The several grounds of attack on the validity of the statute are summarized in the briefs as follows:

"(1) Because it authorizes the commissioners to pay expenses of preparing the act itself; (2) because it limits the right of appeal from a judgment of a county court to twenty days, which is contrary to the general law of the State, allowing six months' time for appeal; (3) because it limits the time within which suit may be brought relative to said improvement district, contrary to the general statute of limitations; (4) because it authorizes the commissioners to advertise and sell lands of the district where assessments have been made and not paid, without bringing a proceeding against the owner, but by description of the land only; (5) because it authorizes the commissioners to assess and tax against the property in the district the cost of organizing and promoting said district even though no improvements were made thereon; (6) because it provides that the commissioners shall not be liable for negligence; (7) because it authorizes the commissioners to sell any land which may be purchased by the district at any price and upon any terms, thereby ignoring the rights of property owners entirely; (8) because the act was not approved by the Governor as required by law, in that after the act had been passed by both houses of the Legislature a protest was filed with the Governor asking that he veto the same, the hearing upon the protest was set for a certain day and in the interim the Governor was absent from the State and the promoters of the act, including the representative of Prairie County and one of the commissioners, with full knowledge of all these facts, presented the bill to the Lieutenant Governor or Acting Governor and induced him to approve and sign said bill before the date set for said hearing, concealing from him the facts, which amounted to fraud, and said bill was therefore not legally approved or signed by the Executive of the State; (9) because each one of the three commissioners is a large landowner in the district, and each one of the commissioners is authorized to act as an assessor and to act

as a judge in passing on issues as to the amount of the assessments, which is contrary to that clause of the Constitution that no person shall sit as a judge in his own case."

(1) Nearly all of the questions stated above have been expressly decided by this court against the contention of appellant. We decided in the recent case of *McClelland* v. *Pittman,* 139 Ark. 341, that a provision in a statute creating a road improvement district which authorizes payment of legal expenses of preparing the statute and other work in promoting the formation of the district before the passage of the statute, even if void and unenforceable, does not render the whole statute invalid. This answers the first and fifth grounds of attack stated above.

(2) The second ground of attack, that the limitation on the right of appeal is void, is answered by the decision of this court in *St. Louis, Iron Mountain & Southern Railway Company* v. *Maple Slough Drainage District,* 138 Ark. 131, 211 S. W. 168.

(3) According to the principles which control in that and other cases, the third ground of attack is also untenable. We have repeatedly upheld a similar provision in general statutes with reference to improvement districts in cities and towns.

(4) The fourth ground of attack seems to be that the Legislature has no authority to authorize a foreclosure of a tax lien by proceedings *in rem,* or by proceedings in the nature of proceedings *in rem,* but we have upheld such authority in cases dealing with a similar provision in other special statutes creating improvement districts, as well as general statutes authorizing organization of improvement districts in municipalities. *McCarter* v. *Neil,* 50 Ark. 188; *Greenstreet* v. *Thornton,* 60 Ark. 369; *Ballard* v. *Hunter,* 74 Ark. 174.

(5) No reason is stated in the brief why we should strike down the provision in the statute to the effect that the commissioners shall not be liable for negligence. Such provision is found in most of the statutes on this subject enacted in this State, and no attack has ever been

made on any of the statutes because of such provision. Commissioners act in a representative capacity and the question of personal liability for their own acts is a matter which is within the control of the Legislature.

(6) Neither is any reason given why it is beyond the power of the Legislature to authorize the commissioners to fix the terms for the sale of lands which the district may acquire. That is a matter entirely within legislative control and there is no constitutional restriction upon the power of the Legislature in this regard.

(7) The eighth ground of attack cannot be sustained, as it is not within the province of the courts to inquire into the motives of the Chief Executive in approving or disapproving an act of the General Assembly. The motives and conduct of the Chief Executive, as well as members of the Legislature, are not proper matters for review by the courts when they are acting within the scope of their constitutional functions.

(8) The last contention is that the act is void because it names as the commissioners of the district and ex-officio assessors men who are large land owners in the district. We decided in the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Board of Directors,* 103 Ark. 141, that the fact that members of the board of commissioners of an improvement district were owners of land in the district did not avoid the statute or render the members of the commission incompetent to act.

In the attack on the validity of the assessments of benefits numerous objections are made with respect to the failure of the commissioners to comply with the terms of the statute, such as the requirement to take the oath of office and of filing with the county court plans and estimates and other such matters, but the record presented shows that those requirements were fully complied with.

Other grounds for setting aside the assessments are stated in the pleadings as follows:

"That the commissioners did not make a fair and equitable assessment and assessed the lands of the commissioners, J. F. Sims and T. T. Sims, at a much lower

basis and amount than that assessed against the lands of the plaintiff and other land owners, taking into consideration the amount of real benefits to said lands; that the commissioners, after assessing the benefits against the Chicago, Rock Island & Pacific Railway Company and the St. Louis Southwestern Railway Company, voluntarily decreased the same to avoid litigation and prevent said railways from instituting proceedings to test the validity of the act and the proceedings of the district, which reduction correspondingly increased the assessment against the land of the plaintiff."

Oral testimony was heard by the court concerning the method of assessment and the reasons for reducing the assessments of the railway corporations mentioned, and we are of the opinion that the evidence justified the court in refusing to declare the assessments to be discriminatory and void. A discussion of the testimony in detail would serve no useful purpose.

Upon the whole we are unable to discover any reasons for declaring invalid either the statute itself or any of the proceedings thereunder. The decree is, therefore, affirmed.

HUMPHREYS, J., not participating.

MILWEE v. TRIBBLE.

Opinion delivered July 7, 1919.

IMPROVEMENT DISTRICTS—DESCRIPTION OF LANDS BENEFITED—INVALID BECAUSE OF LANDS OMITTED—ROAD DISTRICT.—The act of 1919 attempting to create the Horatio and Eastern Road Improvement District of Sevier County, *held* invalid because the description in the act contains an entire section which is five miles distant from the remaining lands described in the act and constituting the body of the district, and excludes, or rather does not include, the lands intervening.

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

J. S. Lake and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

1. It was error to sustain the demurrer. It was a mere mistake in including section 18 in the district. 130 Ark. 70.

2. This section should be stricken out as unconstitutional and the other valid sections allowed to stand. *Sallee* v. *Dalton,* 138 Ark. 549.

3. The bill was properly passed. This case is settled by 130 Ark. 505. See also in point 103 *Id.* 110; 133 *Id.* 64. The act should be upheld, notwithstanding the clerical error in writing up the journals.

B. E. Isbell, for appellee.

The act is unconstitutional and void, as the lands are not contiguous. 130 Ark. 70. The description is unambiguous and there was no mistake. *Ib.;* 83 Ark. 54. The act is manifestly arbitrary. *Ib.;* 81 Ark. 562. If the section 18 be eliminated the act will not stand the constitutional test. 113 Ark. 566; 120 *Id.* 230; 130 *Id.* 70. Section 25 of the act has not sufficient saving grace to sustain the act, as the cases cited, *supra,* show. The decree is right and should be affirmed.

WOOD, J. The General Assembly at its session of 1919 passed an act entitled "An act to create Horatio and Eastern Road Improvement District of Sevier County." Acts 1919, act No. 204; 1 Road Acts, p. 652.

Included in the above district are the lands embraced in section 18, township 9 south, range 32 west. This land is situated a distance of five miles from theother lands described in the act. All the lands of the district, except that above described, constitute a compact body, the lands being contiguous.

The appellee, a landowner of the district, instituted this action against the appellants, as commissioners of the district, setting up that the act was unconstitutional and void, and prayed that the appellants as the commissioners of the district be enjoined from proceeding under the act. The appellants demurred. The demurrer

was overruled. The appellants stood on the demurrer and a decree was entered in favor of the appellee perpetually enjoining the commissioners from proceeding under the act. From which decree is this appeal.

The act is unconstitutional and void because as shown by the allegations of the complaint it contains an entire section "which is situated at a distance of five miles from the remaining lands described in the act and constituting the body of the district," and excludes, or rather does not include, the lands intervening.

The Government method of designating the land is adopted in the act and the language, "section 18, township 9, south of range 32 west," is unambiguous. We can not, therefore, substitute for the section named the intervening section which is not named and say that the Legislature intended to include the latter, and not the former, nor can we say that the Legislature intended to include the intervening section.

It is impossible that the lands in section 18, and the other lands five miles distant constituting the main body of the district, would be benefited while the intervening lands receive no benefit whatever. The act, therefore, upon its face shows an arbitrary discrimination between the landowners, who necessarily derive benefit from the improvement. The case under the facts, comes strictly within the rule announced in the recent case of *Heinemann* v. *Sweatt,* 130 Ark. 70-74. In that case we said: "Words of description employed by the lawmakers cannot be varied, and, reading the description literally, we find a statute which is so arbitrary and discriminatory on its face that it is void."

There is an independent section of the act under review which provides: "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, in so far as it is not in conflict with the Constitution, shall be suffered to stand." Appellant contends that under this provision the lands five miles distant from the main body of the district should be stricken out. The contention cannot be

sustained for the reasons given in *Heinemann* v. *Sweatt, supra,* as follows: "The doctrine cannot be applied, however, in a case like this which affects the validity of an assessment of lands according to legislative determination. We must treat the statute as a determination by the Legislature that it is appropriate and just to impose the cost of the improvement upon all of the tracts of land included in the district, and if we strike out one of the tracts we vary the legislative decision and impose an additional burden on the other lands described."

The provision including the section 18, township 9 south, range 32 west, is not independent of the other portions of the section describing the boundaries of the district and it is so interlocked and connected with the other provisions of the statute that it cannot be eliminated without imposing an additional burden upon the landowners in the portion of the district remaining.

The decision in *Smetzer* v. *Gregg,* 129 Ark. 542, is not applicable because it was based on a differently worded statute and related to a different state of facts. The statute in that case authorized the assessment of both real and personal property in a district, but declared that if the assessment on one class of property should be judicially decided to be void, it should not affect the validity of assessments on the other class of property. That was an attempt on the part of the Legislature to impose assessments on a class of property which, according to our decision, could not be taxed under the Constitution for local improvements, but the lawmakers declared in advance, if the attempt proved ineffectual, their intention to exercise the power to the extent that it actually existed. In other words, in construing the statute and testing its validity, we struck out the void provision for the assessment of personal property, and, pursuant to the express declaration of the lawmakers as to their purpose, we upheld the valid provision for the assessment of real property.

In the present case we do not, and cannot, strike anything from the statute, for it is void as a whole. The in-

clusion of section 18 constituted a legislative finding that the tract will be benefited by the improvement and the implication necessarily follows that the intervening omitted lands will also be benefited. The statute is void, not because it includes section 18, but because, while including this, it excludes the intervening lands; and it is not a case where only a part of a statute is void, but one where the whole is void for the reason that the Legislature has omitted lands which, according to its own findings, will necessarily receive benefits from the improvement.

The decision of the chancery court is, therefore, correct, and it is affirmed.

HUMPHREYS, J., (dissenting). The inclusion of lands in section 18, township 9 south, range 32 west, which are five miles from the other lands embraced in the district, does not evidence an intention to include intervening lands, if the lands in said section were included through a clerical error. If included through a misprision, it follows, as a matter of course, that the Legislature never intended to include the lands between said section and the main body of lands embraced in the district. This is the very point at issue in this case, and the court should have determined the issue one way or the other before finding that the Legislature intended to include the intervening lands. The rule announced in the case of *Heinemann* v. *Sweatt* was based upon the fact that the Legislature really intended to include the lands not adjacent to other lands embraced in the district. And the intent was not determined from the mere inclusion of the remote territory, but from a reading of the whole act. In rendering the opinion in the case of *Heinemann* v. *Sweatt,* 130 Ark. 70, the court took occasion to say:

"The method of description adopted by the Legislature does, indeed, indicate an intention to embrace all the lands abutting on the west side of the road, and this would indicate that a mistake was made in describing a portion of section twenty-six (26) instead of a portion of section twenty-eight (28), but it is quite a different ques-

tion for us to undertake to treat this as merely a clerical error and undertake to correct the error by substituting a description of land which the framers of the statute entirely omitted. We may be fully satisfied that the Legislature intended to describe section twenty-eight, but yet we are powerless to correct the error, for the simple reason that to do so would be purely a matter of legislation on our part. That would constitute an amendment of the statute to conform to what we conceive to be the legislative intent. In other words, the case presents a situation where we are reasonably certain that the language used does not express the legislative will, yet we are not at liberty to substitute the language which we think will express it."

In the instant case, a substitution of one tract for another is not required. There is nothing in the act to indicate an intention to include all the lands on any particular side of a road or other monument, as in the case of *Heinemann* v. *Sweatt, supra.* So, the lands in said section 18 can be eliminated under the rule that they were included by mistake, or by clerical error. Of course, if it were necessary to substitute other lands to carry out the purpose or intent of the Legislature, such act on the part of the court would be a form of Legislation, but, it is in no sense legislation to treat the inclusion of lands in said section 18 as a clerical error. I do not question the soundness of the doctrine announced in *Heinemann* v. *Sweatt, supra,* but I think the application of the doctrine to the facts in this case clearly erroneous.

I also think the act should be upheld under the doctrine announced in the case of *Snetzer* v. *Gregg,* 129 Ark. 542. The provision including section 18, township 9 south, range 32 west, is independent of the other portions of the section describing the boundaries of the district. It may be eliminated because included through a clerical error, leaving intact all the lands intended by the Legislature to be embraced in the district. The act itself provided for just such a contingency as we have here, in the following language:

"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 in so far as it is not in conflict with the Constitution, shall be suffered to stand."

For the reasons given, I think the decree should be reversed and the act declared valid.

DUNAWAY v. GALBRAITH.

Opinion delivered July 7, 1919.

OIL AND GAS—CONTRACT OF LEASE—MUTUALITY.—A covenant by A. to allow G. to drill on her land for oil and gas, and a covenant of G. in consideration therefor, to bring in a well within a year, and in case he failed to complete the well to pay a stipulated sum in advance as rental for the privilege of drilling for a well for another year, are mutual covenants, making the contract binding, the lease also providing that G. could surrender the lease at any time upon the payment of $25 to the lessor.

Appeal from Jefferson Circuit Court; *W. B. Sorrels,* Judge; reversed.

STATEMENT OF FACTS.

This is a controversy between Mrs. Maggie Dunaway, lessor, and R. M. Galbraith, lessee, from the Jefferson Circuit Court over an oil and gas lease. The lease reads as follows: "Agreement made and entered into the 24th day of February, A. D. 1913, by and between Maggie Dunaway of ————, party of the first part, lessor, and R. M. Galbraith, party of the second part, lessee.

"Witnesseth: That the said party of the first part for and in consideration of the sum of $1 to her in hand well and truly paid by the party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept and performed, has granted, demised, leased and let, and by these presents do grant, demise, lease and let unto the said second party, its successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of

laying pipe lines, and of building tanks, powers, stations and structures thereon to produce and take care of said products, all that certain tract of land situated in the county of Jefferson and State of Arkansas, described as follows, towit: 'South half south half southwest quarter and south half southwest quarter, southeast quarter section 19, east half northwest quarter and southwest quarter northwest quarter, section 20; all of section 30, in township 6 south, range 8 west; east half section 25, southeast quarter northwest quarter and east half southwest quarter section 25, township 6 south, range 9 west of 5th P. M. and containing 1,200 acres, more or less.

"It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, its successors or assigns.

"In consideration of the premises the said party of the second part covenants and agrees:

"*First.* To deliver to the credit of the first parties, her heirs or assigns, free of cost, in the pipe line to which it may connect its well, the equal one-eighth part of all oil produced and saved from the leased premises.

"*Second.* To pay to the first party $100 one year in advance from the gas from each well, where gas only is found, while the same is being used for the premises, and the first party to have gas free of cost from any such well, for all stoves and all inside lights for the dwelling house on said lands during the same time by making her own connections with the well.

'*Third.* To pay to the first party for gas produced from any oil well and used off the premises at the rate of $100 per year, for the time during which such gas shall be so used, said payments to be made each three months.

"The party of the second part agrees to complete a well on said premises within one year from the date hereof, or pay at the rate of $360 in advance for each additional 12 months such completion is delayed from the time above mentioned for the completion of such well

until a well is completed, and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

"The party of the second part shall have the right to use, free of cost, gas, oil and water produced on said lands for its operation thereon, except water from wells of the first party.

"When requested by first party, the second party shall bury its pipe lines below plow depth.

"No well shall be drilled nearer than 200 feet to the house or barn on said premises.

"Second party shall pay for damages caused by it to growing crops on said lands.

"The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

"Party of the second part shall not be bound by any change in the ownership of said land until duly notified of any such change, either by notice in writing duly signed by the said parties to the instrument of conveyance, or by the receipt of the original instrument of conveyance, or by a duly certified copy thereof.

"All payments which may fall due under this lease may be made directly to Maggie Dunaway, Little Rock, Arkansas, or deposited to her credit in the Cotton Belt Savings & Trust Company office, Pine Bluff, Arkansas.

"The party of the second part, its successors or assigns, shall have the right at any time, on the payment of $25 to the party of the first part, her heirs or assigns, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine; provided this surrender clause and the option therein reserved to the lessee shall cease and become absolute and inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease, or any other person or persons. All convey-

ances and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators and assigns.

"Witness the following signatures and seals.

"Maggie Dunaway,
"R. M. Galbraith."

"C. B. Maxwell,
"J. J. Schmultz."

R. M. Galbraith paid the installment of rent due on the 24th day of February, 1914, but did not make any further payment to Mrs. Dunaway. Galbraith did not at any time complete an oil well on the premises embraced in the lease. He did not pay to Mrs. Dunaway any sum of money for the cancellation of the lease, nor did he ever surrender said lease for cancellation. Mrs. Dunaway sued him to recover $1,080 and the accrued interest alleged to be due her as rent under the terms of the lease.

Galbraith defended on the ground that the contract was void for want of mutuality.

The court sustained the contention of Galbraith and Mrs. Dunaway has appealed.

Mike Danaher and *Palmer Danaher,* for appellant.

The contract is not unilateral and therefore void. The contract did bind the defendant and formed a valid consideration for the rent or lease (citing clauses from the lease). Galbraith in the contract promised to dig an oil well or pay the stipulated rent. He did neither. The land was subject to his lease during the entire stipulated term, and he should pay what he promised. The cases cited by appellee are all taken from cases cited in L. R. A. 1917 B., p. 1184. The excerpts from these cases are all misleading; they are not this case. The dissenting opinion in that case by Kane, C. J., states the law of such contracts and this case. The "unless" lease by its terms confers upon the lessee the option to continue or renew by paying rental. The payment of rental is a necessary condition precedent to the renewal. In fact, it is a lease from year to year or quarter to quarter. Under the "or"

lease (with surrender clause) the lessor may waive default and recover rentals, the lessor being bound until the lessee surrenders. L. R. A. 1916 B. 686; 150 Pac. 467; 23 Okla. 776; 101 Pac. 1116; 44 L. R. A. (N. S.) 51.

Irving Reinberger and *Maurice L. Reinberger,* for appellee.

The lease is void because it is unilateral and lacks mutuality. The $1 consideration was paid for the option to drill a well within one year and the real consideration was the drilling of an oil well on the premises. L. R. A. 1917 B. 1184; 67 S. W. 545; 168 *Id.* 192; 132 La. 601; 119 *Id.* 703; 34 S. E. 923; 96 Ark. 188. See also *Weil* v. *Chicago etc. Tool Co.,* 138 Ark. 534.

HART, J., (after stating the facts). The trial court seemed to have been of the opinion that the lease comes within the principle of law that, when it is provided that it is terminable at the will of one of the parties, it is terminable at the will of the other. This construction undertakes to divide the lease into independent parts. We are of the opinion that the lease constituted an entire contract. According to the settled rule of construction, all parts of it must be given effect, if possible, and the intention of the parties must be gathered from the four corners of the instrument. Mrs. Dunaway leased to Galbraith 1,200 acres of land for the sole purpose of mining and operating for oil and gas. She agreed that the lease should remain in force for five years from date and as long thereafter as oil or gas should be produced therefrom by Galbraith or his assigns. In consideration therefor Galbraith agreed to complete a well on the premises within one year or to pay a rental in advance at the rate of $360 per annum for the privilege of extending his time for drilling and bringing in a well on the premises. Section three of the contract further provides that the completion of such well shall operate as a liquidation of all rent under this provision during the remainder of the term of the lease.

Under a subsequent provision of the contract Galbraith reserved the right to surrender the lease for cancellation upon the payment of $25 to Mrs. Dunaway. The parties were capable of contracting and were contracting about a matter which was the legal subject of a contract. The covenant of Mrs. Dunaway to allow Galbraith to drill on her land for oil and gas, and the covenant of Galbraith in consideration therefor to bring in a well within a year, and in case he failed to complete the well to pay a stipulated sum in advance as rental for the privilege of drilling for a well for another year are mutual covenants which prevent the contract from being unilateral. Each imposed a legal liability upon the party making it, and thus prevented the contract from being void for want of mutuality. The parties did not insert any forfeiture clause in the contract. The contract, however, does contain a clause allowing the lessee the privilege of surrendering the lease for cancellation at any time upon the payment of $25. The land was unexplored for oil or gas. This clause was for the benefit of the lessee, so that in case he did not discover oil or gas, or for some other reason should find it to his interest not to continue as lessee, he could terminate the lease by paying the stipulated amount. The payment of $25, the amount fixed for relieving the lessee from the necessity of continuing with the lease, is a substantial sum and not a mere nominal consideration; and, when construed with the other covenants, it sustains the entire lease; for Mrs. Dunaway gave Galbraith the right to explore her lands for oil or gas and Galbraith obligated himself to complete a well on the land, or pay in lieu thereof $360 in advance as delay money, or to pay $25, a substantial sum, to be relieved from the necessity of continuing with the lease. Thornton on the Law of Oil and Gas (3 ed.), vol. 2, sec. 899; *Beebe* v. *St. Louis Transit Co.*, 12 L. R. A. (N. S.) 765; *Brewster* v. *Layton Zinc Co.*, 72 C. C. A. 213, 140 Fed. 801; *Houssiere Latreille Oil Co.* v. *Jennings-Heywood Oil Syndicate,* 115 La. 107, 38 Sou. 932, and case note to L. R. A. 1917 B. 1206 *et seq.* In so holding

we have not overlooked the opinion of the majority in *Brown* v. *Wilson* (Okla.), L. R. A. 1917 B. 1184. That case is distinguished from the case at bar in that the consideration for the surrender clause was a mere nominal consideration. But, inasmuch as we do not approve the reasoning of the majority in that case, we decline to follow it, and for the reasons given above, are of the opinion that the contract in the present case is not void for want of mutuality, and that the circuit court erred in so holding.

It follows that the judgment must be reversed and the cause remanded for a new trial.

WOOD *v.* WILLEY *et al.,* COMMISSIONERS.

Opinion delivered July 7, 1919.

ROADS AND ROAD DISTRICTS—ORGANIZATION—FAILURE OF ACT TO PROVIDE FOR ASSESSMENTS AGAINST BETTERMENTS.—An act of the General Assembly of 1919 intending to create the Grady and Arkansas River Road Improvement District of Lincoln and Jefferson Counties, *held* void for failure of the act to provide any machinery to assess against the betterment of the Jefferson County lands their proportionate share of the cost of the improvement.

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

John F. Clifford, for appellant.

The act is void; the district embraces lands not only in Lincoln County but in Jefferson County. This is a legislative finding that the Jefferson lands will be benefited and the lands should be taxed also. 48 Ark. 370; 86 *Id.* 231. The county court of Lincoln County cannot tax lands outside the limits of that county. 115 Ark. 438. If it could levy the tax, no machinery is provided for getting the tax extended on the tax books of Jefferson County, nor for issuing a warrant to collect.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. The act furnishes adequate working machinery by which the purpose of the Legislature can be carried out. Any person or body of persons can levy a tax if selected as an agency by the Legislature. This is purely a ministerial function. 111 Ark. 150; 96 *Id.* 410; 104 *Id.* 425.

2. The county court of Lincoln County can be invested with the power to levy taxes, even in Jefferson County. Cases *supra.* There is no defect in the act.

SMITH, J. An act was passed at the 1919 session of the General Assembly entitled "An act to create Grady and Arkansas River Road Improvement District of Lincoln and Jefferson Counties."Acts 1919, No. 509, 2 Vol. Road Laws, p. 2009. The act defines the territory which would be benefited by the proposed improvement, the bulk of the lands being in Lincoln County and the remainder in Jefferson County. Appellant is the owner of property in the proposed district and brought this suit to restrain the commissioners of the district from issuing bonds to construct the roads there proposed. The basis of his attack on the act is that there is a legislative finding that the lands described, which lie in both counties, will be benefited but provision is made only for taxing the lands in Lincoln County.

Counsel for appellant says that the act creating the district was evidently prepared with the view to embracing only lands in Lincoln County and that it was afterwards amended to include lands in Jefferson County without an alteration of its structure, and that in consequence it fails to make provision for taxing the lands in Jefferson County or collecting the tax if levied. Without conceding this to be true, counsel for the commissioners contend that it is immaterial, if true, as adequate machinery was provided by the act to enforce the payment of the tax against the lands in each of the counties.

Section 9 of the act provides that the county court shall, at the time that the assessment of benefits is filed,

enter upon its records an order, which shall have all the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement; and counsel for the district says that this section authorizes the county courts of the respective counties to levy the proportionate part of the tax to be paid by the lands in each county, and, second, that if this be not true, and if only the county court of Lincoln County is authorized to levy the tax, the act should not be held invalid on that account, as the Legislature might authorize any person of sound mind to levy the tax and could, therefore, constitute the county court of Lincoln County as an agency with that authority. The correctness of these contentions present the issues to be decided.

There is every indication that this act was drawn originally to embrace only lands in Lincoln County and that it was amended to include lands in Jefferson County without an alteration of its structure as contended by counsel for appellant. For instance, section 4 provides that the commissioners shall file their plans, after they have been approved by the State Highway Department, with the county clerk of Lincoln County and that the county court of that county may approve the report or may change the plans as it finds necessary. Section 7 provides that the assessment of benefits of said district shall be "filed with the county clerk of Lincoln County," and that the secretary of the board of commissioners shall thereupon give notice by publication for two weeks "in a newspaper published and having a *bona fide* circulation in that county."

The form of this notice is set out in the act and concludes with the statement that "All persons wishing to be heard on said assessment will be heard by the commissioners of said district at the circuit court room at Star City, in Lincoln County, on the — day of —, 19—."

No provision is made for giving notice in Jefferson County. Section 7 further provides that after the commissioners have met to equalize the assessments pursu-

ant to the notice to that effect their action shall be final "unless suit is brought in the chancery court of Lincoln County within thirty days thereafter to set aside their findings."

As stated above, section 9 provides that the county court shall at the time that the assessment of benefits is filed enter an order upon its records that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement. This can mean only the county court of Lincoln County, because the assessments are filed there and nowhere else. The language of section 10 of the act is as follows: "When levies of assessments of benefits are made by said county court, the land owners shall have the privilege of paying the same in full within thirty days after the levy becomes final * * * ." The language quoted shows that action by one court only was contemplated, and this view is reinforced by the reading of section 11 as follows: "The amount of the taxes herein provided for shall be annually extended upon the tax books of the county * * * ."

We conclude, therefore, that the county court of Jefferson County has no function to perform in the creation of this district or the levy of the tax.

The statement of counsel for the commissioners that the levying of the tax is a ministerial function which may be discharged by any person of sound mind is necessarily subject to the qualification that that person has been thereto properly authorized to levy the tax. So that if it be conceded that the county court of Lincoln County might levy the tax on lands in Jefferson County if authorized so to do by the Legislature, it is certain it cannot do so in the absence of that authority. We are not, therefore, called upon to decide whether the county court of Lincoln County could be constituted an agency to assess all the lands of the entire district, as it was in fact constituted an agency to assess only the lands in Lincoln County.

It follows, therefore, that no machinery has been provided to assess against the betterment of the Jefferson County lands their proportionate share of the cost of the improvement and the act necessarily falls on that account.

The decree of the court below sustaining the demurrer to appellant's complaint is, therefore, reversed and the cause will be remanded with directions to overrule the demurrer.

TINDALL v. LAYNE.

Opinion delivered July 14, 1919.

1. PLEADING AND PRACTICE—WAIVER OF DEFECTIVE SERVICE BY PLEADING TO THE MERITS AND GOING TO TRIAL.—A party waives a defect in the service upon him by pleading to the complaint and going to trial on the merits of the case without preserving his status in specially pleading his objections to the method of service.
2. SAME—SAME—OBJECTION TO SERVICE, PRESERVED HOW.—An objection to service may be preserved by appropriate language in a plea to the merits, filed after the overruling of his special plea objecting to the service.
3. SAME—SAME—MOTION TO SET ASIDE DEFAULT JUDGMENT.—A motion to set aside a default judgment in order to plead to the merits, constitutes an appearance which cannot be withdrawn.
4. CONTRACTS — TO FURNISH WATER FOR RICE CROP — BREACH — SUFFICIENCY OF THE EVIDENCE.—In an action for damages for breach of contract to furnish water for plaintiff's rice crop, the evidence *held* sufficient to sustain a verdict in plaintiff's favor.

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

O. M. Young, for appellant.

1. Direct testimony of a party that he is a citizen of a certain locality is competent. 25 A. C. A. 600. But such testimony, if given by a third person, is incompetent as calling for a conclusion on the part of the witnesses. Defendant's motion to dismiss should have been granted (Act No. 63, Acts 1913), or the case at least transferred to the proper district.

2. There is no proof to support the verdict. The proper rule for the recovery of damages is laid down in 19 L. R. A. (N. S.) 958 and 6 A. & E. Ann. Cases 946, *i. e.,* the value of *like* crops in the *same neighborhood* where the crop is planted under *like* conditions. 1 A. & E. Ann. Cas. 61; 65 Ark. 278. See also 7 Ark. 462; 24 *Id.* 224; 15 *Id.* 109.

John W. Moncrief, for appellee.

1. The court had jurisdiction and defendant was properly served with process. 40 Cyc. 115-6.

2. There is assignment of error in the motion for new trial based on the alleged excessive damages. 66 Ark. 460.

3. Neither the motion for new trial nor the record sustain the contention that the judgment was entered before noon of the first day of the term, nor was any complaint made until an appeal had been taken. The question of jurisdiction of the person of defendant was not raised. All the motions were heard before the answer was filed. 135 Ark. 445.

4. Appellant has not briefed any question as to the admissibility of testimony and this court will pass only upon such questions as are discussed in appellant's brief.

5. In order to show yield, evidence is admissible to show what a crop would have made, also as to the yield of other farms. 80 S. W. 542; 57 Ark. 512; 64 Tex. 293-5. See also 1 Ark. 455; 100 S. W. 204; 110 *Id.* 934.

McCULLOCH, C. J. Appellee sued appellant in the circuit court of the Southern District of Arkansas County to recover damages sustained by reason of an alleged breach of contract between the parties whereby appellant undertook to furnish water for appellee's rice crop during the year 1917. Appellee was engaged in growing rice and put in a crop of about thirty-eight acres, and, according to the allegations of the complaint, appellant orally agreed for a consideration to furnish water to flood the crop, and neglected to do so, thereby causing the crop to fail. Damages were laid in the com-

plaint in the sum of $4,560, the difference between the market value of appellee's portion of the crop raised and the value of his part of the crop that would have been raised if water had been furnished by appellant according to the contract.

The action was commenced on March 18, 1918, and the return of the sheriff shows personal service on appellant that day. There were no proceedings at the succeeding April term of court, but on the first day of the November term, which began November 4, 1918, the court rendered judgment by default against appellant without his appearance, and the cause was passed to a later day of the term for assessment of the damages. There was an adjournment of the court that day over to December 16, 1918, and on the reconvening of the court appellant appeared by attorneys and filed his motion to require the sheriff to correct his return on the writ of summons to make it state the truth, but the motion did not set forth the imperfection or falsity of the return. On the same day appellant filed another motion to set aside the default judgment on the ground that there had been no valid service of the writ of summons and that appellant had a good defense to the complaint. The prayer of that motion was that the default judgment be set aside and that he be allowed to plead to the complaint.

On the next day, December 17th, appellant filed still another motion to dismiss the complaint on the ground that he was not a resident of the Southern District of Arkansas County and that the court had no jurisdiction over his person. This motion was accompanied by numerous affidavits tending to show that appellant was a resident of the Northern District of Arkansas County and had no "usual place of abode" within the meaning of the statute (Kirby's Digest, section 6042) in the Southern District of Arkansas County, and that he was not personally served with process. Appellee responded to the motion and undertook to show by affidavits of certain persons that appellant had a place of residence in the Southern District of Arkansas County and that the

sheriff served the process by leaving a copy of the summons at appellant's usual place of abode with a person who was a member of appellant's family over the age of fifteen years. The deputy sheriff who signed the return stated in his affidavit that he had served the writ by delivering a copy at the place where appellant resided in the Southern District of Arkansas County to a person who also resided there. Each of the motions just referred to contained a statement that appellant appeared only for the purpose of presenting the motion.

The court overruled each of the motions on December 17th, and appellant then, by permission of the court, filed his answer tendering an issue on each of the allegations of the complaint. Appellee moved to strike the answer from the file, but the court overruled the motion and postponed the cause, at appellant's request, to give the latter time to prepare for trial. The cause was heard by a jury and the jury returned a verdict in favor of appellee and awarded damages in the sum of $1,000.

(1-3) It is unnecessary to determine whether or not according to the testimony, appellant was legally served with writ of summons, for it is clear that he waived that defect by pleading to the complaint and going to trial on the merits of the case without preserving his status in specially pleading the objections to the method of service. Each of the motions contained a recital that appellant appeared solely for the purpose of objecting to the service, but when the court overruled the motions appellant then appeared generally in the cause by filing his answer raising issues on the merits of the case. He had the right to appear specially and if his motion was incorrectly overruled he had the right to plead on the merits of the case without disturbing his former status in thus appearing. *Spratley* v. *Louisiana & Arkansas Ry. Co.*, 77 Ark. 412. But in order to preserve his objection on the ground of want of service he should have so indicated in the plea to the merits subsequently filed. *Chicago, Rock Island & Pacific Ry. Co.* v. *Jaber*, 85 Ark. 232. Moreover, one of the motions filed by appellant was solely for

the purpose of having the default judgment set aside in order to permit him to plead to the merits and this itself was an appearance which could not be withdrawn.

The order of court refusing to set aside the default judgment and the order allowing appellant to file an answer on the merits and overruling appellee's motion to strike it out were inconsistent with each other, but no prejudice resulted to appellant, for, notwithstanding the court did not formally set aside the default judgment, appellant was permitted to file an answer and the cause was tried on all of the issues raised in the complaint and answer. In other words, the issues were not confined merely to an ascertainment of the damages, but all of the other issues with respect to the making of the contract and the alleged breach of it were tried, as well as the question as to the amount of damages. The court submitted each of those issues to the jury upon appropriate instructions, the correctness of which have not been challenged.

(4) The only other question raised here is that the evidence is not sufficient to justify the amount of damages awarded by the jury. It is claimed that the testimony was too vague and general as to the probable amount of rice appellee's land would have produced if properly watered, whereas it should have been limited to testimony as to this particular land or adjoining lands of like character.

We are of the opinion that the evidence is sufficient to sustain the verdict. Several witnesses testified that they were familiar with this and adjoining lands and it is shown what amount of rice would probably have been raised on that land if it had been properly watered. It was proved also what the same character of lands in that particular locality produced that year. It is true the testimony took a broader range on the cross-examination of certain witnesses, but there are no objections here to the introduction of testimony, and we think there was an abundance of evidence to sustain the verdict.

Judgment affirmed.

BOOE v. SIMS.

Opinion delivered July 14, 1919.

1. LEGISLATIVE ACTS—TEST OF PROPER ENACTMENT.—In determining whether an act has been properly passed by both houses of the Legislature, the court will not look beyond the records, books, papers and rolls of the Legislature, and the journals of each house required to be kept by the Secretary of State.

2. STATUTES—CONSTRUCTION—VALIDITY.—Where the language of a statute is susceptible of two constructions, the court will adopt the construction which will render the statute valid.

3. IMPROVEMENT DISTRICTS — ROAD DISTRICT — DESCRIPTION OF LANDS INCLUDED.—An act creating a road district described the lands contained in the district as follows: "All of sections 2-36, both inclusive, township 4 north, range 5 west, west of White River. Sections 12 and 13 lay east of White River". *Held,* the description covered all the sections in township 4 north, range 5 west from 2 to 36, both inclusive, which lay west of White River, and and that such description was valid.

4. IMPROVEMENT DISTRICTS—DESCRIPTION OF BOUNDARIES—VALIDITY.—A road improvement district was organized by special statute, the act describing the southern boundary of the district as: "The north half of sections 19, 20, 21 and 22, township 2 north, range 5 west, including the right-of-way of the Chicago, Rock Island & Pacific Railway * * * ." *Held,* the description was valid, and only so much of the right-of-way of railway was included in the district as lay within the sections described.

5. ROADS AND ROAD DISTRICTS—ORGANIZATION—ROUTE.—Under Act 302, Acts 1919, a road ran into an incorporated city and into a street which was stopped at a certain point by dwellings. *Held,* under the act the route may be varied so as to pass around houses or other obstructions.

6. SAME—ROUTE—ROAD OF ANOTHER DISTRICT.—An act creating a road district is not rendered void because the roads to be constructed in the district are tied together by other roads constructed or being constructed by independent improvement districts. The boundaries of separate districts may overlap without destroying the independence or singleness of each, if the lands in both derive a substantial benefit from either improvement.

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

W. H. Gregory, for appellant.

1. The act was never properly passed by the Legislature as the Constitution requires. Art. 5, secs. 21-22.

2. The description 2-36 only embraces the two sections and the act is void for uncertainty. 122 Ark. 491; 105 *Id.* 380; Standard Dict. (20 ed.), "Hyphen."

3. The improvements are not connected, as there is a gap of at least a mile between them and the improvements are too remote from each other, etc. 118 Ark. 294.

4. The act fixing the southern boundary line is indefinite and uncertain, as the Chicago, Rock Island & Pacific Railway lies separate and apart from the boundaries of the district. 130 Ark. 70; 142 *Id.* 492.

5. The road from Des Arc to Hazen is improperly described, as if followed it would pass over lands, none of which are embraced in the district. 120 Ark. 517.

6. Section 2 authorizes the commissioners to build lateral roads without limitation and compel the county court to lay out same, if not already public roads. The commission is too broad—a roving commission—which avoids the act. 118 Ark. 119; *Ib.* 125.

7. The commissioners are given absolute authority to make and determine plans for improvements and no provision is made for a hearing by or approval of the county court, thus depriving it of its jurisdiction.

Emmett Vaughan and *J. W. House, Jr.,* for appellee.

1. The journals of the Legislature on file in the Secretary of State's office show that the bill was duly passed by both houses as the Constitution requires. 40 Ark. 215-16; 90 *Id.* 177-8; 103 *Id.* 113-14; 34 *Id.;* 76 *Id.* 201. The presumption is in favor of the constitutionality of the act. 75 *Id.* 120; 72 *Id.* 201. No evidence is admissible to contradict the records of the Secretary of State as to the proper passage of a law. The journals are conclusive. Cases *supra.*

2. The - between 2-36 is not a "hyphen" but a "dash." "DASH," Cent. Dict. There is no ambiguity in the description, as 2-36 means 2 to 36. 110 Ark. 99.

3. The act does not call for two separate improvements not connected with each other. The act in no way violates any constitutional provision. 130 Ark. 507-517; 131 *Id.* 59; 125 *Id.* 325; 133 *Id.* 380.

4. An inspection of the map shows that the railroad is properly included and described. 130 Ark. 70. Courts give a reasonable interpretation of the meaning of an act and not an unreasonable one.

5. Proceedings of the commissioners do not violate the Constitution nor interefere with the jurisdiction of the county court. *Sallee* v. *Dalton,* 138 Ark. 549; *Cumnock* v. *Alexander.*

6. Unlimited authority is not given the commissioners as to laterals, etc. *Ib.,* and *Reitzammer* v. *Dist.*

7. The jurisdiction of the county court is not in any way taken away. 120 Ark. 284; 134 *Id.* 30. The act is not unconstitutional. See 110 Ark. 99; 113 *Id.* 193; 106 *Id.* 139.

Frauenthal & Johnson, F. E. Brown and *Cooper Thweatt, amici curiae.*

1. The boundaries of the district must be definite and certain. 122 Ark. 491. Here the boundaries are so indefinite as to render the act invalid. 130 *Id.* 70; 105 *Id.* 392; 122 *Id.* 498.

2. The district fails because the act provides for improving a road along the route where there is no public road. The route as described cannot be followed without opening a new county road. Act 442, Acts 1911, is a public act and county courts are given power to open new roads and change old ones. Improvement districts are not empowered to do this. 88 Ark. 517; 118 *Id.* 125; 34 *Id.* 224; 202 S. W. 831.

3. The act is void because it provides for the improvement of two roads which do not connect and which constitute distinct and separate improvements. 118 Ark. 301.

W. A. Leach, amicus curiae.

The act is unconstitutional. 122 Ark. 492-7; 130 *Id.* 70; 83 *Id.* 54; 130 *Id.* 516; 118 *Id.* 294; 75 *Id.* 542; 130 *Id.* 70; 105 *Id.* 392; 122 *Id.* 491.

HUMPHREYS, J. The issues presented by the pleadings in this case involve the validity of an act of the General Assembly of 1919 (Act No. 302) creating road improvement district, designated as the Des Arc-Hazen Road Improvement District of Prairie County.

(1) It is contended that the act is void because, after the act was read the first and second times in the Senate, the first two pages were extracted and two pages substituted for them, which had not been approved by the Senate. In determining whether an act has been properly passed by both houses of the General Assembly the court will not look beyond the records, books, papers and rolls of the General Assembly, and the journals of each house required to be kept by the Secretary of State. *Rogers* v. *State,* 72 Ark. 565. In the case of *Chicot County* v. *Davies,* 40 Ark. 200, Mr. Justice SMITH took occasion to say that "the enrollment is a solemn record and the existence of the act is to be proved by the record and is not to depend on the uncertainty of parol proof or on anything extrinsic to the law and the authentic recorded proceedings in the passage thereof." This doctrine was reiterated in the case of *Harrington* v. *White,* 131 Ark. 291, in which the rule was laid down that "an act of the Legislature, signed by the Governor and deposited with the Secretary of State, raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the record of the General Assembly." This rule was confirmed in the recent case of *John W. Perry* v. *State of Arkansas,* 139 Ark. 227. All the records pertaining to the passage of the bill in question are incorporated in the transcript in this case. An examination of them fails to disclose that the first two sheets of the original bill, after being read the first and second times, were extracted and different sheets substituted

therefor, which were never read a first or second time in the Senate. Without an affirmative showing in the record to this effect, the act cannot be declared invalid. An admission to this effect, unless established by the record, could not affect the validity of the bill any more than parol proof to that effect.

It is also contended that the act is unconstitutional because the description of the lands in township 4 north, range 5 west, is indefinite and uncertain. The lands in said township and range embraced in this district are designated by sections and parts of sections. The particular description complained of in section 1 of the act is as follows:

"All of the territory embraced within this district lies west of White River and shall include the following described property, to-wit:

"All of sections 2-36, both inclusive, township 4 north, range 5 west, west of White River."

(2) It is insisted by appellant that the description "2-36, both inclusive," was intended to describe only two sections, 2 and 36. If appellant's contention is correct, the effect would be to include section 2, two miles from the improvement, and exclude several sections between it and the improvement. Under the rule laid down in the recent case of *Milwee* v. *Tribble,* 139 Ark. 574, this would render the act void as being arbitrary and discriminatory on its face. Our construction of the description, however, is that it describes all of sections 2 to 36, inclusive, in said township and range, lying west of White River. A dash between figurse is defined in the Century Dictionary as follows: "Dash—The em or the en dash is often used to indicate the omission of the intermediate terms of a series which are to be supplied in reading, between thus often equivalent to 'to * * * inclusive;' thus, Mark iv, 3-20 (that is, verses 3 to 20, inclusive); the years 1880-88 (that is, 1880 to 1888)." Of course, if the dash were treated as a hyphen, appellant's contention as to the meaning of the description would be correct. If by treating it as dash, instead of a hyphen, validity can

be given to the bill, that is the proper construction to give it, for, where the language is susceptible of two constructions, the court will adopt the construction which will render the statute valid. *Cunningham* v. *Keesham,* 110 Ark. 99.

(3) It is manifest from the language used in the act that the Legislature only intended to include within the district lands west of White River. It is admitted in the answer that all or parts of sections 12 or 13, township 4 north, range 5 west, lie east of White River. On account of this admission the contention is made that the description "2-36" was not intended to include sections 12 and 13, and therefore must be construed as including sections 2 and 36 only. The logic of learned counsel for appellant would be sound if "2-36, both inclusive," stood alone. In that event, it must either mean the two sections only or the entire 35 sections, one or the other. But when followed by the words, "west of White River," as in this case, it clearly means all or such parts of the 35 sections in said township and range as lie west of the river. This interpretation is in keeping with the plain meaning of the language used. The language is: "All of sections 2-36, both inclusive, township 4 north, range 5 west, west of White River."

(4) It is also insisted that the act is void because the southern boundary of the district is indefinite and uncertain, in that the act fixes the one-half section line of sections 19, 20, 21, 22, township 2 north, range 5 west, and sections 23 and 24, township 2 north, range 6 west, as the southern boundary, and, at the same time, includes the right-of-way of the Chicago, Rock Island & Pacific Railway Company, most of which is conceded to lie 100 yards south of said one-half section line. The descriptive language in the act, construed by counsel for appellant as rendering the southern boundary of the district indefinite and uncertain, is as follows: " * * * and the north half of sections 19, 20, 21 and 22, township 2 north, range 5 west, including the right-of-way of the Chicago, Rock Island & Pacific Railway, * * * and

the north half of sections 23 and 24, township 2 north, range 6 west, including the right-of-way of the Chicago, Rock Island & Pacific Railway Company." We do not think the language of the act warrants such a construction. According to the map in the transcript, a part of the right-of-way of the Chicago, Rock Island & Pacific Railway is north of said one-half section line; so, the reasonable interpretation and one in keeping with the plain wording of the act, is that only so much of the right-of-way of said railroad as lies in the north half of said sections is intended to be included in the district. Any other construction would lead to the conclusion that territory intervening between said right-of-way and said one-half section line was intended to be included, but omitted. Such construction would render the act void under the rule announced in *Milwee* v. *Tribble, supra,* and *Heinemann* v. *Sweatt,* 130 Ark. 70. Where a statute is susceptible of two constructions, the court will adopt the one that will sustain the validity of the act. While we think there is no ambiguity in the language referred to, and that the language clearly sustains the construction that only such parts of the right-of-way as lie in the north half of said sections were intended to be included in the district, yet, under the rule last announced, applicable to the ambiguity of statutes, the statute is valid.

(5) It is also insisted that the act is void because it provided for the improvement of a road running west along the half section line of section 19, township 2 north, range 5 west, to Livermore street in the town of Hazen, where there is no public road, and where it would be impracticable for the county court to open a road or street, on account of houses or other improvements obstructing the way. It is immaterial whether the route designated by the Legislature follows a public road, because it is provided by section 2 of the act that: "If any part of said roads has not been laid out as a public road, it is hereby made the duty of the county court of the proper 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.''

A like provision in a similar statute was upheld as constitutional in the recent case of *Sallee* v. *Dalton,* 138 Ark. 549. But it is said the Sallee case should not rule the instant case because it did not appear in the Sallee case that the way was obstructed by houses and other improvements. This, however, can make no difference, as there is no inhibition against the opening of public roads over improved lands. Again, it is provided in the act that the commissioners, with the approval of the county court, may vary the route. Even under the restricted construction placed upon a grant of such power in the case of *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W. 831, the route might be varied so as to pass around houses or other obstructions. It goes without saying that the route, as varied, must remain within the boundaries of the district. Appellant has called attention to the fact that Livermore street, in the town of Hazen, is not open to the corporate limits, and that the county court has no jurisdiction to approve a plan for a new street or route within the corporate limits of a town, and, for that reason, it is contended the act is void. This conclusion is reached on the theory that the city council is vested by the Constitution of the State with the exclusive jurisdiction to open highways through a town. No such exclusive power is granted to the agencies of towns.

It is insisted the act is void because the route or roads, designated for improvement, are separated for the distance of a mile by a road being constructed by another district from the southeast corner of section 10 to the northwest corner of block 25, W. S. Des Arc. It is said that the roads are so disconnected and remote from each other as to constitute separate or independent improvements, and that the legislative determination that they constitute a single improvement is an arbitrary exercise of power. The section of the act assailed is as follows: ''It is found and declared by the General Assembly that the road now being constructed by Road Im-

provement District No. 4 of Prairie County, connects the roads hereinabove described, making a single improvement, and for the purposes of this act, it is hereby declared that the connection extending from the southeast corner of section 10 to the northwest corner of block 25 W. S. Des Arc, shall operate to constitute the lines of road mentioned in this act as a single improvement."

(6) A similar statute was before this court for review in the recent case of *VanDyke* v. *Mack,* 139 Ark. 524. In that case, it was held that a connecting road between the contemplated improvement, ten miles in length, in the course of construction by an independent improvement district, did not frustrate the design of the Legislature in creating the Jackson County Improvement District, even though the boundaries of the district were fixed by measurement from the route selected. In the instant case, the boundaries are not dependent on the route of the road constructed and the gap is only one mile in length, as compared to ten miles in the Jackson County district. The mere fact that roads to be constructed in an improvement district are tied together by other roads constructed, or being constructed by independent improvement districts, does not prove that the proposed district is a combination of independent districts. Even the boundaries of separate districts may overlap without without destroying the independence or singleness of each, if the lands in both derive a substantial benefit from either improvement. *Cumnock* v. *Alexander,* 139 Ark. 153; *VanDyke* v. *Mack,* 139 Ark. 524.

The last contention of appellants, that the broad powers conferred upon the Board of Commissioners is an infringement upon the exclusive jurisdiction of the county court over roads, is contrary to the doctrine announced in *Sallee* v. *Dalton, supra,* and approved by *Cumnock* v. *Alexander, supra,* and *Reitzammer* v. *Commissioners of Desha Road Improvement District No.* 2 *et al.,* 139 Ark. 168.

No error appearing, the decree of the learned chancellor is affirmed.

HART, J., dissents.

APPENDIX

I.

OPINIONS NOT REPORTED.

Bowman *v.* Ragsdale; appeal from Columbia Chancery Court; James M. Baker, Chancellor; affirmed June 2, 1919, *per* McCULLOCH, C. J.

The Augusta Cooperage Co. *v.* Porham; appeal from White Circuit Court; J. M. Jackson, Judge; affirmed June 16, 1919, *per* HART, J.

Fort Smith Lumber Co. *v.* Baker; appeal from Yell Circuit Court, Dardanelle District; J. T. Bullock, Special Judge; affirmed June 16, 1919, *per* SMITH, J.

Walker *v.* Meyer; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed, June 30, 1919, *per* SMITH, J.

Doane *v.* Rising Sun Mining Co.; appeal from Boone Chancery Court; B. F. McMahan, Chancellor; affirmed June 23, 1919, *per* HART, J.

Satterwhite *v.* State; appeal from Clark Circuit Court; George R. Haynie, Judge; affirmed July 14, 1919, *per* SMITH, J.

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CASES DISPOSED OF ON MOTION.

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Clyde A. Walb *v.* C. W. Tipton; Mississippi Circuit Court, Chickasawba District; R. H. Dudley, Judge; reversed and remanded on confession of error, June 9, 1919; *per curiam.*

Mrs. E. F. Peebles *v.* A. H. Walker; White Chancery Court; J. E. Martineau, Chancellor; settled and appeal dismissed on appellant's motion, June 9, 1919; *per curiam.*

A. M. Malone and A. M. Dobbs *v.* Sebastian State Bank *et al.;* Sebastian Chancery Court, Greenwood District; W. A. Falconer, Chancellor; settled and appeal dismissed on appellants' motion, June 16, 1919; *per curiam.*

E. H. Bost *v.* Johnson County *ex rel.* H. H. Ragon, prosecuting attorney; Johnson Circuit Court; A. B. Priddy, Judge; settled and appeal dismissed by consent, June 30, 1919; *per curiam.*

Joe Beaty *v.* The State of Arkansas; Hempstead Circuit Court; Geo. R. Haynie, Judge; appeal dismissed July 14, 1919, on suggestion of appellant's pardon subsequent to lodgment of transcript; *per curiam.*

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